

**NECESSITY AND POSSIBILITIES OF THE INTERNATIONAL
PROTECTION OF HUMAN DIGNITY FROM NON-STATE
VIOLATIONS**

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To my beloved wife and children,
thank you for your support and understanding, and for filling my life with
love, greater than knowledge and power.

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Deo Gratias.

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“Should a robber break into my house, and with a dagger at my throat make me seal deeds to convey my estate to him, would this give him any title? Just such a title, by his sword, has an unjust conqueror, who forces me into submission. The injury and the crime is equal, whether committed by the wearer of a crown, or some petty villain”,

John Locke, *Second Treatise of Government*

“[N]ot [in favor of] preserving polite fiction at the expense of human life”,

Harper Lee, *To Kill a Mockingbird*

“Law is powerful, but more powerful is the need”,

Johann Wolfgang Goethe, *Faust*

““They, on the other hand, judge [...] that the partnership of human nature is instead of a league; and that kindness and good nature unite men more effectually and with greater strength than any agreements whatsoever; since thereby the engagements of men’s hearts become stronger than the bond and obligation of words”,

Thomas More, *Utopia*

“There is no "neutrality" in Law; every Law is finalist, and the ultimate addressees of legal norms, both national and international, are the human beings”,

Antônio Augusto Cançado Trindade

“Conflicts and laws are made by man. So are the theories which pronounce, for example, that international law cannot confer rights or impose duties directly on an individual because, says theory, the individual is not a subject but an object of

international law”,

Philip C. Jessup

“[A] singular reliance on positive law, unchecked by the application of right reason, leads to positivism”,

Robert John Araujo

“If the result of a definition is to make them seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer to realities”,

Benjamin N. Cardozo



'The unwed mother', by Jean-Louis Forain. Bristol Museum & Art Gallery



'Evicted 1887', by Blandford Fletcher, Queensland Art Gallery



'Masacre en Colombia', by Fernando Botero, Museo Nacional de Colombia



'Masacre de mejor esquina', by Fernando Botero, Museo Botero

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INTRODUCTION

Both *jus gentium*¹ and international human rights law have evolved in ways that have considerably improved the protection of human dignity. Among relevant developments, the acknowledgment that human rights norms can be directly regulated by international law in substantive terms and that individuals have access to some international mechanisms of protection when domestic remedies fail are noteworthy. This is an ongoing process, and recent developments include the procedural sanction of some violations of human rights by international judicial bodies. Important landmarks concerning the *jus standi* and *locus standi* of individuals can be identified in the European and Inter-American regional human rights systems.²

In addition to procedural progresses, the substantive protection of human rights has evolved as well and increased with the adoption of different instruments and the emergence of peremptory human rights norms. Such evolution is related not only to the internationalization of human rights but also to their specialization, because some norms address special needs of protection of the human rights of some individuals, such as children, the elderly, women, or persons with disabilities, among others; while some of those and other norms address the protection of some rights from worrisome or frequent violations, including protection from torture, genocide, or discrimination, among others.

That being said, taking into account how frequently individuals are harmed by non-state entities, it can be argued that international human rights law must also protect individuals from non-state abuses in substantive and procedural terms, taking into account the needs of victims.

Curiously, that dimension of the protection of human rights is overlooked or rejected by some authors and practitioners. This is problematic, because the fact that non-state actors can prevent the exercise of human rights in practice implies that unless individuals are sufficiently and effectively protected from them, which may require international action, the goals of the human

¹ This legal system is commonly but, in my opinion, inaccurately termed international law in spite of covering much more than the regulation of relations between political groups that assume the State form. On these issues, see Harold Koh, "Why Do Nations Obey International Law?", *The Yale Law Journal*, vol. 106, 1997, at 2626; Antonio Gómez Robledo, *Fundadores del Derecho Internacional (Vitoria, Gentili, Suárez, Grocio)*, Universidad Nacional Autónoma de México, 1989, at 14-15, 98-99; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", *Global Legal Goods Working Papers*, N° 2/2011, at 45-46, available at SSRN: <http://ssrn.com/abstract=1753036>

² See Protocol 11 to the European Convention on Human Rights; Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, 16 November 2009, para. 232; article 25 of the Rules of Procedure of the Inter-American Court of Human Rights approved by the Court during its LXXXV Regular Period of Sessions, 2009; article 45 of the Rules of Procedure of the Inter-American Commission on Human Rights approved by the Commission at its 137th regular period of sessions, 2009.

rights system will not be fully accomplished, its demands and the implications of its foundation will not be met, and some victims will be defenseless in legal terms.

As was declared in the Vienna Declaration and Programme of Action on Human Rights in 1993, the aforementioned foundation is human dignity. According to persuasive theories and studies, human dignity is non-conditional: this means that it does not depend on any factor different from human nature. Therefore, its protection cannot depend on the identity of violators, for instance regarding their being State or non-state actors. Additionally, due to its being a legal foundation, the protection of human dignity is the basis of international entitlements and burdens, and is protected among others by prohibitions found in international humanitarian law and international criminal law, which clearly bind non-state actors. The legal protection of human dignity has hermeneutical effects and implications,³ including that of guiding the interpretation of human rights norms.

According to the previous ideas (studied in depth in Chapter 1), the protection of human dignity must be complete. This implies that it must be protected from all threats, not only those attributable to States. Otherwise, some individuals, who always have dignity, will be unprotected and violations will remain in impunity. This analysis stresses human rights analyses must be centered on human beings and not on other actors.

Furthermore, the fact that the protection of human rights must be universal and interdependent further demands a comprehensive approach and rejects limited approaches that focus on some violations and excludes some individuals from the scope of legal protection.⁴

In sum, arguments that put forward that the protection of *victims* of non-state entities is not pertinent under human rights law seems at odds with the fact that they are often violated in practice by those entities and also with the comprehensive and interdependent⁵ protection of human dignity that law requires. In fact, that exclusion may amount to an additional violation: discrimination against some victims (as examined in Chapter 3).

³ See Carlos Villán Durán, *Curso de Derecho Internacional de los Derechos Humanos*, Editorial Trotta, 2006, at 63, 92; Jordan J. Paust, "The Other Side of Right: Private Duties Under Human Rights Law", *Harvard Human Rights Journal*, Vol. 5, 1992, at 54, 56; Chris Jochnick, "Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights", *Human Rights Quarterly*, Vol. 21, 1999, at 55, 59-60; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006, Chapter 11.

⁴ See Part I, *infra*; Zehra F. Kabasakal Arat, "Looking beyond the State But Not Ignoring It", in George Andreopoulos *et al.*, *Non-State Actors in the Human Rights Universe*, Kumarian Press, Inc., 2006, at 5-6; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", *op. cit.*, at 24-25.

⁵ *Ibid.*

Furthermore, it is convenient to bear in mind that disaggregated analyses reveal that States are constructs operated by individuals,⁶ and that throughout history many acts attributed to States have had a non-state origin.⁷ The facts that non-state actors can impact on the conduct of States, that they can affect human rights, and that the responsibility of those actors and that of States can coexist (see Chapter 7), make it possible to argue that actors without links to States must have responsibilities as well, because they can engage in similar factual abuses.

Another argument that lends strength to the necessity of protecting human rights from non-state violations is that failure to protect the victims of violations is inconsistent with some of the purposes, principles and rules of human rights law (as examined in Part I).

Given its relevance, it is important to examine what the protection of human dignity demands. Some conceptions about it condemn using individuals as means to ends,⁸ which is an idea that can be invoked to criticize non-state conduct that treats human beings as instruments. Additionally, some authors posit that human beings have inherent worth and inalienable rights.⁹ If these rights are based on human nature, then *all* individuals must be protected from abuses against them.

Additionally, it would be unfair to only protect victims who are “fortunate” enough to be attacked by States. Taking into account that human rights advocacy rests to a great extent on solidarity with victims,¹⁰ the suffering of victims of non-state entities deserves attention and effective responses.

⁶ Concerning this, see Eric A. Posner, *The Perils of Global Legalism*, The University of Chicago Press, 2009, at 40-41, 71; Harold Koh, “Why Do Nations Obey International Law?”, *op. cit.*, at 2627, 2633; Hersch Lauterpacht, *International Law and Human Rights*, Steven & Sons Limited, 1950, at 40; Judgment of the International Military Tribunal for the Trial of German Major War Criminals, where it was considered that “Crimes against international law are committed by men, not by abstract entities [States], and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

⁷ See Fred Halliday, “The Romance of Non-state Actors”, in Daphné Josselin and William Wallace (eds.), *Non-state Actors in World Politics*, Palgrave (ed.), 2001, at 27-34.

⁸ See Andrew Clapham, *Human Rights: a Very Short Introduction* (EPUB version), Oxford University Press, 2007, at 9-10, 22; Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, translated by Thomas Kingsmill Abbott, Penn State Electronic Classics Series Publication, 1785, at 44-47, 50, available at: <http://www2.hn.psu.edu/faculty/jmanis/kant/Metaphysic-Morals.pdf> (last checked: 2/11/2011); Immanuel Kant, *The Critique of Practical Reason*, translated by Thomas Kingsmill Abbott, Penn State Electronic Classic Series Publication, at 89, available at: <http://www2.hn.psu.edu/faculty/jmanis/kant/Critique-Practical-Reason.pdf> (last checked: 2/11/ 2011); Immanuel Kant, *The Metaphysical Elements of Ethics*, translated by Thomas Kingsmill Abbott, Penn State Electronic Classics Series Publication, at 26, available at: <http://www2.hn.psu.edu/faculty/jmanis/kant/metaphysical-ethics.pdf> (last checked: 2/11/ 2011); Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, at 535-547.

⁹ See, for instance, Pope John XXIII, *Encyclical Pacem in Terris*, 1963, paras. 3, 9-10, 30; Jack Donnelly, “Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights”, *The American Political Science Review*, Vol. 76, 1982, at 306.

¹⁰ See Andrew Clapham, *Human Rights: a Very Short Introduction*, *supra*, at 11, 28, 30, 131; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, at 107.

From a legal point of view, it can be added that if victims are not repaired, their international rights to reparations will be violated as well. Additionally, international human rights law is contrary to the impunity of violations,¹¹ and so non-state abuses of human rights must be tackled.

Furthermore, the fact that human rights obligations of States address both how States can affect the exercise of human rights and their duties to protect those rights recognizes both that non-state entities can violate human rights and that law commands to tackle their abuses.¹² In light of State duties to protect from those abuses, it can be argued that it would be inconsistent to recognize that States have duties to prevent and respond to non-state violations and deny that non-state actors can *violate human rights* regardless of State involvement.

Moreover, legal developments show that non-state entities, as for instance international organizations and non-state armed groups, can have international obligations, compliance with which ensures the respect or protection of human rights.¹³ This rebuts the supposed impossibility or irrelevance of international human rights obligations of non-state actors.

While the previous ideas are based on the notion that human dignity is the foundation of human rights, it must be acknowledged that some authors suggest that the foundation of human rights is or ought to be *emancipation*, which demands the protection of individuals from actors

¹¹ See Chapter 7, *infra*; Vienna Declaration and Programme of Action, World Conference on Human Rights, A/CONF.157/23, 12 July 1993, paras. II.60, II.91; Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, Sweet & Maxwell (ed.), 2003, at 12-13; Inter-American Court of Human Rights, *Case of Gelman v. Uruguay*, Judgment, 24 February 2011, para. 206. It must be noted that there is a trend to hold every actor who violates principles considered important by the international community accountable, as commented in: José Manuel Cortés Martín, *Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional*, Instituto Andaluz de Administración Pública, 2008, at 56-58. On the other hand, the Inter-American Court of Human Rights has considered that toleration of a human rights violation, which is not dealt with by law, does not “allow society to learn what happened, and [...] reproduces the conditions of impunity for [that] type of facts to happen again”, as commented in: Inter-American Court of Human Rights, *Case of the “Mapiripán Massacre” v. Colombia*, Judgment, 15 September 2005, para. 238. Likewise, the Preamble to the Rome Statute of the International Criminal Court declares that “to put an end to impunity for the perpetrators” of heinous violations of international law may “contribute to the prevention of such” violations.

¹² See Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, *Amsterdam Center for International Law Research Paper Series, Non-State Actors in International Law, Politics and Governance Series*, 2010, at 36, 40; Nicolás Carrillo, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, *op. cit.*, at 46.

¹³ See common article 3 to the Geneva Conventions on International Humanitarian Law of 1949; article 96.3 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), and the commentary of the ICRC to that article, available at: <http://www.icrc.org/ihl.nsf/COM/470-750123?OpenDocument> (last checked: 2/11/ 2011); Nicolás Carrillo, “The Links between the Responsibility of international organizations and the Quest towards a More Reasonable and Humane International Legal System”, *international organizations Law Review*, Vol. 7, 2010, at 442; article 59 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or articles 43 and 44 of the Convention on the Rights of Persons with Disabilities; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, at 73.

with power over them.¹⁴ This consideration would also demand protection from non-state abuses, because States are not the only entities that can have such power.

While a discussion on foundations is found in Chapter 1, for the time being it can be said that if emancipation were the *only* foundation of human rights, many victims would be unprotected, because there are many cases in which actors that are not in a position of power prevent the enjoyment of human rights. The emancipation paradigm would have a problem similar to that of State-centered human rights conceptions: it would lead to a limited protection, which would be inconsistent with principles and values and discriminatory against some victims.

Logically, this does not mean that the protection of victims of non-state entities in a position of power is inappropriate, but only that it ought to be complemented by the effective protection of other victims. The risk is that emancipation theories may fail to envisage human rights protection from violations that take place outside of the contexts of abuses of power and failure to discharge the functions of authorities.

It is important to add that emancipation is protected by human rights. For example, some international supervisory bodies have considered that certain non-state actors have human rights duties because they have powers and prerogatives that are somewhat similar to those of States, and also that individuals must be protected from abuses of actors that are quite powerful in relation to individuals.¹⁵

The limitations, shortcomings and unfairness of paradigms of human rights limited to protection from State abuses explain the presence of initiatives that put forward the necessity of a more complete protection of human rights.

One of those initiatives, that is semantic and symbolic, consists in the fact that international bodies, authors and some NGOs, among others, have used expressions that recognize that non-state actors can impinge on human rights, such as 'human rights abuses' and 'human rights destruction'. The fact that those expressions are used to describe the conduct of both States and non-state actors permits to affirm that those expressions serve to condemn abuses and do not deny that non-state actors can violate human rights and may have human rights obligations.¹⁶

¹⁴ See, *infra*, Chapter 1; and Michael Goodhart, "Human Rights and Non-State Actors: *Theoretical Puzzles*", in George Andreopoulos et al., *Non-State Actors in the Human Rights Universe*, Kumarian Press, Inc., 2006, at 36-37.

¹⁵ See Sergio García Ramírez, *Los derechos humanos y la jurisdicción interamericana*, Universidad Nacional Autónoma de México, 2002, at 117-119; Inter-American Court of Human Rights, *Case of Suárez-Rosero v. Ecuador*, Judgment, 12 November 1997, para. 98.

¹⁶ See Chapter 2, *infra*; Ilias Bantekas and Susan Nash, *International Criminal Law*, Cavendish Publishing Limited, 2003, at 14; Robert Dufresne, *Review of: Liesbeth Zegveld, The Accountability of Armed Opposition Groups in International Law*, *European Journal of International Law*, Vol. 15, 2004, at 227; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, at 49.

Other initiatives are of the type adopted by bodies as the Inter-American Commission on Human Rights, which has issued press releases and statements, reports and resolutions in which it condemns or criticizes the conduct of non-state actors, such as non-state armed groups or international organizations. Additionally, that Commission has examined non-state conduct in light of human rights and guarantees. By means of those actions, the Commission has been able to directly address non-state conduct and ignore competence limitations that it has in contentious procedures triggered by individual complaints.¹⁷

For its part, the Inter-American and European Courts of Human Rights have acknowledged that there may be violations of human rights committed by non-state actors and that States have duties to prevent and respond to them.¹⁸ This recognition is quite important, even if those actors did not have international legal obligations, because actions of different actors and authorities to respond to those violations and protect affected legal goods are legitimated and authorized in substantive terms by that recognition.¹⁹ Furthermore, such recognition and those actions send signals against non-state abuses. Moreover, they strengthen condemnations of non-state abuses and highlight the duties of authorities to deal with them.

It must be added that some authors and non-governmental organizations have realized that support of communities and victims could be withdrawn if non-state violations are ignored, and that it is unsustainable to deny the unlawfulness and unfairness of those violations from both a legal and a moral standpoint. For these and other reasons, they have opposed non-state abuses.²⁰

¹⁷ See Resolution 03/08 and Press Release N° 28/08 of the Inter-American Commission on Human Rights; Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.LV/II.102. 26 February 1999, paras. 5-9; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.LV/II.116, 22 October 2002, para. 48.

¹⁸ See Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, 29 July 1988, paras. 166, 172-174, 176, 177; Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, 16 November 2009, paras. 236, 252, 254; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, 17 September 2003, paras. 140-153; European Court of Human Rights, Second Section, *Case of Vona v. Hungary*, Judgment, 9 July 2013, paras. 54-57.

¹⁹ See Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paras. 4, 13-15; Concurring Opinion of Judge Leval to: United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010, at 30, especially footnote 30 therein; Antonio Cassese, "Remarks on Scelle's Theory of "Role Splitting" (*dédoublément fonctionnel*) in International Law", *European Journal of International Law*, Vol. 1, 1990, at 225-231; United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, p. 12; John H. Knox, "Horizontal Human Rights Law", *American Journal of International Law*, Vol. 102, No. 1, 2008, at 43-44; Amartya Sen, "Elements of a Theory of Human Rights", *Philosophy & Public Affairs*, Vol. 32, 2004, at 326-328, 345.

²⁰ See Chris Jochnick, *supra*, at 58; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 44, 50 (especially footnote 94 therein); Nicolás Carrillo, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., at 5, 22.

When examining whether international law can directly protect individuals from non-state violations of human rights, it is important to consider that individuals may have international rights but no direct remedies to claim their protection, and that actors can have obligations without being subject to international procedures of supervision and sanction.²¹ That does not imply that human rights and obligations do not exist, only that non-international authorities must enforce those substantive guarantees. Therefore, it is not true that norms that protect human dignity from non-state abuses that are not endorsed by procedural mechanisms have no substantive or indirect procedural effects, although this stresses the necessity that different actors protect that international legal value.

It is possible to affirm that violations of human rights happen when any actor hinders the enjoyment of those rights, and that if effective mechanisms of protection to address any such situation do not exist, they must be created *de lege ferenda*.²² It is important that non-state violators have substantive obligations, because their existence ensures that authorities can sanction them and order them to repair victims directly. To my mind, all non-state actors have at least implicit and inherent duties to respect peremptory human rights and to not harm individuals in ways contrary to their human dignity, as examined in Chapter 6.

The fact that there can be non-state violations makes it necessary to respond to them and protect victims, which requires the existence of different mechanisms of protection from those abuses. Among other possibilities, international organs and agents that have tasks that are related to the promotion and protection of human rights can be considered to have competences and powers to contact non-state actors and ask them to refrain from violating human rights or to cease violations, and to promote human rights persuading those actors to respect them.²³

²¹ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, supra, at 74-75; Andrew Clapham, "The Role of the Individual in International Law", *European Journal of International Law*, Vol. 21, No. 1, 2010, at 29; Hersch Lauterpacht, op. cit., at 27, 34; Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Intersentia, 2001, at 58-62; United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, at 11-13; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors: Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, The Hague Conference, 2010, at 21, where it is clarified that not all actors who have an international legal "status" have the same capacities or enjoy them in the same degree; and Kate Parlett, "The PCIJ's Opinion in *Jurisdiction of the Courts of Danzig. Individual Rights under Treaties*", *Journal of the History of International Law*, Vol. 10, 2008, at 136-137, where the argument that an entity does not enjoy international personality if it does not have a right to employ an international mechanism to protect or enforce it is dismissed.

²² That expression alludes to desirable regulations that do not exist in positive law but should or ought to be enshrined in it, as explained in Michel Virally, *El devenir del derecho internacional : ensayos escritos al correr de los años*, Fondo de cultura económica, 1998, at 242.

²³ See Chapters 1 and 8, infra, especially the Manual of Operations of the Special Procedures of the Human Rights Council of August 2008, paras. 81-83; Committee Against Torture, *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, CAT/C/22/D/120/1998, 25 May 1999, paras. 6.5 through 7; Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006 (hereinafter, the 'UNMIK case'), para. 4.

Soft law instruments have also addressed the protection of victims of non-state violations. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, for instance, mention in Principle 15 that non-state entities can have a duty to repair victims. This is important because, as examined in Chapter 7, quite often the full reparation to which victims are entitled is only be possible if *all* the entities that participate in a violation provide reparations, either because a State sometimes cannot fully repair victims or because it has not breached duties of its own but non-state actors still violate human rights.

For example, the right to know the truth is a component of reparations, and guarantees of non-repetition must be given by responsible entities.²⁴ Concerning this, it can be said that the whole truth about a violation, or relevant parts of it, may be known only by non-state participants; and all participants in violations must guarantee that they will not victimize again. These arguments illustrate why non-state provision of reparations is often indispensable for victims.

Concerning guarantees of non-repetition of violations, taking into account that non-state actors can violate human rights or be complicit in abuses, it can be added that even if States that participate in violations promise to not do so in the future, victims will not be reassured unless all participants promise this, and everyone else will benefit from those assurances and from the training of agents to prevent similar violations from being committed.

Concerning the possibility of non-state actors having legal responsibility, it is important to stress that the evolution of international jurisprudence and practice reveals that the responsibilities of different entities involved in a violation of law can be complementary and are not exclusive. In this sense, the International Court of Justice (hereinafter, ICJ) has declared that States can be complicit in violations perpetrated by States or non-state actors which are contrary to human rights, such as genocide.²⁵ The International Law Commission (hereinafter, ILC), in turn, has also considered that States can be responsible as aiders or abettors of violations of international law attributable to international organizations, or vice versa.²⁶ This line of reasoning can be transplanted to other situations involving other actors. To this, it must be added that non-

²⁴ See, *inter alia*, Principles 18, 22 and 23 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Preamble and Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance; Human Rights Committee, *Abubakar Amirov and Aizan Amirova v. Russian Federation*, Views, Communication No. 1447/2006, CCPR/C/95/D/1447/2006, 22 April 2009, paras 11.7, 13; Inter-American Court of Human Rights, *Case of Barrios Altos v. Peru*, Judgment, 14 March 2001, paras. 43, 48.

²⁵ See International Court of Justice, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 419-420.

²⁶ See International Law Commission, articles 14, 42 and 58 of the Draft Articles on the Responsibility of international organizations adopted in 2011, A/66/10, 2011.

state actors can be responsible on different bases in connection with one same violation, for instance as perpetrators or as assistants.

It is certainly possible for non-state actors to have international legal responsibility because they can be bound by international obligations, which can be created by the sources of international law, provided that fundamental rights and *jus cogens* are respected and some conditions are satisfied.

Concerning this possibility, Theodor Meron, Kate Parlett and other authors have argued that even the Permanent Court of International Justice accepted that international norms can address non-state entities, such as individuals, in its Advisory Opinion on the Jurisdiction of the Courts of Danzig, in which it accepted that the object of an international treaty can be the creation of individual rights and obligations.²⁷ Whether the Advisory Opinion fully accepted that non-state entities could be subjects of international law is somewhat controversial, because the Permanent Court mentioned that a treaty could not “create direct rights and obligations for private individuals” but that its object could be “the adoption by the Parties of some definite rules creating individual rights and obligations”, which would have effects in their domestic legal systems.²⁸ The aforementioned authors posit that the Court was cautious and employed a language that averted criticisms but ultimately accepted that international treaties can regulate rights and duties of individuals.

Currently, it is widely accepted both that international law can regulate non-state behavior and that it can also protect human rights. It must logically follow that it can directly protect human dignity from non-state actors. John Knox has described how international law can do this in different ways: it may regulate State obligations that generally indicate to authorities that they must protect individuals from non-state actors; it may specifically determine how that protection must be; it may regulate non-state human rights obligations; or it may regulate procedures in which non-state conduct and compliance with norms that protect human dignity can be examined.²⁹ Those possibilities confirm that international law can directly address non-state violations without the mediation of domestic law or authorities in substantive and/or procedural terms.

²⁷ See Theodor Meron, *The Humanization of International Law*, Martinus Nijhoff, 2006, at 40; Kate Parlett, “The PCIJ’s Opinion in *Jurisdiction of the Courts of Danzig*. Individual Rights under Treaties”, op. cit., at 120, 143-145; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 71-73, Hersch Lauterpacht, op. cit., at 27-29.

²⁸ See Permanent Court of International Justice, *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have passed into the Polish service, against the Polish Railways Administration)*, Advisory Opinion, Series B, No. 15, 3 March 1928, at 17-18.

²⁹ See John H. Knox, “Horizontal Human Rights Law”, op. cit., at 20-31.

For example, the Nuremberg Trials of war criminals revealed that individuals could not only be *bound* by international duties but also be *sanctioned* for their abuses and be *parties* in international procedures in which compliance with their duties are examined. Likewise, human rights treaty and customary norms, principles and soft law, among others, have envisaged the possibility of adopting recommendations or duties addressing the conduct of individuals and other non-state actors,³⁰ and permit to restrict their rights when restrictions are necessary to protect the human rights of others as long as proportionality and other conditions are satisfied.³¹

Additionally, some international norms and bodies have ordered States to enact domestic prohibitions for the sake of the protection and promotion of human rights, including prohibitions from racial discrimination; have ordered States to protect individuals from violence or violations committed by non-state actors; and have also directly regulated and enforced obligations of non-state actors, such as criminal duties, without State mediation.

The prohibition and prosecution of piracy, for instance, acknowledges both the importance of dealing with non-state actors that can affect international legal interests and the possibility of adopting international norms to protect them from those and other actors. Interestingly, their being considered *hostis humanii generis* due to their putting at risk the safety and freedom of the seas, which are interests of the international society, led to the establishment of a rule of “quasi-universal” jurisdiction, which can be more properly considered as a rule that solves possible conflicts of jurisdiction³² by permitting States that detain pirates to try them.

It is important to mention that, as explored in Chapter 8, judicial supervision of compliance with non-state human rights obligations is not the only way in which it is possible to seek to protect human dignity from non-state abuses. Furthermore, non-judicial strategies have effects that are complementary to those of judicial ones; and non-state actors can participate in mechanisms and processes that promote the protection of human dignity, being it important to permit that participation.

Regarding duties and legal capacities of non-state actors, it may be asked if only actors that are “international legal persons” can have them, especially because some authors argue that only actors with certain international substantive (e.g. lawmaking powers) or procedural legal capacities (e.g. to request protection of rights or be subject to supervisory procedures) can be considered subjects or persons of international law. However, as studied in Chapter 5, those theories are challenged by persuasive arguments that explain how any actor with legal capacities

³⁰ See Chapters 5 and 6, *infra*.

³¹ See Chapters 1 and 8, *infra*.

³² See Antonio Cassese, “When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium Case*”, *European Journal of International Law (EJIL)*, Vol. 13, 2002, at 857-858.

regulated by international law is one of their addressees and subjects. To my mind, those arguments not only better describe legal possibilities and practice but can also be invoked to prevent the impunity and lack of protection of legal goods that could be the result of the application of norms in the belief that narrow theories of legal personality are correct.³³

Interestingly, apart from being addressees of international law, non-state actors can contribute to shaping it. This is revealed, for example, by the power of international organizations, armed groups and other entities to consent to be bound by international treaties and even to participate in their creation, and by the fact that other actors can participate in and exert their influence on the formation of customary law and negotiations of international norms, as revealed by the drafting history of the Anti-Personnel Landmines Convention and the Rome Statute of the International Criminal Court, as examined in Chapter 5.

Apart from not being the only possible direct and indirect international lawmakers, States are neither the only actors that can impede the exercise of human rights dignity nor the only participants of the international society and supra-national legal frameworks. For instance, it cannot be denied that throughout history non-state actors have violated the right to life, the enjoyment of which permits the exercise of other human rights.³⁴ Those are some of the reasons why it is preferable to call international law *jus gentium*,³⁵ another being that this legal system protects important non-State interests as well.

Concerning the relevance of non-state actors in international relations, studies have indicated that it is not always easy to determine if some internationally-relevant actions have a State or a non-state origin, or whose interests they favor.³⁶ The fact that the agents of collective actors, as States, have their own motivations and that they can have legal responsibility of their

³³ On these theories, see: José Antonio Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, Tecnos, 2003, at 186; Manuel Díez de Velasco, *Instituciones de Derecho Internacional Público*, Tecnos, 2005, at 258; Roland Portmann, *Legal Personality in International Law*, Cambridge University Press, 2010, pp. 274-275; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 64-65; Malcolm N. Shaw, *International Law*, Cambridge University Press, Fifth Edition, 2003, at 176; Elena Pariotti, "Non-State Actors, International Law, and Human Rights", in Sanford R. Silverburg (ed.), *International Law: Contemporary Issues and Future Developments*, Westview Press, 2011, at 102, 104; ILC, Draft articles on the responsibility of international organizations, with commentaries, A/66/10, 2011, at 8-9, para. 8 of the commentary to article 2; Gaetano Pentassuglia, "Review of: Meijknecht, Anna. *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*", *European Journal of International Law*, Vol. 14, 2003, at 391.

³⁴ See Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, 16 November 2009, para. 245.

³⁵ See Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion", *Virginia Journal of International Law*, Vol. 51, Number 4, 2011; Fred Halliday, op. cit.; Daphné Josselin and William Wallace, "Non-state Actors in World Politics: a Framework", in Daphné Josselin and William Wallace (Eds.), *Non-state Actors in World Politics*, Palgrave, 2001, at 4-10, 15, 19.

³⁶ See Fred Halliday, op. cit., at 22-35; Eric A. Posner, op. cit., at 53-55.

own, which can coexist with that of collective entities,³⁷ indicate that non-state responsibility is possible and that it does not displace State obligations.

That being said, non-state violations must be tackled even when no States are involved in them, and this is pressing nowadays because of different challenging factors present in a global society. Among them, it must be noted that many States have lost power and are challenged by other actors, and are often unwilling or unable to respond to the human rights challenges generated by non-state actors, due to difficulties such as the power of those actors, or to the fact that States sometimes attach more importance to interests that differ from those concerned with the protection of human dignity, among others.³⁸

Concerning the aforementioned factors, studies indicate how States acting alone and even cooperating with others are sometimes unable to effectively control and respond to actors whose power in economical, military, logistic or other terms is greater than theirs.³⁹ This is sometimes explained by the fact that the power and capabilities of non-state actors are often heightened in a globalized context that offers them opportunities to elude control, and that they take advantage of them and engage in old and new conduct that challenge international legal goods.⁴⁰

Additionally, practices of privatization, delegation of powers –even of some traditionally ascribed to sovereignty-, competition among domestic legal systems to attract foreign investment,

³⁷ See Inter-American Court of Human Rights, Advisory Opinion OC-14/94, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, 9 December 1994, para. 56; Principles I through IV of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; Judgment of the International Military Tribunal for the Trial of German Major War Criminals.

³⁸ See, among others, Alfred Van Staden and Hans Vollaard, “The Erosion of State Sovereignty: Towards a Post-territorial World?”, in Gerard Kreijen et al. (Eds.), *State, Sovereignty, and International Governance*, Oxford University Press, 2002, at 167-168; Sandra Lavenex, “Globalization, Global Governance and the *Bonnum Commune*: a Conceptual Investigation”, *European Journal of Law Reform*, Vol. 6, 2004, at 381, 388; Celestino del Arenal, “La nueva sociedad mundial y las nuevas realidades internacionales: un reto para la teoría y para la política”, in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2001*, Bilbao, 2002, at 23, 27-29, 34, 52-53, 64-66; Antonio Cassese, “Remarks on Scelle’s Theory of “Role Splitting” (*dédoublement fonctionnel*) in International Law”, *op. cit.*, at 216; Francisco Galindo Vélez, “Consideraciones sobre la determinación de la condición de refugiado”, in Sandra Namihás (Ed.), *Derecho Internacional de los Refugiados*, Pontificia Universidad Católica del Perú – Instituto de Estudios Internacionales, Fondo Editorial, 2001, pp. 125-126; Alexandra Gatto, “Corporate Social Responsibility in the External Relations of the EU”, in *Yearbook of European Law*, 24, 2005, at 423.

³⁹ *Ibid.*; Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, *op. cit.*, at 3, 6, 9, 20, 26, 45, 49-50.

⁴⁰ *Ibid.*; Anna Badia Martí, “Cooperación internacional en la lucha contra la delincuencia organizada transnacional”, in Victoria Abellán Honrubia and Jordi Bonet Pérez (Dirs.), *La incidencia de la mundialización en la formación y aplicación del Derecho Internacional Público, Los actores no estatales: ponencias y estudios*, Bosch Editor, 2008, at 319; ‘We the Peoples’: *The Role of the United Nations in the 21st Century*, United Nations, 2000, pp. 11-12; Gáspar Biró and Antoanella-Iulia Motoc, *Working paper on human rights and non-State actors*, E/CN.4/Sub.2/2005/40, 11 July 2005, paras. 42-45; Kofi A. Annan, “Foreword”, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, United Nations Office on Drugs and Crime, 2004, pp. iii-iv. Available on: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

the lowering of standards that benefit individuals –e.g. due to race to the bottom phenomena or labor dumping-, and the possibility that potential perpetrators choose to be bound by systems with low levels of protection,⁴¹ among others, may lower domestic human rights standards and guarantees and expose individuals to non-state threats without prospects of an effective domestic protection. For this reason, international norms must outlaw non-state threats and order protection from them, so that States have an international duty to adjust internal legal systems to those human rights demands and other States and actors can demand protection and cooperate in this field.

Apart from this, international norms that protect individuals from non-state violations directly or indirectly (i.e. directly regulating non-state behavior or commanding authorities to protect) have an additional benefit: some States may be willing to tackle non-state threats but be unable to effectively do so due to their loss or lack of power. In those cases, international norms against non-state violations can authorize (and sometimes command) other entities to cooperate in the protection of individuals and respond to conduct that is considered contrary to international law, thus increasing the possibilities and prospects of protection of human dignity.

The power of some non-state actors cannot be underestimated. For instance, not only many of the most powerful economies in the world are corporate,⁴² but also many actors have accumulated soft, systemic and even hard power, and it sometimes rivals even that of States, which they can therefore pressurize.⁴³ This, and the fact that actors that have always challenged the protection of human dignity, as transnational criminal groups, have alliances with others and

⁴¹ See 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, pp. 54-55, 75-76; Menno T. Kamminga, “The Next Frontier: Prosecution of Extraterritorial Corporate Misconduct before Non-US Courts”, in Willem J.M. Van Genugten et al. (eds), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference*, T.M.C. Asser Press, 2009, at 172; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008, para. 14; Koen de Feyter, “Globalisation and human rights”, in: Felipe Gómez Isa and Koen de Feyter (eds.), *International Human Rights Law in a Global Context*, 2009, at 81-82; Alexandra Gatto, *supra*, at 423; Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, *op. cit.*, at 7; Elena Pariotti, *op. cit.*, at 98; José Manuel Cortés Martín, *op. cit.*, pp. 227-228; Zoe Salzman, “Private Military Contractors and the Taint of a Mercenary Reputation”, *New York University Journal of International Law and Politics*, vol. 40, 2008, pp. 860-866; Corporate Responsibility, the corporate responsibility coalition, “Protecting rights, repairing harm: How state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities”, briefing paper for the UN Secretary General’s Special Representative on Business and Human Rights, 2010, at 7, available at: <http://www.business-humanrights.org/media/documents/ruggie/core-submission-to-ruggie-nov-2010.pdf> (last checked: 06/02/2012).

⁴² See Alexandra Gatto, *supra*, at 423.

⁴³ See Celestino del Arenal, *op. cit.*, at 27-28, 34, 52-53, 64-66; Francisco Galindo Vélez, *op. cit.*, pp. 125-126; Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, *op. cit.*, at 3.

take advantage of possibilities available in a globalized landscape,⁴⁴ often make it impossible for States acting alone or with isolated strategies to effectively protect individuals.

This consideration highlights the importance of international cooperation, in the understanding that not only States but also non-state actors can contribute to pursue shared goals as the protection of human dignity. Indeed, some non-state actors, as some NGOs, have contributed to the effectiveness and development of the local and international protection of human rights, making it possible for many victims to find hope in the international legal system after fruitless domestic attempts.⁴⁵ Those entities have sometimes also examined and criticized the conduct of other non-state actors in light of human rights standards and recommend or adopted standards on the protection of human rights from non-state actors.

While substantive and procedural legal burdens of non-state actors can bind them to respect human rights and serve to protect them otherwise, it must be considered that some authors have argued that non-state human rights duties could be used by States to divert attention away from their obligations or as excuses to commit abuses; or that non-state actors could take advantage of the existence of non-binding regulations to falsely suggest that it is unnecessary to create legal obligations that bind them and/or to reap benefits from their existence, such as by improving their image without having real human rights commitments.⁴⁶

In my opinion, those objections to non-state human rights duties and other responsibilities can be rebutted: States retain their duties even if non-state obligations exist; and labeling an actor as a human rights violator in no way legitimizes it. Additionally, previous arguments found in this introduction indicate how problematic it is to not tackle non-state

⁴⁴ Ibid.

⁴⁵ On these issues, see Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion", in Gerard Kreijen et al. (eds.), *State, Sovereignty, and International Governance*, Oxford University Press, 2002, pp. 133-134; Concurring Opinion of Judge A.A. Cançado Trindade to: Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et-al v. Peru*, Judgment (Preliminary Objections), 4 September 1998, para. 35; ASIL, *Proceedings of the 92nd Annual Meeting: The Challenge of Non-State Actors*, The American Society of International Law, 1998, pp. 22-23; Daniel Thürer, "The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State", in Rainer Hofmann (ed.), *Non-State Actors as New Subjects of International Law*, Duncker & Humblot (ed.), 1999, at 44-45, 47; Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", in Gunther Teubner (ed.), *Global Law Without a State*, Dartmouth (ed.), 1997, pp. 188-190; Thomas Buergenthal, "The Evolving International Human Rights System", *American Journal of International Law*, Vol. 100, 2006, pp. 803-804; Anna Badia Martí, op. cit., pp. 337-338, 342-343; Luis Pérez-Prat Durbán, "Actores no estatales en la creación y aplicación del Derecho Internacional", in Victoria Abellán Honrubia and Jordi Bonet Pérez (Dirs.), *La incidencia de la mundialización en la formación y aplicación del Derecho Internacional Público: los actores no estatales: ponencias y estudios*, Bosch (ed.), 2008, pp. 34-38.

⁴⁶ See, among others, John H. Knox, "Horizontal Human Rights Law", op. cit., at 32-46; John H. Knox, "The Human Rights Council Endorses "Guiding Principles" for Corporations", *ASIL Insights*, Vol. 15, Issue 21, 2011, at 1 (PDF version, available at: <http://www.asil.org/pdfs/insights/insight110801.pdf>, last checked: 04/11/2011); Mary Ellen O'Connell, "Enhancing the Status of Non-State Actors Through a Global War on Terror?", *Columbia Journal of Transnational Law*, Vol. 43, 2005, at 457-458; Alexandra Gatto, op. cit., at 431; Nicolás Carrillo, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., at 34.

violations by international law, which creates problems that far exceed difficulties created by international norms addressing them, which can be overcome or simply not exist. This is discussed in more detail in Chapter 5.

An example illustrates some of the previous points. Under International Humanitarian Law (hereinafter, IHL), non-state armed entities are bound by common article 3, by customary law, and eventually by some treaty norms.⁴⁷ As that article and legal interpretation indicate, the obligations those norms regulate do not alter the status of bound entities and do not legitimize their violations.⁴⁸ On the contrary, they indicate how non-state actors are expected to behave lest they are exposed to condemnation. Additionally, States remain bound by their own IHL obligations even when non-state duties exist.

The same rationale about status is found in point 4.5 of the Memorandum of Understanding between the United Nations and the group JEM in Sudan, and in the Manual of Operations of the Special Procedures of the Human Rights Council of August 2008, according to which:

“[I]nteraction between the mandate-holder and representatives of the non-State actor or *de-facto* authority might take place within the country concerned. The context of such meetings and the conditions under which they are held should seek to ensure that the involvement of the mandate-holder is not understood as an endorsement of any particular claim made by the non-State actor or *de-facto* authority as to representativity, legitimacy, or other matters”⁴⁹ (emphasis added).

As explained above, saying that an actor must comply with some standards and that if it does not do so it can be branded as a violator of norms that protect human dignity highlights that it can commit violations that must be prevented and responded to,⁵⁰ making others aware of their possibility or duty to address violations of that actor.

In sum, there can be international obligations of non-state actors that protect human dignity, apart from other legal capacities with the same purpose, and they can be implemented and supervised by means of different mechanisms found across normative systems and the action of different actors that promote international legal goods. If *lex lata* does not fully or properly protect human dignity from non-state abuses, it must be complemented or modified until

⁴⁷ See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 159-160; article 3 of the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia.

⁴⁸ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 51.

⁴⁹ See Manual of Operations of the Special Procedures of the Human Rights Council, adopted in June 2008 at the 15th Annual Meeting of Special Procedures, published in August 2008 (available at http://www2.ohchr.org/english/bodies/chr/special/docs/Manual_August_FINAL_2008.doc, last checked: 14/11/2001), para. 82.

⁵⁰ Similarly, Andrew Clapham has mentioned how imposing human rights duties on an entity does not “increas[e] its legitimacy” but rather limits their conduct, as expressed in: Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 52-53.

it is compatible with the demand of the full protection of human dignity, and practitioners and authorities must interpret norms in light of it. Needless to say, according to the rule of law this cannot be done in an arbitrary fashion, and international obligations must be both accessible and foreseeable by entities bound by them, as indicated by the Grand Chamber of the European Court of Human Rights in the *Kononov* case.⁵¹

The creation and regulation of non-state human rights obligations is one among different complementary measures that can be used to protect individuals. Some of those obligations can be criminal, since some norms of international criminal law share the goal of protecting human dignity. Likewise, other branches of international law, as IHL, also have norms that seek to protect human dignity, as described in the CSCE Helsinki Document 1992, “The Challenges of Change”, Helsinki Summit Declaration.⁵²

The protection of human dignity from non-state abuses can be strengthened by resorting to other measures that are different from the creation of obligations. They include, among others, recommendations, non-binding norms such as those found in some codes of conduct, initiatives to generate non-state culture that is respectful of human rights, the enforcement of obligations to prevent and respond to non-state violations of States and other authorities, domestic protection of human dignity, education, addressing the causes of violations, or the shaming of offenders, besides some actions of transnational and private actors. Some of those mechanisms are explored in Chapter 8.

Regarding codes of conduct, it can be said that due to the pressure exerted by other actors and society itself, or out of a genuine commitment, some corporations, NGOs and other entities have adopted instruments that address issues related to the respect of human rights and other values. The nature and effects of these codes vary: some are self-regulation initiatives and others are adopted by some actors but address the conduct of others;⁵³ some are mere declarations of aspirations whereas others have stronger and perhaps even legal commitments; some may be considered manifestations of non-state regulations or “global non-state law”, as understood in the theories put forward by Günther Teubner and examined by global

⁵¹ See Chapter 5, *infra*, and European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, 17 May 2010, paras. 185-187, 235-239.

⁵² The protection of human dignity can be found in criminal norms, refugee law or international humanitarian law, among others. Concerning these ideas, see Claire de Than and Edwin Shortts, *op. cit.*, pp. 12-13, 29; John H. Knox, “Horizontal Human Rights Law”, *op. cit.*, at 24; Inter-American Commission on Human Rights, Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina*, Ecuador – Colombia, 21 October 2010, para. 117; Conference for Security and Cooperation in Europe, 1992 Summit, Helsinki, “The Challenges of Change”, Helsinki Document 1992, 9 - 10 July 1992, para. 47.

⁵³ See Luis Pérez-Prat Durbán, *supra*, at 33.

administrative law or global law theories;⁵⁴ and international law may attach some value to some of them, for example due to the expectations they generate and due to the protection of good faith and trust in them.

Additionally, it is important to examine codes of conduct with care, because some of them may be merely rhetorical exercises that seek to promote a good reputation or may be used to divert attention away from the needs of adopting binding obligations of non-state actors and/or of regulating remedies that victims can effectively access to, which is something many codes of conduct lack.

As indicated above, international obligations of non-state actors can be complemented, among others, by initiatives that seek to make non-state culture respectful of human dignity. Concerning this, the human rights Committees and experts of the United Nations have highlighted that States must employ all the legal and legitimate measures they can in order to promote the respect of human rights by non-state actors, including the promotion of non-state culture that is consistent with them. It is possible to seek to generate such culture in different ways, including normative strategies because norms can have symbolic and expressive functions and effects. Others have pointed out that non-judicial and non-legal mechanisms and strategies, such as (lawful) boycotts, socialization, exclusion, and persuasion, can be relevant and useful for protecting human rights from non-state threats.⁵⁵ These considerations confirm that different mechanisms can be used to prevent and respond to non-state violations and that they can complement each other, which is relevant given the advantages and disadvantages each of them have.

Regarding normative strategies, it can be said that they can truly contribute to enhance the protection of human dignity because making non-state actors be bound by obligations and

⁵⁴ See Gunther Teubner, "Global Bukowina: Legal Pluralism in the World Society", in Teubner, G. (ed.), *Global Law Without a State*, Dartmouth (ed.), 1997, pp. 12-19; Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law", *European Journal of International Law*, vol. 20, No. 1, 2009, pp. 52-55; Rafael Domingo, *¿Qué es el derecho global?*, Thomson Aranzadi, 2007, at 108, 159.

⁵⁵ See Ryan Goodman and Derek Jinks, "Incomplete Internalization and Compliance with Human Rights Law", *European Journal of International Law*, Vol. 19 No. 4, 2008, at 735; Mauricio García Villegas, "De qué manera se puede decir que la Constitución es importante", in Álvarez Jaramillo *et al.*, *Doce ensayos sobre la nueva Constitución*, Díkē, 1991, at 40; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 55; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., paras. 9, 26, 29-32, 84-85, 92; Daniel Thürer, op. cit., pp. 46-47; Bob Reinalda, "Private in Form, Public in Purpose: NGOs in International Relations Theory", in Bas Arts *et al.* (eds.), *Non-State Actors in International Relations*, Ashgate Publ., 2001, pp. 13, 35-36; Andrew Clapham and Scott Jerbi, "Categories of Corporate Complicity in Human Rights Abuses", *Hastings International and Comparative Law Journal*, Vol. 24, 2001, pp. 347-348; August Reinisch, op. cit., at 53, 67-68, 77; Alexandra Gatto, op. cit., at 431; Gunther Teubner, op. cit., pp. 9, 12-13; Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", op. cit., pp. 188-191; Menno T. Kamminga, op. cit., at 186; Human Rights Committee, General Comment No. 31, op. cit., paras. 7, 15.

responsibilities can change their perceptions and attitude. It is considered that this happened with some non-state armed groups, which began to justify their behavior in light of international humanitarian law after the emergence of obligations that bound them under that branch of international law.⁵⁶ Regulation can therefore strengthen the full protection of human dignity not only from the perspective of its enforcement but also from a psychological, educational or symbolic point of view.

However, normatively addressing non-state conduct is not simply a voluntary choice: it is imperative that legal systems procure the respect of human rights and the non-repetition of violations, including non-state ones.⁵⁷ For this reason, the adoption of non-state duties is mandatory and necessary whenever they are indispensable for the protection of human rights to be effective.

Another important development that helps to protect many victims from non-state abuses is the international supervision of compliance by States, and also by other authorities, with their duties to protect human rights with due diligence. Some factors can make the diligence with which authorities must strive to protect individuals stricter, such as the vulnerability of rights and persons, the guarantor position of authorities in some events, or the creation of risks of violations by authorities.⁵⁸ The obligation to protect requires entities bound by it to diligently strive to prevent and respond to all human rights abuses, including non-state ones.

It is important to mention that the obligations of authorities, including positive ones, do not cease to exist or have effects when there are events of privatization, public-private partnerships, or delegation or transfer of powers to international organizations and other entities. Therefore, authorities cannot elude their obligations by means of those dynamics, and they continue to be bound by their duties to ensure that actors involved in those processes do not violate human rights, which often oblige them to oversee the conduct of private and public actors that perform actions and supply services that can affect the exercise of human rights which were previously

⁵⁶ See Fred Halliday, "The Romance of Non-state Actors", op. cit., at 35; David Capie, "Influencing Armed Groups: Are there Lessons to Be Drawn from Socialization Literature?", in: Geneva Call, *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law*, Conference Report—Geneva, 4-5 June 2007, 2008.

⁵⁷ See Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, supra, paras. 288-291.

⁵⁸ See Inter-American Commission on Human Rights, *Case of Jessica Lenahan (Gonzalez) et al. v. United States*, Case 12.626, Merits Report No. 80/11, 21 July 2011, paras. 113-114, 122-134; European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, 30 November 2010, paras. 41, 45-46, 50; Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment, 31 January 2006, paras. 125-126; Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), Forty-four session, 1992, para. 11; Inter-American Court of Human Rights, *Case of Ximenes-Lopez v. Brazil*, Judgment, 4 July 2006, paras. 138-141; Inter-American Commission on Human Rights, Press Release 114/10.

directly or only conducted or supplied by authorities, in order to ensure that human rights are effectively protected from the respective non-state entities.⁵⁹

Likewise, the International Law Commission has considered that States shall not elude their obligations by taking advantage of their membership in international organizations, and that those organizations cannot circumvent their obligations by making their members commit acts that those organizations are forbidden from committing.⁶⁰

Regarding positive human rights obligations, it is important to take into account that apart from being bound by duties of respect, sometimes non-state actors have positive duties and that other times it is necessary for them to be bound by such duties for the protection of human dignity to be effective, as explored in Chapter 6. For example, positive human rights obligations of non-state entities can bind some international organizations in the field of the protection of persons with disabilities, in the European regional human rights system, or can bind actors that administer territories in relation to its inhabitants, whose rights remain and are unaffected by changes of the entities that administer those territories.⁶¹

The international supervision of compliance with the obligations of States and other authorities to put an end to, sanction, or prevent non-state violations of human rights, and to ensure the reparations of victims, do not protect individuals from non-state abuses directly but offer *indirect* protection *when* authorities breach their duties, cases in which the authorities can be rightly sanctioned and held responsible due to their passivity, because their powers must be used diligently to protect human beings⁶² from all abuses, including those committed by powerful actors that are often able to operate across borders or have powers that can affect human rights.

Obligations to protect human rights recognize some dimensions of the horizontal effects of those rights,⁶³ and their implementation and enforcement protect some individuals from non-

⁵⁹ See August Reinisch, *op. cit.*, at 78-82; European Court of Human Rights, Press Unit, Factsheet on *Case law concerning the European Union*, 2010, at 3, available at: http://www.echr.coe.int/NR/rdonlyres/EA6F3298-FE75-48E7-B8A7-F9C5FF5EB710/0/FICHES_European_Union_EN.pdf (last checked: 15/11/2011); European Court of Human Rights, *Case of Matthews v. the United Kingdom*, Judgment, 18 February 1999, paras. 34-35; Andrew Clapham and Scott Jerbi, *op. cit.*, at 339; Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, para. 1; Inter-American Court of Human Rights, *Case of Ximenes-Lopez v. Brazil*, Judgment, 4 July 2006, para. 96.

⁶⁰ See articles 17 and 61 of the Draft articles on the responsibility of international organizations, adopted by the International Law Commission at its sixty-third session, 2011.

⁶¹ See Chapter 6, *infra*; article 59 read in conjunction with article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; article 44.2 in conjunction with article 4 of the Convention on the Rights of Persons with Disabilities; Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006, para. 4.

⁶² See Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, *Juridical Condition and Human Rights of the Child*, 28 August 2002, para. 19.

⁶³ See Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, *supra*, paras. 140-148; Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *supra*, para. 8; Inter-American Court of

state violations. However, since *those* legal processes do not protect all victims, as happens when authorities behave diligently, complementary effective mechanisms must be offered to victims not protected by them for the protection of human rights to be truly universal and consistent with the non-conditionality of human dignity and the equality of all victims. Certainly, in some cases States discharge their duties with due diligence but violations are committed and remain in impunity despite their efforts. In those cases, it is undeniable that there are human rights violations, which the authorities attempt to tackle, despite which victims suffer and face the risk of not being fully repaired.

Denying that there are violations of human rights in those cases, or not offering alternative effective protection to victims, would be inconsistent with the basis of the existence of duties of protection, with the equality of victims, and with the non-conditionality of human dignity (this is further explained in Chapter 2 when examining what I call the “Mastromatteo paradox”).

Moreover, as explored in Chapter 6, it can be argued that according to general principles of law, whenever an actor violates human rights it is bound to repair victims. This may be required by a principle according to which an entity that causes harm must repair those that are affected, which can achieve the status of a general principle of law with international relevance,⁶⁴ especially if the notions of inherent and implied duties presented in that Chapter are accepted. Additionally, it can be considered that automatic, presumed and/or implicit obligations demand that all entities respect peremptory law, as examined in Chapter 6 as well. Otherwise, the absolute protection and effects of *jus cogens* regarding all manifestations and norms and in relation to all potential offenders would be questioned.⁶⁵

In other words, non-state actors have duties to respect *jus cogens* norms that protect human dignity. If they did not, the achievement of goals and interests of the international community would be impracticable. Those duties flow, among others, from the consideration that *jus cogens* trumps all interpretations and manifestations that would deprive it of practical effects, and also from the principle of effectiveness.⁶⁶

Human Rights, Advisory Opinion OC-17/2002, *Juridical Condition and Human Rights of the Child*, 28 August 2002, paras. 87-91; John H. Knox, “Horizontal Human Rights Law”, *op. cit.*, at 20-27.

⁶⁴ See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, 2006, at 169-170.

⁶⁵ See Roland Portmann, *op. cit.*, pp. 162-167, 273-274, 276-277, 280-281; ICTY, *Prosecutor v. Anto Furundzija*, Judgement, *supra*, paras. 144-147, 151-157; Antonio Cassese, “Remarks on Scelle’s Theory of “Role Splitting” (*dédoublement fonctionnel*) in International Law”, *supra*, at 227; Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio histórico-crítico*, Universidad Nacional Autónoma de México, 2003, at 169-170; Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, *op. cit.*, at 17, 30-32.

⁶⁶ See Nicolás Carrillo Santarelli, “La inevitable supremacía del *ius cogens* frente a la inmunidad jurisdiccional de los Estados”, *Revista Jurídica de la Universidad Autónoma de Madrid (RJUAM)*, No. 18, 2009, at 60-63, 74-76.

It cannot be said that only actors with international legal personality have that obligation, because such an alleged requirement fails to properly describe legal practice and is actually not required by positive law. Certainly, all actors can have legal obligations created by the sources of international law, and to achieve fundamental international purposes all actors that can violate them can be implicitly bound by duties of respect.

Moreover, studies on the history of the notion of subjectivity, as one conducted by Janneke Nijman, indicate that originally it did not allude to a supposed exclusive or primordial formal legal participation of States, and did not mean to exclude other actors or participants from international legal life either, but was in fact devised by Leibniz to justify more participation of some entities within the Holy Roman Empire *and* at the same time to explain why they could be subject to certain regulations.⁶⁷ In fact, even after the peace of Westphalia, the personality of entities within the Empire was far from clear.

Leibniz designed a concept of personality to strike a balance between the desire of independent action of those entities and the perceived importance of them remaining in the empire and being bound by some standards.⁶⁸ In my opinion, this implies the recognition that they were not the only participants in the international landscape, contrary to some conceptions of legal personality that endorse notions of exclusive participation of States. Even if some theories that challenge non-state subjectivity under international law are widely accepted in some circles, they must be examined in light of positive law, which can change. Truly, non-state actors can be and are addressees of international legal norms.

According to the previous ideas, the notion of international subjectivity can be considered to have been designed to stimulate the recognition of the legal relevance of State action alongside that of other entities, contrary to what the theories of Oppenheim and other authors seem to suggest. Jordan Paust rebutted those theories and explained how even during periods of the history of *jus gentium* in which States were supposedly the only or principal actors, other entities participated and had international legal capacities, entitlements and obligations.⁶⁹ Altogether, non-state conduct may be regulated by international law and non-state actors can be

⁶⁷ See Janneke Nijman, "Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability or the Last Great Defence of the Holy Roman Empire", IILJ Working Paper 2004/2, *International Law and Justice Working Papers*, Institute for International Law and Justice, New York University School of Law, 2005, at 2-3, 33-34, 52-57; Janne Elisabeth Nijman, *The Concept of International Legal Personality*, T.M.C. Asser Press, 2004, pp. 448-449.

⁶⁸ *Ibid.*

⁶⁹ See Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion", *op. cit.*, at 985-1000.

its subjects. The fact that they can impact on international legal goods also indicates that their conduct must be regulated when it is not sufficiently addressed.⁷⁰

It is also necessary to take into account that some authors have critically examined the notion of international legal personality and proposed alternative conceptions. They include Andrew Clapham, Rossalyn Higgins and others. According to some of them, some can invoke the concept of international legal personality to exclude important non-state actors and participants in international legal processes, and it is necessary to overcome the dichotomy of objects-subjects regarding those processes. Others argue that the concepts of legal personality and subjectivity have mainly descriptive functions, and that nothing impedes an actor that is not considered a subject in doctrine to be directly addressed by international norms. In turn, other authors consider that international law has undergone a process of increasing the inclusion of non-state entities and call for its continuation and expansion.⁷¹

Undoubtedly, the issue of legal personality is a controversial one, being there different viewpoints about it. Some of them stress the importance of active or passive access to international procedures; others emphasize the direct attribution of rights or obligations to an entity; others argue that entities that have some procedural or substantive legal capacities possessed by States are subjects of international law;⁷² and still others consider that not even States have all international legal capacities, rights and duties.⁷³ Regardless of what theory is endorsed, non-state entities can frequently have international legal capacities even if they are not regarded as subjects or persons of international law *according to one* of those theories.

Those legal capacities can be regulated by norms that seek to protect human dignity from non-state abuses. In legal practice, mechanisms that can be used to offer that protection include those of transnational litigation, universal jurisdiction, human rights processes and other fields.

This reveals that State agents, judicial or otherwise, can contribute to the protection of international legal goods and human rights from non-state abuses. This possibility strengthens the protection of human dignity because of the importance of complementing international protection with domestic and non-state initiatives. Among other examples, it can be said that the defense of international human rights from non-state abuses, such as those of private actors as

⁷⁰ See Chapter 5, *infra*; Janneke Nijman, "Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability or the Last Great Defence of the Holy Roman Empire", *op. cit.*, at 2-3.

⁷¹ See José Manuel Cortés Martín, *op. cit.*, pp. 109-110; Math Noortmann, "Non-State Actors in International Law", in Bas Arts et al. (eds.), *Non-State Actors in International Relations*, Ashgate, 2001, at 62-63; Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion", *op. cit.*, at 141; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, at 59-63, 70-71.

⁷² See Math Noortmann, "Non-State Actors in International Law", *op. cit.*, pp. 64-66; Manuel Díez de Velasco, *Instituciones de Derecho Internacional Público*, Tecnos, 2005, at 258; José Antonio Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, Tecnos, 2003, at 186.

⁷³ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 68-69.

individuals or corporations, can be taken into account by authorities implementing the U.S. Alien Torts Statute;⁷⁴ and that the legal system of States as Colombia and the United Kingdom offer protection from non-state violations of human rights directly and indirectly under certain conditions.⁷⁵

Just as international action can have shortcomings, domestic protection is often constrained by limitations and hindrances, related for instance to the reach of domestic law, gaps in internal norms, or the power of States against some actors. The fact that all legal systems and actors have limitations makes a comprehensive approach in which different actors and normative systems contribute to the protection of human dignity and complement each other necessary.⁷⁶

Additionally, to cope with the challenges to the exercise of human rights in a global society, the protection and promotion of human rights and guarantees must legitimately use tools and seize opportunities that are available in a globalized context,⁷⁷ such as the proper and lawful use of technological developments and opportunities of formal and informal joint action. The common efforts of different actors and norms may shape the attitudes of participants and society, and lead to the emergence of legal goods jointly protected. Additionally, it can prompt manifestations of *lex humana* that supersede, complement or exert an influence on the *opinio*

⁷⁴ See United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, pp. 6-15; United States Court of Appeals for the Second Circuit, *S. Kadic et al. v. Radovan Karadzic*, Decision of 13 October 1995, where it was mentioned that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals”; Roland Portmann, op. cit., at 166; Mireia Martínez Barrabés, “La responsabilidad civil de las corporaciones por violación de los derechos humanos: un análisis del *Caso Unocal*”, in Victoria Abellán Honrubia and Jordi Bonet Pérez (Dirs.), *La incidencia de la mundialización en la formación y aplicación del Derecho Internacional Público, Los actores no estatales: ponencias y estudios*, Bosch Editor, 2008, at 232-248.

⁷⁵ See *Ibid.*; article 42 of Decree 2591 of 1991 of Colombia; article 6.3.b of the Human Rights Act 1998 of the United Kingdom; Department for Constitutional Affairs, *A Guide to the Human Rights Act 1998: Third Edition*, 2006, pp. 8-9, 37, available at: www.justice.gov.uk/guidance/docs/act-studyguide.pdf (last checked: 02/02/2012); <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/peoples-rights/human-rights/pdf/act-studyguide.pdf> (last checked: 29/02/2012).

⁷⁶ See Janneke Nijman, “Sovereignty and Personality: A Process of Inclusion”, op. cit., pp. 133-134; Anna Badia Martí, op. cit., at 337-338, 342-343; Statement issued by the President of the European Court of Human Rights concerning Requests for Interim Measures (Rule 39 of the Rules of the Court), available on: http://www.echr.coe.int/NR/rdonlyres/B76DC4F5-5A09-472B-802C-07B4150BF36D/0/20110211_ART_39_Statement_EN.pdf (last checked: 15/11/2011), where it is mentioned that “[f]or the Court to be able effectively to perform its proper role in this area both Governments and applicants must co-operate fully with the Court”; Sandra Lavenex, op. cit., at 383; Pierre Calame, “Non-state actors and world governance”, Discussion paper, 2008, at 22-23, available at: <http://www.world-governance.org/spip.php?article297> (last checked: 27/12/2011); European Court of Human Rights, *Annual Report 2011*, Registry of the European Court of Human Rights, 2012, pp. 34, 36-37; ‘*We the Peoples: The Role of the United Nations in the 21st Century*’, United Nations, 2000, at 13.

⁷⁷ See Kofi A. Annan, “Foreword”, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, United Nations Office on Drugs and Crime, 2004, at iii-iv. Available at: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> (last checked: 15/11/2011); Anna Badia Martí, op. cit., pp. 319-320.

juris of actors that can shape international law, and so bolster supranational community links, for which the opinion and participation of human beings are important.⁷⁸

The synergic interaction and common efforts of actors and legal systems can also generate a global legal space, in which domestic and international law and private regulation and actions interface.⁷⁹ The common interests found in that space can include legal goods related to the protection of human dignity, which demands protection from all violators, State or not. The fact that interaction between actors and systems can also impact on their practice explains why recognition of the possibility and importance of that protection can spread and why the protection carried out by some participants in a global space benefit all of them and can be complemented by the protection given by others.

Global legal dynamics strengthen the protection of human dignity from non-state threats for different reasons. First and foremost, they make the impunity of non-state violations more unlikely because different mechanisms and actors can tackle and regulate non-state conduct, and because actions from one system can be complemented by others that can be used if the former fail in a multi-level arrangement.⁸⁰ Additionally, the importance of the position of victims is highlighted and they help to overcome distinctions of private and public law and internal and international norms, generating a (common) legal culture and messages that are sent to society and practitioners, that will be made aware of the necessity of protecting human dignity from all abuses and will be required to interpret norms in light of common legal goods.

On the other hand, the recognition of global legal goods found in different normative systems legitimizes their protection by actors and participants of those systems; and the fact that their implementation and interpretation should be made in light of the legal goods that all those systems share can strengthen the common protection of those legal goods, including dignity.

Taking into account the previous considerations put forward in this introduction, it can be concluded that it is necessary to examine if international law fully and effectively protects human dignity from non-state violations, especially because law must benefit human beings to be justified,⁸¹ and also because it is unacceptable that individuals are unprotected or under-protected from abuses contrary to essential rights.

⁷⁸ See Andrew Clapham, "The Role of the Individual in International Law", *op. cit.*, at 29-30.

⁷⁹ Additionally, see Benedict Kingsbury, Nico Krisch, Richard Stewart, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1, New York University, pp. 12-18; Rafael Domingo, *¿Qué es el derecho global?*, *op. cit.*, at 108; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", *op. cit.*, at 15, 17-19, 28, 32, 45.

⁸⁰ Cf. Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", at 35-43, 46.

⁸¹ See Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, *Juridical Condition and Human Rights of the Child*, 28 August 2002, paras. 19, 25.

It is thus relevant to note that many violations of human rights and guarantees based on human dignity are attributable to non-state actors.⁸² Ignoring this can lead to re-victimization, impunity, and the belief by victims that law or authorities abandon them and consider their suffering as irrelevant. This goes against the human rights ideals of equality and protection of the *inherent* worth of *all* human beings, which belongs to individuals and does not depend on who they interact with.

Concerning this, it is important to always bear in mind that individuals are the protagonists of the protection of human rights. Therefore, if local remedies to request protection from serious abuses do not exist or are not effective for some reason, they must have access to other remedies. Moreover, if victims of non-state abuses are told that human rights are not concerned with their suffering, they may lose faith in law and regard it as unfair, partisan or incomplete; and if law only protects some victims it will fail to protect all individuals, as it should.⁸³

Whether it is because the right to food cannot be enjoyed due to non-state action, or because someone is killed by members of non-state armed groups, among other examples of violations, daily examples make it necessary that a coherent and comprehensive regime of human dignity protects victims from all abuses and regulates the conduct of potential non-state violators. Otherwise, law will fail to address problems found in practice and society, and fail to live up to the idea that *sic societas, sicut jus*⁸⁴ or that law must take into account social features, which include dynamics of non-state violations. Additionally, law has an instrumental character, which must be used to serve human beings. Since States cannot always protect victims of non-state abuses, the law of peoples should prohibit non-state violations and tackle them directly or indirectly, as circumstances and legal considerations demand (Chapter 4 offers proposals about when direct international action is needed).

In a globalized landscape, international law cannot fail to take account of non-state challenges and of how protection of individuals from those challenges is demanded by legal and extra-legal goals and interests, which must be safeguarded in an effective way. This demands,

⁸² See Michael Goodhart, *op. cit.*, at 24-27, where it is explained that State powers exist precisely *to protect* individuals from non-state violations, and that insisting on exclusive State responsibility is fictitious and leads to ignoring the protection needs of persons subject to non-state threats. Moreover, taking into account that as fictitious entities violations attributable to States are also attributable to non-state entities (their officers), who can be responsible as well, it can be seen that in factual terms ultimately individuals, who are non-state entities (that can compose group entities), are always involved in violations of human dignity, and often they carry out violations on their own or in group structures without engaging the responsibility of a State. Concerning these issues, see footnotes 5 and 37, *supra*.

⁸³ Concerning these issues, see Chris Jochnick, *op. cit.*, at 58; Jordan J. Paust, "The Other Side of Right: Private Duties Under Human Rights Law", *op. cit.*, at 62; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, pp. 43-44, 50, 53-54.

⁸⁴ See Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, at 46.

among other things, rethinking what international law is. As Jessup and Scelle posited, it is to a certain extent improper to label this legal system as *international* because it encompasses much more than the regulation of inter-State relations and interests; and as other authors argue, it has included *inter-gentes*, *intra-gentes*, human, collective and cosmopolitan dimensions throughout its history.⁸⁵

Regarding the idea that different mechanisms and strategies can contribute to the protection of human dignity from non-state abuses, it must be said that they can be legal and extra-legal mechanisms, the latter of which may sometimes be required by law, as happens with the promotion of a non-state culture respectful of human rights, recognized as important by Amartya Sen and by international bodies.⁸⁶ The complementariness of different mechanisms of protection is one of the dimensions of the comprehensive character of the human rights framework, being another one the necessity of protecting individuals from all abuses, and another the need to permit the contribution of different actors and normative systems.

Interestingly, international law has doctrines and mechanisms of subsidiarity and complementarity⁸⁷ that acknowledge that the protection of some legal goods is embedded in a multi-level structure and can be pursued by joint legal effort, and also presuppose that local and other actors can contribute to protect international law. All of these considerations imply that the boundaries between legal systems are not absolute and can be blurred due to common enterprises, principles of “shared responsibility”, and the need of cooperation and complementarity among actors and norms. Relevant authorities and authors recognize that the

⁸⁵ See Antonio Gómez Robledo, *Fundadores del Derecho Internacional* (Vitoria, Gentili, Suárez, Grocio), op. cit., pp. 14-15, 98-99; Immanuel Kant, *Perpetual Peace, a Philosophical Essay* (translated by M. Campbell Smith), George Allen & Unwin Ltd., London, 1917, pp. 119, 139, 142, 152, 157, 165-166; Rafael Domingo, *¿Qué es el derecho global?*, supra, at 71-72; Benedict Kingsbury, Nico Krisch, Richard Stewart, *The Emergence of Global Administrative Law*, supra, at 29, 31-32, 34; Elena Pariotti, op. cit., at 102; Antonio Remiro Brotons et al., *Derecho Internacional*, McGraw-Hill, 1997, pp. XLV-XLVI.

⁸⁶ See *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, op. cit., paras. 27-32; Amartya Sen, op. cit., at 345; Oscar Schachter, “Human Dignity as a Normative Concept”, *American Journal of International Law*, Vol. 77, 1983, pp. 853-854; Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, judgment, op. cit., para. 256; articles 2 of the Convention on the Elimination of All Forms of Discrimination against Women and 4 of the Convention on the Rights of Persons with Disabilities.

⁸⁷ See articles 17 of the Rome Statute of the International Criminal Court, 2 of the Optional Protocol to the International Covenant on Civil and Political Rights, 46 of the American Convention on Human Rights, or 35 of the European Convention on Human Rights, among others; Darryl Robinson, “The Mysterious Mysteriousness of Complementarity”, *Criminal Law Forum*, Vol. 21, No. 1, 2010; articles 14 and 15 of the Draft Articles on Diplomatic Protection of the International Law Commission, A/61/10, 2006; Paolo G. Carozza, “Subsidiarity as a Structural Principle of International Human Rights Law”, *American Journal of International Law*, Vol. 97, 2003, pp. 78-79.

effective protection of human rights and different legal goods requires the cooperation of local authorities and non-state actors.⁸⁸

Complementariness is important for different reasons, including the facts that State authorities, agents and norms may be too entrenched in selfish and artificial State interests;⁸⁹ that non-state actions may be undemocratic, biased, contrary to international law or may not provide guarantees of access to victims; and that international law usually has few resources, may be encumbered by strict and slow lawmaking processes, and its agents may bend it to seek to impose unfair decisions against legitimate domestic processes or human rights.

A multi-level framework of protection of human dignity in which different actors and initiatives seek the same purposes and complement others must take into account aspects of simultaneous action, allocation of power, multi-level governance, and the importance that legitimate domestic debates (that respect human dignity) are not circumvented.⁹⁰

Taking into account that the protection of individuals must be complete, it is important to consider that apart from perpetrating violations, non-state actors may be complicit in abuses committed by States and other actors, and that individuals must be protected from those forms of participation *as well*, because they contribute to abuses and harm. It is possible for assistant actors to have international responsibility, because under international law the responsibilities of different entities can coexist in relation to one violation.⁹¹

⁸⁸ See European Court of Human Rights, *Annual Report 2011*, Registry of the European Court of Human Rights, 2012, pp. 34, 36-37.

⁸⁹ See Celestino del Arenal, *supra*, p. 29; Antonio Cassese, "Remarks on Scelle's Theory of "Role Splitting" (*dédoublément fonctionnel*) in International Law", *op. cit.*, p. 216; Rafael Domingo, *¿Qué es el derecho global?*, *op. cit.*, at 174-181. I consider that State agents and even "citizens", category that excludes foreigners, often think to favor exclusively or mostly their own, even if it implies acting against others, and thus the reinforcement of a broader more inclusive conscious and subconscious category of belonging to humankind is needed.

⁹⁰ See John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge University Press, 2006, pp. 73-76; Paolo G. Carozza, *op. cit.*, pp. 78-79; Anne Peters, "Humanity as the A and Ω of Sovereignty", *European Journal of International Law*, Vol. 20 No. 3, 2009, pp. 535-536; Hans-Otto Sano, "Good Governance, Accountability and Human Rights", in Hans-Otto Sano, Gudmundur Alfredsson and Robin Clapp (eds.), *Human Rights and Good Governance: Building Bridges*, Martinus Nijhoff Publishers, 2002, pp. 137-141; Pierre Calame, *op. cit.*, pp 19-20, 22-23.

⁹¹ See Chapter 7, *infra*. Furthermore, that responsibility of an actor does not exclude that of another entity in relation to one same breach or violation has been acknowledged in doctrine and jurisprudence and is demonstrated by the fact that States may be complicit in crimes committed by non-state actors or by the possibility of holding a state agent and a State simultaneously responsible for breaches of international law caused by one same act. See International Court of Justice, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 419-420; Inter-American Court of Human Rights, Advisory Opinion OC-14/94, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, December 9, 1994, para. 56; Antonio Cassese, "When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case", *supra*, at 864, where it is mentioned that "there may coexist state responsibility and individual [...] liability"; Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et al. v. Peru*, Judgment, 30 May 1999, para. 90.

Furthermore, for the sake of the complete protection of victims, full reparations must be provided. They include components of satisfaction⁹² and other elements that can only be provided if all entities involved in a violation repair victims; and law requires that future violations be prevented, which also demands involving non-state agents of abuses.

On the other hand, it is important to insist on the idea that non-state actors can also contribute to the protection of human dignity. In this regard, some of them have contributed to the effectiveness of many mechanisms of protection, and their participation is often crucial because of how States have limitations that do not hinder those actors, which may have advantages such as flexibility and expertise.⁹³ The fact that State agents can and must take humanitarian interests into account and seek to protect them⁹⁴ does not detract from the importance of a principle of complementarity, which alludes both to the multi-level protection of human dignity and the contribution of non-state actors in that protection, as discussed in Chapter 4.

In light of what has been said, it can be said that for international law to be fair and legitimate⁹⁵ it must protect essential human rights from all abuses and take into account the opinion of actors that promote that protection.

Law cannot remain passive before cases in which private security corporations injure individuals; domestic violence; cruel atrocities perpetrated by non-state armed groups; corporate violations of labor and other rights of employees and members of the societies they operate in; or abuses and negligent offenses of international organizations, among other non-state offenses.

If not all individuals are sufficiently and effectively protected from non-state abuses, law must change *de lege ferenda*, because the foundation and principles of human rights require their

⁹² See Principles 18 and 22 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; articles 31, 34 and 37 of the articles on the responsibility of international organizations drafted by the International Law Commission (version adopted at its sixty-third session in 2011) and 31, 34 and 37 of the articles on the Responsibility of States for Internationally Wrongful Acts drafted by the International Law Commission, adopted at its fifty-third session in 2001.

⁹³ See Bob Reinalda, "Private in Form, Public in Purpose: NGOs in International Relations Theory", op. cit., at 25; Daniel Thürer, supra, at 40, 58; Pierre Calame, op. cit., pp. 9-10, 17, 22-23.

⁹⁴ See Antonio Cassese, "Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law", op. cit., at 226-231; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", supra, at 13; Harold Koh, "Why Do Nations Obey International Law?", at 2659.

⁹⁵ Regarding fairness, Thomas Franck distinguished the notions of procedural correctness as allusive to legitimacy and material properness as related to justice, and considered them as components that make law fair, as explained in: Thomas M. Franck, *Fairness in International Law and Institutions*, Clarendon Press – Oxford, 1998, at 3-24. I must mention that, in any case, I disagree with his narrow conception of justice, because in my opinion it is not correct and is even risky to focus *exclusively* on distributive justice and disregard other meta-legal considerations, because this stance may justify abuses that go against the ethics and morals that law should take into account, that is to say those that without confusing their identities or making the latter an instrument of the imposition of the former impede law becoming an instrument that permits or orders abuses against human dignity and several values. Among others, while being distinct from positive law, natural law can still serve in order to critically examine the former.

full and effective protection. After all, for all victims, potential and actual, direct and indirect, *who* violates their rights does not matter as much as their *need* to be protected from all abuses.

Deng Xiaoping is quoted as saying that it is irrelevant what the color of a cat is, because what matters is that it catches mice.⁹⁶ I cannot fully subscribe to that idea because I reject the idea that goals, however noble they are, justify all means (something the phrase could be interpreted to endorse), and in this regard Chapters 1 and 5 posit that the adoption of non-state obligations and legal burdens must respect fundamental rights, legality and *jus cogens*. Still, international law must protect individuals from all abuses and permit this protection to be offered under other normative systems. This cannot be done in any way, but it must be done. For instance, counter-terrorism measures must respect human rights, but still terrorism must be countered, because it can violate human rights.

Accordingly, the aforementioned phrase is not entirely irrelevant, because it stresses the importance of focusing on goals. In this sense, Mahatma Gandhi stressed how important it is to adhere to cardinal principles.⁹⁷ The protection of all victims of human rights violations must be one of them, being a core principle of the global and international human rights frameworks and guiding them.

To summarize this introduction, it must be stressed that for victims what matters is not so much who violates their rights but that they are protected from all violations and offenders. After all, human rights not serve only to protect human dignity from States but from all possible violations.⁹⁸

This thesis critically examines if and how international law can or does offer protection from non-state abuses, and has the following structure: Part I explores why the legal foundations and principles of human rights and guarantees, including human dignity, equality and non-discrimination, and the horizontal effects of human rights, demand the protection of individuals from all violations, as required for instance by the non-conditional character of human dignity.

⁹⁶ The phrase attributed to him is the following one: "No matter if it is a white cat or a black cat; as long as it can catch mice, it is a good cat." See http://en.wikiquote.org/wiki/Deng_Xiaoping (last checked: 17/11/2011).

⁹⁷ Gandhi expressed that "as the doctrine of *satyagraha* developed, the expression 'passive resistance' ceases even to be synonymous, as passive resistance has admitted of violence as in the case of suffragettes and has been universally acknowledged to be a weapon of the weak. Moreover passive resistance does not necessarily involve complete adherence to truth under every circumstance. Therefore it is different from *satyagraha* in three essentials: *Satyagraha* is a weapon of the strong; it admits of no violence under any circumstance whatever; and it ever insists upon truth." (emphasis added). Excerpted from: Mahatma Gandhi, *The Essential Writings*, Oxford University Press, 2008, at 326.

⁹⁸ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 56, where it is mentioned that "[i]f human rights once offered a shield from state oppression in the vertical relationship between the individual and the state, they now also represent a sword in the hands of victims of private human rights abuses."

Afterwards, it explores when it is convenient to regulate international non-state duties and when direct international action can be used to protect victims of non-state abuses.

Part II examines if non-state conduct can be regulated with the purpose of protecting human dignity, how this can be done, and what the conditions of the creation of non-state duties and legal burdens are. To conduct this analysis, issues of legal subjectivity, interaction of non-state actors with the sources of international law, and what human rights obligations non-state actors can have, are examined. Afterwards, aspects of non-state responsibility arising out of breaches of non-state duties are examined alongside the right to full reparations of victims of non-state abuses. Finally, the question of which strategies can be used in a complementary fashion to protect human dignity from non-state threats is examined.

Finally, it must be said that human beings can *suffer* because of the action or omission of State and non-state entities, as examined in the painting *Evicted 1887* by Blandford Fletcher (being the bailiff portrayed in it an authority and unsupportive villagers private actors).⁹⁹ Every person who cannot exercise her human rights deserves protection, sympathy and support –as expressed by artists¹⁰⁰, intellectuals and activists, and experienced by those who show solidarity towards victims-. International law must fully and truly protect human dignity and establish a lowest common denominator that has an impact on different legal systems,¹⁰¹ at least regarding peremptory human rights and guarantees, and must be further *humanized*¹⁰² and seek to protect *all* potential and actual victims, not slipping into apathy or dehumanization, dangers always looming when authorities, scholars and practitioners become too fond of abstract theories that ignore human needs and suffering, which must be addressed by law, that can and must protect all victims.

⁹⁹ The image of the painting and a description of it can be found in the following Web Page Address of the Queensland Art Gallery: http://qag.qld.gov.au/collection/international_art/blandford_fletcher (last checked: 17/11/2011). The image is shown at the outset in this book.

¹⁰⁰ On the transmission of feelings through art, see Leo Tolstoy, *What is Art?*, Aylmer Maude (translator), Crowell, 1899, where the process of transmission of feelings is analyzed.

¹⁰¹ Cf. Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, *op. cit.*, at 6, 15.

¹⁰² On the humanization of international law, see Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, *Juridical Condition and Human Rights of the Child*, *op. cit.*, paras. 48, 71; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, 17 September 2003, paras. 25, 27, 88; Theodor Meron, “The Humanization of International Law”, *American Journal of International Law*, Vol. 94, No. 2, 2000, p. 239.

**PART I. THE DEMAND OF THE PROTECTION OF HUMAN DIGNITY FROM
NON-STATE VIOLATIONS BY INTERNATIONAL LEGAL FOUNDATIONS**

INTRODUCTION

Both preexisting and recent factors increase the likelihood and seriousness of different non-state threats to the enjoyment of rights based on human dignity. For long, non-state entities have been relevant participants in the international society, but their importance and influence have increased due to developments concerning their roles, capacities, functions and powers.¹⁰³ Hence, it is necessary to examine if international law can and must demand the protection and promotion of human dignity *vis-à-vis* non-state entities, especially because of the need to ensure a lowest common denominator that demands universal standards of protection to ensure that no victim is unprotected. Moreover, those standards of protection can be referred to by domestic and non-state initiatives, having thus both practical and educative functions.

The approach to the aforementioned protection must include different legal systems and actors. This is because that task cannot be achieved with States acting alone without the cooperation of other actors, and neither can it be accomplished if only States are held as possible responsible entities. Likewise, it would be naïve to think that international law strategies alone are sufficient.

In that regard, it is important to highlight that international law has a complementary or subsidiary nature, because ideally domestic norms and authorities must be the first to try to prevent and respond to violations, especially because frequently there are few resources available to international bodies as compared to those at the disposal of actors in other levels of governance.¹⁰⁴ Furthermore, the content of international norms is sometimes the result of compromise and thus may not afford the maximum protection possible, reason why it ought to be complemented by domestic -or even private- rules. Finally, the implementation of *jus gentium* in the international level is often difficult, and so the presence of mechanisms found in other levels that enforce and promote its content is usually convenient for the achievement of common humanitarian goals to be feasible.

In the field discussed in this text, the aforementioned interaction and complementarity of normative systems and actors must be guided by the attachment of central importance to the protection of human dignity and by heeding the demands of the principles and values that constitute the foundations of that protection. This first part of the book explores why those

¹⁰³ See Celestino del Arenal, *op. cit.*, pp. 27-28, 34, 52-53, 64-66; Anna Badia Martí, *op. cit.*, at 319-320, 324, 336, 342; Francisco Galindo Vélez, *op. cit.*, pp. 125-126; Sandra Lavenex, *supra*, p. 388; Alexandra Gatto, *supra*, at 423; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", *op. cit.*, at 49.

¹⁰⁴ See John H. Knox, "Horizontal Human Rights Law", *op. cit.*, pp. 2, 19, 44.

foundations require that human beings be protected from non-state abuses and what the general and concrete implications of this are; while Part II addresses the way in which those requirements can be made effective: through the existence of legal obligations and responsibilities of non-state actors and of mechanisms to promote and protect human dignity from their eventual abuses.

The insights of Part I suggest that human dignity *demand*s the international legal protection of individuals from non-state abuses, and so law must change *de lege ferenda* if that protection is not offered or is given only in an incomplete manner. Part II examines why such legal changes are possible under international law, and also examines why it is clear that *de lege lata* non-state actors currently do have some international duties (primarily related to peremptory law) and responsibilities on the subject.

It must be mentioned at the outset that the viewpoint held in the text is neither reductionist nor centered on the negative impact of non-state entities, because it is acknowledged that non-state actors can also have a positive impact on human rights and sometimes may contribute to their promotion in ways that State entities often cannot.

Needless to say, apart from internal legal considerations pertaining to rights, principles and normative consistency, protection of human beings from non-state abuses is also demanded by ethical considerations, and also by socio-normative notions according to which authors of serious abuses must be held accountable.

The goal of protecting all victims makes it necessary to overcome the belief held by many that international law is largely State-centered and also demands the modification of norms and practices that endorse such a reductionist framework. The possibility of overcoming normative limitations in that regard has been examined by authors as José Manuel Cortés and has been implicitly acknowledged by Andrew Clapham or Philip Alston,¹⁰⁵ and has multiple manifestations, as for instance evinced by the evolution of individual international responsibility and the regulation of the responsibility of international organizations¹⁰⁶ Discussions and developments regarding

¹⁰⁵ See José Manuel Cortés, *op. cit.*, pp. 56-58; Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?", in Philip Alston (ed.), *Non-State Actors and Human Rights*, Oxford University Press, 2005, pp. 5-6; Nicolás Carrillo, "The Links between the Responsibility of international organizations and the Quest towards a More Reasonable and Humane International Legal System", *op. cit.*, pp. 443-444; Andrew Clapham, *Human Rights: a Very Short Introduction*, *op. cit.*, at 96, where the author comments that "the development of the law of international crimes has highlighted questions of individual responsibility for violations of international law [...] In turn, the scope of human rights obligations is coming to be seen as having an impact on other non-state actors".

¹⁰⁶ See article 59 in conjunction with articles 33 and 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; articles 1 and 6 in conjunction with articles 10 through 12 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities; Nicolás Carrillo, "The Links between the Responsibility of international organizations and the Quest towards a More Reasonable and Humane International Legal System", *op. cit.*, at 448; United States Court of Appeals for the Third Circuit, *OSS Nokalva, INC. v. European Space Agency*.

human rights duties and responsibilities of transnational or other corporations also form part of this dynamic.

CHAPTER 1. HUMAN DIGNITY DEMANDS TO PROTECT ALL VICTIMS

The evaluation of the demands of international human rights law and related norms must examine their foundation, which shapes their goals, objects and purposes, that in turn influence the interpretation of those norms, as described in article 31 of the Vienna Conventions on the Law of Treaties of 1969 and 1986. As indicated in international instruments and the works of several scholars, and posited by philosophical theories that shaped them, that basis is human dignity.¹⁰⁷

To analyze how the foundation of human dignity has an influence on the question of whether individuals must be protected from non-state entities, it is useful to examine how it or its implications are mentioned in international instruments.

In the Preamble and articles of the Universal Declaration of Human Rights, it is mentioned that:

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [...]

Whereas the peoples of the United Nations have in the Charter 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 and have determined to promote social progress and better standards of life in larger freedom [...]

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” (emphasis added).

The concept of human dignity is also mentioned in the Preamble of the Charter of the United Nations, which refers to human rights in article 1.3.

The two Universal Covenants on Human Rights adopted in 1966, along with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, allude to the foundational character of human dignity in a more revealing way, expressly mentioning that:

“The States Parties to the present Covenant, [consider] that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal

¹⁰⁷ See Carlos Villán Durán, op. cit., at 63, 92; Daniel O'Donnell, *Derecho Internacional de los Derechos Humanos*, Oficina en Colombia del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, 2004, at 66; Chimène I. Keitner, “Rights Beyond Borders”, *The Yale Journal of International Law*, vol. 36, 2011, at 113; Roberto Andorno, “Human dignity and human rights as a common ground for a global bioethics”, *Journal of Medicine and Philosophy*, 2009, at 4 (version available at: http://www.unesco.org/uy/mab/fileadmin/shs/redbioetica/dignidad_Andorno.pdf, last checked: 21/11/2011); Oscar Schachter, op. cit., at 853; Oliver Sensen, “Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms”, *European Journal of Political Theory*, Vol. 10, 2011. Additionally, see Resolution 41/120 of the General Assembly of the United Nations; Helsinki Final Act of 1 August 1975 of the Conference on Security and Co-Operation in Europe; Preamble and Articles 1, 22 and 23 of the Universal Declaration of Human Rights; Preamble to the Vienna Declaration and Programme of Action of the World Conference on Human Rights of 1993; Preambles to the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; Inter-American Commission on Human Rights, Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina*, op. cit., para. 117; Claire de Than and Edwin Shorts, op. cit., pp. 12-13.

and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recogniz[e] that [human] rights derive from the inherent dignity of the human person” (emphasis added).

Comparing the texts cited above, Oliver Sensen has considered that the evolution of the way in which notion of dignity is treated from the Charter and the Declaration to the Covenants reflects a developing conception according to which human rights are *derived from* human dignity,¹⁰⁸ i.e. the inherent worth of every human being.¹⁰⁹ Certainly, while being undoubtedly related, it would be improper to hold human dignity and human rights as equivalent notions.

Human dignity is also mentioned in universal human rights instruments different from the ones examined before.¹¹⁰ In the regional human rights systems, the essential role of human dignity as the basis of human rights seems to be recognized as well. References to human dignity are made, for instance, in the American Convention on Human Rights; in the Preamble to Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, related to the abolition of the death penalty; or in the African Charter on Human and Peoples' Rights.

The latter treaty is quite interesting, since it seems to envisage both individual dimension and collective dimensions of dignity, the latter of which refers in it to the African peoples. This may be explained by the idea that human beings are not the only entities that can have *dignitas* - although that of human beings must be recognized as having unique features and a privileged character, in my opinion-. As to the human dimension of dignity under the African Charter, this treaty goes as far as recognizing a right to the respect of dignity, the content of which is somewhat vague but concretized in the prohibitions of some degrading treatments in article 5. This is consistent with the ideas put forward by authors as Roberto Andorno regarding the

¹⁰⁸ See Jack Donnelly, *op. cit.*, at 304; Oliver Sensen, *op. cit.*, where it is mentioned that “human dignity is presented as the main foundation of [human] rights: Rights ‘derive’ from inherent dignity.”; Oscar Schachter, *op. cit.*, p. 853; Principle VII of the Helsinki Final Act of 1 August 1975 mentions that “human rights and fundamental freedoms [...] derive from the inherent dignity of the human person and are essential for his free and full development”; while paragraph 4 of Resolution 41/120 of the General Assembly states that human rights norms should be mindful of the idea that those rights “derive from the inherent dignity and worth of the human person”.

¹⁰⁹ See Oliver Sensen, *supra*, where it is considered that “[h]uman dignity is associated with worth and said to be inherent.” Moreover, see Oscar Schachter, *op. cit.*, at 849, where it is mentioned that “[a]n analysis of dignity may begin with its etymological root, the Latin “dignitas” translated as worth (in French, “valeur”). One lexical meaning of dignity is “intrinsic worth.” Thus, when the UN Charter refers to the “dignity and worth” of the human person, it uses two synonyms for the same concept. The other instruments speak of “inherent dignity,” as an expression that is close to “intrinsic worth.” Furthermore, Roberto Andorno has posited that “dignity is not an accidental quality of some human beings, or a value derived from some specific personal features such as the fact of being young or old, man or woman, healthy or sick, but rather an unconditional worth that everyone has simply by virtue of being human” (emphasis added), as found in: Roberto Andorno, *op. cit.*, at 6.

¹¹⁰ E.g. the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; or the Convention on the Rights of Persons with Disabilities, for example.

possibility of human dignity having some direct legal effects, implementation and implications, and also with the consideration that some violations of human dignity are clearly recognized as such under human rights law.¹¹¹ That article reads:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

Similarly, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa includes a right to dignity under article 3, concretized in the recognition and protection of the human rights of women, emphasizing certain guarantees given the vulnerability to which women are often exposed. The text of that article has the following wording:

“Right to Dignity

Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights;

Every woman shall have the right to respect as a person and to the free development of her personality;

States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women;

States Parties shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.”

The African model seems to stress the relevance of a collective dimension of protection alongside an individual one, and on the other hand seems to consider that, besides being their foundation, the respect of human dignity is a concrete right, somewhat related to the right to have one’s personality recognized or to the prohibition of certain acts against individuals. Likewise, in other regional systems and the universal system of protection of human rights, it has been considered that certain violations are contrary to human dignity. Since all rights are meant to protect dignity, this must be understood as indicating that those violations are contrary to a specific right, and are not to be interpreted as suggesting that some violations do not violate human dignity, which would be contrary to the idea that it is the foundation of all human rights.

¹¹¹ See article 5 of the African Charter on Human and Peoples’ Rights; Roberto Andorno, op. cit., at 5, 7, 10, where among other ideas it is mentioned that while “Dignity’ alone cannot directly solve most bioethical dilemmas” and that “[t]hus, to become *functional*, dignity needs other more concrete notions that are normally formulated using the terminology of ‘rights’”, the “requirement of non-instrumentalization [related to human dignity] [...] means, for instance, that no one should be subjected to biomedical research without his or her informed consent, even when very valuable knowledge could result from that research; it also means that law must prevent poor people from being induced to sell their organs as a means to support themselves or their families [...] These two examples illustrate that the idea of dignity as a requirement of non-instrumentalization of persons, far from being purely rhetorical, has some immediate applications” (emphasis added). Likewise, Andrew Clapham has studied how “many human rights instruments and treaties not only recall the importance of protecting dignity, but actually specifically provide for its specific protection as such”, as mentioned in: Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 537. Additionally, see Daniel O’Donnell, op. cit., at 94, 130-131, 166, 169-170, 175, 182-184, 191-193, 195-196, 197, 200, 210, 212, 221-222, 224, 226, 234, 258, 275, 276, among other pages.

Additionally, some conduct is contrary human rights violations if they are understood as being contrary to human dignity, as happens for example with the prohibition of mistreating persons deprived of liberty and mandatory labor, among others.¹¹²

A most interesting mention is made in the Preamble to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as the Protocol of San Salvador, according to which rights from all the categories of human rights used by some authors are relevant, because:

“[T]he different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized” (emphasis added).

The previous passage confirms that all human rights are based on human dignity, which is the ultimate reason why all human rights, civil and political, economic or otherwise, are equally relevant regardless of the formal categories they belong to.¹¹³ This reasoning is also expressly mentioned in the Preamble to the Vienna Declaration and Programme of Action of the World Conference on Human Rights of 1993, where it is said that:

“[A]ll human rights derive from the dignity and worth inherent in the human person, and [...] the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms” (emphasis added).

In the same manner, the Helsinki Final Act of 1 August 1975 of the Conference on Security and Co-Operation in Europe stated that human rights “derive from the inherent dignity of the human person and are essential for his free and full development.”

Furthermore, according to General Assembly Resolution 41/120 of 1986 and doctrine, States, the United Nations and all pertinent entities should make sure that human rights are intimately connected with the protection of human dignity when identifying human rights and drafting their instruments.¹¹⁴

Notwithstanding, it must be admitted that given human fallibility when drafting human rights instruments, it is possible that a norm that claims to address a human right deviates from the scheme according to which human rights are derived from dignity. Yet, should this happen the right envisaged in that norm that is not based on human dignity may be formally called a human

¹¹² See, for example, articles 10.1 of the International Covenant on Civil and Political Rights and 5.2 and 6 of the American Convention on Human Rights.

¹¹³ See paragraph I.5 of the Vienna Declaration and Programme of Action; Preamble to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, where the concepts of the “universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms” are mentioned.

¹¹⁴ See Roberto Andorno, *op. cit.*, at 10, where the mutual relations of human dignity and human rights are mentioned, although I consider that humanitarian guarantees also protect the former, that is not limited to the latter for having concrete effects in many cases. Additionally, see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, at 538.

right but is not substantively such, and the respective norm should in consequence be modified *de lege ferenda* or else be removed from the legal system.

That being said, apart from the consideration that human rights are based on dignity, some important insights pertaining to the question of the protection of human dignity from non-state entities can be gleaned from the text of the Vienna Declaration quoted above. One of them is the apparent endorsement of one understanding (among competing ones) of human dignity: that dignity is the *inherent worth* of every single human being, that must therefore be upheld and respected. In my opinion, this endorsement does not entail the exclusion of other conceptions, such as those based on ideas of the non-instrumental character of human beings, especially because they are not rejected and can complement it. The non-instrumental character of human beings, for instance, is to my mind one of the implications of their unconditional inner worth.

The Declaration mentions another essential idea: the sake of individuals must be at the center of every analysis of human rights. Therefore, excluding individuals from protection and leaving them unprotected runs contrary to the logic that underlies those rights. In other words, just as the Protocol of San Salvador mentioned that excluding the protection of certain rights is opposite to human dignity, I consider that the exclusion of some victims from protection equally contradicts the foundation of human rights.

In that regard, it is pertinent to note that the Declaration and Programme of Action of Vienna itself contains the idea that human rights are “universal, indivisible and interdependent and interrelated.”¹¹⁵ The exclusion of individuals victimized by non-state actors from the scope of the protection of human rights law would be contrary to those four aspects.

First of all, while universality certainly entails a territorial component, according to which human rights are to be upheld everywhere regardless both of which State has sovereignty over one place and of whether some cultural conceptions do not recognize those rights,¹¹⁶ which is the traditional understanding of the notion of universality. To my mind, there is a second dimension of the universality of human rights: universality concerning protection, that alludes to protection from all possible threats to the enjoyment of (the content of) human rights.¹¹⁷

¹¹⁵ As expressed in paragraph I.5.

¹¹⁶ In the Vienna Declaration and Programme of Action, for example, it was stated that “All human rights are universal, indivisible and interdependent and interrelated (...) While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms” (...) “Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards.” See Vienna Declaration and Programme of Action, World Conference on Human Rights, A/CONF.157/23, 12 July 1993, paras. I.5, I.37.

¹¹⁷ See Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, *op. cit.*, at 24-25.

It has been considered that one implication of the first aspect of the universality of human rights (and of the dignity they are based upon) is that State and other actions must be taken to change or tackle cultural and other practices and customs that are contrary to human rights standards,¹¹⁸ especially because cultural arguments should not be successfully invoked against human rights norms.¹¹⁹ This implies that territorial concerns are not the only elements to be examined in relation to the protection of human rights, since others as cultural manifestations are relevant too. This logic posits that universality comprises multiple dimensions. Therefore, if it is accepted that cultural and other practices and patterns can be contrary to human dignity, it follows that not only State practices can run counter to that dignity.

For example, there may be one practice of the majority of the population in one State that is the minority of the inhabitants of another State has as well, without the latter being supported officially in any way whatsoever, being it possibly even discouraged and responded to by that State. Yet, the fact that the practice is one and the same implies that it can equally affect the enjoyment of human rights and thus must have the same connotation from their perspective. Therefore, universal and non-discriminatory protection considerations demand addressing both situations and contexts (admittedly, sometimes with different strategies), since the problems are generated by one identical factor, even if in one case there can be State responsibility and not in the other one.

This suggests that whenever protection demands so, non-state actors that carry out practices that can be inimical to human rights must have duties to not engage in violations and to repair victims. Those duties must respect the principle of legality and fundamental rights, because also violators have them.¹²⁰

¹¹⁸ See articles 24.3 of the Convention on the Rights of the Child; 2 and 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (along with its Preamble); 2 of the Convention on the Elimination of All Forms of Discrimination against Women and 4 of the Convention on the Rights of Persons with Disabilities; Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, 16 November 2009, para. 256; Committee on Economic, Social and Cultural Rights, General Comment No. 20, op. cit., paras. 11-12, 14, 38-39; Human Rights Committee, General Comment No. 31, op. cit., para. 13; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, supra, paras. 78, 81, 88, 104; Henry J Steiner, "International Protection of Human Rights", in Malcolm D. Evans (ed.), *International Law* (third edition), Oxford University Press, 2010, at 804.

¹¹⁹ This is a subtle matter, for sometimes the human rights discourse endorses ideas that are not really hard law and are argued against reasonable cultural matters and decisions that are adopted by human communities, while other times the margin of appreciation of States that is respectful of human rights is ignored, being those approaches contrary to the need of allocating power in several levels in accordance with democratic ideas, in accordance with the maxim that those affected by something should regulate it if they have the capacity and willingness to do so. On these issues, see John H. Jackson, op. cit., 73-76; Rafael Domingo, *¿Qué es el derecho global?*, op. cit., at 217.

¹²⁰ See Chapter 5, infra; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, 22 October 2002, para. 5, where it is mentioned that "efforts to oppose terrorism and the protection of human rights and democracy are not antithetical responsibilities"; Inter-American Court of Human Rights, *Case of Castillo-Petrucci et al. v. Peru*, Judgment, 30 May 1999, para. 89; Christoph J. M. Safferling, "Can

Altogether, a universal protection of human dignity requires complete protection in all dimensions: territorial, cultural, and subjective ones, that is to say protection from every threat, because both State and non-state entities can harm human rights. That the universality of human dignity demands its protection regardless of who participates in a violation is a conclusion shared by other authors, as Elena Pariotti.¹²¹ After all, universality refers to a totality, and law must address *all* threats to human dignity, so that human beings are fully protected.

Moreover, some authors have suggested that a State-centered system of human rights that leaves victims of non-state aggressions unprotected (and so unrecognized) is contrary to other features of human rights: their interrelatedness, interdependence and indivisibility.¹²²

I agree with this idea because, since human beings must be at the center of the analysis of human rights, excluding some individuals from their scope of protection simply because a State did not participate in a violation cannot be reconciled with the fact that the crux of human rights is that those individuals have an inherent and non-conditional entitlement to enjoy human rights, rather than considerations of what entities violate them. The aforementioned exclusion should thus be understood as rendering the protection of rights divided and dependent on extraneous aspects as the State identity of violators. What Hannah Arendt called the right to have rights and procedural dimensions of human rights are ignored in such a scheme, which attaches importance to formal aspects rather than to the foundational character of human dignity.

To overcome this deficiency, it is imperative to replace rules and preconceptions centered on a State-based paradigm with a human-centered/victim-centered framework of protection that calls for protecting victims of violations committed by any actor, because legally and ethically relevant the central factor is that rights can be violated and their enjoyment curtailed, instead of the consideration of who can commit violations, which is an accessory factor that may be relevant for determining strategies, *not* for determining *if* action must be taken.

Altogether, since the wellbeing of *all* human beings is one of the essential factors in a framework that protects human dignity, this comprehensiveness cannot be reconciled with systems that exclude some individuals from the scope of protection.¹²³

One example illustrates this point: according to judge Williams of the United States Court of Appeals for the District of Columbia Circuit, the U.S. Alien Tort Statute can be used against non-state entities when they commit acts that are contrary to the so-called Westphalian (legal)

Criminal Prosecution be the Answer to massive Human Rights Violations?", *German Law Journal*, Vol. 5, 2004, at 1472; articles 55, 66 and 67 of the Rome Statute of the International Criminal Court.

¹²¹ See Elena Pariotti, *op. cit.*, at 96.

¹²² See Zehra F. Kabasakal Arat, "Looking beyond the State But Not Ignoring It", *op. cit.*, at 6.

¹²³ See pp. 60-61; Chris Jochnick, *op. cit.*; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, p. 546; Oscar Schachter, *op. cit.*, at 848, 850; Roberto Andorno, *op. cit.*, at 8.

system. Judge Rogers disagreed considering that this is not required.¹²⁴ This rebuttal considers that violations of non-state entities can be examined even when they do not affect inter-State legal interests, and thus defends the idea of a broad protection. This shows how a paradigm that over-focuses on States and inter-State relations is too narrow and may lead to failing to protect some individuals.

A comprehensive protection is related to two features of human dignity: it is inherent to every human being, and on the other hand it is *inalienable*, which entails that rights and guarantees founded upon human dignity cannot be unrecognized, renounced or “withdrawn.”¹²⁵ This aspect also ensures that no one can invoke the existence of protection from non-state abuses to curtail rights or evade human rights responsibilities (e.g. State obligations).¹²⁶ Thus, criticisms according to which non-state responsibilities will undermine State ones are unfounded.

After all, the inherent character of human dignity demands respect from all actors, including States and other functional authorities, which retain their duties and responsibilities – including positive obligations-, as pointed out by authors that reassure those who mistrust the protection of human dignity from non-state violations.¹²⁷

On the other hand, universality stresses the idea that individuals who violate human rights also have dignity and human rights.¹²⁸ Doctrine and international bodies as the Inter-American Human Rights Court and Commission uphold for instance that even terrorists and other

¹²⁴ Unlike judge Williams, who insisted on offenses against the “Westphalian system”, judge Rogers considered that the need to identify that element was inappropriate. The debate is found in the concurring votes of: United States Court of Appeals for the District of Columbia Circuit, *Ali Mahmud Ali Shafi et al. v. Palestinian Authority*, Decision of 14 June 2011.

¹²⁵ See Jack Donnelly, *op. cit.*, pp. 306, 310; Oscar Schachter, *op. cit.*, p. 853; Roberto Andorno, *op. cit.*, at 6; Oliver Sensen, *supra*, where it is posited that human dignity is “a non-relational property, that is, a property that does not change according to the different circumstances or relations in which a human being finds himself.” Concerning the non-exclusiveness of human rights regarding the protection of human dignity, see Jack Donnelly, *op. cit.*, at 303.

¹²⁶ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 41-46; John H. Knox, “Horizontal Human Rights Law”, *op. cit.*, at 20.

¹²⁷ See August Reinisch, *op. cit.*, at 78-83; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, p. 44; Andrew Clapham and Scott Jerbi, *op. cit.*, p. 339; Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, para. 1; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011, commentary to principle 11, at 13.

¹²⁸ Cf. Pope John XXIII, *Encyclical Pacem in Terris*, *op. cit.*, para. 158. On the other hand, some consider that group entities can also have dignity or be worthy of protection due to the link between the respect of the dignity of individuals who interact with them, and therefore actions regarding them must take that dignity into account, as studied in: Oscar Schachter, *op. cit.*, 850, 852-853; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, p. 545-546.

violators of human dignity have human rights, and that protection from their misdeeds must respect the rule of law and human rights.¹²⁹

Having said this, it is important to determine *which* rights and guarantees demand protection *from all* abusers and violations according to their foundations, values and principles.

In that regard, human rights are not merely those rights found in instruments formally called as such. Therefore, it is useful to use the expression human rights *lato sensu*, which despite not being called as such is a concept handled in case law and practice. According to it, every right of human beings founded upon their dignity that is directly recognized in their favor and respects the dignity of others *in abstracto*¹³⁰ is a human right, irrespective of its being formally called as such or its being included in a document with such a label or not.

Concerning this, when facing the question of whether rights of individuals found in the Vienna Convention on Consular Relations were human rights or not in the Lagrand case, the International Court of Justice considered it unnecessary to ascertain whether they were human rights, but Germany considered that they were indeed human rights. The latter position endorses the viewpoint that all human rights are one and the same, be them *stricto sensu* (formally called as such) or *lato sensu*.¹³¹

Insofar as it focuses on the need of protecting rights the content of which makes human rights instead of on formalities, this conception is closely related to the inter-relatedness and equal importance and nature of all human rights, mentioned in doctrine and instruments as the Vienna Declaration and Programme of Action of the World Conference on Human Rights of 1993.

Regarding this, it is necessary to stress that *lato sensu* and *stricto sensu* human rights share the same qualities because both categories refer to rights directly recognized in favor of human beings that protect their inner worth or dignity, being both thus equally human rights, with no distinction besides the nominal one.

That this is so is illustrated by the fact that when facing a dilemma that was similar to the one of the Lagrand case, the Inter-American Court of Human Rights was of the opinion that some

¹²⁹ See the answer of Philip Alston to the question of whether persons who violate human rights have those rights, found in: <http://www.un.org/cyberschoolbus/humanrights/qna/alston.asp> (last checked: 21/11/2011). Additionally, see Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, op. cit., para. 5; Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et al. v. Peru*, Judgment, 30 May 1999, para. 89.

¹³⁰ If a right is compatible with the dignity of third parties *in abstracto* but not in a specific case, it is still a right of the humanitarian framework but measures such as restrictions or the application of doctrines such as the *abus de droit* or the engagement of the responsibility of an offender are called for and their use by authorities is mandatory. Concerning these measures, see Chapters 5 and 8, *infra*.

¹³¹ See International Court of Justice, *LaGrand Case (Germany v. United States of America)*, Judgment, 27 June 2001, paras. 77-78.

rights comprised in the Vienna Convention on Consular Relations were indeed human rights.¹³² This position is consistent with the one the Inter-American Court held in its first Advisory Opinion, in which it maintained that human rights can be found in various instruments, even in those the main object of which is concerned with other issues. This position confirms that human rights may be found in instruments without that formal label or not belonging to that branch formally, even if most of the norms present therein are not concerned with the protection of human dignity.¹³³

Furthermore, the Inter-American Commission on Human Rights has said that:

"In common with other universal and regional human rights instruments, the American Convention and the 1949 Geneva Conventions share a common core of non-derogable rights and the mutual goal of protecting the physical integrity and dignity inherent in the human being"¹³⁴ (emphasis added).

The Commission thus recognizes the idea that there are human rights *lato sensu* and values and interests commonly protected by different normative sectors.¹³⁵ Furthermore, the fact that some IHL treaties are included as human rights instruments in the webpage of the Office of the United Nations High Commissioner for Human Rights¹³⁶ confirms this conclusion.

The previous considerations lay the groundwork for an important aspect related to the object of this work: authors as Elena Pariotti have examined how some norms that attempt to address and regulate non-state conduct (for instance in the field of armed conflicts) may be truly human rights norms.¹³⁷ Couple to this the facts that there are international humanitarian norms that protect human dignity and rights, as the Commission said in the passage cited above; that those norms may well address non-state conduct; and that norms in other branches and sectors may also protect human rights and so could address non-state conduct as well, and it follows that

¹³² See Inter-American Court of Human Rights, Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 1 October 1999, Opinion 2, at p. 64.

¹³³ Inter-American Court of Human Rights, Advisory Opinion OC-1/82, *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)*, 24 September 1982, paras. 32-34 and the first opinion, shown in page 12.

¹³⁴ See Inter-American Commission on Human Rights, Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina*, Ecuador – Colombia, op. cit., paras. 91, 117, where it is also mentioned that "human rights are inherent in all human beings and are not based on their citizenship or location".

¹³⁵ Legal goods are those interests and values protected by law. This concept has been examined in doctrine and has been handled by entities such as the Inter-American Commission on Human Rights. See: Markus Dirk Dubber, "The Promise of German Criminal Law: A Science of Crime and Punishment", *German Law Journal*, Vol. 6, 2005, at 1069-1070; Santiago Mir Puig, "Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State's Power to Criminalize Conduct", *New Criminal Law Review*, Vol. 11, 2008; Christoph J. M. Safferling, "Can Criminal Prosecution be the Answer to massive Human Rights Violations?", *German Law Journal*, Vol. 5, 2004, at 1472; Inter-American Commission on Human Rights, Report No. 95/08, Admissibility, *Nadege Dorzema et al., or "Guayabin Massacre" v. Dominican Republic*, 22 December 2008, footnote 7; Inter-American Commission on Human Rights, Report No. 64/01, *Leonel de Jesús Isaza Echeverry and Others v. Colombia*, 6 April 2001, para. 22; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Argentina*, OEA/Ser.LV/II.49, 11 April 1980, in: Chapter II, The Right to Life, para. 1 of section A. General Considerations.

¹³⁶ See Inter-American Commission on Human Rights, Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina*, Ecuador – Colombia, op. cit., para. 117; <http://www2.ohchr.org/english/law/> (last checked: 30/11/2011).

¹³⁷ See Elena Pariotti, op. cit., in section 4 ("Armed Non-State Actors").

human rights standards, be them *lato* or *stricto sensu*, are and can be pertinent for assessing non-state conduct.

The consideration that human rights are not limited to those that are formally called as such (i.e. are not human rights *stricto sensu*) confirms that developments in a given branch or instrument that deals with the protection of human dignity can be perfectly followed in others, including developments concerning protection from non-state participants in violations.

Returning to the example that some norms of international humanitarian law share the foundation of human dignity, it is important to note that common article 3 to the Geneva Conventions of 1949 prohibits “[o]utrages upon personal dignity” committed by State *and* non-state participants in hostilities: those prohibitions protect human rights, because those rights protect human dignity. It must be recalled that human rights and humanitarian law are interconnected.¹³⁸

It must be clear though that not only humanitarian law may have human rights *lato sensu*. As indicated above, even a branch that at first glance seems unrelated to them, as that of consular relations, may protect human rights. Even the law of the sea may contain norms that protect human dignity directly or indirectly, for instance concerning the rescue of persons at sea or protection against slavery, piracy (which can affect rights such as liberty, among others) and drug-traffickers;¹³⁹ and some norms dealing with transnational crime and terrorism seek to dissuade and sanction behavior that may have a negative impact upon the enjoyment of human rights.¹⁴⁰ Refugee law and criminal law are other branches that contain human rights *lato sensu*,

¹³⁸ Regarding these issues, cf. Inter-American Commission on Human Rights, Report No. 55/97, Case 11.137, Merits, *Juan Carlos Abella v. Argentina*, 18 November 1997, paras. 157-171; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106; Inter-American Commission on Human Rights, Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina*, Ecuador – Colombia, op. cit., paras. 117, 121-122, 124; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Study on Targeted Killings, A/HRC/14/24/Add.6, 28 May 2010, para. 29, footnote 53; Marko Milanovic, “Lessons for human rights and humanitarian law in the war on terror: comparing *Hamdan* and the Israeli *Targeted Killings* case”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 390-392. Moreover, Rule 99 of the Customary IHL Database of the ICRC, related to the deprivation of liberty, makes references to human rights treaties for the purpose of clarifying customary rules applicable in non-international armed conflicts, being it important to recall that non-state entities are bound by those rules. See: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99 (last checked: 30/11/2011).

¹³⁹ See articles 98 through 108, 110, 111 and 146 of the United Nations Convention on the Law of the Sea; Claire de Than and Edwin Shorts, op. cit., pp. 257-262; articles 3 through 5 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Eugene Kontorovich, “International Legal Responses to Piracy off the Coast of Somalia”, *ASIL Insights*, Vol. 13, Issue 2, 2009.

¹⁴⁰ See, for instance, Tom Obokata, “Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law”, *International Journal of Refugee Law*, Vol. 17, 2005, pp. 394, 399-402, 414-415; Kofi A. Annan, “Foreword”, op. cit., pp. iii-iv; articles 23 through 25 of the United Nations Convention against Transnational Organized Crime; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, especially its articles 6 and 7; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime; Ilias Bantekas and Susan

which is logical because of how intimately related to the protection of human dignity many of its norms and purposes are. As will be explained shortly, what is remarkable is that many international norms protect human dignity from non-state actors.

International criminal norms, for instance, can regulate non-state conduct and often protect human rights¹⁴¹ by prohibiting conduct that violates their content. It is telling that, as happens in the African human rights system (explained pages above), under international criminal law some conduct contrary to human dignity are held to amount to wrongful acts branded as violating human dignity -with a criminal nature in this case-. In this sense, Articles 8.2(b)(xxi) and 8.2(c)(ii) of the Rome Statute of the International Criminal Court forbid “outrages upon personal dignity, in particular humiliating and degrading treatment” during armed conflicts, and Article 68 calls for taking into account the dignity of victims and witnesses. Similarly, international criminal norms and decisions, as those of the International Criminal Court or the criminal Tribunals for Rwanda and the Former Yugoslavia, have developments concerning the criminalization of serious offenses against human dignity.¹⁴²

That being said, it is important to take into account that criminal law has an *ultima ratio* character. Therefore, neither every non-state violation of human dignity amounts to a crime *de lege lata* nor ought every such violation to amount to a crime *de lege ferenda*. For instance, non-state actors may negatively affect economic, social and cultural or other rights and have responsibilities –which can be criminal or otherwise, depending on several factors-, as recognized by the Committee on Economic, Social and Cultural Rights.¹⁴³ In any case, criminal law highlights how non-state actors can not only enjoy rights but also be subject to international legal duties.

Nash, op. cit., at 14; Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et al. v. Peru*, Judgment, 30 May 1999, para. 89.

¹⁴¹ See Claire de Than and Edwin Shorts, op. cit., pp. 12-13; Hersch Lauterpacht, op. cit., pp. 36, 38; Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., at 42.

¹⁴² Cf. article 4.e of the Statute of the International Criminal Tribunal for Rwanda; ICTY, *Prosecutor v. Anto Furundzija*, Judgment, 10 December 1998, paras. 44, 158, 162, 168, 173, 176, 183-184, 186, 188, 259, 274-276, 279, 295, and footnotes 192 and 201.

¹⁴³ See Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food (art. 11)*, E/C.12/1999/5, 12 May 1999, paras. 10, 15, 19-20, 27, 29; Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4, 11 August 2000, paras. 33, 42; Committee on Economic, Social and Cultural Rights, General Comment No. 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2002/11, 20 January 2003, paras. 23-24; Committee on Economic, Social and Cultural Rights, 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 International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2005/4, 11 August 2005, para. 20; Committee on Economic, Social and Cultural Rights, General Comment No. 18, *The right to work*, E/C.12/GC/18, 6 February 2006, para. 25; Committee on Economic, Social and Cultural Rights, General Comment No. 20, *Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, 2 July 2009, para. 11.

The notion of human rights *lato sensu* highlights two aspects: that developments regarding the protection of human dignity may also be followed by other norms; and that this protection may counter fragmentation because human rights and human dignity concepts constitute a *lingua franca* that can operate as a legal cohesive element, as highlighted by August Reinisch and Roberto Andorno¹⁴⁴ and revealed by the fact that, due to social and legal demands, the protection of human dignity and human rights must be recognized as being relevant in fields where due to prejudices it was believed they had no role. After all, international legal regimes are often interdependent and exert influence on each other,¹⁴⁵ which may be partly explained by the existence of common legal goods. Granted, issues found across regions and systems may sometimes be addressed by resorting to different rights regulations protecting common legal goods in order to deal with particularities but ensuring that human dignity is protected.¹⁴⁶

Concerning human rights, *lato sensu* or not, it must be said that the Global Compact and other initiatives acknowledge that even though human rights were traditionally understood to be relevant in relations between individuals and the State, it is possible and important to extend their reach beyond the State and make other entities that may potentially prevent the enjoyment of human rights respect them.¹⁴⁷ This is relevant not only with respect to those initiatives but across the human rights universe, due to all of its norms sharing common traits whatever their label or branch is.

One of the grounds on which the aforementioned extension can be based is the fact that:

The “Universal Declaration of Human Rights [...] calls on ‘every individual and every organ on society’ to strive to promote and respect the rights and freedoms it contains and to secure their

¹⁴⁴ On these issues, cf. Roberto Andorno, *op. cit.*, at 11; August Reinisch, *op. cit.*, at 72-74; Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, *op. cit.*, at 17.

¹⁴⁵ See Thomas M. Franck, *op. cit.*, p. 12.

¹⁴⁶ In this regard, Paolo Carozza has argued that human dignity “serves as a common currency” in legal practice, that is taken into account in core and non-controversial cases, at least. See Paolo G. Carozza, “Human Dignity and Judicial Interpretation of Human Rights: A Reply”, *European Journal of International Law*, Vol. 19, 2008, 932, 938-939. On the other hand, Christopher McCrudden acknowledges that “A principled interpretation of a grand principle often seems to call for agreement on what the effect of applying the principle is, whilst nevertheless disagreeing on what a full theoretical basis for the principle may be. Cass Sunstein has described the process of deciding cases on their facts without necessarily agreeing on any particular theory supporting the decision as giving rise to ‘incompletely theorized’ agreements. Such agreements exist where individuals can agree on a specific result, even if they do not agree on all the aspects of the specific theory justifying that result.” This argument supports the idea that the same result (the protection of human dignity), which is demanded by the common foundations of law, is brought about by different processes (the use of different particular norms). Cf. Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights”, *European Journal of International Law*, Vol. 19, 2008, at 697.

¹⁴⁷ Principles 1 and 2 of the Global Compact mention that “Businesses should support and respect the protection of internationally proclaimed human rights” and that they must “make sure that they are not complicit in human rights abuses.”

effective recognition and observance. The concept of 'every organ of society' covers private entities such as companies."¹⁴⁸

As explained before, the Declaration recognizes human dignity. Its evolutive interpretation¹⁴⁹ must recognize that the rights enshrined therein are based on it, as stated in later instruments. The fact that elements of protection against abuses committed by non-state entities are addressed in instruments as the Declaration builds upon and is required by the foundations on which all human rights rest reinforces the necessity of taking those developments into account generally.

For its part, the practice of the United Nations may reveal an unconscious or intuitive recognition of the idea that human rights norms may be included in different instruments that can formally belong to diverse "formal" branches of international regulation, and may sometimes address non-state behavior. Article 2.1 of the Memorandum of Understanding between the Justice and Equality Movement (JEM) of Sudan –a non-state entity- and the United Nations – another non-state actor- on 21 July 2010, for instance, says that:

"UNICEF mandate and actions are guided by the principles of international humanitarian law. The basic elements of these principles are drawn from UN General Assembly Resolution 46/182 and other instruments, including the 1949 Geneva Conventions and the 1977 Additional Protocols relating to the protection of victims of war, the protection of victims of international and non-international armed conflicts, the Convention on the Rights of the Child and the two Optional Protocols, the Guiding Principles on Internal Displacement and other international human rights instruments" (emphasis added).

Complementary to the concept of human rights *lato sensu*, it is possible to conceive a related category of norms: those enshrining human or humanitarian guarantees (including but not limited to those found in international humanitarian law).

Humanitarian guarantees consist in norms that, despite not directly regulating individual *rights* entrenched in human dignity, promote and protect that dignity and sometimes human rights indirectly or directly in a form that differs from a direct regulation of rights. This may happen, for example, when norms place duties on actors to prohibit and discourage violations against dignity or to command them to strive to protect individuals; when norms regulate the restriction of rights when it is necessary to ensure a proportional protection of human rights; or when norms aim to exert influence on the culture of certain actors fostering new practices conducive to greater harmony with the respect and promotion of human dignity, among other measures.

¹⁴⁸ Cf. United Nations Global Compact and the Office of the High Commissioner of Human Rights, *Embedding Human Rights into Business Practice*, at 15.

¹⁴⁹ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-10/89, *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*, 14 July 1989, paras. 37-38.

From a theoretical standpoint, humanitarian guarantees reflect the idea put forward by Oscar Schachter that the respect of human dignity and human rights can be promoted by means beyond those available under litigation or rights-schemes, because promotion may for instance take place also under social or political processes¹⁵⁰. This explains why *soft law* initiatives are relevant when addressing non-state conduct, especially because they may contain some proposals or ideas relating humanitarian rights or guarantees that despite not being formally binding are persuasive or otherwise impact on the practice of non-state actors or authorities.

It is important that at least a minimum of complementary strategies is legally binding. Otherwise, we would be entirely at the mercy of the good will of some actors, which is sometimes nonexistent or unreliable. Actually, the very fact that Professor Schachter mentions codes of conduct¹⁵¹ is telling, because they may sometimes be adopted out of a desire to improve public image and evade criticisms with no real commitment.¹⁵² The lack of obligatoriness, remedies and enforceable supervision of many codes of conduct makes them frequently ineffective instruments of protection needs unless complementary action is taken.

Human or humanitarian guarantees encompass a wide variety of initiatives and manifestations, as for example: criminal provisions, international legal obligations, provisions allowing the restriction of certain rights after a proportionality test has been effectuated in order to prevent private violations of human rights, principles as the *pro homine* principle, precautionary measures, prohibitions of the use of force, legal initiatives that seek to ensure self-defense against non-state actors in order to prevent otherwise vulnerable populations from being undefended,¹⁵³ refugee law guarantees, or procedures granting access or *locus standi* to individuals to *fora* where their human rights can be invoked to request protection from non-state threats directly or indirectly, among others.

It must be clarified that the notions of human rights *lato sensu* and humanitarian guarantees may be somehow related to the concept of obligations stemming from the principle of humanity *lato sensu* as explained by Antonio Cançado, but are different from it, because his notion seems to try to explain how the respect of human dignity is an integral part of international

¹⁵⁰ Cf. Oscar Schachter, *op. cit.*, at 853-854; Amartya Sen, *op. cit.*, at 345.

¹⁵¹ See Oscar Schachter, *op. cit.*, at 853-854.

¹⁵² See Alexandra Gatto, *op. cit.*, at 431; August Reinisch, *op. cit.*, at 53.

¹⁵³ Cf. articles 4 or 5 of the International Covenant on Civil and Political Rights, 5 of the International Covenant on Economic, Social and Cultural Rights, 27, 29 or 30 of the American Convention on Human Rights, or 15, 17, 18 or 53 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, among others; Álvaro Francisco Amaya Villarreal, "El principio *pro homine*: interpretación extensiva vs. el consentimiento del Estado", *International Law: Revista Colombiana de Derecho Internacional*, 2005, at 356, 361, 374-375; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *op. cit.*, para. 156.

law,¹⁵⁴ whereas the two concepts proposed here are normative manifestations of the protection of human dignity.

Those concepts suggest that all human rights are part of the same *corpus juris*, which has been humanized and must continue to be so and become a full *lex humana* with human beings at its center –therefore, the aphorism of *dura lex, sed lex* is not to be blindly accepted.¹⁵⁵ They also highlight how different international norms and measures may have a positive direct or indirect impact on human dignity and may address non-state conduct.

The normative categories being discussed are not something completely new. Ian Brownlie, for example, considered that international human rights law, while being a useful “category of reference”, does not constitute a “separate body of norms”, reason why scholars should focus on applicable norms when analyzing human rights.¹⁵⁶

This reasoning confirms the non-closed and open character of “human rights law”, which makes it possible for human rights norms to be present in diverse legal fields, and reinforces the idea expressed before that approaches and mechanisms found in some of those norms may also be present in other norms protecting human dignity, including approaches to protect individuals from non-state abuses. Among some examples, one can consider the mechanisms for the protection of human dignity against non-state threats under refugee law (where the concept of persecutors is not limited to States),¹⁵⁷ humanitarian law (non-state armed actors may clearly be bound by its norms),¹⁵⁸ or criminal law (which criminalizes some human rights violations and sanctions perpetrators and participants even if they belong to non-state groups), among others.

Different norms belonging to different branches that have the same purpose to protect victims reveal the possibility and confirm the need to protect human dignity from all offenses,

¹⁵⁴ See Separate Opinion of Judge Caçado Trindade to: International Court of Justice, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, paras. 93-106; Separate Opinion of Judge A. A. Caçado Trindade to: International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 22 July 2010, paras. 74-76.

¹⁵⁵ Cf. *Ibid.*; Concurring Opinion of Judge A. A. Caçado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, *Juridical Condition and Human Rights of the Child*, 28 August 2002, para. 19; John Finnis, “The Priority of Persons”, in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence, Fourth Series*, Oxford University Press, 2000, pp. 1-3, 13; Inter-American Court of Human Rights, OC-6/86, *The word “laws” in article 30 of the American Convention on Human Rights*, 9 May 1986, para. 33.

¹⁵⁶ See Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, Martinus Nijhoff Publishers, 1998, pp. 65-66.

¹⁵⁷ Cf. Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, Reedited, Geneva, 1992, para. 65; Francisco Galindo Vélez, *op. cit.*, pp. 125-126.

¹⁵⁸ See Concurring Opinion of Judge A.A. Caçado Trindade to: Inter-American Court of Human Rights, *Case of the Miguel Castro Prison v. Peru*, Judgment (Interpretation of the Judgment on Merits, Reparations, and Costs), 2 August 2008, paras. 90-91.

whatever their origin. This is supported, for example, in the following statement of the International Committee of the Red Cross:

“Enforced disappearance is a crime under international human rights law and – when it occurs in war – under international humanitarian law.”¹⁵⁹

In light of the previous considerations, mentions of human rights or victims of human rights violations¹⁶⁰ must be construed as referring to all human rights and victims, unless expressly excluded. This is how, for example, the following principle of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Law, must be read:

“15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim” (emphasis added).

According to what has been said so far, it is possible to assert that human dignity is the *legal* foundation of all human rights and that its protection is one of its main goals, in light of which pertinent norms should be interpreted, as confirmed by a value-based interpretation of human rights promoted in international jurisprudence.¹⁶¹ Additionally, human dignity is the foundation of humanitarian guarantees as well, with the same implications.

Moreover, apart from being the foundation of many norms of *jus gentium* and determining their *purposes*, human dignity serves to assess the fairness¹⁶² of that legal system.

An objection I have to some theories that agree with the identification of human dignity as an overarching and transversal foundation of *jus gentium* is, ironically, their State-centrism, which

¹⁵⁹ Cf. ICRC, “ICRC calls on States to join Convention against Enforced Disappearance”, News Release 10/155, available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/missing-news-270810> (last checked: 30/11/2011).

¹⁶⁰ Such as, for instance, the references found in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

¹⁶¹ Cf. Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, Judgment, op. cit., para. 33, where it was mentioned that “international human rights law is composed of a series of rules (conventions, treaties and other international documents), and also of a series of values that these rules seek to develop. Therefore, the norms should also be interpreted based on a values-based model that the Inter-American System seeks to safeguard from the perspective of the “best approach” for the protection of the individual.” Likewise, cf. Dissenting Opinion of Judge Cançado Trindade to: International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, para. 293.

¹⁶² Cf. Patrick Capps, *Human Dignity and the Foundations of International Law*, Hart Publishing, 2009, pp. 5, 273-276; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, *Juridical Condition and Human Rights of the Child*, 28 August 2002, paras. 10-34; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, 17 September 2003, paras. 4-12; Rafael Domingo, *¿Qué es el derecho global*, op. cit., pp. 91, 110, 158-159.

is a feature that is contrary to both international legal practice and reality¹⁶³ and to the ideal of a law *centered on* human beings. Truly, some of those conceptions over-focus on the idea that *jus gentium* is concerned with regulating relations among States and affirm that only those entities have a duty to respect and protect human dignity.

Certainly, protecting individuals against State abuses is of the utmost importance and an achievement that cannot be renounced to, albeit it must be clarified that it is not the only dimension in which human dignity is relevant, insofar international law and human rights norms are not solely devoted to the regulation of State relations.¹⁶⁴ Protecting individuals only from States is insufficient to fully protect them, being it necessary for other entities capable of affecting their interests to be addressed by law in light of the legal principle, value and foundation of the protection of human dignity, lest it is not effective, given how multiple entities can violate it.

Authors as Pierre Calame, Fred Halliday or Jordan J. Paust have demonstrated how neither in social nor in legal practice the international or global levels of governance have been exclusively concerned with States, because there have been other entities that are important in, participate in, and are addressed both formally and informally by the international legal system, that is not concerned only with State relations and interests.¹⁶⁵

This is why I disagree with some theories of the fiduciary character of peremptory international law, according to which States have their legitimacy and sovereignty conditioned to the respect of *jus cogens*, being this consideration determinant of the identification of that sub-set of hierarchically superior norms:¹⁶⁶ I agree with the first idea, but the second one denies that some international peremptory norms are founded *on* the respect and inner worth of individuals, regardless of what authority exercises control or power over them, being power not necessarily juridical but also factual, which explains why protection of human dignity is not only owed against

¹⁶³ Cf. Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion", op. cit., pp. 985-1004; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, *Juridical Condition and Human Rights of the Child*, 28 August 2002, para. 26-29.

¹⁶⁴ In this regard, for instance, supervisory bodies of human rights treaty norms have acknowledged that States must protect human beings from non-state threats because the latter can "violate" human rights, and are sometimes able to offer direct or indirect protection against entities different from States. Complementary norms of the humanitarian *corpus juris*, such as those of international criminal law that protect human dignity, sanction abuses that are committed by persons that either have or do not have an affiliation with a State. The evolution of that *corpus* has answered to the normative and meta-legal demand and need to protect human dignity from all threats, but naturally must continue to progress in the possibilities of offering that protection.

¹⁶⁵ See Pierre Calame, op. cit., pp. 3-4; Fred Halliday, op. cit., pp. 27-37; Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion", op. cit., pp. 985-1004.

¹⁶⁶ Cf. Evan J. Criddle & Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens", *Yale Journal of International Law*, Vol. 34, 2009, pp. 361-368.

entities that exercise State or formal authority over individuals, who are vulnerable to the actions of other entities as well.¹⁶⁷

These considerations stress that only an integral approach to the subjective elements of the protection of individuals can bring about a full protection of the inner worth of individuals. This idea is echoed in the opinion of activists that call for integrating multiple dimensions in the protection of human rights (social, legal, etc.), taking into account the protection demanded and made possible by norms belonging to different *formal* branches that yet form part of the same *substantive corpus juris*.¹⁶⁸ This holistic approach must take into account all relevant norms and dimensions of protection and human needs, and also all actors and levels of governance. This is the only way to effectively and fully protect human dignity from *all* threats, which often also requires the legitimate contribution of *all* actors that can help to achieve that goal, as explained in section 1.4. As a consequence, one must integrate all relevant provisions, be they against piracy in the law of the sea, against transnational organized crime or terrorism, on consular provisions dealing with human rights, or others that protect human dignity directly or indirectly.

Apart from being their *legal* foundation, several conceptions consider that human dignity *justifies* human rights, which derive from it. Among these, one can find philosophical, legal, political and religious accounts. Those theories may occasionally differ in regard to what they conceive as human dignity, but in all those approaches there are elements that permit to consider that human dignity must be protected from non-state threats.

Studying those conceptions is important because the absence of a general legal definition of dignity, notwithstanding its clear legal relevance, makes their analysis pertinent, especially due to the fact that philosophical and extra-legal theories have often had an impact on

¹⁶⁷ Cf. Annyssa Bellal and Stuart Casey-Maslen, "Enhancing Compliance with International Law by Armed Non-State Actors", *Goettingen Journal of International Law (GoJIL)*, Vol. 3, 2011, at 187. In the *Issa and others v. Turkey* case the European Court of Human Rights handled a concept of *factual* power (in that case, manifested as effective control due to a general control of a territory or the actions of agents) over someone as a criterion that triggers the applicability of human rights obligations in relation to the entity exercising that power, criterion that is also present in advisory opinion of the ICJ concerning the *Wall in the Occupied Palestinian Territory* or in the Colombian regulation of the protection of fundamental rights *vis-à-vis* non-state entities, as opposed to the concept of formal authority, that can also generate human rights responsibilities, as discussed in the UNMIK case. On these issues, see: European Court of Human Rights, *Case of Issa and others v. Turkey*, Judgment, 16 November 2004, paras. 69-71, 76, 81; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, op. cit., paras. 109-113; article 42.9 of Decree 2591 of 1991 of Colombia; Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006, para. 4 (the "UNMIK case").

¹⁶⁸ Cf. the notion of the interface or intersectional approach to human rights expounded in: "Intersectionality and the U.N. Special Rapporteur on Violence Against Women", 2010, available at: <http://intlwgrrls.blogspot.com/2010/09/intersectionality-and-un-special.html> (last checked: 30/11/2011); and the idea of the need to focus on material rights rather than on formal distinctions when it comes to analyzing human rights presented in: Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, op. cit., at 65-66.

legal practice, as explained by Mario G. Losano and Jack Donnelly, and that practitioners work based on theoretical conceptions even if they are not aware of this, as Jans Klabbers argues.¹⁶⁹

Certainly, considering the multiplicity of legal processes (law creation, adjudication, etc.), law is not fully isolated separated from other disciplines and realities. For instance, religious considerations have had an impact on rules of interpretation, as the teleological and systemic ones, which were methods employed to study theology and transplanted to legal analysis by Roman law scholars.¹⁷⁰ In turn, legal institutions as human rights respond to philosophical and political demands, having sometimes divergent interpretations because of indeterminate or broad contents due to compromises in legal negotiations; and policy choices may be considered an integral part of the practice of some legal processes, including but not limited to lawmaking and adjudication.¹⁷¹ Therefore, law is not hermetic,¹⁷² and the analysis of a legally relevant concept as human dignity must therefore pay attention to sources that inspired its legal recognition, especially because of the vague content of some norms about it. Furthermore, such an analysis may shed some light on issues concerning non-state responsibilities.

Additionally, it is also convenient to examine alternative proposals that have been put forward as allegedly better bases of human rights instead of dignity, to determine if they would better demand a complete protection of human rights from all violations, State or not. As will be explained below, human dignity is a better and more proper foundation, which conceives human rights as comprehensive guarantees of all individuals, because alternative suggestions fall short in some respects and may leave some victims unprotected.

¹⁶⁹ The influence of philosophy and other fields of study in law and legal analysis has been examined, among others, in: Mario G. Losano, "Towards a Common Good: A Path to Utopia?: From Philosophy through Legislation to the Dignified Life", *European Journal of Law Reform*, Vol. 6, 2004, p. 329-330; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., at 7; Harold Koh, "Why Do Nations Obey International Law?", op. cit., pp. 2603-2604; Jack Donnelly, op. cit., at 75; Jan Klabbers, *International Law*, Cambridge University Press, 2013, locations 541-550 of 11783 (Kindle version).

¹⁷⁰ See, for instance, Yezid Carrillo de la Rosa, "Derecho y argumentación: el modelo de adjudicación del derecho en la antigüedad y el medievo", *Revista de Derecho (Universidad del Norte)*, No. 28, 2007, pp. 78-82; Sara Bialostosky, "Historia o dogmática: dicotomía que ha resuelto la romanística contemporánea", *Revista de la Facultad de Derecho de México*, 2005, pp. 14-16; Pope Benedict XVI, *Jesus of Nazareth: Holy Week: From the Entrance into Jerusalem to the Resurrection*, Ignatius Press, 2011 (EPUB version), at 212.

¹⁷¹ Cf. Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order", *The American Journal of International Law*, Vol. 53, 1959, at 9-10; Myres S. McDougal, "Some basic theoretical concepts about international law: a policy-oriented framework of inquiry", *The Journal of Conflict Resolution*, Vol. IV, 1960, at 341-342, 345-350.

¹⁷² Some criticisms of the "hyper-purification" of law, that in my opinion highlight the risks of hermetic legal conceptions, are offered in: Rafael Domingo, *¿Qué es el derecho global?*, op. cit., at 22-23. Additionally, cf. Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens*", *European Journal of International Law*, vol. 19, 2008, at 495, on the non-isolated character of law concerning social ordering and protected values.

1.1. The legal implications of the protection of human dignity concerning protection from non-state threats and conflicts of rights

In spite of its being mentioned in many international instruments, there is no clear general legal definition of human dignity or of its elements, save for its occasional identification with the inherent worth of human beings, as in doctrine and the Preambles to the Universal Declaration of Human Rights and the Charter of the United Nations or in the Vienna Declaration and Programme of Action of the World Conference on Human Rights of 1993.¹⁷³

According to Oliver Sensen, this normative ambiguity of the concept can be understood as some sort of compromise that was necessary for adopting international treaties on human rights.¹⁷⁴ If this were true, it would be necessary to combine resorting to extra-legal explanations of what human dignity is to understand this concept with the exploration of legal developments and frameworks on its protection in order to determine which its legal implications are.

An alternative explanation could suggest that the absence of a clear general legal definition of human dignity does not have negative connotations and is not derived from the impossibility of agreement. In fact, this absence *could* be some form of agreement. As Roberto Andorno and Sensen explain, there seems to be an intuitive understanding of what human dignity is, and it would be difficult to provide a single definition capable of satisfying all the parties to a given treaty that refers to it.¹⁷⁵ Taking this into account, an indeterminate definition may be useful given its adaptability to different circumstances and the necessity of avoiding a narrow stagnant legal definition in the face of emerging challenges, while endorsing a minimum shared notion.

Ascertaining whether the history of the national and international recognition and protection of human rights has always been based on human dignity is a difficult question, especially because some authors consider that it was only after World War II that they emerged

¹⁷³ Cf. Oscar Schachter, *op. cit.*, at 849. The Preamble to the Universal Declaration of Human Rights mentions that “the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person”, and the second paragraph of the Preamble to the Charter of the United Nations has a similar expression. The Vienna Declaration and Programme of Action of the World Conference on Human Rights of 1993, in turn, apart from making a reference to that idea as expressed in the Charter, mentions in its Preamble that “all human rights derive from the dignity and worth inherent in the human person”, while paragraph I.18 mentions some acts that are contrary to the “dignity and worth of the human person”, that therefore “must be eliminated.”

¹⁷⁴ Cf. Oliver Sensen, *op. cit.*, where he considers that “[i]n documents like [the UN documents] key terms [such as human dignity] are deliberately kept vague, since one can only secure an agreement among so many different parties at the price of a certain ambiguity.”

¹⁷⁵ Cf. *Ibid.*, where it is mentioned that “[t]he way one can detect such a value [i.e. human dignity] is often said to be by intuition as direct recognition [...] [although] [n]ot every proponent of the *contemporary* paradigm of dignity holds an intuitionist epistemology”; and Roberto Andorno, *op. cit.*, at 6, where it is considered that regarding the notion of human dignity, as handled in some human rights instruments, “the term is not explicitly defined by international law. Rather, its meaning is “left to intuitive understanding, conditioned in large measure by cultural factors”.

in positive law, or because philosophers as Oliver Sensen hold that only a contemporary conception of dignity, unknown before, became the foundation of human rights.¹⁷⁶

Assertions concerning the date of the emergence of human rights may be contested, especially because prior to international legal endeavors international legal doctrine, political movements and constitutional norms had an idea of human rights, even if not formally called as such; and as explained in the previous section, the formal denomination of rights is not a decisive factor when examining if they are human rights, just as calling an instrument a treaty or not does not determine if it is one. Additionally, it is important to consider that some conceptions held that law must respect natural inherent and inalienable rights of human beings, and that there were attempts to codify such rights, as happened in the revolutionary American and French declarations (the latter being immersed in a context where revolutionaries engaged in conduct that clearly violate today's recognized human rights).¹⁷⁷

Additionally, some authors have evaluated positive law in light of the respect of dignity. Therefore, traditions on which drafters of the Universal Declaration of Human Rights and the Charter of the International Military Tribunal adopted in London on 8 August of 1945 to deal with war atrocities drew, at least partly, must not be ignored.

It is pertinent to mention that David Boucher has suggested that even though they are related in some respects, the notions of human rights and natural rights are distinct and independent –although notions of inalienable human or natural rights existed in “classical and medieval concepts of law”-,¹⁷⁸ basically because to him each of those notions has a different *formal normative foundational basis*: while natural rights would be founded on a conception of the rights of human beings under a religious and/or rational conception, human rights would be special rights granted by positive law, which is a relatively recent phenomenon.¹⁷⁹

¹⁷⁶ Cf. Oliver Sensen, op. cit., where he argues that “In the contemporary pattern of thought human rights are based on an inherent (value) property of human beings. One can claim one’s rights in pointing to one’s absolute value. The *traditional* paradigm, in contrast, does not rest rights on a non-relational value property of human beings.” According to him, unlike the contemporary conception of dignity, for the traditional one “dignity is not the basis of rights”.

¹⁷⁷ In this regard, the novel “A Tale of Two Cities” by Charles Dickens is worth reading. Furthermore, Ruth Scurr considered that “[i]n Lyon and elsewhere there were plenty of terrible examples: horrific mass executions...and group drownings in the Vendée—crimes against humanity that the revolutionaries would today be called to answer for under the European human rights legislation they themselves pioneered. Robespierre had argued consistently since 1789 that in a time of revolution the end justified the means, and even his advocates have to acknowledge that he did not flinch from the bloodiest implications of his position”, as commented in: Jean Bethke Elshtain, *Sovereignty: God, State, and Self*, Basic Books, 2008, at 299.

¹⁷⁸ Cf. David Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition*, Oxford University Press, 2009, where the author considers that “natural law, natural rights (both prescriptive and descriptive), and human rights are conceptually distinct, but are related to each other, not as answers to the same question, but as part of the same historical process by which one turns into the other.” Additionally, cf. Anna Meijknecht, op. cit., at 46.

¹⁷⁹ Ibid., where it is mentioned that “[n]atural rights [...] retained the foundation of a religious world view to sustain its moral claims [...] Reason, for the most part, could not in itself create obligation. Reason is what enables us to come

Nonetheless, I do not find this supposed separation of the aforementioned rights totally convincing. First of all, because as the aforementioned author admits, human and natural rights are related in some regards, and I consider that one of those links is their sharing the same *substantive foundation*: both categories are based on the necessity of defending the inherent unconditional dignity of human beings. Therefore, would human rights not be an ulterior manifestation of the quest for the practical applicability of the idea of natural rights, at least for some drafters and practitioners?

Admittedly, international *norms* are sometimes adopted with compromises. However, it is worth wondering if the very mention of the word *recognition* in human rights vocabulary and instruments points to the belief of some drafters that international law merely translates into positive law what human beings were entitled to prior to that recognition. Moreover, admitting for the sake of discussion that some lawmakers did not believe in a natural foundation of human rights, other participants in the drafting processes of human rights instruments may have held such a belief, and they could certainly have had an influence on elements of the normative framework. Certainly, in certain official international human rights discussions some participants have held that certain traditions and beliefs are translated into regulation proposals,¹⁸⁰ while renowned authors indicate that there is an important natural law tradition and component in the history of international law and human rights law.¹⁸¹

The idea that human rights have nothing to do with natural rights is further challenged on two bases: first of all, authors as Amartya Sen and John H. Knox have considered that the human

to know what our rights and duties are, while God provided the foundation for the enjoyment of the rights, and for fulfilling our obligations. The British Idealists are important [...] because they play an important role in the transition from natural rights to human rights. They jettison the rationalist element in natural rights, but retained the religious. Ideas of human rights, on the whole, abjure the divine and present us with foundationless universal principles that constrain the actions of individuals domestically and internationally, and within and between states." In spite of the claims of the author, I disagree with some of his ideas, since some religious conceptions can and in fact do uphold the idea of human rights, which are compatible with their beliefs and yet applicable to all human beings, even those who do not share their faith. For example, see Pope John XXIII, *Encyclical Pacem in Terris*, op. cit., paras. 3, 9-10, 30, 60-61, 63, 75, 143. The Israeli human rights organization Additionally, B'Tselem, for example, explains how its name has a meaning that is related to its mission in the following way: "B'Tselem in Hebrew literally means 'in the image of,' and is also used as a synonym for human dignity. The word is taken from Genesis 1:27 'And God created humans in his image. In the image of God did He create him.' It is in this spirit that the first article of the Universal Declaration of Human Rights states that 'All human beings are born equal in dignity and rights.' As an Israeli human rights organization, B'Tselem acts primarily to change Israeli policy in the Occupied Territories and ensure that its government, which rules the Occupied Territories, protects the human rights of residents there and complies with its obligations under international law." Excerpted from: http://www.btselem.org/about_btselem (last checked: 30/11/2011).

¹⁸⁰ Cf., for example, Report of Mr. Miguel Alfonso Martinez, *Human rights and human responsibilities*, E/CN.4/2002/107, 19 March 2002, para. 69.

¹⁸¹ Cf., among others, Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, *Juridical Condition and Human Rights of the Child*, 28 August 2002, paras. 20, 46; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, 17 September 2003, paras. 7-12, 26, 41, 48-49, 58; Anna Meijknecht, op. cit., at 46.

rights discourse may have legal and extra-legal dimensions (which can be ethical and moral, for instance, and even meta-legal considerations), and have warned against over-legalized or exclusively-legal approaches to the promotion of human rights.¹⁸² Non-legal dimensions of human rights have also been taken into account by international authorities and authors.¹⁸³

It is important to clarify, however, that even though there may be claims in human rights terms that appeal to ethical and moral considerations, or that appeal for recognizing them in positive human rights law, there are cases in which human rights claims *may* be regarded as unethical or immoral by some, as happens when they consider that those rights permit or entitle to claim things deemed as wrong by others, with the vague content of rights and margins of appreciation complicating the scene. Moreover, not all claims are supported by human rights law.

Concerning their extra-legal dimensions, human rights advocacy in the human rights is relevant both regarding implementation and drafting procedures,¹⁸⁴ demonstrating that positive law does not subsume the whole human rights lexicon and discourse, which often calls for including contested political or ethical demands in legal institutions and doctrines. Indeed, human rights law *lato sensu* and humanitarian guarantees (as some international criminal law norms) became part of positive international law as a response to demands and appeals after atrocities as those of World War II, due to the idea that some core rights should be respected everywhere, with States not being allowed to refuse to respect and protect them.¹⁸⁵

Altogether, the fact that human rights (under international law) and some natural rights theories and accounts are based and *founded* on the concept of human dignity makes it convenient to study this notion.

This foundational character stems from the understanding that some rights are inextricable from the human dignity they protect. Some authors consider that such dignity is be

¹⁸² See John H. Knox, "Horizontal Human Rights Law", *op. cit.*, pp. 43-44; Amartya Sen, *op. cit.*, pp. 326-328, 345.

¹⁸³ Such as some experts of the United Nations extra-conventional human rights framework, that discussing draft human rights norms addressed to corporations [the draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights], considered that even though those norms were not binding or did not enjoy a coercive character, "the value of the Norms was not in their binding effect but rather in their ethical and moral value, which should be reinforced by monitoring mechanisms", as shown in: Commission on Human Rights, *Report of the sessional working group on the working methods and activities of transnational corporations on its fifth session*, E/CN.4/Sub.2/2003/13, 6 August 2003, para. 13.

¹⁸⁴ Cf. George J. Andreopoulos, Zehra F. Kabasakal Arat, and Peter Juviler, "Rethinking the Human Rights Universe", in George Andreopoulos *et al.*, *Non-State Actors in the Human Rights Universe*, Kumarian Press, Inc., 2006, pp. 335-337; Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", *op. cit.*, pp. 185-186; Andrew Clapham, *Human Rights: a Very Short Introduction*, *op. cit.*, at 30.

¹⁸⁵ Cf. Felipe Gómez Isa, "International Protection of Human Rights", in Felipe Gómez Isa and Koen de Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, 2006, 19-20, 24-26; Roland Portmann, *op. cit.*, pp. 254-257; Andrew Clapham, *Human Rights: a Very Short Introduction*, *op. cit.*, p. 38 ("the horrors of the Second World War provided the impetus for the modern human rights movement [...] they had been stirred profoundly by those outrages upon human dignity perpetrated by the Nazis"); Eric A. Posner, *op. cit.*, at 182.

based on the –intuitive or not- understanding that there is an inherent and unconditional human worth that is to be respected. This philosophical conception of dignity is described as the contemporary conception by Oliver Sensen,¹⁸⁶ and the aspect of the non-conditionality of human dignity is regarded by many authors as essential,¹⁸⁷ position with which I agree.

Whereas some religious and non-religious conceptions of inherent rights attach importance to a notion of human dignity, the expression is not found in all the historical texts that exerted an influence on the gradual emergence of the legal recognition of human rights. Notwithstanding, some of them have upheld ideas of an inherent human worth, which is a central element of the concept of dignity,¹⁸⁸ and thus may have exerted an influence on its current understanding. It is thus useful to reexamined aspects of them when assessing if the protection law currently offers is sufficient and adequate. For example, John Locke dealt with notions that would often qualify as dealing with human rights from a current perspective, and it is relevant that he refers to how rights can be violated by individuals,¹⁸⁹ which are entities different from States. Such insights therefore help examining how human dignity must be protected.

¹⁸⁶ Cf. Oliver Sensen, op. cit., where it is argued that “The [Universal] Declaration [of Human Rights], though, does not give an account of what this ‘inherent’ (value) property is, nor of how one is able to know or ‘recognize’ it [...] Although in [some United Nations human rights] documents ‘dignity’ is neither defined any further nor justified, the UN documents can serve as an illustration of the *contemporary* paradigm of human dignity and its prominence.” Additionally, see the discussion in: James Griffin, “Human Rights and the Autonomy of International Law”, in Samantha Besson and John Tasiou, *The Philosophy of International Law*, Oxford University Press, 2010, pp- 341-350; Emily Kidd White, op. cit., at 2.

¹⁸⁷ Cf. Oliver Sensen, op. cit., where he mentions that, regarding the “ontological status” of the value of human dignity as understood contemporarily (i.e. as an inherent value of human beings), “[some] scholars [...] consider the value to be a non-relational property, that is, a property that does not change according to the different circumstances or relations in which a human being finds himself. The distinguishing feature of this property is a moral importance: Each human being has an ‘intrinsic and objective preciousness’. Dignity is said to be a value that is ‘incommensurably higher’ than other values”. Likewise, Jack Donnelly considered that human rights (which are one “path to the realization of human dignity”) “are not grants, either conditional or unconditional, of state or society, but are inherent to man”, as found in Jack Donnelly, op. cit., at 310. Roberto Andorno, in turn, argued that “dignity is not an accidental quality of some human beings, or a value derived from some specific personal features such as the fact of being young or old, man or woman, healthy or sick, but rather an unconditional worth that everyone has simply by virtue of being human. The same idea can be expressed by saying that all human beings are ‘persons.’” Cf. Roberto Andorno, op. cit., at 6.

¹⁸⁸ Cf. Oscar Schachter, op. cit., pp. 849-850; Jack Donnelly, op. cit., pp. 304, 310; Oliver Sensen, op. cit., where it is considered that the “members to the [Universal] Declaration [of Human Rights], present dignity as an ‘inherent’ fact or property that can be ‘recognized’. As I indicated above, this way of conceiving of dignity suggests that human beings are equipped with dignity as a distinct (value) property, in virtue of which one is justified in demanding one’s rights from others.” Roberto Andorno posited that “The term “inherent” means “involved in the constitution or essential character of something,” “intrinsic,” “permanent or characteristic attribute of something.” The idea expressed in this term, when it is accompanied by the adjective “human,” is that dignity is *inseparable from the human condition*. Thus, dignity is not an accidental quality of some human beings, or a value derived from some specific personal features such as the fact of being young or old, man or woman, healthy or sick, but rather an unconditional worth that everyone has simply by virtue of being human.” See: Roberto Andorno, op. cit., at 6, 8.

¹⁸⁹ Cf. Jack Donnelly, op. cit., at 305; John Locke, *Second Treatise of Government*, where the author argued that “Should a robber break into my house, and with a dagger at my throat make me seal deeds to convey my estate to him, would this give him any title? Just such a title, by his sword, has an unjust conqueror, who forces me into submission. The injury and the crime is equal, whether committed by the wearer of a crown, or some petty villain.”

Concerning these ideas, Professor Oscar Schachter posits that some theories about human dignity are too embedded in a given society at a given time and are the result of which rights are considered essential to human beings in them.¹⁹⁰ Nevertheless, it is possible to ask the opposite, that is to say whether human dignity is an intuitive conception related to essential human needs and qualities which leads to the conviction that some rights must be protected to satisfy and respect them. In other words, it may be that our understanding of the unchanging human dignity evolves alongside new challenges, developments and insights, explaining the expansion, modification and increase of rights.

This idea supported is by the fact that rights can be exercised and must be protected in relation to new realities and developments, with previously recognized rights remaining the same but being applicable in new ways and other rights emerging to protect dignity from new challenges not properly tackled. The first idea is exemplified by the protection of the exercise of the freedoms of opinion and expression in relation to new technologies, as explained by the Human Rights Committee.¹⁹¹ Concerning the need to update and improve the protection of human dignity in the face of existing challenges, the realities and risks of non-state abuses demand effective legal mechanisms that protect human dignity from non-state threats.

On the other hand, while word dignity, which comes from the Latin term *dignitas*,¹⁹² was not invented by Kant, his explanations are still influential to this day and must therefore be examined. According to the German philosopher, human beings have an *inner worth* and cannot be treated as means but as an end in themselves.¹⁹³ In his own words:

“Whatever has reference to the general inclinations and wants of mankind has a market value; whatever, without presupposing a want, corresponds to a certain taste, that is to a satisfaction in the mere purposeless play of our faculties, has a fancy value; but that which constitutes the condition under which alone anything can be an end in itself, this has not merely a relative worth, i.e., value, but an intrinsic worth, that is, dignity”¹⁹⁴ (emphasis added).

The idea of worth has been quite influential, and authors as Oscar Schachter put forward that human dignity is a notion that is *almost or actually interchangeable* with that of the inner

¹⁹⁰ Cf. Oscar Schachter, op. cit., at 853, where it is posited put forward that “[a]s history, it would probably be more correct to say [...] that the idea of dignity reflects sociohistorical conceptions of basic rights and freedoms, not that it generated them. However, as a philosophical statement, the proposition that rights derive from the inherent dignity of the person is significant. It clearly implies that rights are not derived from the state or any other external authority.”

¹⁹¹ See Human Rights Committee, General Comment No. 34, *Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, 12 September 2011, para. 15.

¹⁹² Cf. Oliver Sensen, op. cit., where it is mentioned how “The Roman *dignitas* is a complicated notion that has further connotations than rank, e.g. excellence, worthiness, and esteem.”

¹⁹³ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 535-536; Roberto Andorno, op. cit., at 7, where it is mentioned that Kant’s “second formulation of the categorical imperative is very helpful for understanding the practical consequences of the notion of dignity. According to this principle, we should always treat people as an end in themselves [...] The Kantian requirement of non-instrumentalization (or non-commodification) of persons is extremely illuminating”.

¹⁹⁴ See Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, op. cit., at 51.

worth that every individual has, and that its recognition by others is deserved by all human beings, who should be entitled to demand respect *from all that threaten to disrespect it*, something that legal systems must recognize (for them to be fair and legitimate, in my opinion).¹⁹⁵

In my opinion, the idea of dignity discussed by Kant about the prohibition of treating human beings as means for attaining goals or satisfying interests must *not* be understood as *the* definition of dignity, but as one of the implications of the intrinsic value/worth of every human being, that is not dependent on any condition whatsoever. This unconditionality is general and thus makes dignity not dependent on legal recognition, as the *right to* the recognition of the legal personality of every human being confirms.¹⁹⁶

In regard to the inherent value of every individual, according to the Kantian theory it is possible to state that everyone ought to acknowledge and respect the dignity of human beings, and that sometimes an individual should strive to ensure that the dignity of others is respected, just as he or she would be morally bound to respect and ensure the defense of his or her own dignity. Some natural rights theories endorse similar ideas.¹⁹⁷

Acknowledging the importance of the contributions of Kant and other pre-contemporary authors, it has been debated if their theories truly reflect the current understanding of what human rights are. There are opposed views on the subject: according to one, Kantian and other ideas are pillars and antecedents of a theory of human rights, and an opposite one held by Oliver Sensen considers that those ideas are circumscribed in the “traditional” notion of dignity, which differs from the contemporary one, being the latter the only one that, for the author, is taken into account by human rights. For him, only this last conception is compatible with a human rights theory, and its shorter history does not make it any less important.¹⁹⁸

Sensen considers that prior to the internationalization of human rights, i.e. before their emergence in the international legal system, the conception of human dignity had the following features: it was based on the idea of the distinctiveness of human beings in regard to other

¹⁹⁵ See Oscar Schachter, op. cit., at 849; and the notions of legitimacy and justice, related to fairness.

¹⁹⁶ Cf. Rita Joseph, *Human Rights and the Unborn Child*, Martinus Nijhoff Publishers, 2009, pp. 66-68; John Finnis, op. cit., pp. 7-10; articles XVII of the American Declaration of the Rights and Duties of Man, 3 of the American Convention on Human Rights, 6 of the Universal Declaration of Human Rights, and 16 of the International Covenant on Civil and Political Rights; Daniel O'Donnell, op. cit., pp. 546-549; Inter-American Court of Human Rights, *Case of the Girls Yean and Bosico v. Dominican Republic*, Judgment, 8 September 2005, paras. 176-180.

¹⁹⁷ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., p. 547; Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*, op. cit., at 46. Additionally, see David Boucher, op. cit., where the author mentions how, for Paine, “[a]ny declaration of rights, such as that of the National Assembly of France is also a declaration of duties. Whatever right as a man I may have, the same right is that of every other. In addition to possessing such rights it is also my duty to guarantee them”.

¹⁹⁸ *Ibid.*, where it is said that “The character and importance of [the] contemporary conception of dignity can be illustrated by the usage of ‘dignity’ in United Nations documents [...] If I am right that the contemporary pattern does not have the support of a long history, it does not undermine the current view. To argue this would be to commit a genetic fallacy. Just because an idea is relatively new, it does not mean it is not justified.”

species; and it encouraged individuals to fulfill their potentials by means of striving to reflect superior qualities of humankind, having thus a “perfectionist” character. According to that author, traditional conceptions of dignity thus emphasized a duty of human beings to strive for human perfection, and as a result he alleges that traditional theories obligations emphasized obligations rather than rights, especially since the duty of respecting other human beings flowed from what God or nature exacted from individuals, being offenses against fellow human beings contrary to those tenets.¹⁹⁹ According to Sensen, traditional theories of human dignity are two-layered: human beings have a special status in the world, but they must realize the potential of the attributes given to them by such status.²⁰⁰

Oliver Sensen goes on to say that the logic of contemporary understandings of human rights is the opposite one, because rights are prior to duties; and holds that international human rights instruments reflect the contemporary philosophy of human dignity and are often based on an ‘intuitive’ idea of what human dignity is. Nonetheless, in my opinion, if one considers dignity as prior to rights, one can conclude that the demands to respect the dignity of others flow from the entitlements that those others have due to their having dignity, which is the central concept from which *both* rights and obligations flow.

Moreover, a different point of view may seek to infer what human dignity is from the features of the rights founded upon it, but this may be inconsistent with the idea that some rights formally called human rights may fail to be founded upon dignity.

Altogether, human dignity as understood by different conceptions leads to ideas of an intrinsic, absolute and inherent value of all human beings, that is not dependent on external factors, and that generates entitlements and/or obligations and responsibilities *of entities* in order to protect this inherent and inalienable worth. While those elements are clearly recognized in current conceptions of dignity, the underlying ideas can also be inferred from previous accounts or considered as implied in some of them, and those elements of non-conditionality and inherent nature are relevant to examine the protection of dignity from non-state threats.

As the intuitiveness of the contemporary theory suggests, lack of verbal formalization of a concept does not amount to its absence, and so some secular and religious developments that are previous to contemporary frameworks may have paved the way for current guarantees and can shed light on pending developments.

¹⁹⁹ See Oliver Sensen, *op. cit.*, where it is argued that “[i]n the *traditional* conception of dignity, the prime emphasis is on *duties*, not on *rights*.”

²⁰⁰ *Ibid.*, where this feature is described as “perfectionism”, explained in the sense that authors that upheld the traditional conception of dignity “emphasize that the agent should realize his or her own initial dignity. In talking about human dignity, they highlight a privilege or capacity human beings have been given, and their emphasis is on how one should use that capacity.”

Furthermore, it may be difficult to categorically separate two generations of theories about dignity, and elements ascribed from each can complement each other (not necessarily in legal terms). In this sense, it can be said that there are two aspects of dignity: according to one, every human being must be respected and protected; and another according to which individuals ought to develop their faculties in *ethical* terms, including those faculties related to *respecting and protecting others*, which is an idea that can have legal manifestations. Both theories recognize the special value of human beings. Because of this, one can conclude that such value demands that human beings are respected simply because of who they are. That both rights and responsibilities must be devised based on such recognition is consistent with the idea that both “empowerments” and “constraints” derive from the necessity of protecting human dignity and can complement each other in human rights law.²⁰¹

This reflection is supported by some considerations. First of all, previous theories and normative developments tend to show an understanding that all human beings have inherent rights, as confirmed by norms that instead of referring to the “creation” of rights talk of their “recognition.” Secondly, while Sensen explains his theory commenting how Pope Leo I exhorted Christians to lead a laudable life because of their dignity, considering that this reflects a pre-contemporary notion of human dignity, his text does not mention that later Pope John XXIII talked about inherent human rights derived from human nature, shared by all individuals.²⁰² While it may be considered that this is a case of the evolution of notions, it could be argued that the different discourses of both Popes address different concerns that draw on common principles, or that the acknowledgment of both conceptions, which thus would not be antagonizing, reveal a more complete understanding of those principles, as happens with other issues.²⁰³ Similarly, the contemporary, the humanist and the classical understandings of human dignity described by

²⁰¹ See Roberto Andorno, *op. cit.*, at 9; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, at 541.

²⁰² Cf. Pope John XXIII, *Encyclical Pacem in Terris*, *op. cit.*, paras. 9-27, 30, 61, 63, 75, 143; Oliver Sensen, *op. cit.*

²⁰³ Cf. the doctrine of development of certain doctrines, which does not equate with their *evolution* because they do not change but are better understood later, as described in: *Acta Apostolicae Sedis* 65, 1973, pp. 402-403, where it is said that “Transmissio Revelationis divinae ab Ecclesia in difficultates varii generis incurrit. Hae autem oriuntur ex eo, quod arcana Dei mysteria ((supte natura intellectum humanum sic excedunt, ut etiam revelatione tradita et fide suscepta, ipsius tamen fidei velamine contacta et quasi caligine obvoluta maneant)); atque etiam ex historica exprimentae Revelationis condicione. Ad hanc historicam condicionem quod attinet, initio observandum est sensum, quem enuntiationes fidei continent, partim pendere e linguae adhibitae vi significandi certo quodam tempore certisque rerum adiunctis. Praeterea, nonnumquam contingit, ut veritas aliqua dogmatica primum modo incompleto, non falso tamen, exprimat, ac postea, in ampliore contextu fidei aut humanarum cognitionum considerata, plenius et perfectius significetur. Deinde, Ecclesia novis suis enuntiationibus, ea quae in Sacra Scriptura aut in praeteritis Traditionis expressionibus iam aliquomodo continentur, confirmare aut dilucidare intendit, sed simul de certis quaestionibus solvendis erroribusve removendis cogitare solet; quarum omnium rerum ratio habenda est, ut illae enuntiationes recte explanentur. Denique, etsi veritates, quas Ecclesia suis formulis dogmaticis reapse docere intendit, a mutabilibus alicuius temporis cogitationibus distinguuntur et sine iis exprimi possunt, nihilominus interdum fieri potest, ut illae veritates etiam a Sacro Magisterio proferantur verbis, quae huiusmodi cogitationum vestigia secumferant.”

Sensen may also accommodate both dimensions as *complementary*. In fact, authors as Donnelly have considered that some western conceptions paved the way for and were able to accommodate notions of human rights.²⁰⁴ On the other hand, the possible existence of two dimensions of dignity, namely one allusive to inherent entitlements and a moral dimension linked to axiological considerations, as examined by Roberto Andorno and Alan Gewirth,²⁰⁵ does not presuppose a complete separation of conceptions of human dignity.

In any case, in order to avoid abuses and the exclusion of some individuals from human rights protection, it must be clarified that philosophical or theoretical conceptions that refer to the dignity of human beings as being based on their reasoning or autonomous capacity of designing “universal laws”²⁰⁶ are to be understood as restricted to the perfectionist dimension of dignity. This must be done to prevent anyone from conditioning the recognition and respect of someone’s dignity, for instance, on his mental faculties, because that would be contrary to the unconditional character of dignity. This explains why I consider dignity to be a better basic foundation of human rights than autonomy, which could be interpreted by some as justifying exclusions of some *human* beings from the protection of *human* rights.²⁰⁷ Exclusions of that or any other sort are

²⁰⁴ Cf. Jack Donnelly, *op. cit.*, pp. 303, 305.

²⁰⁵ See Roberto Andorno, *op. cit.*, at 8.

²⁰⁶ See Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, *op. cit.*, pp. 51-52, where it is held that “What then is it which justifies virtue or the morally good disposition, in making such lofty claims? It is nothing less than the privilege it secures to the rational being of participating in the giving of universal laws, by which it qualifies him to be a member of a possible kingdom of ends, a privilege to which he was already destined by his own nature as being an end in himself and, on that account, legislating in the kingdom of ends; free as regards all laws of physical nature, and obeying those only which he himself gives, and by which his maxims can belong to a system of universal law, to which at the same time he submits himself. For nothing has any worth except what the law assigns it. Now the legislation itself which assigns the worth of everything must for that very reason possess dignity, that is an unconditional incomparable worth; and the word respect alone supplies a becoming expression for the esteem which a rational being must have for it. Autonomy then is the basis of the dignity of human and of every rational nature.”

²⁰⁷ Concerning this, it has been mentioned that “[w]hile [f]or Kant, the goods of freedom and moral action spring from the faculty of reason[.] Certain scholars have criticized this approach [...] believing that individuals lacking, or seen to be lacking, certain rational capacities would be deemed less worthy of respect or protection”. Excerpted from: Emily Kidd White, “Emotions and the Judicial Use of the Concept of Human Dignity”, J.S.D. Proposal of Study, p. 7, available at:

http://law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website_llm_jsd_graduate_admissions/documents/documents/ecm_pro_069003.pdf (last checked: 21/11/2011). Nonetheless, the potentiality of every human being can be invoked by those who defend their protection in regard to limitative arguments. See, for instance, John Finnis, *op. cit.*, at 10, where he says that “a being of a rational nature can, with sufficient health and maturity, make choices (because understanding different kinds of benefit and different ways to one and the same benefit), and by making choices one shapes one’s character/identity [...] A day-old baby has—*radically*, albeit not yet in actually usable form—this capacity to choose (with such self-determining, intransitive effects). A mouse, whether day-old or mature, lacks that radical capacity, though even as a day-old embryo it has the radical capacity, unlike an acorn or an oak seedling, to run.” I prefer not to rely on potentiality exclusively, because even persons who cannot recover from conditions that impede certain actions deserve protection for the mere fact of their having a *human nature*, being they therefore endowed with inherent and *non-conditional worth*. On the other hand, Roberto Andorno has mentioned that “the recourse to human dignity reflects a real concern about the need to ensure respect for the inherent worth of every human being. This concern is far broader than simply ensuring “respect for autonomy” for the simple reason that it also includes the protection of those who are not yet, or are no more, morally autonomous (newborn infants, senile elderly, people with serious mental disorders, comatose patients, etc.). As noted above, this broad view of the

contrary both to the way in which law should serve human beings²⁰⁸ and to the non-conditionality of human dignity, according to which the *mere existence* of a human being endows him/her with a dignity that cannot be made dependent on *any* circumstance different from his/her being a member of the human race or on *any* contingent condition, as for instance the degree of development of his reasoning, consciousness or abilities,²⁰⁹ or his/her entering into relations with entities with a State nature. Moreover, I consider that the *pro homine* principle demands protecting everyone who is human even when in doubt.²¹⁰ In relation to this, inherent dignity refers to the respect and protection that are owed to a human being recognized as such out of the simple fact of her existence, even if her personality is not recognized by law as it should, which would be an autonomous violation of her human dignity and rights.²¹¹

Therefore, whatever discourse one prefers, there are some general largely uncontroversial features of human dignity with important legal consequences: its inherent character and non-conditionality, and its enjoyment by every member of the human species for the mere fact of that belonging, recognized by others or not.

Another feature of human dignity is its inalienability, based on its inseparability from human beings. It delegitimizes attempts to ignore it, either by potential agents of violation or even by the same victim.²¹² This delegitimation of ignoring human rights is found in primary and

concept of human dignity is explicitly enshrined in international human rights law, which assumes that the worth of human beings does not rest on their actual intellectual or moral abilities, but merely on their *human condition*." Text found in: Roberto Andorno, op. cit., at 7.

²⁰⁸ See John Finnis, op. cit., pp. 7-9.

²⁰⁹ Ibid.

²¹⁰ In cases of doubt such as that of when life begins, rather than simplistic theories put forward by Courts such as the European Court of Human Rights, that ultimately endorse legal systems' conditioning of when to recognize personality, ignoring that it is a right of every *human being* to have it recognized, it should be thought that in cases of doubt, *pro homine* interpretations are to be applied (the *pro homine* principle, thus, not only serves to choose the most favorable norm, but also the interpretation most favorable to the protection of human dignity). Thus, if someone is not sure when life begins, is it not better to not risk killing a human being than risking it? In my opinion, the *pro homine* principle demands the election of both the most favorable norms and interpretations.

²¹¹ Cf. Rita Joseph, op. cit., at 67, 171, 216.

²¹² Cf. Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*, op. cit., pp. 45-46, where Kant argued that "the practical imperative will be as follows: So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only. We will now inquire whether this can be practically carried out. Firstly, under the head of necessary duty to oneself: He who contemplates suicide should ask himself whether his action can be consistent with the idea of humanity as an end in itself. If he destroys himself in order to escape from painful circumstances, he uses a person merely as a mean to maintain a tolerable condition up to the end of life. But a man is not a thing, that is to say, something which can be used merely as means, but must in all his actions be always considered as an end in himself. I cannot, therefore, dispose in any way of a man in my own person so as to mutilate him, to damage or kill him. (It belongs to ethics proper to define this principle more precisely, so as to avoid all misunderstanding, e. g., as to the amputation of the limbs in order to preserve myself, as to exposing my life to danger with a view to preserve it, etc. This question is therefore omitted here.) Secondly, as regards necessary duties, or those of strict obligation, towards others: He who is thinking of making a lying promise to others will see at once that he would be using another man merely as a mean, without the latter containing at the same time the end in himself. For he whom I propose by such a promise to use for my own purposes cannot possibly assent to my mode of acting towards him and, therefore, cannot himself contain the end of this action. This violation of the principle of humanity in other men is more obvious if we take in examples of attacks on the freedom and

secondary international norms and rules, such as those according to which it is unlawful to justify violations of human rights, international humanitarian law or peremptory law based on the consent of the victim or on previous wrongful acts attributable to a victim.²¹³

Altogether, the non-conditional character of human dignity is one of its central elements and demands the effective protection of the inherent worth of *all* human beings.²¹⁴ This may explain why authors as John Knox are wary of provisions that allegedly seek to protect individuals from non-state abuses but can actually be used to subject the enjoyment of human rights to some conditions as compliance with obligations towards collective actors.²¹⁵ In turn, the draft Universal Declaration of Human Responsibilities drafted by the InterAction Council mentions in article 7 that “[e]very person is infinitely precious and must be protected unconditionally”, linking the recognition of the inner worth of *all* human beings with the unconditional character of its protection, that must be given against every conduct that can disregard human dignity, including that of individuals. Those two considerations suggest that such mandatory protection must be made in a way that is respectful of human and fundamental rights, being it thus required that it is proportionate and lawful.

That being said, the ideas presented until now do not suggest that *all* rights based on and protecting human dignity are absolute, admitting no restrictions; and for sure they do not imply that violating the rights of others is permitted.²¹⁶ Concerning this, the protection of dignity both empowers and restricts, demanding or permitting that some rights be restricted under certain circumstances to protect individuals, on the condition that those restrictions are necessary,

property of others.” Likewise, see Roberto Andorno, *op. cit.*, at 9, where the author wrote that “the notion that individual freedoms can be restricted to ensure respect for human dignity is neither new, nor specific to the instruments dealing with biomedicine. Rather on the contrary, such restrictions are quite common in legal documents, both at the domestic and international level. Just to give two examples: labour laws do not allow workers to waive their basic rights and benefits or to accept working conditions close to slavery; contract laws do not recognize the validity of contracts containing terms that are unfairly burdensome to one party and unfairly beneficial to the other.” Additionally, see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 540-541, 547.

²¹³ See articles 60.5 of the Vienna Convention on the Law of Treaties of 1969 and of the Vienna Convention on the Law of Treaties between States and international organizations or between international organizations of 1986, 50 of the articles on the Responsibility of States for Internationally Wrongful Acts drafted by the International Law Commission, or 53 of the version of the draft articles on the responsibility of international organizations adopted by the International Law Commission at its sixty-third session in 2011.

²¹⁴ Article 1 of the Universal Declaration of Human Rights, for instance, mentions that “[a]ll human beings are born free and equal in dignity and rights” (emphasis added).

²¹⁵ Cf. John H. Knox, “Horizontal Human Rights Law”, *op. cit.*, pp. 1-3, 5, 7, 13-16, 18, 20, 34-37, 39-40, 47.

²¹⁶ Cf. John H. Knox, “Horizontal Human Rights Law”, *op. cit.*, p. 10; Roberto Andorno, *op. cit.*, pp. 8-9; Jack Donnelly, *op. cit.*, at 306. That some rights such as the right to not be tortured or subjected to cruel, inhuman or degrading treatments are absolute is due to their peremptory character, and they are recognized as overriding *all* opposing claims. See Paolo G. Carozza, *op. cit.*, at 79; ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 153-157; European Court of Human Rights, *Case of Al-Adsani v. The United Kingdom*, Judgment, 21 November 2001, paras. 30-31, 60, 61, 65, where the Court recognized the peremptory character of the prohibition of torture but failed to implement all the consequences of that conclusion, as explained in the Joint Dissenting Opinion of Judges Rozakis and Caflich Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić.

proportionate, and comply with some formal and substantive requirements. Additionally, legal institutions such as the prohibitions of the *abus de droit* and of manipulating human rights frameworks to “destroy” the rights of others, and as the principle of *ex iniuria jus non oritur*, can be resorted to as well in order to protect individuals.²¹⁷

The features of human dignity that have been explored are legally relevant because they refer to the foundation of human rights, and hence ought to guide the interpretation of human rights and humanitarian guarantees, because according to the teleological principle enshrined in Article 31 of the two Vienna Conventions on the Law of Treaties,²¹⁸ an international norm has to be interpreted in its “context and in light of its object and purpose.” Apart from that teleological dimension, features of human dignity also relevant when interpreting those human rights and guarantees insofar as the value of human dignity is certainly the most relevant one when the value-based interpretation that international human rights jurisprudence calls for is conducted.

In that regard, as mentioned by the Inter-American Court of Human Rights in its Judgment to the case of *González et al. (“Cotton Field”) v. Mexico*, human rights norms are to be interpreted in light of the values underlying the human rights framework. This idea was expressed in the following terms:

“[I]nternational human rights law is composed of a series of rules (conventions, treaties and other international documents), and also of a series of values that these rules seek to develop. Therefore, the norms should also be interpreted based on a values-based model that the Inter-American System seeks to safeguard from the perspective of the “best approach” for the protection of the individual.”²¹⁹

As indicated above, another important aspect of human dignity worth studying is the idea that human dignity has positive and restrictive normative implications. In other words, both entitlements and limitations are derived from it and required for its effective protection. Briefly, it can be said that the demands derived from the respect owed to human dignity both “empower” individuals and “constrain” behaviors contrary to that respect.²²⁰ Both effects are essential in a human rights framework for it to be comprehensive: law ought to recognize rights to have

²¹⁷ Cf. Regarding these principles, see Allan Gerson, “Trustee-Occupant: The Legal Status of Israel’s presence in the West Bank”, *Harvard International Law Journal*, Vol. 14, 1973, at 5; Separate Opinion of Judge Ammoun to the Judgment of the International Court of Justice of 5 February 1970 in the *Case concerning the Barcelona Traction, Light and Power Company, Limited*, at pp. 297, 325, paras. 7, 32. Additionally, see the quote of H. Lauterpacht found in Michael Byers, “Abuse of Rights: An Old Principle, A New Age”, *McGill Law Journal*, Vol. 47, 2002, at 391, footnote 2; articles 5 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights, 30 of the Universal Declaration of Human Rights, 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or 29.a of the American Convention on Human Rights.

²¹⁸ Between States and involving international organizations, adopted in 1969 and 1986, respectively.

²¹⁹ See Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, Judgment, op. cit., para. 33.

²²⁰ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp.540-541; Roberto Andorno, op. cit., pp. 8-9.

essential needs of protection and respect satisfied and basic freedoms guaranteed, while at the same time outlawing and responding to conduct contrary to those entitlements. Out of logic and consistency, every entity that can impede the enjoyment of rights linked to human dignity should have responsibilities. These two legal implications of human dignity are thus complementary.

In light of what has been explained in this section, one should ask what the legal implications of what human dignity demands are, for instance concerning protection from all abusers. If the qualities of dignity demand protection from non-state abuses and no implementation takes place or required legislation is not enacted, there is a wrongful act due to the breach of an obligation to adopt measures required to make human rights effective, and measures must be adopted *de lege ferenda*. In case it is possible to protect victims under existing law and all that is needed is a change in interpretation and action, that change must take place.

Certainly, historically the notion of *dignitas* had an “aristocratic” connotation once,²²¹ and some historical understandings of dignity have emphasized status or the fulfillment of duties,²²² but the notion of human dignity that human rights are based on highlights the worth of *every single* human being, no matter what, and therefore legal manifestations must recognize that worth.²²³ This is consistent with the ordinary meaning of the word dignity. The Oxford English Dictionary, for instance, provides the following definition of dignity: “1. The quality of being worthy or honourable; worthiness, worth, nobleness, excellence.”

An interesting question must be asked: does the concept of human dignity equate with human rights? The answer is a negative one because, as Jack Donnelly rightly mentions, they are different but related concepts.²²⁴ They have a link, which is the fact that human rights are entitlements to have human dignity respected and protected.²²⁵

Unlike alternative mechanisms and traditions, the notion of dignity as a non-conditional inherent worth of all individuals is remarkable because it refrains from conditioning the enjoyment of human rights on things as the fulfillment of duties, the meeting certain requirements, having certain status, or the absence of goals that can override human entitlements. This is manifested in law partly as their nature as “trumps” over multiple claims (some human rights have this feature

²²¹Cf. Oliver Sensen, op. cit., where it is considered that “The *traditional* paradigm of human dignity is related to an older *aristocratic* usage of ‘dignity’. The *aristocratic* usage is familiar from common parlance if, for instance, one speaks of a ‘dignitary’ or a ‘baroness who carries herself with dignity’. The *aristocratic* usage of ‘dignity’ can be seen in the ancient Roman *dignitas*²⁶, according to which dignity is an elevated position or rank. In ancient Rome *dignitas* was a concept of political life: It expressed the *elevated position* of the ruling class.”

²²² Ibid.; Roberto Andorno, op. cit., p. 8.

²²³ Professor Schachter believes that the notions of (intrinsic) dignity and (inner) worth employed in philosophical analyses and legal texts, as the Charter of the United Nations, are synonyms or exchangeable. Cf. Oscar Schachter, op. cit., p. 849.

²²⁴ Cf. Jack Donnelly, op. cit., at 303.

²²⁵ Ibid.; Roberto Andorno, op. cit., at 10.

in an absolute manner, which are those with a peremptory character).²²⁶ This feature of human rights is related to what Oliver Sensen and Seifert describe as the non-relational property of human dignity, according to which dignity is a value:

“[T]hat does not change according to the different circumstances or relations in which a human being finds himself.”²²⁷

As entitlements to the respect and protection of human *dignity*, the scope of human rights should not be limited to protection from official power, and so ought to protect from non-state abuses too, as the horizontal effects of those rights hint. Hence, they must transcend a mere State-individual relationship. Thus, while human rights are often defended against the State, the basis of those invocations is human dignity,²²⁸ which also demands protection in other events.

Additionally, being the protection of human dignity the key element of human rights, relativist arguments that hold that some cultural or other practices contrary to them ought to be respected should not prevail,²²⁹ given the imperative that human rights are protected universally and comprehensively. This does not mean that the only way in which they can be protected depends on the creation of obligations: sometimes they are necessary, but not always. As discussed in Chapter 8, there are multiple mechanisms to promote and protect human rights and guarantees, even from non-state abuses, that differ from the creation of obligations.

When they are necessary or, despite not being so, it is convenient to create them, the fulfillment of obligations must not be made a condition for the enjoyment of human and fundamental rights, because that would be detrimental to the whole edifice of human rights. As John Knox comments, this logic could be taken advantage of by States to abuse or unduly restrict many rights;²³⁰ and as mentioned by Donnelly human rights are based on the assumption that they are inherently enjoyed by human beings without prior requirements of status or action for that enjoyment being admissible (although restrictions can sometimes be permitted or even required).²³¹

Therefore, duties in a framework of human rights must respect fundamental rights and seek the recognition, respect and sometimes even the protection of human dignity; and restrictions of those rights that are necessary for protecting human rights are admissible when proportionate. For instance, the logic that someone (B) has to respect rights flowing from the

²²⁶ Cf. James Griffin, *op. cit.*, at 341; Jack Donnelly, *op. cit.*, p. 306.

²²⁷ See Oliver Sensen, *op. cit.*

²²⁸ See Oscar Schachter, *op. cit.*, at 851, where it is argued that “[t]here is also a “procedural” implication [of a concept of personality based on human dignity] in that it indicates that every individual and each significant group should be recognized as having the capacity to assert claims to protect their essential dignity.”

²²⁹ See Roberto Andorno, *op. cit.*, at 12; Jack Donnelly, *op. cit.*, pp. 303, 314-315.

²³⁰ See John H. Knox, “Horizontal Human Rights Law”, *supra*, pp. 2-3, 16, 34, 37.

²³¹ Cf. Jack Donnelly, *op. cit.*, pp. 307-308.

dignity of an individual (A) is consistent with human rights, unlike the idea that A *has* and *can* enjoy rights if she fulfills duties that bind A towards a collective entity or enjoys a given status. Human beings automatically have human rights and dignity, which is a non-conditional consideration. These reasons explain why attempts to introduce a duty-based logic have been met with opposition both with philosophical and legal arguments.

- | |
|---|
| <ul style="list-style-type: none">• B (anyone) must respect the inherent rights of A = consistent with dignity• The rights of A exist as long as some conditions are met = contrary to the non-conditional, inherent and inalienable nature of dignity |
|---|

Figure 1: Dignity-based rights as different from relational conceptions of rights

A framework that is consistent with the logic that human rights are enjoyed by all human beings with no further requirements than their belonging to humanity, that ensures that States and other duty-bearers will retain their obligations, and that protects individuals from non-state violations effectively directly or (when permissible and effectively) indirectly, can overcome criticisms based on fears that non-state responsibilities will undermine it. Thus, it is convenient that projects and initiatives to protect from non-state abuses do not introduce conditions to the exercise of human rights in the form of converse duties, which are those owed to a collectivity, due to their being prone to being used to condition the enjoyment of rights, and instead employ correlative obligations, which are those owed *to individuals* as demanded by their dignity.²³²

While human rights and guarantees serve to protect and ensure the respect of human dignity, encompassing legal entitlements and guarantees derived from aspects of that dignity,²³³ the principle-value of human dignity itself is not without specific direct legal consequences.

In this sense, besides its relevance in the interpretation of human rights and guarantees, it has been considered by some that there are cases in which dignity has concrete legal consequences, being it possible to directly protect human dignity without the mediation of concretized human rights or guarantees that (are meant to) specify and support its demands. This is illustrated, for instance, by the prohibition of experimenting on human beings without their consent with the aim of obtaining material or scientific profit, which would amount to making an

²³² Cf. John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 1-3, 20, 32-33, 37-38, 40, 47.

²³³ Cf. Roberto Andorno, op. cit., p. 10. While James Griffin considers that the content of dignity is vague or broad, to be settled with proposals based on ethics and legal implications, I consider that dignity is the best foundation of human rights, especially because it is the one that is more encompassing regarding the protection of essential features of human beings. In my humble opinion, just as the functional accounts that he criticizes, the importance that Griffin places on "normative agency" for identifying human rights limited is narrow for over-focusing on some implications that are already protected in a framework founded upon human dignity and leaving other guarantees offered by human dignity outside the scope of human rights. The opinion of James Griffin can be found in: James Griffin, op. cit., pp. 341-344, 346-348, 350.

individual a means towards that gain instead of regarding him as an end in himself, as explained by Roberto Andorno.²³⁴

This does not deny the relevance of human rights, because frequently the concept of dignity is too broad or vague so as to permit to solve individual cases, and it is certainly useful that human rights and other norms offer more detailed manifestations of their foundation,²³⁵ although sometimes the content of human rights itself is vague or indeterminate and the concept of dignity can help to interpret them.

Besides handling notions of dignity, secular and religious conceptions and traditions also have opinions concerning human rights, the analysis of which may be useful, as said above.

As Donnelly reflects, there are different traditions with conceptions of human dignity, but their analysis is not useful for our purposes when they place conditions (different from being an individual) to the enjoyment of basic rights and thus exclude some individuals.²³⁶ Some interpretations of traditions and religions endorse ideas of human rights expressly or implicitly, as revealed by the fact that some have expressly alluded to such recognition, as happens with the conception of Judaism described by the Israeli NGO B'Tselem, that stresses that because of their nature all human beings have worth and value and must thus be respected. Some Catholic teachings, in turn, endorse the belief in human rights derived from the inherent and *non-conditional* dignity of every individual.²³⁷

Having examined the previous general considerations, I will now turn to exploring some legal implications of the absolute foundational value of human dignity in relation to protection from non-state abuses.

To begin with, different authors, as Clapham, Jochnick, Bellal and Casey-Maslen, agree that a system based on human dignity is incompatible with the exclusion of victims of non-state abuses from the legal protection of human rights.²³⁸ To my mind, this conclusion is correct

²³⁴ Ibid., pp. 5, 7, 10.

²³⁵ Ibid

²³⁶ Cf. Jack Donnelly, op. cit., pp. 303, 305, 307-308, 310, 312.

²³⁷ See the following previously examined references: http://www.btselem.org/about_btselem; Pope John XXIII, *Encyclical Pacem in Terris*, op. cit., paras. 10, 14, 20, 24, 26, 41, 44, 48, 50, 73, 89, 104, 112, 122, 132, 144, 145, 158; "Human dignity central to Catholic faith, Archbishop Dolan teaches", available at: <http://www.catholicnewsagency.com/news/human-dignity-central-to-catholic-faith-archbishop-dolan-teaches/> (last checked: 09/12/2011). Pope Benedict XVI has written that "Jesus' innermost dignity cannot be taken from him- The hidden God remains present within him. Even the man subjected to violence and vilification remains the image of God- Ever since Jesus submitted to violence, it has been the wounded, the victims of violence, who have been the image of the God who chose to suffer for us [...] God is on the side of those who suffer" (emphasis added). Passage found in: Pope Benedict XVI, *Jesus of Nazareth: Holy Week: From the Entrance into Jerusalem to the Resurrection*, op. cit., at 140 (epub version).

²³⁸ Cf. Chris Jochnick, op. cit., at 60, where it is held that "Human dignity makes certain claims on all actors, state and non-state, regardless of custom or consent [...] the emphasis on the human person places human rights beyond the narrowness of particular treaties or, at a minimum, suggests a broad interpretation of these treaties and their

because such exclusion is contrary to the inalienability, non-conditionality and effectiveness of dignity. After all, it is undeniable that in practice human dignity is and can be disregarded by diverse entities. As John Locke considered:

“Should a robber break into my house, and with a dagger at my throat make me seal deeds to convey my estate to him, would this give him any title? Just such a title, by his sword, has an unjust conqueror, who forces me into submission. The injury and the crime is equal, whether committed by the wearer of a crown, or some petty villain.”²³⁹

Moreover, all victims deserve preventive or responsive protection, because their common human dignity is equally threatened. This is recognized, among others, in article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, according to which:

“Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions” (emphasis added).

Truly, excluding victims of non-state entities amounts to conditioning the recognition of the entitlement to the protection of human dignity to the presence of State violations, which is unfair in extra-legal terms and contrary to the tenets of the protection and respect of dignity, especially because as human beings can be victimized by State and non-state misbehavior alike, placing requirements of that kind pertaining the identity of offenders runs counter to non-conditionality. Furthermore, this would generate impunity, leaving some victims unprotected and vulnerable to future violations, which instead of being deterred would be encouraged. And as examined previously, such exclusion is also contrary to the universality, interdependence and integrality of human dignity and the rights based on it.

Therefore, human dignity must be protected from *all abuses* and potential agents of violation, lest its protection is illusory and incomplete. It is interesting to recall that Chris Jochnick considered that:

“A broader conception of human rights is consistent with their original foundation in human dignity. International law generally is understood to be based on a mix of customary practice and consent. States are either bound by those norms that achieve the distinction of customary law or

corresponding duties. Thus human rights obligations linked to human dignity may be violated by a host of actors including non-parties to the treaties; the exclusive focus on the state must be viewed as pragmatic and contingent, rather than necessary.” Likewise, see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 534, 546, where Clapham says that “[o]nce one accepts the proposition that human rights are ultimately concerned with the protection of human dignity and that assaults on that dignity have to be prevented, remedied, and punished, there is little room left for arguments about the state or non-state character of the assailant [...] [i]f the overriding aim is to protect the victim’s dignity, then that victim has to be protected from everyone, states and non-state actors. It matters not whether the actor has public functions, is financed by the state, or is simply a private individual.” Oscar Schachter, in turn, considered that “[a]ffronts to dignity may come from nonofficial sources.” See Oscar Schachter, op. cit., p. 852. Furthermore, see Annyssa Bellal and Stuart Casey-Maslen, “Enhancing Compliance with International Law by Armed Non-State Actors”, *Goettingen Journal of International Law (GoJIL)*, Vol. 3, 2011, pp. 186-187.

²³⁹ Cf. John Locke, *Second Treatise of Government*.

those that they explicitly consent to through treaties. However, human rights law has in large measure defied these narrow categories by suggesting an additional foundation—human dignity.

Human dignity makes certain claims on all actors, state and non-state, regardless of custom or consent. The Universal Declaration of Human Rights and the twin covenants of 1966 do not merely recognize those rights that are considered customary or to which states have previously consented, but also acknowledge those rights derived ‘from the inherent dignity of the human person’²⁴⁰ (emphasis added).

As a consequence, identifying one violation as a violation of human rights/human dignity makes the protection of those affected imperative. In light of this consideration, statements as the following by Amnesty International regarding violence against women are to be examined, considering that the underlying rationale is applicable to other violations and that public responses are but one form of protection measures required by legal principles and basic tenets:

“One of the achievements of women’s rights activists has been to demonstrate that violence against women is a human rights violation. This changes the perception of violence against women from a private matter to one of public concern and means that public authorities are required to take action.”²⁴¹

The previous conclusions are further supported by the legal principle of effectiveness, according to which the interpretation and implementation of norms must seek that they have practical effects. In this regard, the European Court of Human Rights mentioned in the *Rantsev* Case that:

“[T]he object and purpose of [a human rights treaty], as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective”²⁴² (emphasis added).

According to that principle, In my opinion, denying human rights and protection to the “unfortunate” victims of non-state misdemeanor limits the effectiveness of the legal protection of human dignity²⁴³ and of human rights, and so alternative interpretations and implementation must be preferred, if available. If not, obstructing norms are to change *de lege ferenda*.

Roberto Andorno, Andrew Clapham and Oscar Schachter, for example, have considered that there are other possible legal implications and dimensions of human dignity that are relevant

²⁴⁰ Cf. Chris Jochnick, op. cit., p. 59-60.

²⁴¹ Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., pp. 121-122.

²⁴² Cf. European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Judgment, 7 January 2010, para. 275. Furthermore, concerning the principle of effectiveness see: Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja to the Preliminary Objections Judgment of the International Court of Justice of 1 April 2011 in the *Case concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, para. 22; Inter-American Court of Human Rights, *Case of Baena-Ricardo et al. v Panama*, Competence Judgment, 28 November 2003, paras. 66-67; European Court of Human Rights, *Case of Giuliani and Gaggio v. Italy*, Application no. 23458/02, Judgment, 24 March 2001, para. 177; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, Tirant Lo Blanch, 2010, at 377.

²⁴³ Human dignity is a value, and its protection a principle. See Oliver Sensen, *supra*, where the author sustains that “dignity [...] is often referred to as an inherent value of human beings[...] Dignity is said to be a value that is ‘incommensurably higher’ than other values”. Roberto Andorno, on the other hand, mentions that “[t]he principle of respect for human dignity holds a prominent position”, as written in: Roberto Andorno, op. cit., p. 4.

for our purposes. At least the following implications of the legal protection of the inherent worth of human beings can be found:

a) First of all, human dignity demands that individuals are not mistreated, denigrated, attacked or injured.²⁴⁴ Therefore, dignity legitimizes claims to protection from these acts, because they are contrary to it. It is interesting to note that the concept of respect is closely linked to that of dignity. Oliver Sensen, for example, considers that contemporary conceptions of dignity demand the respect of individuals.²⁴⁵

This first implication of human dignity is *expressly considered* in several international norms recognizing human rights and guarantees.²⁴⁶

It can be said that it is expressly recognized that human integrity, both physical and psychological,²⁴⁷ is protected because of the *respect* dimension of dignity, a guarantee that is translated into (but not limited to) the prohibition of torture, inhuman, cruel, denigrating and *humiliating* treatments, being humiliating mistreatments and attitudes an affront to human dignity that should be addressed by law, as pointed out by Oscar Schachter and Andrew Clapham.²⁴⁸

Furthermore, the duty of respecting human dignity ought to be placed on all potential perpetrators and requires, among others, prohibiting every entity from making human beings means for achieving ends (as profit, political benefits, etc.). This dimension is exemplified in prohibitions of slavery, forced labor or other violations, which *can be attributable to non-state entities*. Additionally, it requires that the (lawful or not) generation of risks of a negative impact on entitlements based on dignity gives rise to an intensified duty of diligence to prevent those risks

²⁴⁴ Cf. Oscar Schachter, *op. cit.*, at 852; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, at 545; article 4.e of the Statute of the International Criminal Tribunal for Rwanda; ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 44, 158, 162, 168, 173, 176, 183-184, 186, 188, 259, 274-276, 279, 295; articles 5 of the African Charter on Human and Peoples' Rights, 5, 6 and 11 of the American Convention on Human Rights, 4 of the Statute of the International Criminal Tribunal for Rwanda, or 10 of the International Covenant on Civil and Political Rights.

²⁴⁵ Cf. Oliver Sensen, *op. cit.*, where the author wrote that "it is often said that one should respect other people because of their dignity [...] Josef Seifert expresses the contemporary view as follows [...] when we speak of human dignity, we speak of a *morally relevant value*, one which evidently imposes on us a moral call and an obligation to respect it."

²⁴⁶ For instance, Articles 10 of the International Covenant on Civil and Political Rights; 28.2, 37.c and 40 of the Convention on the Rights of the Child; 5.2, 6.2 and 11.1 of the American Convention on Human Rights; 5 of the African Charter on Human and Peoples' Rights, or 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, expressly link the *respect* of human dignity and rights with the prohibition of certain acts, as violent acts, acts that constitute torture, inhuman or degrading treatments, infringements of privacy, exploitation and slavery, or those that ignore the demands of protection in relation to persons in vulnerable conditions that make them more prone to being potential victims of abuses, such as detainees or prosecuted persons.

²⁴⁷ See articles 5 of the American Convention on Human Rights, 5 of the African Charter on Human and Peoples' Rights, and 4.e of the Statute of the International Criminal Tribunal for Rwanda; ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 158, 162, 168, 173, 176, 183-184, 186, 188, 259, 275-276, 279, 295, and footnote 201.

²⁴⁸ Cf. Oscar Schachter, *op. cit.*, pp. 850, 852; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 544-545.

from materializing, as evinced by calls for ensuring the respect of the dignity of detainees or prosecuted persons, for instance.

This duty of intensified diligence has been examined in international case law, as in the case of the *Pueblo Bello Massacre v. Colombia*, concerning which the Inter-American Court of Human Rights declared that the generation of risks of non-state violations of human rights intensified the positive duties of the State that created such risks. Other supervisory bodies have identified the guarantor position or the vulnerability of human beings as other factors that make positive duties of State and other authorities (to protect or to fulfill) more demanding.²⁴⁹

Interestingly, in the *Pueblo Bello* case the Court ruled that the State-created risk it examined had to do with the empowerment and legitimization of non-state actors who afterwards carried out violations of the content of human rights.²⁵⁰ This position is coherent with the jurisprudence of the Court and other international supervisory bodies, which have consistently considered that States must strive to prevent and put an end to violations of human rights committed by non-state actors in their jurisdictions, and to ensure that victims are repaired in those cases.²⁵¹

The previous considerations confirm how inseparable the protection of human dignity is from the protection of persons against non-state threats: insisting on a State-centered paradigm that relies on the false assumption that only States can violate human rights contradicts the content, aims and causes of positive State obligations under human rights law. Factual and ethical critical analyses also challenge the State-centered paradigm, because they indicate how legal fictions surrounding the constructed entity called the State cannot be used in order to deny

²⁴⁹ Cf. Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment, 31 January 2006, paras. 125-126; European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, 30 November 2010, paras. 41, 45-46, 50; Human Rights Committee, General Comment No. 20, op. cit., para. 11; Inter-American Court of Human Rights, *Case of Ximenes-Lopez v. Brazil*, Judgment of 4 July 2006, paras. 138-141; Inter-American Commission on Human Rights, Press Release 114/10, "IACHR Deplores Acts of Violence in Prisons in Brazil"; Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food (art. 11)*, op. cit., para. 15 (where the positive duties of 'protection' and to 'fulfil' are discussed).

²⁵⁰ See Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment of January 31, 2006, paras. 123-131.

²⁵¹ Cf., *inter alia*, Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, op. cit., paras. 166-178, 181; Human Rights Committee, General Comment No. 31, op. cit., para. 8; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 140-153; Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., 87-91; European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Judgment, op. cit., paras. 208, 218-219, 232-233, 285, 287; European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, op. cit., para. 45; European Court of Human Rights, *Case of Mastromatteo v. Italy*, Judgment, 24 October 2002, paras. 67-68; Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, op. cit., paras. 236, 243-247, 252; Inter-American Court of Human Rights, *Case of the "Mapiripán Massacre" v. Colombia*, Judgment, op. cit., paras. 111-115, 123; Inter-American Court of Human Rights, *Case of Ximenes-Lopez v. Brazil*, Judgment, op. cit., paras. 85-87; Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment, op. cit., paras. 112-114; European Court of Human Rights, *Case of N. v. Sweden*, Application no. 23505/09, Judgment, 20 July 2010, paras. 55, 60, 62.

the satisfaction of real needs of human beings, whose existence precedes and conditions that of States and their sovereignty, as mentioned by legal scholars and philosophers.²⁵²

In connection with this, Andrew Clapham argues that the strength of the human rights movement rests partly on the compassion and solidarity with victims and those who suffer.²⁵³ If it is admitted that the acts of a State agent can resemble those of particulars and non-state actors in how they make individuals suffer, and that from a factual point of view non-state entities can also prevent individuals from enjoying guarantees they have, it must follow that individuals must be fully protected from non-state violations as well. Victims deserve protection regardless of who attacks them, and because anyone can make them suffer, they must be protected everywhere and from everyone, given the non-conditional nature of their dignity.²⁵⁴ Regarding this, for example, John Locke mentioned that even in the absence of a State framework individuals are exposed to threats of other individuals,²⁵⁵ and, I might add, of other non-state entities.

Additionally, and from a legal theory standpoint, the respect of human rights and dignity is centered and rests on the person and not on other factors, because it is the individual who must be protected from trespasses and offenses against her dignity, which amount to a breach of its respect. This respect is in consequence also non-conditional or non-qualified, due to its not being

²⁵² It is important to stress that being creations and artificial constructs, the power of States is justified *and* must be oriented towards the protection of human beings, in the furtherance of which it must act. John Locke considered that “the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good; but is obliged to secure every one’s property, by providing against those three defects above mentioned, that made the state of nature so unsafe and uneasy. And so whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home, only in the execution of such laws, or abroad to prevent or redress foreign injuries, and secure the community from inroads and invasion. And all this to be directed to no other end, but the peace, safety, and public good of the people.” Kant, on the other hand, criticized the “attachment to [...] lawless liberty, the fact that [some people] would rather be at hopeless variance with one another than submit themselves to a legal authority constituted by themselves, that [people] therefore prefer their senseless freedom to a reason-governed liberty”, which in turn can be implicitly considered as the condition whose maintenance justifies State power. On these issues, see John Locke, *Second Treaties of Government*; Immanuel Kant, *Perpetual Peace*, Cosimo, 2005, p. 13; “Locke & Kant: Why Form a State?”, available at: <http://tryingliberty.com/2008/06/06/locke-kant-why-form-a-state/> (last checked: 09/12/2011). Regarding the “construct” nature of States, see the Judgment of the International Military Tribunal for the Trial of German Major War Criminals, where it was considered that “Crimes against international law are committed by men, not by abstract entities [States], and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

²⁵³ Cf. Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., at 11, 28, 30, 131.

²⁵⁴ See Elena Pariotti, op. cit., at 96, where she mentions that “the attention on NSAs [non-state actors] may (1) give more relevance to the content of rights and on the actual violations rather than to the form of rights and the legal status of the violator [...] help withdraw human rights from their ambiguous link with state sovereignty and give expression to their inner universality” (emphasis added); Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, op. cit., pp. 4, 46; Chimène I. Keitner, “Rights Beyond Borders”, op. cit., at 113, where the author holds that “International human rights seem particularly well suited to a conscience approach, and thus to extraterritorial application, because they are based explicitly on the intrinsic dignity and worth of individual human beings regardless of geographic location or national membership.”

²⁵⁵ See Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., at 19-20.

based on and limited to one among the different relationships a human being can have, i.e. a relationship with a State. Instead, the underlying logic of is that all threats and conduct that are contrary to human dignity are illegitimate.

Hence, a framework based on human dignity must be human and victim-centered and universal in scope regarding the threats against which protection is provided.

Concerning the *respect* exacted by human dignity, it is interesting to observe that Oscar Schachter points out that such respect has both a subjective dimension, related to the esteem and perception by an actor about a human being, and an objective aspect, that is assessed in terms of how an individual is treated in practice. Both relate to the attitude of third parties towards an individual, but Professor Schachter argues that while both aspects may have legal relevance, the second dimension is more likely to be taken into account when examining cases.²⁵⁶

Complementing this approach, Andrew Clapham indicates that international jurisprudence has gradually taken into account the other side of the relationship when evaluating if a violation has been committed: *the perception of the victim*. This jurisprudence takes into account the feelings, self-esteem, intensity of suffering and outrage of a victim in relation to a treatment he has been subjected to, being those elements relevant to assess if a breach of the respect of dignity has taken place. For Clapham, this perspective entails a shift from focusing on the perpetrator to focusing on the victim,²⁵⁷ and so forms part of a trend to focus on individuals.

Some supervisory bodies have adopted this approach but are cautious to avoid unduly affecting respondents. Such moderation is necessary, because of possible unreasonable or exaggerated reactions of individuals, which if endorsed uncritically could in turn jeopardize guarantees of the rule of law and the principle of legality, more precisely the latter's elements of accessibility and foreseeability.²⁵⁸ For this reason, bodies as the International Criminal Tribunal for the former Yugoslavia have tempered the analysis of the victim's perspective with the requirement to take into account objective elements, requiring that "the humiliation to the victim must be so intense that the reasonable person would be outraged" to consider that a violation of dignity has been committed.²⁵⁹

Another jurisprudential development related to the centrality of victims has to do with the necessity of examining the concrete situation of a victim to decide upon certain legal questions,

²⁵⁶ See Oscar Schachter, *op. cit.*, p. 849.

²⁵⁷ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 542-543.

²⁵⁸ Cf. European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, *op. cit.*, paras. 185-187.

²⁵⁹ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 542-543.

as some related to admissibility, e.g. the exhaustion of domestic remedies or the existence of a significant disadvantage in the European regional system of human rights.

Concerning this, among the elements of the situation of a victim that international bodies have considered relevant are the material and economic conditions of the victim/applicant, her fear and perceptions (tempered with objective elements), and the social context in which victims are, as mentioned in the case *Korolev v. Russia* of the European Court of Human Rights or in the Eleventh Advisory Opinion of the Inter-American Court of Human Rights, among others.²⁶⁰

Steps as these highlight the necessity of a complete protection of all victims and of making victims the main object of legal attention. As a result, they support the protection of victims from all abuses, State or not, which is possible under international law. This does not mean, however, that direct international legal mechanisms must always be set in motion against all non-state violations. Nevertheless, mechanisms from other legal systems and levels of governance must always have a prospect of effectiveness, as commented by the European Court of Human Rights in relation to cases where non-state abuses have been invoked.²⁶¹ If they do not have this prospect, international substantive or procedural action is necessary to not leave victims undefended, at least before serious violations, as will be examined in Chapter 4.

b) Alongside the call for respecting human dignity, which is related to the “constraining” effect of dignity referred to previously in this section, its legal protection calls for “empowering” human beings. According to this idea, there are some rights that are essential for the enjoyment of a dignified human life. Besides being complementary to legal guarantees that forbid infringements against individuals, those rights protect positive or freedom-related entitlements connected to dignity. Granted, violations of the empowering, freedom and positive-related rights amount to disrespecting the inherent dignity of a human being. A distinctive aspect of this

²⁶⁰ See Inter-American Court of Human Rights, Advisory Opinion OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies* (art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), 10 August 1990, paras. 25-31, 33, 35; European Court of Human Rights, First Section, *Case of Korolev v. Russia*, application no. 25551/05, Decision of Admissibility, 1 July 2010, where it was held that “The severity of a violation should be assessed, taking account of both the applicant’s subjective perceptions and what is objectively at stake in a particular case [...] the impact of a pecuniary loss must not be measured in abstract terms; even modest pecuniary damage may be significant in light of the person’s specific condition and the economic situation of the country or region in which he or she live [...] a violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting pecuniary interest [...] The applicant’s subjective feeling about the impact of the alleged violations has to be justifiable on objective grounds” (emphasis added).

²⁶¹ Regarding the effectiveness that domestic mechanisms must have and the prospect of success of the protection of human rights with their use, see European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, op. cit., paras. 36-38. Concerning the other issues, see Concurring Opinion of Judge A.A. Cançado Trindade to: Inter-American Court of Human Rights, *Case of Castillo-Petrucci et-al v. Peru*, Judgment (Preliminary Objections), op. cit., paras. 5, 11, 20; Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment (Preliminary Objections), 26 June 1987, paras. 58, 60, 62, 67, 70; Inter-American Court of Human Rights, *Case of Fairén-Garbi and Solís-Corrales v. Honduras*, Judgment (Preliminary Objections), 26 June 1987, paras. 58, 60, 62, 67, 70; Inter-American Court of Human Rights, *Case of Godínez-Cruz v. Honduras*, Judgment (Preliminary Objections), 26 June 1987, paras. 61, 63, 65, 70, 73.

implication is that pertinent rights are concrete manifestations of the empowering dimension of dignity.

Concerning this, Andrew Clapham, for instance, argues that the inherent dignity of individuals requires that their autonomous choices be protected.²⁶² In the end, there is a link between this legal manifestation of dignity and rights that materialize it. In consequence, dignity protects human rights that guarantee non-interference with voluntary and freely adopted decisions and manifestations of individuals, such as the freedoms of association, of speech, of movement, of conscience, of opinion and of religion, among others. Non-state actors can certainly interfere with those decisions (and the enjoyment of all other human rights),²⁶³ and therefore protection from those interferences must be given. Additionally, since all dimensions of dignity are relevant, human beings must be protected from decisions and choices of others that are contrary to their dignity.

c) A third implication of human dignity is related to the interdependency of human rights. As domestic and international jurisprudence have demonstrated, exaggerating the distinctions of categories of rights may contribute to undermine the human rights framework because human dignity is integral and all its demands must be protected, and also because denying the enjoyment of some rights may adversely affect the enjoyment of other rights, besides ignoring how similar rights classified in different categories may be in some respects.

Concerning this, for example, it has been said that the right to life is to be understood as the right to a dignified life, requiring sometimes positive duties of protection of third parties such as the State, and not merely demand refraining from attacks for that right to be effectively guaranteed.²⁶⁴ It thus requires the satisfaction of essential needs that allow human beings to fully develop their potentials and have a dignified quality of life.²⁶⁵ Likewise, scholars have mentioned

²⁶² Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 546. Similarly, see Oscar Schachter, op. cit., at 851.

²⁶³ *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, op. cit., paras. 6, 51, 52; Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011, at 13.

²⁶⁴ See Human Rights Committee, General Comment no. 06, *The right to life (art. 6)*, 30 April 1982, para. 5, where the Committee held that "the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection [...] it would be desirable for States [...] to take all possible measures to reduce infant mortality and to increase life expectancy"; European Court of Human Rights, *Case of Mastromatteo v. Italy*, Judgment, 24 October 2002, paras. 67-68; European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Judgment, op. cit., paras. 218-219; Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, op. cit., paras. 243-245.

²⁶⁵ See, Inter-American Court of Human Rights, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Judgment, 19 November 1999, para. 144, where the Court said that "the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee

that dignity demands that individual “essential needs” are satisfied.²⁶⁶ This third implication of dignity is reflected in the third of the four freedoms envisaged by Franklin Roosevelt in his 1941 State of the Union address: freedom from want,²⁶⁷ which tries to secure a “healthy peacetime life” for every human being.²⁶⁸ The notion of this freedom is so important that it is expressly mentioned in the Preamble to the Universal Declaration of Human Rights.²⁶⁹

Moreover, International treaties dealing with Economic, Social and Cultural Rights link dignity with the satisfaction of those rights -which are interdependent with other rights based on human dignity-, for instance concerning the relationship between the right to education and human dignity.²⁷⁰ Such connection, as that of the rights to work and living conditions that are not degrading and permit satisfying basic needs, is also mentioned by Schachter concerning guarantees of human dignity.²⁷¹

The link of this implication of dignity with the object of this text is the following: just as it would be inconsistent to deny the character of human rights to rights that require positive means of implementation and satisfaction, given their interdependency and equal value, because some individuals would be left unprotected in relation to the enjoyment of what their dignity entitles them to, it is also legally contradictory and ethically unsound to deny legal protection to victims of non-state actors. Furthermore, just as even civil and political rights require measures of protection and facilitation, so it is widely accepted that authorities must protect human beings from non-state violations.²⁷²

the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it” (emphasis added); Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 545-546. This aspect of the right to life and of human dignity is all the more pressing in a world in which so many suffer from poverty, hunger, famine and starvation, a poignant fact exposed, among others, by the Food and Agriculture Organization of the United Nations (FAO). See Food and Agriculture Organization of the United Nations, *The State of Food Insecurity in the World: Economic crises – impacts and lessons learned*, Rome, 2009; United Nations, *A more secure world: our shared responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, A/59/565, 2 December 2004, paras. 22, 45, 145.

²⁶⁶ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 546.

²⁶⁷ See Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., at 38.

²⁶⁸ Cf. Franklin Delano Roosevelt, *The Four Freedoms*, State of the Union address to Congress, Speech delivered on 6 January 1941, available at: <http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm> (last checked: 13/12/2011).

²⁶⁹ See “Freedom from Want/Freedom from Poverty”, available at: http://www.everyhumanhasrights.org/index.php?option=com_content&view=article&id=17:freedom-from-want-freedom-from-poverty&catid=1:udhr; Preamble to the Universal Declaration of Human Rights, where it is said that “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people”.

²⁷⁰ On the concrete rights mentioned above and their relation to human dignity, see articles 13 of the International Covenant on Economic, Social and Cultural Rights and 13 of the Protocol of San Salvador.

²⁷¹ Cf. Oscar Schachter, op. cit., pp. 851-852.

²⁷² See, for instance, article 4 in conjunction with articles 43 and 44 of the Convention on the Rights of Persons with Disabilities; Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006, para. 4 (the “UNMIK case”).

In consequence, since human rights address different essential human needs, deriving “from the inherent dignity of the human person,”²⁷³ those needs must be protected whenever their satisfaction is threatened. Therefore, law cannot support violations by means of its silence and omission, since they generate suffering. As Louis Henkin commented concerning principles in international law, good sense ought to “triumph [...] over the limitations of concepts and other abstractions.”²⁷⁴

Legal developments support the necessity of addressing non-state conduct when it can threaten needs and guarantees stemming from human dignity. Some have taken place in the fields of international humanitarian law and of international criminal law, and consist in the existence of norms that protect human dignity and prove how non-state actors as non-state groups and individuals may be addressees of international norms,²⁷⁵ confirming that they can be subjects of international legal responsibilities for the purposes of ensuring the protection of human dignity and not only be possible rights-holders. Interestingly, Hans Kelsen considered that the evolution of international law involved an individualization of responsibility,²⁷⁶ which holding non-state actors as duty-bearers contributes to achieve.

Moreover, doctrine and international authorities agree that some violations of international criminal law amount to human rights violations, showing how norms with different structures, i.e. those that confer rights based on dignity and those that protect that dignity in a non-rights form (human guarantees) can have the same purposes and complement each other. Three additional ideas must be considered:

²⁷³ The Preamble to the International Covenant on Economic, Social and Cultural Rights mentions that the rights recognized therein “derive from the inherent dignity of the human person”, just like the International Covenant on Civil and Political Rights, and the Preamble to the Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”) mentions that there is a “close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person”.

²⁷⁴ Cf. Bruno Simma and Philip Alston, “The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles”, *Australian Yearbook of International Law*, Vol. 12, 1988-1989, p. 108.

²⁷⁵ See United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, p. 9; *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference*, T.M.C. Asser Press, 2009, pp. 174-175; Roland Portmann, op. cit., pp. 276-277, 280-281. While U.S. judge Leval has considered that criminal sanctions of corporations can undermine the purposes of criminal law because those responsible for the “corporation’s misdeeds” may evade responsibility as a result, I disagree, because the responsibility of entities involved in violations is complementary and not exclusive, as seen in Chapter 7, *infra*. The opinion of judge Leval is found in: Concurring Opinion of Judge Leval to: United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010, at 35. Moreover, see *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, op. cit., paras. 20, 31, 83, 105.

²⁷⁶ See Hans Kelsen, *Pure Theory of Law*, University of California Press, 1978, pp. 326-328.

1) First of all, not every material violation of a human right amounts to an international crime.²⁷⁷ Even though some norms of criminal law protect human rights, only some serious violations are and should be criminalized, given the *ultima ratio* character of criminal law,²⁷⁸ which it must have given how it affects those it sanctions. It is implicit in the fourth principle of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Law that not every violation of human rights is a crime. It states that:

"In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations" (emphasis added).

2) Secondly, since non-state entities can commit violations of human rights or human guarantees, States and other functional authorities with proper mandates must strive to prevent or respond to those violations in order to protect victims, and in some cases they can or must do so without resorting to criminal law-mechanisms. After all, human rights *lato sensu* and humanitarian guarantees highlight that different strategies and normative responses and branches²⁷⁹ can be relevant to defend human rights and can complement each other.

²⁷⁷ This is implicitly recognized when it is asserted that the criminalization of the violation of some human rights constitutes an indicator of the possibility of the prohibition of that violation being part of peremptory law. This last argument is found in: Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio histórico-crítico*, op. cit., pp. 169-170.

²⁷⁸ See George P. Fletcher, "Parochial versus Universal Criminal Law", *Journal of International Criminal Justice*, Vol. 3, 2005, p. 31.

²⁷⁹ See Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, op. cit., pp. 65-66; Inter-American Commission on Human Rights, Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina*, Ecuador – Colombia, 21 October 2010, para. 117; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, supra, at 73; Inter-American Court of Human Rights, Advisory Opinion OC-1/82, op. cit., paras. 32-34 and the first opinion, shown in page 12. In those documents, it is argued that instead of focusing on formal distinctions, when it comes to the protection of human rights that, as we know, must protect human dignity, it is preferable to acknowledge that they can be shared and protected in various branches, that in my opinion therefore form part of the same *corpus juris*. Thus, it is possible to conclude that the mechanisms or strategies used in one of them can inspire the adoption of similar strategies to protect the same foundational values, rights or guarantees in other branches forming part of the same *corpus juris*. Concerning the existence of *corpus juris* in the humanitarian legal context, see the notions of the *corpus juris* of the protection of children, the *corpus juris* of human rights and a general humanitarian *corpus juris*, founded upon values and including human rights (both broadly and strictly speaking) and guarantees, in: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 24, 92; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 15, 18, 31, 37, 50, 53; Inter-American Court of Human Rights, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Judgment, op. cit., para. 194. Moreover, the International Law Commission has considered that "rules and principles that regulate a certain problem area are collected together so as to express a 'special regime'" [as happens with 'humanitarian law' and 'human rights law', that in my opinion belong to the *corpus* of the protection of human dignity alongside other sub-regimes and norms]. Cf. International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006, para. 12.

3) Thirdly, the complete protection of human dignity must address all violations, be them criminal or not, State or not, that affect civil, economic or other human rights, because limiting protection to some violations, for instance those that amount to crimes, excludes victims and goes against the non-conditionality and comprehensiveness of human dignity.

In light of the previous ideas, it can be concluded that the third legal implication, i.e. that of the interdependence and equal relevance of all aspects of human dignity, which thus must be protected, demands protection from all threats, including actual and potential non-state ones.

The Committee on Economic, Social and Cultural Rights, for instance, has confirmed this when arguing in its General Comments that non-state actors can violate the content of the rights it supervises; that those actors should refrain from committing those violations; and that States have a duty to prevent and respond to them, fostering a climate of respect of rights and stimulating conditions for their enjoyment, which may require dealing with possible non-state abuses or obstacles.²⁸⁰

d) In addition to the previous legal implications of human dignity, some scholars have considered that a fourth general implication can be identified. Unlike the previous ones, that have an individual rightsholder approach, it has been put forward that some group or collective entities may have dignity. According to Andrew Clapham or Oscar Schachter, for example, some groups may deserve legal protection in the humanitarian *corpus juris* (not limited to IHL, covering the protection of human dignity), given the connections between them and their individual members and how important they are for the latter, reason why they argue that protecting those groups sometimes contributes to protecting individuals affiliated with or related to them²⁸¹ (other arguments may claim that some groups have a dignity or worth of their own, which in any case should never prevail over human dignity). The possible nature and features of the collective groups in question are manifold: some may be based on a common identity, some on common cultural characteristics leading to a voluntary or spontaneous association, etc.

I consider this last possible implication to be the most complex and perhaps the problematic one, which demands its careful analysis.

From a theoretical standpoint, the pertinent implications may be justified by arguments such as that according to which just as dignity is inherent to human beings, their social dimension

²⁸⁰ Cf. Committee on Economic, Social and Cultural Rights, General Comment 12, op. cit., paras. 15, 19-20; Committee on Economic, Social and Cultural Rights, General Comment No. 14, op. cit., paras. 33, 42; Committee on Economic, Social and Cultural Rights, General Comment No. 15, op. cit., paras. 23-24; Committee on Economic, Social and Cultural Rights, General Comment No. 16, op. cit., para. 20; Committee on Economic, Social and Cultural Rights, General Comment No. 18, op. cit., para. 25; Committee on Economic, Social and Cultural Rights, General Comment No. 20, op. cit., para. 11.

²⁸¹ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., p. 545-546; Oscar Schachter, op. cit., 850, 852-853.

is also inherent to them, as explained by theories such as Aristotle's conception of the individual as a *zoon politikon* or political animal.²⁸² Because of this, it could be considered that the links of human beings with other individuals and their associations and groupings are essential for them, as confirmed by the theories of relatedness and non-separateness of Erich Fromm.²⁸³ Moreover, the development of emotional and intellectual bonds with such groups may lead to close relationships, which lead to suffering when the "dignitas" or rights of the group are heinously violated.

As hinted earlier, the difficulties of translating these conceptions into law are not few. Firstly, aside from some rights as the right to self-determination or those related to the protection of some collective entities in the European regional human rights system,²⁸⁴ most *stricto sensu* human rights norms are based on the idea of individuals as their holders. Furthermore, the international mechanisms of protection of such rights are designed to protect individuals even when the respective rights allude to beliefs or manifestations shared with others, as asserted for example by the Human Rights Committee of the United Nations.²⁸⁵ However, that same Committee and the Inter-American Court of Human Rights have acknowledged that offences against entities different from individuals may indirectly have a negative impact on the rights of those individuals, who must thus be protected.²⁸⁶

Care must be taken not to overemphasize on groups and lose sight of individuals, which may generate the risk of justifying violations against them for the sake of those groups, even

²⁸² See Aristotle, *Politics*, Forgotten Books, 2007, pp. 3, 58.

²⁸³ See Erich Fromm, *The art of loving*, Perennial Classics, 2000, pp. 8-9, where the author argues that "Man is gifted with reason; he is life being aware of itself. This awareness of himself as a separate entity, the awareness of his own short life span, of the fact that he will die before those whom he loves, or they before him, the awareness of his aloneness and separateness, of his helplessness before the forces of nature and of society, all this makes his separate, disunited existence an unbearable prison. He would become insane could he not liberate himself from the prison and reach out, unite himself in some form or other with others, with the world outside. The experience of separateness arouses anxiety [...] The deepest need of man, then, is the need to overcome his separateness, to leave the prison of his aloneness."

²⁸⁴ Cf. articles 1 of the International Covenant on Civil and Political Rights (where the right of self-determination of peoples is mentioned), 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (according to which "any person, non-governmental organization or group of individuals claiming to be the victim of a violation [...] of the rights set forth in the Convention or the Protocols" may file applications for the European Court of Human Rights to protect their rights), or 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (that mentions that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions").

²⁸⁵ Cf. Human Rights Committee, General Comment No. 23, *The rights of minorities (Art. 27)*, CCPR/C/21/Rev.1/Add.5, 8 April 1994, paras. 1, 2, 3.1, 5.1, 6.2; Human Rights Committee, General Comment No. 31, op. cit., para. 9.

²⁸⁶ See Human Rights Committee, General Comment No. 31, op. cit., para. 9. Regarding the protection of human rights when they are affected as a result of actions against group entities in the Inter-American framework of human rights, see Juanita María López-Patrón, "Los derechos laborales en el sistema interamericano de protección de derechos humanos: la protección de los derechos económicos, sociales y culturales", *International Law: Revista Colombiana de Derecho Internacional*, No. 12, 2008, pp. 187-199; Inter-American Court of Human Rights, *Case of Cantos v. Argentina*, Judgment (Preliminary Objections), 7 September 2001, paras. 22-31.

limiting individual freedom in a totalitarian way. To prevent this, in the first place, as has been considered in case law in connection with the freedom of association and the right to form and join trade unions, the freedom to belong to a group is one dimension of those rights, which also include the liberties to not join one such group and to abandon them.²⁸⁷ As a result, belonging to a group cannot be compulsory, and because of this there must be freedom to leave it.

Secondly, care must be taken to bear in mind the strict requirements to restrict rights and to interpret them in the way that most favors individuals, as required by the *pro homine* principle.²⁸⁸ Thus, only exceptional circumstances justify limitations of rights, that must be necessary and proportionate, which is something that must never be lost sight of when analyzing relations between individuals and groups.

These considerations indicate that rights or interests of collective entities cannot be invoked to justify violations of the rights of individuals,²⁸⁹ because it is for the sake of those individuals and in relation to their inherent features that some of their aspects are protected to a certain extent in human rights frameworks. Cases filed before domestic and international authorities indicate the perceived need that individuals are protected from groups, even if they belong to them, as discussed in relation to cases where individuals belonging to indigenous groups requesting protection from them, being it inadmissible in my opinion to hold groups' rights as deemed to prevail over the inherent and non-conditional rights of those individuals.²⁹⁰

Another example is that of the debates before the Human Rights Council concerning anti-defamation or "blasphemy" measures. Interestingly, both secular and Christian individuals and groups have opposed proposals by some Muslim representatives that seek to legally back up these measures: the former consider that they may be employed in a way that thwarts individual

²⁸⁷ Cf. articles 20.2 of the Universal Declaration of Human Rights and 8.3 of the "Protocol of San Salvador"; Daniel O'Donnell, op. cit., pp. 721-723.

²⁸⁸ As mentioned above, I believe that the *pro homine* principle demands not only the election of norm that better protects human dignity but also of the interpretations that meet that requirement. According to the Court, "the principle of the most favorable interpretation cannot be used as a basis for an inexistent normative principle". Conversely, it can be understood to be applicable when a normative basis does exist, such as a norm that is applicable in a given case, that must therefore be interpreted in the most favorable way for the protection of human dignity, which is the foundation and a goal of human rights law. The excerpted passage is found in: Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, op. cit., para. 79.

²⁸⁹ Concerning the relevance of this assertion in relation to obligations of individuals, see John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 1-2, 9-10, 20, 34, 40.

²⁹⁰ Cf. Vicente José Cabedo Mallol, "La jurisdicción especial indígena de Colombia y los derechos humanos", Facultad de Derecho de la Universitat de València, 1998, sections "Las sanciones indígenas y la prohibición de las torturas, tratos inhumanos o degradantes" and "A modo de conclusión", available at: <http://www.alertanet.org/F2b-VCabedo.htm>

human rights, as freedom of speech and freedom of religion. The Human Rights Committee supports this position.²⁹¹

Just as it has been considered that when determining who is an indirect victim, i.e. someone whose enjoyment of human rights is negatively affected as a result of the direct violation of the rights of someone else,²⁹² it has been considered that those with a close bond with direct victims will likely suffer concerning their right to personal psychological integrity,²⁹³ the bond between an individual and a collective entity, along with the nature of an offence and its impact of on that bond, must be analyzed to examine if there is a violation of the dignity of the former.

It must be said that international law is no stranger to norms that protect principles and values that guarantee collective or social manifestations. For example, as mentioned by Antonio Cançado Trindade, a principle of humanity and the recognition of humankind are relevant in international law;²⁹⁴ and additionally norms as the prohibition of genocide protect both individual and group/social dimensions, and interestingly prohibit both State and non-state actors from engaging in their violations.²⁹⁵ In fact, the extra stigmatization of genocide lies on this very fact,

²⁹¹ See “The limits of freedom and faith”, *The Economist* (31 March 2010), available at: <http://www.economist.com/node/15833005> (last checked: 14/12/2011); “Islamic bloc drops 12-year U.N. drive to ban defamation of religion”, *Reuters*, 24 March 2011, available at: <http://blogs.reuters.com/faithworld/2011/03/24/islamic-bloc-drops-12-year-u-n-drive-to-ban-defamation-of-religion/> (last checked: 14/12/2011); United States Commission on International Religious Freedom, “USCIRF Welcomes Move Away from “Defamation of Religions” Concept”, 24 March 2011, available at: <http://www.uscirf.gov/news-room/press-releases/3570-uscirf-welcomes-move-away-from-defamation-of-religions-concept.html> (last checked: 14/12/2011); “Defusing the defamation issue”, *The Economist* (25 March 2011), available at: <http://www.economist.com/blogs/newsbook/2011/03/free-speech> (last checked: 14/12/2011); Human Rights Committee, General Comment No. 34, op. cit., paras. 47-48.

²⁹² Note how the ‘indirect’ victim still suffers the violation of his own rights, being the term “indirect” thus didactic but not altogether precise Cf. Sergio García Ramírez, *Los derechos humanos y la jurisdicción interamericana*, op. cit., pp. 117-118.

²⁹³ On the protection of individuals who are close to direct victims, see, among others, Inter-American Court of Human Rights, *Case of Bámaca-Velásquez v. Guatemala*, Judgment, 25 November 2000, paras. 160-165; Claudio Nash Rojas, *Las Reparaciones ante la Corte Interamericana de Derechos Humanos (1988 – 2007)*, Universidad de Chile, 2009, pp. 79-82. On the psychological dimension of personal integrity, see, for instance, Inter-American Court of Human Rights, *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala*, Judgment, op. cit., paras. 163-165, 173; Inter-American Court of Human Rights, *Case of Loayza-Tamayo v. Peru*, Judgment, 17 September 1997, para. 57.

²⁹⁴ Cf. Separate Opinion of Judge A. A. Cançado Trindade to: International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, op. cit., paras. 74, 209-210; Separate Opinion of Judge Cançado Trindade to: International Court of Justice, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, op. cit., para. 106.

²⁹⁵ In this regard, the International Court of Justice has mentioned that the drafting history of the Convention on the Prevention and Punishment of the Crime of Genocide reveals how genocide is “the denial of the existence of entire human groups”, as “contrasted with homicide, ‘the denial of the right to live of individual human beings’, and that the Court had said previously that “an object of the Convention [is] the safeguarding of the ‘very existence of certain human groups’”. Andrew Clapham, on the other hand, has highlighted the human rights dimension of the prohibition of genocide by saying that “today genocide and other crimes against humanity are increasingly seen as part of the human rights story.” See International Court of Justice, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, op. cit., para. 194; Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., p. 42. Additionally,

because conduct that would otherwise amount to different crimes in the absence of a design to eliminate a group, such as homicide, is regarded as more heinous due to the presence of a purpose to eliminate a human *group*. Still, it cannot be forgotten that multiple individuals are victimized by genocidal acts, and the protection of a group does not mean that murders conducted by authors of genocide are irrelevant in ethical, legal and philosophical terms. After all, the killing of even a single human being is very serious.²⁹⁶

Additionally, the so-called third generation of human rights have collective or meta-individual features,²⁹⁷ given their importance for multiple human beings, peoples and generations, and in consequence there may be a simultaneous victimization of multiple human beings with a single trespass against such rights.²⁹⁸

The recognition of those rights often protects joint or common interests, although as mentioned before, individuals are victimized when they are violated. This also happens with other rights, as civil and political ones, for example the right of persons belonging to ethnic, religious or linguistic minorities to manifest and enjoy their shared beliefs, knowledge and culture along with other members, whose titular are the individuals and not the group, as discussed by the Human Rights Committee.²⁹⁹ However, it cannot be denied that, in practice, a blend of individual and meta-individual features is found in those rights, which constitutes further evidence of possible

article IV of the aforementioned Convention states that “[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals” (emphasis added).

²⁹⁶ Besides the recognition of the right to life in international law and domestic norms, and by philosophers, several religions recognize it (through the prohibition of murder). Judaism and Christianity hold so in the Decalogue (“Thou shalt not kill”/“You shall not kill”). See Part Three, Section Two, Chapter Two, article 5 of the Catechism of the Catholic Church. The Jerusalem Talmud mentions in Sanhedrin 4:1 (22a) that “Whoever destroys a soul, it is considered as if he destroyed an entire world. And whoever saves a life, it is considered as if he saved an entire world.”

²⁹⁷ It has been considered that the so-called third generation of human rights encompasses “solidarity rights” that “address more directly the collective of social groups or peoples”, although “Due to the fact that the complexity of “third generation rights” is highly debated by the international community of states, solidarity rights have not yet reached the legally essential status for their full implementation as collective human rights.” Albeit some consider that States might consider themselves “right-bearers” regarding them, this assertion has been challenged by some that consider that, for instance concerning the right to development, “[t]he collective dimension of the Right to Development did not mean rights of States, simply because States could not be bearers of “human” rights. The holders of the collective dimension of the Right to Development therefore were the peoples.” References extracted from: Carolin Sehmer, *Report of the Parallel Event “Third Generation” Human Rights – Reflections on the Collective Dimension of Human Rights*, Geneva, 2007, pp. 3-4, available at: http://www.fes-globalization.org/geneva/documents/Report_FES-Geneva_3rd-generation_human_rights.pdf (last checked: 15/12/2011).

²⁹⁸ It is possible to think that *some* of these rights protect global public goods, which are goods that by their nature can benefit multiple individuals across boundaries and even generations, given the spontaneous or socially-created characteristics of non-rivalry and/or non-excludability they exhibit in various degrees. See Inge Kaul and Ronald U. Mendoza, “Advancing the Concept of Public Goods”, in Inge Kaul et al. (eds.), *Providing Global Public Goods*, Oxford University Press, 2003, pp. 95-99.

²⁹⁹ See Human Rights Committee, General Comment No. 31, op. cit., para. 9; Human Rights Committee, General Comment No. 23, op. cit., paras. 1, 6.2.

connections between singular individuals and groups they belong to. Non-state agents can attack both of those features, and as a result protection against those attacks is necessary.

e) Finally, when analyzing the protection of individuals from non-state abuses it is necessary and inevitable to examine the notion of whether the protection of human dignity is based on the separation of a private sphere from a public one or if, on the contrary, those boundaries should be eroded or exist at all.

Arguments supporting each alternative have been put forward. As to the first idea, some consider that the conception of a private sphere derives from the respect and protection of human dignity, which demands the respect of privacy rights, which that position tends to describe as being “located” in a private sphere. According to this position, infringements against it should be prohibited and dealt with properly in order to protect those rights and their purposes.³⁰⁰

An opposing position argues that a full separation of a private sphere, isolated from legal intrusions, may actually protect some violations committed by private entities, as for instance in the context of domestic violence, which would remain in impunity and victims be left unprotected if it is ignored that human rights can be violated by non-state entities. A third option suggests that, unlike what some feminists claim, freedoms within a private sphere are *not incompatible* with a scheme of protection from private and other non-state violations, because that sphere protects rights, but on the condition that private violations are forbidden and tackled by law.³⁰¹

In my opinion, some norms protecting human dignity defend rights that protect what some have called aspects of a “private sphere”, but it is actually unnecessary to employ that term, which may suggest a barrier, being it preferable to talk of rights that protect privacy and private issues as demanded by human dignity. I consider that this better illustrates the context and what is at stake.

Altogether, the same foundation of human rights that protects privacy is contrary to violations of human dignity committed in a private context, which must as a result be regarded as unlawful, being it necessary to protect their victims, as demanded by the comprehensive protection required by human dignity. This is what Andrew Clapham may be suggesting when he argues that privacy cannot be an obstacle to tackling violations *and* that privacy rights protect individuals against abuses,³⁰² being their recognition in my opinion a legal, individual and social conquest.

³⁰⁰ See Oscar Schachter, *op. cit.*, at 850; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 544-546.

³⁰¹ Concerning these issues, see Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 544-547; Andrew Clapham, *Human Rights: a Very Short Introduction*, *op. cit.*, pp. 94-99.

³⁰² *Ibid.*

In sum, it can be said that human rights that protect aspects of privacy are to be protected and respected, and violations are to be prevented and responded to wherever and however they are committed. This is confirmed by the Durban Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance of 2001, according to which authorities must ensure that victims “can fully exercise their rights in all spheres of public and private life” (emphasis added). Moreover, articles 1 and 3 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belém do Pará”) demand that women are protected from violence “in both the public and private spheres” (emphasis added), since such violence can take place in any of those contexts, and women accordingly have a right to protection in all of them.

It must be recalled that even individual offenders have human rights,³⁰³ which must not be ignored when exploring this issue. Yet, doctrines as the prohibition of the *abus de droit*, contrary to the abuse of rights, among others, confirm that it is possible and important to attach negative legal consequences to abuses committed by private actors, including not recognizing the result of abuses, sanctions, and obligations to repair.³⁰⁴ Those consequences in no way can lead to denying rights of offenders and the necessity of proper responses by authorities and norms that sufficiently protect victims.

According to the previous idea, some aspects of privacy are protected by international norms protecting human dignity, which at the same time oppose abuses against the dignity of others perpetrated in a private context. Therefore, the rights that protect privacy persist, and calls for protecting victims in private contexts must not lead to ignoring them or subordinating their enjoyment to fulfilling duties, something that can pervert the system.³⁰⁵ Duties to protect individuals in private contexts, and responsibilities for violations committed in them, are better strategies than conditioning the enjoyment of some rights. As all responses to violations, they must respect the principle of legality and human dignity, being it both necessary and possible to do so while protecting victims.

³⁰³ See, among others, Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et al. v. Peru*, Judgment, op. cit., para. 89; answer of Philip Alston to the question on the human rights of persons who violate human rights, found in: <http://www.un.org/cyberschoolbus/humanrights/qna/alston.asp> (I disagree with one aspect of his answer, that in which he identifies individual violators with criminals, because not every violation of human rights amounts to a crime and because crimes can well be simultaneously human rights violations, as recognized by Lauterpacht, as seen in: Hersch Lauterpacht, op. cit., pp. 36-37). Furthermore, see European Court of Human Rights, *Case of Sufi and Elmi v. the United Kingdom*, Judgment, 28 June 2011, para. 212.

³⁰⁴ Cf. Michael Byers, op. cit., p. 400; 325-327; Separate Opinion of Judge Ammoun to the Judgment of the International Court of Justice in the *Case concerning the Barcelona Traction, Light and Power Company, Limited*, op. cit., paras. 32-36.

³⁰⁵ Cf. John H. Knox, “Horizontal Human Rights Law”, supra, pp. 1-2, 4-5

After all, we are dealing with inherent rights³⁰⁶ that protect essential aspects and entitlements derived from dignity that protect personal and private life and convictions. Some examples of those rights, truly important, are the right to the protection of the family; freedoms of thought, of conscience and of religion, manifested for instance in conscience objections; or the right to privacy. Privacy aspects protected by human rights have public relevance given dynamics related to exchange of ideas and manifestations of beliefs, and also because of their nature as human rights. The recognition of those rights constitutes a historical achievement and forbids violations against them, that are contrary to the inner worth of an individual.³⁰⁷

Conditioning or denying those rights, contrary to what human dignity features demand, could pave the way for abuses and the imposition of totalitarian majoritarian or minoritarian (when minorities have the respective power) religious or secular ideologies or decisions ignoring individual freedoms. These risks of conditioning human dignity guarantees, contrary to the inherent and non-relational nature of human rights, are to be averted.

The risk is high given the temptation that some may have to manipulate interpretations so as to deny freedoms of opinion and expression of those with whom they disagree. It must be stressed that the freedoms of opinion, expression and beliefs protected by human rights cover religious and non-religious beliefs, and that no one should suffer being intimidated for his conscience.³⁰⁸ The double standards that some may have when they decry some ideologies while promoting their conceptions in a forceful way may also generate risks.³⁰⁹

As mentioned above, privacy rights do not confer freedoms to abuse, and protection must be given from abuses in relations between private parties. Therefore, private actors neither have nor ought to have a “sphere of immunity.” Accordingly, international bodies and authors have

³⁰⁶ Cf. Rita Joseph, op. cit., at 233.

³⁰⁷ Cf. Robert John Araujo, “Conscience Protection and the Holy See”, *Ave Maria International Law Journal*, 2009, pp. 7-17.

³⁰⁸ See Human Rights Committee, General Comment No. 34, op. cit., paras. 9, 11, 48, where it is mentioned that “All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature [...] [freedom of expression] includes political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse [...] it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers” and vice versa, it should follow. Moreover, see articles 18 of the International Covenant on Civil and Political Rights, 12 of the American Convention on Human Rights, 9 of the European Convention of Human Rights, XXII of the American Declaration of the Rights and Duties of Man, 8 of the African Charter on Human and Peoples’ Rights, or 18 of the Universal Declaration of Human Rights; Robert John Araujo, op. cit.

³⁰⁹ The Constitutional Court of South Africa has considered that “the dignity of the parents may be negatively affected when the state tells them how to bring up and discipline their children and limits the way in which they may express their religious beliefs”, as mentioned in Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., pp. 105-106; articles 26.3 of the Universal Declaration of Human Rights, where it is mentioned that “[p]arents have a prior right to choose the kind of education that shall be given to their children.”

recognized how private and public non-state actors can violate human rights even in private relations and that individuals must be protected accordingly.³¹⁰

For this examination to be complete, however, it must be added that clashes of rights do not necessarily amount to violations of rights. As will be discussed, sometimes those conflicts can be resolved by proportionality tests or other mechanisms.³¹¹ Certainly, in some events rights that protect privacy and personal freedoms may clash with other human rights or among themselves.

These are complex cases that are tackled by some domestic legal systems by balancing rights and using a proportionality test, although authors as Dawn Oliver argue that balancing is not always convenient and may be detrimental to some rights in the long run. For this reason, some jurisdictions have opted for having recognizing indirect horizontal effects of human rights. This opinion also explains why that author argues that tensions of the sort being described should be solved by decisions made by “politically accountable” entities. This assertion, to be satisfactory, should provide guidance on “how” those decisions must be reached, which in my opinion presupposes the need to not engage in the “total denial” of a human right in practice when solving conflicts, to not permit abusive exercises that attack the human dignity of others, and to resort to a balance analysis that recognizes the two prior elements.

Other authors discuss that authorities, frequently domestic ones (due to factors as limitations of international supervisory entities), must conduct a proportionality analysis, taking into account however whether the rights that are clashing are relative or absolute, because if two

³¹⁰ See, among others, Inter-American Commission on Human Rights, *Preliminary Observations of the Inter-American Commission on Human Rights after the visit of the Rapporteurship on the Rights of Afro-Descendants and against Racial Discrimination to the Republic of Colombia*, OEA/Ser.L/V/III.134, Doc. 66, 27 March 1999, para. 46 (“The armed actors in the conflict -- guerrilla groups, security forces, and paramilitary groups -- have committed human rights violations and serious breaches of international humanitarian law against the civilian population”); European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment, 9 June 2009, para. 159; Ilias Bantekas and Susan Nash, op. cit., p. 14; Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment, op. cit., paras. 166, 172; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 140; Inter-American Court of Human Rights, *Case of Castillo-Petrucci et al. v. Peru*, Judgment, May 30, 1999, para. 89; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, pp. 43-44, 47-53, 56-58, 70-73; Human Rights Committee, Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, op. cit., para. 4; Committee Against Torture, *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, CAT/C/22/D/120/1998, op. cit., para. 6.5; Inter-American Commission on Human Rights, Resolution 03/08, *Human Rights of Migrants, International Standards and the Return Directive of the EU*; Inter-American Commission on Human Rights, Press Release No 06/09, *IACHR Condemns Killings of Awá Indigenous People by the FARC*; Inter-American Commission on Human Rights, Press Release No. 35/07, “IACHR expresses its repudiation of the deaths of eleven legislators held as hostages by the FARC in Colombia”, where the Commission said that “the taking of hostages constitutes a serious crime, prohibited by the standards of international human rights law and international humanitarian law, and urges armed groups that continue to illegally hold numerous civilians in Colombia to respect their lives” (emphasis added); European Court of Human Rights, *Case of Sufi and Elmi v. the United Kingdom*, Judgment, op. cit., paras. 94, 104, 131; European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Judgment, op. cit., paras. 208, 218-219, 232-233, 285, 287, 319; European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, op. cit., para. 45; European Court of Human Rights, *Case of N. v. Sweden*, Application no. 23505/09, op. cit., paras. 30, 34, 55, 60, 62; Committee on Economic, Social and Cultural Rights, General Comment No. 20, op. cit., paras. 11-12, 24, 28, 37-40.

³¹¹ Cf. Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., pp. 92, 97-99.

of the latter are in conflict, in principle they must be protected “in all circumstances”, although sometimes inevitable choices “may have to be made between conflicting absolute rights”, as commented by Jonas Christoffersen. Other authors, as Xiaobing Xu, highlight that balancing conflicting rights is complex and entails ascertaining whether the weight of each right is to be taken into account, or whether utilitarian or rights-calculus considerations are to be employed, being those elements criticized by authors such as McCloskey and Waldron due to how they run counter to the ideals and the defense of human rights.³¹²

Andrew Clapham, in turn, tells how some authors have put forward the idea that conflicts between rights can be solved by authorities whenever there are causes of (legal) action, while some judges have put forward the idea that rights are to be balanced taking into account the details of each case, including factors as the public character of a service offered by a non-state entity that enjoys human or fundamental rights, the absence or presence of which may tilt the proportionality analysis to one side or the other. Clapham himself considers that all conflicts must be solved and that considerations as seriousness of the consequences of a given outcome, along with its impact on the respect of values (and principles regarding their protection) as dignity or democracy must be employed.³¹³

Concerning these ideas, Xiaobing Xu comments that conflicts of human rights have:

“[U]sually two types of results: either one of the conflicting rights overrides the other, or a compromise is reached between the conflicting rights [...] There are plenty of methods to resolve [conflicts of human rights]. From the point of view of judicial practice, Aharon Barak, Israeli Supreme Court President, has divided them into two categories: one is principled balancing, the other is *ad hoc* balancing. The former may be applied in future cases while the latter may not.”³¹⁴

Whatever strategy is adopted, it is necessary to not ignore that when opposing parties have human rights and guarantees that are inherent and non-conditional they cannot be ignored or considered to disappear, especially because the “total denial” of a human right is not permissible when it is restricted,³¹⁵ and it is neither possible when solving conflicts of such rights. Additionally, I put forward the idea that if in a conflict or tension or rights it is detected that a given manifestation or exercise of a right would be contrary to the human dignity of the other party, for example because the latter would be treated as means or his inner worth would be seriously attacked, then *that manifestation* (not the right itself as a whole, which cannot be denied

³¹² Ibid.; Dawn Oliver and Jörg Fedtke, *Human Rights and the Private Sphere: A Comparative Study*, Routledge, 2007, pp. 18, 508-509; Dawn Oliver, “Human Rights and the Private Sphere”, *UCL Human Rights Law Review*, Vol. 1, 2008, pp. 10-15; Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2009, pp. 108-111; Xiaobing Xu, “On Conflict of Human Rights”, *Pierce Law Review*, Vol. 5, 2006, pp. 40-53.

³¹³ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 529-531.

³¹⁴ See Xiaobing Xu, op. cit., pp. 40-42.

³¹⁵ See Rita Joseph, op. cit., at 239.

completely) should not be allowed to prosper, because it is abusive and contrary to the foundation of the human rights framework and its goals.

Sometimes, in conflicts of *fundamental* rights the opposing parties are public or private actors with such rights (as discussed in Chapter 5, *infra*). In those events, it is convenient for legal mechanisms that address the conflicts to take into account the fundamental rights of the private entities even when they are considered to provide public services, as for instance entities that operate in the health field are considered in some countries.³¹⁶ This is so because even if internationally their acts can engage the responsibility of States in accordance with the law of international responsibility, those entities are *not* part of the State structure.³¹⁷ That being said, their position makes those private entities prone to being burdened with several human rights obligations, as examined in Chapter 6.

Nonetheless, to my mind human dignity and rights should be attached priority and prevalence in case it conflicts with other values and rights, such as those that benefit private and other actors different from individuals.

Yet, when fundamental rights of private entities clash with human rights, sometimes a proportionality test may be conducted due to formal requirements (taking into account what was just said), especially when the fundamental rights of non-individual entities are recognized in a framework that protects both human rights and fundamental rights of non-state entities (that despite being called human rights sometimes are ontologically fundamental and not human rights because they benefit non-individuals), as happens in the European regional system³¹⁸ or in the

³¹⁶ Regarding this, one can argue that the State, that contingent construction, is not equated with society, being human relations and interactions rich and surpassing the walls of this cultural and social construct that can never pretend to subsume or be identified with the whole of society –and, in fact, in a globalized world, and even before it, allegiances, identities and links are not limited to the State, and the freedom of conscience of individuals must be respected, both directly and indirectly, i.e. without forcing them to do what goes against their firm beliefs that are respectful of human dignity by means of trying to coerce institutions they found or participate in into doing what they regard as evil-. On identities, see Alfred Van Staden and Hans Vollaard, *op. cit.*, pp. 167-168. On the other issues see, for example, http://www.eltiempo.com/opinion/columnistas/alfonsollanoescobar/ARTICULO-WEB-NEW_NOTA_INTERIOR-9929110.html (last checked: 16/12/2011). In my opinion, domestically considering private actors as *State* agents may lead to complicated situations in which the freedom of conscience of members and founders of a given entity is compromised by the imposition of the ideology and beliefs of the ruling party or political leaders in a given country on the private entity in question, thus being the ideological imposition detrimental to pluralism and indirectly affecting the freedom of association and conscience of some individuals, as confirmed by the possibility that attacks against the freedoms of legal or juridical persons can indirectly affect human rights, as accepted by entities such as the Human Rights Committee or the Inter-American Court of Human Rights in the General Comment no. 31 of the former or the *Case of Cantos v. Argentina* decided by the latter, as explained above.

³¹⁷ Article 5 of the Articles on the Responsibility of States for Internationally Wrongful Acts mentions that “[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

³¹⁸ See articles 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and 1 of the (first) Protocol to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms; Inter-American Court of Human Rights, *Case of Cantos v. Argentina*, Judgment (Preliminary Objections),

U.S. or Colombian legal systems,³¹⁹ for instance. Such a test is also called for by substantive considerations when human rights can be indirectly affected in connection with the rights of collective entities, to ensure that they are not rendered ineffective.

It is also necessary to consider that the separation of public and private dimensions is not always absolute, and that as expressed before, rights protected in the private sphere have public dimensions and consequences, something unavoidable since individuals enter into relationships with others, willingly or not, and may affect them. After all, we are political beings and have a social nature. In this regard, for instance, the Inter-American Court of Human Rights has considered that the freedom of expression has both an individual and a social component.³²⁰

In sum, it is necessary to protect individuals in their dignity from all aggressions, be it concerning the protection of aspects of privacy or of others, while at the same time prohibiting all abuses against that dignity given its comprehensive protection, even when committed in a private context, bearing in mind that sometimes fundamental rights may clash and those conflicts must be solved in a careful manner, ensuring that human rights are never fully limited.

The idea that freedoms and rights of every individual ought to be protected against all threats, both public and private, and that thus individuals have a sphere of *protection*, which does not endorse abuses, is compatible with both the contemporary conception of human dignity and with the value-based Kantian conception of dignity.

What has been explored in this section allows me to conclude that human dignity is currently the basic legal foundation of international human rights *lato sensu* and of human guarantees and demands protection from non-state abuses. *If* it were not their foundation, it should be adopted as such *de lege ferenda*, because it is the only one capable of ensuring a non-conditioned comprehensive protection of all human beings that respects and recognizes them and calls for protecting them from *all* abuses. After all, the legal value and principle related to the

op. cit., para. 29; Inter-American Commission on Human Rights, *Bernard Merens and Family v. Argentina*, Report N° 103/99, 27 September 1999, para. 16 and footnote 2.

³¹⁹ Cf. John Finnis, op. cit., pp. 8-9 (where a critical analysis of the situation in the U.S. is presented); Constitutional Court of Colombia, Judgment T-201/10, 23 March 2010, section “i- Las personas jurídicas como titulares de la acción de tutela”, where the Court stresses that the mechanisms available under Colombian law to request the protection of *fundamental* rights can be employed by legal persons in regard to those rights that they can enjoy, since fundamental rights are not identical to *human* rights; Constitutional Court of Colombia, Judgment T-184, 4 March 2004, section “3.1 Los derechos fundamentales de las personas jurídicas y la acción de amparo”, where the Court holds that some fundamental rights enshrined in the Colombian legal system are exclusively enjoyed by human beings; that legal persons can enjoy some of those rights as well and request their protection; and that sometimes by protecting legal persons the fundamental rights of individuals are protected indirectly.

³²⁰ See Inter-American Court of Human Rights, *Case of Ivcher-Bronstein v. Peru*, Judgment, 6 February 2001, paras. 146-155; Inter-American Court of Human Rights, *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*, Judgment, 5 February 2001, paras. 64-69; Inter-American Court of Human Rights, Advisory Opinion OC-5/85, *Compulsory Membership in an Association prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, 13 November 2005, paras. 30-35.

protection of dignity has legal consequences that fully support and demand the protection of human beings against all threats. Norms based on human dignity must therefore be interpreted taking into account those implications (that exact goals to be achieved) and its features.

However, it must be admitted that theories that propose alternative foundations have been proposed, such as some based on the concept of *emancipation*, as that put forward by Michael Goodhart and other authors. Some of these theories claim to seek the same goal sought herein: to protection of human rights from non-state (and other) violations, and will be examined in the next section. Yet, it must be said that from a theoretical standpoint certain interpretations of some of these theories would not ensure the protection of individuals from all threats, not even against some State abuses when individuals interact through an actor more powerful than the State.

Some of the proposed alternative theoretical justifications of human rights, as utilitarianism or feminism, also fall short of the comprehensiveness and fairness that a system based on human dignity have, either because they overemphasize the role of the State, ignoring events when it has no ability to exert control over non-state violations, or because by focusing too much on *one set* of potential victims or some violation dynamics they may ignore some events that the dignity approach does address given its express universality and emphasis on the inherent and equal dignity of *all* individuals, which is contrary to leaving some victims unprotected or to recognizing the importance of only some victims while ignoring or underestimating others. A dignity-centered framework insists on protecting *all* human beings against *all* threats.

Notwithstanding, I consider that while many of these theories *partly* satisfy the protection demands of individuals or are otherwise limited, excluding victims from a scope of protection, reason why the concept of human dignity is preferable as a legal foundation, they deserve to be studied and often have conclusions that must be accommodated or taken into account in the framework based on human dignity, in case they are compatible with it and are not as clearly stated in it. Besides, the concepts those theories handle can often complement the principle of human dignity, reason why they are neither to be understood as its alleged replacements nor as irrelevant. The next section will examine these issues.

1.2. Proposals about human rights foundations different from human dignity: functional approaches to human rights, emancipation, utilitarianism, and feminist approaches

Taking into account the many problems posed by State-centered conceptions for the full protection of human rights,³²¹ it is not surprising that authors have sought to defend protection from non-state abuses and discuss foundations, policies or theories capable of overcoming those conceptions. These theories are important because they try to defend suffering and vulnerable victims who would be unprotected under a State-centered scheme.

One among the theories that have been sought to protect human rights from non-state actors and are not directly and expressly based on references to human dignity is that proposed by Michael Goodhart in his article on “Human rights and Non-State Actors: Theoretical Puzzles.”

Reflecting on how unjustified it would be for human rights law to remain silent and fail to protect all victims, he considers that some prejudices of liberal paradigms of human rights may have led to the perception of some scholars and practitioners that human rights are supposedly concerned exclusively with individual-State relationships. Accordingly, the author argues that problems ensuing from this can be overcome with a change of perspective: instead of concentrating on *relationships* supposedly relevant for human rights, he suggests shifting attention to the *functions* of human rights. Goodhart considers that these functions are twofold: “guarantee[ing] freedom or emancipation³²²” (emphasis added).

Elaborating on this pragmatic approach to human rights law, Michael Goodhart defines the aim of his idea of emancipation as follows: that “people are subject to no arbitrary or unaccountable authority³²³”. Consequently, he considers that whenever someone is subjected to illegitimate power, she ought to be entitled to claim human rights protection no matter what the identity of the offender is. While not necessarily adhering to Goodhart’s theory completely, the rationale he puts forward that human rights must protect individuals from abuses of power or authorities is certainly one advanced by many authors and supervisory bodies.

In this way, for instance, Joseph Raz considers that while human rights can be invoked in relation to multiple actors, they are identified by their being opposable to States and exacting duties from them, thus upholding an element of their invocation *vis-à-vis* authorities.³²⁴ Anne

³²¹ Some authors defend such a conception based on extra-legal and legal grounds, believing either that an extension beyond the scope of protection offered by this framework is unadvisable because it would empower illegitimate non-state actors or allow States to provide legal justifications to abuses of their own; or that such an extension cannot find room in the international legal system due to what they perceive as problems related to the subjectivity of certain actors or their having international obligations and other legal burdens.

³²² See Michael Goodhart, *op. cit.*, at 36.

³²³ *Ibid.*

³²⁴ Cf. Joseph Raz, “Human Rights without Foundations”, in Samantha Besson and John Tasiou, *The Philosophy of International Law*, Oxford University Press, 2010, pp. 328-329, 332, 334-335, where the author argues that “human

Peters, in turn, considers that actors that exercise authority internationally, for instance because their powers are granted or transferred to them by States, are to be checked and regulated from a constitutionalist perspective.³²⁵

I do not disagree with those conclusions: certainly, it is necessary that entities with power or positions of authority (formal or not) are obliged to respect human dignity (and, sometimes, to ensure its protection, as discussed in Chapter 6). However, the scope of the protection of human rights will be unduly limited if protection from authorities is regarded as their only concern. This is so because non-state entities can violate guarantees and rights founded upon human dignity without having either a normative or a *de facto* position of authority. Thereby, the basis of the protection of human rights cannot be limited to emancipation, because this would exclude some victims from legal protection and so run counter to the universal protection of human dignity. Rather, it must focus on protecting all victims and human beings, even when they are harmed by entities with no formal or informal authority whatsoever, as required and made possible by human dignity and the solidarity with all victims that is so dear to human rights ideas.

Therefore, I believe that however well-intentioned the theory described above may be, while its conclusions must certainly be taken into account, it is unadvisable to fully adopt it as the only basis of human rights protection or as a full replacement of the implications of a theory grounded on human dignity. First of all, it inverts the logic that should guide the justification of a comprehensive protection of human dignity. Parting from this goal as an *a priori* statement, the proposal goes on to assert that emancipation and freedom do in fact provide a protection that Goodhart considers more inclusive than what the traditional State paradigm offers and, for this reason, he believes that it is by focusing on those functions that it is possible to come up with a better framework of human rights protection.

Nonetheless, by starting from an emotional (understandable and laudable) goal, it ignores what constitutes the true starting point: human worth. Had this overarching goal been the express starting point, the syllogism would necessarily lead to the conclusion that however

rights [are] rights which set limits to the sovereignty of states [...] I will continue to treat human rights as being rights against states. But I do not mean that human rights are rights held only against states, or only in the international arena. Human rights can be held against international organisations, and other international agents, and almost always they will also be rights against individuals and other domestic institutions. The claim is only that being rights whose violation is a reason for action against states in the international arena is distinctive of human rights, according to human rights practice [...] Individual rights are human rights if they disable a certain argument against interference by outsiders in the affairs of a state [...] setting limits to Sovereignty [...] is the predominant mark of human rights in human rights practice [...] Human rights are moral rights held by individuals. But individuals have them only when the conditions are appropriate for governments to have the duties to protect the interests which the right protect.”

³²⁵ Cf. Anne Peters, “The Merits of Global Constitutionalism”, *Indiana Journal of Global Legal Studies*, Vol. 16, 2009, p. 46.

necessary it is to offer protection against abuse of all positions of power, this *function* is related to *one* of the many areas in which protection must be given, because individuals can be harmed in their essential entitlements not only when they are subject to *de facto* or normative authorities,³²⁶ but also when individuals are the ones in a position of power or when such a kind of hierarchical relationship does not exist at all. Thus, in a deductive way, we must infer that if there is a legal purpose to protect human dignity, law has to grant protection from *all* violations of human dignity, which may take place in scenarios where there is no abuse of power involved (and also in them).

Ironically, the approach being discussed may offer protection to more victims but end up with the same flaw of State-centered paradigms: being too limited by excluding some victims; and may also lead to thinking that entitlements not dealing with emancipation or certain freedoms are not human rights, despite their protecting dignity aspects. Moreover, there are risks that such theories could be invoked by authorities to elude some of their positive obligations, including those of protecting human rights from non-state abuses that are not committed by entities with power or authority.

Actually, Michael Goodhart himself hints about the limitations of an exclusively emancipatory paradigm when he argues that his theory is useful in to distinguish human rights violations and crimes. In his opinion, crimes do not amount to violations when they do not address abuses of power.³²⁷ A legal and theoretical analysis dismantles this opinion, since some crimes committed outside of “systematic” patterns of subjection are considered human rights violations. Some human rights violations are contrary to domestic private law and non-criminal *jus gentium*, and crimes, torts and wrongful acts committed in situations of equilibrium of power may also amount to human rights violations, which as always must be tackled. Some appropriate responses found in domestic mechanisms can effectively protect the rights being affected.

After all, the Human Rights Committee mentioned in General Comment no. 31 that while the International Covenant on Civil and Political Rights does not have “direct horizontal effect”

³²⁶ Concerning this, the Convention on the Rights of Persons with Disabilities acknowledges that in the current context there are some entities, such as some international organizations, that can have powers and capacities that impact directly on the enjoyment of human rights by persons with disabilities as a result of their scope and content, and accordingly permits them to be bound by it. While other non-state entities can act in a way that impacts directly on the enjoyment of those rights as well, the decision to permit the direct regulation of the conduct of those organizations answers perhaps to their role as functional authorities that have a position that is also shared by States sometimes and explains their direct duties in turn. This, however, does not imply that direct obligations cannot be imposed on other non-state entities, being international criminal norms that protect human dignity examples of the possibility of directly binding other entities. Additionally, indirect mechanisms of protection against other non-state entities may be put in place. Moreover, the Convention acknowledges that parties to it, be it States or international organizations, have duties to “ensure that public authorities and institutions act in conformity with the [...] Convention” and to prevent and respond to State *and* non-state discrimination against persons with disabilities. See articles 4, 43 and 44 of the Convention.

³²⁷ See Michael Goodhart, *op. cit.*, pp. 29-30, 36-38.

and does not impose direct obligations on non-state entities, State parties to it are bound to prevent and respond to non-state abuses, which can be done for instance by mechanisms of “domestic criminal or civil law” with direct horizontal effect, as implicitly manifested by the Committee.³²⁸

It is thus clear that international crimes may affect human rights, but the conception of when this happens held by Goodhart is narrow for reasons stated above. In any case, on the link between human rights and criminal law, *some* international supervisory bodies, as the Inter-American Court of Human Rights, state that while their competences under existing positive law are limited to examining the behavior of State parties (although some international supervisory bodies can oversee the actions of international organizations and bodies, as happens in the European regional system or concerning rights of persons with disabilities),³²⁹ the judgment of individual acts constitutive of human rights abuses may pertain to other -international or national- bodies, as criminal Courts and Tribunals.³³⁰ The Inter-American Court has even considered that there are “certain criminal acts that constitute [...] grave violations of [...] human rights”.³³¹

Likewise, concerning the link mentioned in the previous paragraph, certain norms protecting human rights call for the criminalization of some violations.³³² Their underlying rationale

³²⁸ Cf. Human Rights Committee, General Comment No. 31, op. cit., para. 8.

³²⁹ As permitted for instance by Protocol 14 to the European Convention of Human Rights, a proper interpretation of the International Covenant on Civil and Political Rights or by the framework of the protection of persons with disabilities permit. See, among others, articles 1, 11 and 12 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, 33, 34 and 59 of the European Convention on Human Rights, or the amendment to article 6 of the Treaty on European Union provided in article 1 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community; Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, op. cit., para. 4.

³³⁰ See, for instance, Inter-American Court of Human Rights, Advisory Opinion OC-14/94, para. 56; Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et al. v. Peru*, Judgment, 30 May 1999, paras. 89-90; Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment, op. cit., para. 122; Concurring Opinion of Judge A.A. Cançado Trindade to: Inter-American Court of Human Rights, *Case of the Miguel Castro Prison v. Peru*, Judgment (Interpretation of the Judgment on Merits, Reparations, and Costs), 2 August 2008, para. 83; Concurring Opinion of Judge Sergio García Ramírez to: Inter-American Court of Human Rights, *Case of the Miguel Castro Prison v. Peru*, Judgment (Interpretation of the Judgment on Merits, Reparations, and Costs), 2 August 2008, para. 21.

³³¹ See Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment, op. cit., para. 148.

³³² This is envisaged, *inter alia*, in articles 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 4 of the International Convention for the Protection of All Persons from Enforced Disappearance, article 146 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 3 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, IV of the Inter-American Convention on Forced Disappearance of Persons, 7.c of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 7 of the Convention on the physical protection of nuclear material, 3 of the Convention for the suppression of unlawful acts against the safety of civil aviation, 2 of the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, 2 of the International Convention against the taking of hostages, or 1, 3, 8, 10 or 12 of the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation of 2010, all of which require the enactment of domestic norms outlawing certain acts.

is that the conduct they address are to be criminalized because of how they threaten the enjoyment of certain human rights, violating human dignity; and that law should not be limited to sanctioning only violations attributable to an authority and protect only their victims, but rather focus on the content of rights in *all* relations.

Prejudices may lead some to think that only State agents can commit some conduct the criminalization of which is required by treaty-law. While this is sometimes true, they can frequently be also committed by non-state actors or be perpetrated with their assistance and cooperation.

The Committee against Torture, for instance, rightly considered in the case of *Elmi v. Australia* that in some situations non-state actors can commit torture as defined in the treaty it supervises, and likewise the European Court of Human Rights has concluded that non-state entities may act in a way that is contrary to the prohibition of torture “or degrading treatment or punishment.”³³³ Another international supervisory body, the Committee on Human Rights, estimated that it was competent to examine the conduct of international non-state entities in territories administered by non-state entities in light of human rights, arguing that the recognition of rights in favor of the population located in those territories is protected irrespective of changes of authorities therein, even if they are non-state (as happened with the UNMIK in Kosovo).³³⁴

Some may think that since in cases as those just described the non-state actors resembled States in some ways and their conduct was examined, the emancipation theory is correct. *However*, this merely confirms that non-state entities can have power, which must be controlled. Yet, non-state human rights responsibilities are not limited to events in which they resemble States or have authority, as confirmed by the independent international commission of inquiry on the Syrian Arab Republic and in doctrine.³³⁵

³³³ Cf. Committee Against Torture, *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, CAT/C/22/D/120/1998, op. cit., paras. 6.4-7, especially paragraph 6.5; Redress, “Not only the State: Torture by non-State Actors: Towards Enhanced Protection, Accountability and Effective Remedies”, the Redress Trust, 2006, pp. 17-18; European Court of Human Rights, *Case of N. v. Sweden*, Application no. 23505/09, Judgment, op. cit., paras. 51, 54-62; European Court of Human Rights, *Case of Sufi and Elmi v. the United Kingdom*, Judgment, op. cit., para. 213, where the Court held that “Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real” (emphasis added). The European Court has also mentioned that “As regards the question whether the State could be held responsible, under Article 3, for the ill-treatment inflicted on persons by non-state actors, the Court recalls that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals”, as seen in: European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment, op. cit., para. 159.

³³⁴ See Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, op. cit., para. 4.

³³⁵ See Tilman Rodehäuser, “Progressive Development of International Human Rights Law: The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic”, *EJIL: Talk!*, 13 April 2013, available at: <http://www.ejiltalk.org/progressive-development-of-international-human-rights-law-the-reports-of-the-independent->

Turning to an analogous subject, some argue that domestic violence against women and children may be committed only in patterns of male-female or adult-child subjugation, being them the only ones in which protection from that violence may be given. Yet, this is not always the case: the European Court of Human Rights and the Inter-American Commission on Human Right, among others, have considered that domestic violence can negatively affect the rights of individuals of both genders –and all ages-,³³⁶ and that violence is certainly contrary to the dignity of all those victims, who must therefore be protected.

For example, isolated violent acts of one partner may violate the human rights of the other without the former necessarily being in a position of *de facto* power. Whatever the case, the violation demands that the victim is protected even if such a position is not found, because *all* human beings must be protected from outrages against their dignity, and cannot be excluded from that protection, as required by the principle of non-discrimination, which is peremptory and includes the prohibition of discrimination based on sex or age, among other conditions (the argument on non-discrimination is expanded upon in Chapter 3).

This is the kind of logic that must guide the interpretation of measures and strategies that tackle patterns of violation, because while special measures may focus on specially affected persons, all the other individuals who do not belong to that category can still be victimized and must be protected, being some alternative of protection means acceptable if they are *effective*. After all, *all* violence must be condemned. According to Amnesty International:

“The purpose of our campaign is not to portray women as victims and stigmatize men as perpetrators, it is to condemn the act of violence itself. That will require all of us to change, not only as organizations and institutions but as individuals [...] Violence against women [and *any other*

[international-commission-of-inquiry-on-the-syrian-arab-republic/](#) (last checked: 9 May 2013); Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/19/69, 22 February 2012, para. 106.

³³⁶ See Inter-American Commission on Human Rights, *Case of Jessica Lenahan (Gonzalez) et al. v. United States*, Merits Report, op. cit., para. 94, where it is mentioned that “[s]tudies and investigations [...] reveal that women constitute the majority of domestic violence victims in the United States”, thus accepting that men can also be victims of such violence, characterized by the context where it takes place rather than being determined by gender, although it is to be accepted that women tend to suffer this form of violence more than men and thus special measures of protection must be designed, being it yet contrary to the human rights of male victims to ignore their plight and rights. The European Court of Human Rights has actually expressly mentioned that “The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly.” This remark is true and brave because some feminists deny its existence, which is actually either naïve or treacherous, and does not deny the possible need for special measures that protect women, which should *never* come at the expense of denying the rights of men lest they are discriminated against. The quote is found in: European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment, op. cit., para. 132. Actually, some feminists have held that “men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence” (emphasis added), implying that they sometimes are or can be victims in those cases, as seen in: Hilary Charlesworth et al., “Feminist Approaches to International Law”, *American Journal of International Law*, Vol. 85, 1991, at 625.

human being, I might add] will only end when each one of us is ready to make that pledge: not to do it, or permit others to do it, or tolerate it, or rest until it is eradicated³³⁷ (emphasis added).

Certainly, children and women abused domestically must be protected from human rights *violations* committed against them by private entities as individuals, as mentioned by the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court and Commission of Human Rights;³³⁸ but so must everyone else be protected, whether a violation takes place in the public or in a private context. Having all victims inherent worth, all of them must receive *effective* protection and the recognition of their rights and victimhood. If this is ignored, dynamics of victim competition and re-victimization, among others, can be generated.³³⁹

Granted, as advanced above, special situations of vulnerability may call for special measures that tackle patterns of violations that affect especially vulnerable individuals, as discussed by the Inter-American Commission on Human Rights and other entities.³⁴⁰

Apart from justifying special measures of protection, vulnerability also serves as the basis of the development of specialized human rights norms that protect especially affected rights, individuals,³⁴¹ *or that offer protection from relevant actors that engage in violations*. The design of such specific norms permits to take account of special needs of protection of some groups or *against some offenders*.

³³⁷ Cf. Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., at 122.

³³⁸ See European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment, op. cit., paras. 74, 86, 132, 142, 144-145, 147, 159, 187-191; Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, op. cit.; paras. 255, 395-396; Inter-American Commission on Human Rights, *Case of Jessica Lenahan (Gonzalez) et al. v. United States*, Merits Report, op. cit., paras. 111-113, 122-134; European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, op. cit., paras. 41, 45-46, 50.

³³⁹ Cf. Luc Huyse, "Victims", in David Bloomfield et al. (eds.), *Reconciliation after Violent Conflict: A Handbook*, International Institute for Democracy and Electoral Assistance, 2003, pp. 61-62, 64-65.

³⁴⁰ Cf. Inter-American Commission on Human Rights, *Case of Jessica Lenahan (Gonzalez) et al. v. United States*, Merits Report, op. cit., paras. 110-114, 127, 129, 130, 132-134, 168; Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, op. cit.; paras. 252-255, 395; European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, op. cit., para. 45; European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment, op. cit., paras. 159, 164, 200. Special measures of protection, as well as general ones that do not focus on the needs of vulnerable rights or groups, must include both measures to prevent violations and mechanisms to protect victims and address offenders if a violation takes place. Additionally, such measures must respect the principle of legality, and fundamental rights of alleged offenders. See Chapter 5 and its section 5.2, *infra*; and European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, op. cit., paras. 185-187; or Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.LN/II.116, 22 October 2002, para. 5, among others.

³⁴¹ Concerning the specialization of human rights, it has been mentioned, for instance, that "[t]he rights enumerated in the Universal Declaration of Human Rights, in a perfect world, would be enough to protect everyone. But in practice certain groups, such as women, children and refugees have fared far worse than other groups and international conventions are in place to protect and promote the human rights of these groups. Similarly, the 650 million people in the world living with disabilities—about 10 per cent of the world's population—lack the opportunities of the mainstream population", as found at: <http://www.un.org/disabilities/convention/questions.shtml#one> (last checked: 20/12/2011).

Returning to the analysis of some emancipation theories, if we consider that some violations may occur with there being no relationships of subjugation among those involved, and that there may be a balance of power between victim and offender, it is possible to conclude that emancipation is but *part* of the purposes of human rights, which must protect individuals in events beyond its scope given the inherent and equal worth of all victims. Curiously, ultimately every violation amounts to an abuse of some *power* (at least factual, understood as capacity). Yet, this is not what some ideas that seek to tackle hierarchical or unbalanced exactly relationships have in mind.

On the other hand, international human rights supervisory bodies and norms have examined the vicarious responsibility and positive duties of the State, that must prevent and respond to *non-state* violations, *even private ones*,³⁴² given the existence of a horizontal effect of human rights. In this regard, it has been considered that a State that fails to exercise due diligence will have its responsibility engaged in connection with non-state violations, which may be criminal or not and be responded to appropriately and proportionately. Were we to follow an approach based exclusively on the notion of emancipation described above, some could consider that private abuses do not qualify as human rights violations given the absence of a hierarchical relationship, which would undermine ambits of protection widely accepted nowadays.

For example, according to Goodhart, some conduct that is contrary to the respect of the family are not really human rights issues, despite the recognition of the human right of protection of the family, simply because he stresses the absence of a hierarchical or power abuse against freedom or emancipation in connection with it.³⁴³ Such train of thought would be contrary to currently recognized human rights that protect ambits of dignity and ignores how human rights issues can manifest in different forms and be likewise tackled in various forms –idea defended by Goodhart himself-, including for example non-adjudicatory and extra-legal mechanisms (that nonetheless may have a positive impact on humanitarian legal goods) besides judicial mechanisms,³⁴⁴ some of which may take the form of civil action of innocent spouses, for instance.

³⁴² Cf. Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 87-91; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, op. cit., para. 140.

³⁴³ Michael Goodhart, op. cit., pp. 35-38

³⁴⁴ Cf. *Ibid.*, p. 37; Part II, especially Chapter 8, *infra*; Oscar Schachter, op. cit., at 853-854; Amartya Sen, op. cit., at 345; *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011, Principles 27 through 31; James Griffin, op. cit., at 355; or provisions that call for the use and adoption of legislative, administrative, judicial, social, educational and other measures to protect human rights and make norms that protect human dignity effectively, such as articles 4.1.a, 15 and 16 of the Convention on the Rights of Persons with Disabilities, 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, 9 and 15 of the International Convention on the Elimination of All Forms of Racial Discrimination, 2 of the Convention against Torture

This rebuts his assertion that claims by those individuals are not relevant from a human rights perspective.

Two additional ideas are worth considering. In the first place, as can be seen in the description of some cases examined by international bodies, the idea of protecting individuals from abuses of power regardless of who commits them is important. Among other reasons, this has allowed some international supervisory bodies, constrained by their limited competence under treaties drafted with a State-centered logic, to interpret their powers as allowing them to examine some non-state abuses, thus giving them the opportunity to increase the number of victims they can protect, which is quite significant for victims who would otherwise find no venues of protection due, for instance, to domestic incapacity or unwillingness to examine those abuses.

Secondly, to be fair I do not criticize the whole theory of Michael Goodhart but those aspects of it that would lead to removing existing human rights protections (e.g. concerning criminal protections and family rights) and fail to protect some victims. However, it is worth stressing that he indicates emancipation *alongside* freedom as *functions* of human rights.³⁴⁵ To my mind, ensuring freedom can be understood in a way that is not limited to protection from abuses of power. The problem is his express exclusion of certain current guarantees, but it is true that emancipation is and must be *one* of the goals of human rights.

Arriving at conclusions similar to those held by Goodhart, James Griffin considers that human rights are to be protected from all actors that have *de facto* authority over individuals, including for instance parents in relation to their children, especially because the value of personhood would be vulnerable in those relationships.³⁴⁶ Deeming that the notion of human dignity is too vague, Griffin attaches importance to the *normative agency* dimension of individuals, and argues that his theory offers an alternative *proposal*, including his conclusions on what entities are to respect human rights.³⁴⁷

As discussed concerning the theory of Michael Goodhart, I do not challenge but actually endorse the idea that authorities –whoever they are- must respect human dignity. Different decisions confirm the idea that authorities, *State or not*, must abide by human rights standards. This can be concluded from the study of decisions addressing non-entities with administration functions in territories (as the UNMIK) or actors that exercise *de facto* authority and can mistreat individuals, who must be protected from all acts that inflict suffering *and* from actors with

and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2 of the International Covenant on Civil and Political Rights, 2 of the American Convention on Human Rights, 1 and 2 of the “Protocol of San Salvador”, or IV.b and VII of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.

³⁴⁵ Cf. Michael Goodhart, *op. cit.*, p. 36.

³⁴⁶ Cf. James Griffin, *op. cit.*, at 343. 346-347.

³⁴⁷ *Ibid.*

functional or factual authority or powers that enable them to abuse human rights. What I disagree with is the reductionism of the two theoretical constructions described above, because despite requiring protection from all actors with positions of authority, they tend to fail to demand that protection against abuses of other entities, which can also act against human rights and guarantees. The crux is whether dignity is disregarded, not by whom, be it a State or an authority or any other actor, as required by the universality of the protection of human beings.

What is more, even if for the sake of discussion were I to say that I agree with James Griffin on his criticism of the alleged vagueness of the notion of human dignity due to difficulties of explaining what the inner worth of individuals is (truth be told, I disagree with this criticism for several reasons),³⁴⁸ the fact that the inner worth of individuals does not depend on circumstances or contingencies, as *for instance the nature or identity of a potential offender against whom protection is to be given*, proves that dignity is not an altogether vague or irrelevant notion, and that at least some elements of it offer some precision and/or guidance that permits to conclude that there is a need of practical ways in which its protection can be implemented. Moreover, I consider that insisting on the inner worth of everyone and his not deserving to be treated as means is neither irrelevant nor deals with completely empty considerations.

Furthermore, with due respect I deem that the theory put forward by Griffin has some problems, because by stressing that human rights are to protect “normative agency,” even against all entities that can threaten it, including formal and informal authorities, something is missing. By endorsing his theory, what would be missing would not be the lack of clear content due to vagueness, which is what he criticizes about functional accounts,³⁴⁹ but rather the complete protection that human rights based on dignity can offer: the account he offers restricts some protections that human rights can offer, which is a shortcoming of some purely-functional accounts.

It must not be ignored that human rights serve multiple purposes and dimensions of the inherent and non-conditional *worth* of human beings. Such protection would be incomplete if human rights and guarantees were only enforceable *vis-à-vis* authorities or only served to protect normative agency.

³⁴⁸ The alleged deficiency of this notion is questionable, because if it truly is an intuitive notion verbal descriptions may not fully explain it, despite which it may be understood in some level of perception. Additionally, difficulties concerning its *comprehension* do not detract from its *relevance*, as those who claim or benefit from human rights law will surely attest. On the intuitive understanding of human dignity, see Oscar Schachter, *op. cit.*, p. 849; Roberto Andorno, *op. cit.*, at 6; Oliver Sensen, *op. cit.*, where it is said that “The way one can detect [human dignity] is often said to be by intuition as direct recognition [...] there might be an independent justification for the *contemporary* paradigm [of human dignity] – be it commonly shared intuitions, or a plausible argument for an absolute value of all human beings.”

³⁴⁹ Cf. James Griffin, *op. cit.*, pp. 341-346, where the author holds that both substantive and functional elements are necessary in order to ascertain what claims can be made by invoking human rights.

For these reasons, for example, Kant's account of dignity, placing too much emphasis on the willful generation of maxims and imperatives, or philosophical accounts that attribute foundational relevance to volitional aspects, may be manipulated by and lead some to ignore the protection needed and deserved by human beings that, due to mental illness or early stages of development, are precisely more vulnerable and in need of protection and do not display those aspects. Yet, their belonging to humankind makes them worthy of demanding and/or deserving the same respect and protection that other *human* beings are recognized to be entitled to claim, lest we endorse a selective system that incurs in contradictions and exclusions, which is contrary to the very values and goals that human rights law claims to endorse.

Another alternative account of the foundation of human rights is utilitarianism, which has been described with both positive and negative conceptions. The former suggests that it is the role of law to serve public utility, in order to maximize the happiness or welfare of the greatest number of individuals subject to it; while the latter approach considers that this theory may prove to be too risky because States or authorities entrusted with implementing law may impose a viewpoint of happiness on individuals and commit abuses when doing so, and that for this reason what ought to be pursued is to make as many persons as less unhappy as possible.³⁵⁰

Both theoretical models could serve as bases for claims of protection from non-state threats to a certain extent, because striving for the happiness or wellbeing of individuals likely requires eliminating the possibility of non-state violations or adopting measures against violations that are committed; whereas the negative approach certainly demands out of consistency eliminating the consequences of non-state threats, which increase the suffering and thus the unhappiness of persons.

Some of the shortcomings of utilitarianism, however, are its generalizations and overemphasizing the consideration of the merely *instrumental* role of extra-legal considerations or the *instrumentality* of the *ultimate duty holder*, which the State and other lawmakers in a given legal system are: indeed, it is the State which usually must strive to deal with non-state violations for this theory, which could be reflected in the obligations of States found in human rights treaties. However, in the current global landscape States have lost part of their power and influence, and non-state actors having acquired hard, soft and systemic power, having some of them economic power that rivals that of many States. Thus, non-state actors are often in a position that permits them to pressurize for lower protection standards; are better suited to operate in a globalized

³⁵⁰ Cf. Suri Ratnapali, *Jurisprudence*, Cambridge University Press, 2009, pp. 31, 37, 155-156; R. N. Smart, "Negative Utilitarianism", *Mind, New Series*, Vol. 67, 1958, pp. 542-543.

landscape more freely than States; can evade controls of legal systems due to their formalities and separation from others; and may form alliances even to further illicit activities.

For these reasons, States and international organizations alone are often unable to effectively protect individuals unless they operate in an integrated, cooperative and contributive manner.³⁵¹ Yet, sometimes drug-cartels, guerrillas and other groups can commit violations with the State not having the power to prevent them from occurring or to hold them accountable.³⁵² In those events, if they fail to address abuses with diligence despite having striven, States would not breach their positive human rights obligations (of means).³⁵³ The panorama is complicated since even informal groups as the G8 can have an impact on the enjoyment of human rights,³⁵⁴ and formalistic notions as their lack of personality, coupled with their influence, which facilitates their elusion of regulation of their conduct, certainly do not help.

Insisting on a State-centered paradigm often implies making it impossible for victims to have access to effective remedies when they are abused by non-state actors, because the domestic system is not able to ensure effective protection in all cases. In consequence, instead of focusing on *duty holders*, it is by focusing on the *rights-holder* (the individual with inherent dignity) that a comprehensive and truly complete protection of human beings can be designed, and the

³⁵¹ See Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., pp. 4, 34, 46; Celestino del Arenal, op. cit., pp. 27-28, 34, 52-53, 64-66; Anna Badia Martí, supra, at 319-320, 324, 336-338, 342-343; Francisco Galindo Vélez, op. cit., pp. 125-126; Sandra Lavenex, supra, pp. 377, 388; Alexandra Gatto, supra, at 423.

³⁵² See Francisco Galindo Vélez, op. cit., pp. 125-126.

³⁵³ Cf. European Court of Human Rights, *Case of Giuliani and Gaggio v. Italy*, op. cit., paras. 245-249, 255; Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, op. cit., paras. 243, 252, 254, 258; Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment, op. cit., paras. 123, 126, 134; Inter-American Commission on Human Rights, *Case of Jessica Lenahan (Gonzalez) et al. v. United States*, Merits Report, op. cit., paras. 122-134; European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment, op. cit., paras. 129-130; European Court of Human Rights, *Case of Mastromatteo v. Italy*, Judgment, 24 October 2002, para. 68; European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, op. cit., para. 50; European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Judgment, op. cit., paras. 219, 221, 249; Inter-American Court of Human Rights, *Case of Gelman v. Uruguay*, Judgment, 24 February 2011, para. 184, where the Courts discuss the fact that positive obligations of authorities (States or others, it must be clarified, even if not expressly mentioned in those judgments, due to the acknowledgment in case law that those obligations also bind other actors) are duties of means and that resources problems are to be taken into account, alongside knowledge of risks and other elements, in order to ascertain whether the respective authority acted with due diligence regarding their positive duties against non-state threats and materialized violations.

³⁵⁴ It can be said that powerful informal networks or groupings may factually impose their decisions on third parties (without an authority or legitimation to do so) by means of making their members operate in formal channels and pretend to elude liability by invoking their "informality" or legal "non-existence". Their power and legal impact call for their accountability. About such groups, the problems they pose, some (insufficient) attempts at increasing their legitimacy in some cases, and the impact of the decisions adopted by these groupings in formal fora, see Benedict Kingsbury, Nico Krisch, Richard Stewart, *The Emergence of Global Administrative Law*, op. cit., pp. 7-8, 21-22, 28; Inge Kaul, Pedro Conceição, Katell Le Goulven, and Ronald U. Mendoza, "How to Improve the Provision of Global Public Goods", in Inge Kaul et al. (eds.) *Providing Global Public Goods*, Oxford University Press, 2003, pp. 27, 32, 53-54; Celestino del Arenal, op. cit., pp. 56, 80; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., at 56; Armin Von Bogdandi et al., "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities", *German Law Journal*, vol. 9, 2008, pp. 1385-1386, 1389.

respective design must take into account a variety of demands and implications derived from human dignity, which may not be considered in utilitarian theories.

Moreover, all individuals has dignity, and attaching priority to notions of general wellbeing may lead some to ignore their needs and entitlements, contrary to the fact that human rights and guarantees have among their functions the protection of human beings from all violations, including those attributable to majorities³⁵⁵ –and minorities as well-. On top of that, concepts as happiness may be even more elusive than that of the inherent worth of dignity (which must be respected and protected by policies and decisions eventually adopted on the basis of utilitarian considerations for them to be fair and legitimate). Moreover, as described in a persuasive manner in Aldous Huxley's *Brave New World*, notions of general social 'happiness' (which may be understood as joy, pleasure, or in other ways, not being an unequivocal term) may be at odds with individual rights and freedoms.

Being related to the previous ideas, it has been pointed out by authors as Amartya Sen that there is a difference about what is central for the utilitarian and the human rights-discourses. While for the former utility occupies a central position, the latter attaches central importance to "the basic importance of human freedoms and the obligations generated by that diagnosis."³⁵⁶ This difference in emphasis certainly is relevant, because only the dignity-centered discourse necessarily makes the individual the center of norms devised to protect her inherent rights through different mechanisms, including complementary non-legal mechanisms that can help to achieve that purpose. As a result, the human rights logic seeks to grant individuals complete protection and take the inherent and *essential needs of every single* human being always into account, something that is not ensured under a utilitarian stance.

Lastly, it can be mentioned that utilitarianism places too much emphasis on benefiting majorities, and this may make their adherents forget that sometimes "benefiting" majorities can be harmful to individuals (belonging to minorities or not) and be contrary to their dignity. The fact that something serves interests of either a majority or a minority says nothing about the respect of human dignity and the enjoyment of guarantees founded upon it.

Other authors have argued that autonomy can be considered an alternative or additional overarching principle of human rights, instead of or complementing human dignity.³⁵⁷ Rather than deeming it a foundational principle, I think that the respect of autonomy is a guarantee that flows from dignity, rather than being the general foundation of all human rights, and consider that the

³⁵⁵ Cf. Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., at 16.

³⁵⁶ Cf. Amartya Sen, op. cit., pp. 325-326.

³⁵⁷ Cf. David A. J. Richards, "Rights and Autonomy", in Carlos Nino (ed.) *Rights*, New York University Press, 1992, at 210; Carlos Santiago Nino, *The Ethics of Human Rights*, Clarendon Press, 1991, at 187.

contrary assumption entails some risks: first of all, because attaching greater importance to the concept of autonomy or arguing that its protection by a right is a condition for it to be a human right may lead to considering that dignity-derived rights are not human rights if they are not directly based on autonomy. Therefore, the guarantees offered by the human rights framework may be narrower if lawmakers and authorities refrain from considering rights as human rights when they are not directly based on autonomy.

Some risks of making autonomy a *foundational* value are risks of exclusion, because even though it is said that all human beings are potentially autonomous, some may take advantage of the concept to deny the human nature or basic entitlements of some human beings due to their not having an apparent or current autonomy,³⁵⁸ something contrary to the idea of rights founded on dignity and the right to have rights and recognition. For this reason, dignity proves again to be the best and proper foundation of a *universal* framework of the protection of the inherent and *non-conditional* worth of *all human beings*.³⁵⁹

Certainly, autonomy does play a very important role in human rights law, as evinced by the analysis of several academic studies and of guarantees offered by multiple human rights, but rather than constituting the sole or prevalent foundation of those rights, it constitutes a value, principle and legal good that defends and flows from that dignity, which is the kernel and crux of the system: lack of manifestations of autonomy by human beings thus do not deny their dignity and human rights.

Feminist theories, on the other hand, have also put forward ideas regarding the protection of human rights from non-state threats. I agree with some insights they offer, but consider that uncritically adopting a wholly feminist stance (especially concerning the most radical feminist opinions) would be problematic, and that is necessary to maintain human dignity as the foundation of the human rights framework. Some feminist proposals declare that they seek to end unjust aspects of law rather than to completely justify a comprehensive human rights defense of all human beings in practice, and thus do not offer complete bases of a human rights system,

³⁵⁸ To my mind, ideas of supporters of abortion that allude to the bond of the preborn with the mother to deny recognition to the latter (despite the fact that dependence does not equate with lack of independent existence) are properly considered by as contrary to the right to the *recognition* of personality that all *human* beings have and a treatment of the unborn as “objects”, and similar in logic to practices of Roman law concerning some human beings and of regimes that supported, permitted or condoned slavery. In my opinion, this highlights the importance of founding *human* rights on the inherent dignity of *every* member of humankind, whose belonging is not dependent on external recognitions, conditions, convenience of others, or any other external or relational consideration. Cf. Rita Joseph, *op. cit.*, pp. 66-68, 78, 213-214-218, 228-230.

³⁵⁹ This was discussed before, taking into account the insights found in: Emily Kidd White, *op. cit.*, p. 7; John Finnis, *op. cit.*, at 10; Roberto Andorno, *op. cit.*, at 7.

while others put forward arguments that may be misleading, fallacious³⁶⁰ or even contrary to human rights.

According to some feminist theories, some international norms, including human rights norms, would presumptively offer protection to individuals in situations in which men are likely to be victims, thus benefiting them, instead of granting protection to women when they are vulnerable. Because of this, they argue, international law favors men and “patriarchal” models.

I would like to begin the analysis of some of those theories by saying that I agree with Fernando Tesón when he considers that the aforementioned feminist criticisms are partly unsound and unfair, but that still their insistence on the need to offer protection from private violations is valid and must be addressed.³⁶¹ However, I consider that it must be clarified that *such protection is needed not only when women are victims* (holding so would be discriminatory, actually) and *must* be offered to any human being victimized by *any* entity.

Concerning this, I deem it important to recall that some human rights and criminal norms, treaties and case law³⁶² expressly address situations in which (currently) women are especially or frequently (but not exclusively) victimized, such as domestic violence, rape or sex-based discrimination; and that in other cases women have access to the same instruments of protection from victimization that men can invoke. In fact, prohibition of discrimination, of which protection from gender discrimination is a component, is part of *jus cogens* and a central component of human rights law that benefits *all* human beings, being it necessary to avoid temptations of

³⁶⁰ E.g. Some feminists say that women will rot in the streets if abortion is not legalized due to the risks of unsafe abortions: this argument ignores that “legal” abortions (contrary to human rights in any case, in my opinion) can be unsafe, and that abortion should not be procured (and may have negative repercussions on women), being there other alternatives that may help mothers *and* the unborn. This argument is like saying that the mafia should be left free to operate and protected in their vendettas, because otherwise they face risks, and that thus criminals should be allowed to kill safely. Cf. “How to magically make abortion “safe”, available at: <http://www.turtlebayandbeyond.org/2011/abortion/how-to-make-abortion-safe-like-magic/> (last checked: 22/12/2011); “Women who have had an abortion are three times more likely to have breast cancer”, available at: <http://www.turtlebayandbeyond.org/2011/abortion/women-who-have-had-an-abortion-are-three-times-more-likely-to-get-breast-cancer/> (last checked: 22/12/2011); “Major study on abortion/mental health risk under attack, but criticisms baseless”, available at: <http://www.lifesite.net/news/major-study-on-abortion-mental-health-risk-under-attack-but-criticisms-base> (last checked: 22/12/2011).

³⁶¹ Cf. Fernando R. Tesón, “Feminism and International Law: A Reply”, *Virginia Journal of International Law*, Vol. 33, 1993, pp. 655, 658-664.

³⁶² See ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 162-164, 175-176; articles 1 through 3 of the Convention on the Elimination of All Forms of Discrimination against Women, among others, 7.1.g, 8.2.b.xxii, and 8.2.e.vi of the Rome Statute of the International Criminal Court, 3.g and 4.e of the Statute of the International Criminal Tribunal for Rwanda, 5.g of the Statute of the International Criminal Tribunal for the former Yugoslavia, 4.2.e of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 76 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 3 of the International Covenant on Civil and Political Rights, or 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, among others.

forgetting or not protecting some of them.³⁶³ After all, all violations of human dignity must be effectively dealt with, given its universality and required effectiveness.

Additionally, to my mind the claims of some feminists that they either represent the opinion of women (being it doubtful that they represent *all* women) or that their ideas benefit all women are not always true.³⁶⁴

Truly, paying special attention to the needs and circumstances of vulnerable victims is necessary, but this is valid not only concerning women but also migrants, children and other vulnerable persons; and at the same time every human being is still protected by norms and considerations on general human rights and guarantees. It is worth mentioning that, as mentioned above, the European Court of Human Rights and the Inter-American Commission on Human Rights have accurately declared that domestic violence can be committed by either men or women, and accordingly action and protection from all such and any other non-state abuses must be given. Excluding men from this protection, or giving them less effective protection, would be discriminatory and endorse their victimhood, favoring their re-victimization.³⁶⁵ Moreover, the principle of non-discrimination expressly demands taking into account special needs of women or *any other* category of human beings, being *all of them equal*, while calling for protecting everyone effectively.³⁶⁶

To their credit, it must be said that it is correct for some activist groups to focus on women's rights, just as others focus on the rights of indigenous peoples, children or persons with disabilities, since their expertise and focus may make them contribute to their promotion; but this over-concentration should by no means be adopted generally and systematically or normatively. Additionally, it is to be acknowledged that feminist theories have rightly pointed out how there are or may be practices or norms that exclude subjects from the scope of normative protection or recognition that accordingly ought to be addressed and modified, not necessarily in order to empower or protect only women.³⁶⁷

³⁶³ On these issues, cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, op. cit., paras. 86-88, 98-101.

³⁶⁴ Additionally, some feminist claims are actually detrimental to the essential rights of some *human* beings while others employ charged terminology created or supported by that ideology to strengthen their viewpoints (sometimes employing *ad hominem*, *argumentum ad verecundiam*, or *ad baculum* fallacies, among others).

³⁶⁵ Cf. Luc Huyse, op. cit., pp. 61-62; Inter-American Court of Human Rights, *Case of the "Mapiripán Massacre" v. Colombia*, Judgment, 15 September 2005, para. 238; Preamble to the Rome Statute of the International Criminal Court, where it is mentioned that the States Parties to that Treaty are "[d]etermined to put an end to impunity for the perpetrators of [grave] crimes and thus to contribute to the prevention of such crimes".

³⁶⁶ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, supra, paras. 78, 85, 88-89, 102-104; Human Rights Committee, General Comment 18, *Non-discrimination*, 11 October 1989, paras. 1, 4, 7-10, 12-13; European Court of Human Rights, Grand Chamber, *Case of Oršuš and other v. Croatia*, Judgment, 16 March 2010, paras. 149-150.

³⁶⁷ See Math Noortmann, "Non-State Actors in International Law", op. cit., pp. 62-63.

Thirdly, *some* feminist theories tend to be reductionist and one-sided, in the sense that they help to create an imaginary account according to which women apparently seem to be the exclusive or most vulnerable potential victims of violations that are not effectively addressed, a discourse that is imprinted in the subconscious of the public through repetitive messages. Discourses that overemphasize one side and lead to ignoring the other can prompt biased policies that do not consider the needs of all victims, who always, because of their human identity, are worthy of protection and entitled to it. Moreover, abuses committed in private contexts are *already* required to be prevented and sanctioned by international human rights law, which not only protects ‘male interests.’”

Fourthly, many feminists claim that women are necessarily best placed to evaluate their demands, and that thus arguments by others according to which feminist claims ignore other victims or endorse violations of rights are to be dismissed. This is nothing but an *ad homine* fallacy that defies logic and the capacity of critical evaluation by others, and also that all points of view must be contrasted and examined, including those of defendants of the rights of other persons that might be ignored by feminist claims. Additionally, this sort of reasoning ignores that arguments are not sound based on who expresses them but because of their content. Additionally, sometimes those who claim to defend the interests of affected persons may be partial, biased or wrong.

Ironically, while some feminist arguments are certainly sound and truly seek to protect women and their equality, some feminists further proposals that make others vulnerable to violations by non-state actors, as happens when they selectively treat some interests and call for legalizing the killing of both preborn and newborn babies, both of whom are considered by some, myself included, to have human rights³⁶⁸ (while often rightly opposing –another- State-ordered death penalty).³⁶⁹ Thus, some feminist ideas do not offer an all-encompassing approach that protects *all* victims from *all* threats, and are not as inclusive as they pretend to be. The person-centered approach that recognizes the inalienable worth of everyone, on the contrary, favors and demands protecting everyone, with no exclusions whatsoever and not being based on the protection of only *some* victims or to the detriment of others.

³⁶⁸ See the San José Articles, available at: http://www.sanjosearticles.com/?page_id=2 (last checked: 27/12/2011); article 4.1 of the American Convention on Human Rights; “Does the International Right to Life Prohibit Abortions?”, available at: [http://opiniojuris.org/2010/09/25/does-the-international-right-to-life-prohibit-abortions/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+opiniojurisfeed+\(Opinio+Juris\)](http://opiniojuris.org/2010/09/25/does-the-international-right-to-life-prohibit-abortions/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+opiniojurisfeed+(Opinio+Juris)) (last checked: 26/12/2011).

³⁶⁹ Cf. Rita Joseph, *op. cit.*, pp. 27, 94, 250, 285, 294; “Shock: No jail time for woman who strangled newborn because Canada accepts abortion, says judge”, available at: <http://www.lifesitenews.com/news/judge-rules-no-jail-time-for-infanticide-because-canada-accepts-abortion/> (last checked: 27/12/2011); How to magically make abortion “safe”, available at: <http://www.turtlebayandbeyond.org/2011/abortion/how-to-make-abortion-safe-like-magic/> (last checked: 27/12/2011).

When studying the horizontal effects of human dignity or the protection against non-state abuses, draft norms, decisions and authors as Reinisch or Clapham often insist that States retain their (positive and negative) obligations,³⁷⁰ which certainly benefit women and others. Additionally, according to the principle of equality, reasonable differential treatments are allowed and may justify different measures designed for dealing with victims of different actors, as long as every victim is effectively protected by law.

Feminism is ideological in many regards, and dignity should not be subject to political games,³⁷¹ reason why I disagree with its adoption as an official human rights policy, not being it necessary to adopt it or share it to protect *everyone* from non-state and other abuses. However, it is true that some feminist theories have ideas defended in this text as well, such as seeking a greater legal inclusion and protection of human beings from multiple abuses.³⁷²

To conclude this section, I consider that human dignity demands a comprehensive scope of protection, and that it is not only the current but also the best possible foundation of human rights and guarantees. Nevertheless, other proposals have interesting insights, some of which are complementary to or accommodated in the normative framework based on human dignity, reason why their examination is so important, even if some of their points are not shared by some.

This being clarified, it is necessary to analyze one dilemma: if for *one* conception of dignity, as the Kantian one, individuals are not to be treated as mere means, how can restrictions of rights and other measures allowed or even required by human rights law against non-state threats be justified? Would this constitute ignoring the finalistic nature of men and women? On the other hand, is it convenient to explore if the legal protection of human dignity has something to do with what Myres McDougal called an international law of human dignity? Such questions are examined in the next section.

³⁷⁰ Cf. August Reinisch, *op. cit.*, at 78-82; Inter-American Court of Human Rights, *Case of Ximenes-Lopez v. Brazil*, Judgment, 4 July 2006, para. 141; Andrew Clapham and Scott Jerbi, *op. cit.*, at 339; Alfred Van Staden and Hans Vollaard, *op. cit.*, at 181-184; Section A.1 of the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12, 26 August 2003; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, *op. cit.*, para. 70.

³⁷¹ Thus, I cannot agree with Andrew Clapham's insistence on the idea that human rights "are" political. See Andrew Clapham, *Human Rights: a Very Short Introduction*, *op. cit.*, p. 130.

³⁷² Cf. Math Noortmann, "Non-State Actors in International Law", *op. cit.*, pp. 62-63; Fernando R. Tesón, *op. cit.*, pp. 657-661.

1.3. Dilemmas of the protection of human dignity from all threats and the normative character of the protection of human dignity

As seen in the previous sections dealing with human dignity, several of its features make it not only admissible but also necessary to protect human rights and guarantees from non-state abuses. Still, States and other authorities retain their responsibilities and must be diligent and cooperate with different actors to protect individuals from non-state abuses, whether they have transferred competences of their own or not.³⁷³ Additionally, it is possible that their responsibility is engaged alongside that of other actors, out of complicity or due to their having simultaneous principal responsibilities.³⁷⁴

Besides not entailing the elimination of State duties, creating non-state responsibilities and legal burdens, including those addressing individuals, with the aim of protecting human rights and guarantees, is not contrary to the concept of dignity and is allowed by law, as long as fundamental rights and peremptory law are respected and tenets of human dignity as not conditioning the enjoyment of essential rights are observed.

From an ethical point of view, following Kantian ideas, Amartya Sen considers that human rights place both *perfect* and *imperfect* obligations on others, being a perfect obligation the duty to refrain from materially or *factually violating* the right, and the imperfect obligations duties derived from the responsibility to prevent or deal with violations committed against someone else.³⁷⁵ Breaches of the so-called perfect obligations are clearly contrary to the respect owed to human dignity (see section 1.1, supra), and legal and complementary mechanisms must deal with the problems they pose.

(Inherent) Dignity of X → (Inherent) Rights of X → Ethical duties (perfect or imperfect) of all to respect the rights of X → necessity of discussing how to regulate those ethical duties

Figure 2: Scheme of duties flowing from rights, which are based on dignity

In fact, just as human rights flow from human dignity, from the existence of those rights and dignity arises the need to forbid and delegitimize acts contrary to them *committed by anyone*. Before analyzing in detail why law and theory permit and even demand some *restrictive*

³⁷³ See August Reinisch, op. cit., pp. 78-82; European Court of Human Rights, Press Unit, Factsheet on *Case law concerning the European Union*, 2010, at 3, available at: http://www.echr.coe.int/NR/rdonlyres/EA6F3298-FE75-48E7-B8A7-F9C5FF5EB710/0/FICHES_European_Union_EN.pdf (last checked: 27/12/2011).

³⁷⁴ Cf. *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, paras. 419-420; Antonio Cassese, "When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium Case*", op. cit., p. 864; Inter-American Court of Human Rights, Advisory Opinion OC-14/94, op. cit., para. 56; Article 16 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts.

³⁷⁵ Cf. Amartya Sen, op. cit., pp. 321-322.

measures to protect rights without this contradicting human dignity, it is necessary to examine why they require measures against non-state violations in general terms.

From a theoretical standpoint, if one considers that dignity is *inherent* to every human being and thereby *independent of* States and normative systems and their recognition, a State-centered system that limits the relevance and effects of human rights to relationships with States must be dismissed. This conception certainly can be conceived from a natural law approach, one I ascribe to, or alternatively can be found in some liberal³⁷⁶ and political conceptions, as those enshrined in the American Declaration of Independence, that mentions that:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed" (emphasis added).

The conviction that protection from the multiple threats to the enjoyment of human rights must be ensured can be translated into normative terms, because the normative features of rights and guarantees protecting dignity require, out of consistency and due to requirements of effectiveness, to acknowledge that their content and enjoyment can be violated by non-state actors and that such (factual) violations constitute *legally relevant facts*, which must be addressed by law. In this sense, the capacity to affect legal systems and their interests must be addressed normatively. Moreover, the Inter-American Commission on Human Rights mentioned in the *Case of Jessica Lenahan (Gonzalez) et al.* that non-state violations must be prevented and responded to by States,³⁷⁷ confirming their possible existence, their legal relevance and the need to respond to them effectively and appropriately. This can be inferred from the jurisprudence of the Inter-American Court of Human Rights, that considers that appropriate sanctions to human rights violations, even when attributable to non-state entities, must be implemented.³⁷⁸

Concerning these ideas, the Preamble of the Declaration on the Protection of all Persons from Enforced Disappearance is both promising and disappointing, because it mentions that the General Assembly has been:

"Deeply concerned that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the

³⁷⁶ Cf. George Cardinal Pell, "Varieties of Intolerance: Religious and Secular", Oxford University, 2009, pp. 6-7, available at: <http://documents.scribd.com/docs/1aqyamje35bx7w1omesl.pdf> (last checked: 27/12/2011)

³⁷⁷ Cf. Inter-American Commission on Human Rights, *Case of Jessica Lenahan (Gonzalez) et al. v. United States*, Merits Report, op. cit., paras. 119, 122, 128.

³⁷⁸ Cf. Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, op. cit., paras. 226, 236, 245, 247, 254, 280.

persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law” (emphasis added).

The previous Preamble, belonging to a specialized regime with limitations that are not found in general human rights norms, also found in specialized norms against torture (the general regulation and criminal sanction of which recognizes direct violability by *all* non-state entities without State involvement being required, unlike some specialized norms, being it necessary to apply the norms that applicable offer greater protection from threats, as Cecilia Medina argues),³⁷⁹ accepts that non-state entities can carry out factual violations that are legally relevant and worth addressing, but unfortunately endorses a very narrow conception of what enforced disappearance is. This prevents it from fully achieving the aim of fully protecting human dignity, i.e. against all threats, given its non-conditional character, which does not depend upon the identity of an offender. The Committee on Accountability of Non-State Armed Groups (CALASAG) has expressed similar concerns.³⁸⁰ Fortunately, the Independent International Commission of Inquiry on the Syrian Arab Republic considers that non-state actors are obliged to not commit any of the two violations referred to in this paragraph.³⁸¹

Conversely, the Working Group on Enforced or Involuntary Disappearance has considered that it has no capacity to examine non-state acts resembling enforced disappearance and that they must be investigated and sanctioned by States.³⁸²

However, the possibility that powerful or resourceful non-state groups elude deficient or even robust State controls makes it necessary to acknowledge that the liberties and rights can be directly protected from non-state entities. This helps to achieve two goals: a) sending a symbolic

³⁷⁹ Cf. Concurring Opinion of Judge Cecilia Medina Quiroga to: Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, Judgment, 16 November 2009, paras. 5-7, 10-17, 20; European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment, op. cit., para. 159; European Court of Human Rights, *Case of N. v. Sweden*, Application no. 23505/09, Judgment, 20 July 2010, paras. 51, 62; Human Rights Committee, General Comment No. 20, para. 2 (the International Covenant on Civil and Political Rights orders protection from torture, cruel, inhuman or degrading treatment or punishment “whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity”).

³⁸⁰ See Committee on Accountability of Non-State Armed Groups (CALASAG), “Not Only the State: Torture and Enforced Disappearance by Non-State Armed Groups”, Position Statement on the Proposed Laws Against Torture and Enforced Disappearance, 2009, <http://www.google.co.uk/url?sa=t&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.southsouthnetwork.com%2Fcalasag%2FCALASAG%2520Position%2520Statement-Petition%2520re%2520Torture%2520%26%2520Enforced%2520Disappearance%2520Bills.doc&rct=j&q=enforced%20disappearance%20by%20non-state%20entities&ei=uJslTtPpBoqGhQeqlKH6CQ&usq=AFQjCNFaj0lwcZyAL-kSHb-1wD200u-u-A&cad=rja> (last checked: 27/12/2011); http://southsouthnetwork.com/calasag_index.html. A relevant excerpt mentions that “From the point of view of the victims of acts of torture or enforced disappearance, there is no difference whether it is committed by a state or non-state perpetrator.”

³⁸¹ Cf. Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/19/69, 22 February 2012, para. 106; Tilman Rodehäuser, op. cit.

³⁸² Cf., Office of the United Nations High Commissioner for Human Rights, “Enforced or Involuntary Disappearances”, *Fact Sheet No. 6/Rev.3*, at 11, available at: <http://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf> (last checked: 27/12/2011), where it is *considered* that there is a principle according to which “States have the obligation to investigate and sanction acts similar in nature to enforced disappearance when committed by non-State actors.”

message that makes individuals feel recognized and protected instead of abandoned due to technical nuances even when domestic initiatives are not present, which sends a signal to potential non-state offenders about the wrongfulness of violations of human dignity; and b) entitling actors different from States (some of which in any case have obligatory jurisdiction) to cooperate in the promotion of legal guarantees of human dignity, as required by the common *erga omnes* interests and norms involved in that promotion and permitted by the fact that members of the *world* community have an interest in their integrity.³⁸³

In turn, the Rome Statute of the International Criminal Court considers, in articles 7.1.(i) and 7.2.(i), enforced disappearance committed by non-state actors as an international criminal conduct that can be prosecuted by the Court, insofar as it addresses crimes committed with the participation of States *or* (other) political organizations. Compared with the position of the Working Group, the Statute provides a better understanding of the protection that human dignity deserves.³⁸⁴ Its position is consistent with the idea that actors different from States with compulsory jurisdiction over non-state violations, as the Court (which can be competent in cases of State failure to exercise its jurisdiction),³⁸⁵ can enforce or promote norms protecting human dignity from non-state violations.

Paragraph 4 of the analysis of article 7.1.(i) of the Statute made in the Elements of Crimes confirms this consideration, although its content is somewhat limited as it only admits protection under the Statute from some non-state threats of enforced disappearance, namely those in which non-state political organizations participate.³⁸⁶ In practice, other non-state entities can engage in such conduct, not only political entities or *de facto* or normative authorities, as happens and is acknowledged regarding torture and other cruel, inhuman or degrading treatment or punishment and commented by the Commission of Inquiry on Syria.³⁸⁷

³⁸³ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, footnote 640; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *op. cit.*, paras. 75, 77, 80-81, 83.

³⁸⁴ Cf. the Preamble and articles 68, 8.2.b.xxi, and 8.2.c.ii of the Rome Statute of the ICC; Elements of Crimes (Elements of the Crimes of Genocide, Crimes against Humanity and War Crimes, corresponding to the Rome Statute of the International Criminal Court), Elements of article 7 (1) (i), paras. 4 and 5.

³⁸⁵ Cf. article 17 of the Rome Statute of the ICC.

³⁸⁶ Cf. Element 4 of Article 7(1)(i) of the Rome Statute of the ICC, found in the Elements of Crimes (Elements of the Crimes of Genocide, Crimes against Humanity and War Crimes, corresponding to the Rome Statute of the International Criminal Court), where it is mentioned that the crime against humanity of enforced disappearance of persons is committed, among other conditions, when “[s]uch arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.”

³⁸⁷ Cf. Concurring Opinion of Judge Cecilia Medina Quiroga to: Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, *op. cit.*, paras. 5-7, 10-17, 20; European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment, *op. cit.*, para. 159; European Court of Human Rights, *Case of N. v. Sweden*, Judgment, *op. cit.*, paras. 51, 62; footnote 1209, *infra*.

The International Convention for the Protection of All Persons from Enforced Disappearance stipulates in article 3 that the State must investigate and bring to justice “persons or groups of persons acting without the authorization, support or acquiescence of the State” that commit acts of enforced disappearance as defined in that treaty. Yet, it does not declare those acts as non-state substantive transgressions in the international plane but orders domestic measures against them, reason why it is insufficient to ensure a lowest common denominator with which to empower international or transnational action against those violations. Naturally, the fact that the definition of enforced disappearance as requiring certain State participation “for the purposes of” that Convention is limited to that instrument makes broader general protection (both in substantive and procedural terms) possible, as argued above.

When some non-state abuses, as the previous one or others, are not properly responded to by the international community, change is required, including changes in legal practice. As said in the statement in the Vienna Declaration and Programme of Action:

“The acts, methods and practices of terrorism in all its forms and manifestations as well as linkage in some countries to drug trafficking are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments. The international community should take the necessary steps to enhance cooperation to prevent and combat terrorism”³⁸⁸ (emphasis added).

It is important to add that since from an ethical and extra-legal perspective there can be claims that invoke human rights even when they are not formally recognized in formal law,³⁸⁹ changes of law as those referred to in the previous paragraph can be requested by claims of this sort with arguments *de lege ferenda*. It may be argued that in some events not all victims of all abuses are effectively protected, being it necessary for international substantive or procedural action to take place for that protection and make up for existing domestic law shortcomings, especially concerning serious abuses (see Chapter 4, *infra*).

Furthermore, insisting on the alleged exclusive concern of human rights with State violations ignores that the State is a legal fiction, which operates through non-state actors, as disaggregated analyses can reveal. Additionally, throughout history, even in moments when theories supporting a supposed (but false) State exclusivist participation were prevalent, some non-state actors have had power and considerable impact on law and world society.³⁹⁰

Additionally, denials of non-state human rights violations ignore that there are non-state entities with practices and capacities that can affect the enjoyment of human dignity-derived

³⁸⁸ Cf. Vienna Declaration and Programme of Action of the World Conference on Human Rights of 1993, para. I.17.

³⁸⁹ Cf. John H. Knox, “Horizontal Human Rights Law”, *op. cit.*, pp. 43-44; Amartya Sen, *op. cit.*, pp. 326-328, 345. Other authors recognize a link between moral and human rights but distinguish them. See Joseph Raz, *op. cit.*, pp. 335-336; Andrew Clapham, *Human Rights: a Very Short Introduction*, *op. cit.*, p. 17.

³⁹⁰ See Pierre Calame, *op. cit.*, pp. 3-4.

rights and guarantees, as corporations, drug cartels, mafias or others.³⁹¹ If it is accepted that States can violate human rights, and that those States operate through non-state actors, which can also affect human rights on their own and must thus be controlled, it must be concluded that human rights must also be protected from non-state violations.

This is one of the reasons why an *erga omnes* paradigm that has effects towards all actors is preferable to a State-centered scheme of human rights, which is problematic and inconsistent with current legal demands. Revealingly, the Inter-American Court of Human Rights has expressed opinions that lend support to this argument, such as that according to which:

“In an employment relationship regulated by private law, the obligation to respect human rights between individuals should be taken into consideration. That is, the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes*). This obligation has been developed in legal writings, and particularly by the *Drittwirkung* theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals”³⁹² (emphasis added).

The need to protect individuals from all agents of violations seems to be an underlying assumption recognized in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, which mentions that:

“No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so” (emphasis added).

The previous considerations may lead to a theoretical question mentioned above: if individuals, who are entities different from States, can violate human dignity and their victims must be protected, does the creation of obligations that bind them or the restriction of their rights respect their human dignity? This question is related to the argument that many human rights are not absolute and to the fact that certain restrictions of human rights and suspensions of human rights obligations do not amount to suppressions or violations of those rights.

Beginning with the notion of the non-absolute character of many rights, it is admitted that rights may clash or that the -abusive or not- exercise of a human right may affect the enjoyment of the rights of others, and that in some events balancing solutions that do not fully restrict the rights involved must be reached. On the other hand, it cannot be denied that some human rights, as the freedom of opinion and the prohibitions of torture, inhuman or degrading treatment³⁹³ and of international crimes against human dignity, are absolute. The other human rights without this

³⁹¹ Cf. *Ibid.*

³⁹² Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 140.

³⁹³ Cf. Human Rights Committee, General Comment No. 34, op. cit., paras. 9-10; ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 153-157; European Court of Human Rights, Grand Chamber, *Case of Gäfgen v. Germany*, Judgment, 1 June 2010, paras. 107, 177.

character can be restricted to some extent under strict circumstances for the sake of protecting some defined goals.³⁹⁴

In fact, human rights law posits that sometimes it is necessary or possible to limit the exercise of some rights for purposes as protecting the rights of others or defending security and public order, general welfare, the existence of a political community or morals.³⁹⁵

Several doctrines and principles, as the prohibition of the abuse of rights, expressly permit restrictions of rights, and along with the (misleadingly called) derogation (i.e. suspension) of human rights obligations during states of emergency, indicate that it is lawful to implement measures that seek to protect human rights and restrict to a certain extent some human rights guarantees of third parties, as long as strict conditions are met. These requirements include, generally: proportionality; necessity (which is not synonymous with indispensability); temporality; publicity; territoriality (geographical limitation to where measures are *required*); legality; notification; respect of humanitarian principles, of the formalities, and of absolute rights; and express permission to implement the respective restrictive measures, being there for instance some human rights obligations that can never be suspended.³⁹⁶

Among absolute human rights it is necessary to include those with a *jus cogens* character, because they cannot be limited since *no derogation* or restriction of any of their effects is lawful and they have both procedural *and* substantive dimensions.³⁹⁷ On the other hand, it is

³⁹⁴ Cf. Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., pp. 16, 83, 92, 97; Jonas Christoffersen, op. cit., pp. 109-110.

³⁹⁵ See articles 13, 15, 16, 22, 27 or 32 of the American Convention on Human Rights, 8, 9, 10, 11, 15 or 18 of the European Convention on Human Rights, 4, 12, 18, 19, 21 or 22 of the International Covenant on Civil and Political Rights, or 11 and 12 of the African Charter on Human and Peoples' Rights, among others; Inter-American Court of Human Rights, Advisory Opinion OC-5/85, op. cit., paras. 59, 64-67; Inter-American Court of Human Rights, OC-6/86, op. cit., paras. 29-32; Human Rights Committee, General Comment No. 29, op. cit., paras. 2-3; Human Rights Committee, General Comment No. 34, op. cit., paras. 21, 22, 26, 28-33.

³⁹⁶ Cf. Inter-American Court of Human Rights, *Case of Durand and Ugarte v. Peru*, Judgment, 16 August 2000, paras. 99-107; Inter-American Court of Human Rights, Advisory Opinion OC-5/85, op. cit., paras. 36, 38, 41-47, 52; Inter-American Court of Human Rights, OC-6/86, *The word "laws" in article 30 of the American Convention on Human Rights*, 9 May 1986, paras. 13-14, 18, 20-37; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 84, 89-93; Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., pp. 83, 85, 119; Human Rights Committee, General Comment No. 31, op. cit., para. 6; Human Rights Committee, General Comment No. 29, *States of Emergency (article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, 22 October 2002, paras. 50-55; Inter-American Court of Human Rights, Advisory Opinion OC-9/87, *Judicial Guarantees in states of Emergency (arts. 27(2), 25 and 8 American Convention on Human Rights)*, 6 October 1987, Inter-American Court of Human Rights, Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, 30 January 1987, paras. 20-40; 14-30, 42-43; articles 27, 29 or 30 of the American Convention on Human Rights, 15, 17 or 18 of the European Convention on Human Rights, or 4 and 5 of the International Covenant on Civil and Political Rights, among others; Human Rights Committee, General Comment No. 34, op. cit., paras. 21-36.

³⁹⁷ Cf. Human Rights Committee, General Comment No. 29, op. cit., para. 11; articles 53 of the Vienna Conventions on the Law of Treaties of 1969 and 1986; Nicolás Carrillo Santarelli, "La inevitable supremacía del *jus cogens* frente a la inmunidad jurisdiccional de los Estados", *Revista Jurídica de la Universidad Autónoma de Madrid*, No. 18, 2009, pp. 60-61, 69-70, 74, where the existence of multiple effects of *jus cogens* and the constitutional, substantive and

interesting to note that the Inter-American Court of Human Rights has mentioned that human rights are also protected from undue “private” restrictions.³⁹⁸

Having mentioned peremptory law, while *jus cogens* trumps non-peremptory norms given their superior hierarchy, when different peremptory human rights conflict a proportionality test must be conducted to determine which right must *give way* in a certain form.³⁹⁹ This must be permitted because those are not cases in which dispositive law is invoked to restrict peremptory law, which is forbidden, and because if no proportionality is admitted all the clashing rights may end up being wholly or partially ineffective or one of them wholly denied, which is to be avoided.

Concerning rights defended by obligations the derogation from which is not admissible even during states of emergency, it is necessary to determine if human rights law permits them to be restricted on a case-by-case basis.

From a theoretical standpoint, it must be asked if the previous possibilities are consistent with the implications of human dignity. In my opinion, they are, as argued below.

Saying that restricting someone’s human rights amounts to treating him as means is actually a never-ending tautological argument: if one considers that limitations are to be forbidden because they imply treating the rights-holder A as means to protect the dignity of another rights-holder (B), one has but to accept that denying this restriction and entitling A to abuse B also implies treating B as means. The difference lies that the latter event endorses an abuse, while the former simply a restriction that takes into account all rights conflicts and does not fully deny rights. This is why lawful proportionate restrictions do not make someone an object of the other. In other words, in the example, denying protection from A permits A to treat B as an instrument and *deny* his dignity, something that not happens with necessary, proportionate and lawful restrictions that are careful to respect the dignity of all involved. After all, protection measures that restrict somewhat *the exercise* of rights are *temporary* and bear in mind the dignity of all.

Moreover, when it comes to restrictions that seek to protect other human rights, the two complementary dimensions of human dignity, namely dignity as inherent worth and dignity as

procedural dimensions of peremptory law, that support the assertion offered here that its norms cannot be restricted or limited, are discussed; Kerstin Bartsch and Björn Elberling, “*Jus Cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision”, German Law Journal, vol. 04, 2003, pp. 486-488; Dissenting Opinion of Judge Cançado Trindade to: International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, paras. 296-299.

³⁹⁸ See Inter-American Court of Human Rights, Advisory Opinion OC-5/85, op. cit., para. 48.

³⁹⁹ While Jonas Christoffersen argues that conflicts between absolute norms are hard to solve, choices “may have to be made”, and certainly this may call for the use of a balance/proportionality analysis, in the context of which that author discusses these ideas. Nevertheless, it must be ensured that there cannot be a total denial of peremptory human rights, especially because not even total denials of dispositive human rights are permitted. Cf. Jonas Christoffersen, op. cit., pp. 109-111; Inter-American Commission on Human Rights, *Fourth Progress Report of the Rapporteurship on Migrant Workers and their Families*, OEA/Ser.L/V/II.117, 7 March 2003, para. 99.

moral dignity, meet each other. This is because of the presence of the responsibility of someone and of the need that he recognizes the worth and rights of others, emphasized by theories considered as belonging to the so-called traditional understanding of dignity.⁴⁰⁰

While these theories also talk of duties towards oneself, they should preferably be regarded as extra-legal to not condition the protection of human rights to compliance with such duties, which would run counter to the non-conditional protection of human dignity. In this sense, for example, I think that someone who knowingly engages in activities that put his health at serious risk and afterwards claims protection to his right to health should still be entitled to protection, but logically moral reproaches, and sanctions that do not deny the enjoyment and protection of that right, may take place according to law.

Sometimes, nonetheless, certain prohibitions that seek to protect rights from the rightsholder and do not condition her rights may exist (e.g. concerning the right to health and its preservation). In relation to obligations towards others, the inherent character of the dignity of every human being demands the acknowledgement of the dignity of others, who share the same nature. As Immanuel Kant asserted, this recognition demands respecting others, as exacted by ethical considerations.⁴⁰¹

In this sense, it is convenient to remember that Kant calls for willingly subjecting oneself to axioms regarded as worthy of being ethical universal dictates. His theory considers that the respect of such imperatives is required by a complete conception of dignity, although it is important to note that this dignity does not disappear if someone fails to abide by its demands. In the words of Kant:

“The practical necessity of acting on this principle, i.e., duty, does not rest at all on feelings, impulses, or inclinations, but solely on the relation of rational beings to one another, a relation in which the will of a rational being must always be regarded as legislative, since otherwise it could not be conceived as an end in itself. Reason then refers every maxim of the will, regarding it as legislating universally, to every other will and also to every action towards oneself; and this not on account of any other practical motive or any future advantage, but from the idea of the dignity of a rational being, obeying no law but that which he himself also gives.”

In the kingdom of ends everything has either value or dignity. Whatever has a value can be replaced by something else which is equivalent; whatever, on the other hand, is above all value, and therefore admits of no equivalent, has a dignity.

⁴⁰⁰ Cf. Oliver Sensen, op. cit., where the author considers that “In the *traditional* paradigm it is therefore not dignity as an elevated position that grounds rights, but the further normative premise that is used to derive any duties, e.g. to fully realize one’s initial dignity [...] One reason might be the perfectionism that is commonly connected with this paradigm [...] In talking about human dignity, they highlight a privilege or capacity human beings have been given, and their emphasis is on how one should use that capacity. This emphasis stems from an underlying perfectionism.”

⁴⁰¹ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 536, 547; Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., at 22; Christian Tomuschat, *Human Rights: Between Idealism and Realism*, (2 edn.), Oxford University Press, 2008, at 45 (“on the responsibility of the individual for maintaining his/her personal health”); <http://www.turtlebayandbeyond.org/2012/council-of-europe/major-victory-for-life-in-europe-euthanasia-must-always-be-prohibited/> (last checked: 30/01/2012).

[...]

Rational nature is distinguished from the rest of nature by this, that it sets before itself an end [...]. The principle: "So act in regard to every rational being (thyself and others), that he may always have place in thy maxim as an end in himself," is accordingly essentially identical with this other: "Act upon a maxim which, at the same time, involves its own universal validity for every rational being." For that in using means for every end I should limit my maxim by the condition of its holding good as a law for every subject, this comes to the same thing as that the fundamental principle of all maxims of action must be that the subject of all ends, i.e., the rational being himself, be never employed merely as means, but as the supreme condition restricting the use of all means, that is in every case as an end likewise.

[...]

Our own will, so far as we suppose it to act only under the condition that its maxims are potentially universal laws, this ideal will which is possible to us is the proper object of respect; and the dignity of humanity consists just in this capacity of being universally legislative, though with the condition that it is itself subject to this same legislation"⁴⁰² (emphasis added).

Thus, when one analyzes restrictions to rights that are necessary to protect the rights of others, who must be considered as ends in themselves, one must make sure that those restrictions do not *condition* their dignity but seek to defend the universality of human dignity. The features of the control and legality of such measures, which must protect others, presuppose the recognition and respect of human dignity, that generates duties of respect that must be heeded by third parties.

Hence, notwithstanding the existence of some rights that cannot be restricted at all, in practice theories that rely on general absolute conceptions of all rights end up endorsing an absolutist sense of someone's will that can disregard the dignity of others, and thus sow the seeds of the self-destruction and inconsistency of a human rights system that should be based on the dignity of every single human being.

Apart from the previous considerations, it is convenient to also mention that theoretical studies have considered that it may be legitimate to prevent uses of freedom that are contrary to the freedom of others to protect the latter.⁴⁰³ Likewise, case law has recognized that some restrictions of rights may be lawfully resorted to in order to prevent individuals from harming other human beings. Regarding this, the European Court of Human Rights mentioned in the *Stanev v. Bulgaria* case that the:

⁴⁰² Cf. Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*, op. cit., pp. 50, 53-54, 56.

⁴⁰³ See, Immanuel Kant, *Metaphysical Elements of Justice (Second Edition)*, Translated by John Ladd, Hackett Publishing Company, Inc, 1999, at 31, where Kant argues that "[a]ny opposition that counteracts the hindrance of an effect promotes that effect and is consistent with it. Now, everything that is unjust is a hindrance to freedom according to universal laws. Coercion, however, is a hindrance or opposition to freedom. Consequently, if a certain use of freedom is itself a hindrance to freedom according to universal laws (that is, unjust), then the use of coercion to counteract it, inasmuch as it is the prevention of a hindrance to freedom, is consistent with freedom according to universal laws; in other words, this use of coercion is just. It follows by the law of contradiction that justice [a right] is united with the entitlement to use coercion against anyone who violates justice [or a right]."

“[D]etention of a mentally disordered person may be necessary [...] where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons”⁴⁰⁴ (emphasis added).

Apart from the admissibility of restricting rights in some circumstances, it is also possible, as explained in section 5.2, to create correlative obligations of individuals and other non-state actors with the purpose of protecting fundamental and human rights of others.⁴⁰⁵

The issue being examined is, however, more complex, because among the reasons expressly mentioned by human rights norms as justifiable causes of restrictions of human rights instruments usually do not mention exclusively the express aim of protecting rights of others, and it is necessary to consider if the other causes are legitimate.

Human rights norms tend to indicate which rights can be restricted and when and how this may happen, either determining this in relation to concrete rights or in general norms addressing lawful restrictions.⁴⁰⁶ To provide some examples, it can be first mentioned that Article 21 of the International Covenant on Civil and Political Rights states that:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others” (emphasis added).

For its part, Article 16.2 of the American Convention on Human Rights, dealing with the Freedom of Association, enunciates that:

“The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others” (emphasis added).

In turn, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms declares:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others” (emphasis added).

Some human rights treaties have general clauses that determine the conditions and situations in which human rights may be restricted, which are relevant when specific norms dealing with concrete rights do not fully regulate restrictions. When an article states requirements

⁴⁰⁴ Cf. European Court of Human Rights, Grand Chamber, *Case of Stanev v. Bulgaria*, Judgment, 17 January 2012, paras. 145-146.

⁴⁰⁵ Concerning correlative duties that protect other rights, see John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 2, 7, 14-15, 18, 20, 27, 33-34, 37, 39-40, 47.

⁴⁰⁶ Cf. articles 30 of the American Convention on Human Rights, 10.2, 11.2 or 18 of the European Convention on Human Rights, *inter alia*.

for a particular right to be restricted, it is *lex specialis* and prevails over the general clauses. Likewise, the peremptory character of a right prevails over general clauses of restriction, which can never be invoked in relation to them. In its fifth Advisory Opinion, the Inter-American Court of Human Rights considered that one of the aforementioned general clauses, Article 32.2 of the American Convention on Human Rights:

“[I]s [not] automatically and equally applicable to all the rights which the Convention protects, including especially those rights in which the restrictions or limitations that may be legitimately imposed on the exercise of a certain right are specified in the provision itself. Article 32(2) contains a general statement that is designed for those cases in particular in which the Convention, in proclaiming a right, makes no special reference to possible legitimate restrictions.⁴⁰⁷”

In order to prevent abuses that could be committed taking advantage of restriction rules, Article 18 of the European Convention of Human Rights, for example, tries to rein in restrictions by declaring that:

“The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

Likewise, Article 30 of the American Convention on Human Rights stresses the condition that limitations must be in strict accordance with the purposes for which they are implemented.

Rules of this sort seek to prevent States from relying on the invocation of a purpose with the intention of surreptitiously restricting rights for other reasons or abusing them. Concerning the problem of the protection of human rights from non-state threats, this means that it is *unlawful* for States to invoke the protection of a human right against non-state actors in order to actually abuse human rights or employ restrictions for purposes different from those invoked or being admitted by human rights law.

The issue is complex because, as mentioned above, among the reasons that justify restrictions mentioned in human rights treaties there are some that do not expressly refer to the protection of human rights, and so it must be asked if restrictions based on those goals are consistent with the demands of human dignity.

As seen in the articles cited above, apart from the protection of the rights of others, reasons as safety, security, public order, health or morals are envisaged in human rights treaties as possible justifications for human rights restrictions.

To examine the question posited above, it is convenient to consider that justifications permit restrictions only when they are *necessary*. Furthermore, the interpretation of restriction clauses must take into account the context in which those articles are embedded and their purposes, as required by article 31 of the Vienna Convention on the Law of Treaties. The

⁴⁰⁷ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-5/85, op. cit., para. 65.

protection of human dignity is the foundation of the system of the norms being examined, and therefore it is relevant and present even in relation to restrictions that do not expressly mention the rights of others, demanding that those measures respect that dignity. Moreover, those other justifications of permissions of restrictions *can* serve to protect human rights. At the very least, they cannot go against features and demands of human dignity (e.g. its non conditionality), because they form part of a system founded upon its protection.

In this way, for example, it can be considered that situations of insecurity and civil unrest may permit, encourage or be conducive to violations of rights as the right to life and personal integrity, or that protecting the health of the inhabitants in a territory and of those who may enter into contact with them likewise serves to ensure their rights to life and health, among others.

This analysis confirms the relevance of theories that condition the legitimacy of both States and legal systems on their respecting human dignity. Such theories consider the respect and protection of human beings as either the foundation, goal or condition of sovereignty, as Anne Peters does,⁴⁰⁸ or as the *raison d'être*, telos, justification and goal of States and law, as has been argued by Antonio Cançado and Domingo Oslé.⁴⁰⁹

This analysis also stresses the persistent relevance of human dignity, because even when human rights are subject to restrictions, those measures must be consistent with human dignity. Moreover, these and other measures (as the ones examined in Chapter 8) can be used to protect the inherent worth of individuals, and usually work best when complementing other lawful effective measures.

Because of how unacceptable it is to deviate from dignity through any act or legal manifestation, and because of the increasing reach of the legal demands it creates, that impact on many legal branches and actors, the protection of human dignity could be considered as part of *jus cogens*. In the end, human rights and humanitarian considerations always resort to considerations of human dignity; and all rights, even *jus cogens* human rights as the prohibitions of torture, inhuman or degrading treatments, slavery, enforced disappearance, or discrimination,⁴¹⁰ are derived from it. Taking this into account, the legal permissibility of the

⁴⁰⁸ Cf. Anne Peters, "Humanity as the A and Ω of Sovereignty", op. cit., pp. 514, 543-544.

⁴⁰⁹ See Rafael Domingo, *¿Qué es el derecho global?*, op. cit., at 91, 110, 158-159, where he accurately says that (I would add "the wellbeing of") individuals should not only be the end, but also the origin and center of law. Moreover, see Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 18-21; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 26, 38.

⁴¹⁰ Those rights have been recognized to belong to peremptory law, although others can also be encompassed in it and have superior hierarchy in relation to dispositive law. Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, op. cit., 86, 88, 97-101; ICTY, *Prosecutor v. Anto Furundzija*, Judgment, 10 December 1998, paras. 153-157; European Court of Human Rights, *Case of Al-Adsani v. The United Kingdom*, Judgment, 21 November 2001, paras. 30, 60-61; Joint Dissenting Opinion

restriction of *some* human rights is not absolute, because its legality is temporary and limited, not being it possible for them to be used in a way that ignores the enjoyment of human rights in absolute terms.⁴¹¹ Those restrictions defend human dignity and are part of its protection, and thus do not deny its absolute character, just as self-defense does not deny the regulation of the use of force in *jus gentium*.

Apart from questions of its normative hierarchy, it can be mentioned that because of its character and features, human dignity can be considered a value and its protection a legal principle,⁴¹² since the demand of that protection has a “general nature”,⁴¹³ guides the interpretation and application of different norms, and constitutes their basis. At the same time, the demand of the protection of human dignity can have direct practical effects and implementation, such as when it is clear that a human being would be treated as means and when it can be clearly determined that a given conduct violates dignity, as for example concerning experimentations with human beings without the consent of the person subjected to them.⁴¹⁴ There are other events in which the solution of cases requires resorting to norms developing

of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and VajiĆ Furundzija to: European Court of Human Rights, *Case of Al-Adsani v. The United Kingdom*, Judgment, op. cit., paras. 1-4; Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens–: la transformación de los derechos internacional y colombiano gracias al Ius Cogens internacional*, Ibáñez, 2007, pp. 96-97; Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio histórico-crítico*, op. cit., pp. 169-170 (where arguments of the identification of humanitarian peremptory norms similar but somewhat different from those offered in Human Rights Committee, General Comment No. 29, op. cit., para. 11 are offered).

⁴¹¹ See, inter alia, Inter-American Commission on Human Rights, *Fourth Progress Report of the Rapporteurship on Migrant Workers and their Families*, op. cit., para. 99; Human Rights Committee, General Comment No. 29, op. cit., paras. 4-5, 9-12; Inter-American Court of Human Rights, *Case of Gelman v. Uruguay*, Judgment, 24 February 2011, para. 75.

⁴¹² As mentioned in a note above, “Human dignity is a value, and its protection a principle.”

⁴¹³ Cf. Giorgio Gaja, “General Principles of Law”, *Max Planck Encyclopedia of Public International Law*, Oxford University Press, paras. 25-31 2008, available at: http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1410&recno=1&searchType=Quick&query=general+principles

⁴¹⁴ Cf. Roberto Andorno, op. cit., at 5, where the author holds that “The primacy of the human being over science is indeed a direct corollary of the principle of respect for human dignity and aims to emphasize two fundamental ideas. First, that science is not an end in itself but only a means for improving the welfare of individuals and society. Second, that people should not be reduced to mere instruments for the benefit of science.” Additionally, see J.C. von Krempach, “The ECJ’s Judgment on Stem Cell Patents: a Tremendous Pro-Life Victory”, available at: <http://www.turtlebayandbeyond.org/2011/abortion/the-ecj%E2%80%99s-judgment-on-stem-cell-patents-a-tremendous-pro-life-victory/> (last checked: 30/12/2011); J.C. von Krempach, “EU Advocate General: Human Embryos to be Protected as from Conception”, available at: <http://www.turtlebayandbeyond.org/2011/abortion/eu-advocate-general-human-embryos-to-be-protected-as-from-conception/?s=stem+cell> (last checked: 30/12/2011) – both articles are related to: European Court of Justice, *Case of Oliver Brüstle v. Greenpeace*, Case C-34/10, Judgment, 18 October 2011, paras. 32-37, 48-52 (the Court said that “The context and aim of the Directive thus show that the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected. It follows that the concept of ‘human embryo’ within the meaning of Article 6(2)(c) of the Directive must be understood in a wide sense. Accordingly, any human ovum must, as soon as fertilised, be regarded as a ‘human embryo’ within the meaning and for the purposes of the application of Article 6(2)(c) of the Directive, since that fertilisation is such as to commence the process of development of a human being” (emphasis added).

human dignity, as those addressing rights and guarantees, given their more concrete and developed content, which must be interpreted in light of the implications of that dignity.⁴¹⁵

It is also useful to ponder upon whether the international protection of human dignity resembles what Myres McDougal conceived as an international law of human dignity.

According to some, international law may be gradually becoming (at least partly) a system of human dignity, since the imperative of the protection of that dignity permeates many of its formally- and nominally-divided branches and finds expression even in some peremptory norms, countering fragmentation as a result.⁴¹⁶ In turn, McDougal and Lasswell considered that over-relying on some doctrines of international law related to principles and norms different from the protection of human dignity may lead to undesirable results and abuses,⁴¹⁷ as may happen for employing with exaggerated conceptions of the principles of non-intervention and sovereignty, which have been invoked against human rights supervision by some States.

McDougal and Lasswell's theories can be understood to equate the concept of dignity more –but not exclusively- to a given way in which international relations are to be conducted than relating it to the direct protection of the inherent worth and inalienable rights of individuals, because McDougal conceived a system based on dignity as one based on persuasion and excluding coercion, seeking to address some of the problems of the then looming Cold War.⁴¹⁸ He advanced the theory of a policy approach to international law, conceived as a process that went beyond mere lawmaking, in which policy objectives are essential components.⁴¹⁹

In my opinion, human dignity is and must be beyond the uncertainties of policies that may be discarded in the future, and legal processes and policies ought to comply with its tenets. In consequence, starting from the recognition of the centrality of the non-conditional and non-contingent demand to respect the dignity of individuals, one can identify international legal implications required by dignity, not only for human rights law but for the entire international legal system.

As seen until now, human dignity demands protection from threats and violations. Can it also be considered that apart from empowering individuals human dignity also empowers other

⁴¹⁵ Cf. Roberto Andorno, op. cit., at 10.

⁴¹⁶ See, for instance, International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, op. cit., paras. 10, 32-33, 42.

⁴¹⁷ Cf. Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order", *The American Journal of International Law*, Vol. 53, 1959, at 4-5, 11, 21.

⁴¹⁸ *Ibid.*, at 1, 3-6, 11, 21.

⁴¹⁹ Cf. *Ibid.*, pp. 1, 5-6, 9-12, 14, 16-18, 21, 23, 28; Myres S. McDougal, "Some basic theoretical concepts about international law: a policy-oriented framework of inquiry", *The Journal of Conflict Resolution*, Vol. IV, 1960, pp. 339-353; Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion", op. cit., pp. 123-126; Math Noortmann, "Non-State Actors in International Law", op. cit., at 62.

actors? It certainly can legitimize actions of actors that operate in the international, national and transnational contexts with the intention of protecting individuals. This will be explored in the next subsection.

1.4. The legal legitimation of non-state actors that promote and defend human dignity

The legal value-principle of the protection of human dignity, that is to be interpreted taking into account the principle of effectiveness, demands that the rights and guarantees based on it be protected completely and effectively protected. A critical analysis of *lex lata* in light of this principle indicates that human beings must be defended from non-state threats, and that remainders of State-centered paradigms found in norms or practice must give way to human-centered ones.

However, just as a system that fails to protect victims from non-state violations is deficient, the protection of human dignity may have few possibilities of success if it is limited to measures as prohibitions and duties against non-state abuses. In other words, just as protection must be complete from the perspective of the protected victims, it is also necessary to permit and encourage actions of promotion and protection of multiple private non-state actors that, besides States and international organizations, must be entitled to engage in such actions.

After all, in practice non-state entities can have a positive or a negative impact on the enjoyment of human rights and guarantees –and law may regulate the effects and origins of such reality, which can also be taken into account by humanitarian actors and strategies-.⁴²⁰ Lest law fails to respond to human needs and to the maxim *sic societas, sicut jus*, it must be ensured that there are multiple options of defending individuals, especially because some measures may prove unsuccessful in one case and different actors must be permitted to try to support actual and potential victims. Therefore, contribution by non-state actors must be permitted.

Logically, those actors are also bound to respect human dignity, since the possession of either rights or duties by a subject highlights how it can also have the others.⁴²¹ At the very least, if entitlements and rights of participation are not granted in some aspects and contexts –e.g. in lawmaking processes-, actions of promotion are to be *tolerated* and not obstructed. This option is a valid one under international law, which is a system that may address conduct in different ways, not limited to the dialectic of permission and prohibition, as described by judge Simma of the

⁴²⁰ Cf. Elena Pariotti, op. cit., pp. 95-105; Zehra F. Kabasakal Arat, “Looking beyond the State But Not Ignoring It”, op. cit., pp. 6-8, 17-18; Office of the United Nations High Commissioner for Human Rights, “Human Rights Defenders: Protecting the Right to Defend Human Rights”, *Fact Sheet No. 29*, pp. 16-18.

⁴²¹ Cf. ASIL, *Proceedings of the 92nd Annual Meeting: The Challenge of Non-State Actors*, The American Society of International Law, 1998, at 34.

International Court of Justice. Likewise, Jean-Marie Henckaerts mentions that there are “prohibitive, obligatory or permissive” rules.⁴²²

That the contribution of non-state entities is to be permitted has been mentioned in the Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance of 2001, that urges to “strengthen cooperation, develop partnerships and consult regularly with” civil society, and to “enable non-governmental organizations to function freely and openly [...] and thereby make an effective contribution” to the protection of human rights. It also calls for expanding the role of those actors, stressing how non-state entities can play an important role to *confront* violations and contribute to the respect of human dignity.⁴²³ Interestingly, this positive role of non-state entities and the importance of its permission are mentioned along with the need to make sure that private and public entities respect human rights.⁴²⁴

That non-state entities can have a positive or negative impact on the protection or evolution of the humanitarian *corpus juris* is not only recognized in doctrine. In this regard, the United Nations has commented that:

“[A]lthough some private actors are perpetrators of violations against human rights defenders, others provide fundamental support in addressing such acts. Transnational corporations can be a powerful force in assuring that rights are respected, and some corporations have adopted good employment policies and contributed to the economic and social rejuvenation of the communities in which they are established. Religious leaders have often been at the forefront of action to defend human rights and human rights defenders themselves. In some cases, there may be no clear-cut separation between positive and negative non-State actors. Business interests may contribute positively to some human rights but have a negative impact on others. It is essential, therefore, to look at how businesses and other actors respond to human rights defenders who draw their attention to the negative human rights impact of their activities”⁴²⁵ (emphasis added).

For example, in practice an NGO can protect individuals or falsely accuse them or otherwise violate their rights.⁴²⁶ This is because ultimately any actor is a potential contributor or offender, and while legal burdens address non-state negative impacts, positive contributions must be acknowledged and permitted, given the necessity of parallel initiatives of protection (as explained in Chapter 4, *infra*). These forms of engaging non-state actors are also relevant because they can work as important persuasive strategies that seek to influence non-state culture

⁴²² See Declaration of Judge Simma to: International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 22 July 2010, paras. 8-10; Jean-Marie Henckaerts, “Customary International Humanitarian Law: a response to US comments”, *International Review of the Red Cross*, vol. 89, no. 866, 2007, pp. 475-476.

⁴²³ See Durban Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001, paras. 210-214.

⁴²⁴ Cf. *Ibid.*, paras. 53, 95, 133-134, 215.

⁴²⁵ Cf. Office of the United Nations High Commissioner for Human Rights, “Human Rights Defenders: Protecting the Right to Defend Human Rights”, *Fact Sheet No. 29*, pp. 17-18.

⁴²⁶ Cf. Jeffrey L. Dunoff et al. (eds.), *International Law Norms, Actors, Process: A Problem-Oriented Approach*, Aspen Publishers, 2006, pp. 214-215; Claire de Than and Edwin Shorts, *op. cit.*, at 260; August Reinisch, *op. cit.*, pp. 48-49.

and make it promote and respect human rights:⁴²⁷ their importance is great. Altogether, the guarantees of the enjoyment of human rights and guarantees will be more robust with cooperating entities.

On the other hand, just as the resources of State authorities and their closeness to victims, evidence and elements of a case make them important players in the protection of human rights from non-state abuses that can still fail, reason protection complementary to that of States must exist,⁴²⁸ non-state compliance of human rights principles out of conviction⁴²⁹ will often make it unnecessary to use certain protection mechanisms against them, which must nonetheless exist in case the need arises.

As done in previous sections, to analyze the issues being explored it is convenient to start by studying the implications of the principle of the protection of human dignity, which has at least some indirect effects in multiple fields of international law. Despite the reluctant attitude of some international organizations, scholars and advocates have mentioned how human rights are to be taken into account by non-state entities as financial and trade institutions, which may as a result be prompted not only to respect but also to promote human rights.⁴³⁰ Additionally, the important principle of the protection of human dignity has links with different branches of *jus gentium*, such as labor law, humanitarian law, refugee law, or criminal law, among others,⁴³¹ having many of their norms the purpose of carrying out that protection.

⁴²⁷ See *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., paras. 27-32; Andrew Clapham and Scott Jerbi, op. cit., pp. 347-348; Fred Halliday, op. cit., at 35.

⁴²⁸ Cf. Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., at 38; John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 2, 19, 44.

⁴²⁹ Conviction differs from coincidence or interest as factors leading to behaving as law dictates. See Harold Koh, "Why Do Nations Obey International Law?", op. cit., pp. 2600-2601.

⁴³⁰ Cf. Koen de Feyter, "The International Financial Institutions and Human Rights. Law and Practice", in Felipe Gómez Isa and Koen de Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, 2006; Koen de Feyter, "Globalisation and human rights", op. cit., pp. 56, 68-76.

⁴³¹ Human dignity also constitutes the foundation of rights and guarantees (as obligations) specified in consular law, the law of the seas, or the law on the use of force, for example: the need to protect persons in distress at the seas, with the corresponding obligations of the coastal State, or the protection against evident threats to human dignity during armed conflicts, are but a couple of examples of those links. In fact, it can be considered that the practice of the Security Council highlights the existence of an undeniable link between peace and security and human rights, and that the Security Council may place obligations on non-state actors, as the International Court of Justice acknowledged in its Advisory Opinion on the legality of the declaration of independence of Kosovo, or permit self-defense against them in order to secure peace and, indirectly, to protect human dignity. See Stephan Hobe, "Individuals and Groups as Global Actors: The Denationalization of International Transactions", in Rainer Hofmann (ed.), *Non-State Actors as New Subjects of International Law*, Duncker & Humblot (ed.), 1999, at 121-122; Malcolm MacLaren, *Book Review -- Like Blind Men Feeling an Elephant: Scholars' Ongoing Attempts to Ascertain the Role of Non-State Actors in International Law*, German Law Journal, Vol. 3, 2002, para. 27; International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 22 July 2010, paras. 115-116, where the Court mentions that "it has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and intergovernmental organizations."

Additionally, some human rights and humanitarian guarantees have acquired the status of customary law or even of peremptory law. Thus, they are to be taken into account by *all* the actors that participate in *any* of the branches of international law, as can be inferred from the report on the fragmentation of international law issued by the International Law Commission.⁴³²

The previous ideas suggest that the protection of human dignity, besides being a value endorsed by law that serves to evaluate law and determine changes to be made to it *de lege ferenda*, is an overarching principle and a common legal purpose and interest of the so-called *international* community, more properly called world or global community given the participation and relevance of both national and non-*national* non-state actors in the world level and their impact on common legal goods,⁴³³ which must be taken into account by all actors. Based on this conclusion, three different ideas indicating the importance of permitting the positive contributions and actions of non-state entities that can promote human dignity can be explored:

a) Firstly, it must be considered that the existence of a goal of the international community justifies actions of actors and empower them when they contribute to achieve it. To my mind, this was an underlying rationale of the Advisory Opinion of the International Court of Justice on the *Reparation for Injuries Suffered in the Service of the United Nations*, that admitted that there may be implied powers of international organizations when they are needed to achieve their goals and the objectives that led to their constitution. On the other hand, the Special Tribunal for Lebanon has mentioned that besides implied powers an international body, like a court or tribunal, can have inherent powers related to its mission and goals.⁴³⁴

The *obiter dicta* and *ratio decidendi* of the cited judicial opinions are broad and admit the extension of their conclusions to other actors. For instance, the Court attached particular

Also see the Preambles to Security Council Resolution 1368 (2001) and SC Res. 1373 (2001); Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Study on Targeted Killings, A/HRC/14/24/Add.6, op. cit., para. 40; Separate Opinion of Judge Kooijmans to: International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, paras. 35-36; Separate Opinion of Judge Kooijmans to: International Court of Justice, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, paras. 26-31; Separate Opinion of Judge Simma to: International Court of Justice, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, paras. 7-13; Constantine Antonopoulos, "Force by Armed Groups as Armed Attack and the Broadening of Self-Defence", *Netherlands International Law Review*, vol. LV, 2008, pp. 168-171.

⁴³² Cf. International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, op. cit., paras. 4, 9-10, 15-20, 31-33, 42.

⁴³³ See Rafael Domingo, *The New Global Law*, Cambridge University Press, 2010, pp. 53, 59, 61, 64, 76, 83-84, 100, 102, 196, 198-199.

⁴³⁴ Cf. José Manuel Cortés Martín, op. cit., pp. 80-81; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 235-236; International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, pp. 178-180, 182; Special Tribunal for Lebanon, Appeals Chamber, Case No. CH/AC/2010/02, *Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing*, 10 November 2010, paras. 44-49.

importance to the (tautological or circular)⁴³⁵ consideration of what an international legal person is,⁴³⁶ which is a notion that is not limited to international organizations.

For the Court, as international society evolves the number of actors considered as its legal subjects may vary, which permits dealing with its issues. This notion is reminiscent of the theories defending the possibility of non-state cooperation.⁴³⁷ I agree with the opinion of those who claim that some interpretations of the very concept of international legal personality may be misleading, confusing or overestimated,⁴³⁸ because entities can be bound and their conduct be *regulated* by norms addressing them even if some scholars do not consider them persons of law, despite which they may even be relevant *participants* of world and international relations.⁴³⁹

When legal regulation is necessary because of the need to normatively address actors that can positively or negatively impact on the protection of human dignity, their conduct must be considered *legally relevant*.

Those entities must act in accordance with the objectives of the world community, that is not limited to inter-State relations and interests and is concerned with international, transnational, domestic and world actors, dynamics and legal interests and issues, as has been recognized by authors as Philip Jessup and Harold Koh.⁴⁴⁰ When actors protect human dignity, they are furthering goals of the global community and their participation must be therefore legally recognized, permitted and unhindered. This logic should prevail over excuses of States and other actors that rely on formalistic or inaccurate interpretations of law and invoke extreme interpretations of notions of non-intervention, sovereignty or the absence of subjectivity or human rights obligations of other entities to try to delegitimize human rights non-state examinations and initiatives.⁴⁴¹

⁴³⁵ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 19, 64, 74-75, where it is argued that holding that an entity is deemed to have personality when it has certain capacities, while holding that those capacities can be possessed by an entity with a degree of personality, is certainly a circular argument.

⁴³⁶ See International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, op. cit., pp. 178-179, 185; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 235-236.

⁴³⁷ See Inge Kaul, Pedro Conceição, Katell Le Goulven, and Ronald U. Mendoza, "Why Do Global Public Goods Matter Today?", in Inge Kaul et al. (eds.), *Providing Global Public Goods*, Oxford University Press, 2003, pp. 5-6, 9-10, 16; Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion", op. cit., at 133.

⁴³⁸ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 59-63, 70-75, 82-83; José Manuel Cortés Martín, op. cit., pp. 109-111.

⁴³⁹ Cf. Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press, 2004, pp. 49-50; Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion", op. cit., pp. 117, 129-131, 133-134, 138, 140-141; Theodor Meron, *The Humanization of International Law*, op. cit., at 317; Roland Portmann, op. cit., pp. 3, 208; Janne Elisabeth Nijman, *The Concept of International Legal Personality*, op. cit., pp. 453-455.

⁴⁴⁰ Cf. Philip C. Jessup, *Transnational Law*, Yale University Press, 1956, pp. 1-3, 71, 102; Harold Koh, "Why Do Nations Obey International Law?", op. cit., pp. 2602, 2614, 2618, 2624, 2626, 2631, 2634, 2645-2649, 2654, 2659.

⁴⁴¹ Cf. Myres S. McDougal and Harold D. La John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 18-31; Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order", op. cit., at 4-6, 21, 23; Felipe Gómez Isa, "International Protection of Human Rights", op. cit., at 37.

Additionally, what part of doctrine has considered as informal participation or participation outside the system by non-state entities⁴⁴² when talking of actors as NGOs, is revealed to actually be *part* of the normative framework and dynamics, because their actions help to further the respect of legal principles and goals of the community dimension of global society.

What happens, then, when non-state conduct is not expressly addressed by law, but may help to achieve and promote goals of the international legal community, including the protection of dignity? In those cases, such an actor operates as a participant of the system, and its contributions cannot be legitimately hindered, because they would be contrary to the purposes of the international normative system and would render its principles ineffective. In this case, the respective actor would be a *de facto* promoter of the system, substantively legitimized by it, and its participation ought to be protected from interference out of normative consistency. This is one of those cases in which absence of a prohibition does not necessarily reveal a right but perhaps a permission (toleration) to act unhindered, as mentioned by Simma and pointed out above.

In any case, actors with *de facto* participation are in a basic position, and increasing the competences and formal participation of relevant actors that can contribute to protecting dignity in a significant way may be advisable. After all, non-state actors can not only be potential agents of violation but also valuable cooperators and contributors when it comes to the protection of human dignity.

b) The necessity of permitting the participation of some non-state actors in the promotion and protection of human rights and guarantees is also based on the idea that for that protection to be complete and effective, there must be joint efforts of different actors and mechanisms, for the sake of ensuring that they complement each other and make up for the shortcomings of the others. Additionally, common efforts are more likely to have chances of accomplishing normative objectives, reason why scholars and practitioners have acknowledged how important it is to accommodate cooperative strategies.

In this sense, in his theory of the international law of cooperation, the theories of Friedmann indicate that there may be a non-state dimension of cooperation, given the importance of the cooperation of several actors to further common international goals.⁴⁴³ Kofi Annan and others, in turn, have stressed that currently “uncivil” non-state actors can seize opportunities offered by globalization to commit unlawful acts and that it is important to take advantage of global opportunities to legally counter those violations.⁴⁴⁴

⁴⁴² Cf. Luis Pérez-Prat Durbán, op. cit., pp. 34-38; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors*, op. cit., pp. 4-6, 10-11.

⁴⁴³ Cf. Janneke Nijman, “Sovereignty and Personality: A Process of Inclusion”, op. cit., pp. 133-134.

⁴⁴⁴ Cf. Kofi A. Annan, “Foreword”, op. cit., pp. iii-iv; Anna Badia Martí, op. cit., at 320.

Concerning this, it can be said that one of the possibilities offered by globalization is the generation and operation of networks and informal associations, given the ease of communications and the possibility of overcoming territorial boundaries.⁴⁴⁵ From this, it follows that the State-centered paradigm also has to give way to a framework in which non-state actors increasingly cooperate in the promotion and protection of human dignity, acting jointly with States, international organizations and other actors. The features of many non-state actors make them natural allies in the protection of dignity, because some of them seek to help States fulfill their duties, have technical capacities that enable them to assist in the effective protection of dignity, and/or sometimes have greater freedom, flexibility, experience, and capacities to act in a globalized landscape and ignore territorial limits than States and other actors.⁴⁴⁶

Naturally, the sort of non-state participation being examined is not to be unbound, and all entities must respect human dignity. In fact, the recognition of their participation would make it more likely for examination of non-state behavior to exist, because it is considered that the more rights and formal participation an entity has, the more responsibilities it has or can have. On the other hand, the universal standards that non-state entities demand others to comply with will be demanded from them out of coherency and non-hypocrisy,⁴⁴⁷ and as awareness of the possibility of dealing with *all* non-state violations increases, conscience of the need to also prevent possible abuses committed by those who claim to promote dignity will increase as well.

Apart from this, given how many non-state actors that claim to act out of respect of human dignity argue that they represent civil society, it must be kept in mind that this is not always so. In fact, the representation and democratization offered by the participation of many non-state entities and found inside them are sometimes limited, questionable or uncertain.⁴⁴⁸ For instance, the standards required for participation in the United Nations allude only to democracy and representation towards members of NGOs. While this certainly permits many voices to be heard, it is necessary to bear in mind that *society* may not be truly or largely represented by some

⁴⁴⁵ See Nicolás Carrillo Santarelli and Carlos Espósito, “Los Jueces Nacionales como Garantes de Bienes Jurídicos Humanitarios”, *REDI*, Vol. LXIII, 2011, at 57; Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, *op. cit.*, pp. 192-197; Daphné Josselin and William Wallace, “Non-state Actors in World Politics: a Framework”, *op. cit.*, pp. 1-4.

⁴⁴⁶ Cf. ASIL, *Proceedings of the 92nd Annual Meeting: The Challenge of Non-State Actors*, *op. cit.*, pp. 21-23; Daniel Thürer, *op. cit.*, at 47; Fred Halliday, *op. cit.*, at 26; Elena Pariotti, *op. cit.*, at 98.

⁴⁴⁷ See Fred Halliday, *op. cit.*, pp. 34-37; Pierre Calame, *op. cit.*, at 18.

⁴⁴⁸ Cf. Elena Pariotti, *op. cit.*, pp. 103-104; Kenneth Anderson, “‘Accountability’ as ‘Legitimacy’: Global Governance, Global Civil Society and the United Nations”, Washington College of Law Research Paper No. 2011-28, American University Washington College of Law, 2011, pp. 888-890; Daniel Thürer, *op. cit.*, at 43, 58; “Explanation for Withdrawal from Amnesty and Establishment of the Benenson Society”, pp. 1, 3, available at: <http://www.docstoc.com/docs/31582041/Withdrawal-from-Amnesty-and-establishment-of-the-Benenson-Society> (last checked: 05/01/2012).

of those entities, reason why it is convenient that their claims are checked by other actors,⁴⁴⁹ both State and non-state in a critical and fair manner.

Additionally, propaganda of non-state entities sometimes leads to confusion, and it must be kept in mind that there are disagreements among non-state actors concerning human rights issues. For example, the Benenson Society split from Amnesty International because it considered that the latter's endorsement of a new policy was adopted with lack of transparency and democracy, and that the new policy was contrary to the philosophy of what should guide that NGO, and yet the new NGO claims to cooperate with Amnesty on some issues.⁴⁵⁰ This shows that non-state entities may check but also support each other: these dynamics strengthen the likelihood of protecting and promoting human rights and guarantees.

Theories of global governance and notions of rule of law also point out how with increased participation, come greater responsibilities.⁴⁵¹ Additionally, an analysis of dynamics of the protection of human beings indicates that it is not advisable to refuse the contribution of non-state actors in a globalized context. Analogous ideas have been put forward in economic and social studies concerning global public goods, the supply of which often requires the participation of non-state entities during the productive and other phases.⁴⁵²

Concerning those actors whose interests are mainly concerned with private, profit or other goals that differ from the protection and promotion of dignity,⁴⁵³ it can be said that nothing prevents them from accepting commitments and carrying out certain internally- or externally-suggested policies that are conducive to the improvement of the protection of human dignity, as encouraged by initiatives as the Global Compact or some codes of conduct. Regulations that emerge from those initiatives may sometimes have binding legal effects or may produce legal effects indirectly, due to the expectations they generate for third parties and for other reasons, as discussed later in this text. In any case, whenever non-state regulations or actors may threaten human rights or guarantees, the need to protect victims is demanded by the implications of human dignity.

⁴⁴⁹ See Economic and Social Council (ECOSOC) Resolution 1996/31, *Consultative relationship between the United Nations and non-governmental organizations*, 25 July 1996, paras. 10, 12; Elena Pariotti, op. cit., pp. 103-104.

⁴⁵⁰ Cf. "Explanation for Withdrawal from Amnesty and Establishment of the Benenson Society"; http://www.benensonsociety.org/index.php?option=com_content&view=article&id=2&Itemid=3 ("Membership and Structure) (last checked: 05/01/2012), where it is mentioned that "The Society would seek to cooperate on specific issues with Amnesty International (while not having any formal membership or link with the organisation)."

⁴⁵¹ Cf. Hans-Otto Sano, op. cit., pp. 137-141; Janne E. Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", op. cit., pp. 9, 35-36, 39-40.

⁴⁵² See, among others, Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., pp. 7, 9-10, 35-36, 47.

⁴⁵³ Cf. Bob Reinalda, "Non-State Actors in International Relations: Do They Matter?", in Bas Arts et al. (eds.), *Non-State Actors in International Relations*, Ashgate Publ., 2001, at 2; Bob Reinalda, "Private in Form, Public in Purpose: NGOs in International Relations Theory", op. cit., pp. 12-15; Daniel Thürer, op. cit., pp. 46-47.

c) Finally, experience shows how beneficial the contribution of non-state actors has been for the effectiveness and evolution of the human rights system. This contribution has had an impact on different legal processes: regarding lawmaking, many international norms have been adopted as the result of campaigns and initiatives of actors as NGOs. Additionally, sometimes those actors can have a more direct impact on normative guarantees, as happens when non-state actors can participate in the generation of customary law or when their opinions can be formally expressed in negotiations of international instruments, as happened in the lawmaking processes of the Rome Statute of the International Criminal Court or the Anti-Personnel Landmines Convention, being there also one time in which they formally participated in drafting procedures, which is that of the drafting of the Convention on the rights of persons with disabilities.⁴⁵⁴

Additionally, judicial, quasi-judicial and promotion human rights mechanisms have sometimes been effective thanks in large part to the contribution of non-state actors. This is so because they have provided evidence, opinions, assistance, arguments, and even triggered international mechanisms of supervision. In some systems, some non-state actors have certain degrees of *jus standi* or *locus standi*.⁴⁵⁵ Additionally, some joint-operations or bodies in which non-state actors participate can contribute to the implementation of the humanitarian *corpus juris*, just as they can contribute in other fields of *jus gentium*.⁴⁵⁶

Even though legitimacy, expertise and flexibility allow some non-state actors to contribute in a relevant way to the promotion of human dignity, it must be kept in mind that non-state proposals in this and other contexts must be critically examined because they are not always the best.⁴⁵⁷ Still, previous arguments indicate that non-state initiatives that seek to protect human

⁴⁵⁴ See, for example, the following web pages: <http://www.un.org/disabilities/convention/questions.shtml#ten>; <http://www.un.org/disabilities/default.asp?navid=24&pid=151#neg1> (all checked for the last time on 05/01/2012), where it is mentioned that during the negotiation of the Convention “Delegates to the Ad Hoc Committee represented NGOs, Governments, national human rights institutes and international organizations. It was the first time that NGOs had actively participated in the formulation of a human rights instrument”, and that “the Ad Hoc Committee decided that representatives from non-governmental organizations (NGOs) accredited to the Ad Hoc Committee could also participate in meetings and make statements in accordance with United Nations practice.”

⁴⁵⁵ Cf. article 44 of the American Convention on Human Rights; Francisco Orrego Vicuña, “Individuals and Non-State Entities before International Courts and Tribunals”, *Max Planck Yearbook of United Nations Law*, Vol. 5, 2001; Luis Pérez-Prat Durbán, op. cit., pp. 34-38; Stephan Hobe, op. cit., pp. 121-126; Concurring Opinion of Judge A.A. Cançado Trindade to: Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et-al v. Peru*, Judgment (Preliminary Objections), op. cit., paras. 24-29, 34, 42; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors*, op. cit., pp. 15-17; article 5 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (A/C.3/66/L.66; A/HRC/RES/17/18).

⁴⁵⁶ Cf. “Private in Form, Public in Purpose: NGOs in International Relations Theory”, op. cit. at 24-26; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors*, op. cit., pp. 13-14; Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 2003, pp. 65-66; article 32 of the Convention on the Rights of Persons with Disabilities.

⁴⁵⁷ Cf. ‘We the Peoples’: *The Role of the United Nations in the 21st Century*, United Nations, 2000, at 13; Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food (art. 11)*, E/C.12/1999/5,

dignity should not be prevented. However, they are not to be blindly accepted either, especially because they can be mistaken in their analysis of human rights and related norms and issues.⁴⁵⁸

This idea that non-state contributions must be admitted *prima facie* unless a critical analysis reveals them as contrary to the protection of human dignity or as actually making it less effective confirms the necessity of critically *examining* non-state input. This has two components: evaluation *and* the need *to* eventually attach importance to non-state ideas. This is something that has been done in practice, as in decisions of the Inter-American and European Courts of Human Rights, that *analyze* non-state opinions communicated in *amicus curiae* and in other ways, as in reports,⁴⁵⁹ and in Practice Direction XII of the International Court of Justice.⁴⁶⁰

The facts that non-state entities can manipulate, depend on other actors or interests, or make mistakes when giving advises and carrying out activities and campaigns (being some mistakes unconscious and made due to processes of path dependency)⁴⁶¹ call for caution. This does not equate with exclusion from participation but refers to subject non-state entities to the critical examination and the rule of law, which is relevant not only for States or governing and powerful actors or authorities, since it addresses all actors and “relationships.”⁴⁶² Additionally, non-state opinions and actions must be open to evaluation and criticism by other actors, as demanded by the same democratic spirit that inspires openness of participation.⁴⁶³

It must also be taken into account that some entities, for instance NGOs, have certain capacities to operate and some comparative advantages, but may lack abilities and advantages that States or other non-state entities have. This is why allowing the participation of different actors in the promotion of human rights *and* lawful checks and balances among them is relevant.

12 May 1999, para. 29; Elizabeth Kirk et al., “SUDS law: Non-State actors and the haphazard route to implementation of international obligations”, *Non-State Actors and International Law*, Vol. 4, 2004, pp. 106, 108-109; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors*, op. cit., pp. 13-14, 16.

⁴⁵⁸ See the pages of the article of Elizabeth Kirk mentioned in the previous footnote; Elena Pariotti, op. cit., pp. 103-104; August Reinisch, op. cit., pp. 48-49; Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food (art. 11)*, E/C.12/1999/5, 12 May 1999, para. 29; Nicolás Carrillo Santarelli and Carlos Espósito, op. cit., at 56; Daniel Thürer, op. cit., at 46.

⁴⁵⁹ Cf. European Court of Human Rights, *Case of Sufi and Elmi v. the United Kingdom*, Judgment, op. cit., paras. 37, 80, 121, 128, 133, 140, 145, 152, 160, 170, 179, 187, 189, 190, 230-234; Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, op. cit., paras. 119, 146; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors*, op. cit., pp. 16-17; Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, op. cit., pp. 187-190; Luis Pérez-Prat Durbán, op. cit., pp. 36-38.

⁴⁶⁰ See Elena Pariotti, op. cit., at 98; Practice Direction XII of the Practice Directions adopted by the International Court of Justice, as amended on 20 January 2009.

⁴⁶¹ See Cf. Elizabeth Kirk et al., op. cit.; Daniel Thürer, op. cit., p. 46, among others.

⁴⁶² See Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, op. cit., pp. 4, 7-19, 39-40.

⁴⁶³ Cf. Math Noortmann, “Non-State Actors in International Law”, op. cit., pp. 62-63; Janneke Nijman, “Sovereignty and Personality: a Process of Inclusion”, op. cit., pp. 111, 141-143.

Some issues related to the comparative advantages and disadvantages of different actors are illustrated in the following passage of the judgment of the European Court of Human Rights in the Case of Sufi and Elmi v. The United Kingdom:

“[C]onsideration must be given to the presence and reporting capacities of the author of the material in the country in question. In this respect, the Court observes that States (whether the respondent State in a particular case or any other Contracting or non-Contracting State), through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court’s assessment of the case before it. It finds that the same consideration must apply, *a fortiori*, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do.”⁴⁶⁴

On the other hand, human rights law recognizes the importance of the participation of multiple actors, which is indispensable for an effective and complete protection of human dignity, given both the factual limitations of States and the need to oppose their abuses; and also its usefulness, because of the expertise of some actors, as some NGOs, among others.⁴⁶⁵ This is a reasonable course of action, because non-state participation has bolstered international protection and promotion of human rights.⁴⁶⁶

Some relevant forms of non-state participation in the human rights and related contexts include contributing to implement and enforce human rights law by exerting pressure for compliance, providing evidence and arguments to international supervisory authorities, representing and assisting victims, training, participating in the administration of protection regimes and mechanisms, and advocating changes *de lege ferenda*. They include formal and informal modes of participation, which can contribute to the improvement, robustness and evolution of the humanitarian *corpus juris*.⁴⁶⁷

Acknowledgement of this contribution can be seen in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, which even mentions a right of a wide

⁴⁶⁴ Cf. European Court of Human Rights, *Case of Sufi and Elmi v. the United Kingdom*, Judgment, op. cit., para. 231.

⁴⁶⁵ Cf. articles 4.3, 29.b.i, 29.b.ii, 32, 33.3, of the Convention on the Rights of Persons with Disabilities; Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., at 82; Thomas Buergenthal, “The Evolving International Human Rights System”, *American Journal of International Law*, Vol. 100, 2006, pp. 803-804; Daniel Thürer, op. cit., pp. 44-46; Elena Pariotti, op. cit., at 98; Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, op. cit., pp. 35-37, 40-41.

⁴⁶⁶ Cf. Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, op. cit., pp. 185, 187-190; Luis Pérez-Prat Durbán, op. cit., pp. 34-36; Thomas Buergenthal, op. cit., pp. 803-804.

⁴⁶⁷ See Luis Pérez-Prat Durbán, op. cit.; Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, op. cit.; George J. Andreopoulos, Zehra F. Kabasakal Arat, and Peter Juviler, “Rethinking the Human Rights Universe”, op. cit., pp. 335-337; Elena Pariotti, op. cit., at 97; <http://www.un.org/disabilities/convention/questions.shtml#ten>; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors*, op. cit., at 10

array of actors to act and participate to protect and promote human rights. The following are relevant pertinent articles of this Declaration:

“Article 1

Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.

Article 5

For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

- (a) To meet or assemble peacefully;
- (b) To form, join and participate in non-governmental organizations, associations or groups;
- (c) To communicate with non-governmental or intergovernmental organizations.

Article 6

Everyone has the right, individually and in association with others:

- (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
- (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;
- (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.

Article 7

Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.

Article 12

1. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.
2. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.
3. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

Article 13

Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration.

Article 18

1. Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible.
2. Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms

and contributing to the promotion and advancement of democratic societies, institutions and processes.

3. Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.”

On the other hand, the relevance of non-state participation and its possible support of individuals is seen in procedural and substantive terms in treaties as the American Convention on Human Rights and the Convention on the Rights of Persons with Disabilities. The former grants the right to complain and denounce violations to “[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the [OAS]”, while the latter states in article 29(b)(i) that States shall promote the participation of persons with disabilities in private and non-governmental organizations that represent them, promote their rights or their public interests. This participation may be crucial for individuals to have more representation and influence in connection with their rights and to make their promotion more effective.

Some non-state actors that engage in human rights promotion and advocacy, due to acknowledging the negative impact of some non-state conduct upon the enjoyment of human rights, have created codes of conduct they expect other entities to abide by (hetero-regulation) or to follow themselves.⁴⁶⁸ They have also sometimes tried to shame entities that threaten human rights and guarantees, and have adopted policies that admit the possibility of examining the human rights or humanitarian performance of other non-state actors (lest they are considered biased or not supporting all victims by focusing only on State conduct), as mentioned by Andrew Clapham⁴⁶⁹ and revealed in different statements of entities as some NGOs, among which sometimes condemnations of non-state violent acts and other acts that threaten human dignity are labeled as contrary to human rights.⁴⁷⁰

⁴⁶⁸ Cf. Luis Pérez-Prat Durbán, *supra*, at 33; Elena Pariotti, *op. cit.*, pp. 99-100; August Reinisch, *op. cit.*, pp. 42-53.

⁴⁶⁹ See Andrew Clapham, *Rights Obligations of Non-State Actors*, *op. cit.*, pp. 43, 49-51.

⁴⁷⁰ See Chapter 8, *infra*; Human Rights Watch, *Letter to Commander Manuel Marulanda*, 10 July 2001 (“These violations would qualify as forced disappearances under international human rights law if carried out by government officials or organized groups and private individuals acting on behalf of or with the support of a government. The fact that these actions do not qualify at the moment as a violation of specific human rights treaties should not, however, lead to any confusion about their nature. Abductions are serious human rights abuses independent of legal or linguistic niceties. They also constitute blatant violations of the FARC-EP’s obligations under international humanitarian law”); Human Rights Watch, *World Report 2012, Events of 2011*, 2012, pp. 228-235; Amnesty International, “Colombia: The Human Rights Situation in Colombia: Amnesty International Written Statement to the 19th Session of the UN Human Rights Council (27 February—23 March 2012), where it is said that guerrilla groups “continue to commit serious human rights abuses and violations of international humanitarian law” (emphasis added); Human Rights Watch, “Colombia: FARC’s Killing of Captives a War Crime”, 28 November 2011 (it must be borne in mind that, as mentioned before, some violations of IHL and of international criminal law constitute violations of human rights that are contrary to shared goals and rights of those branches that belong to the humanitarian *corpus juris* when they intersect. Cf. Claire de Than and Edwin Shorts, *op. cit.*, pp. 12-13; Inter-American Commission on

Human Rights Watch, for example, has considered that there can be “business-related human rights abuses”; has “documented a wide-variety of business-related abuses around the world”; and has exposed “targeted children for recruitment, forced marriage, and rape, and attack[s] [against] teachers and schools” attributable to the Islamist insurgent group al-Shabaab, to which it has recommended to “cease recruitment of children”, hold commanders who permit or engage in such recruitments to account, cease indiscriminate attacks and attacks against civilians, not interfere with the right to education, not discriminate against women and girls, and to hold members to account for “violations of international humanitarian law and human rights abuses.” Some of these recommendations were also addressed to AMISOM and the African Union, among other parties to the conflict in Somalia, with recommendations of promotion and protection (including sanctions to be adopted) being sent to international entities as well.⁴⁷¹

The importance of the cooperation of non-state actors when examining the negative impact of non-state entities on the respect of norms that protect human dignity is recognized in a statement on the Monitoring and Reporting Mechanism on Children and Armed Conflict, that contemplates the monitoring of non-state entities and says that:

“[I]t must be stressed that an effective monitoring, reporting and compliance regime depends largely on the collaboration of a number of critical stakeholders, particularly Member States, United Nations system partners, NGOs and local civil society, in situations of concern. The Special Representative is committed to ensuring that the space and opportunity exist for the full participation of all partners and stakeholders”⁴⁷² (emphasis added).

It is important to recall that non-state actors can affect human rights in positive and negative ways, and that they can help to protect individuals from the latter and condemn non-state abuses. NGOs, for instance, have considered that the United Nations (a public non-state actor due to its being an international organization)⁴⁷³ and other non-state entities may

Human Rights, Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina*, op. cit., paras. 117-124; Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., at 42; Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio histórico-crítico*, op. cit., pp. 169-170).

⁴⁷¹ See Human Rights Watch, “UN Human Rights Council: Weak Stance on Business Standards: Global Rules Needed, Not Just Guidance”, 16 June 2011, available at <http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> (last checked: 05/01/2011); Human Rights Watch, “Somalia: Warring Parties Put Children at Grave Risk: Al-Shabaab Rebels Impose Forced Marriages, Use Students as ‘Human Shields’”, 21 February 2012, available at: <http://www.hrw.org/node/105208> (last checked: 21/02/2012); Human Rights Watch, *No Place for Children: Child Recruitment, Forced Marriage, and Attacks on Schools in Somalia*, 2012, pp. 96-98, 100-103.

⁴⁷² Cf. <http://www.un.org/children/conflict/english/monitoringreporting.html> (last checked: 05/01/2012).

⁴⁷³ In my opinion, international organizations are *non-State* actors, as illustrated by the fact that they are different from their members, which can be States or other entities. Contrast this consideration with the notion of non-state actors offered in: Philip Alston, “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?”, op. cit., pp. 3-6; Andrew Clapham, “Non-state Actors”, in Vincent Chetail (ed.), *Postconflict Peace-Building: a Lexicon*, Oxford University Press, 2009, pp. 1 through 4 (SSRN version, available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1339810). Concerning the entities that can aspire to membership in international organizations, see article 2.a of the Draft Articles on the Responsibility of international organizations, A/66/10, 2011; José Manuel Cortés, op. cit., pp. 111-114.

sometimes contribute to the infringement of norms related directly or indirectly to human dignity, and have issued pronouncements to elicit a response and provoke a change in their behavior. In turn, actors as the UN have considered that they must abide by principles and norms that protect human dignity, that can bind other international organizations as well.⁴⁷⁴

Besides allowing the participation of actors, the protection of human dignity has an additional effect concerning international organizations: given its nature as a principle of international law, endorsed by the communitarian dimension of the international society,⁴⁷⁵ which has to be taken into account by international organizations, these entities have implied and inherent powers to achieve the goal of protecting human dignity against non-state abuses, which is one implication of human dignity, even when their constitutive treaties or their internal rules are silent on the matter.

This legal basis supports developments and trends in international legal practice, as the issuance of press releases or reports in which international bodies condemn or reveal non-state violations of actors as different as international organizations, criminals, terrorists or non-state armed groups, among others, expressing support or condolences to victims and/or calling for the cease of ongoing violations, apart from indicating to authorities that they must deal with those abuses.⁴⁷⁶ In other cases, applying a “lateral” protection of human rights,⁴⁷⁷ international

⁴⁷⁴ Cf. José Manuel Cortés, op. cit., pp. 128-132, 136-141, 153-157; articles 59 of the European Convention on Human Rights or 43 of the Convention on the Rights of Persons with Disabilities; Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, op. cit., para. 4; August Reinisch, op. cit., pp. 46-47; Declaration of the European Union to its Formal Confirmation of the Convention on the Rights of Persons with Disabilities, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec (last checked: 06/01/2012).

⁴⁷⁵ In my opinion, humanitarian legal issues have a communitarian dimension that is not denied by the not-so integrated and synergic character of many layers of world (rather than merely *international*) relations, given the relevance of their common goals and foundations, that have a different logic and operate under dynamics that differ somewhat from general *jus gentium* ones. It must be taken into account that the international society can have communitarian traits when it is called to operate guided by solidarity. Therefore, the protection of human dignity is a common endeavor that forms part of the community layers of world (global) relations, reinforced by some of its norms being peremptory and generating *erga omnes* obligations. Concerning these issues, see: Manuel Díez de Velasco, *Instituciones de Derecho Internacional Público*, Tecnos, 2001, at 61; International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law*, op. cit., paras. 11-16, 31, 33, 38; Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio histórico-crítico*, op. cit., pp. 169-170; Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens–*, op. cit., pp. 31-34, 77, 80-85, 161; Human Rights Committee, General Comment No. 29, op. cit., para. 11; articles 60.5 of the Vienna Conventions on the Law of Treaties of 1969 and 1986, 50.1 of the articles on the Responsibility of States for Internationally Wrongful Acts of 2001, or 53.1 of the draft articles on the responsibility of international organizations in its 2011 version (A/66/10); Antonio Cassese, “*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?”, *European Journal of International Law*, Vol. 10, 1999, at 26.

⁴⁷⁶ Cf. Resolution 03/08 and the following Press Releases of the Inter-American Commission on Human Rights: Press Release N° 28/08, Press Release N° 86/10, Press Release N° 98/10, Press Release N° 34/11, Press Release 89/10; Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, Press Release R42/12, *Office of the Special Rapporteur Expresses Concern for Kidnapping of French Journalist in Colombia*, 1 May 2012; Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, Press Release No. R49/12, *Office of the Special Rapporteur Condemns Attack in Colombia*, 16 May 2012.

supervisory bodies have examined non-state conduct when implementing measures of protection of individuals, including conduct of groups in failed States or of international bodies, for example when those actors operate as *de facto* authorities over a territory or have powers therein.

Sometimes, the possibility of direct formal supervision of non-state conduct is expressly envisaged in international instruments; and in some cases it has been considered that international agents and bodies are permitted to contact non-state actors directly to protect human dignity (e.g. requesting the cease of their abuses),⁴⁷⁸ acknowledging the indispensability of contacting them to fully protect individuals.

To conclude this Chapter, it can be said that the principle-value of the protection of human dignity is the foundation of human rights and guarantees and is legally binding. If it were not, it should become so, because it demands both the non-conditional and complete protection of human beings from all abuses and permits the participation of those actors that promote it.

Other principles and normative considerations complement dignity because they also justify and demand a universal protection, taking into account the two roles that non-state entities can have, and will be examined throughout this thesis. Yet, human dignity offers a broader scope of protection and ensures that those other considerations are not distorted or interpreted in ways that may be contrary to the protection of some human beings, which would be unacceptable.

⁴⁷⁷ On the notion of the *lateral* protection of human rights, cf. Jennifer Corrin, "From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post Colonial Legal Systems of the South Pacific", *International and Comparative Law Quarterly*, vol. 58, 2009, pp. 67-69.

⁴⁷⁸ Cf. Manual of Operations of the Special Procedures of the Human Rights Council, adopted in June 2008, op. cit., paras. 81-83.

CHAPTER 2. HOW INTERNATIONAL HUMAN RIGHTS AND GUARANTEES DEMAND PROTECTION FROM NON-STATE ACTORS: NORMATIVE, CONSISTENCY AND TELEOLOGICAL CONSIDERATIONS

In the remainder of Part I, it will be argued that not only the value-principle of the protection of human dignity calls for preventing and responding to non-state abuses, because different norms and legal principles have features and implications that require this as well. That being said, it is true that a demand to give this protection is not always robust because there are gaps and problems related to procedural and specialized substantive aspects, reason why that demand often requires legal changes *de lege lata*, both to better protect victims and to overcome the normative contradiction of specific norms that fail to uphold underlying and general demands.

This chapter will examine how some characteristics of international principles and norms on the protection of human dignity call for a protection that is greater in scope than the one suggested by adherents to State-centered paradigms of protection.

2.1. The protection of *jus cogens* norms from non-state violations of human dignity

When a norm of human rights and guarantees belongs to *jus cogens*, it is binding regardless of consent and de-legitimizes contrary manifestations from all legal systems, requiring thus that every normative manifestation is compatible with it.⁴⁷⁹ This effect, coupled with the fact that *jus cogens* creates non-state obligations,⁴⁸⁰ requires contrary international norms, interpretations or applications to be deprived of effects and to be modified, as required by the principle of *effectiveness*.

To begin this analysis, it must be mentioned that one of the weaknesses of some conceptions of the international legal system is that they overemphasize the role of States. In this manner, for instance, some of them correctly point out that States have duties to prevent discrimination from taking place socially, individually and in their legal systems,⁴⁸¹ but fail to address some cases of discrimination beyond the domestic level (e.g. concerning access of all victims to international remedies or from all violations). This is especially poignant because of many normative gaps, and States and their domestic law do not have the reach to address some

⁴⁷⁹ Cf. Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens–*, op. cit., pp. 171-186.

⁴⁸⁰ Cf. Tilman Rodehäuser, op. cit.; Chapter 6, *infra*.

⁴⁸¹ Cf. European Court of Human Rights, Grand Chamber, *Case of Oršuš and other v. Croatia*, Judgment, op. cit., paras. 72, 154-155, 178, 180-181; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 77-78, 113-114, 137-154.

conduct carried out extraterritorially or in non-domestic levels (transnational or international), thus creating vacuums of protection that could be taken advantage of by actors that commit abuses.

As a consequence, a purely domestic-centered strategy is insufficient, and it has to be asked if different normative systems and actors can coordinate their actions to ensure that discrimination does not take place internationally and transnationally and all victims are protected.

In my opinion, such extra-domestic dimension is *partly* addressed due to one feature of *jus cogens*: its prevalence over all contrary effects or interpretations. Let me describe this effect in some detail before formulating a conclusion.

Apart from the effects of *jus cogens* mentioned in the Vienna Conventions on the Law of Treaties, related to the annulment and termination of norms contrary to them,⁴⁸² authors, international courts and bodies as the International Law Commission mention that *jus cogens* has other effects. Firstly, peremptory law has relevance beyond treaty law, as in the fields of (State and non-state) responsibility, customary law, non-international norms, and other international legal dimensions.⁴⁸³ Additionally, it has been considered that termination or annulment are not the only possible effects of peremptory law in relation to contrary legal manifestations: in this regard, when *some* interpretations of a norm are contrary to *jus cogens*, they must be *discarded*; and when some but not all applications of a norm go against peremptory law, that norm remains in the legal system but cannot be applied in the event of conflict. This is an effect of the prevalence of *jus cogens*, that in events of non-absolute normative or interpretative contradiction, instead of terminating a norm or making it void, makes peremptory law prevail over contrary manifestations or interpretations and deprives them of effects.⁴⁸⁴

Peremptory law has an additional related implication: it conditions the way in which international law as a whole is to be interpreted, because of its enshrining essential goals of the international community as a whole.⁴⁸⁵ It must therefore be taken into account when interpreting *any* norm or interpretation of international law, according to the teleological principle of

⁴⁸² See articles 53 and 64 of the Vienna Convention on the Law of Treaties of 1969 and 1986.

⁴⁸³ Cf. Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens–*, op. cit., pp. 121-160; ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 153-157; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 65-73.

⁴⁸⁴ Cf. Nicolás Carrillo Santarelli, “La inevitable supremacía del *ius cogens* frente a la inmunidad jurisdiccional de los Estados”, op. cit., pp. 60-63.

⁴⁸⁵ Cf. Santiago Villalpando, “The Legal Dimension of the International Community: How Community Interests are Protected in International Law”, *European Journal of International Law*, Vol. 21, 2010, pp. 389, 394-403, 418. Note how peremptory law has effects that trump individualistic interests of international actors in fields such as those of the sources of *jus gentium* or the regulation of responsibility. See ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 153-157; articles 53 and 64 of the Vienna Convention on the Law of Treaties of 1969 and 1986; articles 26, 40, 41 and 50 of the articles on the Responsibility of States for Internationally Wrongful Acts of 2001, or 26, 41, 42 and 53 of the draft articles on the responsibility of international organizations in its 2011 version (A/66/10).

interpretation of international law.⁴⁸⁶ This is further endorsed by the fact that international norms cannot be interpreted in isolation and ought not to be examined out of context but rather must be interpreted in the context of the *corpus juris* or the complete framework of international regulation, as considered in case law, treaties and doctrine.⁴⁸⁷

Norms and principles based on human dignity that belong to *jus cogens* have an absolute character and play an essential role in international law, as indicated by the Inter-American Court of Human Rights, which said that:

“[T]he principle of equality before the law, equal [protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable [...] This principle (equality and non-discrimination) forms part of general international law”⁴⁸⁸ (emphasis added).

Jus cogens norms are not only found in norms and principles of human rights *stricto sensu*,⁴⁸⁹ and all legal content and interpretations rests on the respect of that law, which affects all aspects of international law, including its interaction with other legal systems.

This, in conjunction with the effect of prevalence of *jus cogens*, makes dignity-based peremptory norms be applicable in regard to international legal norms, none of which can be discriminatory or otherwise contrary to *jus cogens*. They thus bind international organizations as well as other entities that behave in a way that is relevant because of how they affect the effectiveness of peremptory law. That all international legal manifestations must respect the principle of non-discrimination and other peremptory principles and norms means that *the international protection of victims* has to ensure the effective protection of all victims, as explored in greater detail in Chapter 3.

On the other hand, some sound theories put forward that *jus cogens* binds subjects of international law regardless of whether they want it or not,⁴⁹⁰ that is to say regardless of their will or consent. This entails a welcome radical change from previous understandings, which assigned

⁴⁸⁶ Cf. article 31.1 of the Vienna Conventions on the Law of Treaties of 1969 and 1986.

⁴⁸⁷ Cf. European Court of Human Rights, *Case of Al-Adsani v. The United Kingdom*, Judgment, paras. 55-56; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 83-84; Article 31 of the Vienna Conventions on the Law of Treaties; International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law*, op. cit., paras. 17-21; Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 24, 92; Inter-American Court of Human Rights, Advisory Opinion OC-10/89, op. cit., para. 37; European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Judgment, 7 January 2010, paras. 273, 276-282.

⁴⁸⁸ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 101.

⁴⁸⁹ Cf. José Manuel Cortés, op. cit., pp. 128-131; Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio histórico-crítico*, op. cit., pp. 166-172; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 71-72.

⁴⁹⁰ Cf. Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 71; José Manuel Cortés, op. cit., pp. 124-129; Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens–*, op. cit., pp. 24, 109-121; ICTY, *Prosecutor v. Anto Furundzija*, Judgment, 10 December 1998, paras. 155-156.

exaggerated importance to consent even if this was detrimental to overarching international legal purposes and principles. This change took place in the transformation from a horizontal system to a normative framework with hierarchical (vertical) dimensions given the prevalence of peremptory norms.⁴⁹¹ For purposes of this research, this has some quite interesting effects, among which there is an implicit obligation that binds every entity capable of committing violations of human rights and guarantees and commands them to refrain from them, as discussed in Chapter 6. Thus, implicitly those entities are addressees and thus subjects of *jus gentium*.

The previous implications are related to what can be called peremptory international implicit negative duties.⁴⁹² Just as a positive dimension determines that subjects of international law as international organizations have implied powers that are necessary for them to accomplish their goals, as determined by its *constituents*, I consider that *every subject and actor* that can prevent the enjoyment of peremptory human rights and guarantees, even if international law has not addressed that actor directly and expressly, can thus engage in internationally legally relevant conduct that is serious and is automatically forbidden from violating those rights and guarantees, that must be wholly effective –as required by the general principle of effectiveness-. After all, *jus cogens* embodies essential goals of the *community layer* of the international or world society, in the formation of which the role of individuals and other actors is essential (process in which they have proven to be willing to participate by manifesting common goals they endorse in the so-called *lex humana*).⁴⁹³

Concerning the idea that just as there are implied powers based on legal goals there are implicit duties to respect *jus cogens* and its purposes, it can be said that this course of action is necessary to truly counter *all* manifestations contrary to peremptory law. To my mind, an intuitive logic similar to this one was followed by the International Criminal Tribunal for the former Yugoslavia when it considered that:

⁴⁹¹ See Antonio Gómez Robledo, *El Jus Cogens Internacional: Estudio histórico-crítico*, op. cit., at 191; Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Jus Cogens-*, op. cit., pp. 31, 163, 279; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 66-67.

⁴⁹² Concerning this, Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, op. cit., pp. 30-31.

⁴⁹³ Cf. Andrew Clapham, “The Role of the Individual in International Law”, op. cit., pp. 29-30; International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Paragraph (18) of the Commentary to Article 25; Andreas Fischer-Lescano, “Global Constitutional Struggles: Human Rights between *colère publique* and *colère politique*”, in Wolfgang Kaleck *et al.* (Eds.), *International Prosecution of Human Rights Crimes*, Springer, 2007, pp. 19-20; International Law Association, Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors*, op. cit., at 9, where Sir Hersch Lauterpacht is quoted as saying that “The international community of interdependence and solidarity which is...a significant factor adding to the legal character of international law is a community not only of States but also of individuals”.

“[T]he *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate [...] The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorizing torture [...] the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition [...] Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction”⁴⁹⁴ (emphasis added).

The Tribunal acknowledged that peremptory law has effects at various levels: at the individual level, at the level of Inter-State relations, and regarding the regulation of the relationships between different legal systems. Among these effects, the deterrence of breaches of *jus cogens* has a prominent place, and the unlawfulness of acts contrary to it implies that they are prohibited, because their prohibition is necessary for them to effectively have an absolute illegal character and for peremptory law to be protected.

Another effect is the unlawfulness or inapplicability of normative manifestations that are contrary to the effectiveness of *jus cogens*, which is a consequence of the legal impossibility of those manifestations producing legal effects. In consequence, a discriminatory treatment of victims of non-state actors that fails to protect all victims from factual violations of peremptory rights and guarantees must not be supported by law, and alternative interpretations and/or mechanisms (including normative changes) of protection must be resorted to. Regarding the imperative that even international legal norms respect the principle of equality of all victims, just like domestic and (non-state) normative manifestations must,⁴⁹⁵ the Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance of 2001 mentions that “everyone is entitled to a social and international order in which all human rights can be fully realized for all, without any discrimination” (emphasis added). Additionally, individuals can claim their rights against non-state conduct contrary to that guarantee.

The notion of implicit obligations to respect *jus cogens* can also be found in case law because, as flows from the works of authors as Roland Portmann, domestic judges faced with questions of international law may intuitively adopt a position that endorses the idea that there is a “principle” according to which *even* individuals and other non-state actors, acting neither on

⁴⁹⁴ Cf. ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 154-156.

⁴⁹⁵ Cf. *Ibid.*, para. 155; Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens–*, op. cit., pp. 89-108, 161-186; articles 53 and 64 of the Vienna Convention on the Law of Treaties of 1969 and 1986.

behalf of any State nor as their accomplices (i.e. acting as purely “private parties”),⁴⁹⁶ may be responsible for breaches of international law (*at least*, in my opinion, and not only) when they violate the content of norms of “universal” concern, which Portmann identifies as international peremptory norms.⁴⁹⁷ Discussing the regulation of armed non-state actors, other authors, as Annyssa Bellal and Stuart Casey-Maslen, also uphold the idea that *non-state entities are bound by jus cogens norms that protect human dignity*.⁴⁹⁸

That this rationale can be applied to any non-state actor, not exclusively to individuals, is hinted by the fact that judicial authorities have applied it for instance in relation to respondents with a corporate nature and not only when individuals are involved.⁴⁹⁹

Some may consider that it is not clear what norms belongs to *jus cogens* and that the previous ideas are thus simply abstract theoretical discussions. Notwithstanding arguments that consider *jus cogens* as useless because of the difficulty of identifying its content, there are ways to identify it, and International Courts and Tribunals have identified some human rights norms as being peremptory.⁵⁰⁰ Additionally, peremptory law and its effects are clearly part of international law, and difficulties to identify would make it necessary to make an effort to define norms belonging to it, given its importance.

Some scholars have proposed theories to identify human rights norms that belong to *jus cogens* and authorities have examined the aspects of norms to evaluate if they are peremptory. Usually, attempts to identify peremptory human rights norms take into account one or both of two sorts of criteria: legal criteria, based on formal and positive law considerations; or normative substantive criteria, based on theoretical or material qualities of rights and principles. This latter approach is employed by natural law, policy, and philosophical theories. Certainly, the two general categories are archetypes, and authors and authorities divert from them somewhat in practice or even resort to both. Most models, for example, take into account the content and features of a norm, thus having to a certain degree a normative dimension.

⁴⁹⁶ Cf. United States Court of Appeals for the Second Circuit, *S. Kadic et al. v. Radovan Karadzic*, Decision of 13 October 1995 (“Karadzic contends that appellants have not alleged violations of the norms of international law because such norms bind only states and persons acting under color of a state’s law [...] We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy”).

⁴⁹⁷ Cf. Roland Portmann, *Legal Personality in International Law*, Cambridge University Press, 2010, pp. 162-166.

⁴⁹⁸ Cf. Annyssa Bellal and Stuart Casey-Maslen, *op. cit.*, at 187.

⁴⁹⁹ Cf. *Ibid.*, p. 166; Mireia Martínez Barrabés, *op. cit.*, pp. 232-248; August Reinisch, *op. cit.*, p. 55-56.

⁵⁰⁰ Cf. ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 153-154 (concerning the prohibition against torture); Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *op. cit.*, paras. 97-101 (regarding the principle of equality and non-discrimination).

One scholar who has formulated a proposal to identify peremptory law is Eric Suy, who considered that human rights norms enshrining such rights are peremptory when: 1) no agreement or exception against them is legally admissible; 2) the obligations they generate cannot be derogated from (i.e. suspended) during states of emergency; or 3) their violation gives rise to an international crime. The Human Rights Committee considered that the second criterion does not always reveal the presence of a peremptory norm, because it may have been considered by drafters that the suspension of some dispositive obligations would not be needed during emergencies or, I might add, perhaps because it was considered that such a measure was not to be admitted without this implying a recognition of *jus cogens* elements and conditions.⁵⁰¹

Professor Suy's criteria take into account elements of norms. Some criteria he suggests seem convincing because they are connected to the consideration that a peremptory norm, as the Vienna Conventions on the Law of Treaties mention, is:

"[A] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"⁵⁰² (emphasis added).

Discussing the three criteria offered by Suy, it can be said that certainly crimes are eminently prohibitory; that norms from which no derogation is possible even during the most stringent conditions reflect a normative decision to make them non-derogable; and that the prohibition of agreements contrary to them is almost a transcription of Article 53 of the Vienna Convention on the Law of Treaties of 1969. However persuasive these criteria are, some doubts persist, which yet do not detract from their normative validity.

First of all, what if there are no normative hints or indicia as to the possibility or prohibition of deviating from a norm, the content of which nevertheless seems to be of the utmost importance for the international community? Should the consideration that derogation from those norms is forbidden be derived from the *opinio juris* of States? But then, are these criteria applicable also to peremptory norms created through non-customary means?⁵⁰³ I think so, but again peremptory norms work as "trumps" of State and non-state will, and are not dependent on consent in some regards (their creation is yet dependent on it, though not on a consensual basis),⁵⁰⁴ so it can be asked whether the content of a norm is such that it suggests that no derogation is permitted.

⁵⁰¹ Cf. Antonio Gómez Robledo, *El Jus Cogens Internacional: Estudio histórico-crítico*, op. cit., pp. 167-170; Human Rights Committee, General Comment No. 29, op. cit., para. 11.

⁵⁰² Cf. article 53 of the Vienna Conventions on the Law of Treaties of 1969 and 1986.

⁵⁰³ Cf. Antonio Gómez Robledo, *El Jus Cogens Internacional: Estudio histórico-crítico*, op. cit., pp. 79-89; Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Jus Cogens-*, op. cit., pp. 48-55 (note that I have changed my mind concerning the opinion I expressed in that book, because now I consider that peremptory law may be enshrined in norms produced by sources different from custom and treaties).

⁵⁰⁴ *Ibid.*

This consideration is close to extra- or meta-legal analyses of the role and substance of a norm, and so it may be asked whether *jus cogens* may act as a bridge between the legal and the meta-legal world (in a manner reminiscent of the dilemmas of the theory of Hans Kelsen as to the final *Grundnorm* and of theories according to which even though law and morality are not merged, they are not completely separated).⁵⁰⁵ On the other hand, some may consider that meta-positivist criteria of identification of *jus cogens* are valuable because otherwise some could mention that a norm cannot be derogated from to make it peremptory despite its being contrary to ethical needs and demands that precisely led to the necessity of recognizing *jus cogens* to limit an otherwise unhindered power of the State's will.⁵⁰⁶

Another take on the normative identification of *jus cogens* seems to be adopted sometimes by International Courts and Tribunals, when they conduct what can be called a semi-intuitive normative identification of *jus cogens*. In this regard, it can be said that judicial authorities sometimes pay attention to the analysis of whether the content of a norm is reiterated in a multiplicity of international (universal and regional) norms, and to the importance of a norm for the protection of human dignity. This happens when judgments mention the jurisprudential or normative absolute character of a norm, to say that it admits no derogation at all, for example concerning the prohibitions of torture and discrimination.

Interestingly, if examines the subject carefully, some dilemmas concerning some well-established peremptory norms can be identified. Let us take the case of the prohibition of the use of force, for instance, on whose peremptory character there is almost universal agreement.⁵⁰⁷ It can be asked if it is possible to consider that institutions as that of self-defense constitute

⁵⁰⁵ Cf. Hans Kelsen, *op. cit.*, pp. 201-205, in light of the consideration that some persons advance the notion that some religious norms are or ought to be legally binding, as some muslims think happens or should happen with the Sharia, which proves how in the end the notion of the "Basic Norm" put forward by Kelsen opens the door to meta-legal and/or extra-legal considerations that can exert an influence in law if so permitted by those authorities and addressees that believe in a given legal system (if they rebel –peacefully, hopefully-, they will not necessarily be coerced into obeying, or will do so reluctantly, and believe in a different normative system, considering the one they challenge either unfair/illegitimate or non-existent (as many authors claim regarding non-state law). Moreover, see Aristotle, *The Nicomachean Ethics*, Forgotten Books, 2007, pp. 101-103, 116-117, 123-124; Kristen Walker, "The silliest pro-abortion argument ever (is one you hear all the time)", LifeSiteNews.com, 17 January 2012, available at: <http://www.lifesitenews.com/news/the-silliest-argument-ever-is-one-you-hear-all-the-time> (last checked: 19/01/2012), where it is argued that "There are two types of laws: *malum in se* and *malum prohibitum*. *Malum in se* is a Latin phrase meaning "wrong in itself." Most of us feel that murder is wrong, therefore there is a law against it [...] *Malum in se* laws are based on morality. Our laws here in the U.S. grew out of English Common Law, which in turn was based on Judeo-Christian morality." Moreover, cf. Mario G. Losano, *op. cit.*, pp. 329-330 (on the influence of extra-legal disciplines on law).

⁵⁰⁶ Cf. Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens-*, *op. cit.*, pp. 31-34, 167, 279; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *op. cit.*, para. 67.

⁵⁰⁷ Cf. Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio histórico-crítico*, *op. cit.*, pp. 83-84, 156-157, 159-162, 167; International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, footnote 641 (related to paragraph 7 of the commentary to Chapter III, at 112).

exceptions to that prohibition, which would therefore not forbid all exceptions in absolute terms and would therefore not be part of *jus cogens*. Such dilemmas can be solved by considering, for example, that self-defense does not constitute an exception but is rather *part of the content* of the prohibition of the use of force (which determines when and how it can or cannot be employed), and that the prohibition refers to using force in events that are different from self-defense or from acts of collective use of force authorized by the Security Council –being there debates as to whether a norm of humanitarian intervention could be evolving customarily.⁵⁰⁸ The same could be said of the right to life, which to my mind is also peremptory.

This reasoning is persuasive, but also reveals that the material importance of a prohibition certainly plays a role in the identification of *jus cogens*; and *opinio juris* can be relevant as well. When it comes to *jus cogens* under the Vienna Conventions on the Law of Treaties, there is a reference to the community of States, which differs from references to an international community the membership of which is not limited to States (that can be more properly called global or world community), made in some scholarly articles and in instruments as the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.⁵⁰⁹ This distinction may suggest that in the current state of legal affairs, the *creation* of peremptory norms takes into account mainly the *opinio juris cogentis* of States (for the time being).

Using a different method, Evan J. Criddle and Evan Fox-Decent follow a meta-legal train of thought, and part from the assumption that in the legal framework there are relationships between individuals and States, being the State a fiduciary entity that ought to protect individuals and is therefore subject to respecting and promoting human dignity, which legitimates it and justifies its legal powers and attributes. According to the authors, norms that sustain this legality are peremptory norms.⁵¹⁰ This proposal is interesting in many respects, and shares the assumption held by other authors regarding the centrality of human beings in the legal system, the subjection of authorities and principles to the respect and promotion of human beings, and State legitimacy as dependent on that.

⁵⁰⁸ Cf. Antonio Cassese, “*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?”, op. cit., pp. 26-30.

⁵⁰⁹ It can be considered that the expression international community of States merely stresses the way in which international law is *traditionally formally* created, whereas the expression international community can encompass a broader set of actors. This is one of the possible interpretations of: International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Paragraph (18) of the Commentary to Article 25. On the other hand, cf. International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors*, op. cit., where it is said that “some distinguished scholars do not limit the concept of ‘international community’ to States.” Certainly, the proliferation and relevance of non-state entities in world social and legal life cannot be ignored and must be acknowledged and addressed for it to be properly regulated (especially regarding humanitarian values).

⁵¹⁰ Cf. Evan J. Criddle & Evan Fox-Decent, op. cit., pp. 361-380.

That theory, however, over-focuses on the role of States and *their* relations with individuals, and thus may fail to reflect the complete attributes and dimensions of rights and guarantees that go beyond this limited dimension.

Alternative meta-legal proposals on the question of the identification of peremptory law include natural law theories and theories that highlight the policy-role played by a norm.⁵¹¹

Some other approaches seem to adopt elements of both a legal and an extra legal character, such as the social-communal theory, according to which *jus cogens* norms are those that protect interests of the international community, which therefore ought to prevail over private interests of *some* States, being the identification of those norms dependent on whether the issues they regulate protect community interests or not.⁵¹² In my opinion, this is a determination that seems mandated by the normative definition of peremptory law, considering it as law established as peremptory by the international *community* as a whole.⁵¹³ Under this theory, essential human needs would be peremptory, given their inherent and inalienable character and the interest of the world community to protect human beings even from the whims of majorities.⁵¹⁴

Perhaps because of these alternative approaches, authors as Lee M. Caplan have a skeptical attitude, considering it especially difficult to identify peremptory norms. This position could seem to be confirmed by contradictions of judicial findings related to the identification of peremptory norms, as revealed for example by disagreements with the opinion of the Court of the First Instance of the European Union in the Kadi case.⁵¹⁵

However, skepticism diverts attention away from two important facts: first, *jus cogens* is part of international law for a reason, and unrestrained power of State volition is dangerous and unacceptable, because crucial issues cannot be left to its whim. There are outrageous practices that cannot be tolerated or legally endorsed and considered legitimate or allowed simply because lawmakers support them. The importance and benefits of *jus cogens* far outweigh difficulties related to its identification, which is thus encouraged.

⁵¹¹ Ibid., pp. 332, 342-345.

⁵¹² Cf. Santiago Villalpando, op. cit., pp. 402-403.

⁵¹³ See article 53 of the Vienna Conventions on the Law of Treaties of 1969 and 1986.

⁵¹⁴ It must be recalled that democracy is but a component of a framework where human rights are also present, that some of these rights are peremptory and cannot be opposed even when it is so consented by State legislative bodies, and that democratic institutions and doctrines exist on the condition that human rights and minorities are respected and protected. Cf. Inter-American Court of Human Rights, OC-6/86, op. cit., paras. 30, 32, 34; Inter-American Court of Human Rights, Advisory Opinion OC-8/87, paras. 24, 26; ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, para. 155.

⁵¹⁵ Cf. Lee M. Caplan, "State Immunity, Human Rights, and *Jus Cogens*: a Critique of the Normative Hierarchy Theory", *American Journal of International Law*, Vol. 97, 2003, pp. 772-773; Court of First Instance of the European Union, Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment, 21 September 2005, paras. 242, 286-288; Court of First Instance of the European Union, Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment, 21 September 2005, paras. 293, 341-343.

Secondly, the existence of peremptory norms is an accomplished fact, and the international legal system is no longer a horizontal but a vertical one. Therefore, what must be done is to identify *jus cogens*. Some of its norms have already been identified, among which there are norms that protect human dignity, such as the prohibitions of torture and discrimination. Still, the ICTY and doctrine have considered that some but not all norms of international humanitarian law and human rights law have a *jus cogens* character.⁵¹⁶

It is certainly possible to identify norms that meet normative criteria that identify them as part of *jus cogens*, as defined in Article 53 of the Vienna Convention on the Law of Treaties. For example, I consider that the following analysis of the European Court of Human Rights, while not mentioning its peremptory character, provides indications that the normative features -reminiscent of Eric Suy's criteria- of the prohibition of slavery, servitude, and forced or compulsory labor, which are *violated on many occasions by non-state actors* as traffickers of human beings, hint to their belonging to *jus cogens*:

"The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere [...] It implies close surveillance of the activities of victims, whose movements are often circumscribed [...] It involves the use of violence and threats against victims, who live and work under poor conditions [...]

There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention [...]

The Court reiterates that, together with Articles 2 and 3, Article 4 enshrines one of the basic values of the democratic societies [...] Unlike most of the substantive clauses of the Convention, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation [...]

Article 4 entail[s] a specific positive obligation on member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour⁵¹⁷ (emphasis added).

In my opinion, it is not contentious that there *are* norms founded upon human dignity with a peremptory character, and they have special effects that reach the plane of individual-non-state relations, establishing prohibitions of disrespecting these norms, conditioning the entire legal system and its effects, and imposing on the international and domestic levels the implicit exigency of recognizing the need of the effective protection of human dignity from non-state violations, which cannot be ignored because of the prevalence effects of *jus cogens*, which conditions the

⁵¹⁶ Cf. ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 137, 153; Human Rights Committee, General Comment No. 29, op. cit., para. 11; Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio histórico-crítico*, op. cit., pp. 166-172.

⁵¹⁷ Cf. European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Judgment, 7 January 2010, paras. 281-285.

interpretation and implementation of law, can even fill gaps or, in extreme cases, require changes in law (mandated by *lex lata*, interestingly).

2.2. Implications of legal principles related to the protection of human dignity concerning protection from non-state violations

Ascertaining that a human right or guarantee is addressed in a principle of law implies that it has certain normative features, some of which display effects in the realm of its protection from non-state violations.

Apart from filling gaps in a subsidiary fashion when other sources insufficiently regulate one situation, as recognized in article 38 of the Statute of the International Court of Justice and in the same article of the Statute of the Permanent Court of International Justice, principles perform other functions in international law, as revealed by how they are used by international authorities: they may influence the interpretation of norms, and sometimes they can be implemented directly, for instance to help determining if a conduct is lawful or how a norm is to be applied. These functions have been used in connection with principles such as those of effectiveness, equality, or *pro homine* protection, for example.⁵¹⁸

Those effects of principles are permitted by the legal system and are not the product of overtly creative implementations because, as Fabián O. Raimondo comments, there are three functions that are “manifestations” of the subsidiary character of general principles:

“(i) [F]illing legal gaps, (ii) interpreting legal rules, and (iii) confirming a decision based on other legal rules, in order to reinforce the legal reasoning.”⁵¹⁹

Case law confirms that legal principles can have interpretive functions and not only serve to fill gaps. In this sense, for example, the International Court of Justice has considered that the principle of equity –that has an interpretive function⁻⁵²⁰ can be employed *infra legem*, that is to say, to interpret applicable law that is pertinent in a controversy, even absent of the consent of

⁵¹⁸ Cf. Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja to the Preliminary Objections Judgment of the International Court of Justice of 1 April 2011 in the *Case concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, para. 22; Inter-American Court of Human Rights, *Case of Baena-Ricardo et al. v Panama*, Competence Judgment, 28 November 2003, paras. 66-67; Inter-American Court of Human Rights, Advisory Opinion OC-19/05, *Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights)*, 28 November 2005, para. 13; Álvaro Francisco Amaya Villarreal, *op. cit.*

⁵¹⁹ Fabián O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Martinus Nijhoff Publishers, 2008, at 44.

⁵²⁰ Cf. Wolfgang Friedmann, “The Uses of “General Principles” in the Development of International Law”, *American Journal of International Law*, Vol. 57, 1963, pp. 287-290.

the parties to that effect, being such consent necessary to apply principles *contra legem* or *praeter legem*, as mentioned in the Case of the *Frontier Dispute (Burkina Faso/Mali)*⁵²¹.

As recognized by the International Court of Justice in the case of the *Military and Paramilitary Activities in and Against Nicaragua*, the fact that the content of a norm is the product of a given source of international law, such as custom, does not prevent that content from being contained in the products of other sources of international law.⁵²² Hence, for instance, protected content of human rights *lato sensu* or humanitarian guarantees can be, to the same or to different degrees, included in the content of principles and customary or treaty norms simultaneously.

As Bruno Simma and Philip Alston pointed out, general principles may be similar to customary law in the sense that they are the product of general agreements based on the conviction that one proto-principle must be binding or have legal effects. For them, however, unlike in the case of custom, practice is not determinative. This makes a difference, because principles can thus emerge even when there is no general practice coupled with conviction, or when practice contradicts them; and can easily be present when regulations requiring abstention of conduct are necessary.⁵²³ Another interesting idea suggested by those and other authors considers that general principles can originate either in the domestic level, out of the similar and coincidental recognition of principles in different legal systems; or in the international plane, when they appear there in response to international dynamics, having even the potential to impact upon domestic law, case in which they would have a dynamic that would be opposite to that of general principles *in foro domestico*.⁵²⁴

Certainly, as long as principles meet the requirement of having a wide consensus concerning their legality, they can be considered general principles *of international law* because, contrary to the assumption of some authors that consider that Article 38 of the Statute of the International Court of Justice alludes to principles *in foro domestico*, Philip Alston and Bruno Simma mention that:

“[T]here is no necessity to restrict the notion of 'general principles' in this way. For the drafters of the Statute the decisive point was that such principles were not to be derived from mere speculation; they had rather to be made objective through some sort of general acceptance or recognition by States. Such acceptance or recognition, however, may also be effected on the *international* plane. The emphasis on acceptance *in foro domestico* was simply caused by the necessity to validate general

⁵²¹ Cf. International Court of Justice, *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, 22 December 1986, paras. 28, 149.

⁵²² Cf. International Court of Justice, *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, paras. 174-175, 177-179.

⁵²³ Cf. Bruno Simma and Philip Alston, *op. cit.*, pp. 85, 92-93, 102-103, 105-106.

⁵²⁴ Cf. *Ibid.*, at 102; Fabián O. Raimondo, *op. cit.*, at 41-42; Giorgio Gaja, *op. cit.*, para. 32.

principles in a reliable way; it cannot be read as closing the door to alternative means of objective validation.”⁵²⁵

This idea is endorsed by other authors, as commented by Fabián O. Raimondo, who goes on to mention that he however considers that the notion of general principles of law alludes to principles “derived from national legal systems”, whereas “general principles of international law” would encompass “legal principles entirely derived from international conventional and customary rules”, a distinction that he believes is held by a large sector of doctrine.⁵²⁶

Whatever the correct position is, it is beyond question that there are general principles derived from national and from international legal systems, being both of them capable of displaying effects and operating in the international legal level (taking into account adjustments that must take into account the peculiarities of international law and the international society).⁵²⁷ As Giorgio Gaja comments, the International Court of Justice refers to general principles as a whole when applying principles even if they “do not find a parallel in municipal laws.”⁵²⁸

That being said, the nature of dignity-related guarantees as principles make them have an impact on the interpretation and application of international norms, being this effect intensified when the principle is part of *jus cogens*. In other words, the interpretation and application of international norms must be guided by principles; and all legal manifestations must be compatible with *jus cogens* principles. This entails that cases are in the end examined in light of humanitarian principles (at least of peremptory ones), directly or at least indirectly. In consequence, it is necessary to assess if international substantive and procedural regulation is consistent with peremptory principles, and that regulation must also always be interpreted in a way that is compatible with those peremptory principles that protect human dignity (among others), whenever possible. If this is not feasible, such regulation must change *de lege ferenda*.

2.3. Implications of the normative content and logic of human rights and guarantees: material human rights breaches and their independence from non-state duties

The content and logic of norms that protect human dignity demand that, out of consistency and according to the principle of effectiveness, their effects go beyond the sphere of domestic regulation and that individuals are protected from non-state abuses, demanding compatibility of international regulation with these requirements.

⁵²⁵ Cf. Bruno Simma and Philip Alston, *op. cit.*, at 102.

⁵²⁶ Cf. Fabián O. Raimondo, *op. cit.*, at 41.

⁵²⁷ *Ibid.*, pp. 58-59, 187.

⁵²⁸ Cf. Giorgio Gaja, *op. cit.*, para. 17 (the author mentions that “When the ICJ referred to principles of international law or to general principles it often considered principles that do not find a parallel in municipal laws.”)

This idea is related to the fact that principles protective of human dignity may have many manifestations and can assume different forms, all of which belong to one same protective principle. One of those forms in which dignity-protective principles can materialize is as rights. Nevertheless, a human right may not derive from a principle or be connected to one. In addition to the effects and implications of principles for being such, there are implications of human rights based on their nature *as rights*, which (also) require protection from non-state violations out of internal logic and normative coherence.

The inherent character of rights implies that they can be invoked by individuals against threats that impair their enjoyment or negatively affect their content. Such claim is unqualified, being based simply on the condition of rights as entitlement.⁵²⁹ Furthermore, human rights must be based on dignity (see Chapter 1, *supra*) and generate prohibitions of (all) violations against them, following this scheme: dignity → human rights → measures of protection, such as creation of duties prohibiting violations. The logic of human rights as entitlements, in sum, must allow claims to protection from all violations, State and non-state alike, regardless of other factors, as the legal personality of offenders, among others.

In consequence, as soon as international law imposes a duty ordering States to adjust their domestic law to effectively protect and respect a right, recognizing it as such, it gives an entitlement to individuals, who can also validly demand that international law fully ensures the respect of their human rights. This conclusion is reinforced by the principle according to which regulation must be made consistent with human rights. While this is usually predicated of domestic law, the underlying logic is valid elsewhere. How this claim is made is a different matter: it can be made formally or informally, directly or with the representation or support of actors different from the individuals that exert pressure on the lawmakers and authorities,⁵³⁰ especially because there can be rights without remedies.⁵³¹

Even though human rights and guarantees are based on human dignity, which makes them have some implications, two trends determined to a great extent some common features of the interpretation or even regulation of norms on human rights *stricto sensu*. They have generated confusion and may be misleading, making some forget that the effects of norms dealing with human dignity must take into account and realize the implications of their foundation and ultimate purpose: the protection of human beings, rather than following accidental historic-

⁵²⁹ Cf. Jack Donnelly, *op. cit.*, pp. 303-305, 311; Roberto Andorno, *op. cit.*, at 11; Oliver Sensen, *op. cit.* (“[I]n justifying human rights, the good (dignity) is prior to a principle stating what is right; and human rights as entitlements—which are justified by the good—are prior to the duties of the agent”).

⁵³⁰ Cf. Luis Pérez-Prat Durbán, *op. cit.*, pp. 34-38.

⁵³¹ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 74-75; Andrew Clapham, “The Role of the Individual in International Law”, *op. cit.*, pp. 28-29; Hersch Lauterpacht, *op. cit.*, pp. 27, 34.

legal models of the regulation of relationships between individuals and some actors (States) that may affect the enjoyment of those rights. This has led many to (in my opinion) wrongly consider that rights, as the right to equality and non-discrimination, have no relevance *vis-à-vis* non-state entities. This, however, is not the case.

The two trends mentioned in the previous paragraph are, firstly, a tradition according to which human rights have since their origins had *one* function: to protect individuals from States, given the risk of abuse of State powers; and secondly, the excessive predominance of the State in former stages of international law.

The first trend is not consistent with what the foundation of human rights demands. This is so because human dignity calls for a full protection that does not depend on the existence of relations with the State, which would be a *relational* argument that would limit the enjoyment of rights to a limited sphere of human life. However, its multidimensionality far exceeds the realm of individual-State relations, and insisting on a State-centered approach to protection is reductionist and fails to address practical, social and individual needs of protection. This approach also insists too much on the relevance of an entity that despite its powers may be manipulated or superseded by other actors.⁵³² This first trend is not unique to the international landscape, and has in some respects been overcome even in domestic settings, that were originally charged with the protection of human rights before their internationalization⁵³³ and now frequently offer protection from non-state abuses.

The second trend that explains why some believe that human rights are only concerned with State abuses is related to the excessive and almost predominant relevance that was attributed to States in international law in other times in relation to different legal processes (including lawmaking and enforcement). Perhaps as a result, at first only States were permitted to be parties to human rights treaties. This shortcoming has been identified and is slowly being overcome by permitting other entities to become parties to those treaties, such as the European Convention of Human Rights and Fundamental Freedoms or the Convention on the Rights of Persons with Disabilities, that allow some international organizations to become parties to them, or by directly imposing duties to non-state actors or punishing certain non-state violations. That flaw is also being overcome by the creation of direct international responsibilities, as happens

⁵³² Cf. Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., pp. 22, 39-40, 42.

⁵³³ Regarding the internationalization of human rights, cf. Francisco Javier Ansuátegui Roig, "La Historia de los Derechos Humanos", in R. Soriano, C. Alarcón and J. Mora (eds.), *Diccionario crítico de los derechos humanos I*, Universidad Internacional de Andalucía, 2000, 71-78, p. 75; Felipe Gómez Isa, "International Protection of Human Rights", op. cit., pp. 24, 31; Carlos Villán Durán, op. cit., pp. 68-75; Stephan Hobe, op. cit., at 120; Thomas Buergenthal, op. cit., pp. 787, 789-790.

with international criminal law. The following passage of the fourteenth Advisory Opinion of the Inter-American Court of Human Rights illustrates the tension between the two paradigms:

“As far as concerns the human rights protected by the Convention, the jurisdiction of the organs established thereunder refer exclusively to the international responsibility of states and not to that of individuals. Any human rights violations committed by agents or officials of a state are, as the Court has already stated, the responsibility of that state [...] If these violations were also to constitute international crimes, they would, in addition, give rise to individual responsibility”⁵³⁴.

The two trends described above exerted an influence on the draft of human rights obligations and mechanisms of protection found in human rights treaties. This has induced many to believe that States are the only entities that can have human rights obligations or have their conduct examined by international authorities on the subject. However, norms can address any actor in order to promote human dignity if they are properly created by sources of law and respect substantive and formal conditions,⁵³⁵ as evidenced by human rights *lato sensu* norms that can and do contemplate non-state responsibilities or permit a wide array of actors to commit to respect human rights, as happens in international humanitarian law, for example.⁵³⁶ It is not only possible but also advisable to address non-state conduct to ensure that human dignity is fully protected.

Because of that possibility, norms based on traditional and narrower understandings must be changed, because they hinder the potential and goals of the protected content and implications of human rights and guarantees. After all, States are obliged to diligently protect victims from non-state abuses, having human rights horizontal effects of human rights. Obligations of this sort protect the content of human rights from non-state abuses, which presupposes that –as hinted in the case law of the Inter-American Court of Human Rights, the

⁵³⁴ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-14/94, para. 56.

⁵³⁵ See Chapter 5, *infra*.

⁵³⁶ See, for instance, common article 3 to the Geneva Conventions of IHL of 1949 (for an example of imposed obligations) and 96.3 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), with the commentary to that article made by the ICRC (concerning facultative acts of non-state entities to be bound by IHL treaty-norms), available at: <http://www.icrc.org/ihl.nsf/COM/470-750123?OpenDocument> (last checked: 11/01/2011), where the ICRC mentions that it considers that “for a very large majority of States the route of acceptance of the Conventions in accordance with their common Article 2, paragraph 3, remains open to authorities representing peoples fighting for self-determination against a State which is a Party to only the Conventions. (37) In the same case a declaration of acceptance of [p.1092] the Protocol would only count as a unilateral undertaking of obligations in matters which are not covered by customary law.” Furthermore, see Theodor Meron, *The Humanization of International Law*, op. cit., pp. 40-41; Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* (3rd edn.), International Committee of the Red Cross (ICRC), 2001, pp. 69, 85-86, 134 (regarding the applicability of Protocol II to the Geneva Conventions to non-state entities); Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 73; Fred Halliday, op. cit., at 35.

Human Rights Committee or the Inter-American Commission on Human Rights⁵³⁷ non-state actors can commit *violations* of the content of human rights.

For this reason, when non-state actors commit human rights abuses and the obliged State(s) have no responsibility because they behave with due diligence to prevent or respond to them, but still fail to protect victims and sanction offenders despite their not committing a wrongful act, it is undeniable that human rights are violated. Non-state human rights abuses are always legally relevant facts, because they affect the protection of human dignity, mandated by law.

This explanation is illustrated by what I have called the Mastromatteo paradox. The European Court of Human Rights examined a case in which criminals killed someone (a non-state violation of the right to life). The applicant argued that the respondent State (Italy) had failed to comply with its obligation to prevent that crime, but the Court held that the State acted with due diligence. Thus, it was considered that the State did not breach its respective human rights obligation. Despite this, it cannot be contested that there are victims: the murdered individual and his father (the applicant).

After all, the content and enjoyment of human rights explain the need of State obligations to protect, and not the other way around. Contrary interpretations would ignore the foundational and *non-conditional* character of dignity. This logic was confirmed by the Inter-American Court of Human Rights in its decision in the *Cotton Field* case, in which it mentioned that non-state entities can violate human rights even when State responsibility is not engaged in connection with their misdeeds.⁵³⁸

Concerning non-conditionality, the Preamble to the American Declaration of the Rights and Duties of Man states:

“The American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality” (emphasis added).

In my opinion, three of the essential rights of victims are the rights to be recognized as such, to have access to effective remedies (ensured and implemented *at least* in the national

⁵³⁷ See Inter-American Commission on Human Rights, *Case of Jessica Lenahan (Gonzalez) et al. v. United States*, Merits Report, op. cit., paras. 119, 122, 128.

⁵³⁸ Cf. European Court of Human Rights, *Case of Mastromatteo v. Italy*, Judgment, 24 October 2002; Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, Judgment, op. cit., paras. 236, 247-248, 252-253 (where it is clarified that not every violation engages the responsibility of functional authorities, in case they act with due diligence).

level, as recognized in international instruments⁵³⁹), and to have full protection. The logic of legal analysis must be based on the protection of their rights rather than on accidental relationships.

In fact, when explaining what justifies and explains the existence of positive duties of protection against non-state violations, even private ones, the Inter-American Court of Human Rights and other supervisory bodies have implicitly or expressly acknowledged that non-state entities can violate human rights, and that States have a duty to prevent or respond to non-state conduct that *factually* threatens to violate or violates the *content* of norms that protect human dignity.⁵⁴⁰

Therefore, obligations of prevention and protection acknowledge and are based on the possibility of non-state violations. Moreover, if protection were limited to victims of non-state violations when States are negligent or assist offenders, other victims whose rights are equally violated would be discriminated against and be left unprotected. For this reason, international law permits States and other entities to devise means to protect human rights and guarantees from non-state entities; sometimes it determines exactly how protection from non-state must be in substantive or procedural terms; and in some cases gives that protection directly.⁵⁴¹ The following words of the United Nations illustrate how State participation (proactive or in the form of assistance) or the lack thereof does not determine if violations and victims exist:

“While the State bears the primary responsibility to protect human rights defenders, it is essential to recognize that non-State actors can be implicated in acts committed against them, both with and without State complicity.”

Armed groups have used killings, abduction and death threats, among other acts, as regular tactics to silence human rights defenders. Some of these groups operate in active collusion with Governments, for example as a paramilitary force, while others are in conflict with the State as armed opposition groups” (emphasis added).⁵⁴²

Since it cannot be denied that non-state actors can act against human dignity and the rights based on it –being their conduct in those cases legally relevant in negative terms-,⁵⁴³

⁵³⁹ Cf. articles 2 of the International Covenant on Civil and Political Rights, 25 of the American Convention on Human Rights, 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or 7 of the African Charter on Human and Peoples’ Rights.

⁵⁴⁰ Cf. Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, op. cit., paras. 172, 176-177; Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 87-91; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 140-148; Theodor Meron, *The Humanization of International Law*, op. cit., pp. 466-470 (where the author holds that “[a]lthough contemporary human rights law focuses on the duty of governments to respect the human rights of individuals, human rights violations committed by one private person against another [...] cannot be placed outside the ambit of human rights law if that law is ever to gain significant effectiveness”).

⁵⁴¹ See John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 18-31.

⁵⁴² Cf. Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 29*, op. cit., at 16.

⁵⁴³ Cf. Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, op. cit., at 42; Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, op. cit., pp. 36, 40, where it is argued that there ought to be international regulation of entities with certain capacities, which calls for their being addressees of *jus gentium*. Undeniably, negatively affecting human rights and human dignity, which entails attacking communitarian

assertions to the contrary⁵⁴⁴ are not only false but also dangerous because they may persuade some to exclude individuals from protection they deserve and have a right to. What I call the Nuremberg syllogism complements these ideas. According to it, if States (legal and social constructions) violate human rights, then, as the Military Tribunal mentioned (and is supported by a disaggregated analysis), it is through individuals that those violations are committed in practice. In factual and ontological terms, individuals have the capacity to attack the enjoyment of human rights, and given the possibility of their belonging to non-state groups or acting on their own, non-state entities can also violate human rights (acting through individuals).⁵⁴⁵ Ergo, individuals and their human rights and guarantees must be protected against their threats as well.⁵⁴⁶

Furthermore, the essential right of the recognition of victimhood is, to my mind, an expression of the right to the recognition of the personality of individuals, recognized in articles 6 of the Universal Declaration of Human Rights, XVII of the American Declaration of the Rights and Duties of Man, and 3 of the American Convention on Human Rights. The effects of this right should not be limited to the national sphere and have a universal vocation, which is the purpose of the right. The Universal Declaration, for example, states that “[e]veryone has the right to recognition everywhere as a person before the law” (emphasis added), whereas the American Convention declares that “[e]very person has the right to recognition as a person before the law” (emphasis added), without it being proper or required to equate the reference to law with

goals and meta-legal foundations endorsed by law (both *de lege lata* and *de lege ferenda*), presupposes the capacity to engage in acts that have *legal relevance*.

⁵⁴⁴ Such as the one offered in: <http://www.un.org/cyberschoolbus/humanrights/qna/alston.asp> (last checked: 11/01/2011), where Philip Alston held that “[f]rom a technical legal point of view governments violate human rights and people commit crimes.” Fortunately, he later engaged in studies that explored how human rights are relevant *vis-à-vis* non-state entities, as can be seen in: Philip Alston, “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?”, *op. cit.* (note that, additionally, not every violation of human dignity attributable to a non-state entity amounts to a crime).

⁵⁴⁵ Cf. United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010, pp. 30-31; Hersch Lauterpacht, *op. cit.*, pp. 40-43.

⁵⁴⁶ Concerning these issues, see Andrew Clapham and Scott Jerbi, *op. cit.*, at 340; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 34-35, 38, 41, 43-46, 58; Zehra F. Kabasakal Arat, “Looking beyond the State But Not Ignoring It”, *op. cit.*, pp. 6-8, 17-18; John Locke, *Second Treatise of Government* (“[t]he injury and the crime is equal, whether committed by the wearer of a crown, or some petty villain”); Chris Jochnick, *op. cit.*, pp. 57-58; Andrew Clapham, *Human Rights: a Very Short Introduction*, *op. cit.*, pp. 19-20, 64-65, 117-118. Altogether, the assertion of Alston in the reference mentioned in the last paragraph cannot be agreed with: non-state entities, individuals included, can and do violate human rights, and something (lawful and proportionate) must be done about it perforce, as demanded by the protection of human dignity legally and meta-legally. The Judgment of the International Military Tribunal for the Trial of German Major War Criminals mentioned that “[c]rimes against international law are committed by men, not by abstract entities [States], and only by punishing individuals who commit such crimes can the provisions of international law be enforced”. If State agents can violate human rights and are human beings who have the same capacities of other individuals, then it cannot be denied that these other individuals can also violate human rights. A syllogism would then say: human beings can violate human rights. Individuals may be State agents or may not be affiliated with a State. Then, State agents and individuals not affiliated with States can violate human rights. Logically, a violator does not necessarily breach law, and this often reveals a flaw in law that does not offer complete protection.

domestic law, given the *inherent* character of dignity and the teleological interpretation of the cited articles, which must be construed so as to maximize the protection of human dignity.

Moreover, according to the insights of John Finnis and Rita Joseph, it can be said that the recognition of the personality of human beings is an *essential guarantee* that *must* be provided by legal systems, lest they are tainted with an exclusionary character that fails to give human beings the central place they deserve to have.⁵⁴⁷

Concerning this recognition, international law cannot be an exception. One of the guarantees to protect and ensure the right of recognition is by acknowledging that individuals have inherent *rights* of various sorts: first-tier rights, which can be considered as the analogous of primary rules and encompass the rights to be respected and protected, given their links to dignity; and second-tier rights, which *in some respects* resemble general secondary international rules,⁵⁴⁸ but refer to more than just responsibility and are centered on individuals: these second-tier rights are those that are triggered or have applicability once a first-tier right has been violated.

The right to reparation is one of these second-tier rights, and the right to protection owed to all victims partly belongs to this category of rights but also deals with entitlements of protection before violations take place. In my opinion, denying that victims of non-state actors have these rights is contrary to their rights, given their personality and how law must recognize them. The right of individuals that all actors and legal systems acknowledge their inherent rights and the need to protect them are based on that recognition.

The Inter-American Court of Human Rights has considered that the human right to recognition is related to the protection from non-state abuses, and that it is not satisfied by mere social participation. According to it:

“Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights. The right to the recognition of juridical personality implies the capacity to be the holder of rights (capacity and exercise) and obligations; the violation of this recognition presumes an absolute disavowal of the possibility of being a holder of such rights and obligations

[...]

[T]he failure to recognize juridical personality harms human dignity, because it denies absolutely an individual’s condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals.

[...]

⁵⁴⁷ Cf. Rita Joseph, *Human Rights and the Unborn Child*, Martinus Nijhoff Publishers, 2009, pp. 66-68; John Finnis, *op. cit.*, pp. 1, 6-10, 13-15.

⁵⁴⁸ On the distinction between primary and secondary rules, cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, pp. 31, 34-35, 54, 60-61, 63, 75, 85, 92, 94-95, 141.

[maintaining someone] in a legal limbo in which, even though the [person] exist[s] and [is] inserted into a particular social context, [implies that his/her] existence [is] not recognized juridically; in other words [he/she does] not have juridical personality”⁵⁴⁹ (emphasis added).

Certainly, the recognition that individuals have legal entitlements to rights entrenched in personality is essential for the respect of human dignity *by a legal system*, and its absence makes individuals “*vulnerable*” to non-state violations. At the very least, the recognition of the condition of someone whose rights have been curtailed and violated by a non-state actor as a victim is an indispensable prerequisite for his protection, and calls for State duties of protection and demands international or transnational actions if State mechanisms of protection are ineffective or inadequate.⁵⁵⁰ This recognition is thus implicit in human rights norms and must guide their interpretation.

Because of its being non-conditional and a human right, the entitlement to recognition is violated when human rights are not recognized by the international (or another) legal system. Rights must be *recognized* even in case of doubt, due to the *pro homine* principle and the need to avoid the risk of ignoring a human being. Positions that ignore this⁵⁵¹ ultimately condition the recognition of personality, ignoring that recognition is a non-conditional right of every *human being*. After all, *pro homine* considerations require not only the election of most favorable norms but also of the interpretations most favorable to the protection of human dignity, as can be identified in the case law of the Inter-American Court of Human Rights. Moreover, paraphrasing Blackstone’s formulation, it can be said that it is better to possibly protect a possible victim than to possibly prevent a violation of human dignity from taking place or from not being tackled.⁵⁵²

In light of the previous ideas, assertions that non-state actors do not or cannot violate human rights are not only unsound, but also amount to denials of the recognition of entitlements

⁵⁴⁹ Cf. Inter-American Court of Human Rights, *Case of the Girls Yean and Bosico v. Dominican Republic*, Judgment, op. cit., paras. 176, 179-180.

⁵⁵⁰ Cf. Ibid., paras. 208-211; Pablo Saavedra Alessandri, “La Corte Interamericana de Derechos Humanos. Las reparaciones ordenadas y el acatamiento de los Estados”, in Juan Carlos Gutiérrez-Contretas (ed.), *Memorias del Seminario Los Instrumentos de Protección Regional e Internacional de los Derechos Humanos*, 2004, Programa de Cooperación sobre Derechos Humanos México – Comisión Europea, pp. 186, 188-189.

⁵⁵¹ Cf. European Court of Human Rights, *Case of Vo v. France*, Application no. 53924/00, Judgment, 8 July 2004, paras. 81-82, 84-85, where the Court considered that “[a]t best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom [...] – require protection in the name of human dignity, without making it a “person” with the “right to life” for the purposes of Article 2 [...] the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention”. I cannot but disagree with the Court, because *every single human being, member of the human race*, has the right to juridical personality (cf. article 3 of the American Convention on Human Rights), precisely because of her dignity and worth and the imperative of her protection, which cannot depend on the whim or negligence of legal systems, State or otherwise.

⁵⁵² Cf. Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, Judgment, op. cit., para. 33 (“norms should also be interpreted based on a values-based model that the Inter-American System seeks to safeguard from the perspective of the “best approach” for the protection of the individual).

that victims deserve in legal terms, especially because those denials may prevent some from employing legal mechanisms that could be employed to deal with violations of human dignity.

Furthermore, insisting on *theoretical* affirmations according to which non-state actors “cannot” violate human rights ignores that *violations* occur whenever the content or enjoyment of a right is negatively affected.

Concerning this, just as human dignity is non-conditional, so are the implications of dignity non-conditional. The need to respond to *material or factual violations* is not qualified, since there can be no requirements as to what actor can engage in them, and this affectation of legal interests and human beings should be effectively and properly responded to in legal terms. In all those cases, victims must be protected and violations prevented from taking place, through obligation-based and/or other precautionary and *ex post facto* measures of protection –e.g. fostering a culture of respect of human dignity, etc.-, that can complement each other.⁵⁵³

As a result, it is necessary to reinterpret expressions and adjectives that have been used in international instruments or by different entities (such as bodies of international organizations and others), including the terms “destruction” or “abuse” of human rights,⁵⁵⁴ that according to some authors may have been employed sometimes to avoid clearly declaring that non-state actors do violate human rights.⁵⁵⁵ Expressions as these must be considered as acknowledgments of *violations* committed by non-state actors. In fact, case law shows how reference to human rights abuses by non-state groups is made recognizing their being contrary to the content and guarantees of enjoyment of those rights. In this sense, for instance, the European Court of Human Rights mentioned in the case of *Sufi and Elmi v. the United Kingdom* that:

“[R]ecent reporting ha[s] consistently identified an increase in human rights abuses in [Somali] areas controlled by al-Shabaab, based largely on that group’s extreme interpretation and application of Sharia law [...] The Court observes that the situation of general violence is not the only risk that a returnee might have to face if he were to relocate to another part of southern and central Somalia. According to the country reports, the areas with the lowest levels of generalised violence are the areas under the control of al-Shabaab [...] which are also the areas reported to have the worst human rights conditions [...] Consequently, even if a returnee could travel to and settle in his home area without being exposed to a real risk of ill-treatment on account of the situation of general

⁵⁵³ Well-founded fear of threats that the victim perceives can be materialized is different from potential victimization, because the former is considered to make the victim an actual rather than a potential victim. Both types of victims, in any case, deserve and are entitled to demand measures of protection, that functional authorities have a duty to provide. Concerning these issues, cf. Inter-American Court of Human Rights, *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala*, Judgment, 19 November 1999, para. 165; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 142; Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, op. cit., para. 177.

⁵⁵⁴ Cf. articles 5.1 of the International Covenant on Civil and Political Rights, 30 of the Universal Declaration of Human Rights, 13.3 of the American Convention on Human Rights (talking about abusive private acts that are contrary to the freedom of thought and expression), or 17 of the European Convention on Human Rights; Ilias Bantekas and Susan Nash, op. cit., at 14; European Court of Human Rights, *Case of Sufi and Elmi v. the United Kingdom*, Judgment, op. cit., para. 262.

⁵⁵⁵ Cf. John H. Knox, “Horizontal Human Rights Law”, op. cit., at 37.

violence, he might still be exposed to a real risk of ill-treatment on account of the human rights situation" (emphasis added).

The Inter-American Commission on Human Rights, for its part, has declared that terrorism threatens the "protection of human rights".⁵⁵⁶

Furthermore, as discussed below, expressions as 'human rights abuses' are also employed in regard to States, whose human rights responsibilities are settled and uncontroverted by some of those who oppose non-state human rights responsibilities.⁵⁵⁷ Likewise, international human rights entities have employed such labels or even the term 'violation' to refer to situations in which both authorities with State features and non-state entities are accused of having acted contrary to the respect and protection of human dignity.⁵⁵⁸ Therefore, those expressions do not suggest in themselves that an entity cannot violate human rights, but quite the contrary.

In this regard, it is telling that in statements of international authorities abuses attributable to different parties involved in conflicts are equated in their reproachfulness. The following declaration of Navi Pillay, High Commissioner for Human Rights of the United Nations, made on March 10th of 2011 concerning "human rights violations against civilians in Côte d'Ivoire", said for instance that:

"Human rights abuses, including rapes, abductions and killings are being committed by people supporting both sides".⁵⁵⁹

Similarly, but employing language that clearly indicates the presence of human rights violations attributable to non-state entities, Human Rights Watch considered that:

"During the conflict, and especially just before the fall of Tripoli in August [of 2011], Gaddafi forces executed prisoners in their custody [...] Anti-Gaddafi forces also committed human rights and humanitarian law violations during the conflict, though they also pledged not to use landmines"⁵⁶⁰ (emphasis added).

In its World Report on the events of 2011, that same NGO expressed that "[r]ebel forces also committed human rights and humanitarian law violations during the armed conflict." Interestingly, the International Commission on Inquiry established by the Human Rights Council in February 2011 considered that both parties to the latest internal conflict in Libya committed

⁵⁵⁶ Cf. Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.LN/III.116, 22 October 2002, paras. 2-3; European Court of Human Rights, *Case of Sufi and Elmi v. the United Kingdom*, Judgment, op. cit., paras. 262 and 272.

⁵⁵⁷ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 33-35, 55-56.

⁵⁵⁸ See Human Rights Watch, "Southern Sudan: Abuses on Both Sides in Upper Nile Clashes", 19 April 2011, available at: <http://www.hrw.org/en/news/2011/04/19/southern-sudan-abuses-both-sides-upper-nile-clashes> (last checked: 12/01/2012).

⁵⁵⁹ See "Human Rights in Côte d'Ivoire deteriorating, warns top UN official", 10 March 2011, available at: <http://www.un.org/apps/news/story.asp?NewsID=37733&Cr=ivoire&Cr1=> (last checked: 12/01/2012).

⁵⁶⁰ Cf. Human Rights Watch, "Libya: Lagging Effort to Build Justice System: Security Needs Working Courts, Legal Reform", 22 January 2012, available at: <http://www.hrw.org/news/2012/01/22/libya-lagging-effort-build-justice-system> (last checked: 23/01/2012).

“human rights violations and war crimes”, that NATO had to investigate civilian casualties, and that the United Nations and the international community should follow some recommendations.⁵⁶¹

Likewise, State practice seems to equally oppose acts contrary to human dignity committed by States and non-state entities. This highlights how they are equally heinous and contrary to legal goods. See, for instance, the following excerpts from the report on Colombia in the 2010 human rights reports of the U.S. Department of State:

“[S]ocietal problems and governmental human rights abuses were reported during the year [...]”

The FARC and ELN committed the following human rights abuses: political killings; killings of members of the public security forces and local officials; widespread use of landmines; kidnappings and forced disappearances; massive forced displacements; subornation and intimidation of judges, prosecutors, and witnesses; infringement on citizens' privacy rights; restrictions on freedom of movement; widespread recruitment and use of child soldiers; attacks against human rights activists; violence against women, including rape and forced abortions; and harassment, intimidation, and killings of teachers and trade unionists.

New illegal armed groups, which included some former paramilitary members, also committed numerous human rights abuses”⁵⁶² (emphasis added).

NGO practice reveals a similar pattern, demonstrated for instance in the section on Colombia in the World Report 2012 of Human Rights Watch, that mentions that there have been “serious violations by all actors”, human rights abuses, atrocities and attacks, and violations of IHL (some of whose norms protect dignity) attributable to non-state entities and to the State.⁵⁶³

Notwithstanding existing criticisms of human rights foreign policies of some States and political advocacy due to possible double standards, manipulations or misconceptions,⁵⁶⁴ it is worth noting that the cited report assimilates State and non-state abuses in their reproachfulness and in their being contrary to human rights. This way of reasoning is found in other documents, as in a report on the situation of human rights in Sudan in a previous year,⁵⁶⁵ and is sound, since all acts against human dignity are reproachful.

⁵⁶¹ Cf. Human Rights Watch, *World Report 2012, Events of 2011*, 2012, at 598; Human Rights Council, *Report of the International Commission of Inquiry on Libya*, A/HRC/19/68 (Advance Unedited Version), 2 March 2012, paras. 39, 576, paras. 134-136 of the recommendations, and Summary (the Commission of Inquiry had a “mandate “to investigate all alleged violations of international human rights law in Libya [...] [and concluded that] international crimes, specifically crimes against humanity and war crimes, were committed by Qadhafi forces in Libya [...] [and that] the *thuwar* (anti-Qadhafi forces) committed serious violations, including war crimes and breaches of international human rights law, the latter continuing at the time of the present report.”); Office of the High Commissioner for Human Rights of the UN, “Human rights violations and war crimes committed by both sides—the latest report on Libya”, 8 March 2012, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/LibyaReport.aspx> (last checked: 08/03/2012).

⁵⁶² Cf. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, 2010 Country Reports on Human Rights Practices, Report on Colombia, 8 April 2011, available at: <http://www.state.gov/documents/organization/160452.pdf>.

⁵⁶³ Cf. Human Rights Watch, *World Report 2012, Events of 2011*, 2012, pp. 228-235.

⁵⁶⁴ Cf. Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., pp. 29-30, 63-64.

⁵⁶⁵ *Ibid.*, pp. 64-65.

Whenever non-state entities violate human guarantees or rights *lato sensu*, it is correct and convenient to declare that such breaches are contrary to human dignity and human rights (in the case of rights *lato sensu*). This highlights the need to do what law requires as a consequence of the existence of violations, including prevention, sanction and protection. In this sense, for instance, authors, the Inter-American Court of Human Rights and the International Law Commission have considered that some crimes, as crimes against humanity violate human rights.⁵⁶⁶

Refusing to accept that non-state actors *can violate* human rights is not only contrary to the logic of human rights but also negative in many respects: it is unfair with victims, and may constitute a discriminatory treatment (as discussed in Chapter 3, *infra*); secondly, it denies in practice that some victims have rights, the content of which is utterly ignored against some actors; and thirdly, because of this, denying that non-state entities can engage in violations of human rights or guarantees is a *performative* action,⁵⁶⁷ completed as soon as the lack of recognition takes effect, and is contrary to the right to have one's legal personality recognized, depriving the rights of victims of non-state actors of effectiveness and international recognition.

The following questions must be asked: what if State is ineffective, unable or unwilling to prevent a non-state violation? Do human rights norms have nothing to say in that case, even from a symbolic perspective? They sure do play very important roles in such an event.

Saying that recognizing non-state violations and rights of their victims is unnecessary because of the possibility of States being responsible if they are negligent is not satisfactory. Apart from the rebuttals of the Mastromatteo paradox, explained above, this claim ignores that States can be simultaneously responsible with non-state actors in different ways: as main violators, accomplices, coauthors or else. This was recognized by the International Law Commission, doctrine,⁵⁶⁸ and the International Court of Justice, which in its 2007 judgment on the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* considered that:

“Although [Article 16 of the ILC's Draft Articles on State Responsibility], because it concerns a situation characterized by a relationship between two States, is not directly relevant to [a case where a non-state actor is involved], it nevertheless merits consideration. The Court sees no reason to make

⁵⁶⁶ Cf. *Ibid.*, at 42; Inter-American Court of Human Rights, Advisory Opinion OC-14/94, *op. cit.*, para. 56.

⁵⁶⁷ This expression is based on the notion that performative acts are performed by an utterance. In my opinion, extending the notion from mere utterances to assertions and implicit denials, one can see how mere denial of the condition of victims and of the existence of a legally relevant violation when non-state violators are involved brings about a state of affairs that is at odds with the foundations of humanitarian (encompassing and not limited to IHL) law. Cf. <http://oxforddictionaries.com/definition/performative> (last checked: 12/01/2012).

⁵⁶⁸ Cf. articles 1.2, 14, 15, 17.3, 18, 42.2, 48, 58, 59, 61, 62, and 66 of the Draft Articles on the Responsibility of international organizations, A/66/10, 2011; Antonio Cassese, “When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case”, *op. cit.*, at 864.

any distinction of substance between “complicity in genocide”, within the meaning of Article III, paragraph (e), of the Convention [on the Prevention and Punishment of the Crime of Genocide], and the “aid or assistance” of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 – setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for “complicity in genocide” within the meaning of Article III, paragraph (e), which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished “aid or assistance” in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.”⁵⁶⁹

The previous considerations related to the recognition of non-state violations and their victims make it necessary to ask if the content of all human rights is can be violated by non-state entities or, in other words, if there are rights can only be abused by States. This is a question that has been made before and is related to others. In this regard, in the context of the relationship between corporations and human rights, it has been asked if it would be preferable to have an exhaustive list of the rights that must be respected by such entities or if, on the contrary, such a list, if it existed, should preferably be open ended and not exhaustive -i.e. exemplary-, or even if it should not be adopted at all, given the possibility of those non-state actors eventually violating *any* human right.

Concerning this question, John Ruggie, former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, considered that while projects as the draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (E/CN.4/Sub.2/2003/12/Rev.2) of 26 August 2003 opt to include lists of rights from the violation of which violation a non-state actor (corporations, in this case) must abstain, it is preferable to not employ such lists.

The Special Representative based his opinion on the argument that those non-state actors (and others, I might add) may virtually impact negatively upon the enjoyment of any human right. This idea was also expressed in the Commentary to Principle 12 to the Guiding Principles on Business and Human Rights.⁵⁷⁰ Thereby, exclusion of protection from non-state violations of any human right is undeserved and lowers standards of protection. Additionally, hypothetically speaking, if a right were not prone to non-state violations, non-state actors could still assist in State violations, and protection against that form of participation should also be granted,

⁵⁶⁹ Cf. International Court of Justice, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, op. cit., para. 420.

⁵⁷⁰ Cf. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, op. cit., paras. 6, 51, 52; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011, at 13.

especially to ensure full reparations, which are only possible if all participants in violations participate in reparations schemes (see Chapter 7, *infra*).

Criticisms as that of Ruggie may be understood as being directed against lists of an exhaustive nature but not against merely exemplificative open-ended lists that indicate some of the rights that can be or are more likely to be violated by non-state actors, perhaps due to how frequently violations occur. As the Special Representative acknowledged, it may be helpful for actors to be mindful of risk situations to avoid, and it must be added that it may be also useful to indicate areas and activities of risk or concern to stakeholders, third parties and authorities, in lists or in other ways.⁵⁷¹ In my opinion a third option, that of lists of rights excluded from protection against a given actor, is undesirable, because this would exclude rights potentially targeted by an actor intentionally or not from legal protection from it, and future realization that they can be violated by a non-state entity will have to deal with the hurdles of processes of normative change.

I wholly agree with John Ruggie that non-state actors can impair the enjoyment of all rights. At first glance, this may seem dubious because some rights tend to be described in instruments taking into account the relationship between individuals and the State, as happens with political rights. Some also question this idea because of norms that portray the State as a qualified and necessary agent of violation, as happens with the right to not be subject to torture, other cruel, inhuman or degrading treatments or punishments, or to enforced disappearance, as *enshrined in* articles 1 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, respectively.

When examined in detail, those objections are revealed as false because non-state actors *can* affect the enjoyment of all rights, even those described in the previous paragraph, despite what *some* specific norms suggest. First of all, just as States can participate in human rights violations as accomplices of non-state violators or failing to prevent abuses, non-state actors may be secondary agents of violation, with States being the principal agents of violation. For example, non-state actors can contribute to State conduct that prevents individuals from exercising political rights and, as expressly mentioned in the articles of the two Conventions cited above, when a non-state actor commits torture or enforced disappearance crimes with the support or acquiescence of a State, those particular forms of violation are prohibited by norms with narrow definition of violations.

What is more: non-state actors may affect the enjoyment of the rights that are close to models of relationships between individuals and authorities (State or not) *even when* no breach

⁵⁷¹ Ibid.

can be attributed to a State at all. This happens, for instance, when non-state actors sabotage elections and threaten those who intend to suffrage.⁵⁷² In those cases, if States attempt to counter the conduct of non-state actors that may impair the enjoyment of a given right with due diligence, their own responsibility will not be engaged but individuals will be affected nonetheless.

On the other hand, individuals may even have rights to political participation in relation to international organizations and other entities, as revealed in the *Matthews* case. Likewise, the due process guarantees are applicable in non-judicial procedures, which in my opinion implies that they must be present in procedures conducted by non-state entities.⁵⁷³

Additionally, specialized treaties with narrow definitions of violations are *complementary* to general human rights treaties, which unlike them may protect the same rights without requiring specific agents of offence for violations to exist. As commented above, international human rights bodies have found that torture, cruel, inhuman or degrading treatments or punishments, for example, may be committed by non-state actors, against whom States must protect individuals.

For the sake of discussion, if eventually a given right or guarantee could ever be violated only by States,⁵⁷⁴ non-state entities could still find ways to violate it in the future or cooperate with State violations, and thus protection against them should be given too. Altogether, potentially all human rights and guarantees could be exposed to non-state violations and must be protected against them, as required in evolutionary systems such as international law and international human rights law.⁵⁷⁵ In consequence, all of them must be legally protected against all threats.

⁵⁷² Cf. Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/III.102. 26 February 1999, paras. 31-38, 46-48 of Chapter IX (Freedom of Association and Political Rights), where the Commission manifested that Colombian non-state armed groups engaged in acts that “interfere[d] with the free exercise of the right of Colombians to vote and to participate in politics”, and that their attacks may “lead to a situation in which the Colombian citizenry does not have effective access to the right to vote and direct or representative political participation.” Likewise, see Human Rights Watch, *World Report 2012, Events of 2011*, 2012, pp. 229, 231. Moreover, see how the foundations of political rights demand their protection from all threats, State or not, as can be inferred from: Human Rights Committee, General Comment No. 25, *The right to participate in public affairs, voting rights and the right of equal access to public service (art. 25)*, CCPR/C/21/Rev.1/Add.7, 12 July 1996, paras. 19-20.

⁵⁷³ Cf. European Court of Human Rights, *Case of Matthews v. the United Kingdom*, Judgment, op. cit., paras. 34, 39-44, 52-54, 63-65; Inter-American Court of Human Rights, *Case of Baena-Ricardo et al. v. Panama*, Judgment, 2 February 2001, paras. 124-131; Constitutional Court of Colombia, Judgment T-083/10, 11 February 2010, paras. 8-14, where the Court explained why the right to due process is applicable in relations between private entities and how that right can be protected by the Colombian judiciary in fundamental rights procedures in some cases.

⁵⁷⁴ Cf. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., para. 52.

⁵⁷⁵ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-10/89, op. cit., paras. 37-38; Inter-American Court of Human Rights, *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala*, Judgment, 19 November 1999, para. 193; Marko Milanovic, “The ICJ and Evolutionary Treaty Interpretation”, *EJIL: Talk!*, 14 July 2009, available at: <http://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/> (last checked: 16/01/2012); International Court of Justice, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, paras. 112, 140.

Another point worth considering is that the recognition of the victim status of individuals whose human rights and guarantees have been violated by non-state entities has an important symbolic function and is demanded by guarantees as the reparation of victims.

Concerning this, as the Inter-American Court of Human Rights recognizes and soft law principles expressly acknowledge, satisfaction is very important role for victims and is a component of reparation. Satisfaction is, in fact, deeply entrenched in the international legal system, being a central category and modality of reparations under general international law. For this reason, in the articles on the responsibility of States and of international organizations, the International Law Commission included it as one component of the duty to repair, and human rights instruments acknowledge its relevance and the right of victims to receive satisfaction.⁵⁷⁶

Satisfaction requires the restoration of the honor of a victim and the *recognition* of this situation, which is why its analysis is important here. Failing to recognize victims of non-states is at odds with the requirements of satisfaction and dignity, and is thus contrary to legal norms and principles because all victims have a right to be repaired⁵⁷⁷ –from both State and non-state abuses- and thus to be satisfied and recognized. In this way, for instance, I consider that an evolutionary and teleological victim-centered interpretation demands considering that human rights protect everyone from all threats no matter who perpetrates them. Principle 18 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power seems to confirm this by saying that:

“Victims’ means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights” (emphasis added).

⁵⁷⁶ Cf. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 18, 22; articles 34 and 37 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts drafted by the International Law Commission (A/56/49(Vol. I)/Corr.4), or 34 and 37 of the version of the draft articles on the responsibility of international organizations adopted by the International Law Commission at its sixty-third session in 2011 (A/66/10).

⁵⁷⁷ Cf. Theo van Boven, “The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, *United Nations Audiovisual Library of International Law*, pp. 2-3, available at: http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf (last checked: 16/01/2012), where it is said that “[i]t was generally felt that non-State actors are to be held responsible for their policies and practices, allowing victims to seek redress and reparation on the basis of legal liability and human solidarity”; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 11 through 26; articles 63 of the American Convention on Human Rights and 41 of the European Convention on Human Rights; Pablo Saavedra Alessandri, “Las Reparaciones en el Sistema Interamericano de Derechos Humanos”, pp. 2-4, available at: http://www.usergioarboleda.edu.co/instituto_derechos_humanos/material/cv/reparaciones.pdf (last checked: 16/01/2012); Pablo Saavedra Alessandri, “La Corte Interamericana de Derechos Humanos. Las reparaciones ordenadas y el acatamiento de los Estados”, op. cit., pp. 187-189.

Let me offer my interpretation of that Principle: in my opinion, the allusion to human rights must be understood as referring to human rights *lato sensu*. All victims suffer harm, irrespective of the identity of participants in a violation; and reference to human rights violations must be understood as including all *material or factual violations*. Understood in this way, the cited soft law instrument calls for protecting victims of non-state entities and recognizes both their victimhood and, in consequence, that they have a right to reparation and thus to satisfaction. As to the use of the term *abuse of power* in the aforementioned principles, it could be understood in the sense of abuse of power to do or not to do something, which can be attributed to any actor, especially since the transcribed definition of victims is not limited to those negatively affected by States.

Returning to norms dealing with human dignity that refer to satisfaction, it can be seen that Principles 18 and 22.d of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law acknowledge the importance of satisfaction when they mention that:

“In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition

[...]

Satisfaction should include [...] An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim” (emphasis added).

The case law of the Inter-American Court of Human Rights has considered satisfaction as important for victims, and that it requires recognition of *victimhood*. According to judge Sergio García Ramírez, satisfaction is an essential part of reparations insofar as it is crucial to the creation of a “new situation that is as similar as possible to” that existing prior to a violation, being purposes of this element of reparation “the moral satisfaction of the victims or their successors, [and] the recovery of the honor and reputation” of victims,⁵⁷⁸ among others.

To my mind, essential to satisfaction is honoring and acknowledging the value and importance of victims, something that is ignored if (not even) his own condition as a victim is recognized. Thus, recognition of victimhood is an essential element of reparations, and operates even when States fail to protect human rights in accordance with their horizontal effects. Worse, ignoring the suffering of victims of non-state actors may constitute secondary victimization.

⁵⁷⁸ Cf. Concurring Opinion of Judge Sergio García Ramírez in the Judgment on Reparations in the *Bámaca-Velázquez Case* (concurring opinion to: Inter-American Court of Human Rights, *Case of Bámaca-Velásquez v. Guatemala*, Judgment (Reparations and Costs), 22 February 2002, pp. 1-3.

In psychological terms, acknowledgement of her suffering is dear and important for a victim because if this recognition is refused she may perceive that her image, worth and reputation are not recognized.

Victims often feel the needs to be dignified and recognized⁵⁷⁹ and to feel that law and legal agents sympathize with them, recognize their suffering, and strive to help them, as is just and fair. After all, people also need to feel supported and protected by law,⁵⁸⁰ and they tend to value legal statements according to which all victims have inherent worth and that the violations they suffer are unlawful, contrary to their inherent rights and unacceptable. They are important measures, especially when victims feel that they have suffered an injustice and their self-esteem is wavering. To my mind, this explains why it has been said that victims may seek “recognition and respect [...] to restore their sense of justice and reduce their suffering”⁵⁸¹.

An empathic treatment, that recognizes the importance of victims, is dear to victims, but it can only be achieved if the violations of the rights of victims are first recognized and branded as unacceptable and to be addressed by law, due to its task of addressing social and human problems no matter who violates human rights. Otherwise, the legitimacy of the system will end up being questioned due to selectiveness, irrelevance and/or insufficiency.

For many victims, to forgive and/or get over their problems and trauma, it is necessary that their situation is acknowledged and considered as wrong and that offenders are identified and apologize. This is analyzed in detail Chapter 7, which examines why reparations must be victim-centered and offer protection from all violations. Additionally, feelings of injustice due to lack of legal remedies and legal indications to everyone that non-state violations are unacceptable and must be properly addressed may aggravate the suffering of victims. Such a

⁵⁷⁹ Cf. Gina Donoso, “Inter-American Court of Human Rights’ reparation judgments. Strengths and Challenges for a comprehensive approach”, *Revista IIDH*, Vol. 49, 2009, pp. 35, 65-66; Luc Huyse, op cit., pp. 55, 58-59, 61-65; Eimear Wynne, “Reflections on Recognition: A Matter of Self-realization or a Matter of Justice?”, *Thinking Fundamentals, IWM Junior Visiting Fellows Conferences*, Vol. 9, 2000, 5, 7-11

⁵⁸⁰ In that regard, the story found in the book *El coronel no tiene quien le escriba (No One Writes to the Colonel)* by Gabriel García Márquez is exemplary, as well as the passage found in his work *Cien años de soledad*, where it is told that “En un cierto momento, el coronel Gerineldo Márquez era en verdad el único que habría podido mover, aun desde su mecedor de paralítico, los enmohecidos hilos de la rebelión. Después del armisticio de Neerlandia, mientras el coronel Aureliano Buendía se refugiaba en el exilio de sus pescaditos de oro, él se mantuvo en contacto con los oficiales rebeldes que le fueron fieles hasta la derrota. Hizo con ellos la guerra triste de la humillación cotidiana, de las súplicas y los memoriales, del vuelva mañana, del ya casi, del estamos estudiando su caso con la debida atención; la guerra perdida sin remedio contra los muy atentos y seguros servidores que debían asignar y no asignaron nunca las pensiones vitalicias.” Cf. Gabriel García Márquez, *Cien años de Soledad*, Mondadori – Leer-e (ebook version), 2012, at 533.

⁵⁸¹ Cf. Jo-Anne Wemmers and Katie Cyr, “What Fairness Means to Crime Victims: A Social Psychological Perspective on Victim-Offender Mediation”, *Applied Psychology in Criminal Justice*, Vol. 2, 2006, pp. 102, 109, 123, 125, available at: http://www.apcj.org/documents/2_2_fairness.pdf (last checked: 16/01/2012).

treatment would be at odds with the idea that law ought to strive to prevent persons from feeling dejected and tempted to take justice into their own hands.⁵⁸²

In consequence, it is necessary to make them everyone be aware of the worth and entitlements of victims, something that is bolstered by official (legal) recognition of the importance of their rights and the unacceptability of violations, indicating everyone (in international, domestic, private and transnational societies) that a violation should never take place and will be tackled.

This is why it is crucial to acknowledge that violations of human rights can be committed by *any actor*, lest victims perceive that law simply protects some persons but not them⁵⁸³ and some cease supporting human rights or humanitarian norms or consider them as irrelevant, ineffective, discriminatory, narrow or *selective*.⁵⁸⁴ These features are openly contrary to the philosophy of a human rights system founded on the complete and effective protection of dignity.

In sum, to prevent victims wronged by non-state actors from feeling *abandoned* by law due to “theoretical” notions of human rights, which could worsen their suffering and risk the legitimacy of human rights law, it must be recognized that their *rights* were violated, and legal measures must deal with this accordingly. In fact, it has been considered that refusing to recognize a victim as such may constitute a form of re-victimization, because it can cause “additional hurt after the direct cause of victimization has disappeared”⁵⁸⁵, as commented by Luc Huyse. It can also encourage future non-state violations due to impunity, which is something to be avoided.

Conversely, the recognition of the status of victimhood and other identities of victims may be a first (but not sufficient) step “in respecting that person’s dignity”,⁵⁸⁶ given how this recognition triggers actions to protect rights of the victim and enforce duties of other entities, including State or non-state authorities and offenders, which are dependent on the recognition of victimhood.

Related to this, Valerie Meredith mentions how the recognition of “the identity projected by a person” is linked to dignity given how the latter “relates partly to one’s own sense of identity and worth.”⁵⁸⁷ As a consequence, she argues that it is important to recognize the different roles of

⁵⁸² It must be recalled that “One of the most important and significant goals of reparations for victims of political violence, is that it allows them to channel their frustration, aggression and feelings of revenge through language and symbolic acts. Well-processed reparations can bring closure or the beginning of mourning and can serve as symbols of healing.” Cf. Gina Donoso, *op. cit.*, at 37.

⁵⁸³ Cf. Chris Jochnick, *op. cit.*, pp. 57-65.

⁵⁸⁴ Cf. *Ibid.*; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 28, 44.

⁵⁸⁵ Cf. Luc Huyse, *op. cit.*, at 61.

⁵⁸⁶ Cf. Valerie M. Meredith, “Victim identity and respect for human dignity: a terminological analysis”, *International Review of the Red Cross*, Vol. 91, 2009, pp. 259-274.

⁵⁸⁷ Cf. *Ibid.*, at 270.

victims, including active ones that are not properly described by the label 'victims', usually associated with passive connotations.⁵⁸⁸

Apart from considerations of convenience, the *legal* recognition of the violation of human rights is a task of authorities and normative systems. If they fail to acknowledge someone's victimhood, they will fail to treat them as rights-bearers who should never be offended. Official reactions on the subject will be perceived by others, who may react according to this signal. Authorities and law may fail to trigger or permit the use of mechanisms and norms on the protection of victims if they do not recognize them as such.

It is worth examining how only by involving all participants in violations, be them agents of the State in their individual capacity or else, as having a responsibility that is different from and complementary to that of States or other actors, it will be possible to truly and effectively protect and repair victims and discourage future violations. For instance, for apologies –a form of satisfaction- to be relevant, they must come from all the actors *that* committed or participated in a violation; and non-state actors must have accountability towards their victims. Interestingly, in practice non-state actors that violate human rights have sometimes recognized the need that they recognize and repair their victims, as was declared by representatives of the non-state armed group FARC from Colombia.⁵⁸⁹

Failing to recognize the existence of non-state violations of human dignity and ensuing rights and responsibilities would also make international law send a negative message: it would refuse individuals the moral satisfaction of claiming their having a right which any other actor has to respect, which is fundamental for victims also from a personal and ethical perspective.⁵⁹⁰

In fact, individuals, groups and movements can and have resorted to criticize non-state behavior even when it is not clear that such entities have breached a *norm* that binds them, as has happened with certain claims of corporate complicity with human rights abuses.⁵⁹¹ Underlying these claims is the consideration that the enjoyment of a human right or humanitarian guarantee has been impaired or is in peril. Denying the existence of non-state abuses and the possibility of *invoking* and showing that a human *right* or guarantee has been *violated* denies the possibility of pointing out wrongs and injustices and of demanding protection and eventually the modification of law or legal practices.

⁵⁸⁸ Ibid., pp. 259, 261-262, 265, 269-271, 273-274.

⁵⁸⁹ See <http://www.espectador.com/noticias/271750/farc-admite-haber-causado-vctimas-y-dolor-en-colombia> (last checked: 23/08/2013).

⁵⁹⁰ Cf. John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 43-44; Amartya Sen, op. cit., pp. 326-328, 345

⁵⁹¹ Cf. Andrew Clapham and Scott Jerbi, op. cit., pp. 347-348.

Amartya Sen describes how many of these actions are often based on ethical considerations.⁵⁹² The strength of those initiatives is weakened if the possibility of non-state abuses is rejected. Furthermore, recognition in ethical and legal terms is important because there may be links between human rights in the ethical realm and human rights law, even if they are independent⁵⁹³ (and so demands in one could be requested in the other realm). It is also relevant because of the symbolic or expressive function of law,⁵⁹⁴ that consists in sending messages by law to society, which impacts upon the beliefs and attitudes of addressees and members of society (even if not addressed by law).

If non-state entities feeling bound by human rights standards they may behave accordingly or claim to observe them to avoid criticism and responsibilities. Fred Halliday has explained, for example, how the mere claim that non-state actors should respect international humanitarian law brought upon a change in the mindset of some of them that made them begin to feel the need to justify their behavior by arguing how it complies with those norms.⁵⁹⁵ This dynamic is necessary in relation to all norms and principles protecting human dignity.

Likewise, it has been explained that several actors, such as corporations, may adjust their behavior or policies in response to human rights ethical, social or legal expectations placed on them; and that they can react and be subject to pressure to conform to those expectations, being it possible for such pressure to be exerted by outsiders or by those who are close to those actors, including for instance investors,⁵⁹⁶ who in turn may have pertinent responsibilities.

Change of attitudes of non-state entities can be brought about by multiple dynamics, including the legal acknowledgment that human rights *can be violated*, because it can have expressive symbolic and educative effects.⁵⁹⁷ Because of it, members of society *may* change their perceptions and be convinced of the importance of the protection required by law. If offenders do not heed this signaling, they may still be subject to social and individual reactions to their violations, and may thus face boycotts, social pressure, and opposition from others.⁵⁹⁸

In relation to the possibility of members of society invoking claims supported by law to bring about changes in the mindset or conduct of abusers, some may consider that they may sometimes engage in conduct described as (a controversial concept called) *lawfare* (which can

⁵⁹² Cf. Amartya Sen, op. cit., pp. 325-328, 342-345, 349, 355-356.

⁵⁹³ Ibid., pp. 326-327, 342-345.

⁵⁹⁴ Cf. Ryan Goodman and Derek Jinks, "Incomplete Internalization and Compliance with Human Rights Law", op. cit., at 735; Mauricio García Villegas, op. cit.; at 40.

⁵⁹⁵ Cf. Fred Halliday, op. cit., at 35.

⁵⁹⁶ Cf. Andrew Clapham and Scott Jerbi, op. cit., pp. 339, 341, 347-348; Alexandra Gatto, op. cit., pp. 428-431.

⁵⁹⁷ Cf. Barbara Ann Stolz, "Russia, Crime, and the Moral Educative Function of Law", *Demokratizatsiya, The Journal of Post-Soviet Democratization*, Vol. 6, 1998, pp. 88-90.

⁵⁹⁸ Cf. Daniel Thürer, op. cit., pp. 46-47; Andrew Clapham and Scott Jerbi, op. cit., pp. 347-348; August Reinisch, op. cit., pp. 53, 68, 77; Alexandra Gatto, op. cit., at 428-429; Menno T. Kamminga, op. cit., at 186.

be used in a hypocritical way).⁵⁹⁹ Proponents of this concept argue that law may be employed as an instrument to achieve political ends, suggesting that it may be abused or manipulated, and that even non-state entities may blame others while remaining silent on their violations of human dignity.⁶⁰⁰

The problem with the concept is that while it tries to highlight possible manipulations of law, it allows others to claim that someone engages in 'lawfare' to divert attention away from their own abuses and their own strategic invocations of law. Yet, it is true that law can be invoked to achieve political ends, sometimes manipulating it in order to make it say what it doesn't truly say.

As a result of the social and psychological factors based on normative considerations that pressurize or persuade actors to respect human dignity, non-state entities may be willing to commit to observe human rights standards in binding or declaratory and non-binding standards, such as codes of conduct⁶⁰¹ or the Global Compact. They may do so because of selfish or unselfish interests, deceitfully or honestly. Regardless of the true intentions of those entities, others may feel further entitled or legitimized to urge them to respect their commitments, and non-state legitimacy will be further checked and constrained by human rights standards. Additionally, legal effects of declaratory commitments are not to be lightly dismissed, because they may exist in connection with legal principles such as good faith, or as the result of the reception of the content of non-binding standards in binding norms of international or domestic law.⁶⁰²

Moreover, regulation of non-state human rights responsibilities can not only be invoked to pressurize non-state conduct, but can also trigger processes of acculturation and internalization. This means that it can make an actor reluctantly or willingly conform to standards of what is expected from it in its social context (acculturation); and/or receive the content of norms due to reiterative procedures enunciating normative contents,⁶⁰³ which can for instance declare the unlawfulness of non-state violations. These processes are more effective if they are supported by

⁵⁹⁹ Cf. Gabor Rona, "Legal Issues in the 'War on terrorism'—Reflecting on the Conversation Between Silja N.U. Voneky and John Bellinger", *German Law Journal*, Vol. 09, 2008, at 712, available at: http://www.germanlawjournal.com/pdfs/Vol09No05/PDF_Vol_09_No_05_711-736_Developments_Rona.pdf (last checked: 17/01/2012).

⁶⁰⁰ Cf. Colonel Charles J. Dunlap, Jr., USAF, "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts", Carr Center for Human Rights Policy, Harvard Kennedy School, 2011, available at: <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> (last checked: 17/01/2012), pp. 5-6, 11, 36; "Rights Group Lists Abuses by Guerrillas in Colombia", *The New York Times*, 10 July 2001, available at: <http://www.nytimes.com/2001/07/10/world/10COLO.html>

⁶⁰¹ Cf. August Reinisch, op. cit., pp. 42-53; Alexandra Gatto, op. cit., pp. 425-430.

⁶⁰² Cf. International Law Association, Non-State Actors Committee, *Report: Preliminary issues for the ILA Conference in Rio de Janeiro, August 2008*, 2008, at 3. Moreover, domestic or international norms can incorporate the content of soft law or even regulations created by non-state actors or aimed at the regulation of their behavior. For an example, cf. Alexandra Gatto, op. cit., pp. 452-454.

⁶⁰³ Cf. Ryan Goodman and Derek Jinks, "Incomplete Internalization and Compliance with Human Rights Law", op. cit., pp. 726-729; Harold Koh, "Why Do Nations Obey International Law?", op. cit., at 2645-2659.

initiatives of promotion and enforcement addressing non-state violations, and if coupled with psychological and perception dynamics.

From the opposite perspective, that of victims, failure to legally recognize the existence of legal importance or existence of non-state violations of human dignity may make (actual or potential) victims feel that law does not correspond to what they (rightly) consider that human rights are.

This is illustrated in the popular expression according to which “the reach of someone’s rights ends where the rights of others begin”, that assumes that the latter rights *can be* violated by non-state actors as individuals, and that they must therefore be protected accordingly, without the effects of these rights being limited to the sphere of State-individual relationships. This is why in war-torn countries or places where non-states entities engage in heinous violations, many claim that international agencies that criticize States but not non-state actors are biased or, worse, may have a hidden agenda and take sides, as some said in Colombia, for instance.

Conversely, if law signals the unlawfulness of and stigmatizes violations of human dignity committed by all actors, individuals will feel better protected and believe that law is proper and not discriminatory or ineffective concerning non-state-sponsored or -committed violations. That is why people may feel baffled by “wise” statements of scholars that, contrary to what axioms, reality and practice reveal, argue that human rights “cannot” be violated by entities different from States.

For all these reasons, in spite of how solid theories of rights *may seem* to those who hold them in reduced circles that sometimes are self-contained and hold self-repeated or intertextual discourses, without paying attention to reality, ordinary people, and even those who uphold those discourses when they are wronged by a non-state, will reject them as flawed. Narrow *theories* of human rights protection thus can and must be overcome through non-reductionist interpretations whenever possible, and by legal modification and complementation otherwise.

In fact, from a practical perspective, quite many of the acts that are contrary to the content of human rights, even serious ones, are committed by non-state entities, and even when a State has its responsibility engaged, non-state actors are often involved: either a purely non-state entity, whose violation was not prevented or addressed by the State, or (always) a State-agent, who may have separate a responsibility. In both cases, future violations must be prevented and individuals protected and repaired from them, even entitling States that pay victims to ask non-state offenders to compensate them later.⁶⁰⁴

⁶⁰⁴ Cf. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 3.c, 3.d, 12, 15-16, 18, 23 (“those who claim to be victims of a human rights or humanitarian law violation [must be provided] with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility”)

After all, States are artificial entities composed of and operating through organs and individuals,⁶⁰⁵ and thus commit their breaches *through* individuals or other actors, who may have violated norms that bind them as well. For this reason, in the Judgment of the International Military Tribunal for the Trial of German Major War Criminals it was considered that:

"[I]ndividuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"⁶⁰⁶ (emphasis added).

Likewise, the International Law Commission acknowledges that the regulation of the responsibility of an entity -as a State or an international organization- does not prejudice "any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State".⁶⁰⁷

In sum, failing to recognize the entitlements and situation of victims of non-state actors and to protect them accordingly, even if no State has its responsibility engaged due to its having complied with its international duties, amounts to ignoring the needs and opinion of stakeholders and victims themselves, thus making the (nonexistent) legal response illegitimate.⁶⁰⁸ Additionally, denying that there are non-state entities that can violate human rights generates a sense of impunity and can stimulate similar future abuses, in part due to the implied message that such abuses are allegedly not unlawful. This message is false, because it *is* unlawful for a State to not deal with those them. Authors⁶⁰⁹ and the Inter-American Court of Human Rights have correctly pointed out that there is a connection between impunity and perpetuation of victimization. In this regard, this Court considered that:

for the violation", and guarantees of non-repetition must be put into place –emphasis added-); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 12-17 ("[w]hen compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation" and may use "national funds for compensation to victims". It also mentions that "Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means"); *Protect, Respect and Remedy: a Framework for Business and Human Rights*, op. cit., A/HRC/8/5, op. cit., para. 82.

⁶⁰⁵ Cf. Eric A. Posner, op. cit., pp. 40-42, 44-45, 71.

⁶⁰⁶ Cf. Judgment of the International Military Tribunal for the Trial of German Major War Criminals.

⁶⁰⁷ Cf. articles 57 and 58 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and 66 of the draft articles on the responsibility of international organizations (A/66/10) as of 2011.

⁶⁰⁸ See research that points to the relevance of the opinion of stakeholders from an economic and political perspective, such as that found in: Inge Kaul et al., "Why Do Global Public Goods Matter Today?", op. cit., at 5; Inge Kaul et al., "How to Improve the Provision of Global Public Goods", op. cit., pp. 27, 33, 35, 47; Inge Kaul and Ronald U. Mendoza, "Advancing the Concept of Public Goods", op. cit., at 91.

⁶⁰⁹ Cf. Pablo Saavedra Alessandri, "La Corte Interamericana de Derechos Humanos. Las reparaciones ordenadas y el acatamiento de los Estados", op. cit., pp. 198, 200-203; Gina Donoso, op. cit., pp. 30-32, 35; Theo van Boven, "The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", op. cit., at 1; Commission on Human Rights, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur*, E/CN.4/Sub.2/1993/8, 2 July 1993, paras. 126-130.

"[W]hen the State conducts or tolerates actions leading to extra-legal executions, not investigating them adequately and not punishing those responsible, as appropriate, it breaches the duties to respect rights set forth in the Convention and to ensure their free and full exercise, both by the alleged victim and by his or her next of kin, it does not allow society to learn what happened, and it reproduces the conditions of impunity for this type of facts to happen once again"⁶¹⁰ (emphasis added).

States have a duty to prevent non-state violations from remaining in impunity. Additionally, *jus gentium* must recognize that the existence of non-state violations is independent of State compliance with its duties to tackle them. That acknowledgment flows from the recognition of the personality of human beings and the nature of their inherent human rights as entitlements, and is a legal acknowledgment with the potential to call for guarantees when States are *unable or unwilling* to deal with non-state violations.

Regarding this possibility, many States lack the interest or power to deal with non-state offenders out of diverse reasons, such as a desire to attract foreign investment, or having lesser economic, material or political leverage, among others. These situations can sometimes be reflected in differences between legislations and decreases in standards of protection (as race to the bottom phenomena) given the pressure of influential entities. Those dynamics, in turn, permit and encourage negative non-state forum shopping and abusive practices. Additionally, even though the jurisdiction of States can be extended with universal or broad civil or criminal jurisdictions, the reach of domestic legal systems is frequently limited.

These realities have been acknowledged and addressed by some international law institutions, including notions similar to the one that holds that norms protect refugees from non-state persecutors; the consideration that cases are admissible in procedures such as those of the International Criminal Court when States are unable or unwilling to deal with crimes under their jurisdiction, as mentioned in Article 17 of its Statute; or by demands that individuals attach greater importance to certain commands of international law than to domestic norms, among others. In this fashion, for instance, the International Military Tribunal for the Trial of German Major War Criminals mentioned in its judgment that:

"[I]ndividuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law"⁶¹¹ (emphasis added).

This, coupled with the inconsistency of the arguments that refuse to admit the conclusion that the horizontal effects of human rights prove that non-state violations exist because they

⁶¹⁰ Cf. Inter-American Court of Human Rights, *Case of the "Mapiripán Massacre" v. Colombia*, Judgment, op. cit., para. 238.

⁶¹¹ Cf. Judgment of the International Military Tribunal for the Trial of German Major War Criminal, available at: <http://avalon.law.yale.edu/imt/judlawch.asp> (last checked: 17/01/2012).

indicate that States have obligations to deal with such “events”, explains the importance of recognizing that the nature of human rights makes them vulnerable to abuses of *any* actor, from which they must be protected. Fortunately, this has been accepted by some authors⁶¹² and by international bodies. For instance, in judgments as its decision on merits in the *Case of Velásquez-Rodríguez v. Honduras*, the Inter-American Court of Human Rights considered that:

“States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation [...] An 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 [...] the violation can be established even if the identity of the individual perpetrator is unknown [...] The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation [...] The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention [...] Where 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” (emphasis added).⁶¹³ (emphasis added).

The Inter-American Commission on Human Rights confirmed in Report No. 80/11 that the positive obligations to protect human rights in their horizontal dimension *vis-à-vis* private or public non-state entities recognize the violability of human rights by non-state actors. This same idea is recognized by the Human Rights Committee, that acknowledges that non-state actors can “impair the enjoyment” of human rights and that private entities can attack the enjoyment of human rights, generally and concerning the guarantees of some rights.⁶¹⁴

Likewise, the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission condemned in Press Release R105/11 the murder of persons attacked by criminals because of their expressing their opinion and transmitting information online. The Office recalled that the ninth Principle of the IACHR Declaration of Principles on Freedom of Expression states that violence against communicators “violate[s] the fundamental rights of individuals and

⁶¹² Cf. the following texts, among others: Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit.; August Reinisch, op. cit.; Chris Jochnick, op. cit.; Jordan J. Paust, “The Other Side of Right: Private Duties Under Human Rights Law”, op. cit.; Elena Pariotti, op. cit.; George J. Andreopoulos et al., “Rethinking the Human Rights Universe”, op. cit.; Zehra F. Kabasakal Arat, “Looking beyond the State But Not Ignoring It”, op. cit.; Michael Goodhart, op. cit.

⁶¹³ Cf. Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, 29 July 1988, paras. 166, 172-174, 176, 177.

⁶¹⁴ Cf. Human Rights Committee, General Comment No. 34, op. cit., para. 7; also see Human Rights Committee, General Comment No. 31, op. cit., para. 8.

strongly restrict freedom of expression.” Moreover, UNICEF has condemned actions allegedly attributable to non-state entities, such as the kidnapping of a girl in Colombia, mentioning that it “violates” her “human rights”, without UNICEF having required the act to be attributable to a State to do this.⁶¹⁵ Likewise, Amnesty International has considered that the non-state group ETA has committed “human rights abuses”,⁶¹⁶ that as mentioned before may be understood as human rights violations.

Furthermore, in my opinion obligations to protect individuals from non-state threats must not only bind States, but also other actors with functional or *de facto* publicly relevant functions or authority or when legitimate expectations demand them to give that protection. This is confirmed by the possibility of international organizations becoming parties to human rights treaties that have positive obligations that can bind them; by the possibility that they exercise powers to prevent violations or respond to them, whether these powers are expressly envisaged or must be necessarily enjoyed by organizations to fulfill their tasks; or by the fact that non-state armed groups must prevent and deal with violations they have the power to control,⁶¹⁷ among others.

Therefore, non-state entities can and must sometimes be obliged to protect individuals from non-state entities,⁶¹⁸ as discussed in more detail in Chapter 6. Cases in which non-state

⁶¹⁵ Cf. http://www.eltiempo.com/colombia/oriente/secuestro-de-la-hija-del-alcalde-de-fortul_10482384-4 (last checked: 17/01/2012), where it is reported that “la directora de la Organización de las Naciones Unidas para la Infancia (Unicef) en Colombia, Myriam Reyes, hizo un llamado ‘muy fuerte y contundente’ a los secuestradores y al país en general, ‘para que entiendan que los niños tienen derecho a estar protegidos y no ser involucrados de manera alguna en tanto delito’; <http://noticias.unicefcolombia.com/repudio-secuestro-nora/> (last checked: 17/01/2012), where UNICEF states that “El Fondo de las Naciones Unidas para la Infancia- UNICEF -, se suma al repudio generalizado que ha provocado el secuestro de la niña Nora Valentina Muñoz de 10 años de edad [...]Este acto deplorable viola de manera flagrante los derechos humanos de Nora Valentina. El secuestro de niñas/os, bajo cualquiera de sus motivaciones, resulta manifiestamente contrario a la Constitución Nacional y a tratados internacionales”.

⁶¹⁶ Cf. Amnesty International, “Spain: End to ETA violence presents opportunity for human rights reforms”, Press Release, 21 October 2011, according to which: “Amnesty International has waited a long time for ETA to announce an end to violence,” said Nicola Duckworth, Director of the Europe and Central Asia programme. “We have consistently condemned the serious human rights abuses it has carried out in the Basque country and other parts of Spain, including attacks on civilians and indiscriminate attacks. ETA must now live up to its word by ending human rights abuses definitively and permanently. All perpetrators of past abuses must be brought to justice.”

⁶¹⁷ In this sense, for instance, Human Rights Watch declared that “[r]ebel forces in Libya should protect civilians and civilian property in areas they control [...] rebel authorities have a duty to protect civilians and their property, especially hospitals, and discipline anyone responsible for looting or other abuse [...] Opposition forces say they are committed to human rights, but the looting, arson, and abuse of civilians in captured towns are worrying”, as found in: Human Rights Watch, “Libya: Opposition Forces Should Protect Civilians and Hospitals”, 12 July 2011, found at: <http://www.hrw.org/news/2011/07/13/libya-opposition-forces-should-protect-civilians-and-hospitals> (last checked: 18/01/2011).

⁶¹⁸ Concerning this, e.g. some Organizations have delegated powers and functions that have been traditionally performed by States, including regulatory powers, and in this context it is possible to find cases in which the “guarantee and promotion” of the rights found in the general *corpus juris* of human rights law and in the specialized sub-regime of the protection of the persons with disabilities cannot realistically and effectively rely on the exclusive imposition of direct international duties on States. Some organizations can be parties to the Convention on the Rights of Persons with Disabilities and, consequently, be bound by it to ensure and promote the enjoyment of the rights of persons with disabilities. Interestingly, the extent to which they are obliged depends on the “limits of their

entities have positive duties concerning human rights *include*: when they create a risk of a violation; sometimes when an individual is in a situation of vulnerability; when they have a guarantor position; when they operate as authorities –as expressly recognized regarding the UNMIK-; or when certain legitimate expectations protected by principles (as that of good faith) demand this possession of obligations.⁶¹⁹

Additionally, the positive duty to protect from non-state violations evinces how the legally relevant facts against which it must be exercised, i.e. potential or actual non-state or State violations, are contrary to law and legal goods. In this sense, the following excerpts of statements from the Inter-American Court of Human Rights and its former judge Antonio Cançado are relevant. The Court said that:

“In an employment relationship regulated by private law, the obligation to respect human rights between individuals should be taken into consideration. That is, the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes*). This obligation has been developed in legal writings, and particularly by the *Drittwirkung* theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals”⁶²⁰ (emphasis added).

Judge Cançado, in turn, has commented that:

“In my view, we can consider [...] obligations *erga omnes* from two dimensions, one horizontal and the other vertical, which complement each other. Thus, the obligations *erga omnes* of protection, in a horizontal dimension, are obligations pertaining to the protection of the human beings due to the international community as a whole. In the framework of conventional international law, they bind all the States Parties to human rights treaties (obligations *erga omnes partes*), and, in the ambit of general international law, they bind all the States which compose the organized international community, whether or not they are Parties to those treaties (obligations *erga omnes lato sensu*). In a vertical dimension, the obligations *erga omnes* of protection bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations).”⁶²¹

Likewise, the Inter-American Commission on Human Rights has expressly mentioned that non-state entities can violate human rights, as seen in the following passages from its Preliminary Observations after the Visit of the Rapporteurship on the Rights of Afro-Descendants and against Racial Discrimination to the Republic of Colombia and from Press Release No. 31/12:

“In recent decades Colombia has been assailed by an armed conflict that has affected hundreds of thousands of people. The armed actors in the conflict – guerrilla groups, security forces, and

competence”, as mentioned in article 45. Furthermore, cf. articles 4 and 43 of the aforementioned Convention; José Manuel Cortés, op. cit., at 228.

⁶¹⁹ Cf. Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, op. cit., pp. 32-33; Annyssa Bellal and Stuart Casey-Maslen, op. cit., at 187 (“there seems to be a broader agreement among scholars that human rights norms could be applicable to ANSAs in specific circumstances, in particular when they exercise element of governmental functions and have *de facto* authority over a population”); Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006, paras. 8-22.

⁶²⁰ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 140.

⁶²¹ Cf. Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 77.

paramilitary groups -- have committed human rights violations and serious breaches of international humanitarian law against the civilian population” (emphasis added)

[T]he conscription or voluntary enlistment of children or adolescents in armed conflict, whether by the State or by other armed actors, places the children in situations of danger for their life and integrity, and violates their right to education as well as other rights recognized in the UN Convention on the Rights of the Child”⁶²² (emphasis added).

State practice also confirms the understanding that non-state actors can and do violate human rights and, therefore, human dignity. For instance, human rights reports issued by the United States of America describe human rights abuses attributable to non-state entities.⁶²³ Likewise, State practice reflected in domestic law and legal actions shows that there are States that understand that protection from non-state violations may (and must) be granted under domestic regulations, which may be interpreted in light of international law or be designed to ensure compliance with it or to implement it.⁶²⁴

Note how among the passages cited above the Inter-American Commission clearly considered that non-state actors could commit *both* human rights and international humanitarian law violations. This endorses the idea that it is fallacious to hold that they can only act contrary to the norms regulating armed conflicts. In fact, that their IHL duties are clear is interesting, because as Andrew Clapham has said, recognition of the need to protect human beings from non-state IHL violations shows that it is unreasonable to deny such protection in the field of human rights. After all, recognition that an actor can violate some norms founded upon human dignity reveal the capacity of that actor to violate others norms sharing the same foundation, being the protection of human dignity (and some core rights) shared by those two branches, as confirmed by the Commission.⁶²⁵

With a similar idea, concerning the possibility of human rights violations being caused by non-state entities, in the *Case of the Pueblo Bello Massacre v. Colombia* the Inter-American Court of Human Rights expressed its opinion that:

“In order to determine the violation of Articles 4, 5 and 7 of the Convention, which was examined in the preceding paragraphs, suffice it to say that the Court finds that the investigations into the Pueblo

⁶²² Cf. Inter-American Commission on Human Rights, *Preliminary Observations of the Inter-American Commission on Human Rights after the visit of the Rapporteurship on the Rights of Afro-Descendants and against Racial Discrimination to the Republic of Colombia*, OEA/Ser.L/V/II.134, Doc. 66, 27 March 1999, para. 46; Inter-American Commission on Human Rights, Press Release No. 31/12, *IACHR Welcomes First Verdict of International Criminal Court: Case on Recruitment of Child Soldiers*.

⁶²³ Cf. the following documents described pages before: U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, 2010 Country Reports on Human Rights Practices, Report on Colombia, 8 April 2011; Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., pp. 64-65.

⁶²⁴ Cf. Alejandro Valencia Villa and María José Díaz-Granados M. (eds.), *Compilación de jurisprudencia y doctrina nacional e internacional*, Vol. IV, Oficina en Colombia del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, 2003, pp. 13-27.

⁶²⁵ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 73; Inter-American Commission on Human Rights, Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina*, op. cit., para. 117.

Bello events conducted in Colombia, in proceedings conducted by the ordinary and the military criminal justice system, and by the disciplinary and administrative justice systems were seriously flawed, and this has undermined the effectiveness of the protection established in the national and international norms applicable in this type of case, and resulted in the impunity of certain criminal acts that constitute, in turn, grave violations of the human rights embodied in the provisions of the Convention cited in this paragraph.

[...]

The Court must emphasize that the facts that are the object of this judgment form part of a situation in which a high level of impunity prevails for criminal acts perpetrated by members of paramilitary groups [...] The Judiciary has failed to provide an adequate response to these illegal actions of such groups in keeping with the State's international commitments, and this leads to the establishment of fertile ground for these groups, operating outside the law, to continue perpetrating acts such as those of the instant case⁶²⁶ (emphasis added).

Likewise, the European Court of Human Rights has expressly found some infringements on the enjoyment of human rights caused by non-state actors, as in the Case of *Rantsev v. Cyprus and Russia*, where it found that there was a "deprivation of liberty" contrary to the "right to liberty" when the victim "was detained by private individuals"⁶²⁷.

Concerning the plausibility of there being human rights violations committed by non-state actors, one widespread misconception holds that States are the entities that by far or almost always commit most violations. To rebut this, one has but to look at everyday violations attributable to non-state entities. Regarding them, Henry J. Steiner has mentioned some examples when saying that:

"[O]f course non-State actors [...] themselves fail to respect others' rights. The rapist or the abusing spouse violates the right to physical security; the discriminatory employer violates equal protection norms; partisans of the dominant political party curb the right to political participation by threatening harm to those supporting the opposition."⁶²⁸

While it is increasingly accepted that non-state actors can violate human rights and victims must be protected from them, some still focus too much on States. Among others, this may be due to two factors: firstly, to the need of protecting individuals from abuses of State power and breaches of positive duties they are expected to comply with (factual element). Secondly, considering States as exclusive or predominant duty-bearers may be explained by beliefs in the State-centeredness that for (too) long permeated international law. This paradigm was thankfully gradually overcome due to factors as the emergence of *jus cogens* and human rights law.⁶²⁹ Steiner himself acknowledged that human rights law contributed to overcoming the inter-State character of international law. In my opinion, this was always possible, as shown by the fact that

⁶²⁶ Cf. Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment, 31 January 2006, paras. 148-149.

⁶²⁷ Cf. European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Judgment, 7 January 2010, paras. 314, 318-319.

⁶²⁸ Cf. Henry J. Steiner, *op. cit.*, at 803.

⁶²⁹ Cf. Nicolás Carrillo Santarelli, *Los retos del derecho de gentes*, *op. cit.*, pp. 31-33.

human rights law was created mostly through traditional sources of international law and protects persons previously considered irrelevant for it by *some* authors and authorities.

The fact that States were for too long the only possible parties to human rights treaties and therefore to supervision mechanisms enshrined therein may have made some think that they were the only possible human rights duties bearers in the international legal system. However, this was an election that could have been different one, and recent developments show that even non-state entities like international organizations –as the EU- or armed groups can be parties to pertinent treaties and agree to be bound by them and interact with other sources of *jus gentium*.⁶³⁰

Consequently, while States may certainly pose a threat that must be addressed in legal terms, there may be legally relevant factual non-state violations (always important for their victims and law, a factor *never* to be forgotten), which are equally problematic. In fact, many domestic norms –that protected human rights prior to their internationalization- seek to tackle them, in civil, criminal and other terms. That is why human vulnerability before both State and non-state entities should never be ignored and left unaddressed, for the sake of coherence and respect of human dignity and to have solidarity with victims, which is a staple of human rights activism.

The idea that human rights *can* be violated by non-state actors and that this implies that such violations also take place from a legal point of view is reinforced by a study of the *travaux preparatoires* of the Universal Declaration of Human Rights, specifically of Article 30, according to which:

“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein” (emphasis added).

The discussions that led to the adoption of that article reveal that the drafters were mindful of the fact that States were *traditionally considered* the “chief offenders against human rights”. Yet, it was thought that allusion to individuals as potential offenders, who should be warned not to engage in acts contrary to human rights, was also necessary, as the debates between Malik and William Hodgson reveal.⁶³¹ Furthermore, the experience of World War II made the drafters of the Declaration consider that it was also important to highlight how frequently it was groups which were agents of human rights violations, and that those groups could act “on the

⁶³⁰ Cf. articles 59 of the European Convention on Human Rights, 43 of the Convention on the Rights of Persons with Disabilities, or 96.3 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), along with the commentary to the last article made by the ICRC; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors*, op. cit., pp. 8-13; Chapter 5, *infra*.

⁶³¹ Cf. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent*, University of Pennsylvania Press, 1999, at 87.

instructions or with the connivance of states⁶³² and could try to exert influence on States or infiltrate them, as happened in Germany and Italy.⁶³³

Concerns about those and other groups, such as the Ku Klux Klan in the United States, paved the way for the final version of Article 30 of the Universal Declaration -and probably of article 5.1 of the International Covenant on Civil and Political Rights-, which refers to three potential agents of human rights “destruction”,⁶³⁴ which is a label that must be construed as an acknowledgement that the acts in question amount to violations of human rights. To my mind, the reference to ‘States, individuals and groups’ is merely indicative and by no means exhaustive. The fact that international human rights *stricto sensu* treaties usually place obligations on States is not an expression about the nature of the rights being protected or the impossibility of obligations of other actors existing, but rather about a policy designed to make it possible for entities as States, deemed powerful, to consent to commitments that are legally binding, given the beliefs that they are entities able to accept those obligations and that protection from their abuse is necessary. These bases still hold true but are *complementary* and not exhaustive, as demonstrated by the current possibility of other entities having some explicit human rights obligations -either voluntarily or because they are imposed on them-.⁶³⁵ Obligations of potential abusers, State or not, constitute *one type* among others of measures that can be employed to protect human rights.

State obligations are thus *one* of the consequences of the protection of rights instead of the center or paradigm of that protection. What is more, as explained in Chapter 5, there are cases in which even international treaties prohibit States *and* non-state actors from committing certain violations of human dignit. Additionally, the current incapacity of an actor to being party to some treaties is not an impediment to its having other treaty or different international obligations in the present and future, and law can perfectly create such obligations if necessities of protection so demand. This is the case, for example, of the international regulation of the prohibition of genocide.⁶³⁶

⁶³² Cf. Ibid.

⁶³³ Cf. Ibid., pp. 87-88.

⁶³⁴ Ibid.; article 30 of the Universal Declaration of Human Rights.

⁶³⁵ Cf. common article 3 to the Geneva Conventions on IHL of 1949 compared with article 96.3 of their First Protocol; article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, op. cit., paras. 185-187, 205-213, 236.

⁶³⁶ Cf. article IV of the Convention on the Prevention and Punishment of the Crime of Genocide, that states that “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals” (emphasis added); General Assembly of the United Nations, Resolution 96(I), *The Crime of Genocide, A/RES/96(I)*, 11 December 1946, that mentions that “genocide is a crime under international law [...] for the commission of which principals and accomplices—whether private individuals, public officials or statesmen [...] are punishable”; Hersch Lauterpacht, op. cit., pp. 27-29, 33-35.

International legal issues can often “be interpreted in different ways depending from what theoretical positions one starts”, as Roland Portmann comments.⁶³⁷ This implies that a theoretical position can have an impact on legal practice, as pointed out by Mario G. Losano.⁶³⁸ By focusing on the importance and non-conditional dimensions of rights and guarantees and those who benefit from their recognition and protection, important practical and normative developments, interpretations and normative changes can be prompted.

Rights and guarantees are, indeed, the cornerstone of the international protection of individuals, and so focus must be placed on their content and *effectiveness*, according to which not only States can violate them. Protection mechanisms and interpretations must accordingly be based on this recognition. This understanding must pervade all aspects of human rights law.

Concerning the idea that all violations of human rights are legally relevant, it is possible to consider, as Lauterpacht, that there is no “event of international policy [that is not] amenable to legal analysis”⁶³⁹, because all factual or material violations of human rights affect international legal goods and must thus be legally addressed. As examined in Chapter 8, measures of promotion and protection can be based on duties (or quasi-duties) or not (e.g. strategies based on contacting entities), be adjudicatory or not, and be applicable prior to the violation (preventive measures), afterwards, or both.

The question of *how* to protect individuals also involves determining which normative systems and actors (private, international or domestic) must strive to protect. As judge Sergio García Ramírez of the Inter-American Court of Human Rights commented concerning the *Interpretation of the Judgment on Merits and Reparations in the Case of the Miguel Castro Prison v. Peru*:

“In its request for interpretation, the State requested a ruling from the Court regarding the responsibility of non-state groups for the violation of human rights and crimes against humanity. Therefore, it invokes the “systematic, dynamic, and evolving nature of international human rights law.” Of course, this is not a matter of interpretation of the judgment on merits, in the strict sense, and that latter has not referred to this matter because it is not within the contentious jurisdiction exercised by the Court in hearing and solving the case of the Castro Prison. Evidently, whoever incurs in crimes that imply a violation of human rights, must respond for its behavior and receive the corresponding punishments. In what refers to the case that occupies us, the matter in question is not that of the criminal responsibility of people who violated criminal law, but the definition of the body called upon to hear of these violations and apply the corresponding punishment”⁶⁴⁰ (emphasis added).

⁶³⁷ Cf. Roland Portmann, op. cit., at 10.

⁶³⁸ Cf. Mario G. Losano, op. cit., pp. 327-335.

⁶³⁹ Cf. Martti Koskenniemi, “Lauterpacht: The Victorian Tradition in International Law”, *European Journal of International Law*, Vol. 8, 1997, at 233.

⁶⁴⁰ Cf. Concurring Opinion of Judge Sergio García Ramírez to: Inter-American Court of Human Rights, *Case of the Miguel Castro Prison v. Peru*, Judgment (Interpretation of the Judgment on Merits, Reparations, and Costs), 2 August 2008, par 21.

As indicated above, the fact that all non-state violations are legally relevant and must be tackled by law does not mean that every single one of those violations amounts to a breach of international obligations (but some do and must, as seen in Chapters 5 and 6). John Knox argues this clearly by saying that:

"The question is not whether corporations and other nongovernmental actors can be accused of violating human rights, but whether they should be directly bound by the body of international human rights law. One does not necessarily imply the other, as Amartya Sen has explained.

To say that one has violated a human right does imply that one has breached a duty correlating to that right, but it does not state where the duty is situated, whether in morality or in law, or (if in law) whether in domestic or international law. A corporation or other private actor that does not have a direct duty under international human rights law may be legitimately described as violating a human right if it is subject to a horizontal duty indirectly imposed by international human rights law (through the imposition of an obligation on governments to ensure that private actors respect the right), or even if it is subject to a duty that is "merely" moral" (emphasis added)⁶⁴¹.

The only thing I would add to the previous excerpt is that being legally relevant, while not all non-state violations of human rights imply breaches of non-state legal obligations, they are not exclusively ethical matters. This is because their legal relevance always demands legal measures of protection of victims. It is important for victims to have the possibility of claiming that human rights were violated by an actor regardless of the existence of legal duties, given the power of those claims (which may call for law changes), which are strengthened when the illegal character of a violation is recognized. Those claims may also legitimize and elicit responses from actors interested in protecting common legal goods of the world community across levels of governance.

Despite its not always being mandated, absence of non-state legal obligations to respect human dignity must be closely examined, for the following reasons: firstly, because absence of direct international enforcement of legal duties or sanctions and duties to repair may encourage potential abusers to pay mere lip service to dignity when it suits their interests without having regard to it in practice,⁶⁴² as has been criticized concerning some codes of conduct, being it necessary in many cases to back-up exhortations with legal sanctions or at least with the possibility of declaring that an entity has breached a binding duty in order to bring about a change of practice and behavior. Possible weaknesses or uncertainty about the outcome of domestic measures reinforces this argument.

As mentioned before, just as binding non-state armed entities to observe International Humanitarian Law brought about a change in their discourse and attitude,⁶⁴³ given the impact on their reputation and interests, signaling someone as a violator of law, especially of norms related to dignity, has a strong influence, and may change non-state attitudes. This signaling also makes

⁶⁴¹ Cf. John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 43-44.

⁶⁴² Cf. Alexandra Gatto, op. cit., at 431.

⁶⁴³ Cf. Fred Halliday, op. cit., at 35.

others aware of their possibility to criticize non-state conduct based on standards and of conduct boycotts or otherwise exert pressure to make offenders heed human rights standards when they fail to abide by them (this process may exist without legal duties existing, but is stronger with them); and authorities are ordered to react to wrongful acts or urged to cooperate with authorities with jurisdiction. Thirdly, the absence of enforceable duties or alternative effective measures may leave victims unprotected, something unacceptable for law, which must serve human beings.

In consequence, if lack of express international obligations or of effective alternative international measures of protection leaves a victim unprotected, her dignity is violated and the international legal system would disregard its peremptory principles (equality of victims) and one of its foundations (dignity). Therefore, that law would have to be modified, as urged both *de lege ferenda*, as dignity and equality seen from an ethical consideration demand; and *de lege lata*, because legal principles, values, norms and mandates of protection would be violated.

Because of their not being always mandated, it is important to mention that the absence of international obligations of non-state actors in one case does not imply that these actors cannot violate human rights. They can, and their abuses are legally relevant facts that must be addressed. This is confirmed by the fact that in the international legal system there can be rights *without* remedies and duties without enforcement.⁶⁴⁴

Moving on to a different subject, it can be considered that there is a legal requirement to adjust international regulation to ensure the protection of victims of non-state violations. According to international human rights case law, the domestic legal system of a State itself can violate human rights either *in concreto* or *in abstracto*, that is to say with or without an application of a norm contrary to human rights taking place, respectively.⁶⁴⁵ This is coupled with the existence of an obligation to adjust law in order to ensure that it does not contradict and conforms to international human rights law, which is an obligation a concrete manifestation of a general rule of international law.⁶⁴⁶

International law is under an analogous duty to be compatible with the demands of human dignity. Its scope of application *ratione loci* and *ratione personae* exceeds that of domestic

⁶⁴⁴ Cf. International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors*, op. cit., pp. 20-21; John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 27-31.

⁶⁴⁵ Cf. Inter-American Court of Human Rights, *Case of Suárez-Rosero v. Ecuador*, Judgment, 12 November 1997, paras. 96-99; articles 1 and 2 of the American Convention on Human Rights; Concurring Opinion of Judge A.A. Cançado Trindade to: Inter-American Court of Human Rights, *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, Judgment, 5 February 2001, paras. 1-5; article 4.1 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (A/56/49(Vol.I)/Corr.4).

⁶⁴⁶ Cf. Inter-American Court of Human Rights, *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, Judgment, 5 February 2001, para. 87; Concurring Opinion of Judge A.A. Cançado Trindade to the previous judgment, para. 12; article 2 of the American Convention on Human Rights; Human Rights Committee, General Comment No. 31, op. cit., paras. 13-14.

norms, and its standards often have effects towards entities as international organizations (both with a general vocation and with specialized missions as financial, economic or health-related purposes and functions),⁶⁴⁷ reason why in principle different actors and issues may be internationally relevant. Add to this the existence of *jus cogens* and foundational standards, that determine goals and objectives of the international community and generate implied powers and duties to ensure respect and seek promotion of those goals; and it can be considered that international law must perforce incorporate a demand that its norms must be compatible with those foundations and peremptory norms and their demands (including that of effectiveness), with no territorial or personal restrictions, and must be adjusted to achieve this.

In consequence, if *jus gentium* fails to respect or ensure the respect of those tenets, those entrusted with its interpretation and application must strive to find lawful interpretations and implementation consistent with them. If this is not feasible, those endowed with treaty-making powers must be made aware of the situation and asked to bring contradictions or insufficiencies to an end, just as it is recommended to national authorities concerning their legal systems, as mentioned for example in Principle 8 the Bangalore Principles on the Domestic Application of International Human Rights Norms⁶⁴⁸.

After examining why the features of human rights make non-state violations legally relevant and requiring legal responses, it is convenient to explore if soft law, directly or indirectly, expressly or implicitly, reinforces the imperative that human dignity can and must be protected from non-state violations, which is not simply an exhortation *de lege ferenda*. If so, it should be examined why that dimension of soft law is relevant for the purposes of a full protection of dignity, notwithstanding its lack of obligatoriness *ab initio*. The next section and Chapter 5 will examine this.

2.4. The reinforcement of the protection of human dignity from non-state abuses by soft law and principles of equity and good faith

Normative elements and purposes of “hard law” human rights and guarantees, and implications of the value-principle of the protection of human dignity, demand the protection of

⁶⁴⁷ Cf., apart from the references to the responsibilities of international organizations of a regional or economic/financial nature mentioned throughout this Part, Committee on Economic, Social and Cultural Rights, General Comment No. 14, op. cit., paras. 39, 42, 50, 64, 65.

⁶⁴⁸ Cf. Bangalore Principles on the Domestic Application of International Human Rights Norms and on Government under the Law, 1988, para. 8, according to which “where national law is clear and inconsistent with the international obligations of the State concerned in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation, which is undertaken by a country.”

human rights and guarantees from all violations. Developments and contributions on the subject have not stopped at hard law, however. Thus, an examination of resolutions, declarations, agreements, exhortations and other instruments that belong to soft law according and recognize that non-state actors can violate human rights, suggesting that measures must be taken to respond to them, is convenient. Moreover, it must be asked what legal effects, if any, those soft law provisions may have (even from an informal perspective), because those effects could strengthen the protection of human dignity from all threats, which requires different strategies.

This analysis can be conducted in three ways, the first of which consists in asking what effects international law assigns to hetero-normative soft law regulations, such as those adopted by private or public entities that directly or indirectly address the protection of dignity from non-state violations. A second and complementary question must posit what effects, if any, international law attaches to public (adopted by States or international organizations) or private soft law self-regulations, including codes of conduct, label policies, declarations and commitments, or manifestations of the so-called global law, among other possibilities. A third complementary question should seek to determine the legal effects of mixed-regulations, i.e. soft law manifestations in whose formation or endorsement public entities (States or international organizations) and private non-state entities (i.e. all except international organizations)⁶⁴⁹ participate jointly, as happens with some memoranda of understanding or the Global Compact, for instance.

Before examining soft-norms that can have an impact on the protection of human rights from non-state threats, it is important to examine what can be considered “soft law.” For this purpose, it is useful to employ the distinctions made by Jean d’Aspremont, who distinguished between “rules with a soft *instrumentum* and rules with a soft *negotium*”. The latter are described as those rules found in legal instruments, produced by the sources of international law, that have an ambiguous, vague or indeterminate content or fail to “lay down any specific obligation.”⁶⁵⁰ Conversely, rules with a soft *instrumentum* would be soft law norms properly speaking, given their non-obligatoriness (in direct terms), produced by their not being the product of sources of law, which makes them not be considered “legal acts”.⁶⁵¹

Alternative definitions have been proposed by authors as Anthony D’Amato, for whom “[t]he essence of any soft law rule is that it is not enforceable.” This notion puts emphasis on the effects of a given rule. That definition is not very useful for purposes of distinguishing legal rules

⁶⁴⁹ Cf. Bob Reinalda, “Private in Form, Public in Purpose: NGOs in International Relations Theory”, op. cit., pp. 13-14.

⁶⁵⁰ Cf. Jean d’Aspremont, “Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D’Amato”, *European Journal of International Law*, Vol. 20, 2009, pp. 914-915.

⁶⁵¹ Cf. Ibid.

from non-legal ones, i.e. rules incorporated in legal acts from others. d'Aspremont seems to be aware that both sorts of rules, legal and non-legal, can "lead to the same result": the lack of restrictions placed on a given addressee,⁶⁵² but considers that it is necessary to determine whether a given norm belongs to the international legal system or not, something I agree with.

As a result, when analyzing what the impact of soft law on the protection of dignity against non-state actors is, I will refer to soft law as that set of standards not produced by the sources of international law that are hence not binding *per se*. Nevertheless, even though soft law does not include binding rules, it would not be correct to say that they cannot produce any legal effects at all. According to Roberto Andorno:

"[I]t is somehow misleading to affirm that soft law only creates *moral or political* commitment for states. This is only true if we consider the *immediate* effect of soft law instruments."⁶⁵³

Indeed, doctrine has recognized that there are multiple effects that soft law can have, and they are certainly relevant for this study concerning soft law that calls for protecting human rights from non-state actors.

A first set of standards found in non-legal acts is that of hetero-regulation soft law, encompassing soft law standards produced by an entity different from that whose behavior the standards address. While any actor different from the addressee can produce them, they are often adopted in international organizations. Standards of this type that demand protection of human dignity from non-state threats can be adopted in resolutions of the General Assembly or in principles and recommendations adopted by human rights bodies (as the Human Rights Council) that lack a binding character according to the constitutive documents of the international organization or its internal rules –that would have legal effects *vis-à-vis* the organization itself and its members and could sometimes impose obligations on them-.⁶⁵⁴

Recommendations and standards of this sort are also adopted by non-state actors (directed to other non-state addressees in a hetero-regulatory fashion),⁶⁵⁵ as happens with codes of conduct adopted by NGOs and other entities, that seek to address the conduct of other non-state entities.⁶⁵⁶

⁶⁵² Ibid.

⁶⁵³ Cf. Roberto Andorno, *op. cit.*, at 3.

⁶⁵⁴ Cf. José Manuel Cortés, *op. cit.*, pp. 159-168; International Law Commission, Draft articles on the responsibility of international organizations, with commentaries, A/66/10, 2011, at 3, (para. 8 of the General commentary); articles 10.2, 22, or 32.2 of the aforementioned draft articles.

⁶⁵⁵ Cf. Luis Pérez-Prat Durbán, *op. cit.*, pp. 33-34; August Reinisch, *op. cit.*, pp. 44-45, 46-49.

⁶⁵⁶ Cf. Luis Pérez-Prat Durbán, *op. cit.*, at 33.

In light of the definitions of soft law, and considering that non-state actors that operate in the international level or in a transnational manner⁶⁵⁷ participate in a world society, these and other normative manifestations of non-state actors can be considered internationally relevant soft law. The question of whether non-state actors can contribute to the creation of international hard law is explored in Chapter 5. Interestingly, some authors consider that non-state actors can produce law that is not dependent on support or confirmation by legal systems or norms controlled by public lawmakers -domestic law or international law-, as has been put forward by Günter Teubner regarding his theory of Global Law and by others.⁶⁵⁸

According to this last idea, legal standards created by private actors could be simultaneously considered binding in a framework of non-state regulations and non-binding under international law. On the other hand, the *content of lex privata* and other non-state regulations can be included in international norms or given effects indirectly.

Indeed, nothing prevents international law (or, usually, domestic law either) from attaching greater or lesser legal effects to standards and declarations adopted by non-state actors.

On the other hand, it is important to mention that soft law can have a very important function: that of paving the way for changes in hard law or prompting changes in conduct and beliefs about proper behavior. The fact that a rule does not belong to hard law says nothing about how it is perceived in terms of its fairness and legitimacy, and the public at large, addressees and stakeholders may consider that it reflects a just and necessary regulation.

Thus, soft law standards that are widely supported, besides possibly contributing to the generation of *opinio juris* or to the formation of general principles (in conjunction with other factors),⁶⁵⁹ can support and reinforce claims or serve as benchmarks concerning non-state behavior, and can even subtly modify their culture, convictions or attitude *if they are persuasive or convincing*, being those dynamics quite important to make the complete protection of human dignity effective, which requires a combination of legal and other factors. Just like their

⁶⁵⁷ There are various conceptions of transnationality. See Bob Reinalda, "Private in Form, Public in Purpose: NGOs in International Relations Theory", op. cit., pp. 12-13 (where transnationality is conceived as allusive to operations "across boundaries", whereas international acts are those that take place in the context of "international affairs", mostly regarding cooperation issues); article 3.2 of the United Nations Convention against Transnational Organized Crime, according to which an offense is transnational in nature if "(a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State."

⁶⁵⁸ Cf. Gunther Teubner, op. cit., pp. 12-19; Rafael Domingo, *¿Qué es el derecho global?*, op. cit., pp. 108, 159; Luis Pérez-Prat Durbán, op. cit., pp. 31-33; Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law", op. cit., pp. 52-55.

⁶⁵⁹ Cf. Bruno Simma and Philip Alston, op. cit., pp. 90-97, 105; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 224-229.

addressees, soft law standards can be taken into account by lawmakers, who may feel inclined to adopt their content in custom, treaty law or through other sources of *jus gentium*, out of conviction or of the desire to avoid criticism related to insufficient protection.

Soft law can also have effects in an even more remote and indirect fashion, as when the good faith of third parties who legitimately expect an entity to abide by certain standards is to be protected.⁶⁶⁰ Furthermore, mechanisms to “monitor” or “follow-up” soft law standards and their implementation, including reporting mechanisms, may be created. This will make non-state conduct more prone to being examined, and with or without those mechanisms the identification of failure to do what is expected from non-state entities, even from a non-legal perspective, may lead to reactions and consequences, stimulated perhaps by the expressive functions that all regulations can have. Concerning the Global Compact, for instance, failure to report progresses on the application of its content can lead to a removal, which constitutes a public signaling. This possibility has taken place in practice. Concerning this, Secretary-General Ban Ki-moon mentioned:

“To date, we have removed more than 2,400 companies from the Compact for failing to report to their stakeholders on progress they have made. Of those that are active, we know that most are still at the beginner to intermediate level.”⁶⁶¹

For these reasons, soft law is not to be underestimated, especially because the independence and autonomy of sources in international law⁶⁶² make it possible that contents found in a soft law instrument appear in hard law simultaneously or later. These considerations also explain the importance of adhering to non-binding instruments that regulate corporate or other non-state conduct and seek to strengthen the protection of human dignity. These ideas provide the backdrop and framework with which to examine the following declaration of UN Secretary-General Ban Ki-moon:

“It is important that the principles of the Global Compact are accepted by more businesses around the world [...] Reaching a critical mass will be essential if we are to help retool markets and economies towards sustainability [...] While it is important for more businesses to join the initiative, the Compact can only make a real contribution if these companies embrace and advocate its principles.”⁶⁶³

Moreover, it has been recognized that some non-state actors have had an impact on the content and formation of international law, not necessarily as lawmakers, but as participants whose opinion can be taken into account given their *formal or informal participation* in discussions

⁶⁶⁰ Cf. International Law Association, Non-State Actors Committee, *Report: Preliminary issues for the ILA Conference in Rio de Janeiro*, op. cit., at 3.

⁶⁶¹ Cf. UN News Centre, “Crucial for more businesses to join UN corporate responsibility pact, says Ban”, 21 June 2011, available at: <http://www.un.org/apps/news/story.asp?NewsID=38786&Cr=business&Cr1=> (last checked: 19/01/2012).

⁶⁶² Cf. Antonio Remiro Brotóns et al., *Derecho Internacional: Curso General*, op. cit., pp. 223-224.

⁶⁶³ Cf. UN News Centre, “Crucial for more businesses to join UN corporate responsibility pact, says Ban”, op. cit.

related to lawmaking processes and implementation, as explained by Andrea Bianchi and Luis Pérez-Prat.⁶⁶⁴

On the other hand, hetero-regulation can be “official” or public, including manifestations of soft law issued by international organizations or under their auspices; and private, when it is not supported by legal systems whose lawmakers have a public nature and is created by the so-called non-state actors with a private nature, understood as those with a private origin or constitution, that do not necessarily have private functions and/or goals.⁶⁶⁵ Private hetero-regulation may have effects that are similar to those of self-regulation norms adopted by entities that are private in origin or constitution.

I will now turn to examine the effects and features of soft law created in public contexts.

In doctrine, it is considered that despite not being directly binding, soft law standards can eventually produce some legal effects. Roberto Andorno, for instance, advances the idea that soft law can become treaty or customary law in the future, being its germ if it is widely supported with an *opinio juris* that asserts the need of its standards to become binding. This persuasion may prompt practice that endorses it, or its content may be adopted by the sources of *jus gentium*. For this reason, for Roberto Andorno soft law may pave the way for customary or treaty law by virtue of indicating what the content of those sources should be like.⁶⁶⁶

In my opinion, soft law may also lead to normative changes in relation to all sources of international law, not merely treaty and customary law. For example, soft law can interact with unilateral acts that operate as sources of *jus gentium*.⁶⁶⁷

Concerning this, obligations that emerge from unilateral acts of a State or an international organization, among other entities, will bind them and do not have a hetero-regulatory character. Those obligations can deal with the protection of human dignity from non-state threats. Certainly, commitments of those actors created by this source of law may be related to duties to protect individuals from non-state threats: their own or those of other actors. Therefore, indirectly potential non-state aggressors may feel exposed to an increased examination of their acts. Moreover, a non-state actor bound by its unilateral acts may be bound by human rights obligations they create.

⁶⁶⁴ Cf. Luis Pérez-Prat Durbán, op. cit., pp. 22-31, 34-38; Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, op. cit., pp. 183-202.

⁶⁶⁵ Cf. Bob Reinalda, “Private in Form, Public in Purpose: NGOs in International Relations Theory”, op. cit., pp. 12-13; Daniel Thürer, op. cit., pp. 46-47.

⁶⁶⁶ Cf. Roberto Andorno, op. cit., pp. 3-4.

⁶⁶⁷ On this source of international law, cf. Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 175-177. Concerning unilateral acts as sources of law and one type of non-state entities, namely international organizations, see José Manuel Cortés, op. cit., pp. 141, 151-158.

Professors Philip Alston and Bruno Simma believe that soft law can have effects in an additional way, by becoming authoritative interpretations of international treaties if they are widely supported, especially by a “virtually unanimous practice”.⁶⁶⁸ This theory is reminiscent of the rule of interpretation found in article 31 of the Vienna Convention on the Law of Treaties of 1969, which mentions that, along with the normative purposes and text of a treaty, its internal (e.g. other provisions of an agreement) and external contexts must also be taken into account when interpreting it. That Convention also mentions that:

“3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

According to Alston and Simma, the aforementioned authoritative interpretation is not to be confused with customary law, which is a formula consistent with that of the Vienna Convention, which does not equate authoritative interpretation (by means of practice or agreements) to customary law.

The previous ideas emphasize that, if persuasive and relevant, the content of soft law has a potential for being included in binding norms.

Despite the relevance they can have if persuasive, which can make them have expressive functions or be adopted in hard law, or their indirectly having effects to protect good faith, when it comes to soft law standards an additional idea must be discussed: that hegemonic States or other actors may resort to invoking soft law to circumvent lawmaking processes in which other actors participate, and to enshrine their will in that soft law in order to further their policies given the possible impact of soft law.⁶⁶⁹ That is why the content of soft law must be critically evaluated.

Possible international legal effects of soft law adopted by private entities by means of self-regulation or hetero-regulation must be examined.

One first thing worth mentioning is that nothing prevents the content of private non-state regulation from being endorsed or made produce effects by international law, either by soft law or hard law dynamics, that could attach some legal effects to it. In this sense, for instance, doctrine and international jurisprudence have considered that the content of non-state declarations without a binding character may be incorporated or referred to in treaties or be adopted in customary

⁶⁶⁸ Cf. Bruno Simma and Philip Alston, *op. cit.*, pp. 100-101.

⁶⁶⁹ Cf. Nico Krisch, “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order”, *European Journal of International Law*, Vol. 16, 2005, pp. 379-380, 391-392, 398.

law.⁶⁷⁰ Such incorporations and remissions may also take place in connection with other sources of *jus gentium*.

Regarding non-state regulation, its incorporation in international law may be accomplished, for example, when the content of a code of conduct adopted by a corporation that declared to commit to labor rights and environmental protection is included in an international norm, case in which the new norm would attach international legal effects to *content* that originally appeared partly or completely in a code of conduct or other non-binding standards.

Concerning this, some suggest that a proposed treaty between Chile and the European Union envisaged the endorsement of social corporate responsibility rules. Those rules on corporate responsibility were developed by an international entity, the OECD,⁶⁷¹ but nothing impedes a treaty or other source of international law from including norms addressing the same or other subject matters that have been produced by other entities, even private ones. For example, the WTO refers to standards issued by the international organization for Standardization (ISO), a private entity, conditionally ascribing some effects to pronouncements of this non-state actor.⁶⁷²

Logically, if soft law standards adopted by a public entity (e.g. a State or international organization) are the ones that endorse or adopt the content of private regulation, the content of the new standard would have the effects that soft law adopted by that entity can have.

Nevertheless, norms that adopt the content of soft law standards may modulate its effects and extent, for instance only adopting part of that content or conditioning its application, among other possibilities. This is made possible by the independence of standards and their sources.

The possibility that soft law that protects individuals from non-state actors has legal effects, explored until now, is usually contingent and indirect, operating mainly when its content is purposefully endorsed, and it is the norm replicating its content which generates those effects.

Even though private norms do not produce effects in international law directly and automatically, this legal system may have principles and rules that, when triggered, demand that the content of some standards adopted by private actors has relevance or effects. For example, the principles of good faith, protection of legitimate expectations, or the duty to repair harm, found in international law, may sometimes make it necessary to take into account or attach some value

⁶⁷⁰ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-10/89, op. cit., paras. 33-37; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 226-228; Bruno Simma and Philip Alston, op. cit., pp. 84, 90-96.

⁶⁷¹ Cf. Alexandra Gatto, op. cit., pp. 451-454.

⁶⁷² Cf. Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law", op. cit., pp. 36-37.

to private normative acts and regulations. International legal rules and private regulations will thus interact with each other, with the content of the latter being given effect by the former, triggered due to the legal relevance of expectations generated or situations created by the latter.

This idea has been recognized by the Non-State Actors Committee of the International Law Association, in which it was discussed that:

“Many non-State actors, e.g. corporations and armed opposition groups, commit themselves to upholding international law. However, they tend to do so as a matter of policy/soft law than as a matter of hard law. In so doing, they may avoid legal accountability. There may nevertheless be doctrines and principles that could be used to harden these soft commitments into hard law (duty of care/negligence/corporate organization/legitimate expectations/good faith/unilateral act...)”⁶⁷³ (emphasis added).

Principles that can make non-state declarations and standards have some international legal effects generally protect legitimate expectations of third parties or protect those who would suffer harm as a result of the negligence or contradiction of an actor. General principles may thus contribute to the protection of individuals from non-state actors in this way.

To my mind, legitimate expectations deserving protection can exist not only because of the public trust in a “private regulation”, but also in relation to statements or acts of a public nature, such as that of becoming a member of an international organization whose goals and functions include the promotion and protection of human rights. Since certain non-state entities can become members of some of those organizations, the public may legitimately believe that such membership is a sign of commitment on the subject.

I will now explore how international law already has legal principles capable of endowing privately-adopted regulations with legal effects, which is pertinent because this may strengthen the protection of human dignity by forbidding conduct against non-state commitments.

In general terms, there are two broad sets of principles that can entitle victims to request protection from abuses that constitute deviances from statements, commitments and regulations of non-state actors: principles that protect innocent third parties who are led to believe in the declarations of a non-state actor, which revolve around the more general principles of equity and good faith; and principles that protect from harm, centered on the responsibility of authors of violations, their duty to repair and the rights of victims to full and effective reparations.

The second group is certainly pertinent to protect victims when regulation addressing non-state conduct has been violated or ignored, but its applicability is not dependent on the existence of this. This happens with principles derived from and related to the principle of good faith as well, inasmuch as innocent third parties can rely on expectations that are not

⁶⁷³ Cf. International Law Association, Non-State Actors Committee, *Report: Preliminary issues for the ILA Conference in Rio de Janeiro*, op. cit., at 3.

necessarily generated by non-state “regulations”. Legal elements that protect from the effects of harm will be examined Chapter 7.

Concerning principles that protect *legitimate* expectations of innocent parties, it can be said that they are related to the general principles of good faith and equity, because this protection constitutes an object of the principle of good faith, as commented by Markus Kotzur. He also mentions that this principle may have effects in relation to non-state actors, even those with a private constitution, making “unilateral statements of [...] international actors [have] a binding effect if, given the concrete circumstances, *bona fides* requires so,” and also considers that it is proximate to the principle of equity.⁶⁷⁴

According to Markus, the principle of good faith can be “concretized in specific applicable rules such as acquiescence, estoppels, or duties of information and disclosure”.⁶⁷⁵ However, Wolfgang Friedmann contends this. For him, rather than being derived from good faith, these more concrete principles are “related” to equity, but not derived from it.⁶⁷⁶ It is interesting to note that Friedmann considers that principles and rules connected with equity may be applicable “to legal relationships of all kinds”,⁶⁷⁷ thereby opening the door to its application to legally-relevant relationships where non-state actors are involved, as those in which human rights are affected – negatively or positively-.

As Giorgio Gaja notes, international arbitration has recognized that good faith is among the general principles of law that operate in the international legal system and have a fundamental character, as was discussed in “the arbitration award in the *Case concerning the Loan Agreement between Italy and Costa Rica*”.⁶⁷⁸ This has been confirmed in doctrine, with many scholars recognizing the international applicability of the aforementioned principle, which is mentioned even in international treaties, as in the Vienna Convention on the Law of Treaties.⁶⁷⁹

According to the previous considerations, the principles of good faith and equity can either produce or be related to principles or normative considerations that may play a role in the protection of victims of non-state violations of human dignity, especially because, as mentioned in the Non-State Actors Committee of the International Law Association, as shown in an excerpt quoted above, commitments of non-state actors can be made have some legal effects in

⁶⁷⁴ Cf. Markus Kotzur, “Good Faith (Bona Fide)”, *Max Planck Encyclopedia of Public International Law*, Oxford University Press, paras. 22-23, 26, available at: <http://www.mpepil.com/>.

⁶⁷⁵ *Ibid.*, para. 23.

⁶⁷⁶ Cf. Wolfgang Friedmann, *op. cit.*, pp. 286-290.

⁶⁷⁷ Cf. *Ibid.*, at 287.

⁶⁷⁸ Cf. Giorgio Gaja, *op. cit.*, para. 26.

⁶⁷⁹ Cf. the Preamble and articles 31.1, 46.2 and 69.2.b of the Vienna Convention on the Law of Treaties of 1969; the Preamble and articles 31.1, 46.3 and 69.2.b of the Vienna Convention on the Law of Treaties between States and international organizations or between international organizations of 1986; and Markus Kotzur, *op. cit.*, paras. 19-26 for the discussion of some effects, functions and implications of good faith in *jus gentium*.

connection with those principles, idea that is endorsed by the consideration that good faith protects legitimate expectations.

Some of the principles and considerations connected with good faith and human dignity that are relevant for giving legal effects to private regulation are: the existence of unilateral obligations; acquiescence; duties to inform; the protection of legitimate expectations; estoppel; the prohibition of *venire contra factum proprium*; and the principle of the prohibition of the abuse of rights,⁶⁸⁰ among others.

It is interesting to ask if the principles of good faith and equity may operate autonomously, which would make it possible for victims to invoke them directly and to independently attribute some effects to non-state conduct and commitments, including soft law promises; and also if they may only operate in order to interpret *existing* duties of an entity.

Confusion may arise from the fact that one of the effects of the principle of good faith is the interpretation of rights and duties in its light,⁶⁸¹ but this does not preclude other effects from existing. In fact, the considerations and principles related to good faith mentioned above sometimes operate with the inexistence of a previous right or duty or with the impossibility of invoking any such a right or duty. This may be the case, for example, with some unilateral obligations, which appear as a result of the behavior of a single entity that had no prior duties; or with acquiescence and estoppel, that give importance to the attitude and behavior of an actor.

Moreover, it has even been considered that good faith may operate in relation to preexisting soft law, whose character is not binding in itself. In this sense, in the Encyclopedia of Public International Law of the Max Planck Institute, it is commented that:

“Even non-binding recommendations, such as UNGA resolutions, or other forms of → *soft law* might, to a certain extent, require to be considered in good faith.”⁶⁸²

According to these considerations, regulations of non-state conduct that can impact on the enjoyment of human rights may generate expectations of third parties and, where appropriate, may produce certain legal effects. Their emergence depends on different factors, as the precise content of the non-state standards; perceived intentions (whether others believe that an obligation is assumed even though officially international or domestic law does not envisage one), which may not coincide with the actual intention of the creators of standards; or the reasonability of expectations. Since principles and rules related to good faith are abstract, whether they have

⁶⁸⁰ Cf. Markus Kotzur, *op. cit.*, para. 22; Wolfgang Friedmann, *op. cit.*, pp. 287-289; at 3; International Law Association, Non-State Actors Committee, *Report: Preliminary issues for the ILA Conference in Rio de Janeiro*, *op. cit.*, at 3.

⁶⁸¹ Cf. articles 31.1 of the Vienna Conventions on the Law of Treaties of 1969 and 1986; Wolfgang Friedmann, *op. cit.*, at 289; Markus Kotzur, *op. cit.*, paras. 19-21.

⁶⁸² Cf. Markus Kotzur, *op. cit.*, para. 25.

effects in each case is determined examining concrete aspects and cases, and are therefore rules and principles that require concretization.⁶⁸³

In this sense, for example, agreements between non-state entities that declare to undertake certain duties, or instruments made by an entity that are endorsed and undertaken by another actor, can have the appearance of being binding, for example, if they provide detailed contents of duties and/or refer to mechanisms and guarantees of supervision.⁶⁸⁴

Therefore, if some non-state instruments are not considered directly binding because of not being produced by the sources of international or domestic law, they may still produce legal effects (either directly or indirectly), due to factors as adoption of their content by hard law or the protection of legitimate and reasonable expectations generated by their publicity and content. To my mind, this may happen with the Memorandum of Understanding between the United Nations and the group Justice and Equality (JEM) in Sudan. This agreement contains provisions that specify duties, guarantees and mechanisms of supervision, as seen especially in articles 1, 3 and 4, which overall give the impression of the existence of duties with a well-defined content, and provide mechanisms of compliance, having also provisions of duration and scope spelt out.

Another example of private regulation that may generate effects by virtue of equity or good faith principles and related rules is that of unilateral statements that lead third parties to rely on them and trust them, as can happen if the content of unilateral acts expresses apparent duties, mechanisms of supervision, or rights of third parties to be respected, among other elements. In this sense, the underlying logic of the effects of unilateral instruments resembles that of agreements between non-state actors. Concerning both sources, it is not necessary that all factors are found or have the same intensity and precision for them to generate effects; and whether they exist is determined by a joint and overall examination of the content of the relevant instrument and other factors, in light of the reasonable legitimate expectations of third parties.

This resembles what international human rights bodies have concluded concerning reasonable periods of time in relation to procedures, which are evaluated considering different elements jointly and globally.⁶⁸⁵

Relevant unilateral private instruments may include resolutions, statements, instruments that recognize principles and standards of non-state conduct concerning some legal goods, codes of conduct, or labels about the quality of a product or compliance with certain standards by an actor. They may generate expectations, some of which can be protected by norms such as

⁶⁸³ Ibid., paras. 22-23.

⁶⁸⁴ Cf. Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 336-338.

⁶⁸⁵ Cf. Inter-American Court of Human Rights, *Case of Genie-Lacayo v. Nicaragua*, Judgment (Merits, Reparations and Costs), 29 January 1997, paras. 77-81.

those that protect consumers, and some that can be directly protected by the principle of good faith.⁶⁸⁶

In turn, norms adopted by an actor that seek to regulate the conduct of another actor may be endorsed or given indirect effects by hard law if they are persuasive enough for lawmakers to endorse them or if the addressee reacts in such a way as to lead others to believe in the emergence of an obligatory standard of conduct.

While hetero-regulation dynamics can involve all sorts of non-state regulation and soft law, it is important to note that by pointing out standards they may have a social and/or psychological impact, especially if they are persuasive. Private norms -and soft law in general⁶⁸⁷⁻ can reflect necessary or convenient rules.

Additionally, demands of compliance with those regulations -as happens, for example, with condemnations of breaches of standards of corporate complicity with a dubious binding character-⁶⁸⁸ may elicit responses from their addressees, that in order to avoid negative effects upon their reputation and interests derived from boycotts, social or other forms of pressure, will try to justify their behavior in light of the regulations in question or may even uphold them publicly. This, in turn, may end up protecting the good faith of third parties and make that regulation be indirectly binding or have legal effects.

Therefore, due to acculturation, socialization, persuasion and normativity strategies,⁶⁸⁹ public image relationships⁶⁹⁰, and/or processes of internalization of rules in a transnational context involving reiterative legal conduct,⁶⁹¹ soft law may find its way into the realm of hard law through *quasi-extra-legal* processes (i.e. processes not entirely alien to hard law partly operating outside it).

On the other hand, as noted by Andrea Bianchi and others, in the human rights landscape, where numerous non-state actors interact, there are some (unconscious or dishonest) claims that lead to confusion between existing obligations and normative or *ideological*

⁶⁸⁶ Cf. José Manuel Cortés, op. cit., pp. 136-143, 151-158; August Reinisch, op. cit., pp. 46-49, 52; Alexandra Gatto, op. cit., pp. 429-432; August Reinisch, op. cit., pp. 42-53, 68; International Law Association, Non-State Actors Committee, *Report: Preliminary issues for the ILA Conference in Rio de Janeiro*, op. cit., at 3.

⁶⁸⁷ Cf. Roberto Andorno, op. cit., at 3, concerning the practical effects of persuasive norms, even if they are regarded as belonging to "soft law".

⁶⁸⁸ Cf. Andrew Clapham and Scott Jerbi, op. cit., pp. 347-348.

⁶⁸⁹ Cf. Fred Halliday, op. cit., pp. 34-35; David Capie, op. cit.

⁶⁹⁰ Cf. Alexandra Gatto, op. cit., at 431; August Reinisch, op. cit., at 53.

⁶⁹¹ Cf. In my opinion, it is perfectly possible to transplant in most regards the description of dynamics of internalization to group non-state entities, especially because they share the group and disaggregated traits with States and lack their formal endowments. Therefore, cf. Harold Koh, "Why Do Nations Obey International Law?", op. cit., pp. 2645-2659.

aspirations desired by some actors⁶⁹² –not necessarily widely representative ones-. Actors engaging in those dynamics may resort to intertextuality and autopoeitic processes, where those who agree on something cite each other to generate the illusion of wide acceptance of alleged binding standards that may actually not be so, among other possible misleading strategies.⁶⁹³

Therefore, while the participation of non-state actors can generate a greater democratization of world relations by permitting more voices to be represented therein, some of which can promote human dignity standards, those entities may be tempted to circumvent legitimate democratic discussions and decisions and seek to subtly impose partisan positions (which may distort human rights discourses) seemingly or truly adopted in the international level to local sovereign entities behave appropriatel.⁶⁹⁴

The emergence of joint participatory mechanisms where non-state actors contribute in processes, some of which may lead to the adoption of legally relevant acts, is a phenomenon that confirms that various voices can be expressed in international official for a. This happens with the codex alimentarius, among other cases –albeit the participants in those processes are not always representative enough, reason why their conduct must be examined respecting liberties-.⁶⁹⁵

Paraphrasing Fred Halliday, romantic overt idealizations of non-state actors must end, recognizing that they may certainly contribute to the promotion of human rights and guarantees but may also fail to abide by universal standards and may act against those rights.⁶⁹⁶ They are thus not to be either demonized or overtly idealized. Moreover, as said before, some actors may lack the representativeness they claim to possess and demand others to have or fail to truly represent civil society. For this reason, different voices and actors must be heard.⁶⁹⁷

⁶⁹² Cf. Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, op. cit., pp. 185, 191-195, 201-203; Iona Institute, *Ireland, the UN & Human Rights: How UN treaties are misinterpreted to drive a radical agenda*, available at: http://www.ionainstitute.ie/assets/files/Human_Rights_centre%20spread%20to%20view.pdf (last checked: 20/01/2012); Eric A. Posner, op. cit., pp. 56-57.

⁶⁹³ Cf. Terrence McKeegan, “Live Blogging from the World Youth Conference in Leon, Mexico”, 24, 26 and 27 of August, 2010, available at <http://www.turtlebayandbeyond.org/2010/abortion/live-blogging-from-the-world-youth-conference-in-leon-mexico-4/>, <http://www.turtlebayandbeyond.org/2010/abortion/live-blogging-from-the-world-youth-conference-in-leon-mexico-3/>, and <http://www.turtlebayandbeyond.org/2010/abortion/live-blogging-from-the-world-youth-conference-in-leon-mexico/> (all last checked on 20/01/2012); Timothy Herrmann, “Who Represents the Youth Voice at the UN Conference on Sustainability?”, 27 January 2012, available at: <http://www.turtlebayandbeyond.org/2012/turtle-bay-un/who-represents-the-youth-voice-at-the-un-conference-on-sustainability/> (last checked: 30/01/2012).

⁶⁹⁴ Cf. Iona Institute, op. cit.; John H. Jackson, op. cit., 73-76; Rafael Domingo, *¿Qué es el derecho global?*, op. cit., pp. 204-208, 217; Andreas Fischer-Lescano, op. cit., pp. 19-20.

⁶⁹⁵ Cf. Nico Krisch, “The Pluralism of Global Administrative Law”, *European Journal of International Law*, Vol. 17, 2006, pp. 255, 260; Benedict Kingsbury, Nico Krisch, Richard Stewart, *The Emergence of Global Administrative Law*, op. cit., pp. 22, 35, 38.

⁶⁹⁶ Cf. Fred Halliday, op. cit., at 36.

⁶⁹⁷ Cf. Daniel Thürer, op. cit., at 46; Nico Krisch, *The Pluralism of Global Administrative Law*, op. cit., at 255; Elena Pariotti, op. cit., pp. 103-104.

Taking into account the opinion of a wide array of actors may enrich debates related to the content of human rights standards, and democratic checks and balances among different actors must be permitted. For instance, even NGOs can compete with and check each other, as commented by Elena Pariotti.⁶⁹⁸

The arguments examined in this and previous sections indicate that the value-principle of the protection of human dignity and the normative features of standards based on it demand legal protection from non-state threats. How such protection can be implemented is examined in Chapter 8. Apart from normative arguments, meta-legal and extra-legal arguments about that protection exist and are so persuasive that if it was not demanded under international law it would have to be accommodated in it *de lege ferenda*.

There are different international and non-international principles and legal elements that call for protecting human dignity from non-state violations. Altogether, failure to offer reasonable and effective international legal protection to victims of non-state threats is contrary to international obligations of protection, that contemplate guarantees in favor of *all* human beings, who possess them in all relations: public or private, with States or with other entities. Such failure is also contrary to the duty to adjust law to human rights demands. Some of the principles and elements referred to in this paragraph will be examined in other sections of this text, beginning with the next one.

⁶⁹⁸ Cf. the reference to the text of Elena Pariotti mentioned in the previous footnote.

CHAPTER 3. EQUALITY AND NON-DISCRIMINATION AND THE NEED TO PROTECT VICTIMS FROM ALL AGENTS OF VIOLATIONS

The principle of equality and non-discrimination is amongst the most important elements in international human rights law. It is peremptory and operates both as a guiding principle and as a right, which in turn is sometimes enshrined in norms that regulate it as an autonomous entitlement while other times it is treated in strict connection to other human rights, prohibiting discrimination in their enjoyment.⁶⁹⁹

The interpretation and application of any human rights provision must be in accordance with this principle, which requires that every person be guaranteed the enjoyment of her human rights without being discriminated against for any reason whatsoever.⁷⁰⁰ When applied as an autonomous right, it demands that an individual is not discriminated against in any way, even when no other human rights are involved. Additionally, the Inter-American Court of Human Rights has considered that the absolute and non-derogable content and nature of this right, as enshrined in international instruments, make it part of *jus cogens*.⁷⁰¹ Certainly, human rights law leaves no room for exceptions to the unrestricted application of equality and non-discrimination, which has a central role and is based on the equal worth of every human being, reason why that conclusion is convincing. Moreover, that Court has mentioned that this guarantee is applicable to relations between non-state entities,⁷⁰² and the African Charter on Human and Peoples' Rights confirms this dimension by saying that "[e]very individual shall have the duty to respect and consider his fellow beings without discrimination".

It is important to recall that this principle and right (it has both natures) does not demand identical treatments in absolute terms: reasonable differentiated treatments may be lawful, since individuals in different situations can be treated differently without there being a violation of

⁶⁹⁹ Compare articles 14 of the European Convention on Human Rights, that prohibits discrimination on the enjoyment of human rights recognized therein, and 1 of Protocol No. 12 to that Convention, that extends protection from discrimination as encompassing any right "set forth by law" and granting protection against discrimination "by any public authority", offering thus a more autonomous entitlement. A similar distinction is seen in articles 2 and 26 of the International Covenant on Civil and Political Rights, as expressed in: Human Rights Committee, General Comment No. 18, *Non-discrimination*, 10 November 1989, para. 12.

⁷⁰⁰ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 82-96, 102-110; articles 14 of the European Convention on Human Rights, 1.1 and 24 of the American Convention on Human Rights, 2.1 and 26 of the International Covenant on Civil and Political Rights; Human Rights Committee, General Comment No. 18, op. cit., paras. 1-3, 12.

⁷⁰¹ On the peremptory character of equality and non-discrimination, cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 97-101.

⁷⁰² *Ibid.*, paras. 140, 146, 152.

equality if different treatments pursue legitimate objectives and are proportional,⁷⁰³ which implies that restrictive measures cannot be used less restrictive ones are available. However, some authors consider that all measures can have an impact on multiple rights and protected interests,⁷⁰⁴ reason why there is no unanimous agreement on the features of this last element.

Furthermore, in case law it has been considered that temporary different treatments may sometimes be required in order to bring about effective equality and improve the conditions of people whose rights are violated or not as enjoyed by them as by others, to make it possible for everyone to equally enjoy his human rights.⁷⁰⁵ For this reason, so-called affirmative actions can be lawful if legal conditions are met, and are sometimes even considered mandatory by some,⁷⁰⁶ although they must be temporary lest they end up treating a previously disadvantaged group in an advantageous way over previously advantaged persons who become discriminated against.

Since the principle of equality and non-discrimination permeates and conditions the entire human rights framework, it must be taken into account when analyzing if victims of non-state threats must be as protected as victims of State abuses. Such analysis must address all relevant aspects: basic considerations as the recognition of victims of non-state human rights violations as such, and more complex issues as remedies and reparations or mechanisms of protection.

In this section, I will briefly examine possible manifestations of equality in human rights law in order to analyze what the position of victims of non-state violations is, and will argue that a complete and non-discriminatory system cannot be limited to protecting victims of State abuses.

3.1. Manifestations of equality and non-discrimination and their effects towards protection from non-state actors

There are at least four manifestations of equality and non-discrimination in legal terms: first, as an overarching *principle*, equality conditions the way in which norms protecting human dignity are interpreted and applied. Often, these operations take place in the State level, and oblige States to comply with their human rights duties in accordance with the principle of equality,

⁷⁰³ Cf. Human Rights Committee, General Comment No. 18, op. cit., paras. 8, 13; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 89-94.

⁷⁰⁴ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-5/85, op. cit., para. 46; European Court of Human Rights, Grand Chamber, *Case of Oršuš and other v. Croatia*, Judgment, op. cit., para. 156; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 84, 90-91, 119; Jonas Christoffersen, op. cit., paras. 111-114, 129-135.

⁷⁰⁵ Cf. articles 1.4 of the International Convention on the Elimination of All Forms of Racial Discrimination and 4 of the Convention on the Elimination of All Forms of Discrimination against Women; Human Rights Committee, General Comment No. 18, op. cit., para. 10; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 81, 104, 144; European Court of Human Rights, Grand Chamber, *Case of Oršuš and other v. Croatia*, Judgment, op. cit., par 149.

⁷⁰⁶ Ibid.

that is to say without discriminating *and striving to eliminate* unfair differences in the enjoyment of rights by those subject to their jurisdiction, even if they are the product of actions of non-state actors, as has been maintained by the Inter-American and European Courts of Human Rights⁷⁰⁷.

A second manifestation of the principle of equality and non-discrimination is the recognition of a *right* of equality, which is usually worded as equality under the law. It entitles every individual to be treated without discrimination in a given legal system.

A third dimension is related to a specific aspect of the first manifestation, stressing that States cannot discriminate and must uphold equality when using available legal mechanisms as restrictions of rights or suspension of obligations. The fourth manifestation consists in reinforcing the protection of equality of certain rights by expressly reminding that their enjoyment must be ensured in a way that is compatible with the equality of all human beings, who have the same dignity. The last two dimensions are but concrete manifestations of the first two.

The existence of multiple legal dimensions or manifestations of equality does not imply that they are separate and completely independent from each other. On the contrary, all those manifestations are related to the same principle, as acknowledged by international bodies as the Human Rights Committee and the Inter-American Court of Human Rights. The former declared on its General comment No. 18, for instance, that:

“Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights”.⁷⁰⁸

The Inter-American Court arrived at the same conclusion, evidenced in its consideration that:

“Non-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights. The element of equality is difficult to separate from nondiscrimination”.⁷⁰⁹

While discussion of the previous manifestations generally involves States, this is because of the competence of the bodies examining them and not because they have no substantive *effects* or applicability in relation to non-state entities: they do. First of all, there is a relevant 1) indirect effect because, given the obligations of States to protect human beings from all violations, embedded in the horizontal effects of human rights, the mandated effective protection of the principle of equality is only possible if social, individual and legal forms of discrimination are fought against. In other words, States have the duty to also prevent and respond to discrimination

⁷⁰⁷ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 140-153; European Court of Human Rights, Grand Chamber, *Case of Oršuš and other v. Croatia*, Judgment, op. cit., paras. 150-155, 180; articles 4.1.e and 9.2.b of the Convention on the Rights of Persons with Disabilities, and 1, 3 and 8 of the Convention of Belém do Pará.

⁷⁰⁸ Cf. Human Rights Committee, General Comment No. 18, op. cit., para. 1.

⁷⁰⁹ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 83.

by non-state actors. This implies that those actors can violate the principle being commented. In this sense, the Inter-American Court of Human Rights has considered that:

“States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations [...]

The State is obliged to respect and ensure the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tol rate [sic] situations of discrimination that prejudice the latter in the employment relationships established between individuals (employer-worker). The State should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards [...]

In labor relations, employers must protect and respect the rights of workers, whether these relations occur in the public or private sector [...]

The State is thus responsible for itself, when it acts as an employer, and for the acts of third parties who act with its tolerance, acquiescence or negligence, or with the support of some State policy or directive that encourages the creation or maintenance of situations of discrimination” (emphasis added).⁷¹⁰

Secondly, 2) the principle of equality may also directly bind non-state entities and/or require international law to protect victims of non-state violations because of three factors: its emergence as a norm of *jus cogens* (hierarchy); its customary nature or its condition as a general principle, among other possibilities related to sources; and its *individual* dimension, different from the State dimension, that emphasizes the content of protection and effectiveness of a right, which is different from the burdens of those with obligations towards it.

All the manifestations and effects of the principle of equality and non-discrimination *vis- vis* non State actors are related to each other and belong to one single general principle, in whose light it is necessary to examine how international law treats victims.

Interestingly, both indirect and direct mechanisms are complementary. Without both of them, it would be impossible to fight against discrimination completely. This is because, as recognized in doctrine and jurisprudence, discrimination can materialize in different ways, e.g. it can be normative, factual, State-sponsored, social, individual, or else; and many manifestations of discrimination involve non-state entities.⁷¹¹ Non-state discrimination can operate alone or together with State discrimination, and must always be tackled.

Additionally, as indicated above, its nature as a principle and its own content make the principle of equality and non-discrimination guide the entire interpretation and application of human rights law.⁷¹² This is confirmed, for example, by the command to not disregard this

⁷¹⁰ Cf. *Ibid.*, paras. 104, 140, 148, 151-152.

⁷¹¹ Cf. *Ibid.*, para. 104; European Court of Human Rights, Grand Chamber, *Case of Or u  and other v. Croatia*, Judgment, op. cit., paras. 151, 154-155; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 103.

⁷¹² Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 85, 88, 94, 96, 100, 102; Human Rights Committee, General Comment No. 18, op. cit., paras. 1, 12.

principle in any aspect of human rights law, including the possibilities of resorting to measures of restriction and suspension, as indicated in the case law of the Human Rights Committee and in the International Covenant on Civil and Political Rights.⁷¹³

The two general effects of the principle under discussion seek to address one same problem: that of acting against discriminatory treatments of human beings, which are against their common inherent worth. In this regard, it is telling that the first Article of the Universal Declaration of Human Rights mentions that: “[a]ll human beings are born free and equal in dignity and rights” (emphasis added).

Now, I will explore how manifestations of equality are enshrined in some international instruments, and then analyze if they are directly applicable to non-state entities in addition to having indirect effects towards them.

The European regional system of protection of human rights provides a clear example of how there are different manifestations of non-discrimination, despite which one same logic underlies all of them, which are complementary. In the original 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, article 14 states:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” (emphasis added).

Additionally, the demand of equality and non-discrimination has also been translated into human rights law as an autonomous *right* that offers broad protection from discrimination in relation to an almost (and perhaps even) unlimited set of rights and situations, since that protection is not restricted to groups of some rights protected from discriminatory treatment. In the European system, that has obligations that can bind a non-state actor (the European Union), this concrete manifestation is formulated in terms of a single right, distinct from as a principle that conditions all the universe of human rights law. In this respect, Article 1 of Protocol number 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms states:

“General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1” (emphasis added).

A comparison of the articles quoted above reveals that a general approach based on an overarching principle is complementary to the formulation of a concrete right on the same matter,

⁷¹³ Cf. Human Rights Committee, General Comment No. 34, paras. 26, 32, 39, 44, 48; article 4.1 of the International Covenant on Civil and Political Rights.

that may cover a great range of rights but not operate as a principle. In other regions and in the universal system of human rights, there are provisions that resemble the two cited articles. It is necessary to determine what their effects are concerning protection from non-state violations.

In the Universal system, the two 1966 Covenants determine in Article 2 that States are obliged to refrain from committing violations and to ensure the enjoyment of human rights in accordance with the principle of equality, that is to say without discrimination. This command imposes obligations on formal, functional and *de facto* authorities, which are often but not always States.⁷¹⁴ Additionally, as indicated before, it indirectly affects other entities, because authorities have duties to eliminate obstacles to the enjoyment of human rights and ensure an equal enjoyment of human rights by every individual subject to their jurisdiction or power, which given the indirect “horizontal” effects of the Covenants call for acting against non-state discrimination. This is confirmed by the Human Rights Committee, according to which the Covenant obliges authorities to address non-state violations.⁷¹⁵ When seeking to comply with their duties, authorities must not discriminate any victim, including victims of non-state violations.

In the International Covenant on Civil and Political Rights, it is expressly stated that measures adopted during public emergencies must respect the principle of equality and non-discrimination; and the special application of that principle in relation to some rights is also addressed, being Articles 20 and 26 noteworthy because the former orders States to prohibit advocacy of discrimination, which can be committed by non-state actors, and the latter deals with the right of equality before the law and the correlated prohibition of discrimination, which has universal applicability within domestic legal systems.

In sum, like the European system, the International Covenant on Civil and Political Rights requires that all the rights “provided for in the Covenant”⁷¹⁶ are enjoyed by persons subject to the jurisdiction of a State party with no discrimination; and additionally prohibits discrimination in domestic legal systems, having this duty a different scope that *complements* the former one’s. Additionally, that treaty includes specific guarantees to reinforce the respect of equality.⁷¹⁷ All of those manifestations have applicability *vis-à-vis* non-state actors: States must ensure that persons are not prevented from enjoying internationally recognized rights comprised in the

⁷¹⁴ Cf. Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006, para. 4, in light of article 2 of the International Covenant on Civil and Political Rights; article 43 of the Convention on the Rights of Persons with Disabilities in light of articles 3 and 4 of the said Convention; article 59 of the European Convention on Human Rights in light of articles 1 and 14 of that Convention and Protocol No. 12 to that Convention.

⁷¹⁵ Cf. Human Rights Committee, General Comment No. 31, *op. cit.*, para. 8.

⁷¹⁶ Cf. Human Rights Committee, General Comment No. 18, *op. cit.*, para. 12.

⁷¹⁷ *Ibid.*

Covenant as the result of non-state discrimination, and they also must design their domestic norms in a way that does not foster but rather impedes non-state discrimination.

The Covenant on Economic, Social and Cultural Rights, in turn, stresses that positive measures of protection shall be implemented without discrimination and following the principle of equality, and concretizes this principle in relation to measures that have to be designed to protect “children and young persons.” The Protocol of San Salvador also requires rights to be guaranteed “without discrimination”, as ordered in article 3.

The American Convention on Human Rights follows the model of directly regulating State behavior in Article 1.1., that includes a general prohibition of discrimination in the enjoyment of human rights, which also has indirect horizontal effects, as declared by the Inter-American Court of Human Rights in Advisory Opinion 18.⁷¹⁸ Those effects have been described as entailing the obligation of States to prevent and deal with non-state threats.⁷¹⁹

The American Convention, following the model of the International Covenant on Civil and Political Rights, also contains concrete regulations on the applicability of non-discrimination throughout its Articles, and includes an autonomous right to “equal protection” by the law as well in Article 24, that also has horizontal effects, as all the Convention does. It must be noted that the American Declaration of the Rights and Duties of Man is equally applicable to State parties to the American Convention and to those OAS members that are not parties to it, and that they form part of the American regional system’s *corpus juris* of human rights protection. Article II of that Declaration has an interesting redaction, which reads:

“All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor” (emphasis added).

According to the content of this article, one may infer that one implication of the principle of equality and non-discrimination is that victims of non-state actors have the same inherent rights as victims of States. Therefore, differences concerning the protection and promotion of those rights are lawful if different treatments of those categories of victims are justified and proportional. This requires not leaving victims of non-state violations utterly undefended when States are unable or unwilling to protect them, among others. The effectiveness of alternative measures of protection of human rights and guarantees of victims of non-state violations is therefore a condition of their legality; and the lack of a proportional, pertinent and effective response to those violations is discriminatory and violates their dignity. Sometimes, for protection to be effective, the

⁷¹⁸ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 140-153.

⁷¹⁹ Cf. Ibid.; Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 87-91; Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, op. cit., para. 172.

protection of victims of non-state violations must be akin to that of victims of States or be a directly international protection, because not all differential treatment of victims of different actors are consistent with equality and allowed.

The African Charter on Human and Peoples' Rights, in turn, has some pertinent interesting features. Apart from recognizing the equality of persons before the law in Article 3 and reinforcing some rights with the prohibition discrimination concerning them, the Charter declares that peoples are equal to other peoples in article 19, states that individuals have a duty to refrain from discriminating other human beings in article 28, and calls for States to ensure that women are not discriminated against in article 18. The last two articles are clearly applicable to non-state entities: article 18 does nothing but refer to a duty to ensure that women, who are and have been victims of discrimination by public and private actors, enjoy equality, demanding a concrete application of general manifestations of equality that seek to protect vulnerable individuals.

Therefore, this article forms part of a trend that aims to protect persons who are especially vulnerable from both State and non-state actors, as required by their being equal to all human beings. This is reflected in other specific provisions and in specialized instruments as well, such as those dealing with the protection of women against discrimination, of persons with disabilities, or of persons that can be victims of racial discrimination, among other cases.⁷²⁰

Article 28 of the African Charter contains a right of *individuals* to not be violated by others, since the Charter mentions the duty to not discriminate other individuals. The counterpart of such a duty in a human rights instrument is the right to not be discriminated against by other individuals. This is a norm that directly mentions non-state duties, recognizing that they can violate the right to equality derived from human dignity. This confirms that human rights instruments can envisage non-state duties that can be invoked by victims against offenders.

Apart from the African Charter, other instruments of human rights or general international law itself contemplate express mentions of non-state responsibilities related to the principle of equality, the existence of which is independent of State duties (albeit their simultaneous existence will enhance their protection). Even if no other instruments regulated them, they could be perfectly created.

⁷²⁰ Cf. <http://www.un.org/disabilities/convention/questions.shtml#one> (last checked: 23/01/2012), where it is mentioned, as indicated above, that "certain groups, such as women, children and refugees have fared far worse than other groups and international conventions are in place to protect and promote the human rights of these groups"; Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; Convention on the Elimination of All Forms of Discrimination against Women; International Convention on the Elimination of All Forms of Racial Discrimination; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Convention on the Rights of the Child; among others.

The Inter-American human rights system has recognized the need to protect human equality from non-state entities. In that regard, article III.1.a of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities mentions that the parties to that treaty undertake to adopt:

“Measures to eliminate discrimination gradually and to promote integration by government authorities and/or private entities in providing or making available goods, services, facilities, programs, and activities such as employment, transportation, communications, housing, recreation, education, sports, law enforcement and administration of justice, and political and administrative activities” (emphasis added).

In turn, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, belonging to the universal system of the United Nations, envisages a particular manifestation of the protection of equality and non-discrimination when it mentions in article 25 that:

“It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article.

3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity” (emphasis added).

As commented in advance above, different factors make the principle of equality and non-discrimination be relevant to protect individuals from non-state threats. Apart from indirect effects requiring action of authorities, direct applicability of substantive duties to respect the equality of all human beings to non-state actors is important, because of the possibility that States comply with their duties but victims are insufficiently protected, as examined in Chapter 2.

Concerning indirect effects, apart from the general duties to address non-state violations, in relation to vulnerable individuals and rights the demands of international norms often go beyond general indications and regulate in more detail how authorities must protect from non-state threats, sometimes not only specifying duties that non-state entities must have but also other measures that must be resorted to for the sake of protecting the human dignity. For this reason, different manifestations of horizontal human involvement effects are not limited to dealing with obligations, because they can also deal with protection measures that differ from the creation of duties (of authorities or direct non-state international obligations, for instance).

Concerning direct effects, three different considerations suggest that the principle of equality may be directly applicable to non-state actors, which means that they can be bound by that principle.

a) The first consideration is related to the *hierarchical nature* of the norm: the fact that the principle of equality is peremptory makes it non-derogable, with a content that cannot be

restricted, and makes it have a mandatory application that admits no exceptions. Concerning the *jus cogens* character of the principle and some of its implications, the Inter-American Court of Human Rights considered that:

“[T]he principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens”⁷²¹ (emphasis added).

The Court thus not only found that the principle of equality cannot be restricted, but also that it exerts influence on the entire international legal system and on domestic legal systems as well. To this it must be added that there are duties to implement it internally and that it must be taken into account in relation to every legally relevant act from a human rights perspective.

I agree with the opinion of the Court, which identifies the features of the principle of equality that make it meet the conditions of Article 53 of the Vienna Conventions on the Law of Treaties, because it cannot be derogated from in any aspect under any circumstances. The *jus cogens* character of the principle attests to the relevance of human equality. Therefore, discriminatory treatments give unreasonable preferential treatment to some individuals merely because of their accidental status, without having regard to the inherent worth of every human being, reason why artificial and unacceptable subcategories of human beings with different treatments are contrary to human rights law. Denying protection and recognition to victims of non-state actors, in truth, is an example of attaching more importance to secondary and contingent aspects than to the necessity of protecting essential entitlements of all individuals. This is why norms that engage in such discrimination must be modified whenever they are identified.

The superior hierarchy of the principle of equality and non-discrimination is, to my mind, one of the characteristics that make this principle have effects beyond the domestic system of States and direct effects towards non-state actors. This is because the peremptory nature of the principle of equality implies that it must be respected by non-state entities and that interpretations or applications contrary to it cannot produce effects, because those entities have implied duties to not breach it, as seen in Chapters 2 and 6. Moreover, the existence of *jus cogens* obligations to respect is not dependent on the consent of entities bound by them.

While some non-state actors can always be subjects of international obligations, even dispositive ones, regardless of consent, some non-state entities can formally interact with the

⁷²¹ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 101.

sources of *jus gentium*, but not even they can avoid being bound by peremptory law, as the one that protects the equality of all human beings, all of who have the same worth.⁷²²

Apart from which actors must respect it, *jus cogens* also imposes burdens and conditions on norms and rules, and require international and domestic law to be consistent with equality and non-discrimination. If a compatible interpretation or application is not possible and contradiction is not limited to one case (in which case contrary manifestations must be unapplied), norms and rules contrary to the equality of all human beings must be removed from the legal system. In case the application of norms on human rights or guarantees discriminate against victims of non-state entities, they must be adjusted or interpreted in a way that is consistent with the principle of equality and non-discrimination.

b) The legal sources of the principle of equality and non-discrimination may sometimes also make this principle be applicable to different actors and regulations without the intermediation of the State, regulating their behavior directly. Several ideas support this consideration.

In the first place, besides having a *jus cogens* character and being recognized in treaty law, the principle of equality and non-discrimination seems to have attained customary nature. In this regard, it must be said that the principle, along with some of the rights and guarantees derived from it, are found in the Universal Declaration of Human Rights, some parts of which, at least, have attained the character of customary international law.⁷²³ The importance of the principle, its non-derogable nature, and the fact that besides granting rights it determines how rights and international law are to be applied and interpreted, due to its overarching character, strongly suggest that it is among the norms and principles of the Declaration that have become part of customary international law. Therefore, it is important to examine the Declaration in order to find some clues as to the applicability of the principle to the regulation of non-state conduct and to confirm that it imposes conditions on the content of international law.

At the outset, it must be kept in mind that the Declaration is in some respects unlike human rights treaties and similar in others. Whereas human rights treaties have been traditionally designed to impose obligations on States (being there some that regulate non-state duties as of late), the Universal Declaration, despite not having binding effects originally (which is no longer the case due to the fact that part of its content has become customary law and also to its

⁷²² Cf. José Manuel Cortés, *op. cit.*, pp. 124-133; Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens-: la transformación de los derechos internacional y colombiano gracias al Ius Cogens internacional*, *op. cit.*, pp. 109-121; article 7 of the European Convention on Human Rights.

⁷²³ Cf. Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, *op. cit.*, pp. 226-228; Bruno Simma and Philip Alston, *op. cit.*, pp. 84, 90-94.

reception in treaty and domestic norms), forms part of the international Bill of Rights and directly addresses some pertinent non-state conduct,⁷²⁴ as do some human rights treaties. In the Declaration, the emphasis was laid on the rights, freedoms and guarantees enjoyed by human beings rather than on the duties of States concerning those rights, freedoms and guarantees. Both types of instruments (declarations and treaties) form part of the same *corpus juris* of human rights law, and must in consequence be examined in conjunction to interpret human rights issues, that must be examined taking into account the system those instruments are embedded in.⁷²⁵ Interestingly, Principle 12 of the Guiding Principles on Business and Human Rights and its commentary mention that there is a:

“[R]esponsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights”, with that Bill “consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified”.⁷²⁶

From its preamble onwards, the Declaration contains many revealing references to equality, the first of which is of great importance: it recognizes that there are “equal and inalienable rights of all” human beings (emphasis added). An implication of this recognition should be that all victims must be granted the same rights and protection, since conditioning them to accidental aspects such as the identity of an offender cannot be reconciled with that recognition.

In Article 1, the Declaration contains a reference to the right to equality and non-discrimination that materializes the previous recognition, stating that “[a]ll human beings are born free and equal in dignity and rights”. Article 1 has a broad applicability: it is neither limited to a certain legal system nor to an exhaustive or defined set of rights. In consequence, victims, as individuals who deserve and are entitled to legal protection, should be recognized to have the same essential –inherent, inalienable, unconditional- rights that other victims also have, due to their being in the same situation of vulnerability and to the existence of a common mandate to protect all non-conditional rights, among which the right to have one’s position as a victim of a human rights *violation* recognized and the right to receive a remedy are included.

⁷²⁴ Cf. Office of the United Nations High Commissioner for Human Rights, “The International Bill of Rights”, *Fact Sheet No.2 (Rev.1)*, at 1, available at: <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011, at 13; article 30 of the Universal Declaration of Human Rights; Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., pp. 33, 44-45, 49-50.

⁷²⁵ Cf. European Court of Human Rights, *Case of Al-Adsani v. The United Kingdom*, Judgment, paras. 55-56; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 83-84.

⁷²⁶ Cf. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011, at 13.

However, since differential treatments are permissible, as mentioned earlier, law does not always require a completely *identical* treatment of all victims. Therefore, offering certain remedies only to victims of States, as a result of their being in a position different from that other victims, may be lawful if that treatment is proportionate and other conditions are met. Additionally, it is required that *at least* other *effective* measures and actions be used to protect the essential rights of victims of non-state actors treated differently. Some mechanisms of protection that can be offered to all victims are examined in Part II.

On the other hand, the fact that Article 1 contains a reference to the equality of *rights*, enjoyed by *individuals*, means that the content of the guarantee is susceptible of being violated by any actor, with no indication to the contrary being made. As a result, the right to be treated equally (not identically) and without discrimination is inherent to human beings, and they can thus claim and demand respect of that right from State and non-state entities and request its protection from authorities.

Additionally, the Declaration contains other references to equality and non-discrimination, such as those found in Articles 10, 16, 21, 23 or 26, that reinforce the protection of equality in relation to some rights. Article 23 is noteworthy: it recognizes the right to “equal pay for equal work”, which is a right that has an evident applicability to relations with both States *and* non-state actors, being its opposability to non-state entities thus essential. Concerning that and related aspects, the Inter-American Court of Human Rights asked States in its Advisory Opinion number 18 to protect workers from non-state abuses attributable to their employers.⁷²⁷

Article 7 of the Universal Declaration is worth being examined as well. It refers to the right to equal protection by the law. It stipulates:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

An effective and teleological interpretation, that takes into account the objective of protecting human dignity, can be construed as indicating that there are two guarantees in this article: 1) equality before the law, without specifying or limiting to *which* law it applies, referring thus in my opinion to equality before *any* law (international, domestic, global-transnational or *lex privata*, for instance), as the *pro persona* principle requires; and 2) the right to be protected against discrimination generally, in the sense that all individuals are to be protected against any discriminatory treatment in relation to their human rights. This is a right that is opposable to non-

⁷²⁷ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 140, 146-153.

state entities, since to be meaningful and effectively protect individuals from *any* human rights *discrimination* it cannot be a right exclusively operative against State discrimination.

Besides addressing relations between actors, the aforementioned guarantees have an impact on the content of law, requiring that no law or regulation allows or engages in discrimination. This means that victims of non-state actors cannot be *unrecognized and unprotected*. Such tolerance or endorsement would generate an additional violation of human rights. Considering that States may sometimes be unable to protect individuals from certain actors despite their diligent efforts, international remedies and mechanisms should be available to victims in serious cases to protect victims from serious harm. Leaving them in a position of extreme disadvantage would amount to discrimination against them, generating an additional wrongful act.

Apart from the study of the broad principle of equality and non-discrimination as a peremptory and customary principle, with part of its content being indicated in the Universal Declaration of Human Rights, specific general principles of law and international law also deal with the protection of the equality of human beings and may complement that content.

The recognition that equality and non-discrimination is a principle of international law is implied in its being treated as such by international bodies and other entities.⁷²⁸ It is a principle found in many legal instruments of both soft law and hard law,⁷²⁹ upheld in statements of different actors, and invoked when violations of it are condemned.⁷³⁰ Additionally, this principle is found in Constitutions and norms of many States and implemented in their legal systems, in such a general and strong way that discriminatory treatments are conceived as illegal and illegitimate, making equality thus have the condition of a general principle of law *in foro domestico* as well.

In adjudication procedures, international supervisory bodies have treated equality and non-discrimination as a *guiding principle* and not as a mere subsidiary mechanism of interpretation. In some cases, they have striven to make the norms they examine compatible with the inherent equality of all victims of human rights violations, when their competences and functions so allow. In those cases, they have granted protected claimants and allowed their petitions against non-state actors to succeed, in a way that is analogous to the way in which victims of States are protected. Those supervisory bodies have understood that they were entitled to grant that protection due to the presence of factors as the role, functions and/or power of such

⁷²⁸ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, paras. 71, 72, 82-88; Human Rights Committee, General Comment No. 18, *op. cit.*, paras. 1-4, 10, 12; European Court of Human Rights, Grand Chamber, *Case of Oršuš and other v. Croatia*, Judgment, *op. cit.*, para. 139.

⁷²⁹ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, paras. 71, 83, 86.

⁷³⁰ Cf. e.g. articles I and II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.

entities, considering that the underlying rationales and principles of the remedies and actions available in some international instruments can be used to protect victims of some non-state abuses, as when their dynamics are similar to those of State violations. This is a way of treating persons in similar conditions alike.⁷³¹

International authorities have considered that some of the ways and situations in which victims of non-state actors can be protected under human rights treaties are: first, a) offering indirect precautionary protection. This implies prohibiting States from exposing individuals to potential abuses attributable to non-state actors. Risk situations in which an actor has the capacity to violate the content of a given right given its *de facto* authority, ability or power to violate human rights, have been understood as deserving attention. Therefore, for instance, when someone can be expelled to places where he faces risks of serious non-state violations and States cannot guarantee protecting him despite their efforts, the prohibition of *non-refoulement* has been considered as applicable, to not expose that someone to non-state threats.

b) Victims of non-state abuses can also be protected by means of implementing a conditioned direct protection. For instance, if the condition that a territory is administered with a State, which always has human rights obligations over it, is not met, relevant human rights standards have been considered to be relevant to guide the conduct of non-state entities that administer that same territory (replacing the State or with the State having no effective control over that conduct due to normative or factual events). Furthermore, the conduct of those entities has been considered prone to direct international human rights examination. This has been done under the assumption that the entitlement to effective protection of those located in a territory is not waived and cannot be diminished due to State absence or limitations (as discussed in the case of the UNMIK, presented before).

Logics of that sort are human-centered. Some international bodies have also considered themselves entitled to directly protect individuals from non-state abuses if other conditions are met.

There are other ways in which international bodies can order protection from non-state violations, including: c) indirect and contingent protection, by way of enforcing obligations of States or *de facto* or functional authorities regarding the horizontal effects of human rights, requiring the prevention and sanction of non-state abuses and the full reparation of victims.

⁷³¹ Cf. Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006, para. 4; Committee Against Torture, *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, CAT/C/22/D/120/1998, op. cit., paras. 6.5-7.

However, given jurisdictional and competence limitations of international bodies, this option does not always have the capacity to make all victims be treated alike, because if supervised States comply with their obligations with the required appropriate diligence, international protection is not granted to victims of actors that get away with their violations. If the non-state offenders elude domestic controls, the situation of victims may not be addressed at all.

Transnational non-state actions to condemn and shame offenders in those and other events may complement international public measures, but cannot fully replace them because, despite their influence, they may lack some of the incentives and resources of public action. Therefore, lack of fully effective legal mechanisms to protect victims makes it necessary to devise complementary mechanisms *de lege ferenda*. Indirect exams of non-state conduct that are conducted to examine State compliance with positive duties or to determine if authorities are obliged to do or refrain from doing something are measures of protection different from those involving direct supervision of non-state obligations.

d) Fourthly, the examination of allegations that a non-state actor has cooperated with or otherwise participated in the violation of norms protecting human dignity, that were perpetrated by another actor –State or non-state-, can also serve to protect victims and defend their equality. This is so because this permits to offer remedies, whether domestic or international, to victims against participants and accomplices in violations, regardless of their nature.

That non-state actors can be responsible due to complicity is widely accepted. Authors and international bodies acknowledge that States have the capacity to be accomplices in violations attributable to non-state violations –private ones or international organizations-; that private and public actors can be accomplices of State or non-state violations, as was declared by judge Leval of the United States and is recognized in criminal law;⁷³² or that someone has responsibility due to his participation in a criminal organization of which he was a member, as envisaged in articles 9 to 11 of the Charter of the International Military Tribunal, adopted in London on August 8 of 1945.

Possible problems include that substantive or procedural norms may fail to address the responsibility for perpetration of non-state actors in addition to their responsibility for

⁷³² Cf. Andrew Clapham and Scott Jerbi, *op. cit.*; articles 25.3 of the Rome Statute of the International Criminal Court, 16, 17, and 41.2 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts of 2001, or 14, 15, 17, 18, 42.2, 61 and 62 of the draft articles on the responsibility of international organizations in its 2011 version (A/66/10); Concurring Opinion of Judge Leval to: United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010, pp. 7, 12, 17, 37, 57-58, 62, 68, 73-74.

assistance,⁷³³ or that someone may consider that an actor lacks the capacity to incur in secondary liability as a result of its supposedly not being bound by duties prohibiting its contribution to a primary violation. I disagree with this idea, but it has been implicitly endorsed before, as in the case of *Kiobel v. Royal Dutch Petroleum*.⁷³⁴

f) International criminal procedures are adjudicatory in nature and permit to address several violations in ways that respect the equality of multiple victims somewhat, because they allow for the prosecution of individuals involved with States or with collective entities or operating on their own. However, despite progresses,⁷³⁵ the narrow scope of victim participation and reparations present in the current stage of international criminal law,⁷³⁶ the existence of non-criminal violations of human dignity,⁷³⁷ and the fact that not even all serious non-state crimes are addressed internationally, make it difficult to consider those procedures a full replacement of other procedures, because they do not ensure all victims of non-state violations an effective and equal protection. Needless to say, some cases must have no criminal nature.

g) Lastly, the possibility that some non-state entities become parties to certain treaties protecting human dignity, that apart from regulating substantive duties can regulate contentious jurisdiction and competence of supervisory bodies to examine their conduct, can increase the protection of victims from those actors. This happens with the possibility of the European Union becoming a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, with the possibility that some international organizations become parties to the Convention on the Rights of Persons with Disabilities and to the Optional Protocol to the Convention on the Rights of Persons with Disabilities, with the consent that certain non-state entities may consent to be bound by Protocol I to the Geneva Conventions of 1949, or with the *jus ad tractatum* of some actors to celebrate arbitration agreements.⁷³⁸ Yet, these possibilities

⁷³³ Ibid., along with articles 4.3 and 7.1 of the Statute of the International Criminal Tribunal for the former Yugoslavia, 2.3 and 6.1 of the Statute of the International Criminal Tribunal for Rwanda, 2 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and 4 of the ILC draft articles on the responsibility of international organizations in its 2011 version.

⁷³⁴ Cf. United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010, pp. 21-43, 48-49.

⁷³⁵ Cf., for instance, the new version of article 34 of the European Convention on Human Rights pursuant to article 1 of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby; Rules of the Inter-American Commission on Human Rights on the Legal Assistance Fund of the Inter-American Human Rights System; Rules for the Operation of the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights.

⁷³⁶ Cf. Avril McDonald, "The Development of a Victim-Centered Approach to International Criminal Justice for Serious Violations of International Humanitarian Law", in John Carey et al. (eds.), *International Humanitarian Law: Prospects*, Transnational Publishers, Inc., 2006, pp. 262-265, 267-272, 275-276.

⁷³⁷ Cf. Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio histórico-crítico*, op. cit., pp. 169-170; Claire de Than and Edwin Shorts, op. cit., pp. 12-13; Human Rights Committee, General Comment No. 31, op. cit., para. 18.

⁷³⁸ Cf. articles 59.2 of the European Convention on Human Rights, 43 and 44 of the Convention on the Rights of Persons with Disabilities, 11 and 12 of the Optional Protocol to the Convention on the Rights of Persons with

may or may not be used, and they leave many other potential non-state offenses unaddressed (despite which their contribution and importance is significant).

All the previous possibilities improve protection to victims, but their intensity, effectiveness and likelihood of treating victims differ. The previous classification does not deny that other possibilities of protecting individuals from non-state actors that also overcome ideas and obstacles about alleged competence and jurisdictional constraints or the subjective scope of human rights may exist. Some mechanisms of a non-adjudicatory nature are explored in Chapter 8. The importance of contentious-adjudicatory mechanisms lies in their obligatory character when they are jurisdictional (judicial and arbitral),⁷³⁹ possibility of examination of non-state conduct in light of standards, and the possibility that some of them be triggered by victims, not depending on the initiative or acceptance of other entities. Restricting the defense of human dignity to such mechanisms would, however, be insufficient and incomplete, because they have some shortcomings, and other strategies have different advantages, as the greater possibility of tackling both causes and consequences of non-state threats.⁷⁴⁰ Reporting mechanisms without an adjudicatory character, for instance, have upheld that even actors without State-like powers and features must respect essential human rights.⁷⁴¹

Examples of some situations described above, in which organs have interpreted their powers in a way that allows them to overcome apparent jurisdictional limitations and grant greater protection to individuals from non-state threats, can be found in the jurisprudence of United Nations human rights Committees.

Disabilities, or 96.3of Protocol I to the Geneva Conventions of 1949; Commentaries of the ICRC to the aforementioned Protocol, paras. 3764-3769, 3774, where the ICRC mentions that “The declaration which the authority concerned must make is unilateral since it produces its effects irrespective of the conduct of the Contracting Party. On the other hand, it does not create merely unilateral obligations; it brings into force rights and duties between the two Parties to the conflict which flow from the Conventions and the Protocol [...] [the declaration involves] right to choose whether or not to submit to international humanitarian [p.1090] law, insofar as it goes beyond customary law [...]ny reservations the Contracting Party may have made will affect the relations between that Party and the authority making the declaration insofar as they are compatible with the object and purpose of the Conventions and of the Protocol [...] [the first effect of the declaration is that] The Conventions and the Protocol immediately come into force between the Contracting Party and the authority.” Moreover, on the capacity of non-state entities to be parties to international treaties, cf. International Law Commission, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, vol. II, 1996, pp. 188-190; International Law Commission, First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook of the International Law Commission*, vol. II, A/CN.4/144 and Add.1, 1962, pp. 31, 36; John R. Crook, “Abyei Arbitration—Final Award”, *ASIL Insights*, Vol. 13, Issue 15, 2009, in conjunction with: Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., at 622.

⁷³⁹ Cf. Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 607-608.

⁷⁴⁰ Cf. Amartya Sen., op. cit., at 345; *A more secure world: Our shared responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, United Nations, A/59/565, 2004, paras. 21, 22, 27, 59, 148, where persuasive, educative and other non-coercive measures embedded in a comprehensive strategy are mentioned as crucial for maintaining peace and security; Inter-American Commission on Human Rights, Press Release 53/11, 7 June 2011 (where it is mentioned that citizen security, which is a human rights issue, must be preserved and brought about through prevention and addressing the “underlying causes” of crime and violence); Chapters 4 and 8, *infra*.

⁷⁴¹ Cf. Tilman Rodehäuser, op. cit.

The Committee Against Torture, for instance, granted indirect protection that upheld the principle of equality and non-discrimination in the case of *Elmi v. Australia*, where it considered that:

“The Committee does not share the State party's view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in article 1 (i.e. pain or suffering 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, in this instance for discriminatory purposes). The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase “public officials or other persons acting in an official capacity” contained in article 1

[...]

The Committee further notes, on the basis of the information before it, that the area of Mogadishu where the Shikal mainly reside, and where the author is likely to reside if he ever reaches Mogadishu, is under the effective control of the Hawiye clan, which has established quasi-governmental institutions and provides a number of public services” (emphasis added).⁷⁴²

Another example of the protection of potential victims from non-state threats to their human rights is the case of *N. v. Sweden*, decided by the Third Section of the European Court of Human Rights. This case is of the utmost importance because, contrary to the limitations concerning the scope of protection present in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that limits the definition of the acts prohibited therein to the condition of involvement of States and a few other actors, the Third Section applied a norm that prohibits those same acts without having the limit that those violations be committed by or with relevant State or similar participation. Thereby, the Third Section provided protection to the applicant, who faced a risk of non-state violations if sent to Afghanistan, with no need of ascertaining whether the potential non-state offenders *de facto* resembled a State in some respects. In that regard, a relevant passage of the judgment mentions that:

“[I]n the special circumstances of the present case, the Court finds that there are substantial grounds for believing that if deported to Afghanistan, the applicant faces various cumulative risks of reprisals which fall under Article 3 of the Convention from her husband X, his family, her own family and from the Afghan society. Accordingly, the Court finds that the implementation of the deportation order against the applicant would give rise to a violation of Article 3 of the Convention”⁷⁴³ (emphasis added).

The jurisprudence of the Human Rights Committee provides one example of the conditioned direct protection that treats victims of non-state violations in a way more consistent

⁷⁴² Cf. Committee Against Torture, *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, CAT/C/22/D/120/1998, op. cit., pars 6.5-7.

⁷⁴³ Cf. European Court of Human Rights, *Case of N. v. Sweden*, Application no. 23505/09, Judgment, 20 July 2010, para. 62.

with the principle of equality and non-discrimination. It is found in its concluding observations on the situation of human rights in Kosovo on 14 August 2006 ('the UNMIK case'), which said:

"The Committee notes that certain problems resulting from the role of UNMIK as an interim administration and, at the same time, a United Nations body whose staff members enjoy privileges and immunities, the gradual transfer of competencies from UNMIK to the Provisional Institutions of Self-Government (PISG), the existence of Serbian parallel court and administrative structures in some parts of Kosovo, and the uncertainty about the future status of Kosovo raise questions of accountability and impede the implementation of the Covenant in Kosovo. However, the Committee recalls general comment No. 26 (1977) on continuity of obligations which states that the rights guaranteed under the Covenant belong to the people living in the territory of a State party, and that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding changes in the administration of that territory. The protection and promotion of human rights is one of the main responsibilities conferred on UNMIK under Security Council resolution 1244 (1999). Moreover, as part of the applicable law in Kosovo and of the Constitutional Framework for the Provisional Institutions of Self-Government, the Covenant is binding on PISG. It follows that UNMIK, as well as PISG, or any future administration in Kosovo, are bound to respect and to ensure to all individuals within the territory of Kosovo and subject to their jurisdiction the rights recognized in the Covenant"⁷⁴⁴ (emphasis added).

The previous logic extends supervision of human rights compliance to non-state performance. However, the reference to the human rights responsibilities of actors as the UNMIK and the PISG should not be understood as implying that unless an entity has *express* human rights obligations its conduct cannot be internationally supervised. The broad competence that the Committee recognized it had should be construed as existing when the entity controlling or administering a territory *ought* to have human rights duties or has *implied* duties. Those arise precisely with the status of an actor in a territory whose inhabitants have internationally recognized inherent rights and guarantees, which remain regardless of changes of actors with powers over or functions in that territory.

A teleological interpretation could indicate that, at least when an actor exerts control over a territory with preexisting human rights guarantees, it implicitly consents to human rights obligations and/or has to abide by them as a burden that comes with power and administration, which ought to be exercised in accordance with the respect owed to dignity and its protection when normative and factual expectations to this effect exist.⁷⁴⁵ This generation of duties does not prejudice about the lawfulness of the control, because it is an entirely different matter. This is analogous to what happens in International Humanitarian Law, according to which non-state armed actors must comply with its norms but do not have their status altered as a result. It is convenient to mention that common Article 3 to the Geneva Conventions of 1949 declares that:

⁷⁴⁴ Cf. Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006, para. 4.

⁷⁴⁵ Cf. Anne Peters, "The Merits of Global Constitutionalism", op. cit., pp. 402, 405, 407, 410.

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [...]

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict" (emphasis added).

Sometimes, extended protection corresponds to what has been called the lateral human rights protection.⁷⁴⁶ It is different from indirect and intermediate horizontal effects because it is directly triggered against actors with authority or superior power, and such protection is not subject to a State being responsible for breaching its obligations.⁷⁴⁷ In other cases, what is enforced is a State duty to not expose someone to State or non-state threats. Still, direct protection not dependent on formal or *de facto* authority is permitted by some other mechanisms and norms.

Since all victims and not only victims of States must be protected, the different categories of protection examined above are important, because they permit more victims to be effectively protected.⁷⁴⁸ The combination of lateral, horizontal and vertical (against the State) remedies and actions of protection can lead to what I call a transversal or complete protection of human rights, covering all spheres of relations, be them with individuals or collective, formal or informal, public or private entities, in different situations, relations and roles.⁷⁴⁹

The content and effectiveness of the concrete right to equality and non-discrimination, which is an offspring of the principle with the same name, must be protected from non-state violations and requires that international law respects and protect it, due to human rights implications concerning non-state entities and international law and the consistency they demand. Therefore, it is necessary to assess if the content of international human rights law is compatible with the principle and right of equality of all victims or not.

⁷⁴⁶ Cf. Jennifer Corrin, *op. cit.*, pp. 67-70.

⁷⁴⁷ Cf. *Ibid.*, pp. 33-34.

⁷⁴⁸ Besides *ex post facto* remedies and preventive/precautionary protection from non-state threats, that can be offered through judicially-ordered and other mechanisms, there are quasi-direct supervisions and measures of protection, i.e. that offered when non-state behavior is closely examined in order to command a functional authority (State or otherwise) to do something or to assess compliance with its duties. Additionally, a more intense and direct evaluation of non-state conduct is also possible, either when ascertaining responsibility due to complicity of an entity with State or non-state misdeeds or to perpetration.

⁷⁴⁹ The transversal or comprehensive approach operates as a framework that includes horizontal, vertical and lateral effects of humanitarian (not just IHL) law across levels of governance and legal systems, with the aim of offering effective protection to all victims and properly responding to threats or violations in light of their seriousness and the needs of human beings, taking into account resources and some criteria (cf. Chapter 4, *infra*).

3.2. The equality of *all* victims and its incompatibility with State-centered protection paradigms

The hierarchy, content and features of the principle of equality and non-discrimination make it have effects in relation to non-state actors and the international and domestic legal systems, which must be compatible with it. In turn, the right with the same name must be effectively protected from every violation against it by law, and therefore so must be protected all human rights and guarantees, which must be respected and protected in light of those principle and right.

One relevant notion in light of which normative compliance with the principle of equality is to be assessed is that of indirect discrimination. It serves to describe how measures or actions that are adopted without the intention of discriminating against a group or individual may nevertheless lead to situations that are contrary to equality and non-discrimination, in which case those measures or attitudes would be discriminatory and must cease. This concept has been recognized by regional human rights Courts and by the Committee on Economic, Social and Cultural Rights. It refers to measures that generate or support unjustified inequalities even if this effect is not intended or the measures are apparently neutral. Concerning this, the Inter-American Court of Human Rights has mentioned that:

“States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons.”⁷⁵⁰

Likewise, the Committee on Economic, Social and Cultural Rights mentioned that “[i]ndirect discrimination occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented”.⁷⁵¹ In more detail, the European Court of Human Rights, quoting the definition offered by the European Commission against Racism and Intolerance⁷⁵², acknowledged this notion, explained by some of its judges in the following manner:

“[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of an ethnic origin at a particular disadvantage compared with other

⁷⁵⁰ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, par 103.

⁷⁵¹ Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 16, para. 13.

⁷⁵² Cf. European Court of Human Rights, Grand Chamber, *Case of Oršuš and other v. Croatia*, Judgment, op. cit., para. 85.

persons, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate.”⁷⁵³

When examining compliance with duties on the way in which victims of different actors are treated, the peremptory principle of equality is relevant for different reasons. First of all, even if the existence of differences concerning measures to respond to different violations does not seek to discriminate against some victims, it may still be discriminatory if *reasonable distinctions* that are necessary and proportional do not exist. Secondly, as was explained by the European Court of Human Rights in the Case of *Oršuš and Others v. Croatia*, it is possible to consider that in some cases indirect discrimination exists *prima facie*, placing the burden of proof on the authors of a measure, or is deemed to be present “without statistical evidence” when it is evident that a difference of treatment in respect of some victims exists, case in which its proportionality must be examined.⁷⁵⁴

Concerning this, many human rights mechanisms treat victims quite differently, permitting only those affected by States to use them. This differential treatment is justified by some due to the scarcity of resources available to international bodies or by arguing that “only” States can be bound by human rights obligations. The latter argument is false, and the first is an objective criterion according to which the scarcity of international resources would make it necessary to choose some victims to be protected by certain mechanisms. Still, those victims that can resort to them should be chosen with reasonable criteria that grant effective protection to at least core rights and victims in serious cases. Additionally, limiting international remedies to victims of States will be contrary to human rights principles and foundations whenever this leaves them with no effective and accessible remedies of protection whatsoever or when this election expressly or implicitly denies the recognition of victimhood of those who cannot enjoy human rights due to non-state abuses, for the reasons studied in the previous chapters.

Moreover, only allowing State conduct to be examined often impedes a fair or effective operation of even traditional mechanisms. For instance, some authors argue that the excessive state-centeredness of many judicial and quasi-judicial mechanisms of human rights protection make it difficult to properly examine cases in which actors as international organizations participate in violations,⁷⁵⁵ and also that this can lead to artificial decisions or to the impossibility

⁷⁵³ Cf. Joint Party Dissenting Opinion of Judges Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić to: European Court of Human Rights, Grand Chamber, *Case of Oršuš and other v. Croatia*, Judgment, 16 March 2010, para. 2.

⁷⁵⁴ Cf. European Court of Human Rights, Grand Chamber, *Case of Oršuš and other v. Croatia*, Judgment, op. cit., paras. 153-155.

⁷⁵⁵ Cf. José Manuel Cortés, op. cit., pp. 41-43; Nicolás Carrillo, “The Links between the Responsibility of international organizations and the Quest towards a More Reasonable and Humane International Legal System”, op. cit., at 448.

to fully protect victims due to the lack of *jus standi* of main or relevant offenders or because of the lack of accessory responsibility of States in some cases.⁷⁵⁶

On the other hand, while sometimes it may be justified to limit the *jus* or *locus standi* of certain mechanisms to some victims if conditions are met, this assertion cannot be used to ignore that international legal mechanisms can certainly address non-state abuses directly, reason why distinctions of how victims are treated must thoroughly respect equality and non-discrimination.

This is exemplified by the actions of International Criminal Tribunals and the International Criminal Court, which are international entities that supervise compliance with international criminal norms that frequently criminalize non-state violations of human rights, protecting them in this manner. Those criminal law strategies and norms are simply one of the multiple dimensions of the legal protection of human dignity, and different remedies may be found in them.

As commented by the European Court of Human Rights, criminal norms and measures deter violations that sometimes are contrary to human rights and therefore protect those rights, even if private entities are the ones participating in a violation.⁷⁵⁷ Additionally, according to Santiago Villalpando, categories as that of crimes against humanity “became the cornerstone of the protection of human rights through international criminal law”⁷⁵⁸. These arguments confirm that international legal mechanisms of protection may directly respond to non-state abuses. To not be discriminatory, at least serious cases, criminal or not, that are similarly worrisome regardless of who participates in them, should always be so addressed.

Certainly, in general terms international direct protection against non-state abuses has not been and cannot be limited to international criminal measures, the scope of which is limited. As examined before, in non-criminal scenarios international supervisory bodies have examined the conduct of a non-state actor from a human rights perspective, as in the cases of the UNMIK, the *Elmi v. Australia* case or in the case of *N. v. Sweden*.

In sum, victims can be entitled to or permitted to request international legal protection from non-state abuses, which responds to the exigency that no individual is left utterly unprotected and has hope of legal protection. Additionally, every differential treatment of victims must be lawful and consistent with equality and non-discrimination, and therefore be reasonable, distinguish different situations, and be proportionate, which implies that distinctions pursue a

⁷⁵⁶ This problem is even more serious when a State is wrongfully acquitted of alleged breaches of humanitarian norms, as in my opinion happened in: European Court of Human Rights, Grand Chamber, *Case of Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Applications no. 71412/01 and 78166/01, Decision as to Admissibility, 2 May 2007, paras. 29, 121, 141, 149-152; Draft articles on the responsibility of international organizations, with commentaries, A/66/10, 2011, pp. 20-24 –especially paras. 8-10 regarding article 7- (where the notion of effective control is properly considered more proper than that of “ultimate control”).

⁷⁵⁷ Cf. European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, op. cit., pars 218, 285.

⁷⁵⁸ Cf. Santiago Villalpando, op. cit., at 398.

legitimate aim, such as for instance the protection of the victims of abuses of power or serious violations, without denying the recognition of other victims or precluding their protection, which *must* be given by alternative *effective* mechanisms.

To my mind, this demands that domestic protection is *always* available and that (unlike what John H. Knox considers)⁷⁵⁹ all non-state violations are (either expressly or implicitly in light of legal foundations and principles) branded as *unlawful* under *jus gentium* from a substantive point of view. Additionally, in my opinion there are events in which international law *must* procedurally deal with non-state violations directly. They are serious violations, i.e. violations of peremptory law, systematic or massive violations, violations that amount to criminal offenses, or violations that are worrisome due to their effects, features, or other elements. Additionally, those violations in which offenders operate as authorities over victims, either formally or *de facto*, must *prima facie* be addressed through strong procedural mechanisms that can protect victims. Those strong mechanisms are domestic and sometimes international.

Apart from all non-state violations necessarily being unlawful and considerations about indirect protection from them and direct protection by non-state authorities, there are events in which non-state international obligations and responsibilities must not only exist but be regulated in detail: violations committed in a transnational manner or by actors operating transnationally; violations against frequently or otherwise specially vulnerable individuals and rights; and violations by powerful actors that have a serious risk of impunity, are some of them, among other cases.

Being legal obligations necessary to ensure that all violations are unlawful and responded to in different legal systems, non-state social responsibility is not a satisfactory replacement of legal responsibility, given its shortcomings concerning access to remedies and other elements that are relevant for the protection of victims, including how many of its initiatives are entirely defined by non-state actors and/or may not address all relevant issues.⁷⁶⁰ This does not mean that public legal responsibility of non-state entities is always effective or the only strategy needed to protect human rights.

As argued before, completely denying *any* international legal protection (substantive or procedural) to some victims discriminates against them, at the very least indirectly, and is thus contrary to *jus cogens*. This demands interpretations that make law respect the equality of all victims or, if this is not possible, its modification.

⁷⁵⁹ Cf. John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 18-30.

⁷⁶⁰ Cf. August Reinisch, op. cit., pp. 52-53; Alexandra Gatto, op. cit., pp. 429-432; Joanne Bauer, "Does Human Rights Language Matter?", *CSRWire*, 2013, available at: <http://www.csrwire.com/blog/posts/850-does-human-rights-language-matter> (last checked: 17 May 2013).

About mechanisms of protection, it is also convenient to add that they should be designed taking into account the whole framework of global spaces⁷⁶¹ of interaction between different actors, mechanisms and legal systems, to determine which mechanisms are needed and how they must complement others.

In this regard, authors as Janne Nijman, Wolfgang Friedmann, Anna Badia Martí and Kofi Annan, among others, agree that in order to further global and common goals and protect victims of actors as transnational criminal groups, States must not act in isolation but cooperate with other States and actors, as international organizations or NGOs, legitimately taking advantage of opportunities offered by globalization, especially because some offenders take advantages of them.⁷⁶² This is endorsed by theories of Global Public Goods and other legal studies, that indicate that some services and guarantees, including the protection of human rights, require the participation of multiple actors; and that joint-actions (related to normative, administrative, implementation and other issues) in which several actors participate are relevant and possible.⁷⁶³ Likewise, public and private actors and normative systems must cooperate with others and must not operate alone in isolation for them to have chances of effectively protecting victims of abuses of non-state entities, that frequently operate in a global and transnational manner or otherwise act in ways that that allows them to avoid isolated controls.

Since the protection of victims cannot be isolated, victims cannot be considered to *only* be able to seek domestic protection. This would amount to making them lack effective prospects of protection in multiple important cases, given the inability of States in some circumstances to

⁷⁶¹ On global spaces of legal interaction, see Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law", op. cit., pp. 24-25, 27, 30, 34; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., pp. 15, 17-19, 28, 32, 34, 40, 45, 47.

⁷⁶² Cf. Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion", op. cit., pp. 133-134, 141-144; Kofi A. Annan, "Foreword", op. cit., pp. iii-iv; Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food (art. 11)*, E/C.12/1999/5, 12 May 1999, para. 29; Anna Badia Martí, op. cit., pp. 334-338, 342-343.

⁷⁶³ Cf. Inge Kaul et al., "Why Do Global Public Goods Matter Today?", op. cit., pp. 4-6, 9-10, 16; Meghnad Desai, "Public Goods: A Historical Perspective", in Inge Kaul et al. (eds.), *Providing Global Public Goods*, Oxford University Press, 2003, pp. 63-64, 66, 74; Inge Kaul et al., "How to Improve the Provision of Global Public Goods", op. cit., pp. 29, 44; Inge Kaul and Ronald U. Mendoza, "Advancing the Concept of Public Goods", op. cit., pp. 83-86, 97-98, 100, 106; Luis Pérez-Prat Durbán, op. cit.; Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 2003, pp. 65-66; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors: Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, The Hague Conference, 2010, pp. 8-17; International Law Association, Non-State Actors Committee, *Report: Preliminary issues for the ILA Conference in Rio de Janeiro, August 2008*, 2008, pp. 2-3; Pierre Calame, op. cit., at 19-20. On the possibility of the participation of non-state entities in the promotion of the enjoyment of human rights, see also: Committee on Economic, Social and Cultural Rights, General Comment No. 14, paras. 37, 42, 56; Committee on Economic, Social and Cultural Rights, General Comment No. 13, *The right to education (article 13 of the Covenant)*, E/C.12/1999/10, 8 December 1999, paras. 4, 50; Committee on Economic, Social and Cultural Rights, General Comment No. 15, op. cit., paras. 27, 49, 50; Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001, para. 104. On the need to check and complement non-state initiatives and provision of goods required by the public, cf. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, op. cit., A/HRC/8/5, op. cit., para. 2.

protect individuals no matter how hard they try, and because of the fact that offenders often escape the reach of domestic legal controls due to factors as: their excessive power –often possible due to globalization-, a transnational *modus operandi* that permits them to go abroad to flee from prosecution, the comparative weakness of States in relation to some groups and entities, or even to the chance of failure of domestic action, deliberate or not. This is why substantive and procedural international action is required (at least in the cases explored above, related to serious and other violations) to operate, in accordance to criteria of subsidiarity and complementarity.

From the perspective of victims, when international law does not engage with non-state abuses in procedural terms, it must still brand them as contrary to human dignity, recognizing victims as such for them to have access to and claim from States and other authorities reparations and protection they are entitled to (including transnational litigation or extraterritorial jurisdiction).

From the perspective of those authorities, they are under an obligation to protect victims even if they do not request this, and the recognition of non-state violations alerts them to act. By doing so, authorities fulfill a role of protecting international and common legal goods. After all, States and other actors can act as agents of the implementation and guarantee of international law, as recognized by Kelsen, Scelle or Cassese, among others.⁷⁶⁴

From the perspective of potential offenders, the identification of agents of violation as such, with the negative symbolic impact and exposure to sanctions this involves, is not to be underestimated, given its dissuasive character, which can enhance the protection of rights. *All* of the previous three perspectives must be taken into account when determining if legal protection treats all victims in accordance with their inherent equality.

What I call the *Rantsev paradox* serves to illustrate this. In the *Rantsev* case, the European Court of Human Rights found that even though Cyprus, one of the respondent States, had breached procedural human rights duties incumbent upon it to protect the right to life, the death of a victim was caused by another entity and that therefore the State did not have to repair the material damages arising from this violation⁷⁶⁵ (I disagree with this consideration insofar as I hold that States that are responsible for breaching procedural duties have the duty to repair damages as well).

⁷⁶⁴ Cf. Antonio Cassese, "Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law", op. cit., pp. 220-221, 225-231.

⁷⁶⁵ Cf. European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Judgment, op. cit., paras. 234-235, 241-242, 341.

Because of how events happened, the father of the deceased, who was the applicant, received no reparations for material damages caused by the death of his daughter, and yet domestic mechanisms proved to be ineffective,⁷⁶⁶ with the applicant having had no proper *complete and integral* reparation, to which he was entitled.⁷⁶⁷

In that case, the State did not carry out investigations diligently but, even if it did, given the frequently transnational operational nature of the violations (trafficking of human beings),⁷⁶⁸ it could have been unable to secure reparations to the indirect victim. In both scenarios, the victim is not completely protected and repaired. This confirms that mere State responsibility of a vicarious nature, based on notions of due diligence or stricter obligations (arising out of risks created by the State, the vulnerability of a victim, or the guarantor position of the State), is a necessary but insufficient means of protecting victims from non-state violations, that must be complemented by other measures. A critical analysis also indicates that *all those involved* in a violation, even accomplices, must repair victims, especially when this is indispensable for the full and effective reparations victims are entitled to.

The Rantsev paradox illustrates how domestic law alone cannot always fully protect victims of non-state violations, especially in a globalized, multi-actor and interdependent world,⁷⁶⁹ due to factors as unwillingness or inability of States to protect.⁷⁷⁰ This is one of the reasons why international criminal tribunals and courts have been set up: to respond to internationally relevant crimes that attack the enjoyment of human rights given the possibility that they are not properly tackled domestically. As Antonio Cassese rightly said:

“An international criminal tribunal may [...] do justice where national jurisdictions are unable to do so and where victims would otherwise have no remedy.”⁷⁷¹

⁷⁶⁶ Cf. *Ibid.*

⁷⁶⁷ Cf. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Preamble and paras. 15-18; Theo van Boven, “The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, at 4; Commission on Human Rights, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur*, E/CN.4/Sub.2/1993/8, 2 July 1993, paras. 19, 28, 30, 33, 48, 88, 90, 128.

⁷⁶⁸ Cf. European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Judgment, *op. cit.*, pars 146-155, 199, 272-289, in light of articles 3 and 4 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

⁷⁶⁹ Cf. International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors*, *op. cit.*, at 4; Celestino del Arenal, *op. cit.*, pp. 32-40, 62-66; Kofi A. Annan, “Foreword”, *op. cit.*, pp. iii-iv; Anna Badia Martí, *op. cit.*, at 319; Eric Suy, “New Players in International Relations”, in Gerard Kreijen et al. (eds.), *State, Sovereignty, and International Governance*, Oxford University Press, 2002, at 382; Gunther Teubner, *op. cit.*, at 7.

⁷⁷⁰ Cf. article 17 of the Rome Statute of the International Criminal Court, that recognizes and addresses this reality.

⁷⁷¹ Cf. Antonio Cassese, “On the Current Trend towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law”, *European Journal of International Law*, Vol. 9, 1998, at 9.

In consequence, absolute lack of international condemnation (at least implicitly) of non-state violations goes against the equality of victims, and lack of international procedural reaction is also contrary to it regarding *serious cases*. Such omissions place disproportionate risks and burdens on victims, ignoring that the legitimacy of norms and actors depends on consistency with human dignity. As a result, even though resource difficulties and even extra-legal considerations may suggest that protection of some victims at the international level can be limited in some cases,⁷⁷² that protection cannot be fully absent in substantive and sometimes procedural terms, and it must be guaranteed that alternative effective measures are always available, as required by human rights and *jus cogens* demands.

In relation to the link between the protection of all victims and equality and non-discrimination, Jessica Almqvist has considered that human rights norms tend to protect victims of State violations and ignore others, whereas counter-terrorism norms tend to benefit victims of terrorists and not so much victims of counter-terrorist measures (which is ironic, since those measures can and must be compatible with human rights).⁷⁷³ She convincingly argues that for the sake of the equality of all victims, these inconsistencies must be carefully examined and addressed.⁷⁷⁴ In my opinion, this is necessary to determine if they are discriminatory, in which case they must be modified to adjust law to peremptory demands. The Inter-American Commission on Human Rights, for its part, has also considered that the protection of victims against some non-state violations is intimately related to the principle of and right to equality and non-discrimination, as commented in its Report No. 80/11.⁷⁷⁵

The cases examined by Almqvist illustrate the problems of distinctions in the treatment of victims in different branches or “parcels”, which may be exclusively concerned with protecting some victims, leading to disparaged and contradictory practices, which make the prospect of international protection, sometimes the only one left, highly dependent on having the “fortune” of being attacked by the entity against which protection is given in one branch. A unified vision centered on human dignity that counters fragmentation would be preferable. The cases examined by Almqvist also serve to highlight how different measures found in multiple regimes and branches should complement each other to promote and seek achieve the purpose of effectively

⁷⁷² Cf. Avril McDonald, *op. cit.*, at 276.

⁷⁷³ Cf. Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.LN/II.116, 22 October 2002, paras. 2-5; Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et al. v. Peru*, Judgment, 30 May 1999, para. 89.

⁷⁷⁴ Cf. Jessica Almqvist, “Facing the Victims in the Global Fight against Terrorism”, *FRIDE Working Paper 18*, 2006, pp. 8-17.

⁷⁷⁵ Inter-American Commission on Human Rights, *Case of Jessica Lenahan (Gonzalez) et al. v. United States*, Case 12.626, Merits Report No. 80/11, *op. cit.*, paras. 118-120.

protecting human dignity in universal terms, eliminating gaps that can leave any victim unprotected.

The underlying logic of the equal protection of all victims, that goes against discriminating some of them, is that all victims of similar violations must have at least an essential or minimum effective level of protection, the exact content of which depends on factors as seriousness or probability of protection in one level of governance or legal system. Additionally, every single violation must be at least recognized internationally and protected domestically, and non-state reactions against it permitted.

This minimum includes: (1) the *recognition* of all victims and unlawfulness of non-state abuses; (2) measures to seek the cessation of an ongoing violation and non-repetition, which require contacting non-state actors involved in violations to be effective, especially because they must be prevented from behaving in this manner the future and must repair victims; and (3) measures to ensure that authorities and actors seek to prevent all violations and repair victims and sanction offenders when they occur. This requires involving non-state offenders, principal or accessory, in a direct or at least indirect manner, because otherwise reparations will never be complete and effective. For example, concerning the right to know the truth, only some non-state actors involved in an abuse may know some information about a violation, with States not being aware of it.

Nonetheless, the requirement of universality in the dimension of protecting all victims is not limited to the factor of the State or non-state identity of actors against which protection must be given. In this fashion, for example, judges of the European Court of Human Rights have declared that protection must be given to victims under both civil and criminal proceedings, in the sense that defendants should not be able to rely on immunity to evade responsibility when the violation of peremptory norms is at stake in any of those proceedings, because otherwise victims would be left unprotected.⁷⁷⁶ Altogether, the exclusion of *any* victim from access to and the prospect of meaningful and effective protection, whatever her situation is, amounts to discrimination.

The full protection of all victims largely benefits individuals and is required by victims. It helps victims not only in material but also in psychological and other ways, preventing that on top of their original suffering they feel abandoned by law. And, as said before, not protecting some victims may generate the phenomenon of competition between various victims that clash with

⁷⁷⁶ Cf. Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić Furundzija to: European Court of Human Rights, *Case of Al-Adsani v. The United Kingdom*, Judgment, 21 November 2001, para. 4.

others to be the ones that receive reparations or symbolic and legal recognition,⁷⁷⁷ to which all are entitled, let it be said.

Besides re-victimizing victims of non-state violations, not recognizing the violation of their rights and their suffering prevents actions that can be used when violations are identified from working, and perpetuates a status quo in which some victims do not have access to remedies available to “officially recognized” victims, embittering them and prompting disavowals or rejection of the legitimacy of human rights law, perceived as unfair and its interpreters as biased for not addressing their plight. To prevent this from happening, at least a minimum level of effective protection must be ensured, given in a way that respects the equality of all victims, as argued in this Chapter.

International practice demonstrates how abhorrent discrimination is considered. The existence of vulnerable rights and persons explains why there are specialized norms and mechanisms that seek to protect certain dimensions of rights exposed to certain violations and vulnerable persons that are usually discriminated against. This includes specialized human rights protecting migrants and women, or specialized norms protecting individuals from racial discrimination, slavery, apartheid, or certain crimes, among others, that seek to bring about a situation of equality.

For the international legal system to truly offer a complete non-discriminatory treatment, it must do what it exacts from other legal systems: it must not have norms or practices that incur in discriminatory treatments. Refusing to address all violations (measures beyond the recognition of all violations can often be subject to differential treatment) is contradictory and contrary to *jus cogens*, especially because it is recognized that peremptory law demands protection from non-state discrimination and other violations by States, functional or *de facto* authorities and from other actors; and those with positions of authority *must treat victims of its own agents and third parties in accordance with the principle of equality and non-discrimination*.

It is necessary to recognize that non-state entities *can* discriminate or engage in human rights abuses. Given the possibility of States or other authorities being unwilling or unable to properly deal with this problem, victims must be protected in effective ways, which must always include at least an international legal recognition of all violations and authorization and command to domestic authorities to protect victims from abuses that are internationally relevant due to the legal goods they impact on. As explained in this Chapter, certain violations *must* receive a more intense international protection for international norms to not discriminate against its victims. To insist on different treatments of victims that are disproportionate, as the refusal to recognize

⁷⁷⁷ Cf. Luc Huyse, *op. cit.*, at 64.

victims of non-state entities and the unlawfulness of non-state violations, is therefore unacceptable and outdated.

CHAPTER 4. FEATURES AND OPERATION OF A MULTI-LEVEL AND MULTI-ACTOR FRAMEWORK OF PROTECTION OF HUMAN DIGNITY FROM NON-STATE ABUSES

4.1. Necessity and conditions of the creation of legal capacities of non-state actors required to protect human dignity

Whether obligations or other legal capacities of non-state entities created in international law will be respected or taken into account by them is related to questions about the effectiveness of law. This explains why authors as Marth Noortmann and Cedric Ryngaert have examined if those duties can be effective and modify the behavior of non-state actors.⁷⁷⁸

Notwithstanding its relevance, it would be convenient to reformulate it. Rather than asking *at the outset* if those and other pertinent legal capacities of non-state entities will be effective, it ought to be asked first whether such capacities can be created, are pertinent, *necessary*, fair, legitimate and offer reasonable prospects of protection (i.e. their creation is a pertinent measure of protection).⁷⁷⁹

If the answers are affirmative, then questions of the practical effectiveness are to be asked. In those events the importance of the capacity would have been established already, because they seek to address pressing legal and social problems and abuses of power (structural or on a case-by-case basis). Therefore, questions about effectiveness asked later should not be meant as suggesting the elimination or lack of creation of a capacity if it is not effective, but should seek to ascertain *how* to make them effectively contribute to the protection of human dignity. For instance, it can be asked if addressees will heed regulations or if persuasion or enforcement mechanics should be in place.

That being said, the analysis of prospects of effectiveness and pertinence must necessarily be performed, lest simple distractions are not created.

Certainly, capacities of non-state actors in this field must be designed to protect human dignity fully in a way that is not fallacious and simply permits actors to take advantage of their existence for propagandistic or partisan purposes. It is also important to recall how the protection of human dignity, which must be universal and respectful of the equality and non-conditional character of the inherent and inalienable worth of all human beings, demands defending individuals from all threats against their essential rights, be them State or non-state threats.

⁷⁷⁸ Cf. Math Noortmann and Cedric Ryngaert, "Introduction: Non-State Actors: International Law's Problematic Case", in Math Noortmann and Cedric Ryngaert (eds.), *Non-State Actor Dynamics in International Law*, Ashgate, 2010, at 2.

⁷⁷⁹ Cf. Chapter 5, *infra*. I consider that the conditions on the legality of restrictions and suspensions of duties regarding human rights are applicable to the placement of obligations on non-state entities when they can affect their human or fundamental rights.

In connection with these ideas, it is useful to mention, as commented by Thomas Franck, that there are both (procedural) legitimacy and (substantive or material) fairness criteria with which to evaluate international law. He employed the term legitimacy to refer to the openness, adequacy and publicness of processes leading to legal decisions (lawmaking ones or otherwise, in my opinion), and considers that substantive fairness alludes to the material justice of a norm (which he analyzes in terms of redistribution, considering that naturalistic or dogmatic assertions of justice may be problematic, idea with which I disagree because law can have substantive problems unrelated to redistribution).⁷⁸⁰ It is certainly convenient to distinguish between the procedural and the correctness of the content of a norm from the perspective of meta-legal considerations and also from a legal standpoint (taking into account publicness, rule of law, and human rights considerations, at the very least).⁷⁸¹

In light of the distinction between procedural and material justice, those norms and practices according to which only States can violate international law and human rights are both illegitimate and unfair: they disempower individuals who could otherwise invoke international norms to claim protection; discriminate against some victims; fail to reflect reality and to address its problems and the real needs of individuals, facilitating the impunity of violations against it; foster partisanship and strategic manipulations of the human rights discourse for strategic purposes (for instance, when those that oppose a State condemn it but refuse to admit that those opposing it can also violate human rights, which entails double standards); and lead to normative, factual and axiological contradictions due to the state-centeredness of that discourse, that cannot be reconciled with the universalist foundations and values of human rights and guarantees.

Therefore, the dignity of all human beings must be protected from all potential abuses (at the lawmaking and precautionary levels) and from all entities that violate norms and principles founded upon it (at the *ex post facto* implementation level). Concerning procedural legitimacy, individuals as stakeholders, and non-state entities interested in the protection of dignity, must have a say in the matter and some input and participation in the human rights lawmaking and implementation mechanisms; and those who voice for equal protection should not be excluded.

Moreover, it is necessary to regulate the conduct of non-state entities, which may be powerful or influential enough to merit this attention in general terms,⁷⁸² whereas other actors not so powerful or that do not violate human rights frequently must also have duties and legal

⁷⁸⁰ Cf. Thomas M. Franck, *Fairness in International Law and Institutions*, op. cit., pp. 17-18.

⁷⁸¹ Cf. Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law", op. cit., pp. 31-33; Janne E. Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", op. cit., pp. 10-11, 13-16.

⁷⁸² Cf. Janne E. Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", op. cit., pp. 3-4, 9-19, 40.

capacities so as to protect human dignity from their potential abuses, which affect international legal goods. This must be done in accordance with the principle of legality and other conditions.

Global governance and global administrative law theories, along with some human rights and international legal scholars, have defended the necessity of regulating relevant non-state conduct.⁷⁸³ For instance, Elena Pariotti mentions how attention paid to the protection of human rights *vis-à-vis* non-state threats that takes into account the contribution of non-state entities has shifted focus from formality and government (which is just one of the possible offenders or promoters of those rights) to governance, taking into account new global realities.⁷⁸⁴

It must be added that failing to regulate relevant non-state behavior directly or (in some cases) at least indirectly is not only contrary to legal principles but may also encourage those misdeeds and make it difficult to protect legal interests and properly tackle real problems.⁷⁸⁵ It is necessary to take account, for instance, that States can be manipulated by non-state actors, perpetrate abuses in conjunction with them, or be weaker than them.⁷⁸⁶

Just as the principle of equality and non-discrimination may permit a reinforced protection of some victims, not all possible violations attributable to non-state actors will be addressed by express specialized obligations and procedural burdens that complement their general duties (discussed in Chapter 6). Indeed, according to John Knox, the horizontal protection of human rights can have different levels of international legal involvement with varying intensity: the first level encompasses general State obligations to prevent and respond to non-state threats to human dignity; the second one comprises international obligations and mechanisms on the subject with a more detailed content. Thirdly, there may be direct international obligations or legal burdens of non-state actors; and the most intense level deals with fora and mechanisms that permit a direct international examination of non-state conduct.⁷⁸⁷ In my opinion, there is a parallel or fifth dimension, related to promotion and protection activities carried out by non-state actors, which must be permitted, that complements the previous mechanisms and obligations.

The role of local authorities in the protection of individuals from all abuses is important not only because of possible resource constraints in the international level, but also because of

⁷⁸³ Ibid.

⁷⁸⁴ Cf. Elena Pariotti, *op. cit.*, pp. 96, 105.

⁷⁸⁵ Analyze in light of: Fred Halliday, *op. cit.*, at 37; Math Noortmann and Cedric Ryngaert, "Introduction: Non-State Actors: International Law's Problematic Case", *op. cit.*, at 3; Janne E. Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", *op. cit.*, pp. 14, 40; Kofi A. Annan, "Foreword", *op. cit.*, at iv.

⁷⁸⁶ Cf. Math Noortmann and Cedric Ryngaert, "Introduction: Non-State Actors: International Law's Problematic Case", *op. cit.*, at 3; Francisco Galindo Vélez, *op. cit.*, pp. 125-126; Alexandra Gatto, *supra*, at 423; August Reinisch, *op. cit.*, pp. 54, 74-75.

⁷⁸⁷ Cf. John H. Knox, "Horizontal Human Rights Law", *op. cit.*, pp. 27-31.

the immediacy of their actions and their being in principle better suited to examine complaints due to their proximity with cases, victims and offenders.⁷⁸⁸

However, it is necessary that domestic action is complemented by international and transnational mechanisms, because those authorities or their legal systems may ignore or be unable to live up to the demands of global and international legal values and guarantees, despite the need to give a real hope of effective protection to victims even if domestic authorities are negligent or cannot respond to abuses (being hopelessness and despair enemies of peace and dignity).⁷⁸⁹ In sum, domestic action can represent global interests,⁷⁹⁰ but complementary alternative effective legal protection must be available (how it is provided may differ in some cases), as required by the human right to an effective remedy.⁷⁹¹

This reasoning makes it necessary to explore when direct international non-state obligations (the fourth or more intense level of horizontal protection) must exist and complement other strategies.

Just as they can affect interests of the world community for better or worse and this makes them relevant actors,⁷⁹² non-state entities can impact on the protection of human dignity in a positive or negative manner. Being their violations legally relevant, their contribution to the protection of dignity benefits an essential legal good and is thus equally relevant.

That relevance is due to the fact that the respect and protection of human dignity is a central international legal goal that must determine the work and content of international law. This makes it necessary for international law to prevent all violations through education, deterrence and enforcement, among others, and for all victims to be repaired. Since no victim can be ignored, which would be illegitimate and unjust, leading to loss of support, that law cannot permit its selective use or its being a tool to further partisan, ideological, theoretical or political ends of some groups in ways that are detrimental to some victims.⁷⁹³ Therefore, theoretical constructions

⁷⁸⁸ Cf. Thomas Buergenthal, "The Evolving International Human Rights System", op. cit., at 806; August Reinisch, op. cit., pp. 53-54; Human Rights Committee, General Comment No. 31, op. cit., paras. 8, 13-15.

⁷⁸⁹ Cf. Statement by Mahmoud Abbas, President of the Palestinian National Authority, before the United Nations General Assembly, Sixty-sixth Session, 23 September 2011 (<http://gadebate.un.org/66/palestine>; http://gadebate.un.org/sites/default/files/gastatements/66/PS_en.pdf, both last checked on 30/01/2012).

⁷⁹⁰ Cf. Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., pp. 21, 35, 45.

⁷⁹¹ Cf. articles 2.3 of the International Covenant on Civil and Political Rights, 25 of the American Convention on Human Rights, or 13 of the European Convention on Human Rights.

⁷⁹² Cf. Math Noortmann, "The Quest for Unity in Empirical and Conceptual Complexity", in Bas Arts et al. (eds.), *Non-State Actors in International Relations*, Ashgate Publ., 2001, pp. 301-302.

⁷⁹³ Cf. Peer Stolle and Tobias Singelstein, "On the Aims and Actual Consequences of International Prosecution of Human Rights Crimes", in Wolfgang Kaleck et al. (Eds.), *International Prosecution of Human Rights Crimes*, Springer, 2007, pp. 46-50; Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", op. cit., pp. 201-202; August Reinisch, op. cit., pp. 60-61.

must not prevent the design of mechanisms to protect victims in the level of intensity of horizontal protection that is necessary for that protection to be effective.

Certainly, the essential and *non-conditional* inherent worth of human beings must be protected *effectively*, as has been manifested in doctrine and international case law,⁷⁹⁴ and that unless it is protected from all threats, it will be at least partly ineffective and incomplete.

However, while all victims must be protected in an effective way that can achieve the purposes of the protection of their dignity, this does not necessarily mean that all victims are to be treated in an identical manner because, as explained in Chapter 3, differential treatments that are reasonable and proportional, and thus respectful of equality, can be employed.

For instance, there can be some specific differential treatments between those affected by violations with a *serious* nature and others, provided that the latter are not ignored. Such a distinction has been made in some soft law instruments and international decisions. This idea can be inferred from the title of the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (emphasis added), and was handled by the Inter-American Court of Human Rights in the *Barrios Altos* case, in which it considered that:

“This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”⁷⁹⁵ (emphasis added).

After mentioning in general terms that self-amnesties are incompatible with human rights law, the Court argues that those measures are contrary to the legal consequences of serious human rights violations. That passage should be interpreted in a way that is not limited to self-amnesties and covers all serious violations. This interpretation has been confirmed by the Inter-American Court itself, which has endorsed the viewpoint that serious violations of human rights be treated in ways that respond to their seriousness even when no self-amnesties are involved.⁷⁹⁶

Note that distinction with the treatment of other violations is related to the *nature* of violations and not to their existence or to differences regarding *actors* participating in them. Yet, this last difference admits *some* lawful differential treatments, except when some violations, as serious ones, are involved. Just as it has been considered in international human rights case law

⁷⁹⁴ Cf. Carlos Villán Durán, *op. cit.*, pp. 89-91; Inter-American Court of Human Rights, *Case of Las Palmeras v. Colombia*, Judgment of Merits, 6 December 2001, paras. 58-60.

⁷⁹⁵ Cf. Inter-American Court of Human Rights, *Case of Barrios Altos v. Peru*, Judgment, 14 March 2001, para. 41.

⁷⁹⁶ Cf. Inter-American Court of Human Rights, *Case of Gelman v. Uruguay*, Judgment, 24 February 2011, paras. 183, 194, 195, 198-199, 202, 205-206, 209-214, 225-229 (“The incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, ‘self-amnesties’”).

that in some events different treatments are suspicious and their lawfulness must be assessed with a more stringent examination,⁷⁹⁷ all different treatments of human rights victims must be thoroughly evaluated.

Therefore, serious or gross violations of human dignity that are not properly examined and addressed in the national level must receive *complementary* international action, in accordance with the criterion of subsidiarity and the need to offer a “final [or another] hope” to potential or actual victims. Simultaneously, non-state actors must be permitted to contribute to the protection of victims harmed by those (and all other) violations, according to the criterion of complementary non-state actions and the principle of effectiveness interpreted in the light of the *pro homine* principle. After all, an effective protection system must encompass multiple levels, strategies and actors.

In consequence, all victims should have access to preventive and *ex post facto* mechanisms of protection in the *international* level when they are victims of serious violations of human rights and guarantees. The exact content and dynamics of that international action can vary taking into account available resources, effectiveness and appropriateness of the responses to violations. Differential treatments can thus exist if they are lawful and are international.

That being said, it is necessary to explore which violations can be considered as *serious*.

a) Firstly, as can be deduced from the violations mentioned in the passage of the Inter-American Court of Human Rights cited above, violations of peremptory law must be considered to be serious. Note how the Court chose the expression “non-derogable rights”. This coincides with the wording of article 53 of the two Vienna Conventions on the Law of Treaties concluded by States and concluded by international organizations, which define *jus cogens* as comprising norms “from which no derogation is permitted”, wording that expresses the impossibility of lawful exceptions to their absolute effectiveness.

An interesting question ensues: if one reads article 40 of the articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, one may get the (to my mind, mistaken) impression that for a violation to amount to a serious one, it must not only violate peremptory law but also be gross or systematic, due to the fact that the second paragraph of the aforementioned article reads as follows:

“A breach of [an obligation arising under a peremptory norm] is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.”

⁷⁹⁷ Cf. European Court of Human Rights, Grand Chamber, *Case of Oršuš and other v. Croatia*, Judgment, op. cit., para. 149.

To my mind, the previous definition is not applicable in regard to human rights violations generally. Human rights norms and considerations operate as a *lex specialis* in the field concerning primary and secondary rules. The fact that human rights case law considers that a violation of peremptory law must be regarded as serious, without mentioning additional conditions, thus implies in my opinion that the other elements handled in the ILC articles are not applicable.

In fact, the massive or systematic character of a violation of any human right has been taken into account in human rights practice and case law for different purposes –e.g. concerning standards of proof⁷⁹⁸ or features of crimes, as mentioned in article 7 of the Statute of the ICC concerning features of crimes against humanity- and, as will be said below, is an independent cause of serious violations. Moreover, the ILC mentioned that the *lex specialis* character of the humanitarian *corpus juris* makes it prevail over more general regulations when they differ.⁷⁹⁹

Examples of peremptory human rights *lato sensu* norms, the violation of which is thus automatically serious, include the prohibitions of torture, enforced disappearance and discrimination. Additionally, common article 3 to the Geneva Conventions of 1949 prohibits some violations of human dignity “at any time”, thus admitting no exceptions whatsoever, reason why in my opinion they protect human rights and also have a peremptory character.

b) Secondly, I consider that the category of serious violations also encompasses those that are committed in the context of massive or systematic violations. As mentioned above, these features make violations serious even if they are not contrary to *jus cogens* and the other way around.

For instance, without alluding to *jus cogens*, in the *Velásquez-Rodríguez Case* the Inter-American Court of Human Rights declared that it “cannot ignore the special seriousness of finding that a State [...] has carried out or has tolerated a practice of disappearances” (emphasis added).

Similarly, in article 7 the Rome Statute of the International Criminal Court mentions that some violations of human dignity amount to crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Pursuant to that article, the Elements of Crimes of the Rome Statute of the ICC mention that “crimes against humanity as defined in article 7 are among the most serious crimes of

⁷⁹⁸ Cf. Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, op. cit., para. 188.

⁷⁹⁹ See articles 55 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts and 64 of the ILC Draft Articles on the Responsibility of international organizations adopted in 2011 (A/66/10); International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006, paras. 5-9, 11-14.

concern to the international community as a whole” (emphasis added), confirming that massive or systematic violations of human rights can be regarded as serious.

c) Thirdly, given their appalling nature and their reproachfulness, international crimes contrary to human dignity must be considered to seriously violate it. In this sense, for instance, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law mention that there are “gross violations of international human rights law and serious violations of international humanitarian law [that] constitut[e] crimes under international law”.

Concerning this, it is convenient to consider that criminal law can protect humanitarian legal values and interests protected by norms of other branches of international law, such as e.g. human rights, humanitarian law, or refugee law.

An international crime does not necessarily have to be committed in the context of systematic violations for it to be considered as such. Nothing requires this in general terms, and the content of article 7 of the Rome Statute of the ICC constitutes a choice concerning some crimes (crimes against humanity *under* the Statute). This idea seems to be confirmed by the wording of article 8 of the Statute, insofar as it lists war crimes and declares that the International Criminal Court has jurisdiction in respect of them “in particular [but not exclusively] when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” According to this, the substantive consideration that a conduct is criminal and the procedural possibility that the ICC can examine it are distinguished. Moreover, the ICC can have jurisdiction even over non-systematic war crimes.

As a result, international crimes that violate dignity are serious violations of human rights or guarantees. In consequence, their victims require special and reinforced protection. This is required by the criterion of the special protection of persons in a vulnerable position,⁸⁰⁰ regardless of to whom or to what entity threats can be attributed. The fact that some authors consider that international crimes may protect peremptory human rights or humanitarian norms does not detract from their being an independent category of serious violations of human dignity (their independent existence is important, for instance if someone challenges the assertion that a given crime violates peremptory law).

d) Fourthly, even when a given violation does not have the features presented in the previous three categories, it can be a *serious* violation if it seriously prevents the enjoyment of

⁸⁰⁰ Cf. European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, 30 November 2010, paras. 41, 45-46, 50.

human rights to a large extent, if it affects essential humanitarian interests, if it is implicitly or expressly considered as serious by the sources of law or in the protection framework, or if it can be considered that it has that character inherently due to its dynamic and effects.

Concerning the express or (normatively) implied indication that a violation of human rights and guarantees is serious, participants in legal processes, lawmakers or law-enforcers, all of whom are relevant,⁸⁰¹ may pinpoint or declare that some factual or normative characteristics indicate that a breach is serious. For instance, it can be thought that the Geneva Conventions on International Humanitarian Law and their Protocols explicitly mention that some violations –grave breaches or serious violations- must be considered to be gross. This is seen in articles 146 and 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War; 13, 129 and 130 of the Geneva Convention relative to the Treatment of Prisoners of War; or 11.4, 85 and 86 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1).

Altogether, given the values affected by serious violations, and the need of enhanced protection of their victims, the logic and the purposes of humanitarian norms require their recognition, whether they are expressly or implicitly serious. That seriousness may be due to the way in which they are carried out, the legal goods (interests and values) affected, or other aspects. That some violations are serious is confirmed in the Preamble of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, that mentions that there are:

"[G]ross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity" (emphasis added).

The previous consideration seems to point out that some violations are inherently grave given the way in which they affront human dignity.

Classifications of violations concerning their concern have been made in other contexts. For instance, in the European human rights systems it is considered that there are violations that merit ordinary supervision and some that require an enhanced supervision by the Committee of Ministers of the Council of Europe.⁸⁰² In any case, it must be said that all or at least most

⁸⁰¹ On those processes and the participation of non-state entities as lawmakers and law-takers, cf. Math Noortmann and Cedric Ryngaert, "Introduction: Non-State Actors: International Law's Problematic Case", op. cit., pp. 1, 3; Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order", op. cit., pp. 9-10; Myres S. McDougal, "Some basic theoretical concepts about international law: a policy-oriented framework of inquiry", op. cit., pp. 341-342, 345-346.

⁸⁰² Cf. Council of Europe, "Judgments of the European Court of Human Rights: First meeting of the Committee of ministers of the Council of Europe to supervise their execution", 8 March 2011, available at:

violations are serious for victims, which does not detract from the convenience of distinctions about the level of seriousness, which has practical purposes, such as the permissibility of amnesties or the need of their being addressed by international action no matter who participates in them.

Additionally, I consider that there must be a presumption that non-state actors have an international obligation to not commit serious violations. Given their seriousness, their impunity must be especially prevented, and victims must receive an intensified protection even if domestic action fails. This means that victims have a correlative right to international protection from those violations. If this is not recognized, the effectiveness of the rights of victims would be precluded by the legal system, and its norms would be inconsistent with its principles.

Because of the *pro homine* principle, found in international human rights law, which requires choosing the interpretations and norms that most favor individuals, if a legal system or branch that is pertinent in a case considers a violation to be serious and others do not, the violation or abuse is to be considered as a grave one.

Based on the previous considerations, it can be concluded that serious breaches of human dignity must be addressed by international action, and that everyone who can commit them has a duty to refrain from doing so (to prevent potential offenders from eluding domestic controls). This is because serious violations are contrary to essential interests and legal goods of the world community in such a way that they must be the object of special attention.

Nevertheless, apart from the *procedural* implications of the recognition of serious violations, in my opinion it is especially necessary to consider every violation of human dignity as unlawful under international law in *substantive* terms, whoever commits them: to ensure that authorities and actors are authorized (and sometimes obliged) to tackle them; that victims are entitled to protection even if domestic law fails to recognize it (requiring it to change in such a case); and also that the symbolic and expressive functions of law brand those violations as unlawful. This is no irrelevant thing. For instance, some domestic actions may depend on identifying a conduct as contrary to substantive international law (as may happen with the ATS).

On the other hand, the parallel cooperation of non-state actors to protect victims and shame or bring offenders to justice is to be always permitted in relation to all violations. In other words: the fourth level of Knox's pyramid of international involvement in horizontal human rights

[https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=PR195\(2011\)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=PR195(2011)&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE); <http://echrblog.blogspot.com/2011/03/enhanced-supervision-by-committee-of.html> (last checked: 01/02/2012), where two tracks for the supervision of the execution of judgments issued by the European Court of Human Rights are introduced: a standard and an enhanced supervision. The latter includes cases "meriting priority attention", such as those involving urgently needed measures of protection, structural or complex problems, or other special circumstances.

protection must be present whenever there are potential or actual serious violations of human dignity, and the first three and the fifth level of complementary measures, related to the dimension of non-state contribution, must always be possible. This is depicted in figures 3 and 5, *infra*.

As argued in this section, the possibility of procedural international legal involvement in serious violations is necessary, because they attack essential legal interests of the world community and are contrary to the inherent worth of individuals in a shocking way. For this reason, given how human dignity is and must be at the center of law, which has as one of its essential purposes its respect and promotion, no additional requirements are necessary for those violations to have an intense international response.

The necessary *procedural* international legal response to serious violations is related to other considerations that are relevant for other violations as well: that it is unsustainable to hold that the protection and respect of human rights and guarantees are exclusively domestic affairs, given the interests of the world legal community in their protection⁸⁰³ (being this community broader and more inclusive than an *international* one);⁸⁰⁴ and the idea that threats against human dignity can also endanger the integrity of other global legal goods, such as peace and security,⁸⁰⁵ even if the effects of violations that materialize them are local. Indeed, serious violations have international or, more precisely, global relevance, affecting global legal interests and goods and beings whose relations are not limited to links with a State.

It is convenient to repeat that, while a procedurally intense international response to serious violations is required and non-negotiable, its exact content may vary if this is not discriminatory, and so alternative effective mechanisms of an equivalent level of protection⁸⁰⁶

⁸⁰³ Cf. Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., pp. 56-66; Christian Tomuschat, *Human Rights: Between Idealism and Realism*, (2 edn.), Oxford University Press, 2008, pp. 269-270; Anne Peters, "Humanity as the A and Ω of Sovereignty", op. cit., at 543; Roland Portmann, op. cit., pp. 254-257; United Nations, *A more secure world: our shared responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, A/59/565, para. 200.

⁸⁰⁴ Note how the fact that interactions lead to subtle and unofficial exchanges that help to transform international law, and that a myriad of actors is affected by this law and is interested in its content and implementation, justifies having this broad conception. From a legal standpoint, even traditionalists acknowledge the role and importance of international organizations. Some hold that States have yet a quasi-monopoly on the formation of essential rules - peremptory ones-, although the input and interest of other *participants* concerning them is undeniable. It can be considered that the expression international community of States merely stresses the way in which international law is *traditionally* and *formally* created, whereas the expression international community can encompass a broader set of actors, although its wording (*international*) is misleading and ought to be replaced by another such as world or global community (being it also important to call *international law jus gentium*). This is one of the possible interpretations of: International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Paragraph (18) of the Commentary to Article 25.

⁸⁰⁵ Cf. Stephan Hobe, op. cit., pp. 121-122; Emma McClean, "The dilemma of intervention: Human Rights and the UN Security Council", in Marco Odello and Sofia Cavandoli (eds.), *Emerging Areas of Human Rights in the 21st Century: The role of the Universal Declaration of Human Rights*, Routledge, 2011, pp. 24, 27, 30-34, 37-39; Anne Peters, "Humanity as the A and Ω of Sovereignty", op. cit., pp. 538-540.

⁸⁰⁶ Cf. The European Court of Human Rights has resorted to the notion of equivalent levels of protection when deciding whether a State that has transferred capacities to other entities has made sure that human rights are

different from express international action with a detailed content and subjection to adjudicatory procedures are admissible as long as they have an international dimension and equivalent effectiveness.

Additionally, nothing prevents non-serious violations from also being addressed by intense procedural international legal involvement (all must be internationally unlawful). Sometimes this may be recommended, as when victims cannot find justice and protection in other levels of governance and violations, while not serious in the sense described above, are grave or cause of particular concern for different reasons, since the four (non-exhaustive) examples of grave violations mentioned in this discussion pretend after all to cover a vague legal notion, that acknowledges that other violations may be serious to their victims.

Undeniably, the scarcity of resources available in the international plane, the absence of effective cooperation, the importance of offering States and authorities the opportunity to address threats in the first place, and the closeness of some authorities with elements of violations (evidence, etc.), are factors that not only make it advisable that national remedies against non-state violations be prior to international involvement, as happens with serious violations, but also makes it advisable to not only permit but also request complementary non-state promotion.

Yet, unless it is decided otherwise in legal terms, generally the fourth level of intensity of international legal involvement (direct international procedural action) would not be mandatory concerning “non-serious” violations. This helps to prevent congestion of international procedures, problem that some international authorities suffer from.⁸⁰⁷ However, if needed or advisable, those mechanisms can also be used and solutions to the aforementioned problem must be found. Concerning these ideas, I think that the existence of direct international obligations of all potential agents of violation of human dignity is justified, because it is just a substantive engagement that spends no resources (treaties are but one possible source of those duties) and has the advantage of having expressive functions and of supporting or founding domestic or other action.

protected by the latter. I borrow that expression but differ with its use in this context, especially because I consider that the respect of human rights must *always* be *thoroughly* examined, and thus *presumptions* of that respect are dangerous, being therefore a *proof* of equivalence necessary and not assumptions that must be rebutted, placing a burden that is perhaps sometimes excessive on the shoulders of applicants and victims. On the concept as used by the ECHR, see European Court of Human Rights, Grand Chamber, *Case of Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Applications no. 71412/01 and 78166/01, Decision as to Admissibility, op. cit., para. 145; European Court of Human Rights, Press Unit, Factsheet on *Case law concerning the European Union*, 2010, pp. 2-3.

⁸⁰⁷ Cf. John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 46; Alicia Cebada Romero and Rainer Nickel, “El Tribunal Europeo de Derechos Humanos en una Europa asimétrica: ¿Hacia el pluralismo constitucional?”, in Pablo Antonio Fernández Sánchez (ed.), *La obra jurídica del Consejo de Europa (en conmemoración del 60 aniversario del Consejo de Europa)*, Ediciones Gandulfo, 2010, pp. 1-2, 31, available at: http://www.jura.uni-frankfurt.de/l_Personal/wiss_Ass/nickel/Publikationen/Cebada_y_Nickel_ECHR_and_constitutional_pluralism_Sevilla_final.pdf (last checked: 01/02/2012).

For those who do not agree with the implied existence of some of those international non-state obligations (see Chapter 6, *infra*), I would answer that, at the very least, they should be created *de lege ferenda*.

The following graphic illustrates the preceding ideas on the international protection of human dignity from non-state actors (i.e. horizontal protection), based mostly on the remarkable study of John H. Knox, with some adjustments of my own:

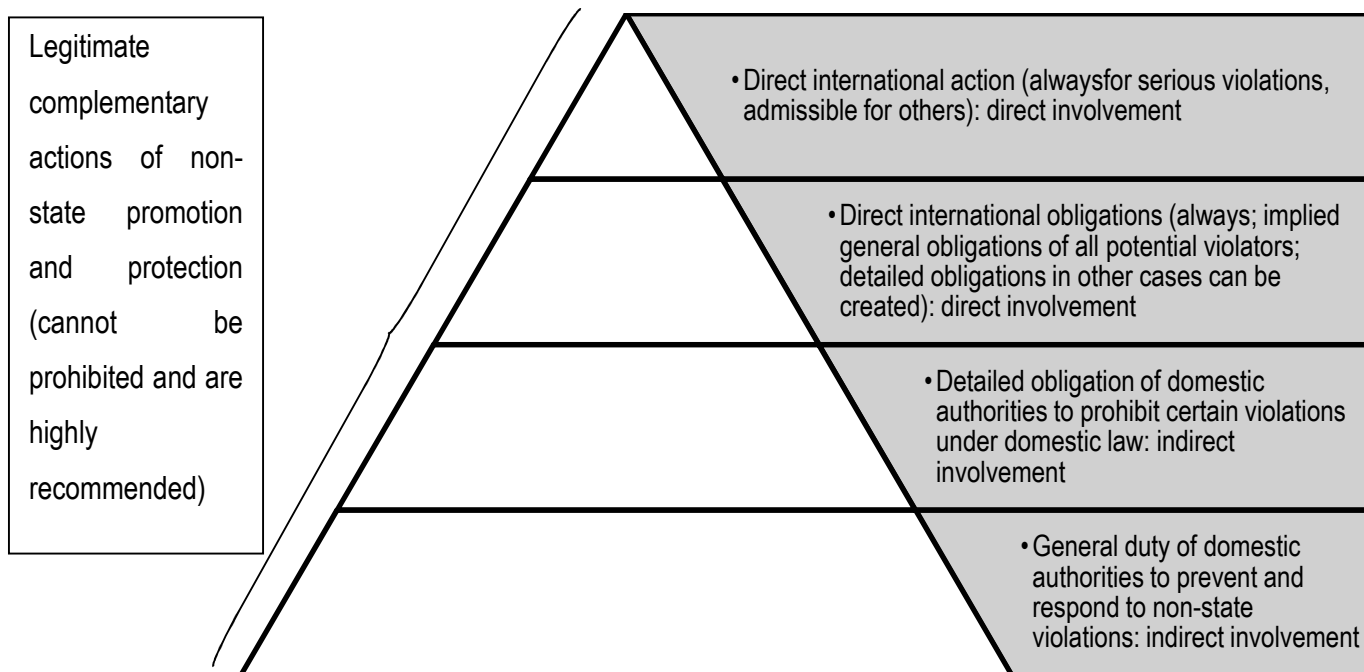


Figure 3: Levels of international involvement in the horizontal protection of human dignity

A question ensues regarding legal action against some violations that are not classified as serious from a normative point of view: what must be done about violations that, not reaching the threshold of gravity, are perpetrated in a way that has transnational or international elements, or in relation to those committed by non-state actors with authority or power similar to those of States? In my opinion, in spite of it *not always* being necessary to respond to them directly in the last level of the pyramid of the international legal involvement, they merit and deserve some degree of special international attention, as will be explained below.

In those cases, international case law and norms have opted to acknowledge that it is possible for international law to sometimes give victims a protection that is more intense than the one offered in other cases, as happens with violations of non-state authorities or actors that control territories. This intense protection refers to: either holding the non-state entity directly accountable concerning detailed and special duties and legal burdens, or giving a strong indirect

or sometimes even direct international protection to its victims. Apart from cases of direct supervision of non-state conduct, other possibilities of intense control will be mentioned below.

First, the principle of *non-refoulement* can have a horizontal dimension. Concerning this, for instance, the Committee Against Torture has accepted that claimants can request a State to refrain from expelling them to places where State control is ineffective and non-state entities with power or control over individuals can commit violations that amount to torture, inhuman, cruel or degrading treatment *as understood* in the treaty it supervises (the Convention Against Torture),⁸⁰⁸ whose definition of those violations is narrower than the one found in general human rights law. Needless to say, agents of the territorial State, no matter how weak, still have duties of protection and should behave diligently, although those are obligations of *means*.⁸⁰⁹

Thus, the application of the *non-refoulement* principle can be used to protect individuals from non-state threats, even under a Convention that is more State-centric in its definition of a violation than other human rights treaties. That protection, which tends to be granted under some circumstances,⁸¹⁰ is *direct* concerning its effects and the evaluation of non-state conduct (in the end, it protects individuals from non-state threats), albeit the focus is on State duties, and thereby actions are brought procedurally *against* the State. Thus, this mechanism is *indirect* against threats of non-state entities in *procedural* terms, but recognizes that non-state actors can commit human rights violations.

Other bodies, as the European Court of Human Rights, have also granted protection in the dimension just explained even when it is completely private entities as individuals (such as relatives of a potential victim) who can *de facto* control or have power over someone and likely injure her.⁸¹¹

The previous examples show that the boundaries between the levels of the framework of international horizontal human rights protection are often blurred, because even though in this case States have a duty to protect individuals from non-state violations, that corresponds to a low level of intensity of international engagement with non-state actors, which is indirect, supervision

⁸⁰⁸ Cf. Committee Against Torture, *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, CAT/C/22/D/120/1998, op. cit., paras. 6.4-7.

⁸⁰⁹ Cf. August Reinisch, op. cit., pp. 79-82; Andrew Clapham and Scott Jerbi, op. cit., at 339; Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, para. 1.

⁸¹⁰ Cf. Regrettably, some decisions have denied protection to victims of non-state entities alleging limitations of the supervised treaties with interpretations that in my opinion, sometimes, are questionable. Cf. Redress, "Not only the State: Torture by non-State Actors: Towards Enhanced Protection, Accountability and Effective Remedies", op. cit., pp. 7, 17-18, 22-23, 30.

⁸¹¹ Cf. European Court of Human Rights, *Case of N. v. Sweden*, Application no. 23505/09, Judgment, 20 July 2010, para. 62.

of that duty entails the evaluation, recognition and direct prevention of non-state threats,⁸¹² with the aim of prohibiting an authority from exposing someone to them.

Moreover, the identification of non-state threats permits third States to protect individuals (e.g. invoking the *aut dedere aut judicare/aut punire* principle or extraterritorial protection of human rights), in which case they can protect interests of the world community. Their action is not always mandatory, except (in my opinion) in some cases, such as when States create risks of non-state violations taking place abroad. Given the internationally unlawful character of non-state violations of human dignity and the international legal interests affected, States are permitted (and sometimes required) to act in this way, even by virtue of norms on transnational or universal jurisdiction, against actors that operate and are located *abroad*.⁸¹³

In my opinion, this presupposes an acceptance of the idea that non-state actors have implicit duties as potential offenders.

Due to elements such as the fact that in practice many legal mechanisms have features that correspond to the description of different levels of international engagement with non-state conduct, described above, and that non-state contribution must be always permitted in relation to all of those levels, an analysis that focuses on the *legal goods* protected –human dignity in our case–, must accept that mechanisms found in different normative systems and contexts (private or public) form part of the same framework.

This was hinted by a President of the European Court of Human Rights, who asked non-state entities (applicants) and domestic authorities to cooperate with the (European) international level of protection of human rights for the latter to be effective and able to achieve its goals.⁸¹⁴ This constitutes an admission that in practice initiatives and actions of multiple actors and levels of governance share legal goods and can belong to one same framework of protection of human dignity.

⁸¹² Cf. *Ibid.*; Redress, “Not only the State: Torture by non-State Actors: Towards Enhanced Protection, Accountability and Effective Remedies”, *op. cit.*, pp. 16-20.

⁸¹³ Cf. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, *op. cit.*, paras. 14, 19, 27; Ilias Bantekas and Susan Nash, *op. cit.*, pp. 9-10; articles 5, 7 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 146 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, or 129 of the Geneva Convention relative to the Treatment of Prisoners of War, among others; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, *op. cit.*, at 824. Furthermore, cf. Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment, 31 January 2006, para. 126; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, *op. cit.*, pp. 91-93, 821-822.

⁸¹⁴ Cf. Statement issued by the President of the European Court of Human Rights concerning Requests for Interim Measures (Rule 39 of the Rules of the Court), available on: http://www.echr.coe.int/NR/rdonlyres/B76DC4F5-5A09-472B-802C-07B4150BF36D/0/20110211_ART_39_Statement_EN.pdf (last checked: 02/02/2012), where it is mentioned that “For the Court to be able effectively to perform its proper role in this area both Governments and applicants must co-operate fully with the Court.”

Certainly, different normative systems and branches, actors and authorities may contribute not only to protect but also to shape the protection of common legal goods that operate as lowest common denominators, including legal goods related to human dignity. This is crucial, because without cooperation of norms and actors in a common legal space of interaction, actions to promote legal goods are usually ineffective in a global context when global actors threaten them.

This also echoes the idea that national authorities can and must protect international law for it to be effective in practice and achieve its full potential. What is more: apart from protecting interests of a *different* legal system, those and other actors can also protect normative contents *shared by* legal systems, including their domestic ones.

This shared normative content can be created and stimulated through cooperation, internalization of legal interests, similar interpretations and creation of norms by authorities and other actors,⁸¹⁵ especially when they protect and promote the same interests, which become global with the interaction of those activities, entities and norms in a shared legal space.

In relation to the international legal system, the promotion of global human legal goods implies creating burdens, obligations and other legal capacities of non-state entities. This is necessary because their international character helps to prevent impunity and counter the deficiency of domestic measures, caused by: i) the weakness or inability of States to control non-state actors due to their power or States limitations; or the ii) priority attached to other interests by State and other authorities, for example to maximize profit and investment even if this implies attracting investors with relaxed standards and supervision or with lack of domestic duties,⁸¹⁶ among others.

Countering this, international capacities of non-state entities that highlight their responsibilities can be invoked by others to demand protection from State authorities or to empower pressure against threats and their condemnation or extraterritorial jurisdiction.

Indeed, foreign States may be entitled to protect international human rights norms thanks to the existence of international substantive duties and burdens of non-state actors. For instance, according to the ideas of the United States Court of Appeals for the Seventh Circuit expressed in the case of *Boimah Flomo, et al. versus Firestone Natural Rubber Co., LLC*, substantive legal considerations differ from procedural ones and international law may create obligations of non-

⁸¹⁵ Cf. Nicolás Carrillo Santarelli and Carlos Espósito, *op. cit.*, pp. 52, 57, 62, 64-65, 67-71; Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", *op. cit.*, pp. 183-204.

⁸¹⁶ Cf. United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, at 15 (where the example of the difference between "countries that have and enforce laws against child labor" and those in which it is condoned is offered).

state entities, the breach of which can be examined by national authorities *whose legal systems allow them to supervise breaches of international law*. In the words of the Court of Appeals:

“Prosecutorial responses to international crimes have occurred at both the national and international levels’ [...] [If an entity has not been prosecuted for violating international law] [t]hat doesn’t mean that [it is] exempt from that law [...] [There is a] distinction between a principle of that law, which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy [...] International law imposes substantive obligations and the individual nations decide how to enforce them [...] [There are] treaties that explicitly authorize national variation in methods of enforcement, allowing civil and administrative remedies as alternatives to criminal liability if the imposition of such liability would be inconsistent with domestic law.”⁸¹⁷

Logically, in case substantive duties and burdens of non-state actors are reinforced by international mechanisms that supervise compliance with them, domestic remedies should be exhausted before the former can operate, as long as domestic remedies are accessible, effective and exist and State action is diligent.⁸¹⁸ Simultaneous non-state cooperation that seeks to promote compliance with capacities that seek to protect human dignity should always be permitted, as argued before.

In turn, action undertaken by States that are not obliged to protect and seek to provide extraterritorial protection of victims *sometimes* operates according to considerations of *forum non conveniens*, comity or the presence of some link with the accused or accusation;⁸¹⁹ and can be based on the principle *aut dedere aut judicare/punire*, that imposes some duties to protect. Certain of the prior elements and how they are used in practice may vary from country to country and be modified through legislative and other initiatives.⁸²⁰ In this regard, for example, the U.S. Court of Appeals for the 7th Circuit considered that the Alien Tort Statute permits to protect victims from non-state violations of *jus gentium* saying:

“[There are] two arguments by the defendant against liability that we reject. The first is that plaintiffs must exhaust their legal remedies in the nation in which the alleged violation of customary international law occurred. The implications of the argument border on the ridiculous; imagine having been required to file suit in a court in Nazi Germany complaining about genocide, before being able to sue under the Alien Tort Statute. What is true is that a U.S. court might, as a matter of international comity, stay an Alien Tort suit that had been filed in the U.S. court, in order to give the courts of the nation in which the violation had occurred a chance to remedy it, provided that the nation seemed

⁸¹⁷ Cf. United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, pp. 7, 11-13.

⁸¹⁸ Cf. Draft Articles on Diplomatic Protection of the International Law Commission, A/61/10, 2006, articles 14 and 15; article 46 of the American Convention on Human Rights; European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, op. cit., paras. 36-38; Inter-American Court of Human Rights, *Case of Las Palmeras v. Colombia*, Judgment of Merits, 6 December 2001, paras. 58-60; Inter-American Court of Human Rights, Advisory Opinion OC-11/90, op. cit., paras. 14-17, 31, 34-36.

⁸¹⁹ Cf. Carlos Espósito Massicci, *Inmunidad del Estado y Derechos Humanos*, Aranzadi, 2007, pp. 102-105, 259; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 91-93, 824, 828-831; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., para. 89.

⁸²⁰ Cf. Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 825-831; Andreas Fischer-Lescano, op. cit., pp. 21-23.

willing and able to do that [...] And second, the defendant argues that the statute has no extraterritorial application [...] Courts have been applying the statute extraterritorially (and not just to violations at sea) since the beginning; no court to our knowledge has ever held that it doesn't apply extraterritorially"⁸²¹ (emphasis added).

Taking into account the foregoing considerations, a graphic portrayal of the dimensions of the protection of human dignity from non-state violations is offered below. It reflects that apart from vertical protection against States, there are the following dimensions of indirect and direct protection: horizontal, i.e. based on the fact that human rights have effects in relations between individuals and non-state entities; lateral, i.e. protection given against abuses committed by non-state entities with power, control or authority over individuals; and a vertical dimension of human rights *erga omnes* obligations, by which both States and non-state actors are bound.⁸²²

All those dimensions complement each other and must lead to a transversal protection of individuals, that is to say to protection from all violations and in all the scenarios in which it is needed. The protection of human dignity must encompass both human rights and guarantees (e.g. duties, legal capacities, etc.), since the latter also seek to protect dignity and strengthen and complement human rights.

The comprehensive legal protection of human dignity from all violations in all levels and with the contribution of different actors can be illustrated as follows:

⁸²¹ Cf. United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, pp. 23-24.

⁸²² Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 140; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 77-78; John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 1-2; Human Rights Committee, General Comment No. 31, op. cit., para. 8; Department for Constitutional Affairs, *A Guide to the Human Rights Act 1998: Third Edition*, op. cit., at 37.

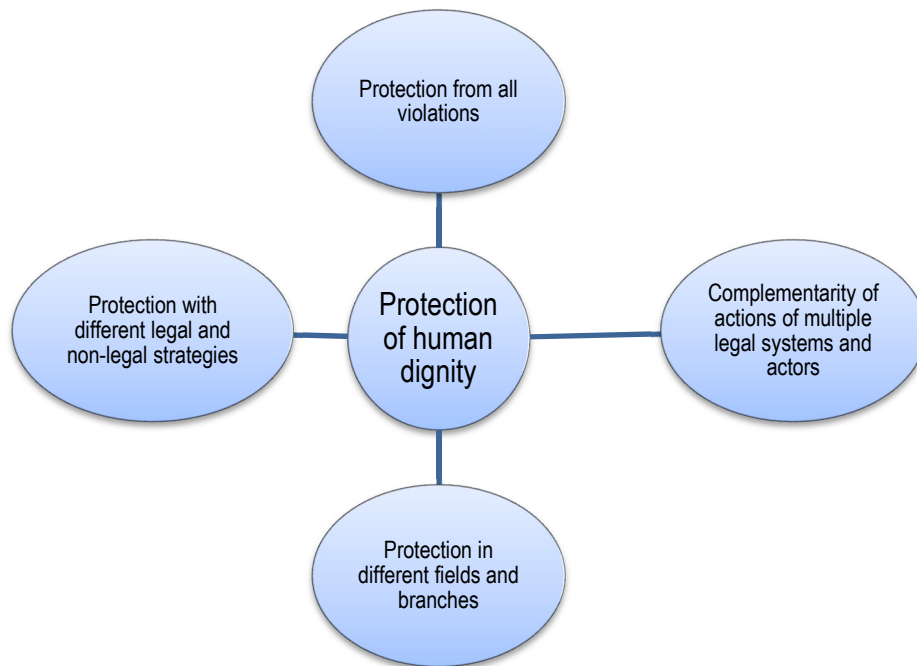


Figure 4: Multi-level and multi-actor protection of human dignity, recognizing the positive and negative roles of all actors

Different considerations must be taken into account to determine when it is advisable or convenient for direct international *action* to deal with non-state violations.

First of all, previous explanations indicate that if there is absence of effective State control in a given territory, for instance due to an international decision or operation that lawfully decrees so, or to armed non-state groups that control it, in practice the respective State will not be able to ensure the enjoyment of human rights therein.⁸²³ According to international law, the State's duties will remain, due to its vicarious responsibility and position as guarantor,⁸²⁴ but its responsibility will not necessarily be engaged in connection with violations if it behaves diligently.

On the other hand, the conduct of non-state entities that operate as authorities or administrators in that territory for normative or factual reasons, for instance due to their having an international mandate or for having wrest control by force, ought to be supervised by human rights bodies, either with the possibility of issuing recommendations to those entities and order or recommend them to comply with human rights standards in that territory, or of indicating that the

⁸²³ Cf. Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food (art. 11)*, op. cit., para. 15; Christian Tomuschat, op. cit., pp. 43-45, 53-54.

⁸²⁴ Cf. August Reinisch, op. cit., pp. 78-82; Andrew Clapham and Scott Jerbi, op. cit., at 339; Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, para. 1.

examined non-state conduct imposes a prohibition on States to expose individuals to them. If this direct examination of non-state *conduct* (the respondent entity is not necessarily non-state but non-state conduct is examined) does not take place, the rights of victims, which remain and are inalienable, would be rendered ineffective.

According to the previous analysis, stringent international control of non-state conduct, that involves direct analysis of that behavior (but can have different outcomes) should take place not only when there are formal authorizations of non-state authority or control over a territory, but also in relation to actors that de facto control a territory or operate as authorities therein. If alleged violations are serious, it is always required that such conduct is internationally examined, even if its authors neither operate as authorities nor control a territory.⁸²⁵

Taking into account the previous considerations, I consider that one criterion among others that can help to determine when non-state conduct should be directly supervised in *judicial or quasi-judicial* international procedures is the existence or lack thereof of a legal/formal or factual impossibility for the State in whose territory a violation takes place or is about to take place to protect potential or existent victims. Accordingly, be it because international law prohibits a State from acting in a given part of its territory (e.g. when ordered by the Security Council), or due to the considerable power of a non-state entity, that enables it to oppose and effectively prevent State control to a meaningful degree,⁸²⁶ among other possibilities, the prospect of direct international review of the non-state conduct (ideally subject to the principle of subsidiarity) makes it more likely that individuals can be protected from the respective non-state actors.

Conversely, in cases in which States *can protect* individuals, if they behave negligently or are unwilling to protect individuals from non-state conduct, their responsibility will be engaged and they can be ordered to repair victims of non-state violations. In those cases, individuals will have access to effective remedies, so perhaps direct international action against a non-state conduct can be made subsidiary to the determination that a State could not effectively protect an individual. However, when serious violations are involved, it is convenient to sanction all abusers, and so this analysis of subsidiarity would be unnecessary.

⁸²⁵ Cf. Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/19/69, 22 February 2012, para. 106; Tilman Rodehäuser, *op. cit.*

⁸²⁶ As may happen with non-state armed groups that effectively control a territory to the exclusion of a State, event mentioned in Protocol 2 to the Geneva Conventions of 1949 for reasons different from the ones discussed herein, which are to lay the conditions of the applicability of that instrument. Cf. article 1.1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). On the other hand, cf. Theo van Boven, "The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", *op. cit.*, at 3.

When States repair victims of non-state abuses, soft law indicates that they may be entitled to demand compensation from the non-state offenders in accordance with domestic law.⁸²⁷ This possibility has a positive implication: it serves to encourage States to repair victims even if they lack legal responsibility, given their being entitled to ask responsible entities to compensate them afterwards. Interestingly, article 79 of the Rome Statute of the International Criminal Court serves a similar purpose, because it determines that victims of non-state or State-affiliated criminals may receive funds from the Trust Fund even when the persons that attacked them do not provide those funds.

Another clarification must be made concerning non-state authority: reference to formal or *de facto* resemblance with State roles and functions is but one way in which actors can have relevant control over a territory or *victims*. Thus, the previous considerations are also relevant if a non-state entity does not control a territory but has considerable power over individuals to the exclusion of effective State protection. In other words, while in a sense every violation of the content of human rights and guarantees by non-state entities presuppose that they have power or control over individuals,⁸²⁸ when State (or other applicable) protection is made almost impossible by them they should be directly accountable and subject to actions in the international plane. This is strongly advised lest human rights guarantees are not effective in practice. Still, a similar course of action is also advisable in other cases without these features.

The previous considerations are related to debates on the foundation of human dignity examined in Chapter 1. Certainly, while the unconditional inner worth of human beings is the proper foundation of human rights and guarantees, and it demands a complete and effective protection from all threats, the power and authority held by non-state entities makes it necessary to effectively protect individuals from their abuses. This consideration is not intended as a replacement of the general foundation of human rights but as a special factor that must be particularly addressed.

After all, violations that are attributable to non-state entities in a position of power or authority are more likely to displace effective State control and so intense international action may prove to be indispensable for victims to be protected,⁸²⁹ as has been examined above.

⁸²⁷ Cf. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 15.

⁸²⁸ Factual considerable power, nonetheless, does not exhaust the cases in which an entity is to be deemed to have power regarding the enjoyment of human rights, as revealed by the fact that every violation to such enjoyment demonstrates the power to affect it.

⁸²⁹ It must be said that authority and positions of power are relevant as *one* of the events in which protection to actual or potential victims must be offered, but not as the only one, as revealed by other criteria that help to analyze whether domestic or other actions are necessary or convenient from both a legal and a non-legal point of view.

The factor of power or authority that demands a more intense international protection even if a violation is not serious can be functional or factual; general or related to some important aspects, such as the power to prevent an individual from having access to essential services for the enjoyment of her human rights. The criterion that such power is a basis of special protection is handled in the practice of some States, which grant heightened defense to individuals threatened by non-state entities with authority *or power*. For example, the Colombian *acción de tutela*, that can be used to protect the content of international human rights law,⁸³⁰ can be resorted to in order to protect fundamental rights of individuals when non-state entities provide a service that is relevant for the enjoyment of their human rights, when those actors threaten certain rights, or when individuals are *subordinated or defenseless* in relation to them and the enjoyment of some rights is threatened.⁸³¹

In turn, the Human Rights Act 1998 of the United Kingdom permits legal action against any entity that “carries out some functions of a public nature”.⁸³² In those cases, actors exercise normatively-sanctioned power over individuals that, if abused or neglected, can prevent the enjoyment of human rights (see articles 6.3.b, 7 or 8 of the Act). Additionally, that Act demands indirect protection against non-state threats due to the horizontal effects of human rights law. This makes public entities and private actors that carry out public functions have the duty to act, interpret and apply norms taking into account the horizontal dimension of human rights, that demands protection of individuals from private or public non-state threats to human rights.⁸³³

To avoid confusion, it is convenient to stress that I do not recommend that *all* violations committed by non-state entities that exercise formal/normative or *de facto* authority over an individual must be examined internationally, but rather that international supervision is pressing, among other cases, when those (and other) actors make it very unlikely that States are able to protect individuals from their abuses. In some cases, domestic action is in principle the one that should address alleged violations, unless other relevant factors make international supervision necessary or highly advisable. In sum, international supervision of actors with a certain extent of power or authority that cannot be checked or controlled by a State that is *unable* to protect individuals *for formal/legal or factual reasons* (criterion of weakness handled for other purposes in cases in which international protection against non-state actors is granted)⁸³⁴ is recommended.

⁸³⁰ Cf. Alejandro Valencia Villa and María José Díaz-Granados M. (eds.), *Compilación de jurisprudencia y doctrina nacional e internacional*, Vol. IV, op. cit., pp. 13-27.

⁸³¹ Cf. article 42 of Decree 2591 of Colombia, 19 November 1991, available at: <http://www.corteconstitucional.gov.co/lacorte/DECRETO%202591.php> (last checked: 02/02/2012).

⁸³² Cf. Department for Constitutional Affairs, *A Guide to the Human Rights Act 1998: Third Edition*, op. cit., pp. 9, 37.

⁸³³ Cf. *Ibid.*, pp. 9, 37.

⁸³⁴ Cf. article 17 of the Rome Statute of the International Criminal Court; Darryl Robinson, op. cit.

Moreover, even if international supervision of non-state conduct does not exist, non-state actors as NGOs or international organizations, among others, can demand the pertinent authorities to respect and protect human rights, and international supervision may examine non-state conduct to indirectly protect human beings from it by ordering State action in that regard. These considerations must be examined bearing in mind that responsibilities of States and other actors, whether they have considerable power or not, are cumulative and not exclusive.

Apart from the criteria of serious violations and power and authority, direct international control of non-state conduct is also called for in relation to non-state violations contrary to human rights that are committed frequently or in an intense or otherwise especially worrisome manner (e.g. utterly denying the enjoyment of rights; intensely affecting vulnerable rights and individuals, etc.).⁸³⁵

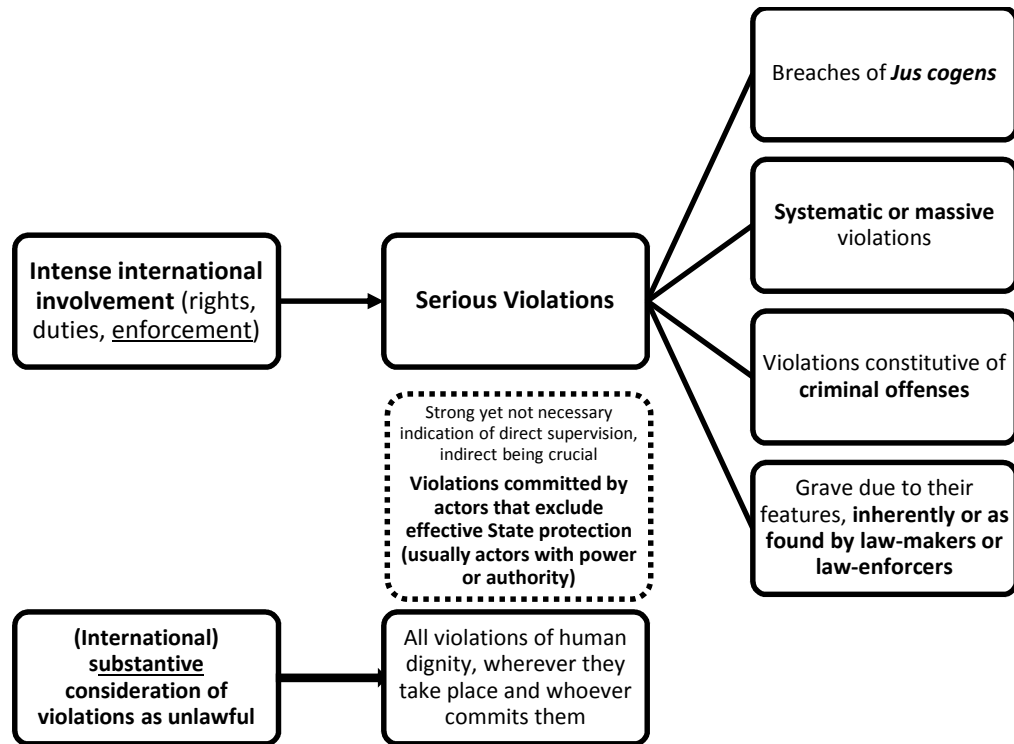


Figure 5: Intense legal response to non-state violations of human rights and guarantees

To my mind, except for the considerations about serious violations and substantive obligations of non-state actors, which I deem necessary, the previous considerations about international action found in this Chapter are both recommendatory and non-exhaustive. They illustrate how in spite of strained international resources non-state violations can and sometimes

⁸³⁵ Cf. Annyssa Bellal and Stuart Casey-Maslen, op. cit., pp. 186-187; articles 43 and 44 of the Convention on the Rights of Persons with Disabilities and 96.3 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), for examples of both direct substantive and procedural engagement of *jus gentium* with potential abusers of norms that can or always do protect human dignity.

must be dealt with by *jus gentium* in substantive and even procedural terms. The only prevalent condition concerning the treatment of non-state violations of human rights is that all individuals are effectively protected from them, among other reasons because they are legally relevant under international and other normative systems and affect their legal goods.

This makes it convenient to analyze if it is worth stressing that all conduct that violates humanitarian legal goods, which as a result is legally relevant, is a substantive violation under international law, *even if* direct international supervision of that behavior is nonexistent.

In that regard, I consider that in a multi-level and multi-actor framework of protection⁸³⁶ *labeling* violations as such, no matter to whom they are attributable, fulfills several important functions. Plenty of those functions work thanks to the fact that the wrongfulness of violations is signaled to addressees of duties, authorities, victims, society and humanitarian actors.

Signaling is a function related to the expressive or symbolic effects of law. It has been considered that norms and legal decisions can have expressive effects to the extent that they indicate what actions are encouraged or discouraged, attaching a legal value to them that may be taken into account by society due to communicative processes and thus end up impacting on the (de)legitimation and modification of practices.

Precisely, among other things declaring that non-state actors can engage in legally-relevant violations of human rights and guarantees attempts to tell society that such violations exist and are illegal, unfair and illegitimate, and must be tackled. As a result, activists or victims may feel emboldened given the legal support given to their claims and carry out lawful actions against non-state violators to make them refrain from engaging in violations or to repair victims, while authorities may be authorized by that indication to prevent or respond to violations. On the other hand, that indication and the stigma attached to it may raise awareness and dissuade non-state entities from the commission of violations, the existence of which is highlighted as a problem that must be addressed in human rights terms, with the impact this has.

Note how the positive impact of some non-state actions on the protection and promotion of human dignity is also related to this dimension, because actors can claim that they can condemn abuses of other entities and that they should be allowed to contribute to address them.

Apart from the psychological dimensions of the symbolic and expressive functions of the identification of the existence and wrongfulness of non-state violations, because of it practitioners and authorities are made aware of the illegal character of certain non-state conduct and are prompted to react accordingly, being obliged to interpret norms in accordance with their purposes

⁸³⁶ Cf. Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", *op. cit.*, pp. 9-10, 15, 34-37.

and in a way that makes them have practical effects, as required by the principle of *effet utile*. Thus, for example, State and non-state entities that promote human rights under different legal systems can and must interpret their own functions and the remedies of victims in accordance with the existence of non-state violations, taking into account the rights of victims and their own obligations to protect individuals against them in both a preventive and an *ex post facto* fashion.

Therefore, for instance, unless it is expressly impeded in an unavoidable form, States and other normative or *de facto* authorities must try to protect victims from non-state violations through mechanisms of supervision⁸³⁷ or non-adjudicatory actions, including the need that victims receive reparations and justice.⁸³⁸

The previous ideas are reflected in instruments as the Human Rights Act 1998 of the United Kingdom. By virtue of article 3 and other provisions, it orders judges and authorities to interpret norms and their functions taking into account European international human rights law even in disputes between private parties, having the Act thus indirect horizontal human rights implications (not general direct ones insofar as no direct cause of action based on the Act is given).⁸³⁹ Additionally, it envisages direct horizontal effects against non-state actors that carry out public functions, either by allowing the institution of proceedings against them based on the Act, or by commanding that in their conduct and the proceedings they conduct or are subject to those entities abide by the substantive provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols (see articles 1.1 and 6 through 8).⁸⁴⁰

Concerning these possibilities, it must be recalled that the behavior of actors exercising functions of another entity (e.g. of a State or an international organization) can engage the responsibility of that other entity. This can happen in relation to functions that are privatized, delegated, authorized or effectively controlled by the actor originally entrusted with the relevant

⁸³⁷ Cf. e.g. article 44 of the Convention on the Rights of Persons with Disabilities, according to which they may be bound by its provisions “within the limits of their competence” “with respect to matters governed by” the Convention. In procedural terms, analogous considerations and limits are found in article 12 of the Optional Protocol to the aforementioned Convention.

⁸³⁸ Cf. e.g. article 75 of the Rome Statute of the International Criminal Court, where the power of the Court to order a convicted person to repair victims; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 3.c., where the right of victims to have access to justice in order to claim their rights is recognized “irrespective of who may ultimately be the bearer of responsibility for the violation” (emphasis added).

⁸³⁹ Cf. Department for Constitutional Affairs, *A Guide to the Human Rights Act 1998: Third Edition*, op. cit., pp. 8-9, 37; “The Human Rights Act and Private Parties”, where it is said that “The only difference in purely private disputes as opposed to claims framed solely in terms of Convention rights against public authorities is the fact that the litigant in the former will have to establish an existing statutory or common law cause of action on which to pin the human rights argument”, available at: <http://www.yourrights.org.uk/vas/the-human-rights-act/private-parties-and-the-hra.doc>, <http://www.docstoc.com/docs/26073083/Horizontal-effect> (last checked: 03/02/2012).

⁸⁴⁰ Cf. <http://www.legislation.gov.uk/ukpga/1998/42/crossheading/public-authorities> (last checked: 03/02/2012).

function, as expressed by the ILC and the Inter-American Court of Human Rights. However, this does not turn the non-state entities exercising public functions into public actors. This is confirmed by the express *attribution* of the acts of an actor to a State or international organization⁸⁴¹ *for the purposes of* determining the subjective element of responsibility.

In these cases, the responsibility of the entity exercising the respective public functions can also be engaged, as demanded by the principle of individual responsibility, the complementarity of responsibilities, the importance of sanctioning offenders, and the need to deter breaches and protect victims from all participants in violations (some of these issues are discussed in more detail in Chapter 7). Moreover, the delegation or privatization of functions does not entail the elimination of the duty of States or international organizations to protect human rights with due diligence regarding the supervision and transfer of those competences.⁸⁴²

Altogether, violations of human rights and guarantees committed by non-state entities may engage the responsibility of a functional (normatively entitled or empowered *de facto*)⁸⁴³ State or non-state authority with pertinent obligations under the humanitarian *corpus juris*, due to:

- i) failure of the authority to prevent or properly respond to non-state violations with due diligence;
- ii) attribution of non-state conduct to the authority due to its being related to a function of the

⁸⁴¹ Cf. Inter-American Court of Human Rights, *Case of Ximenes-Lopez v. Brazil*, Judgment, 4 July 2006, paras. 86-87, 94-100; articles 5, 6 and 8 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts (A/56/49(Vol. I)/Corr.4) and 7 of the version of the ILC Draft Articles on the Responsibility of international organizations adopted in 2011 (A/66/10). Concerning international organizations, the current version of the draft articles on their responsibility does not contain a provision analogous to article 5 of the articles on State responsibility, although a proper interpretation of the intention of the International Law Commission evinces how even non-state entities entrusted by an IO to perform its functions can generate its responsibility. In this sense, in accordance to article 2 of the current version of the draft articles on the Responsibility of international organizations, agents of IOs are all entities different from organs that are “charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.” Taking into account the fact that the previous definition is applicable to the totality of the draft articles, and that therefore that definition is applicable concerning article 6, which expressly alludes to the conduct of agents as attributable to IOs, it is possible for agents to be private entities entrusted with functions of international organizations, according to article 2 of the 2011 version of the ILC articles on the responsibility of international organizations.

⁸⁴² Cf. Inter-American Court of Human Rights, *Case of Ximenes-Lopez v. Brazil*, Judgment, 4 July 2006, paras. 96-97, 102-103; August Reinisch, *op. cit.*, pp. 76, 80-82.

⁸⁴³ In practice and case law, considerations of the protection against *de facto* or normative authorities can also be found, and in this sense the Human Rights Committee, for instance, has considered that once human rights are recognized in favor of the individuals in a given territory, changes in its administration do not alter that recognition, and those individuals are thereby still protected by the relevant norms and instruments against whosoever has control or administration, regardless of its identity and, accordingly, irrespective of its being a State or not. For these reasons, the Committee held that the UNMIK had human rights obligations in Kosovo. In the same sense, it has been considered that when territory is controlled *de facto* by a non-state entity that operates as an authority, or when they have power over the fate of individuals and can elude State control, *among other possibilities*, protection against individuals from that entity can take the form of international action in the form of recommendations and engagement directly addressed to them, as mentioned in the Manual of Operations of the Special Procedures of the Human Rights Council of 2008, or in the form of indirect protection against non-state threats by means of, *inter alia*, protecting refugees that escape non-state agents of persecution or by prohibiting a State sending a potential victim to a place controlled or under the power of the respective non-state entity or where it can operate largely uncontrolled and the territorial State’s protection is largely ineffective or illusory.

authority (function that is public in nature due to the role of the authority and to expectations of protection and respect); iii) attribution of non-state conduct to an authority or other type of entity that controls, directs or gives instructions (specific ones) concerning that conduct; iv) acknowledgment and adoption of non-state conduct by a public (or another) actor as its own; or v) the exercise of authority by others under some circumstances. Those are general possibilities, and regarding States there is another possibility: the behavior of insurrectional movements that establish a State or acquire the power and control of a State.⁸⁴⁴

Additionally, both in legal and extra-legal terms, it is neither correct nor convenient to consider every entity that exercises publicly relevant functions as *State* entities, notwithstanding the wisdom of the international legal possibility that their conduct engages State responsibility. I hold this because otherwise some may try to subsume private entities in the State structure and deny them freedoms and liberties of their own, indirectly affecting conscience and privacy human rights of individuals related to those entities. It must not be forgotten that the State is a construct that *must* serve human beings and that it is *part* of society, not the other way around.

On the other hand, supervisory bodies and authorities that have mandates to protect and promote human rights which are broad enough or can be interpreted as allowing those actions in relation to non-state actors will likely realize that they can and must examine non-state abuses due to the indication that there are non-state violations. This does not mean that they can only do this if contentious procedures admit this possibility. For instance, they can contact and engage in dialogue with potential abusers of all kinds; or shame, denounce or declare non-state violations and call for the protection of victims.

If the behavior of non-state entities is assessed, scrutinized and criticized in human rights terms, victims will have more guarantees of protection. A result, the legitimacy of a system that claims to protect the non-conditional *human* dignity from all threats will be strengthened. That protection cannot be inconsistent or incomplete, or attach more importance to *some* (criticized and contested) abstract theories than to human beings.

Additionally, the recognition that non-state actors can violate human rights and their victims must be protected makes law better respond to reality, as has been acknowledged by Annyssa Bellal and Stuart Casey-Maslen.⁸⁴⁵ Certainly, non-state abuses take place daily, victims suffer, and law must respond to social and human needs (*sic societas, sicut jus*). That recognition is especially critical nowadays, because even though non-state entities have always been

⁸⁴⁴ Cf. article 10 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts; Chapter II of the ILC articles on the Responsibility of States for Internationally Wrongful Acts, 2001, and of the 2011 version of the ILC draft articles on the Responsibility of international organizations (A/66/10).

⁸⁴⁵ Cf. Annyssa Bellal and Stuart Casey-Maslen, *op. cit.*, pp. 186-187.

relevant in the “international” society, in the current social landscape they have more possibilities to impact positively or negatively upon the enjoyment of human rights and guarantees, given their empowerment and the normative and social dynamics they participate in, all of which makes it difficult for regulation and control to be completely effective unless global legal strategies are adopted.

These issues must be examined considering that law is a tool that can accomplish several functions. According to many, including myself, its legitimacy rests on its serving human beings concerning their most essential and important needs and on its answering to what their inherent worth demands.

It must be mentioned that those non-state violations that are not serious or are not strongly suggested to be addressed in international procedural terms can still be the object of international action. Even if this does not happen, the substantive qualification of those violations as wrongful serves many purposes, some of which have been explained in this section. Moreover, the possibility that there are rights without remedies and responsibilities without action confirms that a mere substantive international response to some violations can be admissible, provided that rights are effectively protected otherwise in accordance with international standards. Furthermore, domestic extraterritorial actions that respond to violations of international law, as explained before, can often be used based on the existence of an international substantive identification of non-state violations.

This makes a *universal universal* protection of human dignity possible. It is complete both from the point of view of offenders from whom individuals are protected and from the point of view of actors that can exert protection in a global legal framework.

As John Ruggie discusses, another relevant question is whether extraterritorial jurisdiction against non-state actors is not only possible but also *mandatory*. In most cases, it is deemed to be facultative under *lex lata* but encouraged *de lege ferenda*,⁸⁴⁶ especially because, in my opinion, it can shape legal lowest common denominators that condemn non-state abuses everywhere, with relevance in domestic and other jurisdictions.

Nevertheless, in my opinion sometimes States are obliged to have extraterritorial jurisdiction against some non-state violations. This happens, for instance, when a State creates

⁸⁴⁶ Cf. Menno T. Kamminga, “The Next Frontier: Prosecution of Extraterritorial Corporate Misconduct before Non-US Courts”, *op. cit.*, at 173; Bruno Demeyere, “States’ Innovative Mechanisms to Prevent Corporate Human Rights Crimes Abroad: Using ‘Due Diligence’ to Complement International Criminal Law’s Regulatory Leverage”, in Willem J.M. Van Genugten et al. (eds), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference*, T.M.C. Asser Press, 2009, pp. 178-179; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, *op. cit.*, paras. 19, 27; 178-179.

or contributes to the generation of the risk of a non-state violation of human rights abroad or at home. In those and other events, according to principles identified in international human rights case law, States have positive duties that are more intense than the usual ones, having for instance duties to prevent or respond to violations the risk of which they created even extraterritorially, in my opinion.

There may be other cases in which extraterritorial jurisdiction may be obligatory. For instance, Bruno Demeyere considers that a State perhaps should at least be obliged to deter violations that could be committed abroad when it is aware of their possible commission, and that it can respond by denying benefits to potential offenders, among other possibilities.⁸⁴⁷

Needless to say, extraterritorial jurisdiction can be exercised in relation to all violations, either if they are serious or for other reasons can be examined in international procedures or not. In fact, to wisely spend international resources; and to be consistent with democratic criteria, a multi-level framework and the right of States to have a first chance to deal with problems in accordance with the principle of subsidiarity, it is convenient that international responses to violations are not used if extraterritorial domestic action effectively responds to violations and protects victims.⁸⁴⁸

International action is, after all, complementary, as seen in the Rome Statute of the International Criminal Court, according to which satisfactory domestic prosecution of the crimes over which the ICC has jurisdiction makes it unnecessary for the Court to operate. Still, international bodies examine cases where States with *mandatory* jurisdiction have no resources, decide to not use them or are prevented from doing so,⁸⁴⁹ reason why it is not necessary to wait for domestic extraterritorial jurisdiction to operate before international action is used.

In regard to the complementarity between domestic and international action, apart from congestion issues, it can be said that overburdening the international level, or not allowing other legal systems to address non-state violations, risks over-empowering international authorities and tempting them to ignore legitimate domestic decisions. This echoes the risks of a world State or

⁸⁴⁷ Cf. Bruno Demeyere, "States' Innovative Mechanisms to Prevent Corporate Human Rights Crimes Abroad: Using 'Due Diligence' to Complement International Criminal Law's Regulatory Leverage", op. cit., at 179.

⁸⁴⁸ Cf. the notion of the responsibility to protect, as examined in: Anne Peters, "Humanity as the A and Ω of Sovereignty", op. cit., pp. 514, 517, 522-524, 527, 535-540; Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., pp. 59-60; United Nations, *A more secure world: our shared responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, A/59/565, op. cit., paras. 199-203.

⁸⁴⁹ Cf. Kevin Jon Heller, "A Sentence-Based Theory of Complementarity", *Harvard International Law Journal*, Vol. 53, 2012, pp. 208, 230, 234, 240, 242, 248, 249 available at: <http://www.harvardilj.org/wp-content/uploads/2012/01/HLI102.pdf> (last checked: 03/02/2012); and the three paragraphs of article 17 of the Rome Statute of the International Criminal Court.

an imperial legal context, pondered upon by Immanuel Kant or authors as Nico Krisch.⁸⁵⁰ On the other hand, denying the possibility of complementary international action and non-state contributions to the promotion and protection of human rights and guarantees deprives individuals of the possibility of challenging unfair local decisions or omissions that ignore universal concerns.⁸⁵¹

In turn, a multi-level and multi-actor framework offers possibilities of complementary initiatives and checks and balances. In such a framework, non-state activism can complement and demand public action, and the latter can examine if non-state claims are legally correct and if other members of civil society contradict those claims.

One case study that exemplifies this possibility of multi-actor checks and balances is exemplified in the research conducted by Eyal Benvenisti regarding the possibility that national judicial authorities counter possible abuses of non-state actors in a transnational and international process of interaction.⁸⁵² Likewise, it has been said that domestic judges can challenge what they perceive as wrong assertions of international authorities (including judicial ones) in order to stimulate normative and judicial changes or point out mistakes;⁸⁵³ while the latter can supervise or condemn the breaches of the former and can also declare non-state activities as lawful or unlawful, permitted or tolerated. This can happen, for example, when international bodies examine reports provided by States and non-state entities. Reports provided by these entities can be implicitly treated as acceptable even if they are not expressly regulated, thanks to implicit powers of the international bodies interpreted in light of the principle of effectiveness of human rights.⁸⁵⁴

It is important to stress that recognition of the substantive protection against non-state threats permits individuals to request domestic (and sometimes international) protection based on international substantive law, even if domestic legislation does not reflect it, case in which it must

⁸⁵⁰ Cf. Immanuel Kant, *Perpetual Peace, a Philosophical Essay* (translated by M. Campbell Smith), op. cit., pp. 155-157; Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order", op. cit., pp. 370-371.

⁸⁵¹ This implies that subsidiarity rests on the condition that global concerns and fundamental rights are respected, given the idea that local authorities should be entitled to address concerns regarding them in the first place. Thus, subsidiarity is not a shield with an absolute character and is not unlimited either.

⁸⁵² Cf. Eyal Benvenisti and George W. Downs, "National Courts Review of Transnational Private Regulation", Working paper, 2011, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1742452 (last checked: 06/02/2012), pp. 1-5, 17-18.

⁸⁵³ Cf. J.C. von Krempach, "Austria: Crucifixes in Public Nursery School not Unconstitutional, says Constitutional Court", 16 March 2011, available at: <http://www.turtlebayandbeyond.org/2011/council-of-europe/austria-crucifixes-in-public-nursery-school-not-unconstitutional-says-constitutional-court/> (last checked: 06/02/2012); Nicolás Carrillo Santarelli and Carlos Espósito, op. cit., at 77.

⁸⁵⁴ Cf. Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", op. cit., pp. 189-190; Luis Pérez-Prat Durbán, op. cit., pp. 37-38; Rule 69 of the Rules of Procedure of the Committee on Economic, Social and Cultural Rights, E/C.12/1990/4/Rev.1, 1 September 1993; Committee on Economic, Social and Cultural Rights, Report on the forty-fourth and forty-fifth sessions, E/2011/22—E/C.12/2010/3, 2011, paras. 26, 44, 46, 48, 52-54.

change. This confirms that substantive regulation of non-state misdeeds is not to be underestimated and in practice operates doing away with boundaries between legal systems, which is necessary to tackle phenomena immersed in an interdependent and globalized world.

From the point of view of non-state entities addressed by substantive or procedural norms on the protection of human dignity, it can be said that some of those actors may be sensible or react to regulations dealing with their conduct. Regulation may impact on non-state behavior at least by forcing non-state entities to either justify their behavior in its light or to declare a disavowal of its norms, decision that exposes them to sanctions, opposition or delegitimization.

As to how regulations affect non-state decisions, some studies that examine incentives for compliance with regulations have concluded that different factors can make non-state actors consider complying with regulations that regulate their conduct. They include arguments of political, ideological, normative, strategic, legal, ethical or other natures.⁸⁵⁵ Usually, it will be a pondered or unconscious combination of some of these factors that will exert an influence on compliance or non-compliance, but frequently one of those arguments will be predominant or even exclusive.

All in all, given the impact of regulations on non-state conduct, it is undeniable that calls for regulating non-state behavior in a globalized landscape⁸⁵⁶ are important, especially because of their potential to strengthen the protection of human dignity.

Concerning those non-state violations which are not implicitly, necessarily or intensely urged to be tackled by international procedures and action but are only addressed in a substantive way, it is important to consider that some scholars have argued that, despite theoretical assertions to the contrary, States have not been exclusive actors and participants in the international arena, and many of their acts can be traced back to the strong influence of non-state agents, or the influence of the latter has been quite influential (and vice versa).⁸⁵⁷

Furthermore, the trends and processes of globalization, privatization, growing interdependence, empowerment of several actors, and delegation, among others, have strengthened the position of many non-state actors, which have at their disposal more resources, opportunities and capacities to operate with a previously unheard-of relevance. This allows them

⁸⁵⁵ Cf. Annyssa Bellal and Stuart Casey-Maslen, *op. cit.*, pp. 194-196; Harold Koh, "Why Do Nations Obey International Law?", *op. cit.*, at 2600-2601. The factors explored in: Nicolás Carrillo Santarelli and Carlos Espósito, *op. cit.*, pp. 61-67 can also be relevant regarding non-state entities and not only concerning State judicial authorities, and are thus worth examining.

⁸⁵⁶ Cf. Hans-Otto Sano, *op. cit.*, pp. 137-141; Janne E. Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", *op. cit.*, pp. 2-3, 5-6, 8-9, 13-16, 40.

⁸⁵⁷ Cf. Fred Halliday, *op. cit.*, pp. 24-34.

to affect norms protecting human dignity (positively or negatively)⁸⁵⁸ or to exert influence over States, in comparison with some of which some non-state entities have more power or resources.

Simultaneously, several actors increasingly operate in a transnational or international way:⁸⁵⁹ some of them seek profit or non-profit goals, and some even engage in criminal conduct – many of those belong to the so-called “uncivil society”.⁸⁶⁰ One definition of transnational acts (that is not all-encompassing or universal given its use for the purposes of that treaty, which still provides inspiration) is found in article 3.2 of the United Nations Convention against Transnational Organized Crime, according to which:

“For the purpose of paragraph 1 of this article, an offence is transnational in nature if:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.”

In a context with dynamics of globalization and interdependence, stakeholders, observers, lawmakers and law-enforcers have realized how important it is to tackle the challenges posed by many actors that operate transnationally, lest they take advantage of gaps in some domestic legal systems and of the lack of coordination among them and with international law and elude justice and controls or impose their will taking advantage of race to the bottom dynamics or forum shopping strategies, among other factors facilitated by the excessive importance attached to non-human interests by some State and non-state agents. Naturally, all of those dynamics must be properly addressed in global and international normative terms.

On top of the challenges posed by actors due to the previous dynamics, some non-state entities cooperate among themselves to violate legal goods that protect human dignity and other values, as has been identified by the media, lawmakers, scholars⁸⁶¹ and organs as the Security Council (hereinafter, SC), which for instance in Resolution 1373 (2001) expressed its concerned about:

⁸⁵⁸ Cf. Elena Pariotti, *op. cit.*, pp. 95-97, 99, 101, 104-105.

⁸⁵⁹ Cf. Bob Reinalda, “Private in Form, Public in Purpose: NGOs in International Relations Theory”, *op. cit.*, pp. 12-13.

⁸⁶⁰ Cf. Anna Badia Martí, *op. cit.*, at 320; Kofi A. Annan, “Foreword”, *op. cit.*, at iii.

⁸⁶¹ Cf. article 6 of the United Nations Convention against Transnational Organized Crime; Anna Badia Martí, *op. cit.*, at 319; Celestino del Arenal, *op. cit.*, at 39; Eric Suy, *op. cit.*, at 382; <http://www.elespectador.com/articulo-segun-desmovilizado-existen-vinculos-entre-farc-eta> (last checked: 06/02/2012); http://www.elpais.com/articulo/internacional/prospera/coalicion/pirata/elpepuint/20090426elpepiint_3/Tes (last checked: 06/02/2012); “Los piratas blanquean el dinero a través de Dubai” (<http://www.publico.es/estaticos/pdf/ficheros/pdf/22042009.pdf>).

"[T]he close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials".

Non-state interaction leading to violations of legal goods makes it very unlikely for isolated actions to successfully protect victims and affected legal goods. Legal responses must therefore not only lawfully make the most of global opportunities, but also permit and foster cooperation with both private and public non-state entities.

Some initiatives have taken the previous ideas into account, and among the actions that have been proposed to combat non-state threats, several cooperation schemes with international legal dimensions have been adopted. This has happened in the fields of counter-terrorism and actions against transnational organized crime, for example,⁸⁶² in which wrongs attributable to some non-state actors that operate transnationally or commit reproachful acts have usually been: a) labeled as contrary to international law from a substantive point of view (third level of horizontal international involvement according to Knox), being States expected to tackle those misdeeds and cooperate to do so; and b) required to be prohibited, prevented and dealt with domestically by States with the cooperation of non-state entities (first or second level of international involvement in the opinion of John Knox). The pertinent principles and regulation suggest that there may be implicit duties of non-state actors due to tacit international understandings or the emergence of principles *in foro domestico* and with an international origin.

The two strategies mentioned in the previous paragraph are consistent with the doctrinal positions that argue that the behavior of actors that are significant or relevant because of their role or impact in reality and their capacity to affect legal interests (heightened by interdependency and globalization) must be regulated.⁸⁶³ Evidently, the suffering of individuals and the disregard of their dignity by non-state entities acting in a transnational way that enables them to elude the control of weak or complicit States or to take advantage of gaps and lack of coordination between actors and normative systems are relevant from ethical, social and legal points of view (given the violation of humanitarian legal goods). It is not only recommended but, from a legal point of view, also obligatory to regulate the conduct of those actors, out of consistency with demands of human rights normative foundations and principles.

⁸⁶² Cf. Anna Badia Martí, op. cit., pp. 334-343; John H. Knox, "Horizontal Human Rights Law", op. cit., at 24; articles 7 and 18 of the International Convention for the Suppression of the Financing of Terrorism.

⁸⁶³ Cf. Janne E. Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", op. cit., pp. 15, 40.

If it is acknowledged that non-state activities committed in a transnational manner can be contrary to human dignity,⁸⁶⁴ then regardless of what level of international intensity operates to address it, States with jurisdiction in all the territories where transnational activities occur must be able to tackle those threats, and all other public entities must cooperate to address them and help States with jurisdiction. Concerning transnational violations with special relevance or frequency, States can be under more stringent and intense obligations to outlaw and regulate responses to those acts in great detail and to act accordingly. Direct international procedural action (not necessarily adjudicatory, see Chapter 8) is also recommended in regard to those violations, and non-state action that engages the respective actors must, as always, be permitted.

In general terms, States and some international organizations have horizontal duties to protect individuals from non-state violations. They flow from the general obligation to guarantee or ensure the enjoyment of human rights; and some treaties envisage more detailed specific manifestations of the duty to protect individuals from non-state abuses in order to take account of the special needs of vulnerable rights or persons or the necessity of effectively dealing with some offenders, as happens with the treaties on the human rights of women, persons with disabilities, or migrants, among others.⁸⁶⁵

The aforementioned specialized or detailed obligations are important because of the need to protect vulnerable individuals. This is important even if their effects are limited to the territory of a State or do not surpass local contexts in geographical terms, due to the global legal goods involved.

Indeed, violations of vulnerable individuals and/or rights are important and must be specially addressed because those abuses can be committed in a way or in the midst of social and other dynamics that makes it necessary for individuals to receive special and intensive protection and for future violations to be deterred and prevented, especially (but not only) when they are common or widespread. In those cases, detailed international regulation is important to ensure that some minimum standards required by all affected vulnerable rights and individuals guide State and non-state initiatives of promotion and protection of rights.

The absence of common international legal minimum standards to protect vulnerable rights and persons that could be taken into account by domestic legal systems could contribute to

⁸⁶⁴ Cf. Tom Obokata, "Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law", *International Journal of Refugee Law*, vol. 17, 2005, pp. 394-395, 400-407.

⁸⁶⁵ Cf. Articles 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, 4 of the Convention on the Rights of Persons with Disabilities, 14 and 25 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, or 1 through 9 of the Convention of Belém do Pará; John H. Knox, "Horizontal Human Rights Law", *op. cit.*, pp. 22, 24-26.

flaws in domestic legislation (perhaps innocently due to ignorance of best practices) and to the absence of the identification of situations of concern that must be especially addressed, preventing the symbolic effects that such special identification can have from operating.

In my opinion, the aforementioned specialized international regulation should at least envisage detailed international substantive duties (not necessarily accompanied by procedural *international* actions) of non-state actors that are potential offenders. That detail does not have to be in depth all the time, and sometimes indication of specific prohibited conduct suffices. I defend this need of specialized non-state duties when non-state actors are frequently offenders of vulnerable rights because of the risk that States do not enact domestic substantive prohibitions that properly deal with the type of violations being examined. After all, inappropriate legislation concerning duties of protection and respect of human rights exists from time to time, and it constitutes a breach of the duty to internalize human rights law and adapt local norms to it.⁸⁶⁶ To my mind, this train of thought is not only important concerning vulnerable rights and is also applicable to transnational offenses contrary to human rights, due to the need to ensure both their being tackled and the protection of victims.

Moreover, it is also risked that the absence of specialized international duties of frequent non-state perpetrators of transnational violations or attacks against vulnerable individuals encourages and fosters impunity when they seek refuge in legal systems in which they cannot face domestic prosecution or take advantage of social endorsement of their misdeeds (e.g. concerning domestic abuses against women in some societies). Thus, *at a minimum* (this means that international protection *can* be more intense), it is convenient to create international obligations of non-state actors that expressly and in detail deal regulate the conduct of entities that either recurrently or with a great likelihood can threaten certain rights (e.g. those of vulnerable individuals) or engage in certain violations (e.g. transnational abuses). Those obligations defend correlative entitlements of individuals in substantive terms regardless of where a violation takes place, and permit different actors and authorities to contribute to protecting them.

Other violations can also be tackled in such an intense manner or even in a more intense way by international norms when their features make an exclusively domestic strategy potentially ineffective or have the chance of not fully and properly tackling abuses.

⁸⁶⁶ Cf. article 4 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts; Nicolás Carrillo Santarelli and Carlos Espósito, *op. cit.*, at 54.

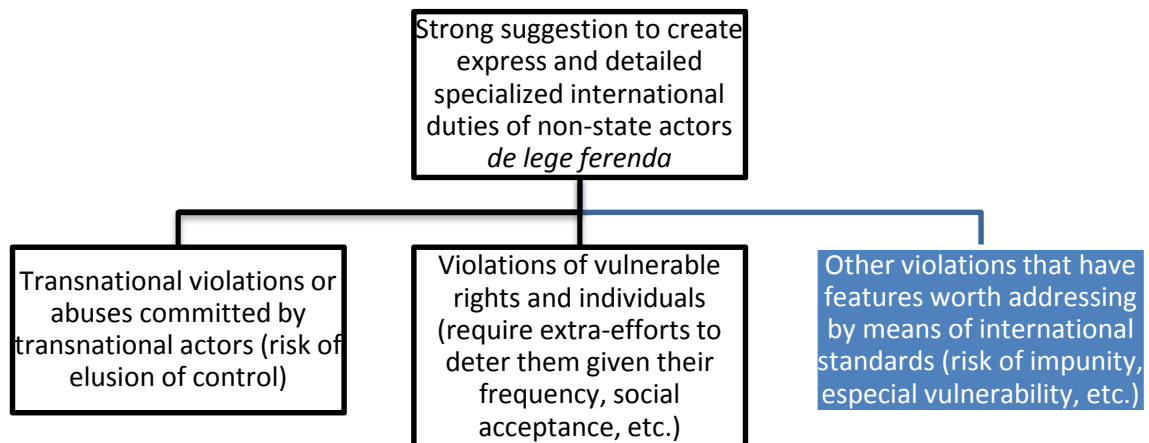


Figure 6: Events in which express and detailed specialized human rights international obligations of non-state actors or alternative equally effective international actions are recommended

It must be said that sometimes other strategies different from non-state duties regulated in great detail can guarantee that all the problematic aspects of violations will be tackled. Since the previous ideas are recommendatory, sometimes those alternative mechanisms may be acceptable instead. Whether those strategies should be adopted through binding norms or non-binding regulation is a controversial question that has been discussed by other authors. Ensuring full and proper responses is the crux of the matter.

To my mind, a combination of judicial and non-judicial mechanisms (see Chapter 8, *infra*) and standards is convenient, given the shortcomings and advantages of each of those types, as will be explained shortly. Mechanisms and instruments that are only recommendatory may be ignored in practice, or even twisted and taken advantage of to improve the reputation of entities that have no actual intention to comply with human rights standards, as can be inferred from the opinion of Alexandra Gatto.⁸⁶⁷ In fact, the somewhat disappointing outcomes of non-binding strategies, as the Global Compact, is attributed (at least partly) by some precisely to their non-obligatory character, which permit to ignore those strategies with changes of policies without this constituting a breach of duties (although some consequences with expressive effects and indirect legal implications can exist even then).⁸⁶⁸

⁸⁶⁷ Cf. Alexandra Gatto, *op. cit.*, at 431.

⁸⁶⁸ Cf. August Reinisch, *op. cit.*, at 52; Koen de Feyter, “Globalisation and human rights”, *op. cit.*, at 83; John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, *op. cit.*, where the author says that “Although thousands of businesses around the world have agreed to participate in the Global Compact, its

Concerning these issues, it is at least *suspicious* that initiatives that seek to create or recognize binding human rights obligations of actors as corporations and are supported by human rights activists have been opposed by the would-be addressees of the norms in question,⁸⁶⁹ in spite of the supposed public pronouncements of those actors about being committed to the respect of human rights. The fact that States have given in to the position of corporations⁸⁷⁰ may be due to factors as their agreeing with them, the belief that it is complex or problematic to adopt those obligations, double standards, weakness against economic power, priority being given to certain interests over humanitarian ones, or a combination of these and other factors.

Even if an entity desires in good faith to heed non-binding humanitarian standards, the frequent lack of access to impartial and/or direct remedies concerning compliance with them and the missed opportunity of permitting others to point out breaches,⁸⁷¹ along with the absence of a process where compliance is discussed and there is a prospect of sanctions or reparations that can serve to deter breaches or repair victims, are some of the problems of exclusively voluntary standards. While they can trigger dynamics that can change the attitudes and practice of addressees and others, sometimes those standards can be adopted as propaganda or to try to evade protests, adverse effects or being branded as violating or having no commitment to human rights.⁸⁷²

Therefore, for the protection of human dignity from potential non-state violations to be effective and not merely rhetorical, binding standards and procedures that can examine non-state conduct must exist, in accordance to the principles and criteria of operation found in this Chapter.

These ideas are backed by the opinion of actors like Earth Rights International, that criticize frameworks on corporations and human rights that do not mention the imposition of

effectiveness is limited by its voluntary nature and the generality of its principles.” Additionally, see “859 Companies Delisted for Failure to Communicate on Progress”, available at: <http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html><http://www.unglobalcompact.org/news/8-02-01-2010> (last checked on: 12/03/2012).

⁸⁶⁹ Cf. John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, op. cit.

⁸⁷⁰ Ibid

⁸⁷¹ Cf. Alexandra Gatto, op. cit., at 431; August Reinisch, op. cit., pp. 52-53; Corporate Responsibility, the corporate responsibility coalition, “Protecting rights, repairing harm: How state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities”, op. cit., at 4; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., paras. 94-95, 102-103; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011, Principle 31 with its commentary (accessibility and other requirements have the utmost importance).

⁸⁷² Cf. Alexandra Gatto, op. cit., at 431; August Reinisch, op. cit., at 53.

binding obligations on those entities,⁸⁷³ or due to the consideration that some initiatives are not completely effective because of their non-binding character.

On the other hand, the adoption of an exclusively hard law strategy that ignores *complementary* mechanisms will fail to take advantage of the culture fostering, persuasion, flexibility, indication of responsibilities (legal or not) to the public and stakeholders, and the self-initiative concerning regulation that are promoted by soft law and voluntary initiatives.⁸⁷⁴ Non-binding standards and initiatives can help to promote a non-state culture of human rights, which in the long term is of the utmost relevance. It is certainly necessary to both impose obligations and generate conviction and awareness about the respect of the principles underlying those duties. After all, as Harold Koh argued in a persuasive way, conviction about the reasonableness and properness of law leads to its most effective implementation.⁸⁷⁵ This may explain why John Ruggie and others stress the importance of creating a human rights culture of corporations⁸⁷⁶ and other actors.

Soft law initiatives can create symbols of what behavior is expected from a non-state entity (in human rights terms, in this case), which is relevant insofar as it can impact on and help to modify or reinforce a given non-state pattern of conduct and to offer incentives, claims and standards that can be invoked by affected persons, stakeholders and third parties. Additionally, soft law can pave the way for future legislation, point out some possibilities of changes *de lege ferenda*, serve as a bridge between soft and hard law, or signal actions that are needed or problems that need to be addressed, among others. Regarding all these functions, it is pertinent to examine the comments of various participants in the discussion of an initiative on Draft Principles on “The Children’s Rights and Business”, that mentioned the following functions and considerations as related to the “Utility of Principles”:

- “Clarify definitions & standards;
- Increase awareness and commitment by business;
- Help businesses recognize a need to commit to the UN Global Compact;
- Enable businesses to validate their communications to clients and suppliers;
- Support humanitarian work;
- Help to identify areas of improvement and foster our understanding that we are on track;

⁸⁷³ Cf. Earth Rights International, Jonathan Kaufman, “Ruggie’s Guiding Principles Address Some—but not all—ERI Concerns”, 2011, available at: http://www.earthrights.org/blog/ruggies-guiding-principles-address-some-not-all-eri-concerns?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+EarthRightsInternational+%28EarthRights+International%29 (last checked: 06/02/2012).

⁸⁷⁴ Cf. Elena Pariotti, op. cit., pp. 99-101; August Reinisch, op. cit., at 53.

⁸⁷⁵ Harold Koh, “Why Do Nations Obey International Law?”, op. cit., at 2601.

⁸⁷⁶ Cf. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., paras. 27, 29-32.

- Help expand the approach to child focused issues;
- Provide input to future advocacy campaigns around ethical business practices;
- Enable NGOs to easily identify the responsibility that business have in relation to children rights and therefore making it easier to engage”.⁸⁷⁷

There are soft law instruments that indicate how non-state entities should behave, as illustrated, for instance, with article XXX of the American Declaration of the Rights and Duties of Man, which deals with duties of individuals towards children and parents. Moreover, sometimes it is hard to distinguish between soft law and hard law are hard, due to possible changes concerning the current status concerning the obligatoriness or lack thereof of a standard, given the possibilities of incorporation of its content by any of the sources of law or of its indirect normative reception or effects in different ways.

All in all, because of the need to *effectively* protect human dignity, the existence of binding obligations is often indispensable to prevent the lack of access of victims to protection measures, the absence of investigations of alleged violations, or mere rhetorical uses of standards. Likewise, both adjudication and *complementary* mechanisms and strategies that are non-legal in their dynamic (that yet may have a legal basis and/or be legally regulated or ordered, optionally or mandatorily) and non-judicial strategies (formal or informal), such as mediation, conciliation, arbitration, or others, can contribute to the protection of human dignity. Additionally, mechanisms of protection can be State-based or not; and to be properly designed and employed, they must meet requirements of accessibility, legitimacy, and due process, in order to maximize and increase the likelihood of human dignity being effectively respected and promoted⁸⁷⁸ by State and non-state entities.

⁸⁷⁷ Cf. UNICEF, The Global Compact and Save the Children, “Draft Principles: Consultation Feedback Analysis & Report”, *The Children’s Rights and Business Principles Initiative*, 2011, at 15.

⁸⁷⁸ Cf. Corporate Responsibility, the corporate responsibility coalition, “Protecting rights, repairing harm: How state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities”, op. cit., pp. 1, 6-7, 11, 13-14, 17-27; Human Rights Committee, General Comment No. 31, op. cit., para. 7; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., paras. 9, 26, 29-32, 84-85, 92; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011, principle 31 and its commentary, pp. 26-27; Jernej Letnar Cernic, “*Global Witness v. Afrimex Ltd.*: Decision Applying OECD Guidelines on Corporate Responsibility for Human Rights”, *ASIL Insights*, vol. 13, issue 1, 2009; Jernej Letnar Cernic, “The 2011 Update of the OECD Guidelines for Multinational Enterprises”, *ASIL Insights*, vol. 16, issue 4, 2012; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011, commentary to principles 25-31 (on judicial and non-judicial, State-based and non-State-based “grievance mechanisms”); *Protect, Respect and Remedy: a Framework for Business and Human Rights*, op. cit., A/HRC/8/5, op. cit., paras. 82-103; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 7.

Concerning the importance of that effectiveness, let me briefly quote an idea mentioned in the British newspaper The Guardian regarding ethics and the tourism industry:

“A code of ethics and human rights policy is no longer enough: companies need to show practical examples of where they have made a difference through the supply chain, local communities, their workplace, and to their customers' behaviour.”⁸⁷⁹

Taking into account all the previous ideas, it is important to bear in mind that strategies of persuasion, socialization, threats, acculturation, internalization, conviction or social pressure, among others, may make soft law (and hard law) norms relevant and have an impact on non-state behavior.⁸⁸⁰ Their use, coupled with the greater guarantees, prospect of effectiveness, access, and prevention of elusion of control present in binding strategies, must be taken into account to generate dynamics of non-state respect of human dignity and help to overcome the deficits of limited and isolated strategies.

In this fashion, for instance, it is possible to order State parties to certain treaties to outlaw conduct deemed as unlawful, as that related to terrorism, transnational crime, etc. The mandate to adopt domestic standards with a content that is to a great extent detailed internationally is relevant because of those acts can affect legal goods that are relevant for the *community* dimension of the international legal society. That strategy can be complemented by contacts, agreements, persuasion, recommendations or supervision by international and national authorities and by non-state entities. Those actions can remind of the existence of responsibilities and rights in a multi-level framework with a global legal space, and their complementarity can maximize the prospects of effectiveness of the protection and promotion of human dignity. Some of these ideas are hinted in the Manual of Operations of the Special Procedures of the Human Rights Council of 2008.⁸⁸¹

To summarize the ideas presented so far, one can say that to complement rights of individuals and properly address legally relevant acts such as potential abuses, it is convenient to create some negative capacities (substantive capacities, e.g. duties, sanctions; and procedural burdens, e.g. subjection to mechanisms of punishment, deterrence or discouragement) of non-state actors through international norms, which operate as lowest common denominators. This is illustrated as follows:

⁸⁷⁹ Cf. The Guardian, “Integrating ethics into tourism: beyond codes of conduct”, *The sustainable business blog*, available at: <http://www.guardian.co.uk/sustainable-business/blog/integrating-ethics-into-tourism> and <http://www.business-humanrights.org/Links/Repository/1008336> (both last checked on: 07/02/2012).

⁸⁸⁰ On these dynamics, cf. analogously the analysis presented in: Nicolás Carrillo Santarelli and Carlos Espósito, op. cit., pp. 61-66. Concerning processes of socialization, persuasion and threats and their influence on non-state compliance with regulations, cf. David Capie, op. cit.

⁸⁸¹ Cf. Manual of Operations of the Special Procedures of the Human Rights Council, paras. 81-83.

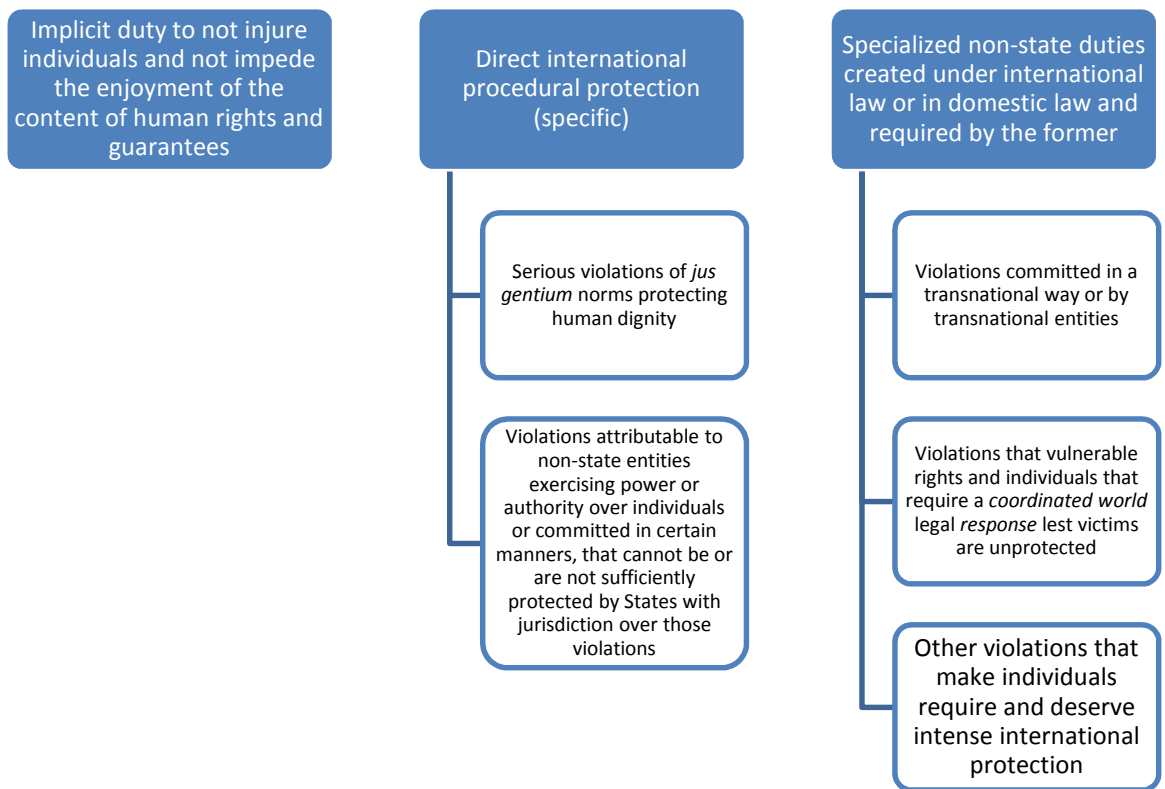


Figure 7: Synthesis of the basic and minimum international legal responses to non-state violations proposed *de lege ferenda*

Note how the substantive or procedural strategies that have been discussed in this section are *complementary to* and not replacements of the general duties of protection, that are implied or –employing the terminology handled by the Special Tribunal for Lebanon- inherent, and bind actors with an inherent capacity to negatively affect the enjoyment of human rights, being it necessary to regulate that capacity just as every conduct that affects legal goods must be regulated, paraphrasing Nijman.⁸⁸²

This regulation, as was just mentioned, can be implicit, given the existence of general principles of law that hold every actor that injures someone responsible. This reflects an *implicit duty to not injure*. Additionally, those obligations are supported by the ideas that: 1) the content of the legal goods that protect human dignity is affected by non-state violations and thus the interests of the world community are often threatened unless implicit *negative duties* exist; and that 2) these duties seek to deal with capacities (of violating human rights) that must be legally addressed, as can be inferred from the opinion of the ICJ regarding capacities of non-state addressees or subjects of international law, taking into account that such capacities can be positive (such as rights) or negative (e.g. duties or other legal burdens), as revealed by the close

⁸⁸² Cf. Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, *op. cit.*, pp. 2-5, 7, 15, 40.

link between powers and duties, being some of the former required for complying with the latter.⁸⁸³ The possibility of international law creating such legal capacities of non-state entities is permitted by its sources and the absence of an impediment to do so, as authors have put forward and is discussed in Chapter 5.⁸⁸⁴

It is necessary to stress that the absence of direct detailed and specialized international duties or subjection to procedures of supervision of non-state actors does not always imply the lack of effective protection of those affected by them. After all, duties are but *one* of the possible legal capacities of non-state actors and of the mechanisms to protect individuals.⁸⁸⁵ What matters is that protection is effective. Therefore, it is possible to use different preventive, *ex post facto*, judicial and non-judicial, legal- and non-legal, duty-based or non-duty based, cooperation or other actions and strategies, as long as they are appropriate. Often, a combination of those strategies is the only way to ensure an effective respect of dignity by non-state actors in practice.

This also explains why non-legal mechanisms are sometimes crucial, as held by Amartya Sen.⁸⁸⁶ Legal strategies that do not follow a breach and sanction logic are also relevant, as are for instance those that address some material and/or ideological roots, causes and (unjustifiable) “justifications” that lead some violators to violate human rights,⁸⁸⁷ being it necessary to address those causes to bring about a lasting respect of those rights. Nevertheless, in turn those strategies cannot sufficiently ensure the protection of human beings, and so initiatives as the creation of duties of respect and the imposition of sanctions to offenders (in different normative systems, according to complementarity criteria) are necessary because there is always the possibility of non-state violations, all of which must be prevented and responded to.

Concerning the impact of different strategies on the protection of human dignity from non-state abuses, it is convenient to first examine the link between the expressive and educative functions of norms and reactions by non-state actors, and secondly analyze what factors can

⁸⁸³ Cf. International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, op. cit., pp. 178-180, 182; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 71; Koen de Feyter, “Globalisation and human rights”, op. cit., pp. 69-71, where it is argued that the extent of both “rights and duties” of international organizations, addressees of norms of *jus gentium*, depends on “the purposes and functions as specified or implied in the constituent documents of the organisations and developed in practice.”

⁸⁸⁴ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 70-73; Robert Dufresne, op. cit., pp. 226-227; Theodor Meron, *The Humanization of International Law*, op. cit., pp. 39-41.

⁸⁸⁵ In my opinion, both negative and positive legal capacities of addressees of norms belonging to *jus gentium* can be substantive or procedural or share both traits. Concerning this, one can think for instance of the freezing of assets, bans or embargoes as some negative capacities encompassed in *jus gentium*. Cf. Annyssa Bellal and Stuart Casey-Maslen, op. cit., at 195.

⁸⁸⁶ Cf. Amartya Sen, op. cit., pp. 327, 345 (although it must be noted that I disagree with the author on the point he tries to make regarding the alternative or exclusive character of non-legal mechanisms of promotion of some rights, because I consider they must be complementary in order to ensure the enjoyment of all rights with judicial and legal backup so that no victim is unprotected).

⁸⁸⁷ Cf. Preamble to the Protocol against the Smuggling of Migrants by Land, Sea and Air.

interplay with norms in order to increase or decrease the likelihood of an obligation being more effective.

Concerning the first issue, it must be recalled that different authors have posited that legal actions, which include but are not limited to lawmaking, can send signals to society and to diverse actors that may contribute to modifying or endorsing behaviors and attitudes, thus impacting on the beliefs of addressees of multiple social actors and having a cultural and expressive impact (limited or strong, dismissed or accepted, depending on many circumstances).

As a result, the creation of duties, judicial actions or the adoption of other measures that aim to protect human dignity from non-state threats, even in the absence of *express* non-state international obligations, may modify the attitude of non-state entities, making them pay more attention to the consequences of their behavior out of conviction or the desire to avoid sanctions and opposition, for instance through boycotts or losses in reputation and concerning their interests.⁸⁸⁸

Even if for the sake of discussion one were to consider that non-state entities with international legal capacities will hardly adjust their behavior to what is legally expected of them, the expressive function of legal actions against non-state violations may persuade *other* actors to attach importance to the foundation and values of those actions and promote and protect them from offenders, through *shaming* techniques, boycotts, legal action,⁸⁸⁹ or otherwise.

Taking into account that non-state entities can pursue interests shared with others through networks and informal alliances,⁸⁹⁰ and that as has been pointed out by David Caron third-parties may be interested in the outcome of legal actions and try to act in consequence to have their opinion heard and protected,⁸⁹¹ tendency that is found in the framework of international law generally,⁸⁹² the identification of non-state violations may persuade actors that promote human rights to operate in ways that help protect individuals from non-state abuses.

Because of its potential to impact on non-state behavior *directly and indirectly* (i.e. influencing other stakeholders or actors that can exert influential pressure on it), it is pertinent to study what factors can increase the effectiveness of both the expressive, symbolic and educative

⁸⁸⁸ Cf. Alexandra Gatto, *op. cit.*, at 431; August Reinisch, *op. cit.*, at 53.

⁸⁸⁹ Cf. Thomas Buergenthal, *op. cit.*, pp. 803-804; Eric A. Posner, *op. cit.*, pp. 55-56; Luis Pérez-Prat Durbán, *op. cit.*, pp. 34-38; Elena Pariotti, *op. cit.*, 98; Daniel Thürer, *op. cit.*, at 47; ASIL, *Proceedings of the 92nd Annual Meeting: The Challenge of Non-State Actors*, The American Society of International Law, 1998, pp. 22-23.

⁸⁹⁰ Cf. Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", *op. cit.*, pp. 184-185, 192-200, 203; Daphné Josselin and William Wallace, "Non-state Actors in World Politics: a Framework", *op. cit.*, pp. 3-4, 8.

⁸⁹¹ Cf. David D. Caron, "Towards a Political Theory of International Courts and Tribunals", *Berkeley Journal of International Law*, Vol. 24, 2007, pp. 413, 417.

⁸⁹² Cf. Eric A. Posner, *op. cit.*, pp. 53-55.

functions of norms and their effectiveness, particularly concerning the dimension of their protection from non-state abuses.

Regarding this, different studies and scholars have devoted attention to processes and factors that may weigh on the respect of (international or other) legal norms by a given entity.

To begin with, it is convenient to handle a distinction drawn by Harold Koh, according to which coincidence with what a norm decrees can be due to: a) mere coincidence between what law states and how an actor behaves; b) strategic or rational considerations that lead an entity to think that it is *convenient* to act in accordance with what law prescribes; c) the desire to obtain a “reward” (in whatever form, be it a benefit, etc.) expected for compliance with the law, or to avoid sanctions for failure to abide by legal prescriptions; or d) a belief and conviction according to which a norm ought to be followed.⁸⁹³

Complementing this interesting insight, other studies indicate that there are many factors that *may* exert an influence on the choice of which of the previous four courses of action to follow, including the following: ethical/moral considerations; pressure and/or tendency to follow the example set by others as paradigmatic in a system/group of common belonging (acculturation, etc.); economic or rational considerations; support of a given ideal or actor; knowledge or absence thereof; or extra-professional and academic background and considerations.⁸⁹⁴ Other factors suggested by authors include strategic, political or normative considerations about the possible consequences or principle implications of compliance with or disregard of law.

It is necessary to take into account that frequently it is not a single factor but the combination of many of them that exerts an *influence* on the perception of an addressee (aware of it or not), that in the end *makes* its own decisions and is thus responsible.⁸⁹⁵

Given their impact, the influence of those relevant factors has to be taken into account when designing norms that address non-state behavior for them to increase the likelihood that they are heeded in practice. Therefore, the specific mindset, context and reality of each actor has to be taken into account when designing legal actions and strategies, to ensure that they appeal to them and third parties and have more possibilities of being successfully obeyed or promoted. This implies, for instance, that it is necessary to take into account the reality of an actor when

⁸⁹³ Cf. Harold Koh, “Why Do Nations Obey International Law?”, *op. cit.*, at 2600-2601.

⁸⁹⁴ Cf. analogously, Nicolás Carrillo Santarelli and Carlos Espósito, *op. cit.*, pp. 52, 57, 62, 64-65, 67-71.

⁸⁹⁵ Cf. *Ibid.*, at 66; Ryan Goodman and Derek Jinks, “Incomplete Internalization and Compliance with Human Rights Law: A Rejoinder to Roda Mushkat”, *European Journal of International Law*, vol. 20, 2009, pp. 444-445; Ryan Goodman and Derek Jinks, “Incomplete Internalization and Compliance with Human Rights Law”, *op. cit.*, pp. 726-727, 731, 743, 745-746; Annyssa Bellal and Stuart Casey-Maslen, *op. cit.*, pp. 177, 194-196.

adopting secondary norms on responsibility or substantive standards that address it, as has been expressed by some authors.⁸⁹⁶

Nevertheless, strategic considerations are not to be regarded as the only criterion to inspire the design of non-state positive and negative capacities, because there is something that cannot be negotiated: the respect of human dignity by every potential violator. There can be no compromise concerning this, least we make individuals means of other entities when they desire to achieve their interests and the non-conditional inherent worth of individuals is ignored. Therefore, strategic considerations serve to make regulations that are necessary for protecting individuals fully effective in practice, not to decide whether to create them or not: human beings take precedence.

That non-state entities can adjust their behavior to what is decreed in norms is demonstrated by some examples, such the fact that IHL or other international norms can impact on and modify non-state attitudes, compelling them to justify their behavior and seek to avoid being declared as violators (out of the desire to avoid sanctions and opposition, or out of conviction and the belief that they are bound by those norms), as has been explained by Fred Halliday, Annyssa Bellal or Stuart Casey-Maslen,⁸⁹⁷ among others.

It cannot be denied that some non-state actors will disagree with the norms that compel them due to their not agreeing with their content or the way in which they were adopted (considering, for instance, that their opinion was relevant and was not considered). In those cases, the norms can still be effective. For example, they may be enforced or prompt actors to express and justify their disagreement.

Alternatively, for a variety of reasons (e.g. brazenness in spite of the correctness of a norm due to attaching more importance to selfish interests), addressees, especially powerful ones, sometimes simply ignore the need to explain their behavior and opt to face the consequences of their conduct. When public interests such as the protection of human dignity are at stake, members of the world community should not make those actors think that they can get away with their violations, lest they foster them and with their negligence and omission have their responsibility engaged as well due to acquiescence or negligence.

A very interesting possibility concerning stimuli of non-state compliance with international law is that of *internalization*. It illustrates the multi-actor framework of the current world society and the multiplicity of normative manifestations. First of all, authors as Günther Teubner and

⁸⁹⁶ Cf. Robert Dufresne, op. cit., pp. 227, 229; José E. Alvarez, "Are Corporations "Subjects" of International Law?", *Santa Clara Journal of International Law*, Vol. 9, 2011, pp. 30-34; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, op. cit., para. 53.

⁸⁹⁷ Cf. Fred Halliday, op. cit., at 35; Annyssa Bellal and Stuart Casey-Maslen, op. cit., pp. 194-195.

Rafael Domingo, among others, consider that non-state actors may adopt normative manifestations that, for those entities, are akin to *law* even if it is not incorporated in public legal systems (domestic or international ones). Sometimes those manifestations are called global law or *lex privata*, being in my opinion the latter a more accurate term when it is created by private actors, due to its emphasizing the private nature of its creators; while the former must be considered in my opinion a broader term, since participation in global legal spaces is not restricted to private entities.⁸⁹⁸

These normative manifestations have an undeniable importance, regardless of agreement with their legal character or not, since they can guide and inspire non-state entities and serve as a measure with which to assess their behavior. This has been acknowledged by the theory of Global Administrative Law, and those standards can be transformed into or recognized by public legal systems, as happens for instance with the possible ascription of effects to standards of the ISO in the WTO, which derives from the recognition of the relevance of those normative manifestations -legal or not-.⁸⁹⁹

Interestingly, the process can be the reverse one, with private non-state entities incorporating recommendations or norms of public legal systems or other non-state actors. This can happen due to dynamics of persuasion or introduction of the considerations of those prescriptions in their own norms, among other processes. This confirms that apart from unilateral or multilateral self-regulation (e.g. by means of some codes of conduct, agreements, contracts as those related to the safety of workers, etc.), non-state entities can also engage in hetero-regulation,⁹⁰⁰ adopting norms that are meant to regulate the conduct of other actors (public or private, State or non-state), in the same way that public actors (State entities and international organizations)⁹⁰¹ can.

It is important to be aware of the fact that just as norms enacted by States can be contrary to international law and engage their responsibility, what non-state actors perceive as

⁸⁹⁸ Some theories posit that non-state actors can develop legal norms outside the frameworks of domestic and international law, due to reiterative processes where behaviors are labeled as legal or illegal, during the course of processes of hierarchization, temporalization and externalization. The terminology of *global law* as equating with law emanating from private entities without reference to State-sponsored legal systems may be misleading, since alluding to globality is more reminiscent of an all-encompassing category, that surpasses just private entities and includes public actors as well. Therefore, I agree with Domingo's proposed terminology. Aside from terminological matters, however, both theories offer interesting and many accurate insights. These issues are examined without endorsing the theory of non-state "binding" law in: Luis Pérez-Prat Durbán, op. cit., pp. 31-34.

⁸⁹⁹ Cf. Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law", op. cit., pp. 36-37, 52-55.

⁹⁰⁰ Cf. Luis Pérez-Prat Durbán, op. cit., at 33, on non-state self- and hetero-regulation. An interesting and important contract that seeks to improve the safety of workers in the garment industry in Bangladesh is described in <http://www.cleanclothes.org/news/press-releases/2013/07/08/accord-announces-implementation-plan> (last checked: 09/07/2013).

⁹⁰¹ Cf. Elena Pariotti, op. cit., pp. 99-101; August Reinisch, op. cit., pp. 43-49.

“their law” or norms can violate international human rights and guarantees. This is the case, for example, of the so-called ‘law’ 002 of the guerrilla FARC of Colombia, in furtherance of which that group considered itself legitimized to blackmail asking for a “revolutionary tax”, and threatened with consequences as kidnapping those who failed to pay it.⁹⁰²

This case highlights how determining whether *lex privata* amounts to non-state law or not is tricky and involves many considerations, as for instance the possible risk of legitimization effect concerning non-state normative manifestations that are contrary to essential interests of the world community and all levels of governance. Public elements and the respect of rights thus must be used to evaluate non-state regulation.

In any case, just as labeling a non-state actor as a violator of human rights does not legitimize it but quite the contrary, considering that a “non-public” regulation is condemned and considered contrary to human rights emphasizes the need to prevent its being applied and to declare that it constitutes an abstract violation. Moreover, its authors must face condemnation of civil society and public actors based on the legal and non-legal, ethical and moral dimensions of human rights, which have been important throughout the history of human rights activism and legal evolution.

This multiplicity of possible interactions and influences of actors and normative dynamics reflects a changing social landscape, the opportunities of which must be taken advantage of to effectively protect human dignity in a multi-actor and multi-level framework. Furthermore, civil society and non-state actors can exert pressure in different ways to push for a more protective system of human dignity. Apart from exploiting current opportunities, the existence of non-state violations of human rights can no longer be ignored by some, lest the suffering of some victims that are unprotected delegitimizes the system⁹⁰³ and makes it crumble due to internal normative inconsistencies and failure to have solidarity with all who suffer, being that solidarity an imperative goal of the human rights movement.

To achieve this, all regulations -private and public- can contribute to recognizing the existence of the aforementioned violations and therefore to highlight the need to protect human rights goals and interests -legal goods-, which are not only found in domestic and international law because, due to synergies, their core is shared in a global legal space of interdependence

⁹⁰² Cf. <http://www.elmundo.es/2000/05/03/internacional/03N0065.html>; “El ‘negocio’ de los secuestros: Las FARC obtuvieron más de 20.000 millones de pesetas con la extorsión en el año 2000”, 25 March 2001, available at: <http://www.elmundo.es/elmundo/2001/03/25/internacional/985538651.html> (last checked: 07/02/2012); “Farc ‘proscriben’ el secuestro y dicen que es hora de dialogar”, El Tiempo, available at: http://www.eltiempo.com/politica/farc-dejaran-en-libertad-a-soldados-y-policias-secuestrados_11226728-4 (last checked: 27/02/2012).

⁹⁰³ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 43-44.

and interaction, in which the failure of one actor or level can lead to an ineffective and insufficient protection of the shared interests of legal systems and actors. For this reason, the protection of human rights from non-state actors must both have an international legal dimension and not ignore global governance and global dynamics that are necessary for its effectiveness.⁹⁰⁴

For these reasons, I disagree with assertions as those of Jean D'Aspremont in the sense that the study of non-state transnational or other regulations is outside the scope of the scientific study of international law.⁹⁰⁵ To my mind, that study is relevant for analyzing international law, because soft law can contribute to strengthening the protection of global legal goods in practice, and also because its content can be later included in hard law or produce effects indirectly. Furthermore, the study of international law should be critical and made in light of human and social needs, their relation to international norms, and their effective promotion, taking into account power and legal practices.⁹⁰⁶

This alludes to the idea that, unlike what some notions of a "purity" of law suggest, law is not hermetic and neither can nor should wholly exclude meta-legal and extra-legal considerations. After all, theoretical conceptions have an impact on legal practice, and an extreme positivism may ignore important realities related to law, which can lead to ignoring ethical imperatives and attacking human nature in practice.⁹⁰⁷ Law is not a goal in itself: it is a tool that must be used to protect and favor human beings or, at least, that should not harm them.

Moreover, *de lege ferenda* considerations, as those presented in some soft law instruments and theories, must be as examined as well as *de lege lata* studies. After all, international legal scholars, international participants and practitioners engage in analyses related to both codification and the progressive development of law,⁹⁰⁸ and given its constant change it is imperative to carefully examine what the content of law should be and cannot have in the future.

⁹⁰⁴ Cf. Jan Klabbers, op. cit., locations 426 and 435 of 11783 (Kindle version).

⁹⁰⁵ Cf. Jean d'Aspremont, "Non-State Actors in International Law: A Scholarly Invention?", Paper presented in: *FWO Seminar—Non-State Actors in International Law*, Leuven, 2009, 10-13, available at: http://ghum.kuleuven.be/ggs/projects/non_state_actors/publications/aspremont.pdf (last checked: 07/02/2012).

⁹⁰⁶ Cf. Anthony Carty, "Sociological Theories of International Law", *Max Planck Encyclopedia of Public International Law*, Oxford University Press, on some roles that the sociology of international law can have in legal studies; ¿*Qué es el derecho global?*, op. cit., pp. 141-226.

⁹⁰⁷ Cf. footnote 169, *supra*; Math Noortmann, "Non-State Actors in International Law", op. cit., at 62; Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion", op. cit., pp. 124-131; Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order", op. cit., pp. 8-29; Myres S. McDougal, "Some basic theoretical concepts about international law: a policy-oriented framework of inquiry", op. cit.; David Kerr, "Pope says Nazis showed danger of power divorced from natural law", op. cit., where it is mentioned that "Pope Benedict pictured life in a culture dominated by positivism as akin to living in "a concrete bunker with no windows," one in which "we ourselves provide lighting and atmospheric conditions, being no longer willing to obtain either from God's wide world."

⁹⁰⁸ Cf. Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 215-217; José A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales* (12th edn.), Tecnos, 2008, pp. 74-75; article 15 of the Statute of the International Law Commission.

Concerning the question of why both positive and negative impacts of non-state actors on human rights are worth being addressed in an international law embedded in a multi-level framework, it can be said that law must ensure that the contribution of non-state actors is not hindered and that their abuses are properly condemned and tackled, given the relevance of both types of impact.

Those considerations are indicated to all actors in domestic and international societies by norms addressing both types of roles of non-state entities concerning the protection of human rights, educating them in relation to the fact that legitimacy depends in part on the respect of human dignity.⁹⁰⁹ This rebuts the argument according to which granting subjectivity or legal capacities to non-state actors automatically legitimizes them, because the creation of negative legal capacities (subjectivity or duties) of actors that violate human rights, such as terrorists,⁹¹⁰ precisely indicates that they can engage in acts that deserve being reproached.

The possession by an actor of one kind of capacity, such as rights or duties (or other positive or negative legal capacities) reveals that it can also possess other (positive or negative) legal capacities in the same legal system that envisages them. Sometimes, both positive and negative legal capacities are linked. This happens with human rights that are correlative to express or implicit non-state duties. Another example is the fact that NGOs are entitled to participate in international scenarios (positive capacities) *if* they comply with some pertinent and appropriate duties and meet certain requirements (burdens) envisaged in the same normative regime in which entitlements are found.⁹¹¹

Likewise, potential human rights offenders, such as powerful and not-so powerful corporations, that are granted rights or capacities under international law, can also be bound by duties imposed on them, with this not being this contradictory in the least. Thus, their having rights or being addressees of international norms in branches concerned with economic or investment interests implies that they can also be subjects of other international norms, including human rights norms. Therefore, they can be obliged to not undermine or weaken guarantees of human dignity. In my opinion, this challenges the fears of some authors who consider that regarding an actor as a subject of international norms (i.e. being its addressee) can undermine

⁹⁰⁹ Cf. Fred Halliday, *op. cit.*, at 36.

⁹¹⁰ On this concern, see Mary Ellen O'Connell, *op. cit.*, pp. 456-458. Versus: Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 46-53.

⁹¹¹ Cf. Menno T. Kamminga, "The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?", in Gerard Kreijen et al. (eds.), *State, Sovereignty, and International Governance*, Oxford University Press, 2002, pp. 402-403; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, at 785; Economic and Social Council of the United Nations, Resolution 1996/31, 25 July 1996, Part VIII, paras. 55-59.

human rights law:⁹¹² not necessarily. To cite a previously invoked example, non-state entities are not empowered or legitimized a result of their being addressees of international humanitarian law, as common article 3 to the Geneva Conventions of 1949 clearly indicates.

To conclude this section, it can be stressed that in a socio-legal context in which private entities can cooperate among themselves or with public actors to promote human rights *or* to carry out violations and secure their product and effects, and can elude State or international control and even challenge it thanks to their power, the protection and full reparation of victims (see Chapter 7, *infra*) makes it necessary for multiple legal systems, levels of governance and actors to cooperate, complementing each other given their respective advantages and drawbacks, and to operate in a transnational and integrated fashion to protect humanitarian legal goods found in a global legal space of interaction.

In such a context, different actors and authorities, including international and national ones, can contribute to protect victims that were not be effectively protected by a State due to its fault or incapacity. They may do this thanks to legal possibilities offered by extradition, the principle *aut dedere aut judicare/punire*, universal (civil or criminal) jurisdiction, contacts and agreements with non-state entities or even direct supervision –criminal or not- of non-state conduct, among others. In turn, non-state contribution must be permitted. A framework that takes advantages of all those lawful possibilities will make the protection of human dignity more likely.

Additionally, the existence of a general international obligation of all non-state entities to respect human rights is necessary, given their potential capacity to violate them and the corresponding need to prohibit their perpetration of violations or cooperation with them. Moreover, a general implied duty that commands this might exist already, as argued in Chapter 6. Such general obligations can and must be complemented by more detailed specific non-state duties that deal with vulnerable rights or worrisome offenders, taking into account special needs of protection.

⁹¹² In this regard, José Alvarez has posited that conceiving corporations as international legal persons may have detrimental effects for human rights law due to the influence of, for instance, investment law on it and the defenses that may be invoked by corporations which can undermine public interests, although the same author mentions that some do not share his fears and that focusing on rights and duties of those and other entities rather than branding them as persons may impede the risks he perceives from materializing, although some disagree. Cf. José E. Alvarez, “Are Corporations “Subjects” of International Law?”, *op. cit.*, pp. 27-35.

4.2. The necessity of a comprehensive framework of the protection of human dignity that encompasses all possible threats and contributions

A narrow interpretation of the legal protection of human dignity that excludes protection from non-state threats is not only contrary to reality but also to its logic and legal foundations,⁹¹³ as explained in this Part.

Interestingly, as mentioned by Elena Pariotti, there is a trend that seeks to focus more on what the content of rights is instead of focusing on the formal identity of offenders. A consequence of this is the attention paid by different initiatives to the fact that non-state actors can violate human rights just as a State can, and to the need to address their conduct through binding *and* non-binding legal strategies.⁹¹⁴ For example, the recruitment of children by both State and non-state entities⁹¹⁵ needs to be normatively addressed in international human rights terms (and has been so addressed),⁹¹⁶ lest the protection of children is made conditional and based on the identity of those who intend to recruit them in armed groups.

The preceding considerations are illustrated and dealt with in reports that mention how non-state entities can threaten the enjoyment of human rights, such as one that discussed how the non-state group al-Shabaab of Somalia controlled portions of territory and jeopardized the enjoyment of human rights. For example, it has been mentioned that:

“[S]ources indicated that in al-Shabaab areas, human rights were practically non-existent because of the organisation’s interpretation of Sharia law, which was not in accordance with the beliefs of ordinary Somalis. Consequently, people lived in fear as there were serious punishments if al-Shabaab orders were not obeyed [...]

The human rights situation has deteriorated particularly in areas controlled by al-Shabaab and allied extremist groups. Al-Shabaab and other armed groups have continued to violate women’s rights in southern and central Somalia. Women face arbitrary detention, restriction of movement and other forms of abuse for failure to obey orders, including non-observance of dress codes. There is a rising pattern of inhuman and degrading treatment, including stoning, amputations, floggings and corporal punishment. Men too are subjected to inhuman and cruel treatment for their illicit relationship with women and other offences such as ‘spying’. Journalists have been repeatedly subjected to threats and short-term arbitrary detentions, particularly in Baidoa and Kismayo. Al-Shabaab has increasingly targeted civil society groups, peace activists, media and human rights organisations. Humanitarian assistance has been severely hampered by the prevailing insecurity and threats specifically targeting humanitarian agencies. In southern and central Somalia there is

⁹¹³ Cf., for instance, Annyssa Bellal and Stuart Casey-Maslen, *op. cit.*, pp. 186-187 (A narrow conception of human rights law does not correspond to the basic philosophy of human rights or to the reality of many situations in which ANSAs operate. As suggested by one author [...] the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person’s dignity. The implication is that these natural rights should be respected by everyone and every entity”).

⁹¹⁴ Cf. *Ibid.*, at 187; Elena Pariotti, *op. cit.*, at 96.

⁹¹⁵ Cf. European Court of Human Rights, *Case of Sufi and Elmi v. the United Kingdom*, Judgment, 28 June 2011, para. 131.

⁹¹⁶ Cf. Tilman Rodehäuser, *op. cit.*

evidence that children are being exposed to recruitment into armed forces by all parties to the conflict.”⁹¹⁷

Additionally, the fact that human rights experts consider that “citizen security is a human rights issue”⁹¹⁸ confirms that some wrongful acts, as for instance crimes, can affect the enjoyment of human rights. This reality justifies and explains the existence of obligations of States and some other authorities to prevent and respond to those and other violations when they are committed by private or public actors. Additionally, this reflects the idea that the framework of the protection of human dignity is multi-dimensional, and that an interface approach that integrates different normative and operational components that are necessary for this protection and integrates different actors, branches and normative strategies, is crucial to effectively protect human dignity.

One manifestation of this underlying spirit and its relevance concerning non-state threats is found in the protection of refugees persecuted by non-state entities. While rejected by some authors, other scholars and the UNHCR itself rightfully consider that this protection falls within the scope of the legal protection of refugees, which also protects human rights.⁹¹⁹ The link between human rights and other regimes, as the one on the protection of refugees, also demonstrates that the humanitarian *corpus juris* can overcome formal normative boundaries and distinctions,⁹²⁰ and that it is possible and necessary to protect individuals from non-state violations.

In sum, the foundation of human rights and guarantees, which is the protection of human dignity, is non-conditional, inherent and must be effective. Therefore, it cannot be narrowly interpreted.⁹²¹ Accordingly, the relevance of public and private threats and contributions to that protection must be taken into account when interpreting, designing, evaluating or modifying the framework of its protection.⁹²²

⁹¹⁷ Cf. European Court of Human Rights, *Case of Sufi and Elmi v. the United Kingdom*, Judgment, 28 June 2011, paras. 94, 104.

⁹¹⁸ Cf. Inter-American Commission on Human Rights, Press Release 53/11, 7 June 2011.

⁹¹⁹ Cf. Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, Reedited, Geneva, 1992, para. 65; Francisco Galindo Vélez, *op. cit.*, pp. 125-126; Claire de Than and Edwin Shorts, *op. cit.*, pp. 31-32 (note how articles 1.A.2) of the Convention relating to the Status of Refugees and 1.2 of the Protocol relating to the Status of Refugees do not mention anywhere that States must be agents of persecution or involved for persons to be protected by the law of refugees).

⁹²⁰ Cf. Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, *op. cit.*, pp. 19-20, 36-37.

⁹²¹ Cf. Annysa Bellal and Stuart Casey-Maslen, *op. cit.*, pp. 186-187.

⁹²² It has been mentioned that the public and private dimensions of society and contexts of violation (and of actors, I might add) are relevant for protecting human rights. Cf. Office of the High Commissioner for Human Rights of the United Nations, *Monitoring the Convention on the Rights of Persons with Disabilities*, Guidance for Human Rights Monitors, Professional training series No. 17, 2010, at 22 (regarding the protection of persons with disabilities); articles 3 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women and article V of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.

This is supported by the fact that violations may occur with or without State involvement,⁹²³ and that even if a human rights *stricto sensu* language is not used, considerations of human rights and guarantees must be present in the legal responses to those violations.⁹²⁴

Just as the creation of human rights obligations of States respond to needs of protection and overcame the fallacy that those rights were sufficiently protected by respecting the sovereignty of States that were assumed to protect them,⁹²⁵ it is necessary to dispel the false myth of the irrelevance of non-state entities in the human rights universe (both in positive and negative terms). This is especially necessary for the claim that law must take into account human necessities and protect human dignity to be truly and effectively upheld;⁹²⁶ for law and legal practice to be consistent with legal values, principles, obligations and rights; and for the call to protect individuals whenever they are vulnerable and have “specific needs of protection” to be heeded.⁹²⁷

⁹²³ Cf. Inter-American Commission on Human Rights, Press Release 34/11, IACHR Condemns Murder of 145 People whose Bodies were Found in Clandestine Graves in Mexico, 18 April 2011, where a State was urged to deal with crimes regardless of whether it was purely attributable to non-state organized criminals or State agents are involved. Similarly, Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, Judgment, op. cit., para. 247; Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, op. cit., paras. 172, 176.

⁹²⁴ Cf. Koen de Feyter, “Globalisation and human rights”, op. cit., at 74.

⁹²⁵ Cf. Roland Portmann, op. cit., at 254. Just as liberty must be protected from States due to their possible abuses, it must be protected against *all* abuses, regardless of to whom they are attributable. Furthermore, cf. Annyssa Bellal and Stuart Casey-Maslen, op. cit., pp. 186-187.

⁹²⁶ Cf. The community is concerned with the welfare of individuals, and therefore if there is a relevant violation, such as a violation of human dignity, it must be regulated and implicit rules and principles can already address it. This does not create subjects, but addressees, because reality does not create legal personality, but implicit duties and other legal capacities can exist in a legal system. Cf. Roland Portmann, op. cit., pp. 253-254, 268-269; Santiago Villalpando, op. cit., pp. 392, 394, 396-398, 401, 407; Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, op. cit., at 40.

⁹²⁷ Cf. Inter-American Court of Human Rights, *Case of Ximenes-Lopez v. Brazil*, Judgment, 4 July 2006, para. 88. (“[T]he Court has further established that from the general duties to respect and guarantee the rights, special duties are derived which are to be determined according to the specific needs of protection of the legal person, either due to his personal condition or the specific situation he is in”).

**PART II. SUBSTANTIVE AND PROCEDURAL ASPECTS OF THE
INTERNATIONAL PROTECTION OF HUMAN DIGNITY FROM NON-STATE
ABUSES**

INTRODUCTION

Unlike what is suggested by some reductionist and State-centered accounts of international law, *jus gentium* counts with a rich background, theories, practices and traditions that permit it to integrate both an *intra-gentes* and an *inter-gentes* component and incorporate cosmopolitan aspirations gradually.⁹²⁸ Therefore, not only international relations, but also the protection of human beings are rightfully part of international law.

In this context, the fact that non-state actors may possibly harm individuals and prevent them from enjoying their inherent rights must be the object of international legal action, as explained in Part I. As will be explained in Chapter 5, positive international law can perfectly address those violations.

Having Part I explored why non-state violations of human rights are legally relevant conduct, it must be asked if the perpetrators and assistants of those violations are legally responsible, case in which they will have a duty to repair victims: it depends on whether they have breached international obligations of their own.

This is because, as is well-known and is indicated in the famous Articles on the Responsibility of States for Internationally Wrongful Acts –Article 2- and in the draft Articles on the Responsibility of international organizations –Article 4- of the International Law Commission (hereinafter, ILC) adopted on second reading in 2011, two conditions must be met for an entity to be considered responsible: 1) a breach of an obligation of that entity 2) must be attributable to it.

Apart from questions of responsibility, and as examined in Part I, there are different strategies and mechanisms that seek to protect human dignity from non-state abuses that are not based on the existence of international legal obligations. While Part I explored why and when all those strategies must exist, this Part will be more technical in scope and examine how those mechanisms and obligations can be created, why there may be implicit obligations in light of positive international law, and what the content and requirements of all those instruments can be.

Concerning the distinction between strategies based on the obligation-reparations scheme and other mechanisms of promotion and protection of dignity, it can be said that systems with aspects and elements that are not based on that scheme are considered to belong to models of non-legal responsibility.

⁹²⁸ Cf. Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 10-22; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 4-12. For purposes of clarity, throughout this book the terms *jus gentium* and international law (given its current prevalence) will be used almost interchangeably, unless otherwise stated. However, I manifest my preference for the former.

In this sense, for example, Bin Cheng comments that the ordinary sense of responsibility may be construed as the necessity of an entity that is “the author of an act”, especially a “reprehensible” one, to “bear the injurious consequences” of that act.⁹²⁹ By contrast, in a moral sense responsibility alludes to the moral duty that an author of an act has to bear its consequences or to behave in some manner. According to Cheng, the difference between these various models of responsibility lies in the fact that they consider that someone can be responsible by employing standards of a different nature. In his own words:

“[A] person may be considered, by moral standards, as the author of an act and its consequences, and, for that reason, as incurring a moral obligation to repair those prejudicial consequences that have affected others. ‘Moral responsibility’ differs from ‘responsibility’ in ordinary usage and ‘responsibility’ in its legal sense, in that in the former only common standards, whilst in the latter legal standards are applied.”⁹³⁰

Therefore, while in an ordinary and moral sense entities that cause injuries are expected to bear the consequences of their acts and to repair those who are affected by their conduct (burden that is also present in legal responsibility),⁹³¹ legal responsibility requires the breach of preexistent obligations, as demanded by the respect of the principle of legality and its components of accessibility and foreseeability. This is discussed in the case law of the European Court of Human Rights and flows from secondary norms of international law.⁹³² The legal responsibility of non-state actors must therefore satisfy those requirements.

The logic of the previous ideas determines the structure of this Part: before ascertaining what the regime of the responsibility of non-state actors for the violation of human dignity dictates, it is necessary as a prior logical step to determine whether those actors can have legal obligations that seek to protect human dignity. If so, afterwards alternative legal capacities and strategies that can pursue that protection will be examined.

The study of the obligations and other legal capacities of non-state actors and different legal strategies is important for many reasons: first of all, their existence and use send messages to actors and individuals, indicating the wrong character of non-state violations and preventing the consideration that international law is *unjust* for not being opposed to non-state abuses. Conversely, denying international substantive and procedural protection from non-state violations or, even worse, not recognizing the latter, would be reproachful in moral (and legal, as seen in

⁹²⁹ Cf. Bin Cheng, *op. cit.*, at 163.

⁹³⁰ *Ibid.*, at 164.

⁹³¹ *Ibid.*, pp.163-166, 169, 170.

⁹³² Cf. articles 2 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts (A/56/49(Vol. I)/Corr.4) and 4 of the 2011 version of the ILC Draft Articles on the Responsibility of international organizations (A/66/10); European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, *op. cit.*, paras. 185-187, 236.

Part I) terms,⁹³³ and that would be detrimental to the effectiveness and legitimacy of the legal system, among other negative repercussions.

Simultaneously, the substantive message and signal sent by non-state duties and norms and strategies protecting human dignity may lead either to an internalization of human rights norms by different actors or to the generation of positive and negative incentives that push for compliance with substantive obligations, especially if the legitimate opinion of non-state addressees has been taken into account, which is a factor that can stimulate compliance. After all, the clear identification of non-state duties or legal capacities based on the protection of human dignity may encourage or discourage certain conduct and lead to positive changes in the attitude of the actors on which obligations are placed and other members of the local and world societies.

⁹³³ Cf. Cedric Ryngaert, "Imposing International Duties on Non-State Actors and the Legitimacy of International Law", in Math Noortmann and Cedric Ryngaert (eds.), *Non-State Actor Dynamics in International Law*, Ashgate, 2010, pp. 76-77.

CHAPTER 5. CONDITIONS AND SOURCES OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND OTHER LEGAL CAPACITIES OF NON-STATE ENTITIES

This Chapter will explore the legal justifications, requirements and possibilities related to the imposition or acceptance of legal capacities of non-state entities that have the purpose or consequence of protecting human dignity.

In a few words, it can be said that obligations or other legal burdens of non-state actors can have the purpose of protecting human dignity and be created with the sources of the legal system in which they are incorporated. In the case of international law, given the multiplicity of sources of international law and the decentralization of legislative and adjudicatory functions in this legal system, it is especially important to analyze all of its sources in order to assess whether a given actor is bound by a certain obligation that protects human dignity either directly or indirectly. The identification of non-state obligations related to this subject-matter is, thus, a complex issue, and it is important not to dismiss the possibility of an actor having human rights obligations and burdens just because no obligations created with one specific source of international law have been found in a given moment.

When analyzing positive international legal responses, it must be borne in mind that, when considering sources, there is no hierarchy of norms determined by the source that produces them, i.e. there is a horizontality of sources.⁹³⁴ Rather, hierarchy depends on the content of the norms, because when it excludes opposition from all manifestations it belongs to peremptory law.⁹³⁵

Additionally, given the evolutionary nature of international law, that can accommodate new norms that fill gaps in the future –and there are many gaps when it comes to the subject being examined- and can incorporate mechanisms or interpretations that adjust preexisting norms to new needs and realities, the content or operation of law may change and a source that does not protect human dignity from non-state violations can do so later. This may permit law to better respond to human needs and explains the emergence of a socio-legal trend that seeks to hold every violator of important international norms accountable.

Altogether, from the perspective of lawmaking, the obligations imposed on non-state actors that are created via the sources of international law may be ascribed to one of several categories related to the creation of duties: *self-regulations*, i.e. those in which a non-state actor

⁹³⁴ Cf. José A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales* (12th edn.), Tecnos, 2008, pp. 162-163; Manuel Díez de Velasco, *Instituciones de Derecho Internacional Público* (16th edn.), Tecnos, 2007, pp. 118-119.

⁹³⁵ Cf. *Ibid.*

binds itself to comply with an obligation via a commitment, declaration, or another unilateral act; *hetero-regulations*, which are those addressing an actor that did not participate in their creation and are adopted by third parties; and finally *participative-regulations*, related to lawmaking processes in which the actor that has an obligation or a burden had the opportunity to effectively participate (not necessarily with a defining vote) in the whole process that led to its adoption or in one or more of its stages. The two first categories echo the notions of self-regulating norms and hetero-regulating norms that have been identified by scholars who study the relationship of non-state actors with international law.⁹³⁶

Admittedly, the former categories are based on formal distinctions, because law can be understood as a process that surpasses legislative functions and includes other activities, such as the judicial one; and because non-state actors can exert influence on the creation and implementation of international and other norms formally or informally, within the system or from without.⁹³⁷ For description and classification purposes, however, those categories may be useful.

From the perspective of normative nature and effects, the fact that a “norm” has not emanated from the sources of international law makes it either soft law, a political or a non-legal norm, or part of the international *comitas*.⁹³⁸ *Prima facie*, all those types have as common denominator their “non-binding” character from an international legal perspective.⁹³⁹ This assertion, however, may be misleading and must be qualified, because as explained in Part I, even though they do not produce legal effects *directly*, they may do so *indirectly*: i) by having their content included by a norm created through the sources of international law; or ii) due to application of a norm or principle that, while not incorporating or replicating its content, gives some legal effects to the existence of those non-legal norms. In my opinion, it is preferable to call them non-legal norms instead of “non-normative” rules, because they can regulate conduct and have the features of a norm despite not being directly legally binding and not having direct international legal effects.⁹⁴⁰

Concerning hard law, the analysis of the interaction of non-state actors with the legal sources of obligations and legal burdens of non-state actors that seek to protect human dignity is of the utmost interest. Such relationships can assume many forms, as explained below.

⁹³⁶ On such processes, from a general point of view, cf. Luis Pérez-Prat Durbán, *op. cit.*, pp. 22-34; Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, *op. cit.*, pp. 183-187.

⁹³⁷ Cf. Luis Pérez-Prat Durbán, *op. cit.*, 22-26; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors: Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, The Hague Conference, *op. cit.*, pp. 8-11.

⁹³⁸ Cf. Manuel Díez de Velasco, *Instituciones de Derecho Internacional Público* (16th edn.), Tecnos, 2007, at 134.

⁹³⁹ Cf. *Ibid.*; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, *op. cit.*, pp. 192, 194.

⁹⁴⁰ Cf. Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, *op. cit.*, at 192; Hans Kelsen, *Pure Theory of Law*, University of California Press, 1978, at 65.

Basically, the three dimensions or relations of non-state actors in relation to sources of legal capacities that impose burdens refer to the following possibilities: non-state actors can be *passive* entities, that is to say, have a passive role in the sense that they are simply addressees of norms; non-state actors can be *participants* or *proactive* entities, role they assume whenever they directly or indirectly exert an influence on the creation of norms addressing non-state conduct –even their own-; thirdly, non-state actors can be *active contributors* in the adoption and effectiveness of norms and, conversely, can hinder them. These threefold set of relationships indicated that non-state actors can officially and unofficially have a direct or indirect impact on the dimensions of lawmaking, law-enforcement and implementation of norms,⁹⁴¹ among others.

In sum, there can be passive and active relationships between non-state actors and norms, referring to the possibility that besides being the addressees of norms regulating their legal capacities they can participate in or contribute to the creation and effectiveness of non-state international legal capacities. Chapter 6 will explore general and specialized international legal obligations, and the remainder of the present Chapter will examine the bases and conditions for the creation of those obligations and other legal capacities that non-state actors can have.

5.1. The legal personality or subjectivity of non-state actors: preconditions for them to have international legal capacities in the human rights *corpus juris*?

Legal capacities of non-state actors can have negative connotations due to the burdens and prohibitions they impose. They can have the purpose of protecting human dignity and regulate obligations or not. Moreover, they can have an international legal character and be imposed on actors, although sometimes they are binding if the respective actors consent to them.

That being said, this section intends to explore if international law can accommodate those capacities and, if so, what the conditions for their creation are. Two pertinent kinds of legal questions can come to mind: first, if human rights must and can have a role in relations that do not fit the mold of the State-individual(s) archetype; and whether it is possible to impose duties on or permit the acceptance of duties by entities whose *international legal personality or subjectivity* is dubious or contested by some.

The first question was examined in Part I, but in positive legal terms the second one seeks to determine if it is possible for an entity lacking “international legal personality” to have legal capacities under *jus gentium*. This has to do hesitation or reluctance by some authors

⁹⁴¹ Cf. Luis Pérez-Prat Durbán, op. cit.; Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, op. cit., pp. 182-197.

regarding the possibility of the existence of non-state legal capacities, due to an alleged non-settled character of the personality of some entities that are candidates to have those capacities.⁹⁴²

This reveals that the questions of subjectivity or personality allude to a supposed prerequisite of some manifestations of the legal protection of human dignity from non-state violations because, according to some authors, their absence would preclude all discussion of non-state international human rights obligations and make it necessary (if possible) to assign legal personality to entities before they can enjoy those or other legal capacities, even in this field.

To examine this question, it is convenient to begin by clarifying what non-state entities are.

In international law generally, and concretely in the field of the protection of human dignity, some authors focus on some entities, such as corporations, armed groups, international organizations or NGOs,⁹⁴³ and some international standards have attempted to regulate or have successfully regulated some of the aspects of the links between that protection and some or all non-state actors. This has happened, for instance, in regard to the protection of individuals from corporations, field in which draft articles, principles, standards and a special framework have been developed; concerning duties and responsibilities of non-state armed groups and their members; and also in efforts to recognize the participatory status of entities that can contribute to the promotion of human rights –including corporations and others, which can be positive or negative actors-.⁹⁴⁴ This acknowledges that non-state entities can play a positive or negative role in the protection and promotion of human dignity, something confirmed by doctrine.

The fact that some initiatives and norms focus on protection from and promotion by some entities, such as corporations or armed groups, does not mean that other non-state entities cannot violate human rights and should not be addressed in normative terms. For example, individuals may commit international crimes that are contrary to human rights, and pirates, terrorists or transnational organized criminal groups can also adversely impact on the enjoyment of human rights and guarantees, even cooperating with other non-state entities to successfully

⁹⁴² Cf. Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 67-68.

⁹⁴³ Cf. Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?", op. cit., pp. 8-14, 27-35; Elena Pariotti, op. cit., pp. 96-102; Gáspar Biró and Antoanella-Iulia Motoc, op. cit., paras. 34-41, 46.

⁹⁴⁴ Cf. Elena Pariotti, op. cit., at 105; August Reinisch, op. cit., pp. 63-64; Economic and Social Council of the United Nations, Resolution 1996/31, 25 July 1996, para. 25; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., para. 50; articles 4.3 and 29 of the Convention on the Rights of Persons with Disabilities, or 7 of the Convention on the Elimination of All Forms of Discrimination against Women.

carry out violations.⁹⁴⁵ Just as protection is insufficient if it is limited to protection from State abuses, victims would be unprotected if only the abuses of some non-state entities are addressed. However, initiatives that focus on some entities are important because they can better respond to the problems posed by them and take into account their features.

It is also important to mention that there are many different non-state entities, often quite different from each other. For this reason, it is important to ascertain what entities have a non-state character, and whether some or all of them can have legal personality or need to possess it in order to have international legal capacities that seek to protect human dignity.

Concerning the notion of non-state actors, different authors, as Philip Alston or Andrew Clapham, consider that the notion encompasses all actors that are not States,⁹⁴⁶ as the term itself suggests. Such a non-reductionist approach, if it is considered that individuals must be protected from all such actors, is the one that can offer the most complete protection of human dignity, which does not exclude State duties but rather insists on them, for instance concerning their positive duties.

Regarding the notion being examined, I consider that while the most widely used term is that of non-state *actors*, I prefer to talk of non-state *entities*, because it can be more encompassing insofar as some authors allude to participants in the international legal system, and the idea of *acting* may lead to a similar understanding by some, which could make some consider that if an entity is not a participant or actor in international society it cannot have international human rights responsibilities. This would not offer the full protection required by the *central* position of individuals in the humanitarian *corpus juris* and by the demands of human dignity, which must be universal and non-discriminatory, as seen in Part I. This is illustrated by the fact that there are non-state “entities” that “have emerged as *actors* in international legal processes and with specific reference to human rights law”, as Elena Pariotti argues.⁹⁴⁷

I grant that it is possible to understand the term *actor* as *actor of violation* or *actor of promotion/protection*. However, others may use a different notion, and for this reason I consider that the expression non-state *entities* stresses the subjective dimension of the universality of protection. As can be seen, I use both terms throughout this work, given the prevalent use of the notion of actors in legal literature. However, I understand the expression as indicated above.

⁹⁴⁵ Cf. Tom Obokata, “Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law”, *International Journal of Refugee Law*, vol. 17, 2005, pp. 394-395, 400-407.

⁹⁴⁶ Cf. Bob Reinalda, Bas Arts and Math Noortmann, “Non-State Actors in International Relations: Do They Matter?”, in Bas Arts et al. (eds.), *Non-State Actors in International Relations*, Ashgate Publ., 2001, pp. 1-3; Bob Reinalda, “Private in Form, Public in Purpose: NGOs in International Relations Theory”, *op. cit.*, pp. 12-15; Andrew Clapham, “Non-state Actors”, *op. cit.*, pp. 1-5.

⁹⁴⁷ Cf. Elena Pariotti, *op. cit.*, at 95. Similarly, cf. Gáspar Biró and Antoanella-Lulia Motoc, *op. cit.*, para. 15.

As to the encompassing character of the definition of non-state actors/entities, some ideas support the consideration that they are all entities, collective or individuals, artificial/constructs or natural, that are different from States.

Firstly, while in social sciences and other disciplines (even in some legal studies) some alternative theories have put forward different definitions, according to which elements such as independence and autonomy from States or the level in which an entity operates –e.g. international, domestic or transnational- determine if an entity can be considered as a non-state actor,⁹⁴⁸ in my humble opinion those conceptions are not to be employed *directly* in legal studies, because they may lead to conclusions that differ from what *jus gentium* regulates (e.g. implied duties of all potential offenders) and are designed for specific purposes and to examine certain dynamics.

Let me provide one example: in social sciences and international relations studies, some authors consider that international organizations are *not* non-state actors (although other authors disagree), given the influence of States over international organizations and/or due to the fact that States are members of those organizations and have the capacity to determine their competences and functions in their constitutions. Conversely, for international law international organizations are clearly *not* States: firstly, they have a legal personality that is *different from* that of its members; and secondly, those members can be State *or* sometimes non-state actors as well, as mentioned by José M. Cortés and the International Law Commission in its articles on the Responsibility of international organizations.⁹⁴⁹

As a consequence, the rights and duties of international organizations may differ from those of their members, and accordingly their responsibility is engaged when they breach their own duties, and the responsibility that State and other members can have is not automatically transferred to the Organizations they are members of or vice versa.⁹⁵⁰

Therefore, one cannot say that those organizations *are* States, and in light of the principle of individual responsibility it would be certainly improper to automatically engage the responsibility of an organization in connection with the acts of its members or vice versa, although in some occasions the responsibility of organizations can arise *in connection with* that of their members, but always in connection with their *own* conduct.

⁹⁴⁸ Cf. Gáspar Biró and Antoanella-Iulia Motoc, op. cit., paras. 16-17, 19, 23; Daphné Josselin and William Wallace, “Non-state Actors in World Politics: a Framework”, op. cit., pp. 2-4.

⁹⁴⁹ Cf. article 2.a of the Draft Articles on the Responsibility of international organizations, A/66/10, 2011; José Manuel Cortés, op. cit., pp. 111-114; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, at 233.

⁹⁵⁰ Cf. articles 2, 17, 18, and 58 through 62 of the ILC Draft Articles on the Responsibility of international organizations, A/66/10, 2011; José Manuel Cortés, op. cit., pp. 295-366; Anne Peters, “Humanity as the A and Ω of Sovereignty”, op. cit., pp. 538-540.

As a result, if in legal terms non-state entities are *all* entities different from States, certainly international organizations are non-state actors. Truth be told, some authors accept this idea⁹⁵¹ and others challenge it.

Another point that is widely discussed in regard to differences about the definition of non-state actors/entities in contrast to that of States between the legal discipline and other academic disciplines is related to the nature of entities that form part of State structures, such as organs, bodies or agents of States. Non-legal academic disciplines often examine their relevance when those members (e.g. judges) act independently from the dictates of high-ranking or central State authorities and even challenge them in different scenarios, including the international one. For this reason, some of their studies and critical legal works regard them as different from governments or other State organs.⁹⁵² That consideration is useful for their purposes, but in legal terms the different entities mentioned in this paragraph are clearly State entities *and* can engage the international legal responsibility of their States in legal terms.⁹⁵³ For this reason, I consider that a convenient way to describe them is that of “sub-state” actors,⁹⁵⁴ which does not regard them as non-state but allows their separate analysis.

The previous considerations do not suggest that the studies conducted in other disciplines are irrelevant for legal scholars and practitioners: law is not –and cannot be– detached from reality, and must answer to practical social *and* individual problems (not to fashions). Therefore, the study of the conduct and social or other impacts of some actors must certainly be taken into account in the legal realm, to better design or interpret norms in a way that makes it possible to respond to the challenges those actors pose *in an effective manner* and to accordingly protect international legal goods they affect in one way or another.

That is why I disagree with Jean d’Aspremont’s consideration about the supposed impertinence of some studies about non-state entities from an international legal perspective due to the lack of formal lawmaking powers of those actors.⁹⁵⁵ Certainly, if law ignores reality and its implications, it will fail to evolve in a way that keeps up with new challenges or will not address problems, and what is more: non-state abuses and contributions are *legally* relevant, impacting

⁹⁵¹ Cf. Gáspar Biró and Antoanella-Iulia Motoc, op. cit., paras. 19, 26, 31, 35-39; Andrew Clapham, “Non-state Actors”, op. cit., pp. 1-4; Koen de Feyter, “Globalisation and human rights”, op. cit., at 52.

⁹⁵² Cf. Daphné Josselin and William Wallace, “Non-state Actors in World Politics: a Framework”, op. cit., pp. 2-3; Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, op. cit., pp. 194-197, 199; Eric A. Posner, op. cit., pp. 40-53.

⁹⁵³ Cf. article 4 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts; Inter-American Court of Human Rights, *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*, Judgment, op. cit., para. 72; Concurring Opinion of Judge A.A. Cançado Trindade to the previous judgment, para. 1.

⁹⁵⁴ Cf. Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, op. cit., pp. 9, 11 (where the notion of “sub-state” actors is handled).

⁹⁵⁵ Cf. Jean d’Aspremont, “Non-State Actors in International Law: A Scholarly Invention?”, op. cit., pp. 5-13.

on legal goods and values, and their study is thus not only pertinent but also *necessary*. Furthermore, regulations or actions of non-state actors that do not directly and immediately generate legal effects may produce indirect international legal effects.⁹⁵⁶

Relevant aspects of non-state actors examined in non-legal disciplines that are important for the purposes of legal analyses include the types of interests sponsored by an entity; the dimensions and levels in which entities are created and participate; their independence or lack thereof; their abilities and expertise; the possible manipulation of regulations by them; their being prone to be affected somehow by legal and non-legal standards; their influence and power and kind of power; their interest in having a good image; or the possible mechanisms of pressure (boycotts, shaming) to which they can be vulnerable or that they use to achieve their goals, including the protection of human beings,⁹⁵⁷ taking into account that those strategies are not always effective,⁹⁵⁸ among others.

Those aspects are certainly relevant in relation to what law can and should do to better protect human beings, and also in relation to how protection purposes can be achieved, taking into account that law is an instrument that can be used by multiple actors to serve some ends, intentionally or not, and that accordingly those human beings who ultimately shape it (as a disaggregated analysis shows) have the moral imperative of making it serve human beings, not being it justifiable for law to refrain from protecting human dignity alleging difficulties due to non-state power or their not being the object of legal studies.

The law on the protection of refugees, for example, acknowledges that in practice non-state entities can be agents of persecution and, accordingly, given its goal of protecting persecuted individuals, grants protection to individuals addressing that problem in a way that, without resorting to some mechanisms employed by other humanitarian norms (adjudicatory procedures, direct duties, etc.), can offer that protection by means of different strategies. Still, its norms could also follow the example set by other human rights norms, and it actually stresses the principle of non-refoulement, which is also present in human rights law *stricto sensu*.

Additionally, both legal and non-legal studies that examine the relevance and roles of non-state entities consider that it is necessary to regulate the conduct of actors that can impact on interests endorsed by law, society or ethics in order to prevent and respond to abuses or permit and foster non-state cooperation. This is especially important because non-state entities

⁹⁵⁶ Cf. International Law Association, Non-State Actors Committee, *Report: Preliminary issues for the ILA Conference in Rio de Janeiro*, op. cit., at 3.

⁹⁵⁷ Cf. Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", op. cit., pp. 188-190; Daniel Thürer, op. cit., pp. 44-47; Thomas Buergenthal, op. cit., pp. 803-804; August Reinisch, op. cit., pp. 67-68.

⁹⁵⁸ Cf. Menno T. Kamminga, "The Next Frontier: Prosecution of Extraterritorial Corporate Misconduct before non-US Courts", op. cit., at 186.

may be receptive to (legal or non-legal) regulations that protect human dignity and modify their attitude in accordance to them, more likely if norms are perceived as just or are regarded as legitimate due to their taking into account non-state opinion,⁹⁵⁹ not necessarily supporting it but at least explaining why it is rejected. In a context in which non-state actors with both public and private origins and goals⁹⁶⁰ can violate human rights and elude controls due to different factors, the regulation of non-state conduct must not only indicate to multiple actors and normative systems that they can and must protect from non-state abuses, but also be designed in a way that overcomes shortcomings and problems posed by those factors.

Among the factors and dynamics that can weaken the public control of non-state conduct, the following are found: decrease or loss of power of authorities; privatization; delegation of functions; interdependence; greater relevance of non-national identities and interests; legal gaps; lack of coordination among actors and normative systems; selfish interests of authorities and actors; alliances among non-state entities that violate rights –e.g. between terrorists and pirates or criminal groups-; increase of hard, soft or systemic power of non-state entities; expertise, flexibility and reputation (not necessarily justified) of some actors. Those and other elements are either intensified or permitted by globalization and demand a global and coordinated response.⁹⁶¹

That being said, it is necessary to analyze if international law restricts the notion of non-state actors somehow. Concerning this, absent a general international legal definition of those entities, scholars and authorities use that expression and similar ones to refer to actors different from States that are relevant for the issues they examine. Logically, unless otherwise noted in an event, that category is a very broad one that includes many actors quite different from each other.

Concerning this, Philip Alston has explained that the expression non-state actors encompasses a multiplicity of entities that differ among themselves in many respects and have as their only common characteristic their not being States. For this reason, he considers that expression as one that is not specialized, concrete or sophisticated⁹⁶²

That non-state actors are quite varied is evident at a glance. The category includes religious groups, NGOs, international organizations, corporations, non-state armed groups,

⁹⁵⁹ Cf. On the possible reluctance of non-state entities to abide by norms in whose creation they did not have a say, cf. Annyssa Bellal and Stuart Casey-Maslen, *op. cit.*, pp. 177, 191. On the importance of permitting stakeholders give opinions on public decisions that affect them, cf. Inge Kaul, Pedro Conceição, Katell Le Goulven, and Ronald U. Mendoza, "Why Do Global Public Goods Matter Today?", *op. cit.*, at 5; Inge Kaul et al., "How to Improve the Provision of Global Public Goods", *op. cit.*, pp. 27, 30, 32-33, 35, 47. Regarding procedural legitimacy, cf. Thomas M. Franck, *op. cit.*, 7-8, 22-23; Harold Koh, "Why Do Nations Obey International Law?", *op. cit.*, pp. 2628, 2642-2643.

⁹⁶⁰ Cf. Bob Reinalda, "Private in Form, Public in Purpose: NGOs in International Relations Theory", *op. cit.*, pp. 12-15.

⁹⁶¹ Cf. Kofi A. Annan, "Foreword", *op. cit.*, pp. iii-iv; Durban Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001, paras. 11, 105.

⁹⁶² Cf. Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?", *op. cit.*, pp. 3-4.

transnational criminal organizations, pirate groups, terrorist organizations, individuals that can act as international criminals, or terrorists, among others.

To my mind, while the term is certainly vague and sometimes imprecise to some degree, it is not unadvisable or erroneous. In fact, it is quite useful when all non-state entities have relevance in one context and all of them must be examined, as is the case for the subject matter being studied. Moreover, it would be impractical or burdensome to come up with endless specialized terms. After all, specialized expressions are compatible with that of non-state actors, being subcategories of them, which can be used when conducting specialized studies of some actors. Therefore, apart from the fact that all non-state actors are *different from States*, there is another feature that is common to non-state entities: their being able to impact on the effectiveness of norms that protect human dignity, reason why all of them are relevant for international law.

Moreover, terms that refer to subcategories of non-state actors are not replacements of the general notion of non-state entities, because even within those subgroups the actors that are included may differ from others also classified in them. This happens, for example, with international organizations, that are different from States and comprise multiple kinds of organizations, some of which have some peculiarities that make them, in the opinion of some, different in relevant regards from others, making it necessary for some to regulate them in a specialized manner that differs somehow from regulations devoted to international organizations generally, which in turn are subject to secondary rules of responsibility that differ from those of States,⁹⁶³ in order to better deal with their unique and different features.

Because of this, just as sometimes all non-state entities can be addressed in like manner, for instance prohibiting all of them from violating human rights, sometimes it is necessary to come up with specialized studies and norms that take into account the particular aspects of some non-state actors, for instance concerning their responsibility or the need to design different legal strategies to promote compliance in a way that addresses particular challenges of an actor or promotes their special contributions.

Nevertheless, as some authors argue, while the category of non-state actors does encompass many entities that are different from each other, it also highlights how the current socio-legal context is characterized by “diversity and complexity”.⁹⁶⁴

⁹⁶³ Cf. José Manuel Cortés Martín, *op. cit.*, pp. 211-223, 225-293; Nicolás Carrillo, “The Links between the Responsibility of international organizations and the Quest towards a More Reasonable and Humane International Legal System”, *op. cit.*, pp. 445-446, 451.

⁹⁶⁴ Cf. Gáspar Biró and Antoanella-Iulia Motoc, *op. cit.*, para. 17; Kate Parlett, *The Individual in the International Legal System*, Cambridge University Press, 2011, pp. 4-5.

Additionally, Andrew Clapham mentions that while generally non-state actors are understood as *all* entities different from States, some authorities, regimes and norms (for instance, regarding *specialized* regimes of protection from torture or some peace-building or peacekeeping regimes) may adopt narrower definitions of the expression non-state actors for the purposes of the application or interpretation of some specialized norms or initiatives, given the narrower scope or personal field of application of the respective norms and strategies or the more limited competence of an authority regarding the entities it can examine or enter into contact with.⁹⁶⁵

Specialized and limited uses of the notion may be abused and lead to reductionist strategies, for instance to offer protection only from some actors despite this not being necessary. Yet, specialized approaches can also be convenient due to needs to particularly deal with some entities that particularly affect some norms or to take into account their unique features so as to better engage them, although specialized approaches are not always necessary or convenient, because as was just indicated they may lead to deficits in the protection of legal goods if used all the time or in an expansive manner.

In any case, specialized uses of the expression ‘non-state actors’ do not detract from its general understanding and do not modify it either, given their narrower scope. In consequence, unless expressly determined –case in which a normative conflict with implicit duties and other norms would arise-, when a limited definition of non-state actors/entities is used, it cannot be understood as being applicable generally. This is analogous to the fact that narrow definitions of human rights violations for the specialized purposes of an instrument are not applicable in general human rights provisions. Therefore, for instance, specialized attention paid to corporations in draft human rights law articles or principles that seek to protect human rights, or the (consultative) status given to some NGOs along with the entitlements this provides,⁹⁶⁶ do not mean that other non-state entities cannot have similar or different negative or positive legal capacities.

In consequence, as confirmed by Clapham, definitions of non-state actors that do not encompass all non-state entities must be understood as applicable only in relation to the instrument(s) or regime(s) in which they are provided.⁹⁶⁷ One example that illustrates this is offered in Security Council Resolution 1540 (2004), where the following definition, “for the purpose” of that instrument is provided:

⁹⁶⁵ Cf. Andrew Clapham, “Non-state Actors”, *op. cit.*, pp. 1, 4-6.

⁹⁶⁶ Cf. ECOSOC resolution 1996/31, paras. 27-54; Luis Pérez-Prat Durbán, *op. cit.*, pp. 24-25.

⁹⁶⁷ Cf. Andrew Clapham, “Non-state Actors”, *op. cit.*, pp. 5-6.

“Non-State actor: individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution” (emphasis added).

Since that Resolution, issued pursuant to Chapter VII of the Charter of the United Nations, addresses the “Non-proliferation of weapons of mass destruction” and the imposition of obligations on States to not assist non-state actors in the acquisition or use of certain weapons and to enforce prohibitions on this issue, the understanding of non-state actors therein does not constitute a general international legal interpretation or definition of non-state actors, given the specific purpose of the use of the term in that instrument and its limited scope.

Furthermore, as indicated above, the coexistence of general and specialized notions of non-state actors serve to accommodate both specialized regulations that address specific challenges concerning some actors and also common obligations (e.g. peremptory duties), principles and guiding tenets applicable to all actors. The latter must perforce take into account that *lex specialis* provisions may exist, but these must respect the basic core of the effective and comprehensive protection of human dignity (see Part I, *supra*).

Certainly, there may be general considerations and standards that are applicable to all or many non-state entities despite the (important) existence of specialized regimes. This is made possible, among others, by the analogous applicability of legal doctrines, principles and notions applicable to entities as States, international organizations or individuals. For example, the rationale and part of the content of rules addressing complicity and assistance found in international criminal law and secondary rules of responsibility applicable by analogy to other entities may be applicable to actors as corporations.⁹⁶⁸

Authors as Jordan Paust and Fred Halliday have challenged as fallacious in legal and extra-legal terms an international legal State-centrism even in the Westphalian system and different historical stages, due to the participation and relevance of other *actors*. If that is so, it the international legal relevance of non-state actors is even greater currently, since globalization offers more opportunities to non-state participation and interaction with international legal goods, and may make the effects of their conduct have a greater impact. Handling the notion of non-state actors can help *jus gentium* take that into account, catch up with reality, and protect victims.

Likewise, the second common feature of non-state actors, i.e. their capacity to impact on international legal goods, coupled with the legal relevance of their violations or promotion of human dignity, explains how norms and mechanisms that were traditionally understood by some as having nothing to do with those actors can be and are being interpreted as demanding

⁹⁶⁸ Cf. Andrew Clapham and Scott Jerbi, *op. cit.*, pp. 341-345; articles 16 and 41 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts of 2001, or 14, 42, and 58 of the ILC draft articles on the responsibility of international organizations in its 2011 version (A/66/10).

protection from non-state entities and authorization of their contribution,⁹⁶⁹ lest human dignity is not protected fully and effectively and legal practice contradicts legal values and principles.

Therefore, for me it is surprising that some authors and entities highlight the positive contribution that some non-state actors can provide to the protection of human rights but ignore the fact that they can violate the protected content of human rights. Sometimes this is ignored to further theoretical or political interests:⁹⁷⁰ to the detriment of victims, it must be said, and contrary to human dignity.

Some criticisms of the expression non-state actors allude to its giving central relevance to States, while others prefer narrower categories, such as that of transnational actors.⁹⁷¹

Concerning the first criticism, one can say that the category serves to distinguish some entities from States, not to underestimate them. The first idea that the expression tends to inspire is one of difference from States, not a supercilious attitude towards other actors.

Granted, the distinction is implicitly based on the fact that for (too) long States were considered the central participant of the “*international*” legal system, as that expression reveals: for this reason, I prefer the expression *jus gentium* to that of international law, because it is a more encompassing notion that indicates the presence of different entities and legal goods, especially human ones. Still, other actors were relevant even in previous stages of international law.⁹⁷²

In regard to the second objection, international relations scholars have pointed out how non-state entities may participate not only in the transnational but also in the national or international arenas. Therefore, given the possible non-state impact on human rights and guarantees in any of those socio-legal levels, it would be improper to limit the regulation and study of the protection of human dignity from non-state violations to actors that operate in a transnational fashion or to any other entities, because that approach would suffer from a problem similar to that of State-centered conceptions of human rights: it would impede the protection of many victims, be contrary to equality and non-discrimination, and prevent a full and effective protection of human dignity.

That being said, it will now be explored if non-state entities have or need to have international legal personality to be able to possess international legal capacities that seek to

⁹⁶⁹ Cf. Part I, *supra*.

⁹⁷⁰ Cf. Chris Jochnick, *op. cit.*, at 58; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 25-58, where persuasive counter-arguments to some theories that deny the direct relevance of humanitarian norms *vis-à-vis* non-state entities, described therein, are offered.

⁹⁷¹ Cf. Philip Alston, “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?”, *op. cit.*, pp. 3-4; Gáspar Biró and Antoanella-Iulia Motoc, *op. cit.*, para. 49.

⁹⁷² Cf. Jordan J. Paust, “Nonstate Actor Participation in International Law and the Pretense of Exclusion”, *op. cit.*, pp. 985-1004.

protect human dignity, imposed on them or consented to by them. To examine this, the current state of the discussion on international legal personality and subjectivity must be explored.

Concerning this, Janne Nijman persuasively argued that the notion of international legal personality can be traced back to a theoretical construct of Leibniz, who wanted to strike a balance between the freedom and power of political entities and their belonging to and being embedded in an imperial structure, in which their power was not absolute (unlike what some positivists that defend a false alleged preponderance or exclusiveness of States hold).⁹⁷³

It is important to take this into account, because by force of repetition of the notion of personality, not found in a general international legal norm but rather employed by doctrine and jurisprudence⁹⁷⁴ –and if such a norm existed, it could still be modified-, practitioners and scholars may attach a meaning or importance to it which it originally lacked. This may be contrary to the possibilities offered in international law or may prevent that law from fulfilling its potential in several areas, especially that of the *full* protection of human dignity against all violations. This makes it necessary to ponder what the purpose of notions of personality is and how they stand in light of current legal goods, developments and goals of the international legal system.

To my mind, the starting point of these analyses is the *necessity* of making non-state actors subject to international law. This is because, as expressed previously, due to the power that many non-state entities have had and have nowadays⁹⁷⁵ it is important to acknowledge their influence and interaction with legal goods and the need to subject them to regulations, so as to ensure that events in which they are *able to* disrespect human dignity are deterred through prohibitions or preventive measures and are addressed. This implies recognizing their violations and placing legal capacities on them, and also to grant entitlements of participation to entities that can or should contribute to promoting the respect of human dignity.

Just as the emergence of powerful political entities made Leibniz realize the importance of subjecting entities to law, both to give them positive capacities (as rights) or negative ones, the power of non-state entities -which has increased with globalization but is not only a recent

⁹⁷³ Cf. Janneke Nijman, "Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability or the Last Great Defence of the Holy Roman Empire", IILJ Working Paper 2004/2, *International Law and Justice Working Papers*, Institute for International Law and Justice, New York University School of Law, 2005, at 2-6, 33-57; Janne Elisabeth Nijman, *The Concept of International Legal Personality*, T.M.C. Asser Press, 2004, pp. 448-449. On the problems of State-centeredness, cf. Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 5-12, 20; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 10-20.

⁹⁷⁴ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 59-63, 70-73; Roland Portmann, op. cit., at 9; José Manuel Cortés, op. cit., pp. 109-111; Anna Meijknecht, op. cit., pp. 46-52.

⁹⁷⁵ Cf. Theo van Boven, "The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", op. cit., at 3.

phenomenon⁹⁷⁶, and their capacities to violate or promote rights (that are *powers* to do something),⁹⁷⁷ demand that their legally relevant conduct is properly regulated by *jus gentium*, which is concerned with a society not composed only of States.

Another idea related to the possibility of actors having legal international legal capacities indicates that since both entitlements and burdens can belong to the same legal system and be created by the same sources, the possession of international rights by a non-state reveals the capacity to possess international legal burdens, and vice versa. This has been recognized by NGOs, practitioners and scholars, even concerning corporations and other private actors,⁹⁷⁸ and explains the reluctance of some to create *or recognize* either rights or duties of an entity, because they may fear that this will reveal the possibility of that entity having other international legal capacities. Nonetheless, denying that some actor must be obliged to not violate human rights is unacceptable, no matter which entity that actor is.

Some authors consider that instead of talking about *personality*, given the confusions of the term and how misleading theories about it can be, it is preferable to talk of *legal capacities* because, as they accurately point out, the sources of international law can regulate legal capacities of any entity, even if they are not formally recognized as actors but their conduct is still factually and legally relevant. In other words, an actor can be addressed by international law *even if some authors* do not consider it a subject of law or as one that has international legal personalities, as long as the sources of *jus gentium* determine so⁹⁷⁹ and, I might add, there are *no logical or legal impossibilities*, such as express or implied exclusions of the possession of one capacity based on normative considerations about peremptory or systematic legal impediments.⁹⁸⁰

For instance, because of the functional and secondary character of international organizations and the relevance of their functions and goals, these entities cannot have

⁹⁷⁶ Cf., for instance, Anna Badia Martí, op. cit., at 319; Kofi A. Annan, “Foreword”, op. cit., pp. iii-iv.

⁹⁷⁷ According to the Oxford Dictionaries available online, one of the meanings of power is “the ability or capacity to do something or act in a particular way”. Available at: <http://oxforddictionaries.com/definition/power?q=power> (last checked: 10/02/2012).

⁹⁷⁸ Cf. ASIL, *Proceedings of the 92nd Annual Meeting: The Challenge of Non-State Actors*, op. cit., at 34; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 82; EarthRights International, “One Year Later, Citizens United Decision Prompts Calls for a Constitutional Amendment on Corporations”, 16 February 2011, available at: [http://www.earthrights.org/blog/one-year-later-citizens-united-decision-prompts-calls-constitutional-amendment-corporations?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+EarthRightsInternational+\(EarthRights+International\)](http://www.earthrights.org/blog/one-year-later-citizens-united-decision-prompts-calls-constitutional-amendment-corporations?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+EarthRightsInternational+(EarthRights+International)), where it is held that denying the capacity of an entity to possess rights may end up denying the capacity for it to have legal responsibilities, thus showing how possessing certain legal capacities reveals the ability to possess others.

⁹⁷⁹ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 59-75; José Manuel Cortés, op. cit., pp. 109-111; Anna Meijknecht, op. cit., at 34; Roland Portmann, op. cit., pp. 271-283.

⁹⁸⁰ Cf. Anna Meijknecht, op. cit., pp. 34-35, 61-62; Gaetano Pentassuglia, op. cit., at 391; Roland Portmann, op. cit., pp. 273-274, 280-281.

capacities that are not compatible with their nature and purposes. This is evinced by the analysis of *ultra vires* acts of international organizations, for instance, because the regulation of those acts is not and cannot be identical to that of the *ultra vires* acts of States.⁹⁸¹

Concerning this discussion about the *capacity to have capacities*, it is interesting that Gaetano Pentassuglia, reviewing the work of Anna Meijknecht, alludes to similar considerations when he explains how he considers that entities can have:

“[L]egal capacity as the ‘internal’ capacity of an entity to bear rights and duties. Such a capacity would indeed reflect the complex of factual qualities of the entity, most notably its degree of autonomy and its will to exist as a separate entity, which manifests itself, in the case of composite entities, with a degree of organization and representation instrumental in establishing relations with other entities. International legal subjectivity, to be enjoyed only by entities possessing legal capacity, would instead indicate the ‘external’ perspective of the international legal order, namely the act of attributing rights and duties to an entity”⁹⁸² (emphasis added).

The prerequisite of an actor having the capacity to have some legal capacities⁹⁸³ refers to all legal capacities, not only to rights and duties.

Moreover, apart from i) *factual* qualities, I consider that the internal dimension of the capacity to bear capacities also alludes to the ii) *normative* possibility of an entity to have a given capacity. This can be illustrated with the example of the *ultra vires* acts of international organizations, which is related to a *normative* feature of those entities. For this reason, there are “ontological” and normative capacities to have legal capacities. They allude to the complex set of factual and normative features of an entity that makes it able or not to possess a given legal capacity. This explains why there can be some exceptions to the general capacity to have capacities, although this should never exclude the protection of human dignity from that actor.

Additionally, there is an external dimension of the capacities to have capacities. It refers to the respect of *jus cogens* and fundamental features of the international legal system. Thus, the regulation of a capacity by that legal system, rather than being only an external dimension, constitutes the transition to the realm of subjectivity (i.e. becoming an addressee of law).

Additionally, the theory of legal capacities stresses that it is irrelevant whether an entity possesses the same legal capacities that another entity possesses or has them to the same extent or not. In my opinion, unlike what some authors say, the fact that an entity does not have, for example, the same lawmaking capacities that a State does, or other capacities of States or other actors, says nothing about its having or being able to have those or other legal capacities

⁹⁸¹ Cf. José Manuel Cortés Martín, op. cit., pp. 110, 211-223; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, at 93. Versus (regarding the secondary status of international organizations): Roland Portmann, op. cit., pp. 274-275, 278-279, 283.

⁹⁸² Cf. Gaetano Pentassuglia, op. cit., at 391.

⁹⁸³ Cf. Anna Meijknecht, op. cit., at 34.

under international law. In fact, it is possible that a State does not have all the international legal capacities that other entities have.⁹⁸⁴

I find an account that focuses on legal capacities more persuasive than those that consider that personality is only enjoyed by entities with certain powers, which are often said to be lawmaking powers, *jus standi* or *locus standi*. To my mind, an entity having those powers or not says nothing about its being able to be an addressee of *jus gentium*. For these reasons, I do think that theories of legal personality are limited and may be confusing.⁹⁸⁵

For instance, the fact that there can be rights or duties without related remedies means that an entity with substantive capacities lacking the procedural capacity of answering to them in international fora, explains that by virtue of its being regulated by *jus gentium* it is an addressee of that legal system. Moreover, theories that require a certain group of capacities in order to consider an entity as a subject or person, notwithstanding the mutability of some legal capacities, are forced to end up using notions of “limited” personality⁹⁸⁶ when a relevant entity only has some capacities. That is why I consider that the theory of capacities is more descriptive and better reflects legal practice.

This is illustrated in the so-called *matrix of capacities*, which indicates how the legal capacities of each actor must be analyzed separately. It is thus compatible with the notion of the “addressees of law.”⁹⁸⁷ It emphasizes the relevance of each capacity and implies that an entity that is regulated somehow by *jus gentium*, even if it does not have the same capacities that, *for example*, States have, still possesses its own international legal capacities. Comparisons between capacities are relevant for descriptive purposes or, in my opinion, for studies about the need to regulate or assign more capacities to an actor *de lege ferenda*, in light of teleological considerations and the need to better protect human dignity and other global legal goods (found in international law and other normative systems).

⁹⁸⁴ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 71-74, 83; Roland Portmann, op. cit., pp. 272, 274-276, 278, 283.

⁹⁸⁵ Cf. Elena Pariotti, op. cit., pp. 102, 104 (on the comparison of theories that require certain capacities or the mere fact of being addressees of law in order to regard an entity as a subject of law); Anna Meijknecht, op. cit., pp. 58-62. Versus: Manuel Díez de Velasco, *Instituciones de Derecho Internacional Público*, Tecnos, 2005, pp. 258, 292; José Antonio Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, Tecnos, 2003, pp. 185-194. The ILC has acknowledged that “The acquisition by an international organization of legal personality under international law is appraised in different ways. According to one view, the mere existence for an organization of an obligation under international law implies that the organization possesses legal personality. According to another view, further elements are required. While the International Court of Justice has not identified particular prerequisites, its dicta on the legal personality of international organizations do not appear to set stringent requirements for this purpose.” Cf. ILC, Draft articles on the responsibility of international organizations, with commentaries, A/66/10, 2011, pp. 8-9, para. 8 of the commentary to article 2.

⁹⁸⁶ Cf. Anna Meijknecht, op. cit., pp. 55-56.

⁹⁸⁷ Ibid.; Roland Portmann, op. cit., pp. 271-283; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 59-83.

Some studies of international legal personality examine the most regulated actors and other relevant entities that are also or according to them should be addressed by *jus gentium*.⁹⁸⁸ Nevertheless, different authors persuasively argue that the doctrine of international legal personality purports to have a pedagogic function that is often exceedingly descriptive and not prescriptive. Still, that function is not always fulfilled and must give way to legal reality, and the notion of personality is truly sometimes rather confusing and can operate as a “mental prison”, as pointed out by Rosalyn Higgins, Andrew Clapham, José M. Cortés, José E. Alvarez and others.⁹⁸⁹ This is why the idea of legal personality could turn into a *barrier* to logical and necessary developments in the protection of international legal goods. This is because if it is employed to say that an entity is not a legal person under international law and therefore capacities such as human rights duties cannot be imposed on it, the protection of human dignity will be weakened. Additionally, authors may be led to think that an entity “cannot” have capacities under international law, which is false because, as said before, absent legal impossibilities or exclusions, the sources of *jus gentium* can create legal capacities of that entity. Moreover, if an actor does not have capacities at present, it can have them in the future or possess legal capacities to a different extent.

Descriptions used in accounts of legal persons can thus become outdated due to the evolution of law. Additionally, not all notions of personality have exclusively educative functions. In this sense, Jordan Paust has mentioned how some conceptions of personality, such as that of Oppenheim and others, which are completely or almost State-exclusivist, pretend that many entities *cannot be* directly regulated by international law, which allegedly has nothing to do with them. Paust rejects this based on practice that is contrary to that narrow conception, and other authors rebut such theories from a theoretical standpoint (mentioning how the notion of “objects” of law ends up undermining itself and showing multiple possible addressees). Certainly, in practice international law has recognized the capacities of different entities, such as indigenous groups, among others, and non-state actors have sometimes even contributed to shape *jus gentium*.⁹⁹⁰

A serious problem of many theories of international legal personality is that unconsciously theoretical analyses can turn into supposed “truths” of positive law, and make others believe that

⁹⁸⁸ Cf. e.g. Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 269-289, 784-786; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 67-68.

⁹⁸⁹ Cf. José Manuel Cortés Martín, op. cit., pp. 109-111; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 62-63; Anna Meijknecht, op. cit., pp. 50-51; José E. Alvarez, “Are Corporations “Subjects” of International Law?”, *Santa Clara Journal of International Law*, Vol. 9, 2011, at 8.

⁹⁹⁰ Cf. Jordan J. Paust, “Nonstate Actor Participation in International Law and the Pretense of Exclusion”, op. cit., pp. 985-986, 992, 997, 999, inter alia; Anna Meijknecht, op. cit., pp. 46-52.

some non-state entities, as indigenous groups or non-state political groups, due to their not being considered to have international legal personality, cannot have legal capacities or be addressees of international law. The danger is that descriptions about personality may be perceived as prescription and become self-fulfilling prophecies,⁹⁹¹ especially if their authors are influential, and therefore may also make law stagnant in practice and not regulate relevant non-state conduct.

Apart from hindering the protection of global legal goods and human dignity, some theories of personality are contrary to the history of *jus gentium*, which throughout its history has included entities different from States, as happened in Greece, the middle ages or modern times, as can be gleaned from studies on the history of international law.⁹⁹²

Additionally, several authors, as Kate Parlett, Felipe Gómez Isa, John H. Knox, Koen de Feyter, Antonio Cançado, Theodor Meron, Andrew Clapham, Hersch Lauterpacht and others, argue that unlike what was long believed by some adherents to narrow theories, individuals and other entities can possess international legal capacities, including as rights and duties.⁹⁹³ This is one example of how State-centered theories are limited and equivocal.⁹⁹⁴

Unfortunately, some authors replace narrow conceptions with others that include a few more entities but are still limited. They often recognize the “limited” personality of a few entities but not that of others entities that have or can and must have international legal capacities, that thus are or must be subjects/addressees of international law. This explains why it is preferable to use the theory of subjectivity based on capacities, because it is better at describing and permitting *lex ferenda* analyses.

Apart from agreeing with historical criticisms, I disagree with narrow conceptions of personality, especially those that have “normative” pretensions or effects in practice (disguised as descriptions of *lex lata*), because apart from often failing to describe, they ignore that law evolves

⁹⁹¹ In other areas of legal analysis, it has been pointed out how the theories posited by scholars, even if not necessarily supported by positive law or legal practice, may make practitioners end up acting in accordance with what they believe has been accurately “described”. In this sense, Joel Trachtman has mentioned for instance that if citizens are convinced by doctrinal works that “international law is ineffective, their support for making and complying with international law could decline significantly, making [those] work[s] a self-fulfilling, and welfare-reducing, prophecy.” Cf. Joel P. Trachtman, short review of Eric A. Posner, *The Perils of Global Legalism*, The University of Chicago Press, 2009, *Global Law Books*, available at: <http://www.globallawbooks.org/reviews/detail.asp?id=627> (last checked: 10/02/2012).

⁹⁹² Cf. Jordan J. Paust, “Nonstate Actor Participation in International Law and the Pretense of Exclusion”, op. cit., pp. 994-1004; Antonio Truyol y Serra, *Historia del Derecho Internacional Público*, Tecnos, 1995, pp. 15-17, 146-158.

⁹⁹³ Cf. Hersch Lauterpacht, *International Law and Human Rights*, op. cit., pp. 27-47; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 70-73, 82-83; Kate Parlett, *The Individual in the International Legal System*, op. cit., at 370-372; Koen de Feyter, “Globalisation and human rights”, op. cit., pp. 52-53, 67-81, 90; John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 27-31; Felipe Gómez Isa and Koen de Feyter, “Preface”, in: Felipe Gómez Isa and Koen de Feyter (eds.), *International Human Rights Law in a Global Context*, 2009, at 16.

⁹⁹⁴ On an alternative account that does not consider that State-centric models in *jus gentium* have been necessarily overcome and that they may sometimes be beneficial or not necessarily improper, cf. Kate Parlett, *The Individual in the International Legal System*, op. cit., pp. 3, 6-7, 365, 369-372.

and has an instrumental character, both factually –as demonstrated by the invocation of law by different actors and authorities to further interests- and from the point of view of the ‘ought’. Concerning this, in my opinion law should be used to protect human dignity and to take into account human needs from a meta-legal perspective, being a tool that is not a goal in itself and must serve human beings.

Even from an intra-normative perspective, norms protect interests, values and goals, i.e. legal goods, as recognized by entities as the Inter-American Commission on Human Rights and in doctrine.⁹⁹⁵ Those legal goods are relevant and their protection must guide the attribution of legal capacities. This is confirmed by the requirement that international norms are interpreted taking into account teleological considerations, as mentioned for instance in article 31 of the Vienna Conventions on the Law of Treaties (of 1969 and 1986) and in the studies on the fragmentation of international law conducted by scholars or International Law Commission.⁹⁹⁶

It is also important to identify values and interests that do not form part of positive law but must be included in it, as happened with the emergence of international human rights law.

Despite considering that the theory of legal capacities better explains the possibility of legally addressing non-state actors, it is not possible to altogether dismiss the relevance of some aspects related to legal personality or subjectivity when analyzing the position of non-state entities in international law. It is convenient to look at these issues taking into account the distinction between those two notions because, as considered by Anna Meijknecht and Sir Humphrey Waldock, personality and subjectivity constitute different concepts.⁹⁹⁷

In that regard, the notions of *subjectivity*, *direct regulation* and the existence of “addressees” refer to the possession and assignation of international rights, duties and other legal

⁹⁹⁵ Cf. Markus Dirk Dubber, “The Promise of German Criminal Law: A Science of Crime and Punishment”, *German Law Journal*, Vol. 6, 2005, pp. 1069-1070; Santiago Mir Puig, “Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State’s Power to Criminalize Conduct”, *New Criminal Law Review*, vol. 11, 2008; Christoph J. M. Safferling, “Can Criminal Prosecution be the Answer to massive Human Rights Violations?”, *German Law Journal*, vol. 5, 2004, at 1472; Inter-American Commission on Human Rights, Report No. 95/08, Admissibility, *Nadege Dorzema et al., or “Guayabin Massacre” v. Dominican Republic*, 22 December 2008, footnote 7, and Inter-American Commission on Human Rights, Report No. 64/01, *Leonel de Jesús Isaza Echeverry and Others v. Colombia*, 6 April 2001, para. 22, in connection with Inter-American Court of Human Rights, *Case of Durand and Ugarte v. Peru*, Judgment (Merits), 16 August 2000, par 117; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Argentina*, OEA/Ser.LV/III.49, 11 April 1980, in: Chapter II, The Right to Life, para. 1 of section A. General Considerations.

⁹⁹⁶ Cf. International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law*, op. cit., paras. 13, 16, 21, 23, 27, 29, 30; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 375-377.

⁹⁹⁷ Cf. Anna Meijknecht, op. cit., pp. 32, 34, 45, 49-51; Gaetano Pentassuglia, op. cit., at 391; International Law Commission, First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook of the International Law Commission*, vol. II, A/CN.4/144 and Add.1, 1962, at 32, paras. 3 and 4 of the commentary to article 1.

capacities –e.g. burdens, permission to do something neither prohibited nor protected in a right, etc.-.⁹⁹⁸

In this regard, it is important to recall that law can do more than protect rights and regulate duties and conduct in a prescriptive manner,⁹⁹⁹ and can also envisage facultative treatments –ranging from toleration to permission-.¹⁰⁰⁰ Since non-state entities can be addressees of norms of *jus gentium*, they cannot be rightly considered as mere “objects” of law, i.e. as entities that cannot be directly addressed by international legal norms, as explained by Anna Meijknecht and Elena Pariotti.¹⁰⁰¹

Therefore, actors that have legal international legal capacities are truly subjects of international law. This notion is thus compatible with the theory of capacities.

Indeed, Anna Meijknecht, Jans Klabbers and Elena Pariotti consider that an entity is a subject (and Portmann argues that it is a person) of international law whenever it is addressed by its norms, regardless of the extension or type of that regulation.¹⁰⁰² This idea concurs with the implications of the theory of capacities, because it avoids complicated theories of subjectivity or personality and focuses on existing legal capacities, whether they are lawmaking powers and *jus standi* or any other. Some authors consider that these two or other capacities constitute “evidence and requirement” of legal personality.¹⁰⁰³ However, those capacities say nothing about the regulation of other capacities of an actor by *jus gentium* and its being able to acquire legal capacities it originally lacked, as has happened in international human rights law, criminal law, and regarding participation in lawmaking and adjudicatory processes and in relation to sources of law. Moreover, lawmakers are addressees of legal capacities too, in the sense that their lawmaking powers are recognized by and regulated in *jus gentium*.

Indeed, international law has undergone a process of openness and inclusion of more entities that can participate and interact with its norms, either as addressees, operators, shapers or agents of promotion and implementation.¹⁰⁰⁴

Concerning legal personality, according to Anna Meijknecht it is a somewhat “empty” notion that is filled with: the capacity to bear legal capacities, the recognition of accepted

⁹⁹⁸ Cf. Roland Portmann, op. cit., at 283.

⁹⁹⁹ Cf. H.L.A. Hart, *The Concept of Law* (2nd edn.), Oxford University Press, 1997, at 81.

¹⁰⁰⁰ Cf. Declaration of Judge Simma to: International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, op. cit., paras. 8-10.

¹⁰⁰¹ Cf. Anna Meijknecht, op. cit., pp. 46-52; Elena Pariotti, op. cit., at 102.

¹⁰⁰² Cf. Jans Klabbers, op. cit., locations 2533-2540; Roland Portmann, op. cit., pp. 271-283; Anna Meijknecht, op. cit., pp. 32-62; Elena Pariotti, op. cit., at 102.

¹⁰⁰³ Cf. Math Noortmann, “Non-State Actors in International Law”, op. cit., pp. 64-66; Manuel Díez de Velasco, op. cit., at 258; José Antonio Pastor Riduejo, op. cit., at 186.

¹⁰⁰⁴ Cf. Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, op. cit.; Luis Pérez-Prat Durbán, op. cit.

capacities (in my opinion entitlements and burdens), the imposition or assignation of legal capacities, and sometimes with *jus* or, I might add, *locus standi*.¹⁰⁰⁵

Conversely, according to the theoretical construct of Roland Portmann, it is useful to take into account legal personality, but without it being relevant in which legal system that personality arises, is granted or recognized. This is because he claims that an entity can have *international* legal capacities that are analogous to those possessed by other entities, and in my opinion also capacities that only it has, even if it is a legal person *under the domestic law* of a given State. Other authors and standards certainly confirm that such an entity can have international legal capacities, and international relations studies confirm the international relevance of actors with a local or internal origin.¹⁰⁰⁶

The same can be said of entities whose legal *personality* has an international legal origin. The most conspicuous actors in this case are international organizations, that according to some authors always have legal personality; while others argue that some of them may *not* have legal personality,¹⁰⁰⁷ although it could be considered that those organizations without that personality are actually different non-state entities. Regardless of the correct answer to this, the discussion raises the thorny question of whether *entities without* legal personality recognized in either international or domestic law can be the addressees of *jus gentium*.

To begin this analysis, it is convenient to clarify that the term *personality* is not used here in the same sense in which it is used in discussions of international legal personality described above. This is because the latter refer to a) the *possibility* of an entity being an addressee of international legal norms, which according to a strict version is only possible for international legal persons, which would be those that have capacities, being this an argument used in doctrine and case law that has been criticized because of its circularity.¹⁰⁰⁸

Conversely, the notion of (formal) personality used now refers to b) entities that are considered to have a separate existence under a legal system. Hence, even if they are collective entities (i.e. composite actors or non-individuals),¹⁰⁰⁹ they are deemed to be different from their

¹⁰⁰⁵ Cf. Anna Meijknecht, op. cit., pp. 32-62; Gaetano Pentassuglia, op. cit., at 391.

¹⁰⁰⁶ Cf. Roland Portmann, op. cit., pp. 273-274, 276-277, 280-281; ECOSOC resolution 1996/31, paras. 5, 8, 20; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, at 275; Bob Reinalda, "Private in Form, Public in Purpose: NGOs in International Relations Theory", op. cit., pp. 12-13; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 271-272, 275.

¹⁰⁰⁷ Cf. article 2.a of the ILC Draft Articles on the Responsibility of international organizations adopted in 2011 (A/66/10); José Manuel Cortés Martín, op. cit., pp. 79-111.

¹⁰⁰⁸ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 63-64; Bob Reinalda, "Non-State Actors in International Relations: Do They Matter?", op. cit., at 65; José E. Alvarez, "Are Corporations 'Subjects' of International Law?", op. cit., pp. 7, 12.

¹⁰⁰⁹ Cf. e.g. Gaetano Pentassuglia, op. cit., pp. 393-395; Roland Portmann, op. cit., pp. 273-283.

members and actors with which they are related. This makes it possible for them to be independent addressees of rights, duties and legal capacities.

Because of this, one can say that all legal persons, due to their separate formal or legal existence, can have international legal capacities, even if that legal existence has a national origin. This explanation confirms the ideas proposed in this text, because non-state entities with a local origin can certainly act and affect international, transnational and domestic legal goods;¹⁰¹⁰ and the necessity to effectively protect humanitarian legal goods from all threats, State or not, demands that they can have pertinent legal capacities.

That violations of human rights always affect international legal goods is confirmed by the legal consideration that even violations of human rights committed by States without transboundary elements against their own nationals are addressed by international law.¹⁰¹¹

On the other hand, capacities can be assigned to collective or legal persons and to their members, that can be simultaneously responsible in connection with one same violation but always as a consequence of the breach of the duties of each of them, as required by the principle of individual responsibility.

Since all individuals have a right to legal personality, the next question is whether apart from entities with a formal or legal independent existence, collective entities with a *factual* existence that is not formally recognized by a public legal system (i.e. excluding *lex lata*) can have international legal capacities.

From the point of view of the *effective* protection of individuals from all violations to their human dignity, which are always *legally relevant*, as discussed in Part I, it is necessary to acknowledge that in practice some collective actors, civil or “uncivil”, engage in abuses of human rights, criminal or not, interact with individuals, and operate in global, transnational and/or local planes, often in a way that would not be feasible for individuals acting alone without the network(s), resources and tools at the disposal of collective entities. They can even have *de facto* hierarchies, procedures and identities regardless of their legal recognition or lack thereof, which they may conceive as irrelevant, unjust or even inconvenient from their point of view.

¹⁰¹⁰ Cf. Bob Reinalda, “Private in Form, Public in Purpose: NGOs in International Relations Theory”, op. cit., pp. 12-13; Draft Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, 2003, para. 21, where business enterprises are considered to include “any business entity, regardless of the international or domestic nature of its activities”. Additionally, ECOSOC resolution 1996/31, paragraph 4, mentions that “the term “organization” shall refer to non-governmental organizations at the national, subregional, regional or international levels.”

¹⁰¹¹ Cf. Roland Portmann, op. cit., pp. 254-257.

For these reasons, to protect human dignity, international law must regulate positive or negative legal capacities of non-state entities that do not have legal capacities recognized under domestic law.

Not all actors have a factual origin: sometimes, an entity comes into existence only when it is created and given formal independence, as happens with international organizations.

Altogether, all non-state entities with international legal capacities are subjects of international law, whether they are collective or individual and have formal recognition or not.

One example of the existence of international legal capacities of entities that can lack formal legal personality and an independent legal patrimony under either domestic law or international law (that has no general norms for granting personality and is an “open system”)¹⁰¹² is that of non-state armed groups. Their conduct is still regulated by customary and treaty International Humanitarian Law, and some of those groups can sometimes consent to be bound by treaty law, as permitted by article 96.3 of Protocol I to the Geneva Conventions of 1949.

In my opinion, another example that supports the possible existence of capacities of entities without expressly-recognized personality in a public legal system, that highlights the distinction between formal existence or personality (with origin in any level) and subjectivity, is that of article 44 of the American Convention on Human Rights, according to which petitions of a contentious nature can be filed in the Inter-American Commission on Human Rights by:

“Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the [OAS]” (emphasis added).

Similarly, article 1 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities specifies that a Party to that Protocol:

“[R]ecognizes the competence of the Committee on the Rights of Persons with Disabilities (“the Committee”) to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention” (emphasis added).

These provisions highlight that it is possible for many persons acting as a group, that i) *factually operate as a single entity and is conceived as such* for certain legal purposes, or for entities with ii) a formal existence originating *in domestic or international law*, to have international legal capacities, including those that seek to protect individuals from non-state violations.

In my opinion, the idea that entities with factual but not legally-recognized existence can have international legal capacities (both positive and negative ones) is endorsed in the decision of the United States Court of Appeals for the 7th Circuit in the *Case of Boimah Flomo*, et al.

¹⁰¹² Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 62-63, 70-71; Roland Portmann, op. cit., pp. 271-283.

versus Firestone Natural Rubber Co., LLC. The defendants objected that only entities with a “heartbeat” have been found to violate customary law (alongside States, it is presumed that the respondents meant).¹⁰¹³ To this, the Court answered saying, among other things, that:

“[I]f precedent for imposing liability for a violation of customary international law by an entity that does not breathe is wanted, we point to *in rem* judgments against pirate ships. E.g., *The Malek Adhel*, 43 U.S. (2 How.) 210, 233-34 (1844); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40- 41 (1825). Of course the burden of confiscation of a pirate ship falls ultimately on the ship’s owners, but similarly the burden of a fine imposed on a corporation falls ultimately on the shareholders”¹⁰¹⁴ (emphasis added).

Altogether, it is not true that legal capacities of entities without formal existence are pointless. While it is true that ultimately individuals or entities with formal recognition that compose or support factual actors will be affected by legal capacities of collective entities they have relations with, factual entities deserve individualized attention as well, to better address their challenges and features.

The conclusion of the Court of Appeals implies that an entity can have the burden of being subjected to a legal response directly (I only disagree with the aspect of its decision considering a vessel an independent actor). On the other hand, the Court says that while *ultimately* the affectation of the members or associates of an entity that is directly addressed by international law may exist as an indirect side effect, this effect differs from the direct purpose of the legal response, which seeks to directly deal with a given entity that is different from those indirectly affected by that response. As will be explained shortly, *it must be determined if fundamental rights are affected directly or indirectly* as a result of an action against an entity different from an individual, given the existence of a condition that legal capacities respect fundamental and human rights, studied in Section 5.2.

Additionally, it must be taken into account that the members of collective entities can have responsibilities and capacities of their own, as is required by an effective full protection of human dignity. Certainly, members or allies of an actor can bear direct legal burdens and be the object of legal responses as well and have their legal own responsibility engaged due to their breaching obligations of their own when they participate (as perpetrators or assistants) in a violation of human rights, as follows from principle of individual responsibility.

For legal purposes, the fact that some persons are affected by what happens to others, as social and theoretical approaches suggest, does *not* mean that *only* some of those parties or sides must and can be addressed by law. For instance, when a human rights violation takes

¹⁰¹³ Cf. United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, pp. 5-6.

¹⁰¹⁴ Cf. *Ibid.*, at 15. Also see pages 7-14.

place, those directly affected by the act or omission that violates rights are considered as victims, while those who suffer and have their rights affected as a result of the affectation of direct victims can *also* be considered as victims, namely indirect ones. Likewise, it has been suggested that human beings can suffer as a result of conduct that directly affects some non-state entities with which they are related.

This has been recognized in international human rights law, because it is accepted that some entities may be directly affected and lack the right to file claims but when conduct against those entities *can* indirectly affect and violate human rights, individual victims of the these violations can claim protection (and indirectly end up protecting the entities directly affected as well).¹⁰¹⁵

Moreover, entities that do not suffer a breach of international *erga omnes* or *erga omnes partes* obligations directly, including human rights ones, can sometimes invoke the responsibility of offenders or, according to some, employ countermeasures, due to the violation of interests of the international community they are members of.¹⁰¹⁶ This highlights that legally relevant conduct, as violations of human dignity, can affect multiple actors, not only direct victims, and that State and non-state members of international society are entitled to promote and seek the respect and protection of human dignity from all violations.

Some examples help to illustrate the previous points. Pirates and terrorists, for instance, can be the subjects of international norms and decisions, as happens with Security Council Resolutions that attempt to combat the phenomena of piracy and terrorism. While some provisions of those resolutions are directly related to individuals who engage in the unlawful activities in question, some others are designed to combat the capacity of groups. In this sense, rather than being restricted to addressing individuals, norms may command members of the international community to refrain from cooperating with actions of terrorism or piracy and to cooperate and adopt measures to counter them, including actions as freezing assets or outlawing some conduct in domestic legal systems.

Regulations of that sort recognize the capacity of groups to engage in certain activities that can and must be neutralized through lawful actions in order to protect important legal goods.

Certainly, this integral and multidimensional strategy is the most effective one, because while it is necessary to sanction and prohibit the conduct of individuals that threatens the effectiveness of humanitarian legal goods, it cannot be denied that their capacity to act and their

¹⁰¹⁵ Cf. Human Rights Committee, General Comment No. 31, *op. cit.*, para. 9; Gaetano Pentassuglia, *op. cit.*, pp. 393-395.

¹⁰¹⁶ Cf. articles 48 and 54 of the ILC articles on State responsibility or 49 and 57 of the International Law Commission's draft articles on the Responsibility of international organizations adopted on second reading.

modus operandi sometimes answer in part to group structures and networks that need to be equally tackled and regulated, lest human dignity cannot be effectively protected from all violations. This logic is relevant to address violations committed by groups and individuals that engage in transnational and local organized crime.

There are different examples of the aforementioned logic that can be found in the following provisions. For instance, Resolution 1373 (2001) of the Security Council decided that:

“[States shall] Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities [...]

Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such person [...]

Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists [...]

Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents [...]

[And also called upon States to] Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups [...]

[And noted] with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security” (emphasis added).

That excerpt illustrates how non-state groups or entities without formal personality, mentioned therein as “entities”, “groups” or “networks”, can also be addressed *directly or indirectly* by international law, because they are relevant and can affect legal goods of the world community. This is remindful of the idea that international law and global governance should regulate the activities of entities with the capacity to affect their interests.

The cited resolution evinces that obligations or recommendations directed to States or other authorities or actors concerning non-state entities. They can indirectly affect and address these entities and their capacities and position in international legal terms and relations of the international society. This presupposes a recognition that those entities can engage in legally relevant conduct contrary (and sometimes beneficial) to international (and global) legal goods.

More intense and direct regulations can be used as well, but the choice to employ them must be made taking into account various factors, as those explored in Chapter 4.

Another example is provided in several provisions of the United Nations Convention against Transnational Organized Crime and its Protocols, which have a human rights dimension insofar as they seek to tackle some behavior that affects human rights and guarantees.¹⁰¹⁷

For instance, article 10 of the Convention, read in light of paragraphs (a) and (c) of article 2, distinguishes between groups, individuals, and legal persons, being the last two entities subject to liability in connection with misdeeds in which organized criminal groups participate. Treaty norms recognize that to address certain acts criminal organizations, their allies and members must be the object of legal responses, and also acknowledge that legal responses must take into account the challenges created by the operations of those groups, how they affect individuals, and the need of international cooperation, as indicated in doctrine¹⁰¹⁸ and the Preamble to the Protocol against the Smuggling of Migrants by Land, Sea and Air.

Other norms belonging to that framework against transnational organized crime mention how public entities must cooperate judicially or otherwise, exchanging information and intelligence, or employing other measures, to counter the unlawful activities of criminal groups and their members. The following articles, for instance, deal with this: 10, 26, 27, 28 or 31 of the Convention; 10 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; 10, 14, 15 or 16 of the Protocol against the Smuggling of Migrants by Land, Sea and Air; and 12 of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

Other examples include some of the Security Council resolutions addressing Somali piracy, insofar as they encourage and permit actions against it in different sea and air spaces (even in Somali land territory for a period of time, to some States). Among them, the following resolutions are included: 1838 (2008), 1844 (2008), 1846 (2008) or 1851 (2008). Additionally, paragraph 8 of Resolution 1844 (2008) prohibits military, technical, financial or other assistance to pirates and calls for the adoption of economic measures against “individuals or entities” (emphasis added) -designated by a Committee established “pursuant to” Resolution 751 (1992)- that: a) commit or support acts that threaten the peace, security or Stability of Somalia; b) violate an arms embargo against Somalia; or c) obstruct the delivery or distribution of humanitarian assistance intended to be given in Somalia.

¹⁰¹⁷ Cf. Tom Obokata, *op. cit.*, pp. 394-395, 399-402; Preamble to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

¹⁰¹⁸ Cf. Kofi A. Annan, “Foreword”, *op. cit.*, pp. iii-iv.

Additionally, it is necessary to take into account that, for some authors and authorities, according to international customary or treaty law, and pursuant to Security Council resolutions, non-state entities can engage in major uses of force and, accordingly, can be the subject of measures of self-defense, case in which they bear the burden of being the object of those measures, which is a legal capacity.¹⁰¹⁹

Interestingly, the International Court of Justice declared that the Security Council can “make demands on actors other than United Nations Member States and intergovernmental organizations”,¹⁰²⁰ that is to say on non-state actors. This secondary source of regulation is but one of the multiple possible origins of the international legal regulation of non-state conduct. This means that other sources of *jus gentium* can regulate legal capacities of non-state entities as well, even if those entities do not have an independent formal independence, because their factual operations as distinct entities, which can be identified by others and themselves, as happens with non-state armed groups, and their impact on human and other legal goods, makes this possible and necessary.

Another question is whether factually-operating *entities* without formal independence can have *all* or just some international legal capacities. The possibility of examining those entities as *units*, and the need to address the specific challenges their conduct poses, make it necessary to stick to the principle of individual responsibility and establish their legal capacities. Those of their members must also be regulated, to fully protect human dignity, as permitted by the possible coexistence of responsibilities. The fact that they are aggregated entities does not detract from this, because all collective actors, including States, operate through others and can have their own responsibilities.

Therefore, entities without formal personality, e.g. the G8 or some organizations, can have international legal capacities and be the object of legal responses just as their members can, lest there are normative or factual impossibilities.

This leads to the question of whether the effectiveness of the protection of human dignity can be intimately related to or even dependent on the existence of non-state legal capacities of both group units and members or allies. Quite often that link exists.

¹⁰¹⁹ Cf. Separate Opinion of Judge Kooijmans to: International Court of Justice, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, paras. 26-31; Separate Opinion of Judge Simma to: International Court of Justice, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, paras. 7-13; Constantine Antonopoulos, *op. cit.*, where opinions for and against self-defense against non-state actors are shown.

¹⁰²⁰ Cf. International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 22 July 2010, para. 116.

In order to prevent or promote contacts and the management of resources by collective actors, and to counter their unlawful activities or to support their promotion of human dignity, capacities of those actors and their members, including individuals, may and often must be created for the sake of the effectiveness of legal goods in practice, because without pertinent regulation patterns of behavior may be not discouraged or encouraged, depending on the type of non-state impact. Moreover, since acts of collective actors are ultimately committed by individuals and omissions are due to their failures, those individuals can and ought to have responsibilities of their own, as held by the Inter-American Court of Human Rights and the International Military Tribunal.¹⁰²¹

On the other hand, international law must recognize that collective units can also be members of others¹⁰²² and provide them with means to commit abuses. Those and other factors must be evaluated when determining if it is necessary or important to assign duties or other capacities to collective entities and their members.

Sometimes, policy and legal considerations make it advisable to distinguish the capacities of each actor despite its relations with others. This is because the capacities of formal entities, e.g. duties, can be complemented by different legal capacities of informal entities, all of which can be required by the protection of human dignity. Similar considerations apply when different entities potentially involved in violations have formal personality, as happens with individuals and legal persons with which they are linked, such as corporations, being it possible to assign criminal duties to the former, while the latter *can* have them but often do not have that sort of obligations but others.¹⁰²³ This is because the assignation of legal capacities depends on many considerations, not necessarily being the formal personality of an entity or the lack thereof definitive.

Concerning the question of what legal capacities entities without formal personality can have, a look at international practice shows, for instance, that because of their roles and impact, both formal and informally existent non-state entities have international legal capacities, such as

¹⁰²¹ Cf. United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, pp. 7-15; Gáspar Biró and Antoanella-Iulia Motoc, op. cit., paras. 7, 21 (“informal actors [...] do not need a procedure or constitution, but their actions must –for practical reasons– be in conformity with certain rules [...] even informal actors have to take into account to a certain extent international norms and customs, and the practice of other actors” –emphasis added–).

¹⁰²² Cf. article 2.a of the Draft Articles on the Responsibility of international organizations adopted by the ILC in 2011, A/66/10; José Manuel Cortés Martín, op. cit., pp. 111-114; ECOSOC Resolution 1996/31, para. 44.f.

¹⁰²³ Cf. United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, at 9; Menno T. Kamminga, “The Next Frontier: Prosecution of Extraterritorial Corporate Misconduct before Non-US Courts”, op. cit., pp. 174-175; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., paras. 31, 74, 83.

legal burdens; being subject to certain measures or sanctions; being entitled *or tolerated*¹⁰²⁴ to present demands, information and claims –e.g. as follows from article 44 from the American Convention on Human Rights-; being able to participate or act in a given manner (formally or informally interacting with actors and international norms); or having some obligations –as happens with non-state entities under IHL-, among others.

Therefore, while one could think that, at first glance, only formally recognized entities can have rights and duties, given their legal patrimony and their being expressly regarded as having the possibility of being addressees of rights and duties, practice demonstrates that other actors can also have the same or other international legal capacities. This is consistent with the need to regulate all legally relevant behavior that affects legal goods positively or negatively.

Additionally, practice shows that assertions that *rights and obligations* are the only legal capacities that non-state entities can have¹⁰²⁵ are flawed, because subjection to or access to procedures in which their respect can be supervised also exist, and other legal capacities different from and unrelated to rights and obligations that seek to protect human dignity can exist. Additionally, there can be legal burdens that strictly speaking are not obligations, because they are meant to be implemented by third parties, obliged or authorized to do so, and produce effects that may affect an actor in a permissible way, without the respective international norm directly obliging that actor to behave in a certain manner.

Naturally, some legal capacities have both elements of burdens and aspects of obligations, because they may oblige an actor to not deprive the effects of a burden of prospects of effectiveness. Additionally, actions of an actor may be tolerated without it having an entitlement to carry them out; or an actor can be given recommendations, which are not binding and are thus not duties.

About the multiplicity of positive and negative legal capacities, it is convenient to mention that Bruno Simma considers that:

“[An] approach [according to which] everything which is not expressly prohibited carries with it the same colour of legality [...] ignores the possible degrees of non-prohibition, ranging from “tolerated” to “permissible” to “desirable”.”¹⁰²⁶

In sum, absent legal or logical impossibilities, entities with or without legal or formal personality may have different international legal capacities. When they are necessary for human

¹⁰²⁴ Cf. Practice Direction XII of the Practice Directions adopted by the International Court of Justice in relation to Declaration of Judge Simma to: International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, op. cit., paras. 8-10.

¹⁰²⁵ Cf. Gaetano Pentassuglia, op. cit., at 391.

¹⁰²⁶ Cf. Declaration of Judge Simma to: International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, op. cit., para. 8.

dignity to be effectively and fully protected, and do not exist yet, they must be created *de lege ferenda*. Their existence can also be implicit. Coinciding with this idea, Roland Portmann argues that automatic or presumed duties can exist in the humanitarian framework.¹⁰²⁷

Certainly, Antonio Cançado, Anne Peters, or Roland Portmann, among many other authors, explain that international law is not exclusively concerned with “State” interests or inter-State dimensions and relations.¹⁰²⁸ In fact, there are even *jus cogens* norms that protect human dignity, and given their nature they automatically display their effects in regard to all potential factual violators (as the ICTY and Portmann have mentioned)¹⁰²⁹ and prevail over some State-centered regulations. If duties to respect those peremptory norms are not expressly recognized, actors that can act against them are still implicitly bound by obligations to respect them.

Therefore, if non-state conduct affects the protection of human dignity¹⁰³⁰ positively or/and negatively, it must be addressed normatively.

Based on what has been said, personality and subjectivity can be considered to be different notions. This is reflected, for instance, in the First Report on the Law of Treaties by Special Rapporteur Sir Humphrey Waldock of 1962, that included draft articles with the following content:

“‘International agreement’ means an agreement intended to be governed by international law and concluded between two or more States or other subjects of international law possessing international personality and having capacity to enter into treaties under the rules set out in article 3 below [...]

International capacity to become a party to treaties is also possessed by international organizations and agencies which have a separate legal personality under international law if, and to the extent that, such treaty-making capacity is expressly created, or necessarily implied, in the instrument or instruments prescribing the constitution and functions of the organization or agency in question”¹⁰³¹ (emphasis added).

In the same document, the commentary to the draft articles mentions how reference to subjectivity, personality and capacity to celebrate treaties was understood in the sense that some entities different from States could enter into treaties, but that not every subject had that capacity.¹⁰³² It also highlights that not all legal persons have the same legal capacities when it mentions how draft articles 1 and 3 implied that not all international legal persons had treaty-making powers. In this sense, the commentary said that:

¹⁰²⁷ Cf. Roland Portmann, op. cit., pp. 273-274, 276-277.

¹⁰²⁸ Ibid., pp. 257, 268.

¹⁰²⁹ Cf. Roland Portmann, op. cit., pp. 162-167, 273-274, 280-281; ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 155-157.

¹⁰³⁰ Logically, individuals are not the only entities protected by norms and legal goods in *jus gentium*, and thus are not the only, almost exclusive or absolute primary subjects of it, contrary to what some theories may suggest. Cf. Philip C. Jessup, op. cit., at 3.

¹⁰³¹ Cf. International Law Commission, First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook of the International Law Commission*, vol. II, A/CN.4/144 and Add.1, 1962, pp. 31, 36.

¹⁰³² Ibid., at 32, paras. 3 and 4 of the commentary to article 1.

"[W]hereas treaty-making capacity involves international personality in the sense that all entities having treaty-making capacity necessarily have international personality, it does not follow that all international persons have treaty-making capacity"¹⁰³³ (emphasis added).

That being said, it is convenient to take into account that some authors have posited the idea that, rather than employing a normative notion of subjectivity or personality, considerations of a realist, factual, empirical or other non-normative nature must be examined to determine whether a given entity possesses international legal personality or subjectivity. This conception can be found in theories of "participants" or in some "realist" theories of personality.¹⁰³⁴

Theories as those have been criticized, among others, by Roland Portmann and Math Noortmann. Noortmann mentions how participation of an actor says nothing about the existence of norms addressing it; and Portmann, faithful to the idea of subjects as addressees of law, mentions how entities that operate and are actors in sociological terms are not necessarily "recognized" or "regulated" by international law.¹⁰³⁵ It is hard to dismiss this criticism, because certainly if one conceives subjects of international law as addressees of its norms, the order of the syllogism cannot be altered to make factual actors subjects of law even if they are not addressed by legal norms, which would drastically alter the conception of subjectivity and fail to explain what being an addressee of law means. Logically, socially relevant activity may make an actor deserve being regulated, and the interplay of its power with some legal goods and principles may make it possess implied legal capacities. Therefore, If law fails to take into account realities that must be regulated, it logically has to be modified *de lege ferenda* or, if that failure is superficial, implied or express legal capacities may be found with a correct interpretation of law.

Moreover, unlike factual conceptions of personality, the normative conception defended herein is preferable because it distinguishes between "is" and "ought", which is something important in legal studies, as argued by Hans Kelsen.¹⁰³⁶

Possible objections to the previous ideas could include: a) some could mention that legal norms may recognize or assign legal capacities to entities that engage in relevant acts in practice if some factual requirements are met, as happens with the Montevideo Convention of 1933, that in article 1 purports to address the existence of States, or with article 1 of Protocol II to the Geneva Conventions of 1949, that determines that that instrument is applicable, among other

¹⁰³³ Ibid., at 36, para. 2 of the commentary to article 3.

¹⁰³⁴ Cf. Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion", op. cit., pp. 117, 129-131, 133-134, 138, 140-141; Theodor Meron, *The Humanization of International Law*, op. cit., at 317; Roland Portmann, op. cit., pp. 3, 208, 248-254; Janne Elisabeth Nijman, *The Concept of International Legal Personality*, op. cit., pp. 453-455; Janne E. Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", op. cit., pp. 29-40.

¹⁰³⁵ Cf. Bob Reinalda, "Non-State Actors in International Relations: Do They Matter?", op. cit., at 65; Roland Portmann, op. cit., pp. 248-254.

¹⁰³⁶ Cf. Hans Kelsen, op. cit., 76-81.

conditions, when a non-state entity has “responsible command, exercise[s] such control over a part of [...] territory as to enable [it] to carry out sustained and concerted military operations and to implement” that treaty. Those norms certainly consider factual elements, but they do so to determine which entities meet certain criteria and thus *become* addressees of international law. Therefore, they actually confirm the conception of subjectivity and capacities presented here.

In addition to this, Roland Portmann challenges that possible objection by questioning if the provision of the Montevideo Convention is still valid in light of possible legal changes, which subject factual elements to compliance with essential international norms.¹⁰³⁷

A possible second objection could point out how b) the meta-legal necessity and demand to protect human beings and adjust law to realities and needs that law is meant to address require making all entities that have the factual capacity to violate human dignity subjects of law, and also making them subject to obligations to respect and, sometimes, to protect human dignity.

About this, taking into account that in principle there are multiple international legal capacities that non-state actors can have in the human rights field, and that international law can deal with non-state conduct with varying degrees of intensity and involvement, it is possible that lawmakers or practitioners decide that non-state conduct is subject to only indirect control, carried out through the obligations of States and. While this may happen, implicit human rights duties of non-state actors may exist already, as seen in Chapter 6.

Additionally, sometimes regulations of non-state legal capacities to protect individuals are deficient and must be modified *de lege ferenda*. This criticism, in any case, supports a normative conception instead of challenging it, because it recognizes the possible flaws of a normative system for not regulating relevant non-state conduct or for doing it improperly.

It cannot be said that the implicit human rights duties of non-state actors handle only a factual and not a normative conception of subjectivity. Far from doing so, these duties are nothing but legal capacities of non-state actors created by law. In other words, implicit obligations constitute one category of legal capacities, and their belonging to international law and binding their addressees confirm the theory defended herein.

Altogether, a normative conception of subjectivity based on the analysis of legal capacities prevents the stagnation and inflexibility of strict conceptions of quasi-exhaustive lists of legal persons, ironically created in doctrine but pretending to be descriptions of law. Moreover, lack of certain powers that according to some theories must be held by an actor to have international legal personality does not prevent an entity from having *other* legal capacities, including those that must exist for human dignity to be protected. Apart from not explaining law as

¹⁰³⁷ Cf. Roland Portmann, *op. cit.*, pp. 250-253.

well as other theories do, narrow conceptions of personality are dangerous because they may lead some to refrain from tackling non-state abuses in international legal practice.

The ideas I defend do not dismiss as irrelevant factual or realist conceptions of “actors or participants” or other entities that can affect legal goods and are important in practice. What I hold is that a normative conception better explains what entities are addressees of law. Still, regulations may be limited and it can be necessary or convenient to legally address non-state entities –granting them rights, entitlements, permission, tolerance, regulating their duties or the burdens to bear adverse legal effects or actions, *inter alia*-. Thus, the conduct and roles of entities that are factually relevant and can impact on the protection of human dignity in a positive or negative sense can be examined from a factual point of view, which can inform advisable norms and serve to criticize positive law, which is a very important task.

In light of the foregoing considerations, I conclude that there is no prior impediment to the possibility of non-state entities having legal capacities under *jus gentium* –accepted or imposed-. They may exist if they are created by the sources of international law, and there must be no logical or legal impediment to their possession by an actor. Therefore, it must be examined if the creation of legal capacities meant to address an actor respect substantive legal criteria, what sources of international law can create them, and how non-state entities may interact with them. These issues will be explored in the remainder of this Chapter.

What is more, according to an eclectic, non-formalist and non-fictitious theory of capacities and addressees of law,¹⁰³⁸ the legal capacities that an actor has may change, but there is one that should never change in meta-legal terms and according to the value of the protection of human dignity: the implicit duty to respect human dignity, which is overarching and binds all entities, States or not, and is thus a common legal capacity.

Similarly, Roland Portmann mentions that one common automatic presumed capacity is the prohibition of committing international crimes that affect human beings, which binds many entities.¹⁰³⁹ Still, the aforementioned implicit duty the existence of which I defend has a universal *ratione personae* scope, and thus binds entities than the one suggested by Portmann, given the common legal relevance of all non-state violations and the common potential capacity to violate human dignity that all entities have. It is a trait that must be regulated, as Janne Nijman

¹⁰³⁸ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 70-75, 82-83; Elena Pariotti, op. cit., at 102; Anna Meijknecht, op. cit., pp. 34, 61-62; Roland Portmann, op. cit., pp. 271-283.

¹⁰³⁹ Cf. Roland Portmann, op. cit., pp. 273-274, 276-277, 280.

suggests,¹⁰⁴⁰ and is implicitly so in my opinion, due to the implications of the global legal good of the protection of human dignity, as explained in Chapter 6.

Before concluding this subsection, it is convenient to quote the following opinion of Antonio Cançado:

"It results quite clear today that there is nothing intrinsic to International Law that impedes or renders it impossible to non-State actors to enjoy international legal personality. No one in sane conscience would today dare to deny that the individuals effectively possess rights and obligations which emanate directly from International Law, with which they find themselves, therefore, in direct contact. And it is perfectly possible to conceptualize - even with greater precision - as subject of International Law any person or entity, titulaire of rights and obligations, which emanate directly from norms of International Law. It is the case of the individuals, who thus have strengthened this direct contact - without intermediaries - with the international legal order"¹⁰⁴¹ (emphasis added).

In the preceding text I would simply replace the term personality with that of subjectivity, and would also say that it is not necessary for an entity to possess both rights and obligations to be a subject of international law, being it sufficient that it has any international legal capacity.

Additionally, there are also indirect addressees of international law. They are those entities that are indirectly affected by international norms. This must be stressed because sometimes non-state entities engage in legally relevant conduct, and international law does address their conduct, although not directly but by means of regulating the duties and entitlements of other actors, such as States or other authorities, that for instance must protect individuals from them.¹⁰⁴² It cannot be denied that international law does affect those entities in different indirect ways, as for example ordering competent authorities to freeze their assets.

5.2. Substantive conditions of the creation of duties and legal burdens of non-state actors with the purpose of protecting human dignity

At the outset, it must be mentioned that substantive guarantees require that obligations and legal burdens of non-state actors created in international law: a) are foreseeable and accessible (condition of legality), and b) are not contrary to human dignity or fundamental rights (respect of the non-conditionality of essential rights).

a) According to the condition of legality, legal capacities that impose burdens must be created by law, which means that actors cannot be held responsible for breaches of obligations or

¹⁰⁴⁰ Cf. Janne E. Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", op. cit., pp. 15-18, 40.

¹⁰⁴¹ Cf. Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., para. 28.

¹⁰⁴² Cf. John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 18-27; Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006, para. 4; article 4 of the Convention on the Rights of Persons with Disabilities in conjunction with articles 43 and 44.

be forced to endure adverse effects of other legal capacities if a legal norm that determines so has not been adopted previously.

This principle is interesting for many reasons. Firstly, ignoring this guarantee can lead to situations in which some authorities and actors blur the difference between *lex lata* and ideological or other beliefs, denying legal guarantees of actors. Secondly, for actors to have responsibility and a legal duty to repair, they must have breached obligations¹⁰⁴³ that bind them and comply with the conditions of legality, examined in detail below.

Additionally, a careful analysis of the condition of legality can dispel some misconceptions about international obligations.

There can be confusion about whether international law can impose duties on non-state actors *directly*, or if instead the creation of their obligations can be ordered by international norms but they must always be adopted under domestic law, which is closer to its “subjects”. On the other hand, it is necessary to examine if international law follows the *nullum crimen [delicto, more broadly]*, *nulla poena sine lege* criterion, and if it admits the more relaxed version of *nullum crimen [delicto]*, *nulla poena sine jure*, as some argue.¹⁰⁴⁴

As to the first question, different norms that protect human dignity in different branches and fields of international law deal with non-state duties and legal capacities, proving that nothing prevents international norms from *directly* regulating them, unless they violate *jus cogens*.

This implies that, in principle, there are no structural, inherent or general impediments that prevent other international norms that also seek to protect human dignity from following strategies that are similar to those used by other norms that have the same purpose, being all of them created through the same sources of international law. Still, there may be express or implied specific logical or normative prohibitions or impediments to the creation of some non-state legal capacities.

¹⁰⁴³ Cf. August Reinisch, op. cit., at 69; articles 31 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts (A/56/49(Vol. I)/Corr.4) and 31 of the ILC Draft Articles on the Responsibility of international organizations as adopted in 2011 (A/66/10); Bin Cheng, op. cit., pp. 166, 169-170.

¹⁰⁴⁴ Cf. Audiencia Nacional de España, Sala Penal, Sección Tercera, *Sentencia Núm. 16/2005*, 19 April 2005, apartado III.4, “El problema de la tipicidad, ‘lex certa’, e irretroactividad de la norma penal aplicable”, where the judicial body mentions that “la formulación clásica del principio de legalidad penal (criminal y penal) *nullum crimen nulla poena sine lege* [...] se articula como de *nullum crime sine iure*, lo que permite una interpretación mucho más amplia de las exigencias derivadas de este principio”. On the principle “of the legality of criminal offences and penalties”, cf. Grand Chamber of the European Court of Justice, *Case of Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, 3 May 2007, paras. 49-50; articles 7 of the European Convention on Human Rights (that expressly accepts punishments and responsibility based on both domestic and international law, even concerning general principles of law “recognized by civilised nations”), 15 of the International Covenant on Civil and Political Rights (that also envisages in an express manner responsibility based on both legal orders and likewise mentions general principles of law, although using the expression “recognized by the community of nations” instead), 7.2 of the African Charter on Human and Peoples’ Rights, and 9 of the American Convention on Human Rights (whose wording, by alluding to the “applicable law”, implicitly accepts this, in my opinion).

For instance, different norms admit the possibility that non-state entities can consent or be compelled to be bound by international law directly, without requiring that domestic norms are the ones that create their legal capacities.

The fact that sometimes an entity may have to consent to an international obligation for it to produce effects does not detract from the capacity of sources of international law to directly bind an actor with no intermediaries. Indeed, in analogous terms, it is accepted that treaties can regulate obligations of States and international organizations that are not parties to them, as long as they consent to be bound by them in written form, as reflected in articles 34 and 35 of the Vienna Conventions on the Law of Treaties of 1969 and of 1986, that contemplate an exception to the maxims of *res inter alios acta* and *pacta tertiis nec nocent nec prosunt*.¹⁰⁴⁵ On the other hand, consent of an actor bound by treaty obligations adopted by others is not always necessary, as the Rome Statute of the International Criminal Court reveals.

Conversely, an example of international norms that can bind non-state actors when they consent to them is found in article 96.3 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). It deals with the way in which some non-state entities may, through a certain representative, issue a unilateral declaration that makes them be bound by that Protocol. No domestic action is required to transform or incorporate the decision of the actor for the effects of the Protocol to be displayed towards it and bind it.

Examples of norms that impose obligations on non-state actors directly and without requiring their consent include the prohibition of committing international crimes –implicitly contained in their formulation–; and duties of armed groups and belligerents participating in non-international armed conflicts, regulated under international humanitarian law, as seen in articles 3 common to the Geneva Conventions of 1949 on International Humanitarian Law, 96.3 of Protocol 1 to the aforementioned Geneva Conventions, or implicitly throughout Protocol II thereto, among others.

Having said this, it must be said that the principle and guarantee of legality has two components: foreseeability and accessibility, both of which must be respected when creating obligations of non-state actors. Those elements were mentioned, among others, in the *Case of*

¹⁰⁴⁵ On these maxims, see Erik Franckx, “*Pacta tertiis* and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation & Management of Straddling Fish Stocks & Highly Migratory Fish Stocks”, *FAO Legal Papers Online*, No. 8, 2000, at 5, available on: <http://www.fao.org/legal/prs-ol/lpo8.pdf>; articles 34 through 38 of the Vienna Convention on the Law of Treaties of 1969 and the same articles in the Vienna Convention on the Law of Treaties between States and international organizations or between international organizations of 1986; Antonio Remiro Brotóns et al., *Derecho Internacional: Curso General*, op. cit., pp. 175, 187, 211-212.

Kononov v. Latvia, wherein the European Court of Human Rights considered that the guarantee of legality, being “an essential element of the rule of law”, has “qualitative requirements, notably those of accessibility and foreseeability.”¹⁰⁴⁶

The principle of legality serves to dispel some doubts regarding non-state obligations. Firstly, it helps to answer the question of whether international law can impose obligations on non-state actors directly, even if domestic law is silent on the matter or contradicts it.

Interestingly, in the *Kononov* case, the Court considered that international law can directly regulate obligations of non-state actors –in that case, individuals-.¹⁰⁴⁷ This possibility has also been accepted by the International Military Tribunal for the Trial of German Major War Criminals,¹⁰⁴⁸ by authors as Hersch Lauterpacht, Clapham or Meron,¹⁰⁴⁹ and in instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights (in articles 7 and 15, respectively). The pertinent provisions of those treaties have an almost identical content, expressing clearly that international law can impose prohibitions on non-state actors directly and, by extension, other legal capacities. They say:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed [...] This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations” (emphasis added) –European version-

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed [...] Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations” (emphasis added) –version of the International Covenant on Civil and Political Rights.

The American Convention on Human Rights, in a briefer version, talks in article 9 of the necessity of punishing offenses previously envisaged by an “applicable law”. This expression can perfectly include international law, which may lawfully place obligations on non-state actors, and has done so even in the severe criminal sphere, to which the article refers expressly.

¹⁰⁴⁶ Cf. European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, 17 May 2010, para. 185.

¹⁰⁴⁷ *Ibid.*, paras. 185-187, 205-213, 236-239.

¹⁰⁴⁸ Cf. Judgment of the International Military Tribunal for the Trial of German Major War Criminals; Principle I of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; Judgment of the International Military Tribunal for the Trial of German Major War Criminals and the commentary thereto, according to which generally “international law may impose duties on individuals [as individuals or as members of organizations] directly without any interposition of internal law.” Cf. Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, *Yearbook of the International Law Commission*, vol. II, 1950, paras. 98-99.

¹⁰⁴⁹ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 70-73, 82-83; Theodor Meron, *The Humanization of International Law*, op. cit., pp. 40-41; Hersch Lauterpacht, op. cit., pp. 27-29, 35-47.

Another important question is whether the conditions of foreseeability and accessibility of obligations, encompassed in the guarantee of legality, are respected by *implicit or inherent* duties.

In that regard, it is useful to bear in mind that non-state actors can be responsible for violating international human rights and guarantees, among other reasons because those *guarantees may be strengthened by implicit duties* to not violate them that consider their violations as unlawful, due to their being legally relevant and forbidden. This can be inferred from one passage of the judgment of the European Court of Human Rights, that considered that:

"[I]ndividual criminal responsibility [...] [can be] defined with sufficient accessibility and foreseeability by, inter alia, a requirement to comply with international fundamental human rights instruments, which instruments [do] not, of themselves, give rise to individual criminal responsibility and one of which [was] not been ratified by the relevant State at the material time [of a violation] (K.-H.W. v. Germany, §§ 92-105, cited above). The Court considered that even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only domestic law, but internationally recognised human rights, in particular the right to life, a supreme value in the international hierarchy of human rights [...] [a person can be condemned for violating] international laws and customs [...] [that are] sufficient, of themselves, to found individual criminal responsibility"¹⁰⁵⁰ (emphasis added).

As required by the elements of foreseeability and accessibility, international prohibitions or commands that seek to bind non-state actors must be sufficiently accessible and foreseeable to their addressees. Otherwise, they cannot be sanctioned and bear responsibility under international law.

Concerning this, the fact that domestic prohibitions consistent with international ones respect the principle of legality must not lead to the belief that if domestic legislation says nothing and an actor has international legal burdens the principle of legality is violated against it. This is because international law is in itself a *sufficient and autonomous normative basis of obligations* of non-state entities designed to protect human dignity.

In this sense, international decisions and various international norms recognize that it is possible to sanction violations of international law committed by non-state entities even if there are no domestic norms that incorporate and internalize their prohibition.¹⁰⁵¹ In this sense, in the *Kononov* case the European Court of Human Rights found that international law alone can be a sufficient legal basis to sanction individuals (or other actors, I might add) when it respects the

¹⁰⁵⁰ Cf. European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, 17 May 2010, paras. 236 and 237.

¹⁰⁵¹ Cf. European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, op. cit., paras. 213, 236; Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principles I through IV; ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 155-157 (concerning *jus cogens*).

guarantee of legality and its elements, independently of what the domestic legal position is. Human rights provisions certainly accept that individuals can be directly bound by *jus gentium*.¹⁰⁵²

This rationale is confirmed in articles 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and 15 of the International Covenant on Civil and Political Rights, according to which the principle of legality is respected when persons are tried and punished “for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by” the international society.

That being said, it cannot be denied that domestic prohibitions are important, first of all because non-state violations of human rights are not always directly prohibited in an express and comprehensive way under international law, and secondly because domestic law can increase the likelihood of effectiveness of the protection of human dignity.

Moreover, when international and domestic norms condemn and address violations of internationally recognized human rights, which can be done in different ways (in tort or criminal regulations, etc.), those rights are simultaneously protected in different legal systems and their guarantees are thus strengthened. According to what has been said, all those norms must still comply with the guarantees of legality and respect of fundamental rights and *jus cogens*.

Actors that participate in serious violations of human rights *ought to know* that their acts and omissions are contrary to legal principles and human rights protected internationally (and, hopefully, also domestically). Therefore, the prohibition to engage in those violations is accessible and foreseeable, so much so that not even obedience of instructions or internal law can be raised as defenses.¹⁰⁵³

It is also important to ascertain if the guarantee of legality is restricted to criminal matters, as the wording of some treaties suggests, or if it also covers non-criminal obligations.

In my opinion, the underlying rationale of the protection of the principle of legality is the necessity that burdens, duties and sanctions be based on preexistent, foreseeable and accessible norms. This guarantee is therefore not only relevant for criminal law, as required by the full protection of human dignity in regard to individuals that have those legal burdens, and by

¹⁰⁵² Cf. articles 7 of the European Convention on Human Rights, 15 of the International Covenant on Civil and Political Rights, and 9 of the American Convention on Human Rights; European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, op. cit., paras. 185, 213, 236-239.

¹⁰⁵³ Cf. Principles II and IV of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; articles 33 of the Rome Statute of the International Criminal Court, 7.4 of the Statute of the International Criminal Tribunal for the former Yugoslavia, or 6.4 of the Statute of the International Criminal Tribunal for Rwanda; ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, para. 155; Margalida Capellà i Roig, “Los crímenes contra la humanidad en el caso Scilingo”, *REEI—Revista Electrónica de Estudios Internacionales*, No. 10, 2005, pp. 9-11; European Court of Human Rights, *Case of K.-H. W. v. Germany*, Judgment, 22 March 2001, paras. 68-76; European Court of Human Rights, *Case of Streletz, Kessler and Krenz v. Germany*, Judgment, 22 March 2001, para. 100.

a necessary evolutionary interpretation of the principle of legality in general terms. Analogously, it has been considered that due process guarantees are applicable outside judicial procedures. Indeed, according to judicial and doctrinal opinions, punitive norms cannot be applied in a retroactive way even if they are not criminal; soft law condemns violations of the principle of legality when deprivation of liberty is at stake, even when non-criminal norms would be applied; and criminal punishments that violate the principle of legality are prohibited.¹⁰⁵⁴

In this sense, international human rights decisions have considered that due process guarantees and the principle of legality are applicable not only in judicial but also in other proceedings, such as administrative ones. This was mentioned in the *Case of Baena-Ricardo v. Panama*, decided by the Inter-American Court of Human Rights, which said that “punitive administrative [or] judicial” procedures must respect guarantees of due process and the principles of legality and non-retroactivity.¹⁰⁵⁵ Similarly, the European Court of Human Rights has considered that guarantees are applicable in “disciplinary proceedings”.¹⁰⁵⁶

The Inter-American Court of Human Rights based its decision, among other considerations, on the idea that it is necessary to not permit the use of punitive powers in a way that is inimical to the exercise of human rights and to limit State discretion in all fields, even administrative ones, because the conduction of all proceedings ought to respect guarantees of human and fundamental rights.¹⁰⁵⁷ That logic is applicable to the powers of all functional and factual authorities and powers, which must respect human dignity even when exercising illicit or non-legally endorsed powers (which may be prohibited under domestic legal systems).¹⁰⁵⁸

Likewise, this logic can be handled when interpreting the principle of legality, because obligations, and sanctions of their breaches, must respect the guarantees of foreseeability and accessibility to be legitimate, even when they do not have a criminal character. Thus, references to criminal law in norms on the principle of legality must not make one think that it is only applicable to criminal issues.

¹⁰⁵⁴ Cf. Daniel O'Donnell, op. cit., pp. 448-451; Inter-American Court of Human Rights, *Case of Baena-Ricardo et al. v. Panama*, Judgment, 2 February 2001, paras. 106-107. Likewise, contrast article XXV of the American Declaration of the Rights and Duties of Man with articles 7 of the European Convention on Human Rights, 15 of the International Covenant on Civil and Political Rights, 7.2 of the African Charter on Human and Peoples' Rights, and 9 of the American Convention on Human Rights.

¹⁰⁵⁵ Cf. Inter-American Court of Human Rights, *Case of Baena-Ricardo et al. v. Panama*, Judgment, 2 February 2001, paras. 107, 124-131.

¹⁰⁵⁶ Ibid., para. 128.

¹⁰⁵⁷ Ibid., paras. 106-107, 126-129.

¹⁰⁵⁸ This is my proposed solution to the question on the dilemma/tension presented in: Robert Dufresne, op. cit., at 227.

Having said this, it can be asked how human rights guarantees as those of legality and due process can benefit non-state entities that are not individuals. This has to do with fundamental rights, as will be explained now.

First, not all legal capacities are applicable *prior* to the commission of a legally relevant (attempted or accomplished) conduct, because sometimes legal capacities seek to tackle or address legally relevant facts after their emergence in order to stop their effects or prevent the continuation of human suffering. Yet, many of them are relevant *before* violations are committed. This happens with the concrete duty to abide by precautionary measures, for instance, even when the actor bound by them did not create a risk of violation. Other examples include measures of arms embargoes or assets freezing that affect armed and other non-state actors, which are usually adopted after verifying imminent dangers of attacks against civilian populations in which they could participate. Still, subjection to the duty to comply with precautionary measures, and all other duties, must respect the principle of legality.

This is because the principle of legality is still applicable and relevant in those cases: not in the form of the prohibition of the retroactive application of law, because this dimension is applicable in punitive spheres that sanction breaches of obligations;¹⁰⁵⁹ but rather requiring that the respective negative legal capacities are adopted in accordance with the sources of law, are necessary and proportionate if they restrict fundamental or human rights, and the affected entities and stakeholders have timely access to information about them, among other conditions.

As can be seen, the principle of legality is intimately related to the protection of fundamental rights, rule of law considerations, elements of public guarantees,¹⁰⁶⁰ and fundamental rights. Law requires that restrictions of human rights are necessary and proportionate: given their relevance, these conditions must be analogously satisfied when fundamental rights are at stake, even if this is not *expressly* indicated.

For formal and pedagogic purposes, one can think of legality *strictly speaking* as encompassing the necessity of enacting negative legal capacities in accordance with the sources of law and their being publicized. In a broad sense, however, since law requires compliance with them, the requirements of proportionality and necessity are part of the principle of legality. At the same time, the principle of legality is a fundamental right.

¹⁰⁵⁹ Cf. Inter-American Court of Human Rights, *Case of Baena-Ricardo et al. v. Panama*, Judgment, 2 February 2001, paras. 106-107.

¹⁰⁶⁰ Cf. Janne E. Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", *op. cit.*, pp. 7-19; Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law", *European Journal of International Law*, *op. cit.*, at 33.

Concerning its intensity, it has been considered that the principle of legality under international criminal law may not be *as stringent* as the one found in domestic criminal law. Given the fact that international criminal norms can be enacted and implemented to protect human dignity, this merits a careful analysis.

A distinction is often drawn when considering that while domestic criminal law emphasizes the criterion *nullum crimen/nulla poena sine lege*, international law enshrines a more lenient principle: *nullum crimen/nulla poena sine iure*. However, some authors consider that the principle is stricter nowadays than when the International Military Tribunal applied it in the Trial of German Major War Criminals.¹⁰⁶¹

The idea that the principle of legality under international law may not be as strict as under domestic legal systems was taken into account by the Spanish *Audiencia Nacional*, which said:

“The classical configuration of the principle of criminal legality [...] *nullum crimen nulla poena sine lege* is articulated in international law as *nullum crime sine iure*, which permits a much broader interpretation of the conditions required by this principle, insofar as it is enough to consider legality in international law even if a crime is not typified under domestic law. Unlike what happens with domestic law, respect of the principle of typification of crimes against peace and security of humankind is not determined in international law by its incorporation in written texts. In this regard, the *lex* is expressed by customary methods (and general principles of law) that make it ambiguous and uncertain until its codification takes place”¹⁰⁶² (my translation).

According to the *Audiencia Nacional*, and as has been considered by Margalida Capellà i Roig, this consideration is based on the Judgment of the International Military Tribunal for the Trial of German Major War Criminals, that attached importance to justice and the sanction of violations of *jus gentium*.¹⁰⁶³ In that Judgment, the International Military Tribunal considered that since the principle of legality is a principle of justice, punishing those that violate publicly-known international norms is not unjust because the offenders ought to be aware that they were

¹⁰⁶¹ Cf. Marko Milanovic, “Gallant on Legality and the Rome Statute”, *EJIL: Talk!*, 5 October 2011, where it is mentioned that “Schabas argues that the application of new, non-customary crimes in the ICC Statute to such persons is acceptable by pointing out that aggressive war was effectively a new crime at Nuremberg. The problem with this argument is that international human rights law has changed since that time. The claim by the Nuremberg Tribunal that *nullum crimen sine lege* was, in international law, merely a principle of justice was true then but is not so now. Now it is a rule of customary international law and perhaps a *jus cogens* rule at that.”, available at: <http://www.ejiltalk.org/gallant-on-legality-and-the-rome-statute/> (last checked: 14/02/2012).

¹⁰⁶² The original text says: “[L]a formulación clásica del principio de legalidad penal (criminal y penal) *nullum crimen nulla poena sine lege*, en el Derecho internacional se articula como de *nullum crime sine iure*, lo que permite una interpretación mucho más amplia de las exigencias derivadas de este principio, en cuanto que sería suficiente la consideración como tal en Derecho internacional, aunque no estuviera tipificado en derecho interno. A diferencia de lo que ocurre en los ordenamientos internos, la tipicidad de los crímenes contra la paz y seguridad de la humanidad no está determinada en el orden internacional por su incorporación en textos escritos. En este ámbito la *lex* se expresa mediante métodos consuetudinarios (y principios generales del Derecho) que la hacen ambigua e insegura hasta que se produce su codificación”. Cf. Audiencia Nacional de España, Sala Penal, Sección Tercera, *Sentencia Núm. 16/2005*, 19 April 2005 (the “Scilingo Case”), available at: <http://www.derechos.org/nizkor/espana/juicial/doc/sentencia.html> (last checked: 14/02/2012).

¹⁰⁶³ Cf. Margalida Capellà i Roig, op. cit., pp. 9-11.

perpetrating a wrongful act. For that reason, it can be considered that the guarantees of foreseeability and accessibility would not be violated. In the words of the Military Tribunal:

"[I]t is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts" (emphasis added).¹⁰⁶⁴

The implications of the different demands of the guarantee of legality under international law are manifold: firstly, it confirms that individuals (and analogously other non-state entities, as domestic¹⁰⁶⁵ and transnational or international actors) can be responsible for violating fundamental and peremptory international norms, and that accordingly negative capacities, such as subjection to punishments, can be designed to respond to threats and protect affected legal goods.

Secondly, the principle supports the idea that non-state entities can have negative legal capacities created by the different sources of international law, and that it is thus not necessary for a legal burden, prohibition or sanction to be regulated in a written or formal international instrument. For example, the Spanish *Audiencia Nacional* mentions international customary law and general principles of law alongside treaties. Other sources of law are also relevant because, as the International Military Tribunal expressly mentioned, violations of "international law" can be sanctioned.

Logically, apart from sanctions, a preventive dimension also exists, and negative capacities and mechanisms that seek to prevent violations can address non-state entities. Likewise, when an entity does not have an express or specific duty to refrain from affecting human rights and guarantees, the international community may create and use mechanisms to deal with or prevent its factual abuses, given their legal relevance. In all these cases, the principle of legality and fundamental rights, freedoms and guarantees must be respected.

b) The principle of legality is comprised in the respect of fundamental rights and freedoms, since there is a fundamental right according to which the imposition of obligations must comply with the requirement of legality. Consequently, legal capacities must respect the principle of legality and other fundamental rights, being all of them in the same normative framework and

¹⁰⁶⁴ Cf. Judgment of the International Military Tribunal for the Trial of German Major War Criminals, section "The Law of the Charter", available at: <http://avalon.law.yale.edu/imt/judlawch.asp> (last checked: 15/02/2012).

¹⁰⁶⁵ Cf. Roland Portmann, op. cit., pp. 273-274, 280-281.

based on common principles. Conditioning the effectiveness of fundamental rights by permitting legal capacities to disrespect them would be contrary to their fundamental character.

Taking into account that not all non-state entities are individuals, is it proper to hold that non-state actors different from human beings have *fundamental* rights? Some terminological and conceptual overlaps and confusion may muddle the question.

First, non-state entities can enjoy rights that have a fundamental nature given their relevance and intimate relation with the rule of law, among other criteria. Even if those rights have a content that is similar or equal to that of human rights, they are not ontologically human rights because their beneficiaries do not have that identity and those rights would not protect human dignity (see Part I). In this sense, the Human Rights Committee has considered that:

“The beneficiaries of the rights recognized by the [International] Covenant [on Civil and Political Rights] are individuals [...] with the exception of article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities, [but] many of the rights recognized by the Covenant [...] may be enjoyed in community with others.”¹⁰⁶⁶

Therefore, while some jurisdictions and norms consider that some rights, e.g. civil or fundamental rights, can be enjoyed by individuals and other actors, such as legal persons, in theoretical, ontological and general legal terms *human* rights are those enjoyed by individuals that protect their dignity, who deserve special and central protection.¹⁰⁶⁷ Other entities can sometimes enjoy other types of rights that have a similar or equal content. This assertion may be considered as contradicted in *formal* terms by norms that protect rights of non-individual entities under human rights treaties. For instance, article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes that:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right” (emphasis added).

That provision, reinforced by article 1 of the first Protocol to the Convention, which regulates the right to the protection of property and considers individuals and legal persons as holders of that right, differs from norms found in other human rights instruments, such as articles 1 of the Optional Protocol to the International Covenant on Civil and Political Rights and 44 of the American Convention on Human Rights: the former only recognizes the right to petition of individuals, and the latter grants a wide *jus standi* of non-state entities in quasi-judicial processes, but it can only be used to denounce violations of *human* rights recognized in the treaty.

¹⁰⁶⁶ Cf. Human Rights Committee, General Comment No. 31, op. cit., para. 9.

¹⁰⁶⁷ Cf. José E. Alvarez, “Are Corporations “Subjects” of International Law?”, op. cit., pp. 9-11, 17-19; John Finniss, “The Priority of Persons”, op. cit., pp. 6-9.

The nominal choice made in the European Convention can be considered to either confuse terms and inaccurately regard some rights of non-individuals as human rights *for the purposes of that treaty* or, alternatively, it can be argued that the very name of the European Convention, that mentions the protection of Human Rights *and* Fundamental Freedoms, can be understood as indicating that non-individuals may enjoy the latter, the content of which may coincide with that of human rights, which can *only* be enjoyed by human beings. Similarly, the African Charter on Human and Peoples' Rights implicitly considers that different entities may have different categories of rights, as revealed by the mention of rights *of* human beings and rights *of peoples*.¹⁰⁶⁸

Based on the previous considerations, it is possible to consider that non-state entities, except individuals, do not have *human* rights but may have rights with a fundamental relevance.

Chimene Keitner has made a theoretical distinction between constitutional rights found in domestic legal systems and internationally recognized human rights,¹⁰⁶⁹ but this distinction is not relevant for the purposes of the analysis I am conducting. I consider that international law can have fundamental or other rights that differ from human rights not concerning their content but their beneficiaries: as said before, human rights are all those rights directly recognized in favor of human beings that protect their dignity in a direct manner.¹⁰⁷⁰ Their enjoyment and exercise is an entitlement and not a condition of their being human rights.

This is so because human rights are supposed to be *recognized* due to their being based on human dignity,¹⁰⁷¹ the legal protection of which must evolve in response to new or different challenges. That consideration implies that it is possible to critically examine if rights labeled as human rights can be considered as such¹⁰⁷² and others must be recognized.

¹⁰⁶⁸ Articles 19 through 24 of the African Charter on Human and Peoples' Rights, while articles 2 through 18 refer to rights of individuals (i.e. human rights, given their being based on human dignity -mentioned in article 5-, as explained in Part I, *supra*).

¹⁰⁶⁹ Cf. Chimène I. Keitner, "Rights Beyond Borders", *The Yale Journal of International Law*, vol. 36, 2011, pp. 58-59, 108, 112-114; Chimene Keitner, "A Response to Milanovic and Verdier on Rights Beyond Borders", *EJIL: Talk!*, 8 March 2011, available at: <http://opiniojuris.org/2011/03/08/a-response-to-milanovic-and-verdier-on-rights-beyond-borders/> (last checked: 15/02/2012).

¹⁰⁷⁰ Cf. Part I, *supra*.

¹⁰⁷¹ Concerning this, most human rights instruments mention in their Preambles that the rights enshrined therein are "recognized", term that is also found in article 1 of the American Convention on Human Rights and article 1 of the African Charter on Human and Peoples' Rights.

¹⁰⁷² The need to examine whether a right formally labelled as human is truly one and the need of drafting human rights provisions in accordance with the tenets of the protection of human dignity are mentioned in: General Assembly Resolution 41/120, A/RES/41/120, 4 December 1986, para. 4 (human rights instruments "should, *inter alia*", "Be of fundamental character and derive from the inherent dignity and worth of the human person"); Conference on Security and Co-operation in Europe, Final Act, Helsinki, 1975 ("all" human rights "derive from the inherent dignity of the human person and are essential for his free and full development"); James Griffin, "Human Rights and the Autonomy of International Law", *op. cit.*; Joseph Raz, "Human Rights without Foundations", *op. cit.* (note that I disagree with some of the authors' criteria for identifying human

Being human rights based on human identity, someone does not cease to have human rights despite engaging in violations, given the non-conditional character of his dignity, which means that sanctions and protection from him must respect those rights. Likewise, if other offenders have fundamental rights, they have to be taken into account when designing responses to their abuses, which naturally must be tackled. Yet, their elements are not as strong as those of human rights, which prevail over them.

Moreover, restrictions of and suspension of obligations in relation to both human and fundamental rights are sometimes permitted, as long as conditions as necessity, proportionality and admissibility, among others, are met, as seen in Chapter 1. In those cases, rights would *not* be violated.

Concerning the condition that legal capacities of non-state actors respect fundamental and human rights, it is convenient to mention that John H. Knox proposes that non-state human rights should preferably be *correlative* instead of *converse* duties. His theory suggests that the latter could be used by States to subject rights to interests of collectivities in an abusive manner.

According to Knox, *correlative* duties of non-state actors have the direct purpose of protecting human rights of others, for instance prohibiting violations of those rights, reason why they are correlative to them. On the other hand, *converse* duties seek to protect collective interests, rather than concrete rights of individuals. In the author's own words, converse duties are:

"[O]wed by [an entity] to the society or state [...] Although these duties may appear to be horizontal, in the sense that they are owed to others in the duty holder's society, in practice they are vertical, enforced by the government acting on behalf of the society. They run conversely to the vertical duties of the government to promote and protect the individual's human rights."¹⁰⁷³

While Knox warns of the risks that can arise from a misuse of converse duties, and rightly puts forward the idea that correlative obligations are better suited to deal with the protection of human dignity, converse duties exist in international law.¹⁰⁷⁴ To prevent abuses of the latter, which sometimes permit restricting rights, *pro homine* interpretation is to be made. It demands that converse duties are interpreted in a way that makes the goals that permit restrictions, suspensions and duties be consistent with (not necessarily identical to) human rights and the elements of its foundation, since those measures are part of the same system of those rights.

For instance, public order or peace, which are envisaged in some instruments as objectives that permit to adopt restrictive measures, can be interpreted as goals that serve to

rights, but agree on the necessity of examining whether what is called a human right is truly one, my proposal being that found in Part I of this book).

¹⁰⁷³ Cf. John H. Knox, "Horizontal Human Rights Law", op. cit., pp. at 1-2.

¹⁰⁷⁴ Ibid., pp. 5, 15, 32, and 34.

protect individuals, to the extent that war or public disorder can affect them and make them suffer.¹⁰⁷⁵ Being found in human rights instruments, those objectives must be understood as protecting human dignity. Moreover, principles and requirements of proportionality, necessity and legitimacy, among others, must guide the use of converse measures.

Altogether, the idea that not only rights but also obligations regulated or permitted in human rights frameworks are based on the protection of human dignity requires that those obligations are interpreted in its light, which implies that those obligations must respect *and serve* rights based on human dignity and, by analogy, other fundamental rights that have a similar content. The guarantee of legality must therefore be respected by non-state human rights obligations, since it is embedded in the framework of human and fundamental rights.

If those conditions and guarantees are respected, then Knox's fear that converse duties may be invoked to further abuses may be allayed, given the wrongfulness of those abuses, which would not be acceptable under the framework of those duties. Unfortunately, throughout history appeals to collectivities and "nations" have been invoked to disregard fundamental rights, and abstract, contingent and fictitious entities as States have been treated as more important than real and precious human beings.¹⁰⁷⁶ This is why those conditions must be respected.

The fact that fundamental and human rights of individuals and other actors must be respected does not mean that they are "permitted" to carry out violations of the rights of others, as some mistakenly argue colloquially: law *commands* their abuses to be prevented and sanctioned, and that victims to be repaired. However, those responses must respect the essential rights of abusers,¹⁰⁷⁷ lest they are treated as means and without inherent worth.

5.3. The consistency of non-state obligations and legal capacities with the protection of human dignity

As mentioned before, the fact that some norms impose obligations on non-state entities to protect human dignity clearly reveals that other norms that seek the same purpose may follow their example, even if they 'formally' belong to other legal branches, as long as normative and logical conditions are met.

This is illustrated with the prohibitions of the recruitment of children and of violations committed against children affected by armed conflict, that bind States *and* non-state armed

¹⁰⁷⁵ Cf. Frits Kalshoven and Liesbeth Zegveld, *op. cit.*, pp. 11, 14, 204.

¹⁰⁷⁶ Cf. Rafael Domingo, *¿Qué es el derecho global*, *op. cit.*, pp. 23, 131-136, 158-163.

¹⁰⁷⁷ Cf. Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et al. v. Peru*, Judgment, 30 May 1999, para. 89.

actors. The violation of those commands thus exposes offenders to sanctions and engages the responsibility of the perpetrators, both under human rights law *stricto sensu* and international humanitarian law.¹⁰⁷⁸

In this regard, apart from Security Council Resolutions and examinations by the Secretary-General of the UN, that also deal with non-state actors,¹⁰⁷⁹ it is worth examining articles 8.2(b)(xxvi) and 8.2(e)(vii) of the Rome Statute of the International Criminal Court, 4 and 1 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and 77.2 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), in connection with article 96.3 thereto. These norms, with differences regarding age in one case, protect the same general legal good and concrete legal interest in different but related legal branches against all threats, both State and non-state, as can be inferred from their text.

The respective articles of the Rome Statute provide that:

It is an international war crime to “[c]onscrip[t] or enlist[t] children under the age of fifteen years into the [national armed forces, armed forces or groups], or [to] us[e] them to participate actively in hostilities”.

In turn, the cited Optional Protocol to the Convention on the Rights of the Child, that belongs to both human rights *stricto sensu* and international humanitarian law, to the extent that it recognizes rights based on dignity in the universal human rights framework and regulates the conduct of hostilities in armed conflicts, regulates duties of respect (abstention)¹⁰⁸⁰ of States; and in article 4 expressly regulates a (positive) duty of protection¹⁰⁸¹ of States and imposes a direct duty on non-state entities in an express and evident way *as well*. It states that:

Article 4

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.

¹⁰⁷⁸ Cf. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, article 1 through 7; article 38 of the Convention on the Rights of the Child; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 74-75.

¹⁰⁷⁹ Cf. Security Council Resolutions 1612 (2005) and 1539 (2004); and “Children and Armed Conflict”, Report of the Secretary-General of the United Nations, A/64/742—S/2010/181, 13 April 2010, paras. 167-175, 179; and <http://www.un.org/children/conflict/english/monitoringreporting.html>, on the monitoring and reporting mechanism on children affected by armed conflict.

¹⁰⁸⁰ Cf. Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, op. cit., paras. 165, 169-172; Human Rights Committee, General Comment No. 31, op. cit., para. 6.

¹⁰⁸¹ Cf. Human Rights Committee, General Comment No. 31, op. cit., paras. 6-7; Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, op. cit., paras. 166-168, 172-177; Human Rights Committee, General Comment No. 03, *Implementation at the National Level (Art. 2)*, 29 July 1981, para. 1.

As commented by Tilman Rodenhäuser, the Independent International Commission of Inquiry on the Syrian Arab Republic considered that the treaty in which that provision is examined “applies to non-State actors”, confirming the opinion of authors as Andrew Clapham that they are *bound by it*. It also said that those who recruit children under the age of 15 “may be liable under international criminal law.”¹⁰⁸²

Lastly, article 77.2 of Protocol 1 to the Geneva Conventions mentions that:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.

Norms of the human rights *corpus juris* reveal that it is possible to regulate duties, responsibilities and other legal capacities of non-state actors with the purpose of protecting human dignity. Soft law instruments confirm that possibility and stress the importance of the respective capacities of non-state actors, for instance in provisions related to both human rights and IHL, as commented by Andrew Clapham and Theo van Boven.¹⁰⁸³ What is more: the fact that all those norms protect the same legal goods highlights how unreasonable and unfair it is to deny a similar protection of the same legal goods in different formal (that should not be treated in a formalistic way) branches that belong to the *same* legal system and sometimes also to the same *corpus juris*.

The way in which those norms protect dignity from non-state abuses can vary on the condition that victims are appropriately, effectively and fully protected, as argued in Chapter 3. Certainly, the regulation of direct international non-state duties is not the only way to protect individuals. For example, refugees are protected not only from State agents of persecution but also from non-state persecutors who may have no refugee law obligations.

Soft law attempts to raise awareness of the duties of non-state entities as corporations, and campaigns for the adoption of norms that bind non-state actors, confirm and are based on the assumption that international law can directly regulate legal capacities of non-state actors. In turn, such efforts are part of a general trend in international legal practice and theory that seeks to hold every entity that violates relevant norms and legal interests accountable, revealed by

¹⁰⁸² Cf. Tilman Rodenhäuser, *op. cit.*; Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/22/59, 5 February 2013, para. 44; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, at 74-75.

¹⁰⁸³ Cf. Theo van Boven, “The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, *op. cit.*, at 3; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, at 73.

developments in international criminal law or the codification, progressive development and clarification of the responsibility of actors as international organizations and corporations.

Apart from the fact that nothing prevents the sources of international law from being used to adopt norms that protect individuals from non-state abuses directly or indirectly,¹⁰⁸⁴ the logical, legal and ethical possibility of non-state actors having duties for that purpose, either accepted by them (consented or created *ex novo* by them) or imposed on them, is confirmed by these facts: first, that i) rights and participation entitlements enjoyed by actors indicate that they can also have responsibilities and obligations in the same normative system;¹⁰⁸⁵ and secondly, that ii) universalistic arguments about the respect of human rights imply that human dignity must be fully protected, which is not compatible with excluding some authors of violations from duties to not violate human rights.

Concerning the first consideration, it can be repeated that norms that address non-state actors, no matter what they stipulate (conferring or recognizing rights; regulating participation in regime or body; or imposing duties or responsibilities, etc.), indicate that those actors can be addressed by other norms that regulate different capacities, as duties or burdens, some of which may be implicit and necessarily accompany other legal capacities. I will now further develop these arguments.

Antonio Remiro has commented, for example, that the fact that some NGOs have some rights or entitlements to participation in the United Nations system when they meet some requirements, for instance, implies that if they cease to meet the aforementioned conditions they may lose their participation entitlements.¹⁰⁸⁶ If we take this a step further, it can be considered that the goal and foundation of the protection of human dignity implicitly imposes on them an obligation to respect it, because it is a central part of the legal system that regulates their entitlements.

A systematic analysis of international law, examined both in terms of the hermeneutic and theory of law, confirms that it is contradictory to hold that entities with international legal entitlements, as NGOs, cannot have international duties and responsibilities.¹⁰⁸⁷ Similarly, Hersch Lauterpacht analyzed how the possibility of individuals having obligations that protect human

¹⁰⁸⁴ Cf. John H. Knox, "Horizontal Human Rights Law", *op. cit.*, pp. 20-31.

¹⁰⁸⁵ Cf. Antonio Remiro Brotóns et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, at 785; Economic and Social Council of the United Nations, Resolution 1996/31, 25 July 1996, Part VIII, paras. 55-59.

¹⁰⁸⁶ Cf. Antonio Remiro Brotóns et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, at 785.

¹⁰⁸⁷ Cf. article 31 of the Vienna Conventions on the Law of Treaties of 1969 and 1986; International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006, paras. 6, 17-23; Antonio Remiro Brotóns et al., *Derecho Internacional: Curso General*, *op. cit.*, pp. 375-377.

dignity reveals, out of consistency, that they can also have international rights¹⁰⁸⁸ -and vice versa, I might add-.

Moreover, the fact that in international law there can be rights without remedies or duties without procedures of supervision confirms that it is implausible to argue that an entity can have rights but not duties, unless they violate fundamental guarantees or are illogical, but these are substantial rather issues instead of absolute impossibilities. In sum, if an actor can have some positive or negative international legal capacities, it is equally capable of possessing others.

Concerning the universality of the protection of human rights, a universal protection is necessarily one against all threats; and entities that invoke universalistic claims must be coherent and respect universalistic standards, like any other actors.¹⁰⁸⁹ The “educative” effects of human rights norms may impact on previously reluctant actors, reason why their universality is double.

In relation to the previous arguments, it is worth noting that the idea that the protection of human rights must be *universal* is indicated by the very name of instruments as the *universal* declaration of human rights; by the consideration that apart from regional frameworks (that contribute to protect the universal human dignity in a specialized way in certain geographical areas) there is a *universal* system of protection of human rights, not limited to one region; by the inherent worth of *all* human beings, and the fact that their full protection must respond to every threat to the exercise of human rights, that can be prevented by multiple actors; and by the existence of peremptory human rights norms, that bind all potential offenders. Moreover, the protection of human dignity is strengthened with the evolution and expansion of human rights norms and procedures, which must respect legitimate and lawful domestic decisions.¹⁰⁹⁰

The universal protection of human rights is an underlying aspiration reflected in instruments as the Vienna Declaration and Programme of Action of the World Conference on Human Rights of 1993, according to which:

“All human rights are universal, indivisible and interdependent and interrelated [...] While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms [...] Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards”¹⁰⁹¹ (emphasis added).

In light of this, it is important to examine in depth if the universal protection of human rights demands protection from non-state violations.

¹⁰⁸⁸ Cf. Hersch Lauterpacht, *International Law and Human Rights*, op. cit., pp. 36-37.

¹⁰⁸⁹ Cf. Chapter 1, supra; Fred Halliday, op. cit., at 36.

¹⁰⁹⁰ Cf. Carlos Villán Durán, op. cit., pp. 111-112.

¹⁰⁹¹ Cf. Vienna Declaration and Programme of Action, World Conference on Human Rights, A/CONF.157/23, op. cit., Part I, paras. 5, 37.

As indicated in Part I, I consider that the universality of human rights does not refer exclusively to the aspiration that human rights norms and guarantees display effects everywhere (geographical dimension), but also implies that they must have universal effects *ratione personae*, because unless individuals are protected against all possible violations and offenders, they will not be protected completely or universally. This is because the foundation of human rights is human dignity, that refers to the non-conditional inherent worth of every human being, not dependent on features different from human identity or contingent aspects such as the nature of a potential offender. Moreover: in an ordinary sense, universality points to comprehensiveness and to the idea that no exceptions are permissible,¹⁰⁹² and teleological considerations about the protection of dignity can confirm this.

When discussing universality, some tend to point to territorial aspects, which include the need that peremptory human rights are protected in every State at all times.¹⁰⁹³ If this is so, and it is admitted that some territories are administered or controlled by non-state entities, the territorial dimension leads to accepting that individuals must be protected from non-state authorities. And if so, why should they not be protected from other non-state actors? That exclusion would be discriminatory and contrary to the effectiveness of human rights.

Some discussions debate tensions between universal claims and particular cultural or ideological manifestations that may be at odds with them. In legal terms, State agents are called to protect international human rights norms that bind them (*jus cogens* ones always do) from those manifestations, which are often non-state in origin and practice.

The universalistic aspiration of a basic and equal protection everywhere is in turn part of a deeper aspiration to protect human rights from *all* contrary manifestations, regardless of their source. Else, an exclusively territorially-universal protection would fail to truly protect individuals in universal terms, and its framework could be rightly deemed as incoherent.

That universality demands protection from non-state entities flows from the fact that State practices held as contrary to human rights violate them as much as similar practices carried out by non-state entities, as for instance minorities in some States. Likewise, the existence of obligations of authorities to tackle abuses attributable to non-state actors, as considered by the Inter-American Court of Human Rights and international experts, and in international

¹⁰⁹² Cf. article 31 of the Vienna Conventions on the Law of Treaties of 1969 and 1986; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 375-376. According to the Oxford Dictionaries available online, the word "universal" is related to something done or applicable "to all cases" or to "all people or things in the world or in a particular group", and to things "having universal effect [...] or application", as shown in: http://oxforddictionaries.com/definition/universal#m_en_gb0906520 (last checked: 16/02/2012).

¹⁰⁹³ Cf. Carlos Villán Durán, op. cit., at 111.

instruments,¹⁰⁹⁴ implies that those actors can violate human rights. The question is thus not if they can commit violations but when they must be responded to internationally, which was examined in Chapter 4.

Apart from those procedural responses, in substantive terms factual non-state violations of human dignity are always legally relevant and contrary to human rights. This is why States and authorities of the national and local level are required to respond to them. Concerning that duty to respond, international norms can regulate: i) general obligations of protection that bind authorities –as the duties to fulfill, ensure, protect or guarantee human rights-¹⁰⁹⁵; ii) and can also regulate detailed and specialized obligations that indicate what authorities should specifically do to protect some rights and individuals or to respond to some abuses, as for instance enacting certain prohibitions under domestic law. Examples of these more concrete duties are found in norms protecting women and persons with disabilities, or dealing with the prohibition of racial discrimination, transnational organized crime or terrorism.¹⁰⁹⁶ Positive duties of authorities oblige them to protect human rights in the territories they control or administer, wherever someone is under the jurisdiction, and abroad when non-state entities may violate rights that authorities should guarantee extraterritorially (e.g. if they have assumed control of a foreign land and exclude all other authorities, being it necessary for its inhabitants to be entitled to claim protection by their agents) or when those authorities created the risk of those potential violations.¹⁰⁹⁷

As indicated before, apart from duties of authorities, international norms can also iii) regulate direct obligations of non-state entities, such as those found in criminal law, the law of the seas, international humanitarian law, or implied duties to not engage in serious violations and

¹⁰⁹⁴ Cf. articles 2 and 3 of the International Convention on the Elimination of All Forms of Racial Discrimination, 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, 4 of the Convention on the Rights of Persons with Disabilities, or 7 and 8 of the Convention of Belém do Pará; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 78, 81, 88, 104, 149, 153, 164, 167; Durban Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001, paras. 29, 38, 102, 109; Durban Programme of Action of the World Conference against Racism, Racial Discrimination paras. 69, 92, 144; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., paras. 27-32; Inter-American Commission on Human Rights, *Case of Jessica Lenahan (Gonzalez) et al. v. United States*, Case 12.626, Merits Report No. 80/11, op. cit., para. 126.

¹⁰⁹⁵ Cf. Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food (art. 11)*, op. cit., para. 15; articles 1 of the American Convention on Human Rights, 1 of the European Convention on Human Rights, 1 of the African Charter on Human and Peoples' Rights, or 2 of the International Covenant on Civil and Political Rights.

¹⁰⁹⁶ See the footnote before the last; John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 20-27; Henry J Steiner, op. cit., pp. 803-804.

¹⁰⁹⁷ Cf. Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment, 31 January 2006, paras. 125-126 in light of: European Court of Human Rights, *Case of Issa and others v. Turkey*, Judgment, 16 November 2004, paras. 69-71, 76, 81; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, op. cit., paras. 109-113.

breaches of *jus cogens*, among others. Moreover, international bodies and authorities can sometimes iv) directly supervise non-state conduct; or promote and recommend non-state compliance with human rights standards.¹⁰⁹⁸

As can be seen in articles 4 of the Convention on the Rights of Persons with Disabilities or 2 of the CEDAW, the first two levels of international responses to non-state violations require addressing not only *norms* that violate human rights but also *practices* that are contrary to them, such as those that encourage or permit non-state violations.

As considered by John Ruggie, States (and other authorities) can comply with their duties with different strategies, including contributing to change non-state conduct that is contrary to human rights.¹⁰⁹⁹ The only condition, as argued in Part I, is that those strategies provide *effective, appropriate and sufficient protection*, which must include access of individuals and prospects of effectiveness of their demands of protection. As Henry J. Steiner rightly points out, deciding which measures must be adopted to deal with and prevent non-state abuses will sometimes depend on factors as the context where they are committed, because it can make some strategies be more effective or convenient than others.¹¹⁰⁰

The yardstick with which to assess compliance of authorities with their obligations will often be that of due diligence, being there some cases in which their efforts must be greater (e.g. if they created risks, if there are especially vulnerable individuals, or if they have a guarantor position, among others).

The margin of choice of authorities to elect strategies to respond to non-state abuses with some limitations and conditions reminds about the doctrine of the margin of appreciation developed in the European human rights regional system: despite its ambiguities, it is considered that States have some margin of conduct given their position to evaluate and deal with violations, although that conduct is subject to international supervision and some core human rights elements are not subject to discretion.¹¹⁰¹

In regard to the different ways in which international law can deal with non-state threats to human rights, it must be noted that the creation of international non-state obligations and direct supervision of non-state conduct are not limited to criminal matters and may even be found in human rights law *stricto sensu*. For instance, the possibility that human rights treaty law binds the European Union and certain other international organizations is contemplated in some

¹⁰⁹⁸ Cf. John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 18-31.

¹⁰⁹⁹ Cf. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., paras. 18, 21, 27-32

¹¹⁰⁰ Cf. Henry J Steiner, op. cit., at 804.

¹¹⁰¹ Cf. Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., at 49.

international instruments.¹¹⁰² Additionally, the Human Rights Committee has for instance admitted international supervision of non-state conduct in light of human rights standards.¹¹⁰³ Other possibilities may exist or develop across international legal fields.

Concerning consistency of legal systems with human rights law, it must be mentioned that if internal laws fail to be compatible with the obligations of authorities, including those against non-state violations, those authorities incur in a breach of international human rights law and their responsibility is engaged for having breached a duty to prevent or respond to non-state violations of human rights.¹¹⁰⁴ Likewise, international law *must* give effective protection to all victims in a non-discriminatory way, as argued in Chapter 3.

As argued in Chapter 4, non-state promotion of human rights in relation to State or non-state actors must be permitted, and it strengthens the different levels of international horizontal protection of human rights.

Non-state cooperation need not be independent, and actors can participate in joint-actions and international fora, contributing with the expertise, flexibility and legitimacy that some actors have. The importance of permitting and even encouraging non-state initiatives also has to do with the possibilities of checking possible State and non-state abuses and omissions and of their contributing to counter selfish interests and providing information or resources.

In turn, the behavior of those actors can be checked in terms of their representativeness and consistency with human rights standards by entities affected by them, public entities, their members and social actors, with the aims of rebutting false legal interpretations or wrong portrayals of *lex lata*¹¹⁰⁵ and asking them to meet fair participation requirements and respect legal goods.

In turn, with the purpose of promoting human rights, international bodies and agents can issue press releases, statements and recommendations concerning non-state conduct, and even contact non-state actors,¹¹⁰⁶ among other measures that acknowledge the legal relevance of non-state violations of human dignity.

These ideas indicate that the protection of individuals from all abuses can be carried out by multiple actors, legal branches and mechanisms, which can complement each other.

¹¹⁰² See articles 17 of Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 59 of this Convention, article 1.8).2 of the Treaty of Lisbon, or articles 11 and 12 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities along with articles 43 and 44 of this Convention.

¹¹⁰³ Cf. Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006.

¹¹⁰⁴ See footnote 646, *supra*.

¹¹⁰⁵ Cf. Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", *op. cit.*, pp. 191, 201-202.

¹¹⁰⁶ Cf. Manual of Operations of the Special Procedures of the Human Rights Council.

According to these ideas, international law is but one component of the full protection of human dignity, which would often be ineffective without complementary actions and legal systems.

This implies that without the cooperation of national authorities and non-state entities, international action may be unable to effectively protect individuals, and vice versa, given the shortcomings and advantages of each. As previously indicated, the President of the European Court of Human Rights recognized this when requesting the cooperation of national authorities, legal practitioners and representatives of victims, without which the system may collapse. For this reason, regional human rights systems rely on a principle of shared responsibility,¹¹⁰⁷ which reveals that legal practice ignores formalistic divisions between systems and is based on an integrated dynamic centered on common legal goods.

All those complementary mechanisms must work together to offer a protection of human rights and guarantees that is universal and takes account of the indivisibility and interdependence of those rights, which call for overcoming State-centric approaches to human rights.¹¹⁰⁸

On the other hand, it may be considered that some non-state actors may feel disinterested or choose to ignore recommendations to respect human rights. For this reason, legal obligations must bind them, authorizing domestic authorities to enforce them, and their conduct must be supervised internationally in some cases due to the possibility of State failure and the special features of some cases, as discussed in Chapter 4.

The creation of non-state regulation by human rights standards is based on the premise that they can violate human rights or promote them. This includes all non-state entities (private or public, such as international organizations and, from a non-legal perspective, sub-State entities).¹¹⁰⁹

If non-state entities must have international legal capacities based on human rights standards, and the sources of international law can create them except when normative or logical impediments exist, it is necessary to explore if the norms regulating those capacities can be effective; how they can be created and bind actors; if non-state actors themselves can participate in the processes that lead to the creation of the norms that regulate non-state legal capacities; and if there are risks or problems created by non-state legal capacities that seek to protect human dignity. These and related issues will be explored in the next sections of this Chapter.

¹¹⁰⁷ Cf. European Court of Human Rights, *Annual Report 2011*, Registry of the European Court of Human Rights, 2012, pp. 34, 36-37.

¹¹⁰⁸ Cf. Zehra F. Kabasakal Arat, "Looking beyond the State But Not Ignoring It", *op. cit.*, at 6.

¹¹⁰⁹ Cf. Bob Reinalda, "Private in Form, Public in Purpose: NGOs in International Relations Theory", *op. cit.*, pp. 12-15; Janne E. Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", *op. cit.*, pp. 9, 11.

5.4. The normative sources of the legal capacities of non-state actors in the human rights *corpus juris*

As has been mentioned before in this Chapter, the sources of international law can create legal capacities of non-state actors that seek to enhance the protection of human dignity from non-state abuses. That being said, the creation of some non-state by the sources of *jus gentium* is necessary for the protection of human dignity to be effective.

This is compatible with the possibility that implicit non-state duties that flow from legal principles and values exist, just as there are inherent and implied powers of subjects of international law.

Since required legal capacities may not exist in *lex lata* and it is possible that positive international law only offers a limited and deficient protection to victims of non-state abuses at a given stage, law must change *de lege ferenda* in those events. Interestingly, such a critical conclusion need not be based only natural law or sociological considerations that take into account the power of actors and/or human needs and nature, but can also be derived from the positive law requirements of the full and effective protection of human dignity and consistency with human rights principles and norms.

That the sources of *jus gentium* can be used to directly regulate non-state behavior is accepted in international decisions and opinions, as the one adopted by the Grand Chamber of the European Court of Human Rights in the *Kononov v. Latvia* case, the ICJ advisory opinion concerning *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, or the Advisory Opinion on the *Jurisdiction of the Courts of Danzig*, that in spite of its cautious and somewhat ambiguous language supports the idea that international treaties can deal with rights or duties of non-state entities, as commented by Kate Parlett, Theodor Meron or Hersch Lauterpacht.¹¹¹⁰

According to the conclusions of the *Danzig* opinion, the fact that certain entities participate in the adoption of an international norm does not mean that its scope *ratione personae* is necessarily limited to them, being it possible for it to address other entities.

Furthermore, authors and associations posit that different sources and normative categories of international law can regulate the conduct of non-state entities. In this manner, for

¹¹¹⁰ Cf. Theodor Meron, *The Humanization of International Law*, Martinus Nijhoff, 2006, p. 40; Kate Parlett, "The PCIJ's Opinion in *Jurisdiction of the Courts of Danzig*. Individual Rights under Treaties", op. cit., pp. 120, 143-145; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 71-73, Hersch Lauterpacht, op. cit., pp. 27-29.

instance, it has been considered that customary and peremptory law can bind international organizations or other entities, such as individuals.¹¹¹¹

Concerning this, the International Military Tribunal for the Trial of German Major War Criminals, and the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, acknowledged that individuals can commit violations of international law and be accordingly punished.¹¹¹² Denying that this logic is relevant regarding other non-state entities that can equally affect legal goods and breach duties that bind them is baffling and unsustainable from a practical and an axiological point of view and also from a normative standpoint.

Additionally, the possibility that non-state actors have international duties and legal capacities is confirmed by some international norms that reveal that international organizations, humanitarian agencies or armed groups, among other entities, can have both international and domestic obligations, such as articles 6 and 7 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)¹¹¹³ or article 7 of the European Convention on Human Rights, entitled “No punishment without law”, that states:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

¹¹¹¹ Cf. José Manuel Cortés Martín, *op. cit.*, pp. 116-133; ICTY, *Prosecutor v. Anto Furundzija*, Judgment, 10 December 1998, paras. 155-157; European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, *op. cit.*, paras. 205-213, 235-239.

¹¹¹² Cf. Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, *op. cit.*, Principle I and paras. 98-99.

¹¹¹³ Article 6 reads: “1. International organizations and humanitarian agencies shall discharge their obligations under this Convention in conformity with international law and the laws of the country in which they operate. 2. In providing protection and assistance to Internally Displaced Persons, international organizations and humanitarian agencies shall respect the rights of such persons in accordance with international law. 3. International organizations and humanitarian agencies shall be bound by the principles of humanity, neutrality, impartiality and independence of humanitarian actors, and ensure respect for relevant international standards and codes of conduct.” Article 7 states, in turn, that: 4. Members of Armed groups shall be held criminally responsible for their acts which violate the rights of internally displaced persons under international law and national law. 5. Members of armed groups shall be prohibited from: a. Carrying out arbitrary displacement; b. Hampering the provision of protection and assistance to internally displaced persons under any circumstances; c. Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family; d. Restricting the freedom of movement of internally displaced persons within and outside their areas of residence; e. Recruiting children or requiring or permitting them to take part in hostilities under any circumstances; f. Forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons especially women and children; g. Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons h. Attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials; and i. Violating the civilian and humanitarian character of the places where internally displaced persons are sheltered and shall not infiltrate such places.”

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations” (emphasis added).

Additionally, it is worth mentioning that non-state conduct and legal capacities can also be regulated via ‘secondary law’, to employ a term of European Union law.¹¹¹⁴ In this sense, for instance, the International Court of Justice accepted the possibility that demands, burdens, duties or other negative legal capacities of non-state actors can be imposed by the Security Council, when mentioning in its Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* that:

“The only point at which resolution 1244 (1999) expressly mentions other actors relates to the Security Council’s demand, on the one hand, “that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization” (para. 15) and, on the other hand, for the “full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia” (para. 14). There is no indication, in the text of Security Council resolution 1244 (1999), that the Security Council intended to impose, beyond that, a specific obligation to act or a prohibition from acting, addressed to such other actors.

The Court recalls in this regard that it has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and intergovernmental organizations. More specifically, a number of Security Council resolutions adopted on the subject of Kosovo prior to Security Council resolution 1244 (1999) contained demands addressed eo nomine to the Kosovo Albanian leadership. For example [...] Resolution 1199 (1998) included four separate demands on the Kosovo Albanian leadership, i.e., improving the humanitarian situation, entering into a dialogue with the Federal Republic of Yugoslavia, pursuing their goals by peaceful means only, and cooperating fully with the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (resolution 1199 (1998), paras. 2, 3, 6 and 13). Resolution 1203 (1998) “[d]emand[ed] . . . that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998) and cooperate fully with the OSCE Verification Mission in Kosovo” (resolution 1203 (1998), para. 4). The same resolution also called upon the “Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo”; demanded that “the Kosovo Albanian leadership and all others concerned respect the freedom of movement of the OSCE Verification Mission and other international personnel”; “[i]nsist[ed] that the Kosovo Albanian leadership condemn all terrorist actions”; and demanded that the Kosovo Albanian leadership “cooperate with international efforts to improve the humanitarian situation and to avert the impending humanitarian catastrophe” (resolution 1203 (1998), paras. 5, 6, 10 and 11)” (emphasis added)¹¹¹⁵

Another example of secondary legislation addressing non-state conduct is provided in Security Council Resolution 1269 (1999), which “condemns all acts, methods and practices of terrorism as criminal and unjustifiable [...] by whomever committed”. This direct international consideration of terrorist acts as illegal and unjustifiable is made regardless of domestic legal

¹¹¹⁴ Cf. “Sources of European Union law”, available at: http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114534_en.htm (last checked: 16/02/2012), where it is mentioned that “There are three sources of European Union law: primary law, secondary law and supplementary law [...] Secondary sources are legal instruments based on the Treaties and include unilateral secondary law [“regulations, directives, decisions, opinions and recommendations”, or “atypical” acts such as communications and recommendations] and conventions and agreements.”

¹¹¹⁵ Cf. International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, op. cit., paras. 115-116.

considerations. Interestingly, in SC Resolution 1373 (2001), “acts, methods and practices of terrorism are [declared] contrary to the purposes and principles of the United Nations”, and human rights are among them.¹¹¹⁶

This Resolution thus declares those acts as unlawful under international law directly and regardless of State decisions on the matter. This, coupled with the duty of authorities to cooperate to combat terrorism, mentioned therein, seeks to ensure a minimum global and coordinated response to terrorism, the only one that can aspire to protect individuals effectively in a global context in which gaps, coordination between offenders and other features facilitate the commission of violations and their impunity.¹¹¹⁷

Additionally, indirect international responses to non-state violations are also found in secondary legislation, as for instance in the obligation placed by the Security Council upon States to punish terrorist and related acts in accordance to their seriousness, as mentioned in point 2(e) of Resolution 1373 (2001). This provision requires States to respond to certain non-state legally relevant conduct in a given manner. Similarly, SC Resolution 1343 (2001) imposed obligations on Liberia in order to prevent and stop threats to international peace and security posed by the operations of a non-state entity (the Revolutionary United Front, or RUF).

As examined in section 5.1, international law can regulate legal capacities of non-state actors. A related interesting and complex issue is the possible influence of non-state actors on the modification or emergence of international law, including norms that regulate their behavior or that of other actors. Additionally, it is worth examining how normative manifestations of non-state actors can have legal relevance in a multi-level framework of global normative interaction.

To examine this, it is convenient to distinguish direct and indirect legal effects of non-state influence.

a) Sometimes, non-state actors can directly participate in the shaping of international law by interacting with its sources. For instance, international organizations can negotiate and be parties to international treaties (as indicated by the existence of the Vienna Convention on the Law of Treaties between States and international organizations or between international organizations), including human rights treaties, as the Convention on the Rights of Persons with Disabilities (articles 43 and 44) and its Optional Protocol or the European Convention for the

¹¹¹⁶ Cf. articles 1.3, 55, 56, and 68 of the Charter of the United Nations; Hersch Lauterpacht, *International Law and Human Rights*, op. cit., pp. 33-35; Felipe Gómez Isa, “International Protection of Human Rights”, op. cit., pp. 28-32.

¹¹¹⁷ Cf. Security Council Resolution Resolution 1373 (2001), para. 4, where it is mentioned that there is a “close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials,” and that there is thus a “need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security”; Kofi A. Annan, “Foreword”, op. cit., pp. iii-iv.

Protection of Human Rights and Fundamental Freedoms (see article 17 of Protocol 14 to the Convention); and other non-state actors can also have capacities to be bound by treaty law, for instance in the fields of arbitration or international humanitarian law.¹¹¹⁸ On the other hand, it is considered that non-state actors can also interact with other sources of *jus gentium* directly or indirectly, for instance by means of prompting practice or *opinio juris* due to factual or normative positions that permit them to do so.¹¹¹⁹

The fact that a non-state entity lacks lawmaking capacities does not detract from its capacity to have its conduct regulated by international law. In this sense, Roland Portmann mentions that entities addressed by international law are its subjects, and that except responsibilities of individuals and other actors in relation to the respect of dignity, there are no automatic or unavoidable consequences of being a subject or addressee of international law. Moreover, Jean D'Aspremont, the ILC and Portmann consider that lawmaking power is a *capacity* that is not enjoyed by all subjects, and therefore it cannot be said that an addressee that does not have that power is not a subject of international law.¹¹²⁰

These ideas are consistent with the consideration that the sources of international law can assign positive or negative capacities to different entities, which do not necessarily enjoy the same capacities or enjoy them to the same extent.¹¹²¹ Therefore, there may be subjects of international law that can not interact with the sources of international law directly and shape it (although they could acquire that capacity) and others that can. Likewise, not all non-state actors with lawmaking capacities enjoy those capacities to the same degree, being there possible differences concerning sources and influence.

Additionally, there are some discussions about the impact of some entities on some sources of law. For instance, the Special Tribunal for Lebanon has declared that as an

¹¹¹⁸ See footnote 738, *supra*.

¹¹¹⁹ Cf. José Manuel Cortés Martín, *op. cit.*, pp. 116-168; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors: Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, The Hague Conference, *op. cit.*, pp. 8-13; Jean-Marie Henckaerts, "Customary International Humanitarian Law: a response to US comments", *International Review of the Red Cross*, vol. 89, no. 866, 2007, pp. 476-479 (in my opinion, besides the ICRC given its formal position in the normative context related to IHL, besides the ICRC currently non-state armed groups are also (although differently) relevant when it comes to IHL custom and principles, subject to the reaction of other entities, such as States).

¹¹²⁰ Cf. Jean d'Aspremont, "Non-State Actors in International Law: A Scholarly Invention?", *op. cit.*, pp. 5-7; Roland Portmann, *op. cit.*, pp. 277, 283; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 70-71, 82-83; International Law Commission, First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook of the International Law Commission*, vol. II, A/CN.4/144 and Add.1, 1962, pp. 31, 36.

¹¹²¹ Cf. Andrew Clapham, *op. cit.*, pp. 68-71.

international judicial body it has the capacity to generate or stimulate customary law, idea that is contested by some authors.¹¹²²

Lastly, it must be noted that sometimes non-state actors can consent to be bound by the product of sources of international law, while other times that product binds them even when they do not have an intention to be bound, as happens with some unilateral acts.

b) On the other hand, some non-state actors without the power to directly interact with the sources of *jus gentium* may overtly or subtly have an indirect influence on the determination of the content of *jus gentium*. This may be due to either: (i) their formal participation in debates or other processes in which lawmakers can take into account their opinion (due to pressure or persuasion, for instance) despite their lacking decision power or due to their participation in delegations or (rarely) drafting bodies;¹¹²³ or (ii) to their informal activism from the “periphery”, that may lead lawmakers to take into account their opinions about what the content of law should be like.¹¹²⁴

Logically, the impact of non-state initiatives varies according to several factors and is not always successful. Factors as power, effectiveness of campaigns, willingness of States, special features of some negotiations not replicated in others,¹¹²⁵ social trends, actions of networks, or the identity of the individuals involved in negotiations or other lawmaking processes, among others, may tip the balance in one side or the other.

Additionally, as explained in doctrine, it is sometimes difficult to trace the origin of the content of some norms, and thus it is not easy to ascertain if non-state actors have contributed to its adoption or to what extent their contribution has been considered and modified.¹¹²⁶

The study of the direct and indirect interactions and possible impact on the content of international law by non-state entities has been downplayed by some authors, according to whom non-state entities (who are truly *actors* concerning this issue) are not a proper object of scientific study about international law, because their influence and participation are often informal or without decision power, and formal international lawmaking would be mostly handled by States.

¹¹²² Cf. Special Tribunal for Lebanon, Appeals Chamber, Case No. CH/AC/2010/02, *Decision on Appeal of Pre-Trial Judge’s Order regarding Jurisdiction and Standing*, 10 November 2010, para. 47, versus: a skeptical analysis presented in: Marko Milanovic, “Formation of Custom and the Inherent Powers of the Special Tribunal for Lebanon”, *EJIL: Talk!*, 11 November 2010, available at: <http://www.ejiltalk.org/formation-of-custom-and-the-inherent-powers-of-the-special-tribunal-for-lebanon/>

¹¹²³ Cf. Jean d’Aspremont, “Non-State Actors in International Law: A Scholarly Invention?”, *op. cit.*, pp. 3-7; Luis Pérez-Prat Durbán, *op. cit.*, pp. 24-31; Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, *op. cit.*, pp. 186-187.

¹¹²⁴ Cf. Luis Pérez-Prat Durbán, *op. cit.*, pp. 22-23, 26-31; Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, *op. cit.*, pp. 186-187.

¹¹²⁵ Cf. Luis Pérez-Prat Durbán, *op. cit.*, pp. 29-31.

¹¹²⁶ *Ibid.*, at 26.

This has been defended by Jean D'Aspremont, who nonetheless accepts that non-state entities increasingly participate in conferences and processes that deal with the adoption of international norms.¹¹²⁷

In my opinion, criticism of this sort adds nothing, and does not deny the point that non-state actors may have an influence in the determination of the content of *jus gentium* and can thus be participants *in the process of its generation*, sometimes informally and other times having the entitlement to have their opinion heard in lawmaking processes. These facts alone –their impact on the content of law, whose goals and features can be somewhat shaped by them, and the possible relevance of their opinions for interpretive purposes- make those actors worth being studied by international law scholars, who should not limit their works to mere descriptions but also critically assess law, what it represents, whether it is capable of achieving its goals effectively, and how open and participatory legal processes are, among other questions.

In fact, the pre-legal account of the drafting history and account of the emergence of norms would be incomplete without the study of important non-state opinions that may have exerted an influence on the content of law, being received completely or with modifications or rejected after being studied. Non-state opinions are also useful to contrast them with positive law and alternative proposals to conduct a critical analysis of law.

For the aforementioned reasons, the study of non-state interaction with the sources of international law is quite important, especially because a very formalistic approach may ignore important realities and dynamics that shape the content and effects of law. Narrow approaches may also suffer from the shortsightedness and ignore how law can be used as a tool of inclusion or exclusion¹¹²⁸ and used to protect or abuse, as the old story of Antigone warns.

Additionally, as Jordan J. Paust expresses, the entities that can formally participate in the shaping of international law are not as few as State-centered conceptions suggest, as revealed by the existence of treaties entered into by non-state political groups even during the peak of classic international law or by the impact on customary and treaty international humanitarian law and other legal branches by tribes and other actors, such as armed entities.¹¹²⁹ Additionally, the informal participation of non-state actors (individuals and others as legal or juridical persons)¹¹³⁰ can be quite relevant as well, and can have a tremendous impact despite its informal character.

¹¹²⁷ Cf. Jean d'Aspremont, "Non-State Actors in International Law: A Scholarly Invention?", op. cit.

¹¹²⁸ Cf. Math Noortmann, "Non-State Actors in International Law", op. cit., 62-63; Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion", op. cit., pp. 140-144.

¹¹²⁹ Cf. Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion", op. cit., pp. 978-986, 994-998.

¹¹³⁰ Cf. John Finnis, "The Priority of Persons", op. cit., pp. 6-10; José E. Alvarez, "Are Corporations "Subjects" of International Law?", op. cit., pp. 4-5, 8-9, 17-18, 26-28, 30-31, 34-35.

For instance, a disaggregated analysis of States indicates that their opinions or actions may be sometimes shaped by other actors (and vice versa),¹¹³¹ whose opinion is also relevant in world and transnational relations. Those actors can influence decisions of other authorities as well, and therefore they can contribute to shaping non-state legal capacities, including their power to shape law formally or informally, directly or indirectly. The examination of non-state entities is thus also relevant concerning the influence of States and other authorities in legal processes. According to Jordan J. Paust:

"More adequate awareness of the formal and informal roles of prior and present non-state actors and present competencies, rights, and duties is necessary for realistic inquiry into what many term the nature, sources, and evidences of international law and the dynamic nature of both treaty-based and customary international law. Ignorance of our past should no longer be used to deny our common dignity."¹¹³²

Altogether, in formal terms there are restrictions as to the heterogeneity of entities with lawmaking powers concerning some sources of international law, although sometimes non-state entities can shape them. This does not detract from the recognition of non-state input and interaction with the content and implementation of international law. Understanding what a norm attempts to achieve, what social dynamics lead to its creation, and what its relation with non-state positions may be, often requires examining non-state entities.

Certainly, non-state actors can have material and substantive influence in international legal processes even when they lack formal participation or decision-making powers. Moreover, when they have formal participation entitlements, their potential of influence is undeniable because their opinion must be heard. Regarding these entitlements, one must not forget that law is neither one-dimensional nor reductionist in its scope and dynamics. Thus, absence of certain lawmaking capacities does not deny the possible existence of other relevant positive legal capacities, even concerning the sources of *jus gentium*. According to the International Law Association:

"[E]ven if NSA may not have formal treaty-making capacity, some international NGOs, such as the ICRC, have had special roles in the development of international treaties, and have thus been able to influence the content of international treaty law. NGOs have also long enjoyed formal participatory rights through accreditation as consultants or observers within the UN under Article 71 of the UN Charter, and its bodies, and within UN-related and unrelated IGOs responsible for negotiating, drafting and organising conferences for the adoption of multilateral treaties, and within COP/MOPs of MEAs. They often participate formally (and informally) in developing norms within these arrangements. NGO participatory rights are accompanied by obligations to comply with rules and regulations of the relevant international legal arrangement. Accreditation rules provide a legal basis for NGOs to participate within particular arrangements, and recent scholarship suggests NGOs now

¹¹³¹ Cf. Eric A. Posner, *op. cit.*, pp. 40-45, 53-58; Fred Halliday, *op. cit.*, pp. 26-34; Daphné Josselin and William Wallace, "Non-state Actors in World Politics: a Framework", *op. cit.*, pp. 4-10; Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion", *op. cit.*, at 999.

¹¹³² Cf. Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion", *op. cit.*, at 1004.

have “at least a legitimate expectation” to a “general right to participate in international legal discourse”¹¹³³ (emphasis added).

Concerning formal participation, it must be said that non-state actors have sometimes participated in what has been called a “new diplomacy”, in which that participation was highly influential. This happened in the drafting and negotiation of the Rome Statute of the International Criminal Law and the Anti-Personnel Landmines Convention.¹¹³⁴ On the other hand, participation entitlements are envisaged for instance in ECOSOC Resolution 1996/31, that in Part VII regulates the “Participation of Non-Governmental Organizations in International Conferences Convened by the United Nations and their Preparatory Processes”.

The Non-State Actors Committee of the International Law Association considered that the possible impact of non-state entities on the sources of international law has the potential to transform *international* law and turn it into a transnational system or, in my opinion, to make it have transnational and global dimensions. According to the Committee:

“In order for the binding force of international law to be palatable to non-State actors as (possible) subjects of international law, international law norms need to be made through an inclusive process, with the participation of all relevant stakeholders. This requires a fundamental rethinking of international law formation, which is traditionally centered on States. It may require giving non-State actors the right to participate in treaty negotiation and adoption, and giving the practice of non-State actors some weight in the determination of norms of customary international law. Law may then become transnational rather than international”¹¹³⁵ (emphasis added).

Moreover, measures and initiatives of lawmakers and authorities can be inspired on non-state actions and requests, as can be seen in the influence of movements whose claims were later incorporated into law, including claims about the protection of human dignity (e.g. the anti-slavery, anti-apartheid and other movements).¹¹³⁶

Furthermore, a scientific approach to law cannot be exclusively intra-systematic and ignore extra-legal or supra-legal criteria and elements such as the social and human impact of law, dynamics leading to its creation, or its relations with other normative systems. Likewise, it cannot be ignored that law is not limited to formal lawmaking but comprises other dynamics as well, including processes previous to formal lawmaking, which is but one operation –certainly important- among others. Non-state actors sometimes participate in them, even formally.

¹¹³³Cf. International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors: Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, The Hague Conference, op. cit., at 10.

¹¹³⁴ Cf. Luis Pérez-Prat Durbán, op. cit., pp. 29-31.

¹¹³⁵ Cf. International Law Association, Non-State Actors Committee, *Report: Preliminary issues for the ILA Conference in Rio de Janeiro*, op. cit., at 3.

¹¹³⁶ Cf. George J. Andreopoulos, Zehra F. Kabasakal Arat, and Peter Juviler, “Rethinking the Human Rights Universe”, op. cit., pp. 335-337; Andrea Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, op. cit., pp. 186-187; Felipe Gómez Isa, “International Protection of Human Rights”, op. cit., pp. 19-21.

Concerning this, it is essential to distinguish between “*formal* and *material* ‘sources’ of international law”, being the latter those “[indirect] sources of ideas for the lawmaker” concerning the “content of the law”.¹¹³⁷ Non-state actors can interact with both kinds of sources.

Additionally, the regulation of non-state participation can change, and even become formal and/or direct sometimes. It is possible that entitlements to formal participation in a direct way are granted in the future if an actor does not enjoy them. For instance, the United Nations mentioned that the drafting and adoption process of the Convention on the Rights of Persons with Disabilities was “the first time that NGOs had actively participated in the formulation of a human rights instrument”.¹¹³⁸ In this sense, apart from receiving statements, comments and proposals by non-state entities (as NGOs, international authorities or international organizations),¹¹³⁹ the Ad Hoc Committee that was entrusted with the task of drafting the instrument and reached an agreement on it had delegates that “represented NGOs, Governments, national human rights institutes and international organizations”.¹¹⁴⁰ In its second session, the Committee established a Working Group that had the task of drafting the Convention, which was composed of “government and NGO representatives” and elaborated a draft version in 2004.¹¹⁴¹

According to what has been said, the possibility of interactions between non-state and the sources of *jus gentium* cannot be dismissed, and accordingly it is convenient to propose criteria about when their participation cannot be refused or is recommended.¹¹⁴² In sum, just as

¹¹³⁷ Cf. International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors: Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, The Hague Conference, op. cit., pp. 8-11. Also see: Jean d’Aspremont, “Non-State Actors in International Law: A Scholarly Invention?”, op. cit., pp. 2-6.

¹¹³⁸ Cf. “Convention on the Rights of Persons with Disabilities: Why a Convention?: How was the Convention negotiated?”, available at: <http://www.un.org/disabilities/convention/questions.shtml#ten> (last checked: 20/02/2012).

¹¹³⁹ Cf. United Nations Enable, *NGO Comments on the Draft Text (Comments made at the Seventh Session and submitted to the UN Secretariat)*, available at: <http://www.un.org/esa/socdev/enable/rights/ahc7contngos.htm> (last checked: 20/02/2012); United Nations Enable, “Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities”, available at: <http://www.un.org/disabilities/default.asp?navid=24&pid=151#neg1> (last checked: 20/02/2012), where it is mentioned that “The Convention was drafted by the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (Ad Hoc Committee), which was a committee of the United Nations General Assembly. Its membership was open to all United Nations Member States and observers. During its first session, the Ad Hoc Committee decided that representatives from non-governmental organizations (NGOs) accredited to the Ad Hoc Committee could also participate in meetings and make statements in accordance with United Nations practice [...] During its first session, the Ad Hoc Committee decided that representatives from non-governmental organizations (NGOs) accredited to the Ad Hoc Committee could also participate in meetings and make statements in accordance with United Nations practice. Thereafter, the General Assembly repeatedly urged that efforts be made to actively involve disability organizations in the work of the Ad Hoc Committee. Throughout the process, organizations of persons with disabilities and other NGOs were very active in providing comments and information from a disability perspective [...] National human rights institutions (NHRI) were also active in the negotiations.”

¹¹⁴⁰ Cf. <http://www.un.org/disabilities/convention/questions.shtml#ten> (last checked: 20/02/2012).

¹¹⁴¹ Cf. <http://www.un.org/disabilities/default.asp?navid=24&pid=151#neg1> (last checked: 20/02/2012).

¹¹⁴² Cf. e.g. ECOSOC Resolution 1996/31, paras. 41-42, 47-50.

soft law or hard law can have an impact on non-state attitudes,¹¹⁴³ non-state entities can also have an impact on the content of international law.

c) Apart from the possibilities of indirect and direct interaction between non-state actors and the sources of international law, non-state conduct can sometimes produce international legal effects, binding the entities that engage in it or having other legal implications. These effects are neither necessarily desired by those actors nor always directly produced by that conduct, and can be produced by principles, norms and sources of *jus cogens* in relation to them.

This can happen, among other possibilities, because of: 1) the reception of the content non-state regulations (whether one considers them legal or not) by international soft or hard law; or 2) the application of good faith and related principles to the protection of third parties, that may oblige non-state entities to comply with their promises or to not disappoint those who trust in their assertions and commitments, for instance. In this regard, in 2008 in the Committee on Non-State Actors of the International Law Association it was considered that:

"Many non-State actors, e.g. corporations and armed opposition groups, commit themselves to upholding international law. However, they tend to do so as a matter of policy/soft law than as a matter of hard law. In so doing, they may avoid legal accountability. There may nevertheless be doctrines and principles that could be used to harden these soft commitments into hard law (duty of care/negligence/corporate organization/legitimate expectations/good faith/unilateral act...)"¹¹⁴⁴ (emphasis added).

Concerning the question of whether non-binding regulations of non-state behavior sufficiently protect international legal goods, I consider that given their voluntary character and frequent lack of access of victims to remedies and petitions of supervision of compliance, binding norms and mechanisms must complement them for the protection of human dignity to have solid prospects of effectiveness in case non-binding initiatives are not heeded.

A twist that has to be considered is how *jus gentium* can be relevant for non-state regulations that are increasingly employed in a globalized world and vice versa.

Authors as Günther Teubner argue that non-state regulation can be considered as law, which he calls global law. Other authors agree with this general conclusion and consider that there are increased possibilities of non-state regulation due to globalization and transnational relations, but prefer expressions as *lex privata* when regulation is created by private entities, especially because they are private regulations not based on the recognition of public law¹¹⁴⁵ and

¹¹⁴³ Cf. Fred Halliday, op. cit., at 35

¹¹⁴⁴ Cf. International Law Association, Non-State Actors Committee, *Report: Preliminary issues for the ILA Conference in Rio de Janeiro*, op. cit., at 3.

¹¹⁴⁵ I consider public law to be that in which public entities control to a relevant extent the sources of law, instead of controversial and somewhat artificial distinctions between private and public law. Cf. Antonio Remiro Brotons et al., *Derecho Internacional*, McGraw-Hill, 1997, at XLV; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, at 40; Elena Pariotti, op. cit., pp. 100-101.

public legal rules of recognition.¹¹⁴⁶ They can have domestic and local scopes and not necessarily global or transnational implications.

Regulations adopted by non-state actors that do not directly create international or internal norms can seek to regulate the conduct of the actors that adopt them or that of others, and can also incorporate the content of international or domestic norms,¹¹⁴⁷ just as it is possible for the latter to include non-state standards.

Sometimes, that incorporation can reinforce the protection of shared legal goods, and is thus recommended. One provision that recognizes and requests this is paragraph 15 of the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, adopted by the Sub-Commission on the Promotion and Protection of Human Rights, according to which:

“As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms” (emphasis added).

Moreover, sometimes effects of *lex privata* and *jus gentium* are intermingled, as happens when non-state norms are given legal effects because of the application of the principle of good faith or other principles, as explained above, or when non-state normative manifestations are regarded as unilateral acts that produce international legal effects.

The three general forms of interplay between non-state entities and the content of *jus gentium* being explained, and the possibility of those entities being bound or constrained by *jus gentium* clarified, it is possible to say that non-state actors and international law can be related in two ways: a) having a causal nexus, when non-state actors exert an influence on the determination of the content of law (proactive or positive nexus) and vice versa; and b) a normative link, when norms regulate non-state behavior, sanctioning or supporting it (passive link, which is negative when negative legal capacities are involved). These two types of relations have been recognized in doctrine when it has been said that non-state actors can be lawmakers and/or law-takers.¹¹⁴⁸

¹¹⁴⁶ Cf. H.L.A. Hart, op. cit., pp. 92, 94-95.

¹¹⁴⁷ Cf. Luis Pérez-Prat Durbán, op. cit., pp. 33-34.

¹¹⁴⁸ Cf. Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, op. cit., at 9; Math Noortmann and Cedric Ryngaert, “Introduction: Non-State Actors: International Law’s Problematic Case”, op. cit., pp. 1, 3.

The division between relations can be blurred in practice, because they can be combined: an entity can be bound by a norm and also have contributed to its emergence.

On the other hand, it is important to make it clear that the content of the principle of legality in international law permits non-state duties and other negative legal capacities to be created and regulated by any source of international law if some conditions are respected, as was discussed previously when examining that principle and its international formulation in the form *nulla poena/nullum crimen sine jure/jus* (see section 5.2, *supra*).

Even if international law can regulate negative legal capacities of non-state entities, sometimes State duties and actions may sufficiently protect individuals from those entities and make the creation or implementation of norms on those legal capacities unnecessary. However, as explained throughout this book, the existence of State duties does not always ensure the full reparation and protection of victims, as happens for example when States behaves with the required diligence but victims are not repaired, or when reparation provided by a State is insufficient since some components of reparation, as truth or guarantees of non-repetition, can only be fully satisfied if non-state participants in violations repair victims. The same can be said of preventative measures, and not only of *ex post facto* strategies.

These reasons explain why there is a trend in international law that seeks to hold all the actors that violate international legal goods accountable. José Manuel Cortés, for instance, argues that progresses in international criminal law and the law on the responsibility of international organizations are efforts of the international community that belong to that trend,¹¹⁴⁹ implicitly arguing thus that this community considers that substantive duties ought to exist or sometimes exist already, since responsibility is a consequence of their breach.¹¹⁵⁰ Therefore, if actors that can affect legal goods (values, goals and interests that a norm seeks to protect) do not have obligations, their conduct must be regulated through substantive (primary) rules and therefore automatically also by secondary norms, i.e. norms about legal responsibility.¹¹⁵¹

That not only States must have international human rights responsibilities is confirmed by the idea expressed before that just as it was considered that States should have human rights obligations for individuals to be better protected,¹¹⁵² non-state actors must have duties and other

¹¹⁴⁹ Cf. José Manuel Cortés, *op. cit.*, pp. 56-58.

¹¹⁵⁰ Cf. articles 2 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts (A/56/49(Vol. I)/Corr.4) and 4 of the ILC Draft Articles on the Responsibility of international organizations adopted in 2011 (A/66/10); Bin Cheng, *op. cit.*, pp. 166, 169, 174-176, 180.

¹¹⁵¹ On primary and secondary rules, cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, pp. 31, 34-35, 54, 60-61, 63, 75, 85, 92, 94-95, 141.

¹¹⁵² Cf. Roland Portmann, *op. cit.*, pp. 254-257. Just as human beings must be protected from State abuses and States must not be unchecked concerning human dignity, they must for the same reasons be protected from non-state entities that can also threaten them.

legal capacities that reinforce the protection of human dignity because they can, and often do, violate the content of human rights and guarantees, and an exclusively State-centric international protection cannot fully protect victims in all cases, as explained previously.

Therefore, non-state actors can not only have international legal capacities created by the sources of *jus gentium*, but also *must* have them for human dignity to be effectively protected.

Before studying different relations between non-state entities and sources of international law, it is important to mention that, unless peremptory law is involved, the existence and status of norms produced by one source does not affect that of other norms even if they have the same or similar content and object, given their independence, as declared by the International Court of Justice in the Case on the *Military and Paramilitary Activities in and against Nicaragua*. The Court argued that:

“The fact that the [...] principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.”¹¹⁵³

This international principle of normative independence is logically applicable in the field of the legal protection of human dignity from all violations, as revealed for example in article 10 of the Rome Statute of the International Criminal Court (ICC), which states that:

“Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

Therefore, for example, the fact that there is a specific treaty regulation in that Statute concerning elements of responsibility arising out of complicity in international crimes, for instance regarding *actus reus* and *mens rea* (being it uncertain if the intentional component of complicity in the Statute is narrower and stricter than the general one regulated under customary criminal law),¹¹⁵⁴ does not mean that it is applicable to international criminal law generally (that condemns some violations of human dignity), and therefore customary norms may be broader than it and are not affected or overridden by it, as commented by Chimène I. Keitner.¹¹⁵⁵ The same logic applies to other norms protecting human rights and guarantees.

¹¹⁵³ Cf. International Court of Justice, *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment (Jurisdiction of the Court and Admissibility of the Application), 26 November 1984, para. 73.

¹¹⁵⁴ Cf. Albin Eser, “Individual Criminal Responsibility: Mental Elements—Mistake of Fact and Mistake of Law”, Reprints from: Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 791-792, 801; Chimène I. Keitner, “Conceptualizing Complicity in Alien Tort Cases”, *Hastings Law Journal*, vol. 60, 2008, pp. 88-89, 91, 93-96.

¹¹⁵⁵ Cf. Chimène I. Keitner, “Conceptualizing Complicity in Alien Tort Cases”, pp. 82-83, 87-97.

5.5. Rebuttals to objections to non-state human rights duties and legal burdens

An analysis of the possibility of regulating international negative legal capacities of non-state actors with the goal of better and effectively protecting human dignity requires ascertaining whether this regulation is feasible in international law and other legal systems, which requires examining their sources of law.

It has been argued that the sources of *jus gentium* and the notion of legal subjectivity confirm that legal capacities of non-state entities can be created if they respect fundamental guarantees and peremptory law. Moreover, non-state regulations can contribute to enhance the protection of human dignity and help shape international law in that regard, but must be controlled to make sure that they are not abusive or contrary to human rights.

Even though international law can accommodate the acceptance by or imposition on non-state entities of negative legal capacities, some argue that this assignation or imposition is unadvisable or even absurd from the perspective of what human rights are meant to be and do.

First of all, it must be said that those criticisms are not actually positive law discussions, given the possibility and examples of the creation of non-state human rights responsibilities. For instance, Hersch Lauterpacht comments that some legal capacities with negative connotations, such as those related to criminal responsibility, can protect human rights and are known bind non-state entities.¹¹⁵⁶

The facts that criminal law and other branches that can protect human dignity, such as international humanitarian law or refugee law, regulate duties, rights and other guarantees to protect individuals from non-state abuses, and that they are sometimes found simultaneously in norms from different formal branches that yet belong to the same *corpus juris* in substantive terms, demonstrate that human dignity *can* be protected legally from non-state violations, even in *jus gentium* and human rights *stricto sensu*, and equally under domestic law and *lex privata* manifestations, as exemplified by the ATS of the U.S., the Human Rights Act 1998 of the UK or the *tutela* action of Colombia.

As a result, it is possible to infer that criticisms to having a human rights logic in the relations of individuals with non-state entities, not being sound from a positive law perspective, should at least appeal to *meta-* or *extra-legal* considerations to be persuasive. However, I consider that a deep analysis proves precisely the contrary: that it is *necessary* for individuals to be legally protected from non-state abuses in international law and other normative systems.

¹¹⁵⁶ Cf. Hersch Lauterpacht, *International Law and Human Rights*, op. cit., pp. 35-46.

Let us say that, as has been commented in doctrine, the internationalization of human rights¹¹⁵⁷ was a response to historical grievances and serious abuses, and constituted a dismantling of the myth that individuals were sufficiently protected under State jurisdiction.

The fact that there are initiatives and trends to persuade non-state entities as corporations to behave in accordance with human rights standards, and even to hold some non-state entities, as individuals, accountable for violations of human dignity, proves that there is awareness of the potential abuses that non-state entities can commit.

Developments concerning legal capacities created to respond to non-state abuses must thus be understood both as reactions to increased non-state abuses and power due to processes of globalization, weakening of States, changes of identities and other dynamics, which are changes that certainly require a proper and updated regulatory response; and as acknowledgments of the need to be coherent with the legal implications of the full and effective protection of human dignity, which would be limited if it denies the vulnerability of individuals against entities different from States and the consequent need of legal protecting them because the logic of State responsibility can be insufficient to protect them.

Both of those logics are intertwined. Since non-state entities can¹¹⁵⁸ and have always been able to act in a manner that is contrary to human dignity, just as they have always been relevant actors in world social relationships throughout history, human rights law must implicitly or expressly acknowledge the need to protect individuals from non-state *violations* and ignore contrary theories that would deprive its norms of their purposes.

¹¹⁵⁷ Cf. Roland Portmann, *op. cit.*, at 254-257; 33, 54-56.

¹¹⁵⁸ See, among others, Inter-American Commission on Human Rights, *Preliminary Observations of the Inter-American Commission on Human Rights after the visit of the Rapporteurship on the Rights of Afro-Descendants and against Racial Discrimination to the Republic of Colombia*, OEA/Ser.LV/III.134, Doc. 66, 27 March 1999, para. 46; Ilias Bantekas and Susan Nash, *op. cit.*, at 14; Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment, 29 July 1988, paras. 166, 172; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *op. cit.*, para. 140; Inter-American Court of Human Rights, *Case of Castillo-Petruzzi et al. v. Peru*, Judgment, 30 May 1999, para. 89; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 43-44, 47-53, 56-58, 70-73; Human Rights Committee, Concluding Observations, CCPR/C/UNK/CO/1, 14 August 2006, para. 4; Committee Against Torture, Communication No 120/1998: Australia, CAT/C/22/D/120/1998, 25 May 1999, para. 6.5; Inter-American Commission on Human Rights, Resolution 03/08, *Human Rights of Migrants, International Standards and the Return Directive of the EU*; Inter-American Commission on Human Rights, Press Release No 06/09, *IACHR Condemns Killings of Awá Indigenous People by the FARC*; Chris Jochnick, *supra*; Jordan J. Paust, "The Other Side of Right: Private Duties Under Human Rights Law", *op. cit.*; August Reinisch, *supra*; Robert Dufresne, *op. cit.*, at 227. As the Special Tribunal for Lebanon has considered, just as there are express and implied powers, when there are none of these and one such capacity is required for an organ as an international tribunal to fulfill its functions, protect human rights and/or achieve goals inherent to it, it can have such functions. If non-state actors have the *factual –yet legally relevant- potential* to offend dignity, they must have the *inherent duty* to refrain from these legal relevant factual violations, or else relevant goals of the legal system will be left unprotected, contrary to the absolute nature of the core peremptory norms involved. Domestic, international and transnational action that responds to those violations "evinces" those inherent duties. Cf. Special Tribunal for Lebanon, Appeals Chamber, Case No. CH/AC/2010/02, of 10 November 2010, paras. 44-49.

Current social trends have not only made individuals more vulnerable against non-state entities. Thanks to the greater ease of mobilization and exchange of opinions made possible by technological and social progresses, for instance, demands for protection from all abuses are facilitated. Ignorance of those demands will make human rights law incomplete, contradictory, illegitimate and unfair.

The facts that international bodies operating in contexts with highly State-centered competence rules have granted protection against non-state entities directly or indirectly, and that non-jurisdictional mechanisms (such as agreements; creation of non-state legal capacities; contacting and persuading entities, shaming them, or issuing recommendations to them) have been employed, confirm that the horizontality of human rights is not just related to State duties of protection of individuals from other private entities, because it comprises a whole framework that is transversal insofar as it answers to the full protection of human dignity, which is non-conditional and thus cannot be relegated to just one accidental set of relations. Responding to non-state threats directly is not only *pertinent* but also *necessary* for human rights law.

That being said, it is important to examine in greater detail some of the most frequent objections to strategies and paradigms that go beyond the narrow State-centered paradigm and truly answer to the call for fully and effectively protecting *human* dignity. The first thing is to bear in mind that the center of the human dignity paradigm is the protection of individuals, not being it proper to place different entities as States at its center, which would turn things upside down and subvert the principles and values of the framework of protection.

Objections are usually of two kinds: first, objections that consider that assigning negative legal capacities to non-state entities can have the adverse effect of legally or socially legitimizing them; and secondly, the idea that the logic of human rights cannot accommodate protection from non-state violations or that it would be weakened as a result of that direct protection.¹¹⁵⁹

These two criticisms have different concerns and emphasis: while the first type shows fears of a symbolic or legal empowerment of non-state entities, the second one considers that 'expanding' the protection of human rights would be detrimental to the purposes and strengths of human rights law.

¹¹⁵⁹ On these arguments and counter-arguments, cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 25, 32, 41-44; Andrew Clapham and Scott Jerbi, op. cit., at 339; Draft Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, 2003, para. 1; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., paras. 17-26; August Reinisch, op. cit., at 82.

I consider that human rights (*lato sensu*) have always been able to be protected from non-state violations, being the particular the way in which that protection takes place subject to a restricted discretion. Traditionally, this has been done to a large extent in an indirect manner, by means of State duties and responsibility for failing to tackle non-state violations, explicitly or implicitly considered as such. Therefore, for a long time human rights have been protected from non-state violations (sometimes in an incomplete or ineffective way, reason why their regulation must evolve), and somewhat recently that protection has been reinforced. That reinforcement has been sometimes related to the *ratione personae* 'expansion' of specialized human rights norms, and other times to an *international procedural* scope. Such extensions are necessary out of consistency with the foundations, values and goals of the humanitarian *corpus juris*, which require a non-discriminatory and effective protection of all victims.

Apart from this, I disagree with both sets of objections for the following reasons:

a) Concerning the consideration that negative legal capacities of non-state entities designed to protect human dignity may end up legitimizing or empowering those entities somehow, it is convenient to begin by recalling how some international norms expressly make it clear that the fact that an entity is bound by some duties does not entail a change of its status. This is contemplated in common article 3 of the Geneva Conventions of 1949 and international humanitarian law generally, that protects some human rights and guarantees.

That article mentions that parties to non-international armed conflicts must abide by some norms, and that this does "not affect the legal status of the Parties to the conflict." The underlying logic of this provision is applicable in other fields, because if one entity is assigned a legal capacity that is not expressly or implicitly accompanied by other capacities that are necessary for that capacity to have effectiveness, it has no additional legal entitlements or burdens as a result.

From another perspective, the objection under examination has been properly rebutted by Andrew Clapham, who considers that declaring that an entity is capable of perpetrating or cooperating with violations of human rights does not legitimize it at all and actually restricts its behavior.¹¹⁶⁰ Moreover, the finding that such violations have been committed can lead to delegitimation or condemnation, which is far from symbolically empowering or legitimizing it.

Expanding on this idea, it is interesting that considering that an entity has the *capacity* to carry out conduct regarded as reprehensible and deserving regulation by the international community is not 'flattering' at all and opens up the door to, at least, the following implications: labeling an actor as an offender of norms that protect human dignity attaches a negative status, that engages the legal responsibility of that entity if an obligation is breached, its social

¹¹⁶⁰ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 52-53.

accountability when the ethical dimensions of human rights are violated; exposes the entity to possible repercussions, reactions or legal measures adopted to protect victims, sanction violations and enforce the affected norms; encourages examining the behavior of that actor; fosters social and individual examination and mobilization to protect victims and condemn abuses; and prompts subjecting the entity to standards that, if ignored, expose it to further legal and extra-legal repercussions.

Objections to alleged 'legitimizations' of non-state entities have been expressed, for instance, by authors that consider that imposing (negative) legal capacities on perpetrators of acts of terrorism or on armed groups would risk giving them international legitimacy, or that holding corporations subject to human rights standards will empower them and permit them to make their private interests prevail over humanitarian considerations.¹¹⁶¹ To my mind, however, those possibilities are prevented by the fact that violations of human rights and other standards protecting human dignity will in fact de-legitimize offenders, negatively affect their reputation, and possibly expose them to adverse reactions (social, legal or otherwise).

b) As to the objections according to which human rights could be weakened for holding that non-state entities can violate human rights and guarantees and be accountable or responsible for such violations, or that international law can directly protect victims from non-state abuses, the following can be said. Some argue that, historically, human rights were designed to protect individuals from State abuses, and others consider that the human rights system is fine if it is limited to protecting individuals from States. These theories agree on the idea that it is not convenient to alter the individual-State logic and scheme of human rights because doing so may weaken or undermine the human rights system.

To answer to those objections, the first idea that must be considered is that State obligations are in no way altered by non-state human rights negative legal capacities. This has been explained by several authors, as August Reinisch, Scott Jerbi or Andrew Clapham,¹¹⁶² and is demonstrated in international case law, which supports the argument that States and other authorities remain bound by their negative (duty of abstention from violations) and positive obligations even if they have delegated or transferred competences to a non-state entity, and that in all other cases they still have a duty to prevent or address non-state violations.

However, as has been explored before, this strategy is not sufficient and can fail to fully and effectively protect individuals, because violations may remain in impunity (which further

¹¹⁶¹ Cf. Mary Ellen O'Connell, *op. cit.*, pp. 456-458; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 46-53; José E. Alvarez, "Are Corporations "Subjects" of International Law?", *op. cit.*, pp. 21-22.

¹¹⁶² See footnote 59, *supra*.

violates rights and guarantees) and victims be left unprotected even when States with jurisdiction acts with the due diligence with which they have to act, according to their obligations of means. Therefore, not only human rights would not only not be weakened by the existence of non-state responsibilities, but their values and logic would actually be undermined *if those responsibilities do not exist*, because human dignity demands protection from all threats in an effective way, that requires substantive and sometimes procedural non-state capacities. Paradoxically, what critics of non-state capacities fear can come true if their position is upheld!

Some authors argue that human rights law was created with the purpose of protecting individuals from States, and that it should remain as its exclusive function to not lose its identity, be weakened by offering more than can be handled, or be manipulated by States that may invoke non-state duties to elude supervision of compliance with their own obligations.

In regard to the possibility of States diverting attention away from their human rights duties by taking advantage of the existence of non-state human rights duties and other legal capacities, it must be repeated that in legal terms States remain bound by their obligations. Therefore, any attempts by them to elude scrutiny should and can be condemned and denied by national authorities, international bodies and independent examiners of the local, transnational and domestic levels (NGOs and judicial authorities, among others).

On the other hand, it is doubtful that since their inception or recognition –being the election of the term dependent on one’s theoretical conception of human rights-, the idea of essential, fundamental or inherent rights was limited to the protection of individuals against States.

To examine this, it is convenient to stress that while some consider that the notion of natural rights differs from the contemporary conception of human rights due to differences of the foundations of each category, both seek to protect the inherent rights and worth of individuals, and therefore are connected historically and theoretically. Moreover, the former inspired some features of positive human rights law and may have contributed to its emergence;¹¹⁶³ and some meta-juridical teleological (rational, ethical, theological or otherwise) conceptions identify many rights from both categories. What is interesting for the issue being discussed is that some natural rights theories defended the idea that individuals had to be protected *from other individuals* –non-state entities-, and this was a reason why some State functions were legitimized: not being ends in themselves, I consider it important to hold that States are empowered precisely to protect

¹¹⁶³ Cf. section 1.1, supra.

inherent rights of individuals against non-state entities, among other functions, and their powers are always subject to serving human beings.¹¹⁶⁴

The evolution of the humanitarian legal *corpus*, not limited to the contemporary conception of positive human rights (broadly speaking, which include *stricto sensu* rights too), later incorporated the necessary protection of individuals against States, because it was recognized that individuals were not sufficiently protected by the assignation of protection powers to States, which are potential violators that can abuse their power or otherwise act against human dignity, for instance due to inertia and omissions of protection despite their duties.

These considerations reveal two things: first, as the Inter-American Court of Human Rights has stated, the human rights system is not static but dynamic. This is consistent with the general evolutionary character of *jus gentium*, acknowledged by the International Court of Justice and the Inter-American Court of Human Rights.¹¹⁶⁵ *Ergo*, the humanitarian *corpus juris* can continue to evolve and accordingly improve the protection of human dignity it offers, including better and more direct protection from non-state abuses, as is direly needed in practice by victims. After all, just as concerns about State threats led to protection against them, the undeniable presence of frequent and heightened non-state threats must likewise be legally prevented and dealt with.

Such protection would be necessary even if non-state actors were not empowered and able to elude control more often due to globalization and other trends and dynamics, because the foundation and source of human rights and guarantees demands a universal protection from all threats.

¹¹⁶⁴ Cf. John Locke, *Second Treatise of Government*, where it is said that “But because no political society can be, nor subsist, without having in itself the power to preserve the property, and in order thereunto, punish the offences of all those of that society; there, and there only is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. And thus all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules, indifferent, and the same to all parties; and by men having authority from the community, for the execution of those rules, decides all the differences that may happen between any members of that society concerning any matter of right; and punishes those offences which any member hath committed against the society, with such penalties as the law has established: whereby it is easy to discern, who are, and who are not, in political society together. Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them, and punish offenders, are in civil society one with another”; Thomas Hobbes, *Leviathan*, 1651 (“The only way to erect such a Common Power, as may be able to defend them from the invasion of Forraigners, and the injuries of one another, and thereby to secure them in such sort, as that by their owne industrie, and by the fruites of the Earth, they may nourish themselves and live contentedly; is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say, to appoint one man, or Assembly of men, to beare their Person”); Charles de Secondat, Baron de Montesquieu (Thomas Nugent, translator), *The Spirit of Laws*, 1752 (“In the state of nature, indeed, all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the laws”); Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, *Juridical Condition and Human Rights of the Child*, 28 August 2002, para. 19.

¹¹⁶⁵ See footnote 575, *supra*.

Concerning the room for improving the legal protection of human dignity from non-state threats there are examples of developments, as the gradual acceptance by some supervisory bodies of their power to examine non-state conduct, issue recommendations concerning responses to their violations, or the regulation of legally relevant non-state behavior in criminal law and other fields.

Secondly, it can be inferred that just as the legal evolution of the humanitarian *corpus juris* incorporated both *internationalized* and internal protection against State violations, protection against non-state entities can also be internationalized, as has happened in some cases.

To expand upon this, it can be said that protection from non-state violations usually exists under domestic law, in an imperfect manner or not, because many domestic norms and mechanisms protect human dignity from non-state threats expressly or implicitly. For instance, it is undeniable that criminal law protects some humanitarian legal goods, and civil or tort law also permit individuals to be protected from harm to their inherent rights or to request protection of entitlements closely related to their inalienable dignity. Actually, the facts that human rights violations are frequently committed by non-state entities, and that State responsibility can coexist with that of non-state entities, have led to legislation and demands to legally protect individuals from those entities in ways that, despite not being formally part of 'human rights' *stricto sensu*, belong to the humanitarian *corpus juris* in substantive terms.

Moreover, scholars have posited the idea that there have been different stages in the evolution of the legal protection of human rights, namely: their constitutionalization, internationalization –incorporation and recognition in *jus gentium*–, and specialization, which consists in the design of specialized norms that either better protect or develop some rights that require special attention given their vulnerability, or respond to the specific challenges posed by some actors. Simultaneously, there is a related process of humanization of international law that, alongside the process of inclusion (increasing international regulation of relevant non-state conduct), seeks to make law better reflect and answer to reality and human and social needs and better protect human dignity, which demands full protection of individuals not limited to protection from just some potential violators.

Concerning these processes, the fact that some norms and principles (even those that belong to soft law or have a voluntary nature) regulate humanitarian standards with which some non-state entities as corporations must comply, can be understood as a necessary part of the *specialization* and humanization processes of law, in the sense that additional regulation is necessary not only to answer to special needs of some rights and individuals, but also to regulate

the behavior of entities that have been identified as potential or frequent violators in depth, to discourage and sanction their abuses and to educate them to respect human rights.

The processes of internationalization and specialization of human rights are not limited to protection from non-state actors but certainly permit and require improving that protection, given the necessity of protecting victims against their violations, as required by the legal foundation of those rights and human rights principles. This dimension of protection is accepted by NGOs, international bodies and authors.

The need and possibility of protecting human dignity from non-state abuses is confirmed by the existence of standards and codes of conduct issued by public and private organizations, such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the OECD guidelines for multinational enterprises, the Global Compact, a framework and principles of corporations and human rights, and instruments drafted by NGOs, private and public entities,¹¹⁶⁶ among others. Those instruments and initiatives acknowledge that non-state conduct must be regulated in order to better protect human dignity.

The facts that all entities have a “capacity to have capacities” that are not prohibited, illogic or impossible,¹¹⁶⁷ and that rights can be unaccompanied by remedies, and that likewise not all addressees of duties and legal burdens have related procedural capacities,¹¹⁶⁸ rebut the arguments that deny the possibility and necessity of non-state actors having legal capacities that seek to make them respect (and sometimes protect) human rights. Moreover, this is confirmed by the fact that there can be international supervision of non-state conduct, which is consistent with the mandate to protect all victims without discrimination even against private entities and with the goal to not let any abuse against human dignity, State or not, remain in impunity.¹¹⁶⁹

Lastly, regarding the idea that the human rights discourse or framework could be weakened because of its ‘subjective expansion’, apart from recalling that this protection already exists in some cases in an indirect and sometimes direct manner and human rights law still protects individuals from State abuses, it can be said that human dignity must always be

¹¹⁶⁶ Cf. Alexandra Gatto, op. cit., pp. 425-426, 428-429, 431-432; August Reinisch, op. cit., pp. 42-50; Elena Pariotti, op. cit., pp. 99-100; John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, op. cit.; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., para. 23; International Standard ISO 26000, *Guidance on Social Responsibility* (cf. http://www.iso.org/iso/discovering_iso_26000.pdf; http://www.iso.org/iso/iso_26000_project_overview.pdf, both last checked on 21/02/2012); OECD Guidelines for Multinational Enterprises (2011 Edition).

¹¹⁶⁷ Cf. Gaetano Pentassuglia, op. cit., at 391; Anna Meijknecht, op. cit., pp. 34-42, 44, 61.

¹¹⁶⁸ Anna Meijknecht, op. cit., pp. 56-62; Gaetano Pentassuglia, op. cit., at 391.

¹¹⁶⁹ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, 17 September 2003, paras. 72-85, 141-147.

protected effectively and fully in an *integrated* global legal space: therefore, it is not necessary to always resort to international authorities with a contentious jurisdiction (judicial or not), being there multiple actors, including domestic ones, that can contribute to implementing international norms on the protection of human rights and guarantees from non-state violations.

Nonetheless, the wrongfulness of non-state violations must always be recognized and condemned, to make every actor and authority aware of the need of protecting individuals against non-state entities and enable or demand protection mechanisms –non-judicial or national, for instance-. This requires international substantive norms that, in turn, demand domestic authorities and legal systems to recognize and appropriately respond to non-state violations of human rights.

Furthermore, in my opinion the identity of human rights law and other humanitarian norms is not altered but fully realized if protection against non-state entities is granted: otherwise, the praxis of that *corpus juris* would betray its foundation of the non-conditional protection of human dignity, and so be inconsistent and defective. In practice, this may mean that communities and victims may feel abandoned¹¹⁷⁰ by a legal system that claims to protect the rights of *humans* but yet attaches more importance to rigid, outdated or false *theories* than to real *human needs* and fails to protect all individuals from threats to the exercise of their inherent rights, since in practice those violations are committed by both States and non-state actors in conjunction or alone.

Furthermore, just as the evolution of the legal protection of human dignity granted protection from States, the vulnerability of individuals before other actors must be regulated, as confirmed by theories of the rule of law, that consider that it demands regulating both authorities and non-authorities, and that the power to affect legal interests must be regulated.¹¹⁷¹ The power of violating human rights and guarantees is a problematic one, and individuals must be protected from it. This means that they must be protected from all actors, since all of them have the capacity to violate those rights and guarantees.

Logically, the maintenance of State duties, the overarching requirements of the rule of law, and compliance with the conditions of legality and respect of fundamental rights, that are

¹¹⁷⁰ Cf. Chris Jochnick, op. cit., pp. 57-58; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 44.

¹¹⁷¹ Cf. Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, op. cit., pp. 13-18, 40. Analogously to the exploration of historical objections mentioned and properly rebutted by Clapham, Nijman says that protecting all individuals by law in the international level, against *power* abuse and abuse by those not in positions of power, is “more helpful than conceptualization which proceeds from the power *against* which the rule of law was first developed to make a stand – arguably this is historically contingent” (emphasis added). What matters is the essence of protecting individuals no matter what or in what circumstances (reminiscent of non-relationness or non-conditionality”), as that train of thought confirms. On Clapham’s analysis of historical objections, cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 33-35, 55-58; José Manuel Cortés Martín, op. cit., pp. 52-53.

never lost, not even for violators, ensure that State abuses will be deemed unlawful. Likewise, the fact that international legal personality as a concept was designed by Leibniz in order to address some social realities and problems makes it necessary to consider how individuals are to be protected against entities that can violate their innermost and most essential rights and guarantees in today's world... actually they have always had this capacity, heightened in some respects nowadays.

As follows from the previous arguments, the humanitarian *corpus juris* risks losing its legitimacy and consistency if victims are not *legally* protected from all violations, State or not, in an effective manner. Rather than weakening human rights, the protection from non-state violations reinforces them and contributes to their continued relevance and to achieving the purposes of that *corpus juris*.

Certainly, the inherent worth of every single human being is not only existent and relevant in relations with States. Therefore, a legal framework founded upon the full protection of that value must not ignore human suffering and violations of human dignity at the hands of non-state entities.

As explained in this Chapter, as long as it respects several conditions –of fundamental rights, legality, logic and peremptory law-, *jus gentium* can regulate substantive and procedural legal capacities of non-state entities through its sources. This can be done either to strive to make them refrain from engaging in violations and be sanctioned if they commit them, or to entitle and legitimize promotion and cooperation activities carried out by them concerning the protection of human dignity. Those legal capacities can be rights or other entitlements, in the positive dimension, and obligations or other legal burdens that attempt to regulate and control non-state behavior in order to protect individuals from it.

The impact of those legal capacities is very important. Among others, they have an educative function, that can make their direct addressees, stakeholders and third parties change their position and behavior concerning the respect and promotion of human rights and guarantees. Additionally, norms that regulate those capacities make it possible for activists and individuals to invoke them when making claims; and procedurally, they either permit or command actors and authorities across different levels of governance to operate in order to fully protect human beings and make law respond to reality and the need of attaching the greatest importance to the respect of human dignity.

The mechanisms with which actors and authorities can strive to protect human dignity from non-state violations, as commanded or permitted by law, are plenty and varied. For

instance, acculturation, persuasion and coercion are complementary strategies¹¹⁷² that can strengthen the protection of human dignity. The features of these and other strategies and mechanisms, when combined, make the accomplishment of the task of protecting human rights and guarantees from non-state abuses more likely.

Many of those mechanisms can be used by different entities *and* in different legal systems. Through implementation, promotion, coercion or persuasion they can make the substantive and procedural legal capacities of non-state actors operative and effective. This, in turn, answers to the legal and ethical foundations of the humanitarian *corpus juris* explained in Part I and, accordingly, to human needs. Some of those mechanisms are explored in Chapter 8.

Altogether, mechanisms that can currently be used to protect human dignity can be found in multiple normative systems, which share legal interests and values (legal goods), some of which have a humanitarian nature. This, coupled with the impossibility of effectively protecting human dignity unless mechanisms and actors from different normative systems and levels of governance cooperate to protect shared legal goods, makes it important to take into account the global dimension of the practical protection of human dignity, that ignores formal boundaries and answers to how legal values are and must be effectively protected in practice, as required by axiological and effectiveness considerations.

¹¹⁷² Cf. Harold Koh, "Why Do Nations Obey International Law?", *op. cit.*, pp. 2600-2601, 2634, 2649.

CHAPTER 6. OBLIGATIONS OF NON-STATE ENTITIES THAT SERVE TO PROTECT HUMAN DIGNITY

According to the principle of legality, the analysis of the possible responsibility of non-state entities and their duties to repair victims must inexorably start from the identification of international obligations of those entities, because that responsibility presupposes that an obligation has been breached and that such breach can be imputable to those entities.¹¹⁷³

In legal terms, differences about the origin or source of an international obligation do not change the fact that responsibility emerges when *any* legal obligation, regardless of its origin, is breached. Hence, an actor is *equally* responsible under international law even if it fails to abide by duties created by general principles, custom, treaties, unilateral acts, or other sources of law.¹¹⁷⁴

Because of this, the International Law Commission has commented that responsibility is a unitary concept in international law, since there is no difference between “contractual” responsibility and “tort” responsibility, for instance. In the words of the Commission:

“[T]here is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation “regardless of its origin” [...] International obligations may be established by a customary rule of international law, by a treaty or by a general principle [...]

Thus, there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*. In the “*Rainbow Warrior*” arbitration, the tribunal affirmed that “in the field of international law there is no distinction between contractual and tortious responsibility”. As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the “civil” and “criminal” responsibility as is the case in internal legal systems”¹¹⁷⁵ (emphasis added).

As the Commission acknowledges, the idea that in international law there is no difference between contractual and other responsibilities has been recognized in international arbitration.¹¹⁷⁶

This makes it necessary to ask if international law can accommodate a framework analogous to domestic tort law to permit individuals who have suffered harm in connection with violations of human rights and guarantees to seek reparations and protection even if they had no previous relations with offenders, which should be responsible for breaching prohibitions of inflicting harm. Thus, it must be asked if victims of non-state entities can have the right to ask those entities to repair them when they disregard their human dignity and, therefore, if those entities have (correlative) duties to refrain from those violations.

¹¹⁷³ Cf. articles 1 through 15 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts of 2001 (A/56/49(Vol. I)/Corr.4), and 3 through 13 of the Draft articles on the responsibility of international organizations, in the version adopted by the ILC in 2011 (A/66/10).

¹¹⁷⁴ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, pp. 31, 55, paras. 3 and 4 of the commentary to article 12.

¹¹⁷⁵ *Ibid.*, at 55, paras. 3 and 5 of the commentary to article 12.

¹¹⁷⁶ Cf. *Ibid.*, at 55, para. 5 of the commentary to article 12.

As argued before, all violations of human rights and guarantees are legally relevant. However, perhaps this would not necessarily mean that a legal obligation to not violate them always binds material offenders. Consequently, having examined in Chapters 4 and 5 how legal capacities of non-state entities can be created with the purpose of protecting human dignity, it is now necessary to ascertain what types of non-state international obligations can be created with the aim of protecting human dignity. As will be seen, there are different possibilities: general or specific obligations; and express or implicit duties, including a principle that regulates a general prohibition of violations of human dignity and implicit obligations that forbid some abuses.

It can also be considered that apart from a principle that forbids violations in general terms, international law can regulate in greater detail specialized non-state obligations with varying degrees of prohibitions or mandates, for instance outlawing the violation of concrete rights, such as those found in a given branch of law or an intersectional group of rights. Specialized obligations complement the general prohibition of violations and implicit obligations, reinforcing the protection of individuals.

Additionally, it is necessary to bear in mind that the necessary involvement of non-state offenders in the reparations of victims of violations of human dignity requires the existence of obligations to participate in reparations that bind them. This makes the creation of primary and secondary norms on non-state human rights obligations a pressing matter.

6.1. General and implicit human rights obligations of non-state entities

The fact that international law can respond to non-state violations of human rights with varying degrees of intensity and involvement, as examined in Chapter 4, could seem to suggest that core norms that protect individuals against harm and injuries and prohibit non-state actors from committing them do not exist. However, detailed examination may reveal elements of general prohibitions to harm to individuals in ways that are contrary to their inherent and non-conditional worth and of implicit obligations that forbid certain violations.

It is convenient to start considering that, as the ILC suggests, in international law there may be an omnipresent or pervasive correlation between rights and duties, including *erga omnes* duties¹¹⁷⁷ (as human rights obligations), being one always present when the other exists.

If that correlation exists, it can be considered that just as the identification of a duty indicates the existence of a correlated right protected by that duty, the existence of a right or a guarantee may presuppose the existence of at least implicit duties of respect –negative duties of

¹¹⁷⁷ Cf. *Ibid.*, para. 3 of the commentary to article 2, at 35.

abstention-, addressed towards entities that can violate that right (and certainly non-state entities can violate human rights), especially when that right has an *erga omnes* nature in the transversal sense, i.e. it displays effects across relations with all possible entities and manifestations. Let us examine these considerations in detail.

Concerning the notion of the correlation between rights and duties in international law, the International Law Commission expressed that:

"In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. PCIJ spoke of an act "contrary to the treaty right[s] of another State" in its judgment in the *Phosphates in Morocco* case. That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States"¹¹⁷⁸ (emphasis added).

As said above, if a correlation between rights and duties does exist, it must perforce operate in two ways. Therefore, when the international legal system recognizes or creates a right or guarantee, it indicates entities that may potentially favor or prevent its exercise that its content is protected and that, for this reason, they must refrain from violating it, especially when it embodies values and interests of the world or a regional community (*erga omnes* and *erga omnes partes* norms will thus be involved) and when *jus cogens* norms are at stake. Prohibitions of that sort can be general or specialized duties dealing with some rights and vulnerable victims or actors, and can be express or implicit, as befits the necessary correlation between rights and duties. Furthermore, the emphasis laid sometimes on the existence of rights and guarantees, whose violation is equated with a breach, which presupposes a duty, is nothing but a confirmation of the existence of implicit obligations, which in my opinion exist in the field of the protection of human dignity.

This logic seems to be even more pressing when the rights in question are either peremptory rights –which generate *erga omnes* obligations all the time, albeit the latter do not always flow from those rights¹¹⁷⁹ or otherwise have an *erga omnes* character. In those cases, the community dimension of international society values their respect.¹¹⁸⁰ Moreover, when the *content* and nature of those rights can be violated by different actors, it is logic that the prohibition

¹¹⁷⁸ Ibid.

¹¹⁷⁹ Cf. Ibid., pp. 111-112, 126, para. 7 of the commentary to Chapter III and para. 6 of the commentary to article 48; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 67-69; Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens-: la transformación de los derechos internacional y colombiano gracias al Ius Cogens internacional*, op. cit., pp. 147-160; Daniel O'Donnell, op. cit., at 73; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 80.

¹¹⁸⁰ Cf. Santiago Villalpando, op. cit., pp. 394, 400-401, 410; ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, para. 151.

of all violations of those rights extends to all those actors, whose conduct is thus legally relevant because they have the capacity to attack normative values held dear by a proto-community.

Regarding *erga omnes* obligations, it can be said that *they include human rights obligations*¹¹⁸¹ and indicate the existence of ‘community interests’¹¹⁸² in the ‘international’ or world society. Given this connection, it is natural to consider that this society expects their communal interests to be upheld thoroughly, which implies protecting them from all offenders and considering all offenses to shared legal values and interests as unlawful.

Moreover, *erga omnes* obligations are owed *to all* members of a group or collectivity, having thus all of those members an interest in their respect and an entitlement to demand it.

In addition to this, obligations can have an *erga omnes* character in another sense, according to which they bind *all potential offenders*. This complementary dimension is necessary for common interests to be protected because, as Santiago Villalpando comments, when international legal community interests are involved “any attack on the public good necessarily affects the enjoyment of its benefits by all members of the community”¹¹⁸³ (emphasis added).

The existence of several dimensions of *erga omnes* obligations has been *de facto* handled in international jurisprudence. From a theoretical perspective, Antonio Cançado has clearly expounded and described the existence of different manifestations of *erga omnes* obligations. According to him:

“In my view, we can consider [...] obligations *erga omnes* from *two dimensions, one horizontal and the other vertical, which complement each other*. Thus, the obligations *erga omnes* of protection, *in a horizontal dimension, are obligations pertaining to the protection of the human beings due to the international community as a whole*. In the framework of conventional international law, they bind all the States Parties to human rights treaties (obligations *erga omnes partes*), and, in the ambit of general international law, they bind all the States which compose the organized international community, whether or not they are Parties to those treaties (obligations *erga omnes lato sensu*). *In a vertical dimension, the obligations *erga omnes* of protection bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations)* [...]”

For the conformation of this vertical dimension have decisively contributed the advent and the evolution of the International Law of Human Rights. But it is surprising that, until now, these horizontal and vertical dimensions of the obligations *erga omnes* of protection have passed entirely unnoticed from contemporary legal doctrine. Nevertheless, I see them clearly shaped in the legal regime itself of the American Convention on Human Rights. Thus, for example, as to the vertical dimension, the general obligation, set forth in Article 1(1) of the American Convention, to respect and to ensure respect for the free exercise of the rights protected by it, generates effects *erga omnes*,

¹¹⁸¹ Santiago Villalpando, op. cit., pp. 388-389, 394, 401; Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens–: la transformación de los derechos internacional y colombiano gracias al Ius Cogens internacional*, op. cit., at 155; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 109-110; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 69, 75-77, 79; International Court of Justice, *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, paras. 33-34.

¹¹⁸² Cf. Santiago Villalpando, op. cit., pp. 389, 394, 401.

¹¹⁸³ Cf. Santiago Villalpando, op. cit., at 392.

encompassing the relations of the individual both with the public (State) power as well as with other individuals (*particuliers*)¹¹⁸⁴ (emphasis added).

The argument of Cançado is largely based on the effects of State obligations of protection, and emphasizes indirect effects of human rights towards non-state actors, which are limited, because according to some possible interpretations of that theory, without the duties of a State the effects of a norm would not reach non-state actors and bind them to respect human dignity. For this reason, rather than using the expression 'vertical' dimension of *erga omnes* obligations, I prefer to talk of the 'transversal' or comprehensive effects and subjective scope of human rights and guarantees. The idea that Cançado bases his theory on State duties can be clearly seen in another opinion of his, according to which:

"It is precisely in this private ambit that abuses are often committed against children, in face of the omission of public power, - what thus requires a protection of the human rights of the child *erga omnes*, that is, including in the inter-individual relations (*Drittwirkung*) [...]"

This is a context in which, definitively, the obligations of protection *erga omnes* assume special relevance. The foundation for the exercise of such protection is found in the American Convention on Human Rights itself. The general obligation which is set forth in its Article 1.1 to *respect and ensure respect* for the protected rights - including the rights of the child, as stipulated in Article 19 - requires from the State the adoption of positive measures of protection (including for preserving the preponderant role of the family, foreseen in Article 17 of the Convention, in the protection of the child - para. 88), applicable *erga omnes*. In this way, Article 19 of the Convention comes to be endowed with a wider dimension, protecting the children also in the inter-individual relations¹¹⁸⁵ (emphasis added).

It must be admitted that due to the limited jurisdiction and competence of many international human rights supervisory bodies, that affects their jurisdiction *ratione personae*, the dimensions described by Cançado are the ones most handled those bodies. However, nothing prevents that competence from expanding or other international mechanisms of protection and broad substantive guarantees from being regulated and used to highlight protection from non-state abuses. Among those bodies it is possible to find the Inter-American Court of Human Rights, according to which:

"The effects of the fundamental principle of equality and non-discrimination encompass all States, precisely because this principle, which belongs to the realm of *jus cogens* and is of a peremptory character, entails obligations *erga omnes* of protection that bind all States and give rise to effects with regard to third parties, including individuals [...]"

In an employment relationship regulated by private law, the obligation to respect human rights between individuals should be taken into consideration. That is, the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (*erga omnes*). This obligation has been developed in legal writings, and particularly by the *Drittwirkung* theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals.¹¹⁸⁶

¹¹⁸⁴ Cf. Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 77-78.

¹¹⁸⁵ Cf. Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, paras. 63-64.

¹¹⁸⁶ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 110, 140.

Given the limitations of some mechanisms of international supervision, it must be acknowledged that the theory of Cançado is correct from their perspective. Certainly, the obligations of protection that bind States and other authorities, and treaty and customary duties to adapt internal norms and practices to international legal demands,¹¹⁸⁷ oblige them to protect individuals from all threats to human rights within their jurisdiction. In this way, human rights law reaches potential offenders indirectly, but that is not the only way in which they can be reached.

Certainly, the indirect dimension can be complemented by another, because human rights and guarantees can also have effects that reach non-state actors directly, which is often required due to the need to interpret and implement norms that protect important legal values that demand protection from all violations in a way that makes them effective in practice.

The different dimensions studied above indicate that, ultimately, *erga omnes* obligations must be understood as affecting everyone: both concerning those entitled to demand respect and those that owe respect.

In other words, human rights *erga omnes* obligations are owed towards everyone and protected from everyone. This second dimension has both: a) an *internal* manifestation, binding in the domestic or internal normative systems, reaching potential offenders through the mediation of authorities; and sometimes b) a direct international manifestation, related to the possibility and importance of directly forbidding non-state violations under international law. It is justified by the importance of the values protected and the fact that they can only be effective if they are protected from every potential violation, because human dignity (the foundation of those rights) is non-conditional and must be protected from all possible offenders, who ought to have a duty not to infringe on rights. To my mind, the correlation between rights and duties and preceding considerations suggest that a principle of law already regulates an implicit duty prohibiting non-state violations.

Concerning this, it is pertinent to say that Hersch Lauterpacht considered that the effectiveness of international protection of individuals rested upon the “evolution of international morality”, which in turn rests on not sending a message that some actors are exempted from obligations to respect international law.¹¹⁸⁸

The direct manifestation of *erga omnes* obligations that protect human dignity implies that there can be obligations of potential offenders not to breach those norms, as required by the importance attached to their respect by the global community, revealed precisely by the *erga*

¹¹⁸⁷ Cf. articles 1 and 2 of the American Convention on Human Rights; Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., paras. 78, 81, 88, 103-104, 149, 153, 155, 164, 167, 171; Human Rights Committee, General Comment No. 31, op. cit., paras. 13-14.

¹¹⁸⁸ Cf. Hersch Lauterpacht, op. cit., pp. 46 and 47.

omnes character of obligations, that indicate agreements on shared legal goods, as those protected by human rights and guarantees¹¹⁸⁹.

Concerning the *ratione loci* and *ratione personae* scopes of *erga omnes* obligations based on human dignity, it is important to distinguish between universal *erga omnes* obligations – derived from peremptory norms or from dispositive universally applicable norms-, which have effects that reach all members and actors of the international society (that have an interest in their respect and a duty to respect them); and *erga omnes partes* obligations, which are applicable only in regard to certain regions or entities bound by a given treaty or norm.¹¹⁹⁰

According to the jurisprudence of the International Court of Justice, *some* norms that protect human dignity are universal *erga omnes* obligations, as seen in the *Barcelona Traction Case*,¹¹⁹¹ and authors as Antonio Cançado have recognized that not all human rights norms generate obligations that belong to that category but are nevertheless *erga omnes partes* norms¹¹⁹² (and can become universal if law changes). In the aforementioned case, the ICJ mentioned that:

“In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character¹¹⁹³ (emphasis added).

The International Law Commission, in turn, has distinguished between universal and non-universal *erga omnes* obligations.¹¹⁹⁴

¹¹⁸⁹ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, pp. 126-127, paras. 6 through 9 of the commentary to article 48; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 77.

¹¹⁹⁰ Ibid.

¹¹⁹¹ Cf. International Court of Justice, *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, paras. 33-34.

¹¹⁹² Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 77.

¹¹⁹³ Cf. International Court of Justice, *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, paras. 33-34.

¹¹⁹⁴ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 126, para. 6 of the commentary to Article 48, where the ILC comments that “[u]nder paragraph 1 (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as “obligations *erga omnes partes*.”

The fact that a given obligation belongs to one or the other category can have relevant implications. Concerning the ideas proposed herein, while all potential offenders are bound by universal *erga omnes* regulations, *erga omnes partes* obligations only have effects towards actors in a given region or legal space of applicability (not necessarily in geographical terms).

This implies that the fact that a norm that protects human dignity does not have a universal scope of application does not detract from its possibility of binding non-state actors implicitly insofar as they fall within their restricted scope. In those events, prohibitions of violations of human dignity must be adjusted to the scope of these norms, binding those non-state entities that operate in the field or region in which *erga omnes partes* obligations are applicable. Therefore, the demand that non-state violations of human dignity are prohibited implies that some conduct must be forbidden universally and some conduct prohibited only in some regions or fields of applicability. This demand can be fleshed out and materialized by implicit and express duties that forbid abuses and harm, the breach of which generates legal responsibility.

The importance of *erga omnes partes* duties and their horizontal effects were highlighted by Antonio Cançado, according to whom:

“[T]he obligations *erga omnes partes* are not to be minimized, nor at the conceptual level, as, by means of the exercise of collective guarantee, such obligations can serve as guide, or pave the way, for the crystallization, in the future, of the obligations *erga omnes lato sensu*, due to the international community as a whole. And, at the operative level, the obligations *erga omnes partes* under a human rights treaty such as the American Convention also assume special importance, in face of the current diversification of the sources of violations of the rights enshrined into the Convention, which requires the clear recognition of the effects of the conventional obligations *vis-à-vis* third parties (the *Drittwirkung*), including individuals (e.g., in labour relations)¹¹⁹⁵ (emphasis added).

In light of the previous considerations, it can be considered that the violation of human rights by a non-state actor should amount to a breach of a correlated human rights *erga omnes* obligation that binds that actor, which cannot be not based on notions of reciprocity but on the existence of general and common legal interests of the international society.

It may be asked whether national Courts that take into account international law when examining non-state conduct have endorsed developments regarding the responsibility of non-state actors. Some of them have adopted an approach according to which actors responsible for violating *jus cogens* clearly have legal responsibility. The principle that regulates an implicit duty correlative to human rights indicated before is broader than this approach. Those two approaches are clearly *complementary* and domestic decisions may be explained by limitations in the scope of national laws or lack of development regarding the possibilities of interpretation of *jus gentium*.

¹¹⁹⁵ Cf. Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, op. cit., para. 83.

Concerning internal approaches, some judges of the United States of America, when examining the ATCA or ATS (Alien Tort Statute), have considered that they can hold non-state actors as individuals or corporations responsible for violating human rights embodied in norms with a universal acceptance, which can coincide with *jus cogens* norms, as commented by Roland Portmann;¹¹⁹⁶ although others consider that this universality alludes to the general customary nature of the international human rights norms.

In this regard, for example, some American judges and author Chimène I. Keitner differ from Portmann, and instead of equating universality with the superior hierarchy of some norms, consider that it is customary international law as a source which operates as the benchmark with which to identify norms of general application in the international society with a scope of application that is so broad that the obligations created by them bind (implicitly or not, I might add) non-state or State actors.¹¹⁹⁷ Some may consider that this idea is apparently confirmed by the fact that prohibitions imposed on non-state actors under classic international law, as the prohibition of piracy, were covered by the ATS¹¹⁹⁸ in an age in which peremptory law was not formally recognized in treaty law.

This view seems to be confirmed by international case law and doctrine, which admit that customary law may create obligations of non-state entities.¹¹⁹⁹ However, in practice U.S. Courts have sometimes protected some rights and not others, and some rights are protected with limitations (e.g. protection from torture only from States) that are not present in customary law or *jus cogens* but only in some instruments and for their purposes. Perhaps there is uncertainty or lack of consistency.¹²⁰⁰ This proves that despite the fact that State agents can implement international law, it is unreliable to always trust them and to interpret all *jus gentium* in light of their decisions, which may be erratic or constrained by purely domestic legal considerations.

¹¹⁹⁶ Cf. Roland Portmann, op. cit., pp. 162-167.

¹¹⁹⁷ Cf. United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, pp. 3-5, 11, 15, 17, 23; United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010, pp. 1-3, 6-7, 9-10, 24, 26, 31, 35, 48; Chimène I. Keitner, "Conceptualizing Complicity in Alien Tort Cases", op. cit., pp. 84-87, 101.

¹¹⁹⁸ Cf. United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, pp. 3-4; United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010, pp. 16-18.

¹¹⁹⁹ Cf. sections 5.1, 5.2 and 5.4, supra.

¹²⁰⁰ Compare ICTY, *Prosecutor v. Anto Furundzija*, Judgement, 10 December 1998, paras. 159-162, Concurring Opinion of Judge Cecilia Medina Quiroga to: Inter-American Court of Human Rights, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment, 16 November 2009, paras. 5-7, 10-17, 20 with: United States Court of Appeals for the District of Columbia Circuit, *Ali Mahmud Ali Shafi, Lamia Ali Shafi, et al. v. Palestinian Authority*, No. 1:09-cv-00006, 14 June 2011, pp. 13-16; Concurring Opinion of Judge Leval to: United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010, at 78.

From an international legal perspective, the two aforementioned theories complement each other: peremptory law is so important that, for the sake of its effectiveness, absolute character and prevalence demanded by it,¹²⁰¹ the imposition of implied duties on entities that can violate *jus cogens* is a *necessary way to protect its norms* (the concept of necessity for restrictions of conduct under international human rights law is not identified with indispensability but with the presence of serious reasons that demand protection of legitimate essential aims).¹²⁰²

Customary law, in turn, is known to be capable of regulating obligations of non-state actors, for instance obligations to protect human dignity, as happens with some criminal or humanitarian customary norms, among others. Moreover, this possibility is not limited to customary law, because all sources of international law can directly regulate non-state conduct and legal capacities, as explained in Chapter 5.

The existence of an implicit obligation that prohibits violations of *jus cogens* is necessary and flows from its features, as indicated above and in the *Furundzija* case (see below). In turn, the creation of general prohibitions of violations of customary human rights law is encouraged given its general applicability and the implications of human rights and human dignity, apart from the need that international substantive law outlaws all non-state violations (see Chapter 4).

My theory about an obligation of all actors to refrain from violating essential interests of the international community enshrined in *jus cogens* is supported by arguments as those of José E. Alvarez, who has mentioned that it is possible to “find implicit duties on corporate entities (as well as other non-state actors) from the principle of universal jurisdiction as applied to *jus cogens* prohibitions”.¹²⁰³

Roland Portmann also accepts a presumed and automatic obligatory character of peremptory law in relation to non-state entities. Other authors agree with this idea or have similar theories, and some even consider that all subjects of international law are obliged to comply with *erga omnes* obligations.¹²⁰⁴ Even John Ruggie, who was reluctant to recognize or draft an obligatory set of human rights obligations of corporations in the framework and principles he worked on as Special Rapporteur, recognized that fundamental humanitarian and criminal provisions (belonging in my

¹²⁰¹ Cf. Nicolás Carrillo Santarelli, *Los retos del derecho de gentes –Ius Cogens–: la transformación de los derechos internacional y colombiano gracias al Ius Cogens internacional*, op. cit., pp. 66-73, 161-167; article 53 of the Vienna Conventions on the Law of Treaties of 1969 and 1986; articles 26, 40, 41, and 50 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts, and 26, 41, 42, and 53 of the Draft articles on the responsibility of international organizations, the version adopted by the ILC in 2011.

¹²⁰² Cf. Inter-American Court of Human Rights, Advisory Opinion OC-5/85, op. cit., para. 46.

¹²⁰³ Cf. José E. Alvarez, “Are Corporations “Subjects” of International Law?”, pp. 31-32.

¹²⁰⁴ Cf. Roland Portmann, op. cit., pp. 162-167, 273-274, 276-277, 280-281; Stephan Hobe, op. cit., at 130; Mireia Martínez Barrabés, op. cit., pp. 238, 265; International Law Association, Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors: Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, The Hague Conference, 2010, at 17.

opinion at least to *jus cogens*) can be binding for corporations (and, in turn, for other actors, I might add).¹²⁰⁵

The argument that supports the existence of a general obligation of respect of *jus cogens* that binds every potential violator is reinforced by considerations of universality. It is important to distinguish universality of protection from universality of application and recognition: the former refers to how binding humanitarian norms are to be protected, and the latter concept alludes to whether norms are binding universally or in some locations.

Those that are binding everywhere exert an influence on all legal systems and actors, cannot be derogated from, their effects and prevalence cannot be excluded in any way, and additionally de-legitimize contrary provisions and conduct, even domestic ones, such as those that deny the liability of individuals (non-state entities) that violate them. Those norms are peremptory and bind all possible offenders. According to the International Criminal Tribunal for the former Yugoslavia:

“155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: “individuals have international duties which transcend the national obligations of obedience imposed by the individual State”.

156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for

¹²⁰⁵ Cf. International Commission of Jurists. “High Level Discussion on Advancing Human Rights and Business in the Human Rights Council.” In *Parallel Event to the Human Rights Council 20th Regular Session*, Palais de Nations, 21 June 2012. Geneva, 2012, at 3; John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, op. cit., where it is discussed that Special Representative Ruggie: “took the position that, with the potential exceptions of “the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture, and some crimes against humanity,” human rights law does not currently impose direct obligations on corporations or any other non-state actors [...] In his view, the responsibility stems from *societal expectations* rather than human rights law. Unlike the Norms, the Framework does not claim to impose human rights obligations directly on corporations. Nevertheless, the corporate responsibility to respect is not mediated through the primary state duty to protect; the responsibility does apply directly to corporations. Moreover, Ruggie stressed that the responsibility is not toothless. It can be enforced through domestic legal sanctions as well as in the court of public opinion.”

States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in Eichmann, and echoed by a USA court in Demjanjuk, "it is the universal character of the crimes in question [i.e. international crimes] which vests in every State the authority to try and punish those who participated in their commission".

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption"¹²⁰⁶ (emphasis added).

It must be noted that not all violations of humanitarian *jus cogens* or dispositive norms are criminal in nature, as shown in studies of authors as Eric Suy and revealed in Principle 18 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.¹²⁰⁷

Despite this, victims of violations of *jus cogens* can and must be protected in universal terms, due to the all-encompassing protection that peremptory law requires: this is applicable everywhere, since peremptory law also has universality of recognition. These implications are the consequence of the facts that *jus cogens* negates all contrary manifestations (including violations) and that the world community has a vested interest on its protection.

Therefore, it follows that all potential violators of *jus cogens*, individuals or not, cannot claim that they are not bound by duties to respect that body of law. As can be gleaned from the case law of the European Court of Human Rights, even when norms that directly *and* expressly regulate an obligation of an actor to not violate human rights do not exist and domestic norms do not prohibit their violation, the fact that international norms are contrary to human rights violations implies that entities with the capacity to violate them are obliged to refrain from engaging in such violations and must face the legal consequences of their wrongful conduct.¹²⁰⁸ Human rights peremptory norms undoubtedly form part of a core that is universal in its territorial and subjective scopes of protection, among others.

The previous insights concerning an implicit obligation of all entities, State or not, to respect peremptory norms founded upon human dignity (or others) are confirmed in practice. As discussed by Tilman Rodenhäuser, the Independent International Commission of Inquiry on the Syrian Arab Republic established by the Human Rights Council considered in its third report that peremptory

¹²⁰⁶ Cf. ICTY, *Prosecutor v. Anto Furundzija*, Judgment, 10 December 1998, paras. 155-157.

¹²⁰⁷ Cf. Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio histórico-crítico*, op. cit., pp. 167-170 (that considers that the criterion according to which those humanitarian norms whose violation amounts to an international crime belong to *jus cogens* is but *one* of the criteria to identify humanitarian peremptory norms, thus implicitly recognizing that not all of them are protected by criminal law). Generally and not exclusively concerning peremptory law, cf. the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 1 and 18, where victims of violations of their fundamental rights are recognized both when those violations are contrary to criminal norms and when this does not happen –whether the term fundamental rights corresponds to peremptory humanitarian rights is open to discussion–.

¹²⁰⁸ Cf. European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, 17 May 2010, paras. 213, 227, 236-237; European Court of Human Rights, *Case of K.-H. W. v. Germany*, Judgment, 22 March 2001, paras. 75, 92-106; European Court of Human Rights, *Case of Streletz, Kessler and Krenz v. Germany*, Judgment, 22 March 2001, paras. 85-87, 92-106.

norms bind all non-state entities and not only States or groups with 'quasi-State abilities.' According to the Commission:

"The commission carefully reviewed the information gathered on the operation and activities to date of FSA groups. In this regard, the commission notes that, at a minimum, human rights obligations constituting peremptory international law (*jus cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *jus cogens* – for instance, torture or enforced disappearances – can never be justified"¹²⁰⁹ (emphasis added).

Apart from *jus cogens*, general prohibitions of non-state violations can be regulated by general principles of law *in foro domestico* or with an international origin. For reasons that will be explained below, the principle of a general prohibition can be created by both types, which influence each other mutually due to their belonging to a field in which domestic practice can influence international law, which in turn determines the way in which some entities can and/or must protect internationally recognized rights and guarantees in the domestic level.¹²¹⁰

State practice and norms must be carefully examined, as said before. For instance, it is important to not be misled by the considerations of U.S. Courts and rely too much on their conclusions to attempt to identify general principles applicable to the international legal system. In this sense, their assertions about their limitations concerning the possibility of ascertaining the legal responsibility of several actors only when *certain* violations may have been committed or, that for petitioners to have cause of action certain links with the State of those Courts must be present, indicate that those Courts have specific domestic jurisdictional limitations, such as competence only over violations of "specific, universal, and obligatory" norms, i.e. of norms accepted "by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms [...] recognized [by the U.S. Supreme Court, related to the "historical paradigms familiar when [the ATS] was enacted]."¹²¹¹

Still, without domestic decisions necessarily discussing international law in an accurate way, it is interesting to examine discussions about non-state responsibility under international law in domestic cases. For example, U.S. Courts have differed about the possibility of that

¹²⁰⁹ Cf. Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, A/HRC/19/69, 22 February 2012, para. 106; Tilman Rodehäuser, op. cit.

¹²¹⁰ On the influence of domestic practice on *jus gentium*, cf. Chimène I. Keitner, "Conceptualizing Complicity in Alien Tort Cases", op. cit., at 101; Nicolás Carrillo Santarelli and Carlos Espósito, "Los Jueces Nacionales como Garantes de Bienes Jurídicos Humanitarios", op. cit., pp. 72-77.

¹²¹¹ Cf. Chimène I. Keitner, "Conceptualizing Complicity in Alien Tort Cases", op. cit., pp. 68-69; Supreme Court of the United States, *Sosa v. Alvarez-Machain et al.*, Certiorari to the United States Court of Appeals for the Ninth Circuit, 29 June 2004, pp. 30-31, 38-40; United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, at 4. Concerning the idea that links with the United States must be present for U.S. Courts to have jurisdiction, see Supreme Court of the United States, *Kiobel et al. v. Royal Dutch Petroleum co. et al.*, Certiorari to the United States Court of Appeals for the Second Circuit, April 17, 2013, pp. 13-14.

responsibility, denying some of them corporate international human rights responsibility and others accepting it, being the latter position supported by NGOs and activists.¹²¹²

Moreover, given the relevance of domestic legal practice for the emergence of customary law and general principles of law, it is noteworthy that there is State practice under domestic law according to which individuals can (and must) be protected from non-state threats, which is in turn consistent with international duties of protection: this practice is thus reinforced and required by international legal considerations.

The possible existence of a non-state obligation of respect is reinforced by the fact that some domestic jurisdictions accept that when some conditions are met, individuals can request protection of their human or fundamental rights against non-state threats to the judiciary or other authorities. This implies that domestic conditions constitute *procedural requirements* for the judges to be able to examine a case, rather than international substantive considerations about the existence of non-state violations of human rights. Sometimes those requirements are substantive, but they often have a purely internal character as well. Accordingly, from an international substantive point of view, domestic limitations do not deny that it is implied that all violations of human rights attributable to non-state entities are unlawful acts and, hereby, prohibited.

Furthermore, those procedural limits have a purely domestic nature, which means that they cannot be transposed to the international level. The fact that they have a procedural nature reminds of the distinctions between rights and remedies and between obligations and enforcement, and of the fact that international supervisory bodies have sometimes refused to examine alleged non-state violations simply due to their (real or supposed) lack of jurisdiction.

When peremptory law is at stake, some consider that peremptory norms do not necessarily clash with procedural impediments to the examination of alleged violations.¹²¹³ This approach has been criticized by those who, as I, consider that peremptory and humanitarian norms have both substantive and procedural dimensions and effects, and that it is inconsistent to

¹²¹² Cf. United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, *versus*: United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010; Marco Simons—EarthRights International, “Kiobel officially an outlier: Yet another US court rules for corporate accountability for human rights abuses”, available at: <http://www.earthrights.org/blog/kiobel-officially-outlier-yet-another-us-court-rules-corporate-accountability-human-rights-abus?page=7> (last checked: 22/02/2012).

¹²¹³ Cf. International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, para. 93; European Court of Human Rights, *Case of Al-Adsani v. The United Kingdom*, Judgment, 21 November 2001, paras. 61-66; International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) Democratic Republic of the Congo v. Rwanda*, Judgment (Jurisdiction of the Court and Admissibility of the Application), 3 February 2006, paras. 64-70.

consider it possible for a clash of *jus cogens* with criminal norms to exist but not with civil or other ones.¹²¹⁴

In any case, it is necessary to distinguish between substantive obligations, which regulate conduct, and procedural conditions that determine if a supervisory body has competence and jurisdiction over an alleged violation of substantive law. In the context of the ATS, for instance, that distinction has been made explicit by Chimène E. Keitner, who mentioned that:

“This distinction between “conduct-regulating norms” and “other rules of decision” categorizes legal standards according to their functions. In this framework, standards that govern behavior are part of what Judge Reinhardt would call the “substantive component” of the ATS. International law provides these substantive standards, including the standards for accomplice liability. Federal common law supplies other rules, such as rules relating to personal jurisdiction and matters of practice and procedure, which Judge Reinhardt would characterize as “ancillary.”¹²¹⁵ (emphasis added).

As a result of the difference between substantive norms, that can prohibit non-state violations, and procedural requirements, the fact that a given domestic Court only has the competence to study violations of universal (general customs) or *jus cogens* –not necessarily customary- norms or rights by non-state entities does not necessarily mean that those entities do not have material or substantive duties concerning other norms or rights under international law, which is not limited by procedural and substantive considerations of internal law, as the law of treaties and responsibility confirm.¹²¹⁶

Additionally, it can be considered that internal law and practice can implement some international substantive norms and that they sometimes reinforce or shape the principle according to which violations of human rights and guarantees generate the responsibility of all offenders. In this sense, inasmuch as internal legal systems have rules of torts and extra-contractual responsibility according to which the causation of harm or injury that is attributable to a –legal or natural- person generates its responsibility, it can be said that harming individuals in a way that is contrary to human rights, some of which have a universal scope of recognition and universal protection, generates the responsibility of violators according to a general principle of law.

¹²¹⁴ Cf. Nicolás Carrillo Santarelli, “La inevitable supremacía del *ius cogens* frente a la inmunidad jurisdiccional de los Estados”, op. cit., pp. 72-76; Kerstin Bartsch and Björn Elberling, op. cit., pp. 483-488; Andrea Bianchi, “Human Rights and the Magic of *Jus Cogens*”, op. cit., pp. 500-501; Alexander Orakhelashvili, “State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong”, *European Journal of International Law*, vol. 18, 2008, pp. 955-956, 965-970; Lorna McGregor, “Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty”, *European Journal of International Law*, vol. 18, 2008, pp. 905-912; Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić to: European Court of Human Rights, *Case of Al-Adsani v. The United Kingdom*, Judgment, 21 November 2001, para. 4.

¹²¹⁵ Cf. Chimène I. Keitner, “Conceptualizing Complicity in Alien Tort Cases”, op. cit., at 81.

¹²¹⁶ See for instance articles 27 of the 1969 Vienna Convention on the Law of Treaties and 3 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts.

Certainly, there are internal differences concerning elements as the presence of negligence or its not being required for responsibility to arise, but common features include attribution of the causation of harm. Breaches of contract may also generate the legal responsibility of parties that breach it.

The commonality of the previous rationales in most legal systems make it possible to consider that there is a general principle of law according to which violations of human dignity, which are contrary to essential common legal values of the world community and violate *erga omnes* duties, and which always harm individuals and are contrary to non-conditional and inherent rights and guarantees, generate the responsibility of perpetrators and accomplices.

From a theoretical standpoint, it can be considered that domestic norms, which ultimately ought to be designed for the sake of human beings, may protect their dignity indirectly or directly without labeling their norms as human rights norms, for instance through civil or criminal law – which can prohibit some violations of fundamental and human rights in absolute terms. This happens in the international plane as well, as explained in regard to the notions of human rights *lato sensu* and humanitarian guarantees, and certainly some crimes sanction violations of human rights –for instance, crimes against humanity-.

In the internal realm, it must be recognized that violations of human rights committed by non-state entities affect their exercise, and domestic authorities are sometimes obliged and other times encouraged to protect individuals and affected legal goods, that are shared with other actors and normative systems, from those entities. This means that the purposes of international and other normative systems can be protected simultaneously and even jointly. Moreover, regarding the possibility of protecting those legal goods from non-state offenders, criminal norms and mechanisms that are adopted to protect human dignity precisely sanction non-state actors, usually individuals; and authors, activists and judicial organs suggest that similar violations committed by other non-state entities can be harshly and properly sanctioned as well.¹²¹⁷

To my mind, the fact that different legal systems can coincide in the consideration that victims of damages are to be protected from harm caused by non-state actors that perpetrate violations of human rights and guarantees may generate or even have generated a general principle. Despite variances in some specific aspects, the general responsibility of an entity to which a conduct that injures inherent rights or guarantees can be attributed is established in

¹²¹⁷ Cf. Roland Portmann, op. cit., 273-274, 276-277, 280-281; United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, pp. 5-15; Ka Hsaw Wa, "When big business and human rights collide", Los Angeles Times, 26 February 2012, available at: <http://www.latimes.com/news/opinion/commentary/la-oe-ka-nigerians-20120226,0,4288698.story> (last checked: 27/02/2012) (victims must have "hope that the perpetrators, including the corporations that enable and profit from such crimes, would be punished so that future abuses could be deterred").

multiple legislations, and under international law that entity is regarded as a violator of human rights and reparations by it are demanded by legal principles and soft law (see Chapter 7 and Part I).

Moreover, the topic under examination is one in which analogies with private law, discussed by Hersch Lauterpacht, are pertinent. They are made possible by the role of principles of law in *jus gentium*,¹²¹⁸ and are justified by the purpose of the full protection of individuals. Moreover, the protection of human rights from non-state violations is one universal human problem,¹²¹⁹ because the necessity of legally protecting human dignity from all violations is an imperative for law to fulfill its purpose of truly having individuals at its center, lest it is illegitimate and unfair. Therefore, normative systems must jointly protect individuals from all violators, as demanded by “social consciousness”, reason why the aforementioned analogies are justified.¹²²⁰

In my opinion, general principles are sources of international law not only when they are shared by or found in many internal laws in an identical or very similar manner, but also when those laws and other systems share at least a legal lowest common denominator, that constitutes the content of a general principle, which can also be independently and simultaneously an international legal principle. Legal principles with an international origin that can coexist with those with an internal origin may have a narrower or broader content than the principles *in foro domestico* or not. In both cases, the shared content can belong to a global legal space.

In international human rights law, no conditions of intentionality are required for an international breach to exist, unless *lex specialis* provisions demand them. This is revealed in case law –that recognizes objective responsibility-¹²²¹ and permits to consider by analogy that generally no such requirements exist for other actors to have international responsibility in relation to norms that seek to protect human dignity, unless otherwise stated, as happens in international criminal law because of its regulation of *mens rea* elements.¹²²²

This means that beyond the core of the principle of non-state respect of human rights and guarantees, specialized duties can *adjust* some features of that core principle to take into account

¹²¹⁸ Cf. Martti Koskenniemi, “Lauterpacht: The Victorian Tradition in International Law”, op. cit., pp. 224-225, 232-233, 259-260; Hersch Lauterpacht, op. cit., at 43.

¹²¹⁹ On universal human problems and *jus gentium*, see: Philip C. Jessup, op. cit., pp. 1-34.

¹²²⁰ Cf. Philip C. Jessup, op. cit., at 30.

¹²²¹ Cf. Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, 29 July 1988, para. 173; Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, Judgment, op. cit., para. 396; European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment, 9 June 2009, para. 191; Concurring Opinion of Judge A.A. Cançado Trindade to: Inter-American Court of Human Rights, *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*, op. cit., paras. 5, 13, 26. In international law generally, the International Law Commission considers that primary rules determine an objective or subjective regime. See International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 34, paragraph 3 of the commentary to article 2.

¹²²² Cf. articles 7, 8.2.b.iv, 25.3.d.ii, 28, 30, 33, and 70 of the Rome Statute of the International Criminal Court.

specific demands of substantive and procedural protection. Both the general core and specialized adjustments to it in some fields that respect minimum standards are consistent with and required by the need that principles that originate in internal law are compatible with the features of *jus gentium*.¹²²³

Furthermore, the importance of a general prohibition of violations of human rights and guarantees that binds all potential offenders, which contributes to the effective and integral protection of human dignity, justifies recourse to domestic law considerations. This is because analogies with internal laws and identification of principles originating in them favor the identification of a principle that makes the effective protection of global legal goods more robust, since those principles serve as legal bases of domestic and other actions that can implement substantive norms based on those legal goods.

The fact that different normative systems, norms and actors can contribute to the protection of human dignity against non-state violations is an important one, because without them that protection can have no prospects of effectiveness nowadays. Those norms can thus have different features and be, for instance, civil norms protecting victims from harm; criminal norms punishing serious violations of human dignity; administrative law norms against lack of protection by authorities; norms on universal jurisdiction and transnational litigation, that permit many victims to have chances of seeking protection from non-state offenders; or human rights provisions that can be invoked directly or indirectly against non-state entities, among others.

While not every domestic legal norm can protect individuals from non-state actors directly, many do so indirectly. Their existence and that of norms some from other normative systems with the same goals reinforces the idea that there is a general principle that requires legal protection of human dignity from all violations, which includes their prohibition (and ensuing responses to breaches). This indicates that such prohibition can have both a domestic origin and an international legal origin, due to both *jus cogens* and the implications of human dignity.

José E. Alvarez puts forward a comparable idea when he comments that it is possible to:

“[F]ind [...] obligations [of non-state actors such as corporations] in general principles of law (as through a showing that national laws impose civil or criminal penalties on corporations in comparable circumstances).”¹²²⁴

A general principle according to which entities that violate human dignity are internationally responsible can be found by directly analyzing the implications of international norms. This seems to be acknowledged in soft law instruments, as the Basic Principles and

¹²²³ Cf. Michel Virally, *op. cit.*, pp. 113-116; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, *op. cit.*, at 37.

¹²²⁴ Cf. José E. Alvarez, “Are Corporations “Subjects” of International Law?”, pp. 31-32.

Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, that in Principle number 15 indicate that:

“Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim” (emphasis added).

The cited Principle recognizes that non-state actors can be legally responsible for violating norms that protect human dignity. Interestingly, the existence of an obligation to not violate those norms is a precondition of their responsibility. In turn, legal responsibility generates the duty to (fully) repair, one of whose many components is compensation, as considered by the International Law Commission and seen in the aforementioned Basic Principles (Principles 18 and 20, for instance),¹²²⁵ that examine reparations from the perspective of the victims, who have a right to them whenever their rights are violated by any actor, being all violations inexorable legally relevant conduct, as mentioned before. Interestingly, Principle 15 mentions domestic protection of internationally recognized rights.

Furthermore, it is possible to consider that there are different normative elements that seem to support the idea that international law regards violations of human dignity attributable to different entities as unlawful or wrongful without this recognition requiring breaches of State duties of prevention and protection to exist. In this sense, for example, general clauses that either directly envisage the prohibition of abuses of rights and violations of human dignity attributable to State or non-state actors, or that indirectly delegitimize such abuses, may be considered as legal bases, confirmation and evidence of a general principle that prohibits non-state violations of human dignity even implicitly.

Some authors consider that clauses such as these may well be the basis of non-state responsibility. Jordan J. Paust, for example, argued that:

“[M]ost modern human rights instruments create private duties expressly or by implication. Several instruments recognize or create private duties in preambular provisions and in particular articles, and in many articles duties and prohibitions are not limited to particular types of actors. Many human rights expressly deny the right of any group or person to engage in conduct aimed at the destruction

¹²²⁵ Cf. articles 1, 2, 28 through 33 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts of 2001 (A/56/49(Vol. I)/Corr.4), and 3, 4, and 28 through 33 of the ILC Draft articles on the responsibility of international organizations, in the version adopted in 2011 (A/66/10).

of rights of others or at their limitation, thereby necessarily recognizing duties of all groups or persons¹²²⁶ (emphasis added).

Probably one of the most conspicuous examples of the clauses that are being commented is Article 30 of the Universal Declaration of Human Rights, which states that:

“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein” (emphasis added).

Because of the relevance of the Declaration, the fact that part of it has achieved customary law status, and the implicit general prohibition of non-state violations it contains, the cited article has an undeniable importance, which is however somehow lessened because of its function. This is because what it concretely does is forbid interpretations of the Declaration that would permit human rights abuses. However, as Jordan J. Paust considers, this sort of clause and those that foresee obligations to prevent or respond to non-state violations indicate the existence of implied duties.¹²²⁷ Indeed, the fact that the toleration and acceptance of abuses are forbidden implies that their unlawfulness is not altered.

In this sense, if one interprets clauses of the sort being examined in light of the value-principle of human dignity, it can be concluded that abuses committed by non-state entities are not only legally relevant but also unlawful and prohibited. Concerning this, it is interesting to note that Chris Jochnick has commented that:

“[T]he emphasis on the human person places human rights beyond the narrowness of particular treaties or, at a minimum, suggests a broad interpretation of these treaties and their corresponding duties. Thus human rights obligations linked to human dignity may be violated by a host of actors including non-parties to the treaties; the exclusive focus on the state must be viewed as pragmatic and contingent, rather than necessary”¹²²⁸ (emphasis added).

Likewise, human rights treaties have incorporated clauses according to which the norms of those treaties cannot be interpreted as endorsing human rights abuses, and mention that individuals have responsibilities and/or cannot rely on those instruments to engage in human rights abuses. These considerations are presented, for example, in the Preambles of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and in article 32 of the American Convention on Human Rights. Interestingly, the European Convention for the Protection of Human Rights and Fundamental Freedoms stands apart from the previous examples and follows the UDHR more closely, forbidding in article 17

¹²²⁶ Cf. Jordan J. Paust, “The Reality of Private Rights, Duties, and Participation in the International Legal Process”, *Michigan Journal of International Law*, vol. 25, 2004, pp. 1242-1243.

¹²²⁷ Cf. *Ibid.*; Jordan J. Paust, “The Other Side of Right: Private Duties Under Human Rights Law”, *op. cit.*, pp. 54-56, 59, 62; articles 5 of the International Covenant on Civil and Political Rights, 17 of the European Convention on Human Rights, 29 of the American Convention on Human Rights, or 5 of the International Covenant on Economic, Social and Cultural Rights.

¹²²⁸ Cf. Chris Jochnick, *op. cit.*, at 61.

abusive interpretations that support abuses committed by States, groups or persons. The African Charter on Human and Peoples' Rights adopts an interesting alternative model, and in articles 27 through 29 includes express duties of individuals.

Underlying some international rules on the responsibility of perpetrators, accomplices, aiders and abettors of internationally wrongful acts, who can be non-state entities, is the assumption that those actors have duties to refrain from committing abuses of human dignity or cooperating with them: this can be found in criminal norms and human rights norms, such as those against genocide.¹²²⁹

As José E. Alvarez wrote, apart from obligations that are found in “general principles of law”, it is feasible to:

“[F]ind implicit duties on corporate entities (as well as other non--state actors) from the principle of universal jurisdiction as applied to *jus cogens* prohibitions. Alternately [it is possible to] infer corporate liability from the application of rules for secondary liability (such as the application of international rules governing aiding and abetting in distinct international legal regimes, including under international criminal law)”.¹²³⁰

Moreover, just as some instruments have narrow definitions of violations of human rights, the limitations of which do not constrain general norms that are more protective and inclusive given the specialized character of the former; the existence of norms regulating duties of States and certain authorities or actors and the absence of an express mention of general non-state obligations in some instruments in no way denies the possible existence of general prohibitions of non-state violations. This is so because many instruments can be considered *specialized from a subjective point of view*, focusing on addressing abuses of States and authorities. Yet, those instruments tend to stress the importance of ensuring that human dignity is protected from all entities, and sometimes even mention non-state duties or legal burdens, apart from considering that no entity is entitled to weaken the protection of human dignity by invoking those instruments or in any other way.¹²³¹ In sum, specialized obligations of States do not deny that other actors must abide by human rights standards.

This, coupled with the fact that *jus gentium* norms created by one source of law have an autonomous life independent of others even if their content and protection coincide fully or partly, makes it possible, for instance, for an entity not bound by some treaty norms to be bound by general principles of law or customary law, among other possibilities.

In my opinion, this highlights the importance of the argument that international law implicitly accommodates the existence of a principle prohibiting non-state violations, or that at least it does not

¹²²⁹ See article IV of the Convention on the Prevention and Punishment of the Crime of Genocide, among others.

¹²³⁰ See José E. Alvarez, “Are Corporations “Subjects” of International Law?”, op. cit., pp. 31-32.

¹²³¹ Cf. the Preamble and articles 2 and 5 of the International Covenant on Civil and Political Rights; the Preamble and article 5 of the International Covenant on Economic, Social and Cultural Rights; the Preamble and articles 1, 27, 28 and 29 of the African Charter on Human and Peoples' Rights; articles 1 and 17 of the European Convention on Human Rights; articles 1, 2 and 29 of the American Convention on Human Rights.

deny the possibility of creating non-state duties with the purpose of better protecting human dignity, since the fact that State obligations do not bind non-state entities does not entail that they do not or cannot have human rights obligations. After all, the fact that an entity is able to affect essential legal interests means that such capacity must be regulated, for instance through principles addressing, at least, (all types of) harm against individuals caused in a way contrary to their inherent worth.

Furthermore, in my opinion a general principle that prohibits non-state violations of human dignity, manifested in acts or omissions contrary to rights and correlated obligations founded upon it, is a logic consequence of the *public* character of the protection of human dignity.

In this sense, for instance, many internal laws regulate administrative, constitutional or other public law standards, one of whose principles is the consideration that what is not permitted is prohibited. This differs from a private law perspective, according to which what is not prohibited is permitted.

In international law, the International Court of Justice seems to favor a principle handled by the Permanent Court of International Justice in the *Lotus Case* that favors consent and sovereignty by considering that what is not prohibited is permitted. This conception, however, has recently been criticized by Bruno Simma, who considers that it represents bygone 19th century legal conceptions that ignore that silence does not necessarily amount to approval, and that there may be shades or degrees regarding apparently unregulated conduct (e.g. tolerance).¹²³²

In light of the evolution of international principles, values, theoretical developments and legal goals in the current context of the world society, it is possible to interpret apparent silences of law and identify prohibitions (or entitlements) in the context of goals and systems of norms.

Concerning pertinent recent international legal developments, it is remarkable that the ICJ has considered that faculties and entitlements may be implicitly held by an actor by virtue of the legal goals of the community and its functions and goals, and that other international judges have considered that entities can have inherent powers.¹²³³

In my opinion, since legal capacities can generally assume the forms of legal entitlements or burdens, the fact that legal purposes related to the full and effective protection of individuals often require the existence of non-state duties (see Chapter 4), and the fact that non-state violations of human rights and guarantees is condemned and not at all “tolerated” or “desirable”, indicate that duties related to that subject matter can implicitly bind non-state actors.

Implicit prohibitions concerning the issue under examination can be partly based on the public character of human dignity, although this is not required. This publicness rests not on the

¹²³² See footnote 1025, *supra*.

¹²³³ See footnotes 1244 and 1322, *infra*.

features of the entities involved and their conduct but on the public interest in the defense of that value and on the nature of the rights involved, whose protection is necessary –some even consider that human rights have a constitutional vocation-.¹²³⁴

Those implied duties can be accessible given the knowledge of human rights,¹²³⁵ and the requirement that restrictions of rights of non-state actors seek an admissible purpose is also complied with, because their purpose in this case is the protection of human dignity (see Chapters 1 and 5). All potential participants in human rights violations (i.e. all entities, see Chapters 1 and 2), in consequence, have a prohibition that forbids participating in them. This applies to any entity, actor or group (see Article 30 of the Universal Declaration of Human Rights).

The existence of implicit human rights prohibitions and general duties that bind non-state actors gives many advantages, summarized in the consideration that they contribute to prevent impunity, condemn abuses, and grant greater substantive protection to individuals, who are thus entitled to demand protection from non-state violations and full reparations when those abuses are committed. In other words, to protect human dignity in a complete, practical and real way, it must be recognized that the normative guarantees that protect it can be violated in practice by non-state entities and that, implicitly, any such violation is a trespass and a forbidden act. This is, to my mind, how the following passage of the Judgment of the International Military Tribunal for the Trial of German Major War Criminals must be construed:

“[I]ndividuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.¹²³⁶

Furthermore, currently there are many important actors, actions, relationships and interconnections with transnational, domestic, global and/or internationally features. In an interdependent and global world as ours, some conduct that must be unlawful due to its being contrary to essential values of the world society and humankind is carried out by actors that take advantage of possibilities available in legal and social landscapes,¹²³⁷ and they must be dealt with in legal terms.

Since it may be difficult for a single individual devoid of resources available to collective actors to accomplish certain deeds that amount to violations of dignity in transnational, international or even local levels, and since many violations are committed by collective entities,

¹²³⁴ Cf. Stefan Kirchner, “Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?”, *German Law Journal*, vol. 05, 2004, pp. 58-61.

¹²³⁵ See footnote 1207, *supra*.

¹²³⁶ Cf., Judgment of the International Military Tribunal for the Trial of German Major War Criminals, “The Law of the Charter”, available at: <http://avalon.law.yale.edu/imt/judlawch.asp> (last checked: 27/02/2012).

¹²³⁷ Cf. Kofi A. Annan, *op. cit.*, pp. iii-iv.

their abuses and those of their members must be tackled as well, sometimes even in criminal terms if this is so required.

On the other hand, only comprehensive and global strategies¹²³⁸ can counter many non-state violations due to factors as those discussed in previous paragraphs. This implies that it is necessary for public and private entities to cooperate to protect individuals.

The possibility of holding all non-state entities accountable is further based on a rationale identified in the Judgment of the International Military Tribunal: given the nature of States as legal fictions, it is necessary to look beyond them in practice because, to truly deter and punish violations, those that effectively carry violations out must be sanctioned. The same can be predicated of other collective entities, whether they have formal recognition or not. This view is supported by disaggregated analyses of collective entities, and is consistent with historical studies that argue that many actions formally or superficially attributable to States have non-state origins.

In order to avoid confusions and misstatements, rather than stressing the idea that different entities can engage in conduct that is formally attributable to States, which may seem to suggest that violations necessarily involve State participation, emphasis must be laid on the fact that many violations are committed independently of any link, support or even remote connection with States. This has been expressly recognized by U.S. Courts and assumed by international criminal judicial bodies. For instance, in the Case of *Kadic v. Karadzic* the Second Circuit of the United States Court of Appeals argued that:

"We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy [...] pirates were "hostis humani generis" (an enemy of all mankind) in part because they acted "without ... any pretense of public authority." [...] Later examples are prohibitions against the slave trade and certain war crimes"¹²³⁹ (emphasis added).

Likewise, the International Criminal Court deals with individual responsibility and can contribute to the protection of victims from all actors that commit crimes under its jurisdiction, which are purposes and functions of its Statute. It is telling that the International Criminal Court can examine cases in which offenders are members of non-state groups, not only concerning war crimes but also regarding crimes against humanity, as mentioned in the 2012 Interim Report on

¹²³⁸ Cf. *Ibid.*; Durban Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001, paras. 3, 11, 105, 120.

¹²³⁹ Cf. United States Court of Appeals for the Second Circuit, *S. Kadic et al. v. Radovan Karadzic*, Decision of 13 October 1995.

the Situation in Colombia.¹²⁴⁰ This means that there is no need of State involvement in or cooperation with the conduct of a non-state entity for misdeeds of the latter to be considered criminal and unlawful under international law.

In sum, it can be said that given the way in which violations of human rights and guarantees are committed in practice, *all* offenders can incur in conduct that is contrary to them and violate an implicit legal principle of respect of human dignity. The comprehensive protection that this principle demands is consistent with the requirements that victims are protected and guarantees of non-repetition of violations exist: they require the participation of all agents of violation.

In this sense, for example, according to U.S. Judge Leval, considering that individuals are the only non-state entities capable of being responsible for human dignity violations would run counter to the goals of norms protecting human dignity, because other actors that commit violations would be unchecked and benefit from the impunity of violations.¹²⁴¹

Certainly, the impossibility of holding some actors responsible would lessen the protection of victims, because this denial prevents claims and sometimes even preventive or *ex post facto* measures of protection, such as reparations, against some violations. In those cases, victims might not receive the full reparations they are entitled to,¹²⁴² and law would foster the impunity of some offenders, which is contrary to international legal goods and principles and encourages the commission of future violations.

Conversely, if it is considered that materializations of non-state threats and obstacles to the exercise of human rights and guarantees are violations contrary to the effectiveness of legal principles and to the integrity of legal and human values, some of which are peremptory, it can be concluded that non-state obligations of respect of human rights are necessary and inherent legal burdens, not just implicit duties.

¹²⁴⁰ Cf. Elements of Crimes (Elements of the Crimes of Genocide, Crimes against Humanity and War Crimes, corresponding to the Rome Statute of the International Criminal Court), para. 3 of the introduction to article 7 and footnote 6 therein, at 5, where both State and organizational policies to commit attacks against a civilian population are mentioned. Likewise, the Elements of article 7 (1) (i) mention the crime against humanity of enforced disappearance of persons (paras. 4 and 5); Separate and Dissenting Opinion of Judge Odio Benito to: International Criminal Court, Trial Chamber I, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, 14 March 2012, paras. 9-14; International Criminal Court, Office of the Prosecutor, *Situation in Colombia*, Interim Report, 2012, paras. 37 onwards.

¹²⁴¹ Cf. Concurring Opinion of Judge Leval to: United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010, pp. 1-2, 10-11.

¹²⁴² Cf. articles 31, 34 and 38 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts of 2001 (A/56/49(Vol. I)/Corr.4), and of the ILC Draft articles on the responsibility of international organizations, in the version adopted in 2011 (A/66/10); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 18, 22.

The doctrine of inherent capacities has been handled by the Inter-American Court of Human Rights and the Appeals Chamber of the Special Tribunal for Lebanon,¹²⁴³ and is worth considering. The fact that non-state entities can participate in violations of human rights and guarantees in different ways, as direct, beneficial or silent accomplices or perpetrators,¹²⁴⁴ among others, means that they have the *inherent* capacity of violating norms protecting human dignity, and therefore have the *inherent* duty to refrain from doing so.¹²⁴⁵ This is confirmed by a systemic analysis that takes into account the effectiveness, goals and interconnectedness of legal goods and norms protecting human rights. In this regard, finding functions and capacities required to achieve purposes of legal goods is essential for ascertaining if an inherent capacity exists.¹²⁴⁶

It must be mentioned that all the previous ideas have a *substantive* nature, and non-state duties of the types being described are not necessarily accompanied by procedural mechanisms of international supervision to which actors are subjected. However, this does not mean that those duties have no procedural implications: the substantive emergence of responsibility, regulated by secondary norms, must be supported by procedural norms and mechanisms of implementation and legal burdens created to fully protect human dignity.¹²⁴⁷

Chapter 4 examines in depth when international procedural action for the purpose of effectively protecting human dignity is required or advisable, which implies that sometimes non-state actors *must* or *should* have international procedural capacities and their conduct can be supervised internationally.

Some points are worth being stressed: first, that not only criminal cases can or must have international supervision, for instance because other cases must be like addressed due to the seriousness and the unacceptability of lack of protection if domestic actions cannot protect victims. Secondly, it is convenient to treat every violation of human dignity as unlawful in international substantive terms, to permit and demand action from different authorities and outlaw those abuses.

¹²⁴³ This doctrine permits to hold that an entity that does not have an express or implied legal capacity may still have the inherent power to exercise it for the sake of its functions and legal goals (goods). These notions permit, thus, to fill gaps concerning procedural protection regulations. See, for instance, Inter-American Court of Human Rights, *Case of the Constitutional Court v. Peru*, Judgment (competence), 24 September 1999, paras. 31-33.

¹²⁴⁴ Cf. Andrew Clapham and Scott Jerbi, op. cit., pp. 341-348; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, op. cit., A/HRC/8/5, op. cit., paras. 51-81; Elena Pariotti, op. cit., pp. 99-100.

¹²⁴⁵ The only coherent (legal answer) to the capacity to violate human dignity is the responsibility that ensues from engaging in one such violation, in light of inherent capacities and legal goods, whose protection is comprehensive and guided by the principle of effectiveness in the humanitarian field.

¹²⁴⁶ Cf. Special Tribunal for Lebanon, Appeals Chamber, Case No. CH/AC/2010/02, *Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing*, 10 November 2010, paras. 45, 47-48.

¹²⁴⁷ The relevance of procedural measures in order to make substantive guarantees effective is undeniable. Cf. Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, op. cit., paras. 166-167, 172-177; European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, 17 May 2010, paras. 128-130, 150-153.

Permitting other States or international authorities to identify substantive violations of international law committed by non-state actors and to protect victims is necessary because States can fail to adopt legislation that implements *jus gentium* or have norms that are contrary to it or are ineffective¹²⁴⁸ and lack duties to appear before supervisory bodies that can order protection against breaches of human rights duties, or States may simply fail despite their efforts. In those events, victims may have no reparations or only partial reparations if non-state actors have no responsibilities, which should be ordained by international law to ensure their recognition everywhere.

In other words, since the accountability of States that fail to protect victims of non-state actors may be insufficient to fully repair victims, as explained in Chapter 7, considering that all entities that violate human dignity have breached obligations of their own authorizes legal responses of States and other entities with competence over those violations.

Interestingly, in the *Kononov v. Latvia Case* the Grand Chamber of the European Court of Human Rights declared that measures adopted by a State in order to sanction violations of international norms dealing with non-state conduct (an individual, in that case) can be lawful even if there are no violations of internal law –if the conditions examined in Chapter 5 are satisfied, it must be added-. In this regard, the Court considered that:

“[B]y May 1944 war crimes were defined as acts contrary to the laws and customs of war and [...] international law had defined the basic principles underlying, and an extensive range of acts constituting, those crimes. States were at least permitted (if not required) to take steps to punish individuals for such crimes, including on the basis of command responsibility. Consequently, during and after the Second World War, international and national tribunals prosecuted soldiers for war crimes committed during the Second World War.

[...]

236. As to whether the qualification of the impugned acts as war crimes, based as it was on international law exclusively, could be considered to be sufficiently accessible and foreseeable to the applicant in 1944, the Court recalls that it has previously found that the individual criminal responsibility of a private soldier (a border guard) was defined with sufficient accessibility and foreseeability by, inter alia, a requirement to comply with international fundamental human rights instruments, which instruments did not, of themselves, give rise to individual criminal responsibility and one of which had not been ratified by the relevant State at the material time (*K.-H.W. v. Germany*, §§ 92-105, cited above). The Court considered that even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only domestic law, but internationally recognised human rights, in particular the right to life, a supreme value in the international hierarchy of human rights (*K.-H.W. v. Germany*, at § 75).

237. It is true that the 1926 Criminal Code did not contain a reference to the international laws and customs of war (as in *K.-H. W v. Germany*) and that those international laws and customs were not formally published in the USSR or in the Latvian SSR (as in *Korbely v. Hungary [GC]*, cited above, at §§ 74-75). However, this cannot be decisive. As is clear from the conclusions at paragraphs 213 and

¹²⁴⁸ Cf. Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, op. cit., paras. 167-170, 175; Inter-American Court of Human Rights, Advisory Opinion OC-14/94, op. cit., paras. 32-38, 50; Human Rights Committee, General Comment No. 31, op. cit., paras. 7, 13-15; International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 40, paragraph 5 of the commentary to article 4, and article 4.1 of the aforementioned articles.

227 above, international laws and customs of war were in 1944 sufficient, of themselves, to found individual criminal responsibility.

238. Moreover, the Court notes that in 1944 those laws constituted detailed *lex specialis* regulations fixing the parameters of criminal conduct in a time of war, primarily addressed to armed forces and, especially, commanders¹²⁴⁹ (emphasis added).

Furthermore, if a non-state entity breaches international norms that protect human dignity, States or other legitimate authorities can punish that violation in a proportionate way that furthers the goals of protection sought by the prohibition. Concerning this, in the same case the European Court held that:

“[W]here international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found an accused guilty, fix the punishment on the basis of domestic criminal law”¹²⁵⁰ (emphasis added).

Apart from ensuring the legality of measures that prevent or deal with non-state violations of human rights, international prohibitions will ensure that those abuses are regarded as unlawful even if some States fail to recognize their illegality or to sanction abuses and protect victims. Those problems may exist because of: i) State weakness against some actors –economic or otherwise- and difficulties to control them, as happens with some States acting against certain criminal groups;¹²⁵¹ ii) connivance or the desire to not forbid certain violations, for instance to encourage investment even if labor or other rights are not effectively upheld; or iii) lack of jurisdiction or evasion by a violator of State control, which is a possibility that makes extraterritorial jurisdiction and strategies relevant,¹²⁵² among other reasons.

For those reasons, it is important to consider all non-state violations of human dignity to be unlawful, or at the very least to consider that they must be branded as such *de lege ferenda*. The unlawful character of those violations will, as argued previously, enable different authorities and actors to undertake actions of protection and promotion of human rights if some conditions of competence are satisfied. This can happen with universal and international jurisdictions if no exceptions –such as *forum non conveniens* in the case of some domestic jurisdictions-¹²⁵³ are present. Otherwise, without multiple possibilities of access to mechanisms and authorities to which protection can be requested, especially concerning serious violations, individuals will be vulnerable, unprotected, and likely devoid of prospects of legal protection. Additionally, lack of

¹²⁴⁹ Cf. European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, 17 May 2010, paras. 213, 236-238.

¹²⁵⁰ *Ibid.*, para. 212.

¹²⁵¹ Cf. Francisco Galindo Vélez, *op. cit.*, pp. 125-126.

¹²⁵² Cf. August Reinisch, *op. cit.*, pp. 54-55, 77, 89; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, *op. cit.*, A/HRC/8/5, *op. cit.*, paras. 14-15, 19, 27; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, at 786.

¹²⁵³ Cf. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, *op. cit.*, A/HRC/8/5, *op. cit.*, para. 89; August Reinisch, *op. cit.*, at 56.

formal recognition of all the elements of a violation may make some authorities think that victims have no standing or that alleged offenders have no duty to participate in proceedings as defendants.

Recognition of non-state human rights duties is also important because of the symbolic and educative functions of law, since the indication that law condemns breaches from a legal *and* social perspective can have an impact on beliefs and attitudes and make victims aware of their entitlements and possibility of claiming protection with legal support, besides making agents of promotion of human rights conscious of the possibility to demand non-state respect and accordingly mobilize and *shame* or exert pressure against violators.¹²⁵⁴

From the perspective of duty-bearers, consciousness of their duties may lead to gradual or fast changes of their attitude. Coupled with awareness of social and legal expectations upon them and possible reactions against violations, this may make non-state actors behave carefully and strive to show respect of human rights. Apart from the case of international humanitarian law regulations, authors have considered that corporate awareness of normative expectations upon them (not necessarily in positive law) can lead corporations to conform to human rights standards and others to condemn abuses.¹²⁵⁵

Mechanisms that can contribute to the protection of individuals from non-state abuses can involve dynamics of persuasion, shaming, threats of negative consequences, promises of benefits, or socialization, among others that can stimulate norm compliance.¹²⁵⁶ These dynamics may accompany general or specialized, implicit or express non-state prohibitions.

Concerning access to remedies and individual petitions, it must be repeated that procedural entitlements do not always accompany substantial rules. Additionally, the exhaustion of or inadequacy of internal remedies will either permit or obstruct access to international supervision, which sometimes can examine non-state conduct. Still, authorities retain their duties of protection (and what some call *primary obligations*) to tackle violations of human rights, and so can have vicarious or direct responsibility in connection with non-state abuses and even have their responsibility engaged simultaneously with that of non-state actors for some violations.¹²⁵⁷

In my humble opinion, it is preferable to not allude to States as the preponderant or *primary* duty holders in the humanitarian *corpus juris*, because they are contingent entities with rights and duties that may not exist in the future or be relevant in one case, despite which

¹²⁵⁴ Cf. Andrew Clapham and Scott Jerbi, *op. cit.*, pp. 347-348; August Reinisch, *op. cit.*, at 68.

¹²⁵⁵ Cf. Andrew Clapham and Scott Jerbi, *op. cit.*, pp. 347-348.

¹²⁵⁶ Cf. David Capie, "Influencing Armed Groups: Are there Lessons to Be Drawn from Socialization Literature?", in: Geneva Call, *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law*, Conference Report, 2007.

¹²⁵⁷ See footnotes 568 and 569, *supra*.

individuals will still have entitlements to be protected and pertinent authorities must have duties of protection.

Additionally, the effectiveness of the exercise of human rights and guarantees depends on many factors, including some related to the behavior of different entities. Therefore, if the features of the protection of human dignity demand protection from State abuses, they also require protection from other entities, with or without authority roles. Because of the role and position of States in contemporary international human rights law, however, it cannot be denied that they have an important but not exclusive role in the protection of human rights.

That being said, if implicit or general prohibitions of non-state violations exist, they do not deny the importance of more specific and/or express human rights international obligations of non-state actors, which can be created and exist alongside obligations of authorities and public entities and domestic non-state obligations, which can be based on international legal demands. In fact, express and specialized non-state duties can contribute to fleshing out relevant general principles and implicit duties and address specific needs of protection in detail.

The absolute inexistence of non-state duties of respect, besides making victims vulnerable and too dependent on contingent State and non-state initiatives and actions, would also be contrary to the correlation between rights and duties and the implications of human dignity.

To conclude this section, in the first place it can be said that the behavior of entities with the factual capacity to affect legal interests with a special importance must be regulated, to prohibit and discourage violations attributable to them and guide their actions (and omissions) towards the promotion of legal goods, especially fundamental ones. Moreover, if an entity has an inherent capacity to potentially affect legal goods, it can be considered to also have inherent duties to not engage in violations for legal purposes to be achieved and expected functions to be fulfilled.

Secondly, it must be stressed that since there can be many sources of general and implied prohibitions, they are cumulative but not mutually dependent. Therefore, if one specific possible source is challenged and denied *lex lata* status, the rest can still regulate non-state duties. Still, the importance of the protection of human dignity and the equality of all victims call for the creation of implicit and general obligations of respect that bind non-state entities *de lege ferenda* if they are ever considered to not have them in positive law.

Thirdly, the existence of implicit and general duties and principles of non-state duties or lack thereof does not undermine the possible existence and importance of specialized non-state human rights obligations, which also serve to address in detail some abuses and prevent their

impunity and the legal abandonment of victims. Thereby, it is indispensable to examine what specific international human rights duties non-state actors can have, which is a study that will be conducted in the next section.

6.2. Specialized international obligations of non-state entities designed to protect human dignity

Possible specialized or concrete non-state human rights obligations are important for two reasons: they can complement general and implicit duties, and they permit to address some abuses in case the existence of general and implied duties are denied by someone.

Indeed, some may argue that only some non-state entities, as individuals, have certain international obligations, and that those duties are few; or) that (some) non-state entities can only violate norms belonging to certain branches of international law. The arguments expressed in this text reveal that I disagree with those assertions.

For instance, some scholars argue that the conduct of some actors apparently cannot be regulated due to their lack of international personality;¹²⁵⁸ and others consider that certain branches, as international humanitarian law, expressly permit regulating some non-state conduct but that other branches (as human rights law) do not. Needless to say, those ideas are (to my mind correctly) challenged by some authors.¹²⁵⁹ For instance, it can be said that developments on the protection of human dignity in some areas can be imitated or followed in others.

Moreover, nothing impedes the creation of general prohibitions that bind non-state actors, and likewise obligations with a more focused scope can be created by the sources of *jus gentium* as well, as examined in Chapter 5. What is more, some who have denied the existence of some non-state duties examine the sources of international law, such as custom, to ascertain whether those duties have been created, and admit that it is possible for inexistent non-state international obligations to be created in the future.¹²⁶⁰

Additionally, as examined previously, the International Court of Justice accepts that non-state duties may be created even by means of the adoption of norms by bodies and procedures that derive their normative powers from original or constitutive norms of international law. According to the Court:

¹²⁵⁸ Cf. e.g. Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, at 784.

¹²⁵⁹ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 36, 40, 48, 50, 73-75.

¹²⁶⁰ Cf. United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decision of 17 September 2010, at 49.

"[I]t has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and intergovernmental organizations".¹²⁶¹

Specialized human rights duties of non-state entities that complement general and implicit duties (or that make up for their supposed absence in an insufficient way) can focus on certain prohibitions, rights to be protected, vulnerable victims, some potential offenders, or other more concrete aspects, instead of regulating general prohibitions or implicit duties to respect *jus cogens* and other rights. Their specialized nature not only permits express focused duties to be used to complement general and implicit obligations but also to flesh out some aspects and details of general obligations and of the protection of legal goods. Both functions serve to better protect human dignity by addressing specific elements that require attention.

Because of the multiple options available, specialized regulation of non-state conduct does not always have to indicate lists of rights to be protected. For example, it can regulate duties of a specific type of actor to respect all human rights. This is the method proposed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, concerning corporations (although that proposal does not consider all corporate responsibilities as binding).

Focused strategies can also specify lists of some rights that some actors must respect, and regulate their duties in an express *or* detailed fashion (this does not mean that other rights should not be respected, as explained in Part I). Focused duties can also take the form of regulation of non-state conduct in some formal branches of international law, as international humanitarian law or international criminal law (likewise, this does not deny that other entities can also breach obligations under those or other branches and affect legal goods). Additionally, focused duties may impose positive duties and not just mandates of respect or abstention.

All in all, express specialized non-state obligations differ from implicit prohibitions in an evident way, and all specialized duties differ from general prohibitions because they focus on some aspects that merit specialized attention. Still, they may be intersectional and ignore formal divisions between branches of international law, for instance prohibiting violations of human dignity that affect the legal goods of many of them,¹²⁶² which contributes to counter fragmentation of law by focusing on protected interests and values.

In spite of the possibility of creating focused or specialized non-state duties, for some authors certain conceptions of international legal personality prevent some entities from having international duties, and for others human rights should not be concerned with non-state threats

¹²⁶¹ Cf. Cf. International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, op. cit., para. 116.

¹²⁶² See footnote 1077, *supra*.

directly but only through the mediation of States (and that of other authorities, as they must admit given recent normative and jurisprudential developments).

These issues were discussed in Chapter 5 already, but it can be added that the notion of legal personality is not static but dynamic, as recognized by the International Court of Justice, which considered that changing conditions and “needs” of the international society could lead to the emergence of new entities as, for instance, international organizations, that can have international rights and obligations.¹²⁶³

Objectors to the possibility of direct international non-state human rights duties must admit that even if for the sake of discussion their objections were regarded as correct, new norms could well regulate duties of previously unregulated non-state conduct, something that is often required by international social needs, which include the full and effective protection of human beings. On top of that, some notions of personality are “circular” or tautological and consider that “persons” are those entities capable of having rights, duties and maybe certain capacities, but also hold that it is only “persons” may have any such rights, duties and capacities.¹²⁶⁴

The need of regulating the conduct of relevant actors¹²⁶⁵ not only justifies their being addressees of law, but also possession of human rights duties because of how they can affect those rights. The fact that special attention must be paid to some protection needs also explains why some focused duties must be created.

It is also convenient to mention that Hersch Lauterpacht warned against prejudices or “preconceived notions as to the capacity of” an actor to be a subject of international law, being instead “the practice of States in both the international and the municipal spheres”¹²⁶⁶ important. That practice indicates that protection from non-state abuses of human rights is and must be given. Additionally, Lauterpacht also rightly argued that legal considerations deemed to be important in doctrine, such as that of personality, ought to be tempered by due consideration to the effectiveness of law and its moral evolution.¹²⁶⁷ Human and social needs may well change or have existed before but been ignored by norms or practitioners. Both things happen with the vulnerability of individuals in relation to non-state threats: they have always existed, but some patterns of violation have intensified or emerged due to recent phenomena.

Implied and express human rights specialized or focused duties of non-state actors can be subclassified in accordance with *what they command* and what is expected of non-state

¹²⁶³ Cf. International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, pp. 8-10, 15.

¹²⁶⁴ See footnote 435, *supra*.

¹²⁶⁵ Cf. Fred Halliday, *op. cit.*, pp. 34-37.

¹²⁶⁶ Cf. Hersch Lauterpacht, *op. cit.*, at 38.

¹²⁶⁷ *Ibid.*, pp. 46-47.

entities. Among others, there can be non-state obligations of result, that are breached by failure to obtain certain results; or obligations of means, that require behaving in accordance with a certain degree of diligence,¹²⁶⁸ which may vary according to different factors.

Needless to say, since actors can participate in violations of all human rights, non-state obligations may have the purpose of protecting any human right or guarantee. This means that economic, social and cultural rights, civil and political rights, or any other right or guarantee that given its features (direct recognition and protection of human dignity) is a human right or guarantee, can be protected through non-state obligations, given the same condition of those rights and guarantees and the fact they have important common traits¹²⁶⁹ despite having some differences, and because they are interdependent.¹²⁷⁰

Focused non-state duties can also be classified as duties of abstention (also known as negative duties or duties to respect) and obligations to do something or positive obligations, which are analogous to State duties to not violate human rights and to ensure or facilitate their exercise.

Some authors hesitate about the convenience or possibility of regulating positive human rights obligations of non-state actors, because they fear that they may place excessive burdens on them. However, I believe that there are some situations in which those obligations are reasonable and even necessary.

First of all, it is convenient to mention that the design of some positive obligations of non-state entities is in certain events consistent with the protection of human dignity, and may even be required by it. As Andrew Clapham argues when analyzing the work of Immanuel Kant, the notion of dignity can be understood as suggesting that positive duties of individuals and, by extension, of other actors, are required in a framework of the protection of human dignity.¹²⁷¹

¹²⁶⁸ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, pp. 56-57, para. 11 of the commentary to article 12; Carolin F. Hillemanns, "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights", *German Law Journal*, vol. 04, 2003, pp. 1072-1073; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, op. cit., A/HRC/8/5, op. cit., paras. 56-58, 73; Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights and the commentary on the Norms, para. b. of the commentary to para. A.1.; Guiding Principles on Business and Human Rights, para. 6 of the Introduction, and para. 17 ("Human rights due diligence"); Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006, paras. 8-22.

¹²⁶⁹ Cf. Christian Tomuschat, op. cit., pp. 43-45, 53-54 (on the existence of positive obligations in relation to both civil and political rights and economic, social and cultural ones, notwithstanding differences on the protection and implementation of their guarantees).

¹²⁷⁰ Cf. Vienna Declaration and Programme of Action, para. I.5; Committee on Economic, Social and Cultural Rights, General Comment 3, *The nature of the States parties obligations (Art. 2, para. 1)*, 14 December 1990, paras. 8-12; articles 1 of the Protocol of San Salvador and 2 of the International Covenant on Economic, Social and Cultural Rights, compared to articles 1 of the American Convention on Human Rights or 2 of the International Covenant on Civil and Political Rights.

¹²⁷¹ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 536, 544, 546-547.

I agree with this conclusion because the recognition of the inherent and inalienable worth of an individual, coupled with the notion that the behavior of all actors must be consistent with universal normative criteria, may indicate that sometimes individuals must be protected by non-state entities or else they will suffer in a serious and irremediable way. This may justify some mandates to protect when inaction would lead to harm that is contrary to rights and guarantees based on human dignity.

While the notion of the necessity of adjusting behavior to universalist criteria is an ethical and philosophical one, it can be relevant in legal terms for regulating non-state conduct for the reasons just explained.

While law must be designed for ordinary human beings and not demand perfection, it must and can prohibit and command certain acts in a way that is consistent with or even required by ethics,¹²⁷² as happens in my opinion in these cases. However, how can these ideas be translated into concrete legal notions?

To my mind, there are at least two general situations in which positive non-state obligations may be necessary or especially important for human dignity to be effectively protected: first, 1) when an entity a) has a role that generates legitimate expectations of protection, for instance because it has a legal mandate or role or due to its *de facto* position; or when b) it is in such a position that the enjoyment of a human right or guarantee completely depends on positive actions of that entity or is exposed to threats due to the conduct of that actor, that may be obliged to act with certain due diligence standards. This may happen, for example, when an actor has the only means that permit to safeguard the enjoyment of a right, creates a risk of harm that must be neutralized, or when individuals and stakeholders can legitimately request protection from that actor. 2) Secondly, in some situations in which an individual faces an imminent danger of having her essential rights harmed *unless* a non-state actor helps her, positive obligations of that actor would be indispensable, legitimate and fair (emergency criterion).

1) As to the first criterion, some have posited the idea that when an entity has a position that creates expectations that it will protect a legal good, it must strive to do so. Interestingly, even non-state groups have accepted that they may have positive duties for having a guarantor position, as has happened with a Colombian guerrilla (whose declarations may have legal

¹²⁷² Cf. the distinctions between fairness and lawfulness, equity as correcting “legal justice”, and legal and natural justice, that support the idea that law does not have to demand perfection from men, yet lawfulness and justice can coincide, as discussed in Aristotle, *The Nicomachean Ethics*, Forgotten Books, 2007, pp. 101-103, 105, 116, 123-124. Moreover, Seneca considered that “modesty (or shame) forbids what the law does not.” Cf. Jon R. Stone, *The Routledge Dictionary of Latin Quotations*, Routledge, 2005, at 102. It must be borne in mind that some natural legal theories and other conceptions call for positive law to not endorse inhuman or certain unethical positions and provisions and to serve human beings, i.e. urging certain mandates of legislation and gap filling.

effects).¹²⁷³ Considerations of this kind have been taken into account when examining or creating some criminal norms and norms on the protection of fundamental rights that can be invoked to demand the protection of human rights from non-state actors when the exercise of those rights depends to a large extent on the action of those actors. In the British and Colombian legal systems, for instance, the conduct of entities with public functions can be regarded as contrary to human rights if it does not conform to general standards set forth in international human rights law.¹²⁷⁴

A similar doctrine has been employed by the Inter-American Commission on Human Rights and the European Court of Human Rights, that consider that intense duties of protection exist when an entity has a guarantor position, either because the enjoyment of human rights *largely* depends on actions of that entity (as happens with some rights of detainees) or because an individual is in a vulnerable position and requires protection by that entity¹²⁷⁵ (which shows that, in practice, differences between events in which positive duties are convenient are blurred). Even though those international bodies talk about State duties, this is been because of limitations of their competence, and the rationale they examine can and should be used in regard to other entities. An analysis in light of the legal goods that must be legally protected permits to consider those situations as legally relevant and in need of regulation when non-state entities are involved.

This criterion, based on legitimate expectations regarding the factual or formal role of social actors, may seem at first difficult to be extrapolated to international human rights law.

¹²⁷³ The Inter-American Commission on Human Rights has mentioned, for instance, that it “reiterates that the State is in a position of guarantor with respect to persons deprived of liberty, and as such it has the absolute obligation to guarantee the rights to life and humane treatment of those persons in its custody.” Cf. Inter-American Commission on Human Rights, Press Release 114/10, “IACHR Deplores Acts of Violence in Prisons in Brazil”; Comunicado de las FARC sobre los 11 Diputados, where the group said that “Reiteramos nuestra responsabilidad como garantes que éramos de la integridad de los Diputados”; Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, op. cit., pp. 176-179.

¹²⁷⁴ Cf. Department for Constitutional Affairs, *A Guide to the Human Rights Act 1998*, op. cit., pp. 8-9, 11, 37; paras. 1-3 and 8 of article 42 of Decree 2591 of 1991 of Colombia, in light of the information found in: *Compilación de jurisprudencia y doctrina nacional e internacional*, Vol. IV, op. cit., pp. 13-27.

¹²⁷⁵ Cf. Inter-American Commission on Human Rights, Press Release 60/11, “IACHR Expresses Concern over Situation in Juvenile Jail in Panama”, where it held that “The State holds a special position as guarantor when it comes to the rights of persons deprived of liberty, which means that the State has the obligation to guarantee their life and humane treatment. Its obligation as guarantor means that the State must take all necessary measures to diligently prevent situations of risk that, as in this case, may pose serious threats to the fundamental rights of those in custody. This obligation also carries special features with regard to minors, which means the State must work more intensely to prevent situations that could place incarcerated children and adolescents at risk. The State has the duty to investigate and punish alleged violations of the right to life and humane treatment, particularly when these occur in correctional facilities.” The Commission has invoked the same doctrine of guarantor position and the positive duties it imposes in other press releases, such as the following ones: Inter-American Commission on Human Rights, Press Release 19/12, “IACHR Deplores Deaths in Fire in Honduras Prison”; Inter-American Commission on Human Rights, Press Release 21/12, “IACHR Deplores Violent Deaths in Mexican Prison”. On the protection that vulnerable individuals are entitled to, cf. European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, 30 November 2010, paras. 41, 45-46, 50. In my opinion, when it is urgent and State action is not possible or effective, other entities may be obliged to protect them in some cases.

However, there are some indicia that suggest that, with some adjustments, it is possible and legitimate to consider that sometimes the role and/or position of actors in relation to inherent rights of individuals demand(s) that they do something and act in accordance with special standards.

These indications are found in international decisions and recommendations that have been developed to tackle some acute problems faced by human rights. One such hint is that of the more intense responsibility of entities that create risks of non-state violations.

This criterion was presented by the Inter-American Court of Human Rights in the case *Pueblo Bello Massacre v. Colombia*. According to the Court, the fact that a risk that non-state actors could violate human rights was encouraged and created by the respondent State made the latter's positive duties more strict, and the diligence with which it had to behave more intense, obliging it to strive even harder to prevent the risks it created from materializing, lest its responsibility was engaged.¹²⁷⁶

It is undeniable that apart from States, non-state entities may also create risks of violations or obstacles to the exercise of human rights. In those cases, it is reasonable and justified to consider that, apart from duties of respect, and partly as a result of their indirect breach if violations occur, non-state entities must be bound by a positive duty to strive hard to prevent those threats from materializing. After all, the generation of risks of violation by any entity can be regarded as contrary to the *spirit* and content of the duty to refrain from violating a right.

These considerations are consistent with the *purpose* and content of human rights law and with an interpretation of non-state duties¹²⁷⁷ and human rights *in good faith*, which is a criterion of interpretation of international law.

Additionally, some actors have positions of power *de facto* or formally, as when they are entrusted with functions the discharge of which may have an considerable impact on the enjoyment of human rights, which can be negatively affected if those actors are negligent. In those cases, the respective actors ought to be under a positive duty to *protect* those rights *within the scope of their competence and concerning the impact of their functions and conduct on human rights and guarantees*, that is to say regarding the impact of their conduct, encompassing both acts and omissions,¹²⁷⁸ on the protection of human dignity.

¹²⁷⁶ Cf. Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment, 31 January 2006, paras. 125-126.

¹²⁷⁷ On support of the idea that non-state entities that generate a risk of a violation may be obliged to neutralize it, cf. Albin Eser, *op. cit.*, at 819.

¹²⁷⁸ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, pp. 31 (para. 1 of the General commentary and footnote 33), 32, 34 (paras. 1 and 8 of the commentary to article 1), or 35 (para. 4 of the commentary to article 2), and article 2 of the aforementioned articles.

Interestingly, the consideration of how non-state conduct can have an impact on the exercise of human rights as one of the criteria to determine the content of non-state human rights responsibilities has been taken into account by John Ruggie in regard to corporations.¹²⁷⁹

According to John Ruggie, instead of basing responsibilities on abstract notions of the sphere of influence of corporations, their conduct and duties to act with due diligence should be assessed considering the “potential and actual human rights impacts resulting from a company’s business activities and the relationships connected with those activities.”¹²⁸⁰ Curiously, that conclusion can also be obtained with doctrines of the sphere of influence. As mentioned by Menno T. Kamminga, the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, which mention that sphere, are not to be dismissed lightly.¹²⁸¹ In my opinion, this is confirmed by an analysis of the notion of the corporate spheres of activity and influence as embodied in those norms, which according to the Commentary to the Norms entails that:

“[E]nterprises shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware. Transnational corporations and other business enterprises shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights. Transnational corporations and other business enterprises shall inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses”¹²⁸² (emphasis added).

To illustrate this, it can be considered that because of their role, private entities entrusted with functions of providing public services can affect the enjoyment of human rights if they are negligent, as for example happens with functions to sanitation and water services. Therefore, it shall be required of them to act with due diligence in the performance of their functions, mandates and activities.¹²⁸³ According to this, sometimes it will be necessary to regulate positive duties of those actors in order to effectively protect human rights and guarantees. This explains why the Human Rights Council of the United Nations considered in a Resolution that “non-State service providers” of “water and sanitation services” must:

¹²⁷⁹ Cf. John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, op. cit.; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, op. cit., paras. 52, 56-58, 61, 63, 67-68, 71-72; *Guiding Principles on Business and Human Rights*, principles 11-24.

¹²⁸⁰ Cf. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, op. cit., para. 72.

¹²⁸¹ Cf. Bruno Demeyere, “The Next Frontier: Prosecution of Extraterritorial Corporate Misconduct before Non-US Courts”, op. cit., at 172.

¹²⁸² Cf. Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights and the commentary on the Norms, E/CN.4/Sub.2/2003/12/Rev.2, paragraph b of the commentary to paragraph A.1. of the Norms.

¹²⁸³ Cf. *Ibid.*; Carolin F. Hillemanns, op. cit., at 1073.

“(a) Fulfil their human rights responsibilities throughout their work processes, including by engaging proactively with the State and stakeholders to detect potential human rights abuses and find solutions to address them;

(b) Contribute to the provision of a regular supply of safe, acceptable, accessible and affordable drinking water and sanitation services of good quality and sufficient quantity;

(c) Integrate human rights into impact assessments as appropriate, in order to identify and help address human rights challenges;

(d) Develop effective organizational-level grievance mechanisms for users, and refrain from obstructing access to State-based accountability mechanisms.”¹²⁸⁴

Certainly, the responsibilities of private providers (must) include positive obligations. Likewise, when considering that some non-state entities that administer territories have a position that makes them have human rights obligations, the Human Rights Committee mentioned that those entities have obligations to ensure and promote human rights. On the other hand, the International Law Commission considers that entities as international organizations can have obligations of prevention.¹²⁸⁵

The preceding considerations corroborate that non-state actors can have positive human rights duties, which are often necessary to ensure the protection of individuals and the satisfaction of essential human needs, especially in a context in which privatization and delegation of State functions take place. According to authors as August Reinisch, Philip Alston or Janne E. Nijman, those dynamics call for examining the protection of human rights and the rule of law, both of which seek to protect important legal goods, from non-state abuses,¹²⁸⁶ which in my opinion include both direct violations and harm caused by inaction of relevant entities.

For the sake of clarity, it must be repeated that duties of State and other authorities are not eliminated by non-state duties, and so they still have obligations to oversee the performance of private entities that provide public services or of public non-state actors as international organizations to whom they have delegated functions, for example. This is consistent with the requirement that an effective and multi-level protection of human rights protection is ensured in relation to delegation and privatization. That can be achieved partly with the existence positive State duties and the vicarious responsibility of States and other entities with positive duties. The human rights framework does not eliminate necessary responsibilities of actors but makes them *complementary* to others when they are required by the practical and principled protection of human dignity.

¹²⁸⁴ Cf. Human Rights Council, Resolution 15/9 adopted by the Council, *Human rights and access to safe drinking water and sanitation*, A/HRC/RES/15/9, 6 October 2010, para. 9.

¹²⁸⁵ Cf. Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006, paras. 4, 8-22; International Law Commission, Draft articles on the responsibility of international organizations, with commentaries, A/66/10, 2011, at 29, para. 10 of the commentary to article 8.

¹²⁸⁶ Cf. August Reinisch, *op. cit.*, pp. 75-76; Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, *op. cit.*, at 7; Philip Alston, *op. cit.*, at 17.

International decisions¹²⁸⁷ support the previous considerations, which are also confirmed in instruments as the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. For instance, the Commentary to the first of those Norms declares that “[t]he Norms may not be used by States as an excuse for failing to take action to protect human rights, for example, through the enforcement of existing laws.”

Moreover, taking into account that lawmaking and other powers traditionally held by States are sometimes delegated,¹²⁸⁸ and that human rights law demands that legislation is respectful of and compatible with its standards, it is necessary that States make sure that organizations to which those functions are delegated ensure an equal or better level of protection of human rights in connection with its functions.¹²⁸⁹

The criterion that the role of non-state actors may require that they have positive obligations seems to be corroborated by domestic and international practice and decisions. For example, declarations –which may have international legal value¹²⁹⁰ that affirmed that non-state armed groups as the FARC have responsibilities concerning the respect and enjoyment of rights of individuals kidnapped by them¹²⁹¹ can be considered as being based on how duties change when an actor creates a risk of violation, because that guerrilla made individuals vulnerable and had duties to cease its abuses and ensure that the rights of its victims are guaranteed and protected.

The underlying rationale of positive non-state duties can be illustrated with a previously mentioned example. Concerning the idea that positive duties of non-state actors are also pertinent when individuals have legitimate expectations or reasons to demand protection from them, due to factors as their role or actions, the opinion that non-state administration of territories with no State control generates positive non-state duties, according to the Human Rights

¹²⁸⁷ On all these issues, cf. *Ibid.*

¹²⁸⁸ Cf. José Manuel Cortés Martín, *op. cit.*, pp. 227-228.

¹²⁸⁹ See footnote 806, *supra*.

¹²⁹⁰ Cf. Antonio Remiro Brotons et al., *Derecho Internacional: Curso General*, *op. cit.*, pp. 176-179.

¹²⁹¹ Cf. Amnesty International, Press Release, *Colombia: FARC and ELN must release all hostages*, 28 June 2007, where it is said that “Whilst civilians and others remain hostage to guerrilla forces their physical security remains the responsibility of the group holding them”; Voice of America, Editorial: “U.S. Condemns FARC Terrorism”, 15 July 2007, where it is said that “U.S. State Department deputy spokesman Tom Casey condemned the FARC for the deaths of eleven Colombian politicians” and expressed that “[t]he responsibility for their death as well as the responsibility for the well-being of other hostages that the FARC maintains is with the FARC, and we call on them to release all of the hostages they have”; OAS, “Declaration on the Assassination of the Colombian Deputies Kidnapped by the FARC”, OEA/Ser.G CP/DEC. 37 (1601/07), 29 June 2007, where it is declared that “kidnapping is a heinous crime; and urges the illegal groups to release immediately, safe and sound, all the kidnapped persons”; Inter-American Commission on Human Rights, Press Release N° 28/08 (“The IACHR urges the armed groups [...] to respect [the] lives [of illegally held hostages], their security and their health, and to proceed with their unconditional and immediate release”); Inter-American Commission on Human Rights, Press Release N° 2/08, “IACHR Expresses Satisfaction Over Release of FARC Hostages”; Inter-American Commission on Human Rights, Press Release No. 35/07.

Committee, can be considered as confirming that the central human rights consideration is the exercise of rights by individuals, regardless of who administers a territory or performs other functions, which are elements that are ancillary to that main point. Therefore, all individuals must be protected from all actors who perform relevant functions or roles, as activists demand¹²⁹² and the implications of human dignity confirm.

In my opinion, in cases similar to the one mentioned before, non-state administration does not even have to be complete or absolute for an actor to have positive duties. In this sense, if an actor shares control with other entities –State or not- or has functions or roles that only partly affect the exercise and enjoyment of human rights, protection from their possible abuses and negligence is still needed. This is because the rationale in those cases is the same one: the difference is that outside the scope of influence, capacity or power of an actor, it would have no positive duties. Moreover, relevant roles that non-state actors can play that can be considered to require positive duties of those actors are not limited to administration functions, and are also predicated of other situations in which legitimate expectations of non-state protection exist.

In sum, positive non-state human rights duties are not limited to actors that manage territories, and extend to all actors with roles or features that generate legitimate normative or factual expectations or (implied or explicit) mandates of protection –including non-state power and control-.¹²⁹³

Therefore, it is possible to consider, for example, that given their mandate and role, when peacekeepers or peacemakers are deployed in a territory expectations or mandates of protecting the civilian population are sometimes generated and perceived implicitly or expressly by authorities or that population. Those perceptions can be reinforced or generated by statements and other acts. Therefore those actors can have implicit or express specialized duties or they must be created. Examples of those obligations include reducing the chance of violations –e.g. through de-mining operations- or protecting civilians from State or non-state armed actors.

Debates and developments concerning the inclusion of functions to protect civilians in the mandates of peacekeeping and peacemaking operations in connection with the expansion of their roles and functions¹²⁹⁴ reveal struggles to make international law demand and ensure protection

¹²⁹² Cf. Human Rights Committee, *Concluding Observations on Kosovo (Serbia)*, CCPR/C/UNK/CO/1, op. cit., para. 4; Philip Alston, op. cit., at 8.

¹²⁹³ Cf. paragraphs 4, 5 or 9 of article 42 of Decree 2591 of 1991 of Colombia; Philip Alston, op. cit., pp. 9-13.

¹²⁹⁴ Cf. *A more secure world: Our shared responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, United Nations, A/59/565, 2004, paras. 210-214; “Protection of Civilians”, available at: <http://www.un.org/en/peacekeeping/issues/civilian.shtml> (last checked: 29/02/2012); Security Council Resolution 1289 (2000).

in a way that meets human and social needs and expectations from those *and* the legal dimensions (sadly, those expectations have been let down sometimes).¹²⁹⁵

Whether all or some social expectations *should* lead to the creation of positive non-state obligations or those obligations exist implicitly must be examined on a case-by-case basis. When expectations are grounded on strong needs of protection due to dependence on non-state performance of functions or roles to a large extent, or if they are created or reinforced by unilateral non-state manifestations, it is hard to deny the pertinence of non-state positive duties.

It is also important to mention that expectations according to which an entity must ensure or protect human rights can have a social, legal or implicit nature. For instance, the Independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation has mentioned that there are social expectations about non-state entities, that the fact that soft law standards call for them to operate with due diligence reveals the need for them to act proactively, and that those actors should not fail to behave as expected by others and in normative terms, that is to say, that they should not *omit to do* or *fail to do* what is expected of them in accordance with the criterion of due diligence, since they not only have duties (binding or not) to refrain from doing something¹²⁹⁶ but also positive obligations.

Truth be told, there are dimensions of many rights that must be *fulfilled and protected* for them to be *enjoyed* or *exercised*, as happens with many aspects of economic, social and cultural rights and also of some civil and political rights (for instance the right to life must be protected from criminals and armed groups).¹²⁹⁷ This consideration is relevant for non-state conduct too.

For instance, the fact that actions must be conducted to guarantee the supply of safe drinking water, analyzed in light of the relationship between that supply and human rights, suggests that domestic or international duties must bind private or other non-state suppliers. While this does not eliminate State vicarious responsibility and obligations to supervise, regulate or sanction violations,¹²⁹⁸ the possible coexistence of responsibilities of different actors (see

¹²⁹⁵ Cf. *'We the Peoples': The Role of the United Nations in the 21st Century*, United Nations, 2000, at 49.

¹²⁹⁶ Cf. Human Rights Council, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, A/HRC/15/31*, 29 June 2010, para. 26, where it is mentioned that the "responsibility [of non-state service providers, based on due diligence] is not a mere passive one, but requires active steps to put into place the necessary policies, mechanisms to identify actual and potential harm to human rights, and grievance mechanisms."

¹²⁹⁷ Cf. Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food (art. 11)*, op. cit., paras. 15, 20, 27; Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, 29 July 1988, paras. 172-177.

¹²⁹⁸ Cf. Human Rights Council, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, A/HRC/15/31*, 29 June 2010, paras. 18-21; August Reinisch, op. cit., pp. 78-82.

Chapter 7) indicates that duties of multiple actors (that must exist for their responsibility to be possible) can coexist as well, being it possible for those duties to ordain them to do something.

2) Apart from the previous events, it can be considered that a non-state actor can have duties to protect human rights in situations of urgency when those rights will be severely or considerably violated unless that actor promptly protects the affected individuals. Such situations can be due to impossibility of protection from States or other authorities or to lack of their presence or of their effective control, for instance. This is relevant, for example, when territories are temporarily or almost permanently not controlled by States or controlled to a higher degree by other entities, which are events that the regulation of internal armed conflicts and the rules on State responsibility take into account for different purposes.¹²⁹⁹ Moreover, when the likelihood of effective State protection is seriously prevented by a non-state actor (e.g. an armed group), the creation of positive duties of that actor is fair and can be even necessary, due to the risk it created (once again, the differences between events in which positive non-state obligations can be created and between justifications of those obligations are *blurred*).

This category of positive duties echoes so-called ‘good Samaritan laws’ or criminal norms that sanction the omission of help, according to which individuals are required to help persons who would otherwise suffer severely and almost inevitably, and is consistent with the foundations of an human rights, that require their *effective and full* protection. The potential seriousness of the impairment of human rights that triggers positive duties, the effectiveness that human rights must have, the imminence of harm, and the necessity of protection, are factors that must be taken into account when considering the regulation of positive obligations of the sort being described. To my mind, at least peremptory rights must be protected by these obligations, even implicitly.

One manifestation of this criterion may be the regulation of silent complicity, whose nature as positive law or *lex ferenda* is debated. According to it, an entity can be considered to be complicit with the violations of another because of its inaction and failure to publicize, denounce or deal with the violation in a pertinent manner in accordance with its capacities. Furthermore, in *lex lata* it is accepted that omissions that legitimize or encourage abuses can clearly constitute the basis of legal responsibility,¹³⁰⁰ and thus provide an example of the existence of duties to act. According to these considerations, in cases in which the revelation of ongoing serious violations can only be made possible by their being exposed by an actor that knows about them, its inaction

¹²⁹⁹ Cf. articles 1.1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), and 9 of the ILC articles on State responsibility, along with paragraph 4 of the commentary to that article, as found in: International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 49.

¹³⁰⁰ Cf. Andrew Clapham and Scott Jerbi, *op. cit.*, pp. 347-348; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, *op. cit.*, A/HRC/8/5, *op. cit.*, para. 77.

would facilitate or permit the impunity of the violations and fail to assist victims who need that help.

Concerning *jus cogens*, since it implicitly binds all potential offenders and assistants to violations, which is consistent with its essential legal and communal character, it can be considered that inaction when the effectiveness of its norms is at stake engages responsibility. This is supported by the rationale of the regulation of some violations of *jus cogens* in the articles on the responsibility of States and of international organizations drafted by the ILC, according to which recognizing or contributing to those violations or not doing anything to try to stop them is unlawful. After all, they command their addressees to cooperate to lawfully “bring to an end” serious breaches of *jus cogens*.¹³⁰¹

In my opinion, the events in which I propose the creation (or recognition) of positive human rights duties of non-state entities are not the only ones in which they can be created, but are ones in which those duties are indispensable or crucial for the protection of human rights. Positive obligations of that sort can be created in other circumstances taking into account protection needs and the conditions for the creation of non-state legal capacities.

It must also be considered that some legal traditions attach great importance to the concept of responsibility –in the non-technical sense of duties rather than in the sense of a consequence of breaches-. This notion, present in some soft law and hard law instruments, may endorse the notion of (not necessarily legal) positive duties of non-state entities.¹³⁰² However, as John H. Knox argues any interpretation of such responsibility must be in accordance with human rights law and cannot be invoked to attempt to legitimate violations or undue restrictions of human rights.¹³⁰³

To avoid that risk, obligations can never be considered as conditions for the enjoyment and exercise of inherent rights, and their existence must be justified by the necessity of protecting human dignity,¹³⁰⁴ being non-state *correlative duties* preferable to *converse ones*. Otherwise,

¹³⁰¹ Cf. articles 41 of the articles on the Responsibility of States for Internationally Wrongful Acts drafted by the International Law Commission, adopted at its fifty-third session in 2001, and 42 of the Draft Articles on the Responsibility of international organizations adopted in 2011, A/66/10.

¹³⁰² Cf. John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 32-33; articles 2, 3, 6, 9, 11, 13, 14, 16, 19, 21, 22, 24, 25, or 27 of the Pre-Draft Declaration on Human Social Responsibilities, as found in: Commission on Human Rights, *Human rights and human responsibilities: Final report of the Special Rapporteur, Miguel Alfonso Martínez, on the Study requested by the Commission in its resolution 2000/63, and submitted pursuant to Economic and Social Council decision 2002/277, E/CN.4/2003/105, 17 March 2003*; articles 9-11 of the Universal Declaration on Human Responsibilities drafted by the InterAction Council.

¹³⁰³ Cf. John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 34-47.

¹³⁰⁴ Cf. Part I, supra; John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 1-3, 20, 47.

there could be a risk that non-state duties could be used as excuses to diminish the effectiveness of the protection of human rights and to condition their enjoyment.¹³⁰⁵

It is also important to mention that international initiatives have considered that in some cases non-state actors must have positive duties *de lege ferenda* or even that they have some of those duties in *lex lata*. This can be seen in draft projects on responsibilities of non-state entities and even in hard law instruments, such as the African Charter on Human and Peoples' Rights.¹³⁰⁶

To recapitulate, positive duties of non-state actors can be based on legitimate social or legal expectations of protection, as indicated by guarantor position theories; on the urgent need of protecting an individual, whose dignity and rights can only be protected by an actor; on the creation of a risk of violation by an actor; or on the special needs of protection of some especially vulnerable victims, among other possible legal justifications, which have been taken into account by international bodies concerning State duties in order to make them more stringent.

Additionally, it is possible to identify situations in which positive human rights obligations of non-state actors are justified and expected given their frequent, intense or immediate possibility of affecting human rights and guarantees, as happens in armed conflicts and other contexts, which are not necessarily contingent and sporadic but may deal with frequent relations or interactions between some actors and some individuals or rights, as may happen with corporations, women, persons with disabilities or migrants, for instance.

Regarding armed conflicts, this theory is confirmed in the report on "A more secure world: *our shared responsibility*" written by the High-Level Panel on Threats, Challenges and Change, where it is mentioned that:

"Under international law, the primary responsibility to protect civilians from suffering in war lies with belligerents — State or non-State. International humanitarian law provides minimum protection and standards applicable to the most vulnerable in situations of armed conflict, including women, children and refugees, and must be respected"¹³⁰⁷ (emphasis added).

The previous quotation illustrates how a State-centric approach is unsustainable from the point of view of the protection of victims, because human rights and guarantees can often be as threatened and violated by States as by non-state entities, for instance given their possibility of assuming similar roles, as happens with belligerents in some regards, among other examples.

¹³⁰⁵ Cf. John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 2-3, 16, 34-35, 37.

¹³⁰⁶ Cf. Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2, 2003; John H. Knox, "The Human Rights Council Endorses "Guiding Principles" for Corporations", op. cit. ("the Norms could have become the basis for a later binding instrument or influenced the development of customary international law [...] the most heinous human rights violations amounting to international crimes" engage the responsibility of corporations, if attributable to them); African Charter on Human and Peoples' Rights, articles 27 through 29.

¹³⁰⁷ Cf. *A more secure world: Our shared responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, United Nations, A/59/565, 2004, para. 232.

Concerning the identification of the vulnerability of some rights or individuals in relation to non-state entities, it can be said that human rights treaties on the rights of women, persons with disabilities, migrants or children, among others, expressly recognize the possibility of victimization *vis-à-vis* non-state entities, and States are permitted and required to adopt positive measures of protection to prevent or respond to those violations. Logically, non-state authorities would be required to do the same when they replace States completely or partly. Moreover, the possibility of creating positive duties of non-state actors can be based on grounds that are similar to those that led to the regulation of positive measures of protection in those instruments, as happens with international organizations that become parties to human rights treaties, for instance, given the need that they protect human dignity from non-state abuses *within the scope of their powers and competences* for that protection to be full.

Since they protect humanitarian legal goods, positive human rights duties of non-state entities are embedded in a global framework of protection of human dignity. In practice and due to the impact of interaction between legal agents, actions from different levels of governance and normative systems are required for its effective protection.¹³⁰⁸ Moreover, those duties can be regulated by international law, since the sources of law permit non-state actors to have international legal capacities, including them; and those duties can be implemented or incorporated in internal law.

Moreover, individuals can have even direct international criminal responsibility and be subject to international procedures, the harshest possible ones,¹³⁰⁹ as responses to their inaction or omission when they breach duties to do something. That this logic is sometimes enshrined in domestic and international criminal law confirms that non-state entities can have (implicit and even explicit or quasi-explicit, i.e. necessarily accompanying other express regulations) positive human rights duties, which need not be criminal. Individuals (who are non-state entities)¹³¹⁰ that operate on their own or as agents of State or non-state entities¹³¹¹ can be sanctioned for failing to protect victims in some events¹³¹² -for instance if they have a guarantor position-. In this regard,

¹³⁰⁸ Cf. Statement issued by the President of the European Court of Human Rights concerning Requests for Interim Measures (Rule 39 of the Rules of the Court), where it is mentioned that “For the Court to be able effectively to perform its proper role in this area both Governments and applicants must co-operate fully with the Court.”

¹³⁰⁹ Cf. John H. Knox, “Horizontal Human Rights Law”, *op. cit.*, pp. 27-31; Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, *op. cit.*, at 374, paras. 98 and 99.

¹³¹⁰ Cf. Andrew Clapham, “Non-state Actors”, *op. cit.*, pp. 3, 7; Gáspar Biró and Antoanella-Iulia Motoc, *op. cit.*, paras. 25, 34.

¹³¹¹ Cf. Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, *op. cit.*, at 374, para. 99.

¹³¹² In this regard, for instance, in the Elements of Crimes of the Rome Statute of the ICC it is held that a policy against a civilian population can be “implemented by a deliberate failure to take action, which is consciously aimed at encouraging” attacks against it, although mere omissions do not prove that policy. Cf. Elements of Crimes (Elements

for example, article 28 of the Rome Statute of the International Criminal Court is telling, because it expresses that failure to act may lead to international (criminal) responsibility in the following way:

Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution" (emphasis added).

Concerning the expression *quasi-explicit duties*, it refers to those obligations that are not worded as such but their existence is widely accepted or not controversial because failure to behave in some way is clearly understood to entail responsibility and expose the entity to which a breach that can be attributed to legal sanctions. Those duties can implicitly accompany other regulations, as those dealing with sanctions, correlative rights, etc.

Regarding how stringent positive duties of non-state actors can be, it can be mentioned that duties arising from risks generated by an actor have a greater than usual intensity and their standards should be stricter, as can be inferred by analogy from State obligations. In most other cases, positive duties of non-state actors will usually be assessed in terms of an ordinary "due diligence", which relies on the "prevention of certain foreseeable harms", as mentioned by Bruno Demeyere.¹³¹³ This consideration explains both what ordinary positive duties demand and why

of the Crimes of Genocide, Crimes against Humanity and War Crimes, corresponding to the Rome Statute of the International Criminal Court), footnote 6, at 5; Albin Eser, op. cit., at 819.

¹³¹³ Cf. Bruno Demeyere, op. cit., at 176.

non-state actors must be bound by them, because the foreseeability of possible harms and their relation to omissions of an actor help explain why positive duties may bind it.

Human rights positive obligations of non-state entities have been recognized in practice. One example is the Memorandum of Understanding between the Justice and Equality Movement of Sudan and the United Nations, according to which armed and intergovernmental actors made human rights commitments of a positive nature, which are partly based on preexistent norms and obligations, and include commitments to prevent and bring to an end violations against some rights of the child, ensure the safety of individuals, ensure the provision of assistance, investigate allegations of violations, and cooperate in the protection of children, among others.¹³¹⁴

Likewise, in the discussion of the *Case of Boimah Flomo, et al. versus Firestone Natural Rubber Co., LLC*, as can be seen in excerpts quoted below, the U.S. Court of Appeals for the Seventh Circuit, applying the ATS –that permits claims about violations of *jus gentium* to be filed even against non-state entities-, seemed to accept the idea that the defendant corporation could have a duty to *prevent* its employees from being helped by children in their labors if their engagement in them were contrary to international human rights law. Furthermore, the respondent itself adopted a policy according to which child labor would not be admitted and was to be discouraged and prevented by it, which seems to be an acceptance of its having positive obligations to prevent risks of negative impacts on human rights related to its activities.

Therefore, both the Court *and* the non-state entity involved in the case seemed to *accept* that positive duties of non-state entities can exist (whether the corporation thought that they have a legal nature is unsettled, although it was concerned about being declared legally responsible for failures). In my opinion, in similar cases, as a result of the direct relation between the work conditions of employees and their requesting help from others, even children, in light of their workload (excessive, according to some), a risk of informal recruitment of child labor by employees can be created by the orders or acquiescence and inactivity corporations, that must detect and prevent labor that is contrary to international (human rights) law and cannot benefit from it.

Concerning the design or identification of obligations of non-state diligence, considerations of beneficial, silent and posterior forms of complicity, and their relation to the prevention of or response to violations,¹³¹⁵ are pertinent as well. Other elements worth

¹³¹⁴ Cf. articles 1 and 2 of the Memorandum of Understanding between the Justice and Equality Movement (JEM) and the United Nations regarding Protection of Children in Darfur of 21 July 2010.

¹³¹⁵ On posterior complicity, cf. Albin Eser, *op. cit.*, 806-807; articles 41.2 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and 42.2 of the Draft articles on the responsibility of international organizations as adopted by the ILC in 2011; ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, Judgement, 29

considering are the role or position of entities and legitimate expectations of protection placed on them, and whether urgent or proactive action of non-state entities is required for human rights to be effectively protected.

To illustrate the previous ideas, it is convenient to cite the following excerpts of the aforementioned decision in the *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC* case:

"We needn't decide how far corporate vicarious liability for violations of customary international law extends [...] Having satisfied ourselves that corporate liability is possible under the Alien Tort Statute, we turn to the question whether the treatment of child labor at the Firestone plantation alleged by the plaintiffs during a period of undetermined length preceding the filing of this lawsuit violated customary international law [...] Although Firestone doesn't employ children, at least directly, it sets high daily production quotas for its employees, who are poor Liberian agricultural workers. It is difficult for an employee to make his daily quota without help, and there is evidence that if he fails to make it he loses his job [...] [employees] can dragoon their wives or children into helping them, at no monetary cost [...] We can't tell from the record whether Firestone has adopted effective measures for keeping children from working on the plantation. The plantation covers 186 square miles, which is roughly the size of Chicago, and thousands of people live there approximately 6500 employees of Firestone plus the members of their families. We don't know how many supervisors Firestone has deployed on the plantation, and hence whether there are enough of them to prevent employees from using their children to help them. We don't know the supervisors' routines, or how motivated they are to put a stop to any child labor they observe. Firestone claims that it now has a policy of firing employees who use their children as helpers, but it didn't have such a policy prior to 2005. The suit was filed that year [...] there is evidence that some of the supervisors had observed child labor during the period (whatever exactly it is) of alleged liability and done nothing to stop it. There is also evidence that the company's decisionmakers were aware of, and may even have condoned, some child labor on the plantation"¹³¹⁶ (emphasis added).

Other examples of possible positive obligations incumbent on non-state entities include obligations of private entities that carry out State functions to disclose or rectify information that is relevant for the public and in human rights terms, or the obligation of private entities that control information about an individual or that is especially important to him to rectify or disclose to him that information, as has been commented in connection with the right of access to information by the Human Rights Committee in its General Comment No. 34 on "Freedoms of opinion and expression". In it, the Committee explicitly recognized that private non-state entities can "impair the enjoyment" of human rights as the freedoms of opinion and expression, which have dimensions that are "amenable to" protection from non-state abuses, being such protection required.¹³¹⁷ As argued in Chapters 4 and 8, that protection can assume different forms on the condition that the chosen form is effective. One of those forms is commanding non-state authorities or actors with special roles to protect or do things to satisfy legitimate demands based on those rights.

July 2004, para. 48, where it was argued that "the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated".

¹³¹⁶ Cf. United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decision of 11 July 2011, pp. 15, 20-21.

¹³¹⁷ Cf. Human Rights Committee, General Comment No. 34, op. cit., para. 7.

It is also important to mention that positive duties of non-state entities (binding or soft law duties) can oblige them to protect, promote or fulfill, which are possible commands of positive human rights obligations, as mentioned in doctrine and international jurisprudence.¹³¹⁸

To conclude, as mentioned by Elena Pariotti, some express objections to positive human rights obligations of non-state entities, even non-binding ones, that allude to: i) the fact that, unlike duties of respect, they may not be derived from the horizontal effects of human rights law (although Andrew Clapham explains why they can be perfectly based on them);¹³¹⁹ or to ii) their possible contribution to the retreat of the State in regard to its responsibilities,¹³²⁰ which as has been seen is a common objection to non-state human rights obligations, not just positive ones.

It is possible to refute those objections by saying that specialized non-state human rights obligations may be created by the sources of international law and regulate positive duties in an express or implied manner when it is so required to effectively protect human dignity, and that those obligations must meet important conditions that prevent abuses, as discussed in general terms in Chapters 4 and 5.

In regard to the second criticism, it must be recalled that State obligations, including those to protect individuals from non-state abuses, are not eliminated when non-state obligations exist.

Conversely, ignoring the need to properly regulate non-state conduct in a way that responds to how it can prevent the enjoyment of human rights would be contrary to how human rights work in practice and what needs individuals have in their everyday relations. It would also be a failure to regulate human rights law and *jus gentium* in ways that take into account, on the one hand, the needs of individuals, and on the other hand the impact and dynamics of several actors and entities, their roles and functions, and their corresponding capacity to affect human rights with their actions or inaction. Those considerations justify, and sometimes even demand, the creation (or recognition of some implicit) international human rights obligations of non-state actors, some of which must oblige them to do somethings for rights to be effectively protected and enjoyed, as recognized in the context of the protection of persons with disabilities and in the European region.¹³²¹

¹³¹⁸ Cf. Elena Pariotti, *op. cit.*, pp. 96, 104-105; Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food (art. 11)*, *op. cit.*, paras. 10, 20, 29; Committee on Economic, Social and Cultural Rights, General Comment No. 14, para. 42.

¹³¹⁹ Cf. Elena Pariotti, *op. cit.*, at 105; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 546-547.

¹³²⁰ Cf. Elena Pariotti, *op. cit.*, at 105.

¹³²¹ Cf. articles 4, 43 and 44 of the Convention on the Rights of Persons with Disabilities, and 1 and 59 of the European Convention on Human Rights.

CHAPTER 7. NON-STATE HUMAN RIGHTS RESPONSIBILITY AND FULL REPARATIONS OF VICTIMS

As argued above, the creation and design of legal capacities of non-state entities, including obligations, that seek to encourage and permit the promotion of human rights and discourage and outlaw their abuses, are often necessary to fully and effectively protect human dignity. Taking into account, as explained by Hans Kelsen, that law belongs to the realm of 'ought',¹³²² breaches of those obligations can happen in practice, and in those events victims must be protected.

Breaches of non-state human rights automatically have substantive consequences and must be addressed in procedures of protection of victims.

As to the substantive implications, the secondary rules of responsibility¹³²³ regulate the responsibility that arises with breaches of obligations attributable to an entity, including aspects related to its emergence and duties of the responsible entities, which include some positive duties. The fact that responsibility is an automatic consequence of breaches of duties means that duties and implications of responsible entities are potential legal capacities of all addressees of international obligations

From the point of view of the practical human and social needs of protection by law, it can be said that just as every factual capacity to affect legal goods must be regulated, victims must be protected in both substantive and procedural terms, recognizing their rights to reparations, preventive measures, and access to remedies, which must have the capacity to protect them from non-state offenders. Moreover, all components of reparations (compensation, satisfaction, etc.) must be satisfied, which often requires that non-state offenders repair victims, which in turn means that those actors must have duties to repair and subjection to procedures of protection.

The important link between non-state responsibility and the effectiveness of rights of victims was taken into account in the Manual of Operations of the Special Procedures of the Human Rights Council of 2008, which said:

"International law focuses upon the legal responsibility of the State for violations of human rights committed on its territory or within its jurisdiction, whether by State agents, other concerned authorities or by non-State actors ranging from national liberation movements to private corporations or other actors. In appropriate circumstances, however, non-State actors can also be held to account for human rights violations and may be relevant interlocutors in the quest to restore respect for human rights and to establish accountability for violations. It might thus be appropriate for mandate-holders to engage in a dialogue with such actors" (emphasis added).

¹³²² Cf. Hans Kelsen, op. cit., 76-81.

¹³²³ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 31, para. 3 of the General commentary.

That excerpt can be somewhat misleading, insofar as norms protecting human rights, as some from international humanitarian law, do not have to *focus* on States, and non-state violations are required to be prevented and sanctioned. It is true that there is a prevalent but not absolute *procedural* focus on State responsibility because of the fact that many human rights judicial or quasi-judicial bodies tend to have competence only to examine State conduct. However, they are still obliged to examine non-state violations in order to assess State compliance with positive duties, and sometimes can examine non-state conduct directly, which means that the procedural focus on States is neither absolute nor unchangeable. This is logical and necessary, because the focus of human rights must be the *protection* of human beings.

Additionally, the citation confirms that it is possible for non-state entities to be held accountable for human rights abuses. That accountability can take many forms: legal responsibility, arising from breaches of duties attributable to the entities bound by them; liability; and ethical, social or other non-legal forms of responsibility.

In substantive terms, legal responsibility generates legal effects, some of which directly protect victims, as the duty to repair; others impose duties on third parties; and others sanction violators.¹³²⁴ A human-centered approach to law must consider that this responsibility is but one “side of a die with multiple sides”. In this sense, responsibility deals with aspects related to: 1) the *rights* of victims of *all* violations, including the rights to full reparations and to access to remedies (*at least* in the legal system of States that must exercise jurisdiction);¹³²⁵ to 2) the duties and rights of third parties, which include the prohibitions of the recognition of or assistance to breaches and the entitlements of third parties to react to violations;¹³²⁶ and related to 3) the legal burdens, duties and sanctions of responsible entities, such as those envisaged in international criminal law.

There is an interconnection between the rights of victims and third parties interested in the protection of human dignity to claim protection and the duties of responsible entities, as can be identified in article 1 of the Draft articles on Diplomatic Protection, that mentions that it is

¹³²⁴ Cf. Manual of Operations of the Special Procedures of the Human Rights Council, adopted in 2008, op. cit., para. 81.

¹³²⁵ Cf. Theo van Boven, “The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, op. cit., at 3; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 3.c, 18; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 4-13; articles 2 of the International Covenant on Civil and Political Rights, 13 of the European Convention on Human Rights, or 25 of the American Convention on Human Rights.

¹³²⁶ See articles 41, 48 or 54 of the Articles on the Responsibility of States for Internationally Wrongful Acts drafted by the ILC, or 42, 49 and 57 of the draft articles on the responsibility of international organizations adopted by the ILC on second reading.

possible to invoke the responsibility of an entity to which it is possible to attribute a wrongful act for an injury; and in the following passage of the *Reparation for Injuries Suffered in the Service of the United Nations* Advisory Opinion of the ICJ, which said that in addition to being entitled to “exercise [...] functional protection of its agents”:

“When [an international organization –a non-state entity-] claims redress for a breach of [...] obligations [owed to it], the Organization is invoking its own right, the right that the obligations due to it should be respected. On this ground, it asks for reparation of the injury suffered, for “it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form [...] the Organization has the capacity to claim adequate reparation, and that in assessing this reparation it is authorized to include the damage suffered by the victim or by persons entitled through him.”¹³²⁷

From the procedural point of view, responsibility-related mechanisms can serve to prevent violations or to respond to them and protect individuals.

Therefore, the protection of individuals (potential victims) from non-state violations is not limited to *ex post facto* measures, because it can have a preventive nature, and instead of enforcement measures can consist in persuasive and dissuasive strategies.

Taking into account that some may disagree with the theories of implicit and *lex lata* general prohibitions of non-state violations of human rights, it can be said that according to that opinion there may be events in which an entity violates internationally recognized human rights but does not breach international obligations of its own. Nevertheless, mechanisms that are based neither on State responsibility nor on non-state obligations can be used (some of them are discussed in Chapter 8). Additionally, victims may be protected by liability and objective responsibility regimes and rules, and duties are imposed on the agents that participate in the relevant act.

7.1. Principles on the responsibility of non-state actors concerning human rights abuses

In any case, since non-state actors can have international human rights obligations or legal burdens, such as being subject to liability regimes, it is convenient to examine relevant principles and consequences of the responsibility of non-state actors in the *corpus juris* of the protection of human dignity.

a) In the first place, despite being elementary, it is necessary to stress that responsibility is an *automatic* consequence of breaches of international legal obligations unless there are circumstances precluding wrongfulness. In consequence, every actor bound by those obligations

¹³²⁷ Cf. International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, at 14 (at 184 according to another sequence of pages shown in the decision).

has the potential inherent legal capacity of being legally responsible, not being it necessary for this to be explicitly mentioned.

b) Additionally, it is important to consider that all entities bound by human rights duties have their responsibility engaged when they do not comply with them and some general principles and rules of responsibility are applicable to all such entities, including States and non-state entities, but some rules may not be applicable to some entities or will have variations that take into account unique features or aspects of specialized protected legal goods or actors.

Likewise, some norms of the humanitarian *corpus juris* may belong to branches or sub-systems that have responsibility rules that are *lex specialis*, the application of which prevails over that of general norms or rules, which remain in the legal system.¹³²⁸ One example would be the requirement of intentional elements concerning international criminal responsibility, as seen in article 30 of the Rome Statute of the International Criminal Court, that is absent in general human rights law *stricto sensu*.

It is important to make these clarifications, because some authors consider that it is necessary to avoid an improper and counterproductive homogeneous treatment of all offenders or protected rights that ignores specificities, differences and unique features of some non-state entities or norms, which would make uniform rules inadequate. Moreover, Roland Portmann mentions that some primary and secondary norms address certain actors insofar as no “logical reasons preclude” their application to them.¹³²⁹ This opinion is sound because the features of some entities may make the application of some general rules impossible or too complicated in practice, and specialized rules that take into account those features may protect affected legal goods. Because of this, the regulation of the responsibility of some entities may differ from that of others in some (not necessarily all) respects, even when they belong to the same sub-category (e.g. not all international organizations are alike, and some have quite distinctive characteristics).

Nevertheless, it is often difficult to strike a balance between the need to take into account special features of actors and rights and the importance of having core shared provisions that guarantee in absolute terms minimum protection and a non-discriminatory protection of all victims, regardless of who the violators are. This explains why there have been discussions about, for example, the responsibility of international organizations of integration, due to doubts concerning the convenience or possibility of applying general rules or the necessity of regulating their responsibility with some special rules.

¹³²⁸ Cf. International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law*, op. cit., paras. 5-10.

¹³²⁹ Cf. Roland Portmann, op. cit., pp. 273-277.

In my opinion, the need to legally and effectively protect human dignity from *all* threats, and the capacity that different entities have to breach norms that protect it (granted, some of them have more power and possibilities of engaging in violations), demand that some common core principles and rules of responsibility are applied in all cases, because the same legal goods can be affected and their existence and relevance do not depend on the specificities of an actor or breach. Still, differences between actors, when poignant, must be taken into account to regulate non-state obligations and responsibility and protect human dignity effectively provided that individuals are effectively protected.

In other words, since human dignity must be equally protected from all violations, some common criteria of international responsibility can be applicable to all violations of rights founded on it regardless of the type of norms or entities involved. Regarding this idea, the International Law Commission has mentioned that the international regime of responsibility does not distinguish between “contractual and tortious” or “criminal” responsibilities,¹³³⁰ which indicates their unicity.

This idea is echoed by Andrew Clapham and Scott Jerbi, who argue that responsibility criteria found in international criminal law can be pertinent in relation to non-state assistance to non-criminal violations –this idea is correct because all the rules and norms that are pertinent for their study, criminal and else, protect human rights and guarantees-. Similarly, the International Court of Justice has considered that rules and criteria on the responsibility of States that assist or are accomplices of other States that commit wrongful acts can equally be applied to cases in which States cooperate with breaches and violations attributable to non-state actors.¹³³¹

It is necessary to take into account that sometimes it is important to examine the regime of the norm in which an obligation is found in order to determine conditions and consequences of its breaches. Likewise, within some *corpus juris* there may be specialized regulations on responsibility that are *lex specialis*, which must be applied instead of general secondary norms.¹³³² This happens in relation to assistance and complicity, because general and criminal regimes differ in some regards, and not all criminal regimes are identical in all aspects either. Notwithstanding, some general and common secondary norms are applicable in all cases, because particular features of an actor or regime do not affect their application and they focus on common protection needs.

¹³³⁰ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 55, para. 5 of the commentary to article 12.

¹³³¹ Cf. Andrew Clapham and Scott Jerbi, *op. cit.*, pp. 341-345.

¹³³² Cf. articles 55 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts (A/56/49(Vol. I)/Corr.4) and 64 of the ILC Draft Articles on the Responsibility of international organizations as adopted in 2011 (A/66/10).

In sum, while it is true that some secondary norms are not applicable to all actors, there can and must be common norms and principles of responsibility, including those on the rights of victims and some on the generation and consequences of legal responsibility for breaches of human rights and dignity.

All norms on non-state responsibility permit the members of the world community to identify violations and their implications and accordingly protect victims, call for the cessation of ongoing violations, demand that reparations and guarantees of non-repetition be given, and be aware of their duty to not recognize effects of breaches, among other legal consequences.¹³³³

After all, the nature and identity of those negatively affected by violations of human rights and guarantees share their human nature and dignity, which are universal.

The preceding discussion on the complementarity of common norms and specialized secondary rules is partly related to the question of whether there can be common norms applicable to all the members of what some perceive as an excessively broad category: that of non-state actors, that includes entities as different from each other as international organizations, NGOs, corporations, individuals, criminal or terrorist organizations, pirates, and many others.

To reply to possible objections, it can be said in the first place that it is certainly possible for different entities to be addressed by common rules and principles and at the same time be eventually subject to specialized norms that depart from the general approach in some aspects.

For instance, entities as different from each other as States and international organizations are subject to some non-identical regulations in some regards, for instance in the law of treaties or regarding legal responsibility, when this is not illogical, improper or impossible and is consistent with the need of protecting identical legal goods of the same legal system. In this sense, the norms drafted by States and the ILC that regulate the aforementioned two fields have some norms that are almost identical, but the regulation of the responsibility of each of those entities also differs in some respects, in order to take into account the particular features of some of them, such as international organizations. In sum, it is possible to offer an effective, logical and convenient responsibility system adapted to the protection of shared legal interests.

Secondly, focus must be made on individuals and their rights rather than on potential offenders: if the former are correctly considered the central persons of responsibility and other regimes, this approach helps to make norms be consistent with the implications of human dignity.

¹³³³ On these effects and principles of legal responsibility, cf. articles 29-31, 34 and 41 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts and 29-31, 34 and 42 of the ILC articles on the Responsibility of international organizations, in the version adopted in 2011; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 3-4, 12-15, 17-18.

In this regard, for instance, Philip Alston has commented that the very definition of “non-state actors” is somewhat problematic due to its including quite different entities in a category that identifies entities based on the exclusion of others: States. Despite this, in his text Philip Alston himself employs that category in a general analysis about non-state actors and human rights, examining some common ideas applicable to all of them concerning the links between them and human rights, and acknowledging that specialized studies (found in the same book) can focus on the particular problems of some actors.¹³³⁴

Similarly, it must be recalled that in Chapter 5 it was mentioned that Andrew Clapham has demonstrated that non-state actors are all entities different from States, but that some norms may use narrower categories of non-state actors *for the purposes of those norms*.

This approach, that recognizes common standards relevant for non-state entities and the possibility of taking into account the specificities of some of them, is compatible with the idea that protection from all non-state violations is required in legal, social and human terms, and that special regulations may be required sometimes *in order to better protect individuals* when general rules are insufficient, inapplicable or inappropriate due to the features of some actors or rights.

For those reasons, non-legal theories that define non-state actors as those with certain features in addition to their being different from States (in fact, some of them classify that some organs of States that are part of them in legal terms and so able to engage their responsibility as non-state)¹³³⁵ cannot be translated into general legal conceptions. Moreover, it is necessary to ensure that individuals are protected from *all* entities.

Concerning common principles and rules applicable to all entities that violate human rights, it is possible to identify the common duty to repair and the correlative rights of victims to reparations and remedies, that can be effective only if *all* violators participate in reparations. This is permitted (and even encouraged) by *jus gentium* and must be recognized in internal legal systems, that can even determine that States that provide reparations can in turn demand compensation from non-state violators, among other legal possibilities.¹³³⁶

Having said this, norms on non-state responsibility that are expressly applicable only to some actors may set an example that must be followed in other norms, that can replicate their content and apply it to other actors when no impediments exist and this is not inappropriate, in

¹³³⁴ Cf. Philip Alston, “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?”, *op. cit.*, pp. 3-19, 25-35.

¹³³⁵ Contrast article 4 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts with Andrea Bianchi, *op. cit.*, pp.194-197 (where the distinction between State and non-state entities is criticized as failing to reflect realities of the participation of public entities); Eric A. Posner, *op. cit.*, pp. 45-53; Daphné Josselin and William Wallace, *op. cit.*, pp. 2-3.

¹³³⁶ Cf. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 15-16.

order to make the protection of all victims effective and prevent discrimination against some of them.

c) An important feature of the responsibility of non-state entities generally, that is also present in the secondary rules on the protection of human rights, is related to the non-exclusiveness and compatibility of responsibilities. According to them, when many entities participate in a violation, all of them can be responsible, because the fact that one category of those entities has duties and responsibilities does not exclude the possibility of others having them as well. In addition to this, different forms of participation in a given violation may give rise to responsibility, including those of direct perpetration, complicity, attempt, or participation in a joint unlawful operation, among others.

Therefore, *all* entities involved in a violation, that contribute to its commission, impunity or success, *must be* responsible and, as a result, have duties to cease their wrongful acts, repair victim(s) and offer guarantees of not participating in violations again, regardless of their identity or the presence of other entities involved in a violation or some procedures or not. If the theories of implied and general prohibitions indicated in Chapter 6 are accepted, those consequences of violations are not only *lex ferenda* ideas but also *lex lata* ones.

The importance that all participants repair victims and have duties to behave in certain manners has to do with the fact that those implications can help to protect the human rights of victims. On the other hand, forms of participation in violations, as complicity, are wrongful acts in themselves that differ from the perpetration of violations, and given their unlawfulness generate responsibility. Concerning the independence of wrongful acts emerging from different forms of participation, the International Criminal Tribunal for Rwanda (ICTR) declared that:

"[A]n individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act with which an accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act"¹³³⁷ (emphasis added).

The fact that different entities can have their responsibility engaged due to the participation in the same violation(s) does not necessarily mean that their duties and other legal consequences of legal responsibility will be identical. This has been made clear by the International Law Commission in relation to the amount of compensation owed by responsible entities, as seen in articles 39 of its articles on the responsibility of States and international organizations (2011 version, A/66/10), and in its consideration that:

¹³³⁷ Cf. International Criminal Tribunal for Rwanda, Chamber I, *The Prosecutor versus Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 532.

"[T]he assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State. In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct"¹³³⁸ (emphasis added).

Moreover, the idea that every wrongful act generates responsibility but that some of the concrete implications of that responsibility may differ in relation to differences in participation, as long as that the basic duty to repair persists, is confirmed by the regulation of responsibility in international criminal law. In this regard, it has been considered that different degrees of the seriousness of criminal responsibilities¹³³⁹ should be reflected in the gradation of the punishment. For instance, according to Albin Eser, this gradation can be made in the decisions of the International Criminal Court, because article 78.1 of its Statute stipulates that in its decisions the Court must take into account factors as the gravity of the crime and the "individual circumstances of the convicted person".¹³⁴⁰

Regarding the *coexistent and not exclusive* responsibilities of different participants in violations, in doctrine and case law it has been considered that State and non-state, purely State or purely non-state responsibilities can simultaneously exist. This has been confirmed by the International Court of Justice in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* and in the draft articles of the International Law Commission on the responsibility of international organizations or the articles on the Responsibility of States for Internationally Wrongful Acts drafted by the ILC. They recognize that the responsibility of one entity can coexist with that of others in connection with a factual violation if each of those entities incurs in a breach of an international obligation (including duties to not contribute to a violation).¹³⁴¹

That entities with different natures or classified in the same category can be legally responsible simultaneously and in relation to the same violations –not being it necessary for their responsibilities to be identical or arise from the same modes of participation- is foreseen in the current version of the draft articles on the responsibility of States and of international

¹³³⁸ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 67, para. 10 of the commentary to article 16.

¹³³⁹ Cf. Albin Eser, *op. cit.*, pp. 782, 787, 799-800, 808, 920.

¹³⁴⁰ *Ibid.*, pp. 787, 920; article 78.1 of the Rome Statute of the International Criminal Court.

¹³⁴¹ See footnotes 91 and 569, *supra*.

organizations.¹³⁴² It is possible to induce a general principle from this consideration, which is not exclusively dependent on the nature or particular features of those entities, as evinced by the applicability of norms of the latter articles (in their version adopted in 2011, for instance) to cases concerning State responsibility.¹³⁴³ This conclusion can also be reached by analyzing the possibilities that entities of the same type have international criminal responsibility in connection with one same crime even when their modes of participation are different, and that, generally, an entity can be responsible for a conduct of its own related to a wrongful act that differs from that of other participants (e.g. assistants and perpetrators).¹³⁴⁴

Lastly, that the responsibility of participants in violations can coexist with that of other participants is also acknowledged in provisions that declare that there may be general or *lex specialis* regulations of the responsibility of some participants; and also in those that determine that entities can be responsible for interacting with the conduct of other entities through assistance, control, coercion, manipulation and circumvention, omission, direction, or else. This is envisaged in articles 16 through 18, 57 and 58 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts, and 14 through 18, 58 through 62, 65 and 65 of the ILC draft articles on the responsibility of international organizations (adopted by the Drafting Committee on second reading), for example.

d) It is also important to distinguish between legal and non-legal responsibilities, being the latter frequently invoked in the context of the promotion of human rights.

The term *responsibility* comes from the Latin word *respondere*, and alludes to answering to something or someone and to bearing the consequences of one's acts, among other definitions.¹³⁴⁵ That notion is shared by legal and non-legal conceptions of responsibility. However, the main difference between them lies in the fact that instead of being based on legal causes and consequences of breaches of legal norms, non-legal forms of responsibility are based on the logic of different normative systems, foundations, or causes, and sometimes do not refer to the consequences of failing to abide by certain standards but to the duties of an entity.

¹³⁴² Cf. articles 8 through 11, 16, 17, 41.2 and 47 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts of 2001, and 9, 14, 15, 17, 18, 42.2, 48, 61 and 62 of the draft articles on the responsibility of international organizations as adopted in 2011 (A/66/10).

¹³⁴³ Cf. draft articles on the responsibility of international organizations as adopted in 2011, articles 42.2, 48, 58-62.

¹³⁴⁴ Cf. e.g. articles 25 of the Rome Statute of the International Criminal Court, 2.3 and 6 of the Statute of the International Criminal Tribunal for Rwanda, 4.3 and 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, 8-11, 16-17, 41 and 57-58 of the ILC articles on State responsibility, or 9, 14-15, 16-18, 42, 58-59, 61-62 and 66 of the ILC articles on the responsibility of international organizations adopted in 2011.

¹³⁴⁵ Other definitions include that of being the cause of something, or of having a duty or behaving virtuously. See Raoul Wirtz, "Moral responsibility in organizations", in: Ronald Jeurissen (ed.), *Ethics & Business*, Royal Van Gorcum, 2007, pp. 25-26; Bin Cheng, *op. cit.*, at 163.

According to this, there are notions of ethical and moral responsibility, the so-called social responsibility, and legal responsibility, among other possibilities.¹³⁴⁶ Corporate social responsibility alludes to the non-binding responsibility of corporate entities regarding “social development and the common welfare”, which may not be as protective of legal goods as legal responsibility and, on the other hand, can even *go beyond* what legal systems require from corporations. This kind of responsibility can therefore help to make up a in a limited manner (given the shortcomings concerning entitlements of victims and remedies) for deficiencies in legal regulation, as explained by Elena Pariotti.¹³⁴⁷

Generally, these different forms of responsibility refer to the idea of answering to someone and the necessary respect of standards and expectations, which can be legal, ethical or social, reason why conduct that betrays those expectations implies accountability. The fact that a lowest common denominator of core protection of human dignity everywhere and from all actors is a foundation of human rights and guarantees¹³⁴⁸ requires the creation of legal obligations because, as argued before, they ensure the effective protection of individuals and access to official protection, given the shortcomings and unreliability of merely voluntary strategies.¹³⁴⁹

Another distinction is that while in *jus gentium* responsibility generates the emergence of legal duties, burdens and capacities of entities that breach legal obligations owed to the international society or other actor(s), non-legal forms of responsibility logically refer to ethical, moral or social duties. This is reflected in the draft Declaration of Human Responsibilities proposed by the InterAction Council -which in my opinion has some ethical staples, as also happens with the Pre-Draft Declaration on Human Social Responsibilities-, that says:

“Every person has a responsibility to respect life. No one has the right to injure, to torture or to kill another human person. This does not exclude the right of justified self-defense of individuals or communities [...] Every person has a responsibility to behave with integrity, honesty and fairness. No person or group should rob or arbitrarily deprive any other person or group of their property [...] No politicians, public servants, business leaders, scientists, writers or artists are exempt from general ethical standards, nor are physicians, lawyers and other professionals who have special duties to

¹³⁴⁶ Cf. Bin Cheng, op. cit., pp. 163-170; Raoul Wirtz, op. cit., pp. 24-26; Alexandra Gatto, op. cit., at 432 (on the complementarity of social and legal responsibilities); John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, op. cit. (on societal expectations as different from binding norms); Antonio Remiro Brotóns et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 784-786; Christian Tomuschat, op. cit., at 107.

¹³⁴⁷ Cf. Elena Pariotti, op. cit., at 100.

¹³⁴⁸ Cf. Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, op. cit., pp. 6, 15, 25, 30-31; Chapter 6, supra (on the implicit humanitarian obligations and peremptory norms).

¹³⁴⁹ Cf. Alexandra Gatto, op. cit., at 431-432; John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, op. cit., (“Although thousands of businesses around the world have agreed to participate in the Global Compact, its effectiveness is limited by its voluntary nature and the generality of its principles).

clients. Professional and other codes of ethics should reflect the priority of general standards such as those of truthfulness and fairness¹³⁵⁰ (emphasis added).

On the other hand, non-legal or non-strictly legal forms of responsibility (including soft law standards) are not necessarily triggered by breaches of duties, although they can also refer to breaches of non-legal duties. Still, different responsibilities may be related with others (e.g. social expectations can be supported by ethical considerations) and their logic can be included in the content of binding duties by its direct reception in international law, or indirectly by virtue of the protection of good faith, for instance. Many of these aspects are discussed in the following considerations put forward by Andrew Clapham and Scott Jerbi addressing the notion of ‘silent complicity’:

“The notion of silent complicity reflects the expectation on companies that they raise systematic or continuous human rights abuses with the appropriate authorities [...]

Whether or not such silent complicity would give rise to a finding of a breach of legal obligation against a company in a court of law, it has become increasingly clear that the moral dimension of corporate action or inaction has taken on significant importance. For example, according to the Ethical Investment Research Information Service, ethical investors ‘are becoming less concerned about where a company operates, and more concerned about the positive steps that are being taken to prevent complicity in violations and to further human rights actively.’ Similarly, shareholder resolutions may put pressure on Chief Executives to raise with the authorities issues regarding human rights defenders or labour activists who have been imprisoned, even in the absence of any legal obligation on the company to do so [...] a narrow reading of complicity does not meet today’s expectations, particularly in situations where there is little trust in government and security forces.

The importance of avoiding accusations of silent complicity is considered by some to be central to sensible risk management in this area. ‘TNCs operating in countries with repressive and corrupt governments are at particular risk of criticism from a wide range of stakeholders for complicity, tacit or active, in human rights abuses perpetrated by the state.’ [...]

The manual *Human rights - is it any of your business?* contains a key element for any corporate human rights strategy [...] companies need to delineate clearly the boundaries of their responsibilities, their willingness to become involved in advocacy and exert influence. This clarifies the extent of assumed responsibilities and makes it possible to monitor progress against objectives and targets¹³⁵¹ (emphasis added).

Many social responsibility arguments highlight that human dignity can be threatened by non-state entities, which should therefore behave responsibly. If this is so, and individuals must be protected effectively and without discrimination, that demand should be translated into legal terms to a certain extent and adapted to the features of *jus gentium*, lest gaps exist and law does not answer to social *and* human needs.

It must be said that social responsibility is not limited to humanitarian concerns, and is often considered to also be related to the environment, labor standards and practices, fair operations, rights and protections of customers, or relations with communities and stakeholders,

¹³⁵⁰ Cf. Declaration on Human Responsibilities drafted by the InterAction Council (available at: <http://www.interactioncouncil.org/universal-declaration-human-responsibilities>), articles 5, 8, 13; John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 32-33.

¹³⁵¹ Cf. Andrew Clapham and Scott Jerbi, op. cit., pp. 347-348.

among other aspects. The cited aspects are mentioned in the ISO 26000 guidance standard on social responsibility (along with human rights), for instance.¹³⁵² Nevertheless, those aspects can be quite connected with the (legal and non-legal) protection of human dignity, because violations of them may amount to or generate violations of human dignity, even as far as soft law and non-legal standards are concerned, as happens with acts contrary to labor, environmental or customer rights standards, for instance.

Being social responsibility important, it is important to not ignore the relevance of ethical and moral dimensions of responsibility. Among other things, they can justify and guide the shaping of legal duties and responsibility, always in the understanding that law is not meant to regulate perfect persons but can have essential mandates also ordained by ethics, can indicate some desired conduct, and should not endorse the harm of individuals.¹³⁵³

Additionally, there have been and can be attempts to introduce social, ethical and other considerations of responsibility in soft law, codes of conduct, guidelines (as the OECD Guidelines for Multinational Enterprises), declarations or lists of duties and responsibilities of non-state entities as individuals, and also in treaties and hard law.

In a sense, it is possible to say that soft law instruments and norms, that are not directly binding, can reflect legal aspirations that some people have, may contribute to the emergence of *opinio juris*, and can include standards that reflect considerations of social or ethical responsibility. However, soft law can also be met with strong opposition or be used to circumvent lawmaking processes¹³⁵⁴ (for noble or suspicious reasons).

Concerning this, it is interesting to point out that there have been controversies about the properness of mentioning certain ideas of non-legal responsibility in international (non-binding) provisions or in non-binding opinions of international bodies.

¹³⁵² Cf. the 7 core subjects of social responsibility according to ISO 26000, as shown in: ISO, *Discovering ISO 26000*, 2010, available at: http://www.iso.org/iso/discovering_iso_26000.pdf (last checked: 05/03/2012), pp. 4, 6-7; ISO, *ISO 26000 project overview*, 2010, at 4, available at: http://www.iso.org/iso/iso_26000_project_overview.pdf (last checked: 05/02/2012); *Protect, Respect and Remedy: a Framework for Business and Human Rights*, op. cit., A/HRC/8/5, op. cit., paras. 52, 55, 67, 71.

¹³⁵³ Justice is not equal to human rights law and does not make persons perfect, but must protect persons from abuses and atrocities and helps to improve their life, reason why a moral dimension exists and *is* relevant in the content of its promotion. Concerning this, e.g. freedom of expression may lead to exchanges and disclosure of information that permits to improve political and non-political life. Yet, it may be used in an offensive albeit not necessarily illegal way deemed as immoral, reason. This explains why it is important to stress the non-absolute identification and the partial separation of law and ethics, in order to prevent denials of rights and to not endorse unethical manifestations –although some unethical actions may lead to restrictions of rights in order to protect others, due to the existence of correlative duties-. Thus, non-legal responsibilities can be invoked in the absence of their legal recognition, and restrictions must comply with all legal requirements in order to prevent abuses in a pluralistic society whose institutions –public and private- and members (majorities and minorities) must *always* respect human dignity.

¹³⁵⁴ See footnote 668, *supra*.

In this regard, John Knox disagreed with the ideas of a Cuban delegate named Miguel Alfonso Martínez concerning notions found in declarations of human responsibilities (such as the draft Declaration on Human Social Responsibilities) that can also be applied to collective non-state entities. Concerning that debate, it can be firstly said that Knox considers that those declarations can be used to introduce “converse duties” in the human rights edifice, and objects to the possibility that they can be used to condition the exercise of human rights and make them subservient to social or group interests, which is a risk that to him does not exist with duties to respect human rights (correlative obligations). Héctor Faúndez Ledesma, who does not deny the ethical relevance of the relationship between obligations and rights, shares this objection.¹³⁵⁵

In the second place, some countries, adherents to some traditions or beliefs and authors argue that human beings must behave responsibly and stress that their acts can have an impact on human rights, reason why they fear that an exclusive focus on liberties and rights may ignore mentions of important responsibilities and conduce to undesirable behaviors and even to violations, which would go against the idea that rights and duties are interrelated.¹³⁵⁶

The tension between both standpoints can be solved by acknowledging that the regulation of both rights and legal burdens (as duties) can protect human dignity and must be based on its protection. For this reason, both dimensions are necessary “sides of the same coin”.

Therefore, both sides put forward interesting considerations. The key to unraveling the mystery is to not permit the denial of the “non-conditional” character of human dignity and rights, and to prevent that actors as States choke individuals in a totalitarian fashion and disregard their dignity. At the same time, it cannot be forgotten that individuals and other non-state entities can violate human rights and guarantees, and that because of this it is important to regulate non-state duties, responsibility and other legal capacities.

Truth be told, this analysis is compatible with the theory put forth by Knox, who fears manipulations of the notion of responsibilities contrary to human rights. The following elements can help to ensure that the human rights edifice is not undermined by non-state responsibilities and protects individuals from all violations: ensure that legal responsibilities and obligations continue to bind authorities and that they can have vicarious responsibility; guarantee the unconditional character of human rights and the protection of human dignity, that must guide the

¹³⁵⁵ Cf. John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 1-2, 32-47; Héctor Faúndez Ledesma, *El sistema interamericano de protección de los derechos humanos: Aspectos institucionales y procesales*, (3rd edn.), 2004, pp. 87-88.

¹³⁵⁶ Cf. John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 32-36; list of individuals that endorse the Universal Declaration of Human Responsibilities drafted by the InterAction Council, available at: <http://www.interactioncouncil.org/universal-declaration-human-responsibilities> (last checked: 05/03/2012); Christian Tomuschat, op. cit., pp. 5, 81; Roberto Andorno, op. cit., at 12.

interpretation and application of law and can even have some direct legal effects;¹³⁵⁷ protect the inherent worth of all human beings from all violations; and acknowledge that international humanitarian law, international criminal law, refugee law, and even human rights law *stricto sensu*, among others, have included, can include and ought to include norms that protect individuals from non-state violators by means of regulating legal capacities of those entities.

On the other hand, it is important to mention that as entities that can operate in society, and as entities that can make decisions (executed and conceived directly by them or through organs in the case of collective actors) and affect human beings, non-state entities must behave in a responsible manner, necessarily taking into account legal obligations and pertinent ethical considerations and social expectations placed upon them.

Needless to say, notions of social, moral and ethical responsibility of non-state actors are relevant and not rendered as unnecessary by their legal responsibility, because they can enhance the protection of individuals because they can help to persuade those actors to behave responsibly or can be invoked by others to demand a responsible non-state behavior. In this sense, public and private actors may react to irresponsible non-state behavior through protests, boycotts, exclusions, condemnations, and other initiatives that seek to make actors behave as *ethically or socially expected from them* and/or to bring about legal reforms. Certainly, in practice the protection of human beings requires legal and non-legal strategies and dynamics.

Additionally, human rights and humanitarian considerations often have not only legal but also ethical and social implications and dimensions, reason why they can be relevant from their perspective and dimensions.

Given their symbolic and often practical implications, demands based on both legal and non-legal non-state responsibility can contribute to making non-state attitudes, culture, policy and practice consistent with human dignity. However, non-legal initiatives are not always effective¹³⁵⁸ or legitimate, as may happen when certain pressures do not affect corporations or some protests are contrary to fundamental rights or are not based on legitimate demands.

For these reasons, non-legal notions of responsibility do not replace international secondary rules, but rather can help to reinforce it and fill its gaps related to aspects that law does not cover or be invoked to bring about changes in positive law. This complementarity can contribute to an effective protection of human dignity from non-state violations, but must respect the rule of law and fundamental rights.

¹³⁵⁷ Cf. Roberto Andorno, *op. cit.*, pp. 4-7, 10; Chapter 1, *supra*.

¹³⁵⁸ See, for instance, footnote 957, *supra*.

e) Another important aspect of non-state responsibility is the distinction between their *external* and *internal* accountabilities.¹³⁵⁹

The internal dimension of non-state responsibility is considered to refer to the accountability of actors towards individuals and other entities with which it has internal or certain close relations, such as employees, donors, staff, or supporters, among others. Some pertinent interests and all the rights of those parties must be protected, and are sometimes reinforced by substantive norms that bind the respective actors, as happens with labor law; while other times they are considered in soft law or *de facto* defended through extra-legal initiatives, such as the threats of withdrawal of support, of ceasing donating or belonging to an NGO, or of no longer investing and being a shareholder in a corporation, among other possibilities.

In turn, the external dimension of non-state responsibility refers to the protection of third parties from misdeeds of non-state entities.

Certainly, some common legal goods may be protected in both dimensions, as happens with human dignity, which must be protected for example both in regard to employees and in relation to consumers or others. On the other hand, it is necessary to ensure the internal and external accountability considerations are not simply illusory and truly prevent actors from “self-legitimizing” themselves or engaging in “mutual legitimization” with other actors and end up being unaccountable and circumventing democratic checks.¹³⁶⁰

f) A fifth important element of the human rights responsibility of non-state entities, that is also common to all of them regardless of their differences,¹³⁶¹ is the principle of individual responsibility, according to which every entity should only be responsible for its own acts, including those of its agents.

The importance and existence of this principle have been stressed by Bin Cheng and Hans Kelsen, and the latter went as far as saying that the evolution of the international legal system would be marked by its being more faithful to this principle and gradually abandoning the idea of making whole collectivities responsible, because many individuals (e.g. citizens) can be

¹³⁵⁹ Cf. Elena Pariotti, *op. cit.*, at 103.

¹³⁶⁰ On all these issues, cf. Menno T. Kamminga, “The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?”, *op. cit.*, pp. 402-403; Elena Pariotti, *op. cit.*, at 100; August Reinisch, *op. cit.*, pp. 48-49; Kenneth Anderson, *op. cit.*, pp. 842-846, 888-890, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1886470 (last checked: 06/03/2012).

¹³⁶¹ Even though it has been said that the concept of non-state entities encompasses entities that sometimes share little more than their not being State entities, I hold that *all* of them can violate human dignity and therefore *all* human beings must be protected from them. Likewise, the contribution of those entities to the promotion of that dignity is to be permitted and not hindered, being this command of permission legally implicit in my opinion. On the heterogeneity of non-state entities and other issues discussed herein, cf. Philip Alston, “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?”, *op. cit.*, pp. 3-8; Gáspar Biró and Antoanella-Lulia Motoc, *op. cit.*, paras. 23-24.

affected otherwise, reason why he considered that individualized responsibility is preferable to a collective one. Indeed, individuals can be affected by acts and sanctions against responsible States with whom they are related, and they should not suffer because of their misdeeds (which often affect them). The Committee on Economic, Social and Cultural Rights agreed with this conclusion when it analyzed the impact of sanctions. Therefore, it is important that sanctions only affect offenders in a lawful manner, respecting the principle of legality and other conditions, and not innocents. Hersch Lauterpacht, in turn, considered that the responsibility of collective entities could be combined with that of their agents. According to him, this would be a “desirable” choice.¹³⁶²

The previous insights are very important, and certainly legal evolution attests to the wisdom of Kelsen’s word, as confirmed by the evolution of international criminal law, designed in part to avoid making whole populations feel responsible and ashamed after World War II and also to specifically address the responsibility of individuals who are responsible for the commission of crimes.¹³⁶³ To my mind, however, in relation to non-state collective entities it is not possible or convenient to altogether and *always* ignore their responsibility and *only* address that of their members and contributors, whose responsibility is often necessary to offer a complete protection of human dignity, for instance because often violations cannot be committed without collective resources, which should be employed to repair victims. Still, individual responsibility is preferable, and collective entities must be responsible for their own acts, with measures to address their accountability having a burden to respect human rights.

In fact, the examination of the conduct and responsibility of collective entities does not necessarily detract from the analysis of individual responsibility (of members and assistants), especially because contrary to some totalitarian ideas groups are not wholly identified with their members, who are not subsumed in the former, as demonstrated among others by the legal conceptions of the different legal personality of legal persons or international organizations *vis-à-vis* their members,¹³⁶⁴ and also by the possibility that both collective entities and their members are addressees of different norms.

Altogether, collective and individual “entities” can have legal responsibility. This does not imply that members of the former are automatically responsible for their breaches. In fact, as can

¹³⁶² Cf. Bin Cheng, *op. cit.*, pp. 208, 210-212; Committee on Economic, Social and Cultural Rights, General Comment No. 8, *The relationship between economic sanctions and respect for economic, social and cultural rights*, E/C.12/1997/8, 12 December 1997, paras. 3-16; Hersch Lauterpacht, *op. cit.*, pp. 40-42.

¹³⁶³ Cf. Eric A. Posner, *op. cit.*, pp. 178, 181, 193.

¹³⁶⁴ Cf. article 2.a of the ILC Draft Articles on the Responsibility of international organizations adopted in 2011 (A/66/10); ILC, Draft articles on the responsibility of international organizations, with commentaries, A/66/10, 2011, at 9, para. 10 of the commentary to article 2; José Manuel Cortés Martín, *op. cit.*, pp. 79-111.

be inferred from the jurisprudence of the Inter-American Court of Human Rights and the works of Hersch Lauterpacht, the responsibilities of States and State authorities may be subject to different regulations, which do not necessarily coincide.¹³⁶⁵ Moreover, the draft articles on the responsibility of international organizations of the ILC indicate that the responsibility of members of those organizations can be engaged in connection with theirs but that this does not always happen, and the other way around.¹³⁶⁶

Additionally, from both symbolic and practical points of view, citizens and inhabitants of a State benefit from the declaration of its responsibility in the humanitarian *corpus juris*, because violations of human dignity are exposed and the consequences of secondary rules of responsibility are triggered, including those related to reparations, sanctions and guarantees of non-repetition.

However, it cannot be denied that some of the consequences of responsibility, despite directly addressing responsible collective entities, can have an indirect and powerful impact on innocent members or individuals related to that entity. Because of their innocence and not having committed a breach, to make sure that they are not stigmatized and their fundamental rights are not affected, it is necessary to individualize responsibility ever more, procuring that it is known exactly which agents or entities carried out or designed violations on behalf of a group, avoiding generalized accusations; implementing secondary rules on responsibility in an individualized manner in regard to reparations, countermeasures or sanctions, among others; supervising the effects of sanctions to avoid their negative impact on human rights or their victimizing individuals.

If these precautionary measures are not taken, attempts to protect human rights from responsible collective entities, for instance through coercive measures, may end up unduly and negatively affecting human rights of individuals (willingly or unwillingly) related to those entities.

This was acknowledged and explained by the Committee on Economic, Social and Cultural Rights in General Comment number 8, in which it examined economic sanctions, although its conclusions can be extrapolated to other sanctions and implementation mechanisms. Because of this, the Committee recommended to bear in mind the need to not impair human rights when designing and implementing sanctions. Moreover, it urged the use of precise sanctions and exemptions, stressing that the effects of sanctions have to be monitored and negative consequences have to be addressed. In the words of the Committee:

¹³⁶⁵ Cf. Hersch Lauterpacht, *op. cit.*, at 42; Inter-American Court of Human Rights, Advisory Opinion OC-14/94, para. 56.

¹³⁶⁶ Cf. articles 17, 18, 62 and 62 of the International Law Commission's Draft Articles on the Responsibility of international organizations adopted in 2011, A/66/10.

“While the impact of sanctions varies from one case to another, the Committee is aware that they almost always have a dramatic impact on the rights recognized in the Covenant [...]

In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing élite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country [...]

Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State [...]

The imposition of sanctions does not in any way nullify or diminish the relevant obligations of that State party [...]

The second set of obligations relates to the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States [...] rights must be taken fully into account when designing an appropriate sanctions regime [...] [...] effective monitoring, which is always required under the terms of the Covenant, should be undertaken throughout the period that sanctions are in force”¹³⁶⁷ (emphasis added).

The underlying consideration of these ideas confirms that Kelsen was certainly right when he advocated a more individualized responsibility in *jus gentium*. In my opinion, this individualization is another necessary step in the humanization of that legal system, because otherwise negative effects can be suffered by human beings, who may be indirectly victimized and can so end up being doubly victimized –by collective entities and those that sanction them-.

In sum, the possibility of a collective entity having international legal responsibility does not detract from the possibility of *individualizing* responsibility, which is important because on the one hand individualization permits the identification of which concrete persons carried out and planned breaches, helping to avoid generalized accusations, and on the other hand can make the consequences of responsibility more effective and accurate. In this sense, for instance, the responsibility of all individual participants in violations makes it more likely that victims will receive compensation and other components of reparation, because no participant that can have means or possibilities of meaningfully repairing victims will be excluded. Additionally, this approach makes deterrence and punishment also be individualized and thus have a greater likelihood of having greater impact and effectiveness, but at the same time tempers them because it can help to avoid indiscriminate or generalized sanctions. The Military Tribunal for the Trial of German Major War Criminals acknowledged these ideas when it mentioned that “only by punishing individuals who commit [international] crimes can the provision (sic) of international law be enforced”¹³⁶⁸ (emphasis added).

¹³⁶⁷ Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 8, op. cit., paras. 3-4, 7, 10, 12-13.

¹³⁶⁸ Cf. Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, op. cit., at 374, para. 99.

Additionally, ignoring the implications of the fact that a collective entity that violates *jus gentium* is also responsible is not only contrary to legal considerations of subjectivity and the potential inherent capacity of responsibility possessed by all entities that are bound by obligations, because this leads to also ignoring reality and the fact that some violations can be committed more easily or only in the context of groups, which are distinct entities that often have their own resources and contacts, especially in a transnational, interdependent and global context.

For measures adopted in response to breaches of law and for the consequences of responsibility to be meaningful and effective, the responsibility of group entities must be recognized and regulated, lest the protection of humanitarian legal goods is not fully realized in practice. After all, effectiveness of protection demands full compliance with the principle of individual responsibility: each entity that breaches human rights duties, even when different ones participate in one same *material violation*, must be held accountable, lest individuals are not fully and effectively protected and fully repaired. This can happen, for example, because an entity that knows part of the truth about a violation or has resources that it would be obliged to employ to repair victims is not involved. Ignoring the responsibility of violators that breach duties or not regulating their conduct so goes against the legally required *restitutio in integrum* (which is mandatory whenever possible and to the extent that it can be provided) and the full reparations of victims,¹³⁶⁹ to which victims are entitled and that authorities must procure.

To this, it can be added that If an entity were not bound by a duty but participates in a violation of human rights (which is always a legally relevant fact), mechanisms of protection that are not based on duties and the existence of responsibility could and should also be employed in addition to holding entities with duties that are breached accountable.

The individualization and identification of the responsibility of all offenders are required by and consistent with the principle of individual responsibility, because their responsibility can emerge due to *their* own conduct, which is what that principle demands. The possible coexistence of responsibilities is also required by the necessity of holding all violators accountable.

Moreover, the individualization of responsibility, coupled with the possible coexistence of responsibilities, permits to hold both collective entities and their members accountable.

Concerning collective entities that operate *de facto* but have no independent formal legal personality –which differs from the notion of subjectivity and capacity to have legal capacities, as

¹³⁶⁹ Cf. article 63 of the American Convention on Human Rights; Pablo Saavedra Alessandri, “La Corte Interamericana de Derechos Humanos. Las reparaciones ordenadas y el acatamiento de los Estados”, at 189; Gina Donoso, *op. cit.*, pp. 29-30, 40-41, 43, 45, 52, 56-57, 59, 60-61, 65.

examined in Chapter 5-, it can be said that they can be bound by international obligations, as examined in section 5.1 but frequently only their members are given express obligations. Since they can have obligations, they can be responsible in legal terms, and even if they could not, international mechanisms of protection of human dignity that are not based on the preexistence of duties, such as some initiatives based on prevention and persuasion, could be used.

On the other hand, according to the ILC, entities with or without a “separate legal personality but acting on a *de facto* basis” may carry out activities that generate the responsibility of entities directing them, controlling them or giving them instructions if a link of effectiveness is present.¹³⁷⁰

It is interesting to note that some entities without formal personality have considerable power and leverage in the international society, such as the G8 and other groups whose decisions can impact on law as a result of initiatives and strategies of members in institutional settings.¹³⁷¹ According to the previous considerations, mechanisms that are not based on duties can be used in relation to them to protect human dignity, and they could be imposed express *and implicit* legal obligations as well, although in practice typically it will be their members who are more likely to be asked to abide by them.

Concerning the notion and content of the principle of individual responsibility, according to Bin Cheng it entails “that responsibility only attaches to the person who is the author of the unlawful act [...] [a]s a duty can of necessity only be personal, so responsibility is also personal”.¹³⁷² That notion must be understood in the light of secondary rules, and so it must be considered that the conduct of agents of a collective entity are attributable to the latter, which can be responsible because that conduct is considered to be its own (although agents can be responsible as well). This is consistent with both individual responsibility and positive law.¹³⁷³

That being said, concerning the object of this study and in connection with the *Drittwirkung* or the horizontal effects of human rights law, it is convenient to mention that the principle of individual responsibility is *not* violated when a *functional authority* -State, international organization or body or else- has its responsibility engaged *in connection with* a violation in which non-state entities have participated if some requirements of attribution established in secondary rules are met, given the violability of human rights and guarantees by private or public non-state actors and not only by States, because of how actors can act irresponsibly in connection with the

¹³⁷⁰ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 49, para. 9 of the commentary to article 8.

¹³⁷¹ Cf. Antonio Remiro Brotons *et al.*, *Derecho Internacional: Curso General*, op. cit., at 56.

¹³⁷² Cf. Bin Cheng, op. cit., at 208.

¹³⁷³ Cf. *Ibid.*, pp. 208, 213.

conduct of others, and because of the positive duties of authorities to protect these rights and guarantees in the interactions of individuals with these actors, as commented unanimously by international supervisory bodies and authors.¹³⁷⁴

This affirmation is supported by the consideration that in cases in which authorities breach their human rights obligations, due to the principle of simultaneous and not exclusive responsibility, the ensuing responsibility of authorities does not exclude the possible existence of independent obligations and responsibility of other entities that participate in the respective violations. In some cases in which authorities are responsible for having failed to prevent or respond to non-state acts with due diligence, the conduct of non-state participants in violations can be considered as conduct of the State or other functional authority under international human rights law as well.¹³⁷⁵

In connection with these considerations, it is convenient to clarify when States or other actors with positive human rights obligations can be responsible for violations in which non-state entities participate. First of all, those obligations can be breached for failing to address violations prior to their perpetration or after their commission with due diligence. In those cases, positive duties are breached due to a negligent behavior in relation to non-state threats.

On the other hand, States and other entities can also be considered to sometimes breach their duties to respect human rights in connection with non-state violations. First of all, the duty to respect human rights is an obligation to refrain from preventing the exercise of human rights, and is therefore a negative obligation. Hence, whenever the conduct of an entity that violates human rights is attributable under the secondary norms of responsibility to another entity with human rights duties of abstention, the latter is considered to have breached its own duty to respect human rights, and the material perpetrator can have simultaneous responsibility. It is necessary to determine when this can happen.

In that regard, the ILC articles on the responsibility of States mention the following events: when an entity is placed at the disposal of another one; when an entity carries out (public) functions of another one; when an entity commits a violation under the control, direction or

¹³⁷⁴ Ibid. *inter alia*.

¹³⁷⁵ Cf. Inter-American Court of Human Rights, *Case of Ximenes-Lopez v. Brazil*, Judgment, 4 July 2006, paras. 85-90, 96, 99-100; articles 5-11 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts; articles 7 and 9 of the ILC Draft Articles on the Responsibility of international organizations as adopted in 2011 (A/66/10). An analogous interpretation inspired by the protection of humanitarian legal goods can make one think that principles or customary norms with the content of articles 5 through 11 –as long as it is logically possible– of the articles on State responsibility are also applicable to functional authorities. Even if this were not accepted, the responsibility of those entities in regard to non-state entities can always be triggered at least when they fail to discharge an obligation to protect and ensure human rights with due diligence.

instructions of another one; or when an insurrecional or another movement establishes a new State or takes over the power of one.

The ILC draft articles on the responsibility of international organizations adopted on second reading do not exactly replicate the text of the articles on State responsibility concerning the subjective aspect of responsibility, but a thorough analysis of those draft articles permits to infer that the underlying rationale of the regulation of most of those events can be accommodated in the secondary rules on the responsibility of international organizations, except in my opinion for the case about insurrecional movements, given their dynamic concerning the assumption of State power.

It is possible to conclude this because, in the first place, the notion of agents of an international organization, found in article 2.d, describes agents as all persons and entities that are “charged by the organization with carrying out, or helping to carry out, one of its functions”, even if they are not “official” persons or entities, as discussed by José Manuel Cortés and the International Law Commission.¹³⁷⁶ Therefore, it is possible to consider that the principle according to which the conduct of an entity performing or having functions of another one can be considered as conduct of the latter if some conditions are met, and therefore can engage its responsibility, is not a principle that only applies to State responsibility. This is because the protection needs, rationale and purposes concerning responsibility are related to events of performance of functions with the knowledge of their titular and of control of an actor over another one, which have elements that can be found in cases in which different actors are involved.

Regarding the possibility of attributing the conduct of an entity to another one that directs, controls or instructs it has been handled in the case law of the International Court of Justice since the *Nicaragua* case and is accepted by the International Law Commission. The Court understands that control must be *effective* for that attribution to occur. This impedes an unlimited attribution of acts of an entity to others –reason why the alternative approach that is satisfied with overall control is not generally accepted-¹³⁷⁷ but takes into account the importance and fairness of holding an entity that is seriously or sufficiently involved in a violation materially perpetrated by another one accountable, in order to protect victims and prevent impunity.

Considering that the regulation of the responsibility of international organizations takes into account the factor of effective control for other purposes, for instance to determine if a member State or an organization must respond for a given act, it can be argued that the

¹³⁷⁶ Cf. José Manuel Cortés Martín, *op. cit.*, pp. 177-184; ILC, Draft articles on the responsibility of international organizations, with commentaries, A/66/10, 2011, at 12, paras. 23-27 of the commentary to article 2.

¹³⁷⁷ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, pp. 47-49, paras. 4-5, 7-8 of the commentary to article 8.

possibility of attribution of conduct for the purposes of responsibility under examination does not have to be exclusive to the regulation of State responsibility, and does not depend on the unique features of States. Rather, it can be considered to be enshrined in a principle based on the protection of legal goods from entities that are involved in threats to them, although it can be somewhat adjusted in light of the specificities of some entities to determine when control exists.

On the other hand, it is difficult to imagine an event in which insurrectional or other movements take over the formal control of international organizations, because their functional and derivative character will impede the legitimacy or formal recognition of their acts as acts of those organizations.

Finally, it must be said that the ILC recognizes that both States and international organizations can be responsible for the conduct of other entities that they adopt as its own.¹³⁷⁸

In all the previous events, non-state conduct that is contrary to human rights and guarantees can be attributable to States or international organizations, and can therefore generate their responsibility. For this reason, when non-state violations of human rights can be attributed to an authority, the latter can be considered to breach its own obligations to respect human rights (i.e. to refrain from violating them), and the material perpetrator can have independent responsibility.

On the other hand, it can be argued that part of the underlying logic of the previous rules can be considered to be derived from or be part of general principles of law,¹³⁷⁹ because they usually do not depend on specificities of States or international organizations (if they did, their analogous extension would be precluded) and are based on the need to protect (humanitarian) legal goods, reason why they are relevant for all actors with human rights duties, being sometimes adjustments in light of features of some actors necessary, as said paragraphs above.

It must also be considered that not in all the cases in which an entity with links to an entity bound by duties to respect human rights participates in a violation the responsibility of the latter entity will be engaged. The regulation of State responsibility deals with this through the notion of public or private capacities. This is also present in the regulation of the responsibility of international organizations, which are public entities. That notion can also be extended to other actors. According to this doctrine, not all acts and omissions of individuals and entities that serve as agents or bodies of a public entity are connected with the attributions and functions of public

¹³⁷⁸ Cf. articles 11 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts (A/56/49(Vol. I)/Corr.4) and 9 of the ILC Draft Articles on the Responsibility of international organizations as adopted in 2011 (A/66/10).

¹³⁷⁹ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, pp. 46, 50, 52.

service and powers. Some conduct of those entities are considered to take place in their “private capacity” and to not engage the responsibility of the public entities, which is logical because not all conduct of agents has a link with the public entities that those agents are related to.¹³⁸⁰ Similar considerations can be relevant concerning non-public entities that operate *de facto* or informally with certain powers and functions, legitimate or not, taking into account the public dimension of the conduct, organization and practices of non-state actors.

On the other hand, conduct that is contrary to or committed in excess of instructions and orders are *ultra vires*. If it is committed by actors that have a pertinent link with a State, they can engage its responsibility, as mentioned in article 7 of the ILC articles on State responsibility for internationally wrongful acts, which is based on established case law and customary norms.¹³⁸¹ In sum, *ultra vires* or *infra vires* conduct of agents, officials or public bodies of a State can be attributed to that State *if* it is committed in a public capacity. According to the International Law Commission:

“The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State [...]. The problem of drawing the line between unauthorized but still “official” conduct, on the one hand, and “private” conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression “if the organ, person or entity acts in that capacity” in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State. In short, the question is whether they were acting with apparent authority”¹³⁸² (emphasis added).

The secondary rules on the responsibility of international organizations do not entirely follow the previous logic. According to them, the conduct of agents of those actors can *sometimes* be attributable to an international organization even if it is an *ultra vires* conduct that exceeds the attributions and powers of an agent, but only if that conduct falls under the competence of the respective organization.¹³⁸³ Because of the functional and derivative character of international organizations, for a conduct to be attributable to them a condition must always be met: that

¹³⁸⁰ Cf. the distinction between “purely private” or “nonofficial” conduct and those that are abusive, “under color of authority” or with connection with an official function, as explained in: *Ibid.*, pp. 42, para. 13 of the commentary to article 4, and 46, paras. 6-8 of the commentary to article 7; International Law Commission, Draft articles on the responsibility of international organizations, with commentaries, A/66/10, 2011, pp. 18, para. 7 of the commentary to article 6, and 27-28, paras. 4 and 9 of the commentary to article 8; José Manuel Cortés Martín, *op. cit.*, pp. 219-223.

¹³⁸¹ Cf. *Ibid.*, at 46, para. 4 of the commentary to article 7.

¹³⁸² *Ibid.*, at 46, paras. 7-8 of the commentary to article 7.

¹³⁸³ Cf. International Law Commission, Draft articles on the responsibility of international organizations, with commentaries, A/66/10, 2011, pp. 26-29, commentary to article 8; José Manuel Cortés Martín, *op. cit.*, pp. 211-214.

conduct must fall within the scope of the (implied or express) powers and attributions of those organizations, which have the legal capacities that permit them to achieve the goals for which members and founders created and support them. This is expressed in article 8 of the ILC articles on the responsibility of international organizations adopted on second reading, which states:

“Excess of authority or contravention of instructions

The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.”

On the other hand, in the case of individuals that are members of criminal groups or participate in joint illegal enterprises, different regulation alternatives have addressed their responsibility and exist in different regimes. According to them, the conduct of persons that also participate in such an enterprise cannot be automatically attributed to other members, being there a requirement of a *dolus eventualis* for someone to be responsible for conspiracy or co-perpetration.¹³⁸⁴

The previous examples concerning *ultra vires* conduct and *dolus eventualis* illustrate how a general possibility of holding entities accountable for the acts of others must and can be sometimes adjusted due to the specific features of some actors, and how this is compatible with the application of some general considerations and purposes even in those cases despite the presence of specialized different rules.

Additionally, as examined in Chapter 6, sometimes non-state entities have or can have positive human rights. They can be duties *to protect* human rights, which impose obligations even concerning inter-private relations, and therefore oblige to prevent or duly respond to non-state violations. Additionally, positive duties can also be duties to *fulfil some* human rights, which impose obligations of striving to create or bring about conditions that permit the exercise of a given right, or of directly making a right be enjoyed.

Those obligations require that when a right cannot be enjoyed due to non-state obstacles, the entity with the respective positive obligations deals with them in order to create the conditions that permit individuals to exercise and enjoy their human rights and guarantees. This implies striving to neutralize non-state obstacles and/or directly providing pertinent services.

In General Comment 12 on the *right to adequate food*, among others, the Economic, Social and Cultural Rights Committee distinguishes the categories of positive obligations mentioned above. Its opinion can be read substituting mentions to States with all entities with the

¹³⁸⁴ Cf. Albin Eser, op. cit., pp. 789-793; Stefano Manacorda and Chantal Meloni, “Indirect Perpetration *versus* Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?”, *Journal of International Criminal Justice*, 2011, pp. 162-175.

pertinent positive human rights obligations and identifying underlying general principles applicable to other rights and different actors:

“The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters”¹³⁸⁵ (emphasis added).

It is convenient to recall that when a State privatizes or delegates its functions to other entities, it does not get rid of its duties and is obliged to supervise and ensure that individuals are protected against possible abuses or lack of protection from those that carry out those functions.¹³⁸⁶ This rebuts objections that argue that the regulation of non-state duties and responsibilities will weaken human rights, because as said before they in fact strengthen them.

On the other hand, positive obligations to protect human rights demand acting with due diligence *before and after* a violation takes place, to prevent and appropriately respond to non-state violations and effectively protect victims. There are circumstances in which the diligence with which obliged actors must act is greater than usual, such as when they create a risk, when they have a guarantor position, when especially vulnerable individuals or rights require intense protection, or when an entity supported or having certain links with those actors can perpetrate a violation, among other events.¹³⁸⁷

It is important to add that, as has been considered by the Inter-American Commission on Human Rights, as in the case of *Jessica Lenahan (Gonzalez) et al. v. the United States of America*, the obligation to ensure the exercise of human rights must be interpreted and applied in light of the general principle of due diligence, and accordingly (unless otherwise stated, it can be added) it is an obligation of means and not one of result. Moreover, the regulation of that obligation is based on the recognition that private and public non-state entities *can violate* human rights, as confirmed by the Inter-American Court of Human Rights in the *Cotton Field* case and by the Inter-American Commission as well.¹³⁸⁸

¹³⁸⁵ Cf. Committee on Economic, Social and Cultural Rights, General Comment 12, op. cit., para. 15.

¹³⁸⁶ See footnote 59, supra.

¹³⁸⁷ Cf. John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, where it is held that “additional steps to protect against misconduct by entities that the state owns, controls, or substantially supports, and to promote respect for human rights by corporations with which the state does business.”

¹³⁸⁸ Cf. Inter-American Commission on Human Rights, *Case of Jessica Lenahan (Gonzalez) et al. v. United States*, Merits Report, op. cit., paras. 111, 133 (there is a “link between discrimination, violence and due diligence” [...])

Apart from generating specialized duties in relation to specific cases of violations, the obligation to ensure the free and full exercise of human rights imposes the burdens of tackling and addressing social and other *practices* that are contrary to those rights, and also requires taking into account the *concrete needs* of victims. This is reflected in the regulation of the protection of persons with disabilities and also concerning the protection of women and children that are victims of domestic abuse. In this regard, positive duties oblige to respond with appropriate measures that have prospects of effectiveness to threats of violations that are known or ought to have been known by States and other duty holders. All organs of collective entities with those obligations are obliged to protect individuals in a coordinated and diligent manner.¹³⁸⁹ The previous criteria coincide with considerations found in the ILC articles on State responsibility and in decisions of the European Court of Human Rights.¹³⁹⁰

Additionally, States, functional authorities and other entities with positive human rights obligations are obliged to address potential or existent non-state violations through different effective means, including cultural, legal and other mechanisms. They are required to use all mechanisms with prospects of effective protection that are available to them, as mentioned by the Inter-American Court of Human Rights in the *Cotton Field* case,¹³⁹¹ which means that they are often under a duty to employ multiple mechanisms that reinforce each other. Therefore, use of the mechanisms described in Chapter 8 may be mandatory in some cases. Concerning this, the Inter-American Court mentioned that the specific needs of protection of rights and the circumstances of a case determine how an authority must respond to threats to human dignity in a comprehensive way that prevents “risk factors” and strengthens measures of protection.¹³⁹²

States are “responsible for failures to protect women from domestic violence acts perpetrated by private actors. Domestic violence, for its part, has been recognized at the international level as a human rights violation” and rights must be protected from them); Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, judgment, op. cit., para. 280 (“the juridical consequence of an act or omission of a private individual [may be] the violation of certain human rights”).

¹³⁸⁹ Cf. Inter-American Commission on Human Rights, *Case of Jessica Lenahan (Gonzalez) et al. v. United States*, Merits Report, op. cit., paras. 133, 145, 160, 173, 177, 212; Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, judgment, op. cit., paras. 236, 258, 288.

¹³⁹⁰ Cf. European Court of Human Rights, *Case of Mastromatteo v. Italy*, Judgment, op. cit., para. 68; European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, op. cit., para. 50; European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment, op. cit., paras. 129-130; European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Judgment, op. cit., para. 219; ILC, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, pp. 35 (para. 4 of the commentary to article 2) and 46 (para. 8 of the commentary to art. 7).

¹³⁹¹ Cf. Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, judgment, op. cit., paras. 246, 252, 258, 279-280, 283, 285, 290, 292.

¹³⁹² Cf. *Ibid.*, paras. 235, 258 (thus, prevention and other measures must complement each other, and each of those categories can include different strategies, such as cultural, persuasive or other initiatives).

On the other hand, it must be said that there are discussions surrounding the possibility of States protecting individuals from non-state threats that take place abroad, which is a topic partly related to the extraterritorial protection of human rights.

The framework and principles on corporations and human rights designed by John Ruggie, for instance, mention that the extraterritorial reach of State protection from corporate abuses is not mandatory but is permitted. According to this idea, jurisdictional bases that permit extraterritorial protection from non-state abuses are admissible and legitimate. However, human rights activists have decried what they perceive as a missed opportunity to identify or develop an extraterritorial obligation to protect.¹³⁹³ According to the framework and principles designed by Special Rapporteur Ruggie say about the subject, it would seem that State responsibility to protect from and sanction non-state violations committed overseas could never arise, because of the lack of a binding obligation that commands such protection.

To my mind, however, even if the aforementioned framework and principles are correct from a *general point of view*, which does not delve into specifics, express and implicit specialized obligations of States and other authorities that demand extraterritorial protection from non-state abuses can still exist. In this sense, if the events in which the duty to behave with due diligence is more intense are taken into account, it is possible to conclude for example that when an actor with positive duties generates the risk of a non-state violation being committed abroad, it should strive with the utmost diligence to prevent its commission or to respond to it, lest its responsibility is engaged.

This analysis does mean that other extraterritorial obligations in relation to non-state abuses cannot exist, since law may evolve, especially because the framework described above is described as a starting point that does not foreclose other “developments” and constitutes a “common platform for action, on which cumulative progress can be built”.¹³⁹⁴ Accordingly, it embodies a minimum that can be expanded by other norms and systems that provide greater protection. Additionally, one of the mandates of its drafter was to “clarify existing standards”,¹³⁹⁵ and it may be that not all existing norms were codified or identified.

¹³⁹³ Cf. John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, op. cit. (the limitation of the duty to protect to abuses within a State’s territory or jurisdiction “was controversial, because human rights advocates have argued that developed states have a duty to protect against foreign abuses committed by corporations domiciled in their territory” and critics were concerned that “the Principles did not characterize the duty to protect as extending extraterritorially”).

¹³⁹⁴ Cf. John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, op. cit.; Human Rights Council, *Human rights and transnational corporations and other business enterprises*, Seventeenth session, A/HRC/17/L.17/Rev.1, 15 June 2011, para. 4.

¹³⁹⁵ Cf. John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, op. cit.

The facts that international Courts and other supervisory bodies can directly or indirectly examine the conduct of non-state actors, and that the previous considerations are not necessarily dependent on State features but rather obey to the logic of positive duties and are based on the effective protection of individuals, make most of the principles and considerations just examined be amenable to application to non-state *de facto* or functional authorities or non-state entities with positive human rights obligations as well, being some adjustments that do not detract from the required protection permissible.

The foregoing analysis explains why it has been considered that positive human rights obligations are related to the *horizontal* effects of those rights. It is because they are relevant even in relations between individuals and public or private non-state entities, and the relevance of those rights is thus not limited to or based on relations between individuals and States or other authorities (covered by the vertical or lateral dimensions of protection). However, the horizontal effects of human rights are not always indirect and dependent on the duties of authorities, because actors without that character can also be directly bound by legal capacities in the humanitarian *corpus juris* and the protection of human dignity has comprehensive and transversal effects and implications (see Chapter 1).

The consideration that horizontal human rights effects do not have to depend on State duties answers to the fact that their protection would be unreliable otherwise, as revealed by the Mastromatteo paradox. Furthermore, the fact that some supervisory bodies can only examine State conduct does not imply that other entities cannot have duties, responsibilities and subjection to other procedures, such as those related to the supervision of compliance with international criminal norms, the European Convention on Human Rights or the Optional Protocol to the Convention on the Rights of Persons with Disabilities,¹³⁹⁶ among other possibilities.

The responsibility of States and other actors in relation to non-state conduct can be summarized by saying that they can be responsible for non-state violations when they fail to prevent or respond to non-state violations with the diligence law requires them to behave with, or when the conduct of non-state entities that violates human rights is attributable to them, case in which they are considered to breach their duty to respect human rights.

In my opinion, apart from States, due to lateral effects of human rights, that in my opinion must not be limited to functional and *de facto* authorities but also involve all actors on which there are legitimate legal expectations (e.g. “traditional leaders”), and also due to the transversal or all-

¹³⁹⁶ Ibid.; section 2.3, *supra*; articles 25 of the Rome Statute of the International Criminal Court, 6 of the Statute of the ICTR and 7 of the ICTY.

encompassing scope of the universal protection of human dignity,¹³⁹⁷ non-state entities can be responsible when they breach positive or negative duties based on their role and the enjoyment of human rights is negatively affected. This is revealed, among others, by the opinion of the Human Rights Committee in the UNMIK case, by the consideration that human dignity must be protected by different actors, by international criminal norms, by non-state responsibility for complicity or participation in violations, or by human rights obligations that can bind functional authorities, as international organizations, that are endowed with some competences that are essential for the enjoyment and exercise of human rights and for the accessibility and integration of persons with disabilities. Interestingly, Amnesty International criticized UNMIK for *failing* to investigate the abduction and murder of Kosovo Serbs, echoing criticisms made by the Human Rights Committee.¹³⁹⁸ This confirms that non-state actors can have positive human rights duties.

g) Lastly, it is convenient to examine if non-state human rights responsibilities entail some risks. This was partly examined previously, when objections to non-state human rights legal capacities were examined.

It is often argued that non-state responsibilities can be pointed out by States to elude their own. However, because legal responsibilities can be complementary and are not exclusive, and since State responsibility can be engaged for failing to tackle non-state violations or for cooperating with them, non-state responsibilities in fact make it necessary to scrutinize State behavior and stress that non-state conduct must also be examined to determine if violations occurred and, eventually, if non-state obligations were breached as well.

Another possible risk, according to some authors, is the possibility that, consciously or not, human rights ideas are invoked in ways that actually weaken existing guarantees and fundamental rights by making them cover too much ground or strain resources to protect them. To this, it can be responded that human rights law *already* requires protection from non-state violations, and that a multi-level framework accommodates many actors and mechanisms that can contribute to offer a full protection. Denying the existence of non-state abuses, in fact, makes human rights cover too little and disregards many victims.

Others, as John Knox, warn how responsibilities should never be interpreted or used as emanating from duties compliance with which can condition the enjoyment of human rights,¹³⁹⁹

¹³⁹⁷ Cf. sections 3.1 and 4.1, *supra*

¹³⁹⁸ Cf. article 44.1 of the Convention on the Rights of Persons with Disabilities; Declaration of the European Union to its Formal Confirmation of the Convention on the Rights of Persons with Disabilities (available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en, last checked: 07/03/2012); Amnesty International, *Kosovo: UNMIK's Legacy. The failure to deliver justice and reparation to the relatives of the abducted*, Amnesty International Publications, 2013, pp. 5-22.

¹³⁹⁹ Cf. John H. Knox, "Horizontal Human Rights Law", *op. cit.*, pp. 1-3, 10, 16, 34-35, 37-40.

which would be contrary to their non-conditionality and inherent character. To this, it can be said that an interpretation of human rights based on human dignity and its non-conditionality, coupled with the strict conditions for restricting rights, ensure that such perversion is forbidden.

Likewise, the use of notions that demand human rights protection from non-state violations, such as the principle of equality and non-discrimination, must be used in a coherent and careful way that is respectful of the foundations of human rights law, lest they can be used against those very foundations. In this sense, some NGOs and authors have warned that some entities may be tempted to falsely invoke the responsibility of non-state entities to impose their own agendas to the detriment of guarantees that are paid lip service, such as human rights. For this reason, care must be taken to identify when arguments are not truly based on human rights law but on ideological aspirations that are disguised as legal arguments that actually can undermine the exercise of some human rights such as those related to privacy and conscience.¹⁴⁰⁰ The practice of portraying aspirations as legal norms is often handled imperceptibly, consciously or not, by non-state entities.¹⁴⁰¹

Therefore, claims of protection from non-state entities must be carefully examined to prevent that perfectly lawful non-state conduct is attacked with “human rights” arguments that, if successful, would be contrary to rights of the utmost importance that are true achievements in human history, such as rights of conscience and conscientious objectors.¹⁴⁰²

Otherwise, it is risked that an official or *de facto* “thought police”¹⁴⁰³ attacks inalienable rights to have and manifest beliefs and opinions, paradoxically violating liberty and human dignity “in the name of human rights and liberty”. It must be considered that *all* the components of the framework of the legal protection of human dignity are relevant, and this includes both the

¹⁴⁰⁰ On these issues, cf. Patrick B. Craine, “Vatican website taken down by pro-abortion hackers”, *LifeSiteNews.com*, 07/03/2012, available at: <http://www.lifesitenews.com/news/vatican-website-taken-down-by-pro-abortion-hackers> (last checked: 07/03/2012); Human Rights Committee, General Comment No. 34, op. cit., paras. 7, 15, 20, 40; Declaration of Principles on Freedom of Expression adopted by the Inter-American Commission on Human Rights (“Restrictions to the free circulation of ideas and opinions [...] violate the right to freedom of expression”); Nate Anderson, “Who Was That Masked Man”, *Foreign Policy*, 31/01/2012, available at: http://www.foreignpolicy.com/articles/2012/01/31/who_was_that_masked_man?page=0.3 –last checked: 07/03/2012- (“The ideology can be inconsistent and is often unformed, as it always will be in a “group” like Anonymous; the irony of shutting down websites you don’t agree with in the name of free speech and transparency seems to be lost on many of them”); Roger Kiska, “Vraiment Excellent!”, *Turtle Bay and Beyond –International Law, Policy, and Institutions-*, 28/01/2011, available at: <http://www.turtlebayandbeyond.org/2011/family/vraiment-excellent/> (last checked: 07/03/2012); Grégor Puppincq, “The Italian Crucifix Case: A Watershed?”, *Turtle Bay and Beyond*, 09/05/2011, available at: <http://www.turtlebayandbeyond.org/2011/abortion/the-italian-crucifix-case-a-watershed/>; European Court of Human Rights, First Section, *Case of Schalk and Kopf v. Austria*, Judgment, 24 June 2010, paras. 13, 55-58, 61-64, 108 (this case denies the substance many accusations of human rights deniers of those who conceive marriage in a traditional way, being those accusations often quite intolerant themselves).

¹⁴⁰¹ See footnote 691, *supra*.

¹⁴⁰² Cf. Alliance Defense Fund, “305 parents, children sue Spain over anti-Christian education”, 25/03/2010, available at: <http://www.alliancedefensefund.org/News/PRDetail/3909> (last checked: 08/03/2010).

¹⁴⁰³ Cf. George Orwell, *1984*, Houghton Mifflin Harcourt, 2008 (First Mariner edition).

protection of privacy rights and the protection from (true) non-state violations. This last idea also means that human rights cannot be invoked to justify violations of other human rights, as mentioned in international instruments.

On the other hand, as Andrew Clapham has well explained, violations can take place in private contexts, which confirms that human dignity must be protected in them. What must be done is to be cautious and not manipulate and politicize human rights, to use proportionality tests when examining conflicts of rights, and to determine what legitimate exercises of rights do not amount to abuses of rights and do not violate their content, as happens with reasonable distinctions, which can respect the principle of equality and non-discrimination.¹⁴⁰⁴

In sum, human rights must be protected in *all* situations, lest arguments purported to be human rights ones can be used against them. In light of the idea that the protection of human dignity is the purpose and foundation of human rights, it can be said, for instance, that that violence against homosexuals or their criminalization but not disagreement with certain lifestyles violate human rights. Likewise, it can be safely concluded that violations of labor rights; domestic abuse by spouses of any gender; physical and psychological inhuman treatment of children by parents, relatives or other persons; bullying, and other acts, are contrary to the inherent and non-conditional human dignity, and victims must be protected from them¹⁴⁰⁵ even if those abuses are committed by private (and sometimes public) non-state entities and in a so-called 'private sphere'. On the other hand, freedoms of conscience, privacy, and other rights that tend to protect intimacy or the individual development and freedom of beliefs and decisions are protected, and must be respected, ensuring that they are not interpreted in a way that endorses *true* human rights violations.

7.2. The participation of non-state violators in reparations as a condition of the full protection of victims

That law can and should protect human dignity from threats of non-state violations, and that it must also permit non-state promotion of human dignity, answers to the central importance that human beings must have in *jus gentium*. Their importance is recognized in substantive and

¹⁴⁰⁴ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 43-44, 526-531, 544-545.

¹⁴⁰⁵ Cf. e.g. Commissioner for Human Rights (of the Council of Europe), "Children and Corporal Punishment: The Right Not to be Hit Also a Children's Right", *Issue Paper*, 2009, pp. 6-9, available at: <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1370686&SecMode=1&DocId=1206996&Usage=2> (last checked: 08/03/2012); Committee on the Rights of the Child, General comment No. 13 (2011), *The right of the child to freedom from all forms of violence*, CRC/C/GC/13, 18 April 2011, paras. 21, 22, 24, 27, 29, 31, 44, 61, 63; articles 1 and 3 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará"), *inter alia*.

procedural norms that seek to protect humanitarian legal goods, and law must serve them because it is a human product and an instrument whose power must be legitimate.

The issues of reparations and the international legal responsibility of non-state entities must be examined in light of those considerations. This means that their implications and consequences, including the right to remedies and the duties to repair, cease ongoing violations and offer guarantees of non-repetition must be interpreted in a way that fully protects human dignity when possible, and if such interpretation is not possible then law must change *de lege ferenda*.

The obligation to repair is one important consequence of responsibility that emerges with violations of human rights. One of the purposes of that responsibility is the protection of victims, which must guide the critical analysis of norms on responsibility and reparations, in order to assess if they are compatible with non-discrimination and the universal protection of human dignity. Therefore, the analysis of the legal consequences of human rights violations cannot focus exclusively on the *duties* of responsible entities, and must also take into account that victims have *rights* to full reparations and access to effective remedies and protection. Therefore, responsibility and reparations are two sides of the same coin. In the words of the Human Rights Committee:

"[I]n addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights [...] Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged"¹⁴⁰⁶ (emphasis added).

Just as there is an obligation to repair human rights violations related to the duty of responsible entities to provide remedies to victims, there is a *right* of victims to have access to effective remedies and to have effective protection and full reparations. *Ergo*, the right to full reparations and the duty of violators to repair victims complement each other and coexist.

On the existence of the right of victims to remedies and the obligation of authorities to provide them, the following articles can be cited: 25 of the American Convention on Human Rights; 13 of the European Convention on Human Rights; or 8 of the Universal Declaration of Human Rights. All of them *recognize* the right to an effective remedy as related to the protection of human rights. Moreover, in my opinion even article 2.3.a of the International Covenant on Civil and Political Rights, written in the form of a duty "to ensure" that victims of human rights violations have "an effective remedy", implicitly recognizes a right of victims to have remedies, because it is correlative to the aforementioned duty and the lack of remedies constitutes a wrongful act. The same can be said of similar norms.

¹⁴⁰⁶ Cf. Human Rights Committee, General Comment No. 31, op. cit., paras. 15-16.

On the other hand, article 79 of the Rome Statute of the International Criminal Court deals with a Trust Fund “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims”. It highlights how the provision to victims of material goods that amount to what they require in terms of compensation (similar mechanisms may be designed in relation to other elements of reparations, in my opinion) may be conducted *even when the entities obliged to compensate victims do not provide the respective components of reparations*. When this happens, solidarity¹⁴⁰⁷ or coercion¹⁴⁰⁸ mechanisms can be used to satisfy the *right* to reparations. Still, those mechanisms do not deny the existence and importance of the *duty* of violators to provide reparations, and they may be obliged to compensate those who have provided elements of reparations.¹⁴⁰⁹

A first conclusion can be drawn here: if victims of human rights *violations* have rights to reparations and to have access to remedies, *and* non-state entities can violate human rights, as has been recognized by the Inter-American Court and Commission of Human Rights, UNICEF, authors and other entities,¹⁴¹⁰ the conclusion of a syllogism would be that victims must be fully repaired even when non-state entities perpetrate violations or participate in them, and not only when States directly commit abuses. Sometimes, this requires that those entities provide reparations.

Whether access of victims to reparations in which non-state offenders can be obliged to participate can be international and not only internal depends on normative decisions. Nonetheless, the fact that in substantive international law protection from non-state violations is required due to the horizontal effects of human rights, which exist even if only States have obligations, confirms that victims have a right to full reparations if violations in which non-state entities participate are committed. Therefore, if domestic law does not ensure those reparations, the respective State incurs in a breach based on the failure to adjust internal law and practices to international human rights standards and to ensure the full and effective protection of individuals.¹⁴¹¹

¹⁴⁰⁷ Cf. articles 75 and 79 of the Rome Statute of the ICC; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 12-17; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 15-16 and Preamble; Avril McDonald, *op. cit.*, pp. 242, 258, 263, 271, 273-274; Theo van Boven, “The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, *op. cit.*, pp. 2-3.

¹⁴⁰⁸ Since the ICC may order the transfer of money or property “collected through fines or forfeiture” to the Fund.

¹⁴⁰⁹ See Principle 15 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

¹⁴¹⁰ See footnotes 611 through 615, *supra*.

¹⁴¹¹ Cf. Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of Merits, *op. cit.*, para. 167.

Both actual and potential victims have a right to effective mechanisms of protection that have prospects of protecting their rights, which includes the entitlement to be repaired.¹⁴¹² Concerning this, they have a right to *fully* repaired whenever possible. This consideration is firmly established in international human rights law and case law, being one of the purposes of human rights law the complete reparation of victims.

In this sense, in the case law of the Inter-American Court of Human Rights it has been said that all of the components of reparations must be provided, because one of the goals of the protection of human rights is the *full* reparation of victims. This implies that there must be a *restitutio in integrum* whenever it is possible. If not, or when the provision of some components of reparations is not enough to fully repair victims, additional forms and components of reparations must be provided to victims. This principle has been acknowledged by the ILC.¹⁴¹³ Likewise, principle 18 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter, Basic Principles) mentions that:

“In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”

That the reparation of violations of norms that protect human dignity must be complete is also confirmed by the following consideration: under the general international regulation of responsibility, reparations must be full, as indicated in article 34 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts. It mentions that there must be “full reparation for the injury caused by [an] internationally wrongful act” (emphasis added). That demand is also present in article 31 of those articles, according to which an entity responsible for a breach “is under an obligation to make full reparation for the injury caused” (emphasis added). While those articles deal with State responsibility, there is no reason to limit the applicability of the

¹⁴¹² Cf. articles 25 and 63 of the American Convention on Human Rights, 2 of the International Covenant on Civil and Political Rights, 13 and 41 of the European Convention on Human Rights, paras. 3, 11-18 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 4-13, 19 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Human Rights Committee, General Comment No. 31, op. cit., paras. 15-16.

¹⁴¹³ Cf. Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment (Interpretation of the Judgment of Reparations and Costs), 17 August 1990, para. 27; Joint Separate Opinion of Judges A.A. Cançado Trindade and M. Pachecho Gómez to: Inter-American Court of Human Rights, *Case of Las Palmeras v. Colombia*, Judgment of Merits, 6 December 2001, pp. 3, 7-19; Inter-American Court of Human Rights, *Case of Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), 10 September 1993, para. 49; articles 31, 34-37 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts (A/56/49(Vol. I)/Corr.4) and of the ILC Draft Articles on the Responsibility of international organizations as adopted in 2011.

underlying principles and rules of the aforementioned provisions to State responsibility, because rather than being based on specific features of States, they answer to the need to repair victims.

This being so, the protection of victims and legal goods requires protection from all wrongful acts, regardless of who commits them. This is confirmed in the following provisions of the ILC draft articles on the Responsibility of international organizations adopted by the Drafting Committee in 2011, which are applicable to those non-state entities. The fact that the purposes, principles and normative content of those rules coincide with the regulation of State responsibility suggests that they are applicable to other responsible entities as well, as confirmed in human rights law. The pertinent articles on the responsibility of international organizations say:

“Article 31

Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter” (emphasis added).

In the commentary to article 31 on State responsibility, the duty to *fully* repair was discussed by the International Law Commission, which said that it alludes to addressing all the consequences of a wrongful act and imposes the duty to seek to counter the effects of breaches.

The ILC also says that reparation is *formulated* (not defined, it must be noted) in the articles *on* responsibility as a duty that automatically binds entities responsible for breaches, rather than being formulated *therein* as rights. According to the ILC, this choice is made because of the problems that, in its opinion, may arise when reparations are owed to many victims, of whom “only a few [...] are specially affected by the breach.”¹⁴¹⁴ In the humanitarian *corpus juris*, it is true that reparation is a duty of violators because, as mentioned by the Human Rights Committee in a passage quoted above, it is related to the duty to provide remedies to victims; and article 63 of the American Convention on Human Rights recognizes the existence of such a duty. Simultaneously, however, as explained before and expressed by van Boven, victims have a *right* to reparations, and each of them can claim it.¹⁴¹⁵

Problems concerning the handling of claims cannot be an excuse to not comply with duties that are correlative to rights of victims. That such rights exist is confirmed in doctrine and

¹⁴¹⁴ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 91, para. 4 of the commentary to article 31.

¹⁴¹⁵ Cf. Avril McDonald, *op. cit.*, at 250.

soft law, as revealed for instance in the Preamble and Principle 18 of the Basic Principles, cited above, and in the very title of those Basic Principles, that deal with the “Right to Remedy and Reparation [of] Victims”.

In any case, an exclusive focus on the burden dimensions of reparations would still confirm the considerations presented here, because the performance of duties to repair cannot be ineffective and incomplete. The crux is that, frequently, unless non-state entities that participate in violations also participate in reparations, the latter will not be *complete and effective*, as explained below.

Furthermore, concerning the *full* character that reparations must have, Bin Cheng has studied how the principle of integral reparation demands the elimination of *all* the proximate consequences of a wrongful act, in order to make an “injured party [...] ‘whole again’”¹⁴¹⁶ because remedies “should be commensurate with the loss, so that the injured party may be made whole.”¹⁴¹⁷ If *restitutio in integrum* is not possible, the duty to repair still exists. In such cases, as indicated before, complementary elements and mechanisms must be resorted to in order to address the *totality* of injuries as much as possible and to “wholly” protect victims, as considered by the Inter-American Court of Human Rights.¹⁴¹⁸ This is another reason why non-state participants in violations must be obliged to provide reparations, because injuries cannot be wholly addressed unless they contribute to repair victims. This is commanded by substantive international law, but that participation can take place in internal fora most of the time.

Additionally, that reparations should aim to be complete is reflected in the consideration that when victims are not fully repaired after certain elements of reparations have been provided, other components of reparation must be used because otherwise victims would not be fully repaired. This is expressly and implicitly acknowledged in soft law; in the case law of the Inter-American Court of Human Rights on non-pecuniary damages, satisfaction, guarantees of non-repetition and non-economical reparations of moral or immaterial damage;¹⁴¹⁹ and in the opinion of the International Court of Justice that alludes to the sufficiency of satisfaction as a means of reparation *in some cases*, which means that, conversely, in other cases full reparation cannot be achieved unless more components of reparation are used. Moreover, in some cases, as in *LaGrand*, the ICJ it explicitly referred to the insufficiency of apologies – which is a mode of

¹⁴¹⁶ Cf. Bin Cheng, *op. cit.*, pp. 234-240.

¹⁴¹⁷ *Ibid.*, at 234.

¹⁴¹⁸ Cf. Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment (Interpretation of the Judgment of Reparations and Costs), 17 August 1990, para. 27.

¹⁴¹⁹ Cf. Gina Donoso, *op. cit.*, pp. 40-41, 51-52; Pablo Saavedra Alessandri, *op. cit.*, pp. 185-187, 198-220; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 18-24.

satisfaction-.¹⁴²⁰ This is confirmed in article 34 of the ILC articles on the responsibility of States for Internationally Wrongful Acts and of the ILC draft articles on the responsibility of international organizations adopted by the Drafting Committee in 2011, that mentions that:

“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination”.

Analyzing the commentary to the former article by the International Law Commission itself, it is possible to conclude that what the ILC calls forms of reparation and I describe as its *components* -insofar as they “giv[e] effect to the underlying obligation of reparation”¹⁴²¹ and “cover particular aspects of reparation”¹⁴²²- are inextricably linked to the “[f]ull reparation for the injury caused”, because their use “separately or in combination will discharge the obligation to make reparation for the injury caused by the internationally wrongful act.”¹⁴²³

While according to human rights law reparations of victims must be full, the fact that general international law considers that reparations must be full as well is relevant for the human rights *corpus juris*. This is because the latter’s norms on responsibility must generally take into account general international law and, concretely, the general international regulation of the modalities and content of reparations, as has been mentioned by the Inter-American Court of Human Rights, that said:

“The obligation contained in Article 63(1) of the Convention [related to reparations for human rights violations] is governed by international law in all of its aspects, such as, for example, its scope, characteristics, beneficiaries, etc. [...] the obligation to make reparation falls under international law and is governed by it”¹⁴²⁴.

Taking into account that victims have a right to be *fully* repaired, which means that full reparations are required, something that the ILC mentions,¹⁴²⁵ it can be said that if general or specialized rules of responsibility in a given field prevent or do not admit full reparations, those rules must be considered flawed and contrary to the rights of victims.

¹⁴²⁰ Cf. *Ibid.*; International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, pp. 106-107, paras. 6-7 of the commentary to article 37; ICJ, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, op. cit., para. 194; Andrew Clapham, *Human Rights: a Very Short Introduction*, op. cit., paras. 465-471.

¹⁴²¹ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 96, para. 6 of the commentary to article 34.

¹⁴²² Cf. Commission on Human Rights, E/CN.4/Sub.2/1993/8, op. cit., 2 July 1993, at 7, footnote of para. 13.

¹⁴²³ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 95, para. 1 of the commentary to article 34; article 34 of the previously mentioned draft articles.

¹⁴²⁴ Cf. Inter-American Court of Human Rights, *Case of Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), op. cit., paras. 44-45.

¹⁴²⁵ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 96, para. 6 of the commentary to art. 34.

Therefore, just as international human rights supervisory bodies consider that domestic norms, conduct and practices that are contrary to integral reparations can constitute breaches of human rights law if they are attributable to States, because that law regulates a State duty to grant full reparation internally,¹⁴²⁶ it can also be argued that international norms must command, accommodate and not hinder complete reparations. It can be considered that this requirement is *implicitly* demanded by international principles, norms and jurisprudence. International norms, especially those in the human rights and related fields, that are explicitly contrary to that demand, and it must change or be eliminated. If no express impediments of that sort exist, then international norms must be interpreted as requiring and permitting full reparations.

On the other hand, it is unlikely that currently there is a peremptory international norm that envisages a right of all victims to demand full reparations ordered by international supervisory bodies. In that regard, it can be seen that according to some practice and authors, international criminal law or liability regimes may deal with human rights *lato sensu* or international humanitarian law norms that can be used to order limited (in territorial, temporal or other terms), facultative or partial compensations in the international or domestic levels in some cases. This means that currently there are exceptions to norms on full compensation ordered by international bodies or domestic bodies that provide certain extraterritorial protection. If a peremptory norm on this matter emerges, contrary norms will not be able to produce legal effects.

Apart from procedural aspects of international remedies, in *substantive* terms it is safe to consider that a right and a correlative duty to full reparations exist already, because procedural limitations do not deny it (given the differences between rights and remedies) and there are norms that demand that reparations be full and insufficient reparations be complemented with other components.¹⁴²⁷

Taking into account that victims have a right to be fully repaired and to receive all the possible components of reparations under human rights law,¹⁴²⁸ and that authorities must ensure that victims receive reparations, it must be analyzed if State-centered schemes suffice to satisfy those requirements. As can be guessed, the answer is a negative one, firstly because the possibility that State responsibility is not engaged when non-state violations of human rights are

¹⁴²⁶ Cf. Human Rights Committee, General Comment No. 31, op. cit., para. 16.

¹⁴²⁷ Cf. Avril McDonald, op. cit., pp. 249-251, 262-263, 270-271, 276; article 75.2 of the Rome Statute of the International Criminal Court; Commission on Human Rights, E/CN.4/Sub.2/1993/8, op. cit., 2 July 1993, paras. 19, 90, 113, 107-108, 124; articles 41 of the European Convention on Human Rights and 63 of its American counterpart; Joint Separate Opinion of Judges A.A. Cançado Trindade and M. Pachecho Gómez to: Inter-American Court of Human Rights, *Case of Las Palmeras v. Colombia*, Judgment of Merits, op. cit., pp. 3, 7-19.

¹⁴²⁸ Cf. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 8-13; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 18; Gina Donoso, op. cit.; Pablo Saavedra Alessandri, op. cit.

committed, coupled with the right of victims to full reparations, indicates that limiting reparations to events in which States breach their duties goes against that right. Therefore, it can be said that victims have a right to have access to effective remedies and reparations in relation to all violations, State or not. Moreover, the legal community endorses the ideas that victims must have reparations even when States are not responsible, and that non-state entities can violate human rights.¹⁴²⁹ Additionally, even if States repair victims, if non-state actors participate in a violation, reparations will probably be incomplete if they do not participate in the provision of reparations.

That victims can and *must* be repaired by non-state entities that participate in violations of human rights and guarantees is confirmed, for instance, in domestic norms that protect victims. It is also recognized in soft law, as evinced in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, according to which responsible non-state entities should provide reparations; and in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, according to which victims must have access to justice “irrespective of who may ultimately be the bearer of responsibility”¹⁴³⁰ and non-state offenders may be obliged to repair victims and to compensate the State when it has provided reparations. In this sense, Principle 15 indicates:

“In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”

In connection with that principle, Theo van Boven acknowledges that a victim-centered orientation demands reparation by non-state violators and protection from them (which are not necessarily dependent on State responsibility). According to him:

“While the Principles and Guidelines are drawn up on the basis of State responsibility, the issue of responsibility of non-State actors was also raised in the discussions and negotiations, notably insofar as movements or groups exercise effective control over a certain territory and people in that territory, but also with regard to business enterprises exercising economic power. It was generally felt that non-State actors are to be held responsible for their policies and practices, allowing victims to seek redress and reparation on the basis of legal liability and human solidarity, and not on the basis of State responsibility. The Principles and Guidelines provide for equal and effective access to justice, “irrespective of who may ultimately be the bearer of responsibility for the violation” (principle 3 (c)). In this connection reference is also made to the following provision: ‘In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim’ (principle 15, last sentence). It is a victim-oriented perspective that was kept in mind in extending, albeit in a modest and cautious way [*that is still insufficient, in my opinion*], the scope of the Principles

¹⁴²⁹ Cf. Theo van Boven, “The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, op. cit., at 3.

¹⁴³⁰ Cf. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 8-13; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 3.c.

and Guidelines to include the responsibility and liability of non-State actors”¹⁴³¹ (emphasis and commentary in italics added).

This opinion is welcome, given the contingent or frequently limited character of State responsibility when non-state entities *violate* human rights and *prevent* their exercise.¹⁴³² In those events, it would be unfair, discriminatory and unreasonable to argue that victims can only be protected if a State *is* responsible.

Furthermore, pursuant to article 75 of its Statute, the International Criminal Court –first international criminal judicial body authorized to order reparations-¹⁴³³ can order the provision of several components of reparations, “including” compensation, restitution and rehabilitation (the reference to appropriate reparations in the article could be understood as suggesting that it could order other components as well). Additionally, international organizations or other entities that are parties to instruments that protect human rights and are subject to the competence of supervisory bodies may be ordered or recommended to provide elements of reparations¹⁴³⁴ if they are found responsible for breaches of human rights obligations.

In my opinion, frequently to fully repair victims it is necessary to involve non-state participants in violations of human rights. While as indicated above this can be done internally, the possibility that, due to ignorance of international legal demands, domestic law does not fully ensure this, makes it necessary to expressly mention the obligation of authorities to ensure that participation, which is based on their positive duties of protection and on the obligation to provide remedies with prospects of full remedies. Moreover, whenever international authorities are allowed to order reparations and they can supervise non-state conduct, they should indicate the need of non-state participation in reparations, which is a requirement that can be implemented by States or other authorities that order it (as permitted by the substantive duty to repair, that should

¹⁴³¹ Cf. Theo van Boven, “The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, *op. cit.*, at 3.

¹⁴³² State responsibility concerning non-state violations of human rights has a contingent nature, as seen in Part I when examining the notions of the Mastromatteo and Rantsev paradoxes, in sections 2.3 and 3.2, *supra*.

¹⁴³³ Cf. “Reparation for victims”, available at: <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Reparation/>, last visited on 09/03/2012, where it is said that “For the first time, an international criminal court has the power to order a criminal perpetrator to pay reparation to a victim who has suffered as a result of the perpetrator’s criminal actions.”

¹⁴³⁴ See, for instance, articles 41 and 59 of the European Convention on Human Rights; European Court of Human Rights, Rule 61 of the Rules of Court, *Pilot-judgment procedure*, 18/03/2011 (especially para. 3), in conjunction with European Court of Human Rights, *Case of Yuriy Nikolayevich Ivanov v. Ukraine*, Judgment, 15 October 2009, Final 15/01/2010, paras. 35, 78-82, 95-100; Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted by the Committee on 10 May 2006, 964th meeting of the Ministers’ Deputies, Rules 6.2, 7 and 9; and Council of Europe, “Execution of Judgments of the European Court of Human Rights”, available at: http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp (last checked: 09/03/2012), where it is mentioned that: “When the consequences of a violation cannot be adequately erased by the just satisfaction awarded, the Committee of Ministers makes sure that the domestic authorities take the other specific individual measures in favour of the applicant which may be required”.

bind non-state entities that violate human rights and breach implicit, general and/or specialized duties).

Moreover, in its decision in the *Cotton Field* case, the Inter-American Court of Human Rights mentioned that according to human rights law States must ensure that victims are repaired by non-state entities that violate their rights. In this regard, it mentioned that:

“[A]ny possible violation of [human] rights” must be “considered and treated as an unlawful act, which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate the victims for the harmful consequences”¹⁴³⁵ (emphasis added).

Altogether, according to substantive law, all participants in violations of human rights should participate in the provision of reparations to victims, and have inherent duties to repair, which flow from their human rights obligations (as examined in Chapter 6).

If the theory of implicit duties to respect human rights and peremptory law discussed in Chapter 6 is not agreed with, it would follow that international human rights obligations of non-state actors *should* be created, because otherwise the full reparations that victims are entitled to would often be improbably because without breach of duties there would be absence of legal responsibility and of non-state duties to provide reparations to victims.

The importance of the participation of non-state violators of human rights has been taken into account by authors as van Boven, John Ruggie or John Knox regarding, for instance, concerning the obligation that binds States and functional authorities to provide domestic remedies against non-state violations, being those authorities authorized and urged to oblige violators to repair in their internal law.¹⁴³⁶ In this sense, when analyzing the framework and principles for the protection of human rights from corporate abuses designed by Ruggie, John Knox mentioned that:

“[S]tates are required, as part of their duty to protect, to take steps to ensure that those affected by corporate human rights abuses within their territory and/or jurisdiction have access to effective remedies.”¹⁴³⁷

A study of the components of reparations permits to understand why it is necessary that non-state offenders provide reparations to victims for them to be fully repaired.

¹⁴³⁵ Cf. Inter-American Court of Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, judgment, op. cit., para. 252.

¹⁴³⁶ Cf. Theo van Boven, “The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, op. cit., at 3; John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 23, 26, 44; John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, op. cit. (on remedies); Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011, Principles 25-31; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, op. cit., A/HRC/8/5, op. cit., paras. 82-103.

¹⁴³⁷ John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, op. cit.

According to several soft law instruments, case law, doctrine and entities as the International Law Commission, the following components of reparation can be identified: compensation, satisfaction (which refers to non-pecuniary forms of reparation, as apologies), rehabilitation, guarantees of non-repetition and *restitutio in integrum* (whenever possible). Apart from them, the duties to cease ongoing violations and to not cooperate with the recognition or effects of serious violations emerge with responsibility as well but are different from the duty to repair (and are contemplated in norms different from those of reparations in the ILC articles on the responsibility of States or international organizations). Despite this, these duties are linked to reparations, and serve to protect victims, who are entitled to request compliance with them. Their breach makes victims vulnerable, due to risks of impunity and persistence of violations.¹⁴³⁸

On the other hand, while the ILC considers that non-repetition of violations is outside the scope of reparations, the Basic Principles and doctrine¹⁴³⁹ include them in their scope, and the ILC itself mentions how it is an aspect that, along with cessation of violations, is related to the “restoration and repair of the legal relationship affected by the breach.”¹⁴⁴⁰ In my opinion, non-repetition has at least two functions: to protect victims from being re-victimized and to prevent others from being similarly victimized in the future. Therefore, it can be said to belong both to the framework of reparations and to that of other duties arising from responsibility.

Principle 18 of the Basic Principles underlies the connection between full reparations and the provision of all components of reparation. It states that:

“[F]ull and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”

It must be recalled that all the components of reparation must be used proportionately, as much as victims need them and whenever their provision is necessary to grant full¹⁴⁴¹ or integral reparations. Therefore, non-state participation in the provision of those components is necessary if those components cannot be completely effective and lead to full reparations without that participation. According to the International Law Commission:

¹⁴³⁸ Cf. articles 29-30 and 41 of the ILC articles on the Responsibility of States for Internationally Wrongful Acts (A/56/49(Vol. I)/Corr.4) and 29-30 and 42 of the ILC Draft Articles on the Responsibility of international organizations as adopted in 2011 (A/66/10); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 18, 22-23.

¹⁴³⁹ Cf. Pablo Saavedra Alessandri, “La Corte Interamericana de Derechos Humanos. Las reparaciones ordenadas y el acatamiento de los Estados”, op. cit., at 189 vs. articles 30 and 31 of the ILC articles on the legal responsibility of States and international organizations (in the 2011 version).

¹⁴⁴⁰ Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 88, para. 1 of the commentary to art. 30.

¹⁴⁴¹ *Ibid.*, at 96, para. 5. of the commentary to article 34; Pablo Saavedra Alessandri, “La Corte Interamericana de Derechos Humanos. Las reparaciones ordenadas y el acatamiento de los Estados”, op. cit., at 189.

"[Full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused]"¹⁴⁴² (emphasis added).

The importance of the reparation of victims of non-state violations and their access to remedies are elements recognized in practice. For instance, in the Human Rights Council panel discussion on human rights and victims of terrorism celebrated in June of 2011, Navi Pillay said:

"Acknowledging the human rights of victims of terrorism "means recognising their loss as well as their rights to reparation, information, justice and a life free of fear, with all the support their require" (emphasis added).¹⁴⁴³

In the same event, a spokesperson of Amnesty International mentioned that:

"Victims of terrorism often do not see those responsible brought to justice and do not receive support from the state to redress the harm they have suffered [...] Victims must be given adequate opportunity to be informed of and involved in investigations and trials."¹⁴⁴⁴

¹⁴⁴² Cf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, at 95, para. 2 of the commentary of article 34.

¹⁴⁴³ Cf. Office of the High Commissioner for Human Rights of the United Nations, "Realizing the rights of victims of terrorism", 22 August 2011, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/VictimsOfTerrorism.aspx> (last checked: 09/03/2012).

¹⁴⁴⁴ Ibid.

CHAPTER 8. STRATEGIES AND MECHANISMS THAT PROMOTE AND PROTECT HUMAN IN RELATION TO NON-STATE CONDUCT

Mechanisms that can be employed to protect human dignity from non-state threats can be legal or non-legal, based on adjudicative proceedings (contentious) or not, State-sponsored or non-state mechanisms, and have features that permit them to be classified in other ways according to other criteria, such as their attempting to address the causes or the consequences and effects of non-state violations, among other factors.¹⁴⁴⁵ To be effective and sufficiently protect victims, those mechanisms must be accessible, appropriate, and respect standards of due process, publicness and legitimacy.

Generally, mechanisms of protection from and prevention of non-state abuses can be regarded as contentious or non-contentious. While international legal doctrine tends to classify mechanisms for the settlements of disputes as either based on controversial or diplomatic procedures, and the former as jurisdictional or not, in my opinion it is more convenient for a general classification to distinguish between contentious mechanisms and others. This is because the protection of human rights from non-state threats involves not only settling conflicts but also addressing causes or preventing abuses, among other possibilities. Apart from this, it must be taken into account that not all contentious procedures in which factual or normative issues (pertaining binding or non-binding norms) are discussed are settled by authorities that can issue binding decisions.¹⁴⁴⁶

8.1. Types of mechanisms that can be used to protect human dignity from non-state abuses

In my opinion, some non-contentious mechanisms and dynamics that can be used to promote or protect human rights and guarantees in relation to non-state entities are: a) the use of symbolic, expressive, cultural, psychological or educative effects of norms that protect human

¹⁴⁴⁵ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., at 55; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, op. cit., paras. 9, 26, 82-103; Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, op. cit., principles 25 through 31 with their commentaries; Human Rights Commission, General Comment No. 31, op. cit., paras. 8, 13-19.

¹⁴⁴⁶ On the classifications mentioned in the paragraph, and on contentious non-binding procedures, cf. Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 676-677; Malcolm N. Shaw, *International Law*, 5th edn., Cambridge University Press, 2003, at 914; Human Rights Committee, General Comment No. 33, *The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, CCPR/C/GC/33, 5 November 2008 (especially para. 11); Inter-American Court of Human Rights, *Case of Baena-Ricardo et al. v. Panama*, Judgment, 2 February 2001, paras. 187-192.

dignity, in order to send messages to society, the public and addressees about which conduct is prohibited or encouraged, which values are endorsed by law, and which legal interests are worthy of being strongly protected. Those messages can contribute to change attitudes and can prompt the support of victims or cessation of abuses, and can also raise awareness of protection needs and support initiatives that help victims of non-state offenders and discourage violations.

Another non-contentious mechanism is related to b) mobilizations and boycotts against offenders. Due to non-state interests to have a good reputation, conviction and desires to amend mistakes and change, or as a result of how non-state interests are affected, those strategies can contribute to changing non-state behavior, although it must be borne in mind that they are not always effective¹⁴⁴⁷ and that sometimes their use can be abusive, excessive or unlawful.

Likewise, non-state entities may c) scrutinize the conduct of other actors, and denounce what they perceive as violations or participation in abuses. Concerning this, in practice some NGOs have attempted to shame State and non-state entities or urge them to behave in a given manner in light of human rights and related standards when those entities are about to commit or engage in what the non-governmental organizations perceive as conduct that is or can be contrary to norms that protect human dignity.

On the other hand, it is possible to seek to tackle non-state abuses outside judicial or quasi-judicial contentious processes settled by a third party by attempting to prevent their commission by means of d) addressing the causes and roots of the circumstances and factors that, according to non-state actors themselves or to those who examine their conduct, are invoked in relation to or lead to the perpetration of violations. Care must be taken to stress that those factors in no way justify violations of human dignity, because according to that dignity human beings have an inherent and *non-conditional* worth that forbids treating individuals as *means* to achieve goals.

In the security context, this strategy has been identified by the High-level Panel on Threats, Challenges and Change, that mentioned that a strategy that seeks to tackle challenges posed by terrorism—that is contrary to human rights, it must be said- must include:

“(a) Dissuasion, working to reverse the causes or facilitators of terrorism, including through promoting social and political rights, the rule of law and democratic reform; working to end occupations and address major political grievances; combating organized crime; reducing poverty and unemployment; and stopping State collapse. All of the strategies discussed above for preventing other threats have secondary benefits in working to remove some of the causes or facilitators of terrorism;

(b) Efforts to counter extremism and intolerance, including through education and fostering public debate. One recent innovation by UNDP, the *Arab Human Development Report*, has helped

¹⁴⁴⁷ See footnote 957, supra.

catalyse a wide ranging debate within the Middle East on the need for gender empowerment, political freedom, rules of law and civil liberties"¹⁴⁴⁸ (emphasis not added).

To address causes of violations, it is possible to spread and disseminate what the norms on the protection of human dignity demand and say, or in other words to *teach* what they regulate and why they are so important. It is important to do this because ignorance of humanitarian norms may be a factor that sometimes makes law ineffective.

International humanitarian law, for example, regulates a duty of parties to armed conflicts, including non-state ones, to instruct their members and civilians about IHL and disseminate what its norms (some of which protect human rights) command and regulate. This is mentioned in articles 127 of the Geneva Convention relative to the Treatment of Prisoners of War, 144 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 19 of Protocol II to the Geneva Conventions of 1949, or 83 of Protocol I to the Geneva Conventions, according to which:

"Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.

2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof" (emphasis added).

Teaching about the humanitarian *corpus juris* can help to increase its effectiveness and the likelihood of its respect. In this sense, Frits Kalshoven and Liesbeth Zegveld consider that education constitutes one mechanism for the guarantee and implementation of international humanitarian law, and it must be added that it can be used in relation to other norms. According to them:

"[An] aspec[t] of implementation and enforcement [...] The overriding importance of dissemination of humanitarian law, first but not exclusively among the armed forces, can hardly be exaggerated. The better the rules of humanitarian law are known, the greater the chance that they will be respected in practice. Regrettably, quite a few states continue to lag behind in this respect. In this unfortunate situation, Red Cross and Red Crescent societies, under the guidance of the ICRC and the International Federation of Red Cross and Red Crescent Societies, are running programmes of dissemination, both among their members and beyond that circle, and, occasionally, even for the armed forces. Needless to say, these activities of the Red Cross and Red Crescent Movement cannot in any way absolve the authorities from their responsibilities. It may be repeated that at least the dissemination of the applicable law is a 'must' under Protocol II as well"¹⁴⁴⁹ (emphasis added).

Apart from addressing some causes of human rights abuses, measures that seek to promote and protect those rights can also e) seek to deprive potential offenders of the means

¹⁴⁴⁸ Cf. *A more secure world: Our shared responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, United Nations, A/59/565, 2004, para. 148.

¹⁴⁴⁹ Cf. Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* (3rd edn.), op. cit., pp. 139-140.

with which they perpetrate offenses or participate in them; deter violations; prevent their commission; or address their effects and protect victims.

Those measures can be implemented and seek to prevent violations, lessen their effects and/or protect victims and sanction offenders after violations are committed.

Examples of measures that aim to tackle the effects of non-state abuses or prevent their commission include: freezing assets that can be used in the perpetration of acts of terrorism, prohibiting granting safe haven to armed groups that can attack civilians, denying visas or residence permissions to violators who want to flee prosecution, self-defense against non-state actors that commit major uses of force in order to protect individuals in the attacked State, or granting protection to refugees threatened by non-state agents of persecution or to individuals that are not refugees but run a real risk of being subject to torture, cruel, inhuman or degrading treatment or of being deprived of their lives by non-state entities, among other possibilities.

Additionally, causes and consequences of non-state abuses can be tackled by means of f) international and inter-actor cooperation.

The importance of cooperation in different areas (judicial, economic, etc.) is recognized, for instance, in instruments dealing with transnational organized crime or the protection of the rights of persons with disabilities or of economic, social and cultural rights.¹⁴⁵⁰

Article 32 of the Convention on the Rights of Persons with Disabilities, for example, highlights that cooperation can and must include non-state participants. Their contribution is often invaluable, and they can represent affected individuals and contribute with their expertise, which are some of the reasons of the importance of inter-actor cooperation. Their contribution is also relevant in lawmaking, participation and implementation processes, as revealed in articles 4.3, 29 or 33 of the Convention. Article 32 also mentions different possible forms of cooperation, although in a way that is less demanding and detailed than that of articles 7, 13, 16 through 22, 24 and 26 through 30 the United Nations Convention against transnational organized crime, because it does not impose certain specific modes and fields of cooperation but mentions some possible components of cooperation, the elements of which must be determined on a case-by-case basis taking into account the needs of victims and the effectiveness of law. That article states that:

¹⁴⁵⁰ In that regard, it is possible to identify paragraph 3 of Security Council Resolution 1373 (2001) or articles 2 of the International Covenant on Economic, Social and Cultural Rights, 4.2 and 32 of the Convention on the Rights of Persons with Disabilities, 1 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador), or 1, 7, 13, 16 through 22, 24 and 26 through 30 of the United Nations Convention against Transnational Organized Crime, which contains a rich and detailed regulation of cooperation in several areas, concerning judicial, administrative, economic, information or technical cooperation, among others. The Protocols to the last Convention also contain similar provisions.

“States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:

- (a) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;
- (b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;
- (c) Facilitating cooperation in research and access to scientific and technical knowledge;
- (d) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies” (emphasis added).

Cooperation in the human rights context must be conducted acknowledging that just as non-state entities can be complicit in State abuses or contribute to make States respect and protect human rights, for instance urging them to do so, non-state actors may also cooperate with other non-state entities in the violation or promotion and protection of human rights.

Therefore, it is necessary to deal with all entities that can contribute to the perpetration and success of violations of human rights. In this sense, paragraphs 1 and 2 of Security Council Resolution 1373 (2001) command States to combat the financing of terrorism or other forms of assistance to it. This is not exclusively a phenomenon related to terrorist actors, and in this regard the High-level panel considered that it is necessary to deal with non-state alliances in the context of organized crime and violations of legal goods. It said that:

“Organized crime is increasingly operating through fluid networks rather than more formal hierarchies. This form of organization provides criminals with diversity, flexibility, low visibility and longevity. Connections among different networks became a major feature of the organized crime world during the 1990s, thus creating networks of networks. The agility of such networks stands in marked contrast to the cumbersome sharing of information and weak cooperation in criminal investigations and prosecutions on the part of States.”¹⁴⁵¹

Additionally, for it to successfully protect shared legal goods, cooperation must not only involve several actors but also integrate several normative systems and levels of governance. This permits to make up for shortcomings and limitations of some actors and systems and to provide a more robust protection of human dignity.

Human rights and humanitarian guarantees can be promoted or defended *vis-à-vis* non-state entities in many other ways that are not based on contentious judicial or quasi-judicial processes. They also include g) peace-making or peace-keeping endeavors, that are also relevant when peace is or can be disrupted by non-state entities, that often participate in armed conflicts, in which human rights and guarantees are constantly threatened, and in other conflicts

¹⁴⁵¹ Cf. *A more secure world: Our shared responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, United Nations, A/59/565, 2004, para. 170.

that do not reach the threshold of armed conflicts but pose threats to those rights as well. Because of this, the facilitation and conclusion of peace-agreements can contribute to the promotion and protection of human rights.

That protection can also be enhanced by h) the adoption of commitments and standards that seek to protect human dignity. They can be binding or not, as happens with some Memorandums of Understanding or some codes of conduct. While binding instruments can be supported by mechanisms of coercion and implementation and by official endorsement, non-binding standards can still have expressive effects, be heeded and taken into account by different social and legal actors, be invoked by affected persons, and contribute to change attitudes.

Therefore, unilateral commitments and norms on non-state behavior can contribute to shaping non-state conduct and reactions to it. When those regulations are found in *jus gentium* and are binding, not only victims but all members of the world society have a legal entitlement to request protection from violations and to demand that responsible entities stop their abuses, provide guarantees of non-repetition, and repair victims, because human rights obligations have an *erga omnes* or *erga omnes partes* character. On the other hand, some actors may be entitled to employ countermeasures when human rights obligations are violated, as discussed in articles 48 and 54 of the ILC articles on State responsibility or 49 and 57 of the ILC articles on the responsibility of international organizations (2011 version).

Non-state human rights standards and commitments tend to be manifested in codes of conduct, as those adopted by corporations or other entities, such as NGOs; or in agreements that recognize or uphold human rights and guarantees, such as an agreement entered into by Sudan's Justice and Equality Movement and the United Nations or the San José Agreement between the FMLN and El Salvador.

Another important way in which human rights and guarantees can be protected from non-state abuses (which may sound ironic at first, but is often necessary) is through i) restrictions of fundamental and human rights or suspensions of human rights obligations when all the requirements imposed by international and internal law are met. As indicated before, law requires, among others, that those measures are necessary, proportionate and adopted to protect some permissible objectives, including human rights and other goals that may be directly related to or at least compatible with the protection of human rights, such as peace and security.

Human rights can also be protected from non-state abuses in j) regimes of accountability in which violators can be sanctioned or that condition the exercise of some non-human rights entitlements or benefits either on the respect of certain standards or on the fulfillment of some requirements.

For example, to enjoy a consultative status and corresponding benefits in accordance with ECOSOC Resolution 1996/31, non-governmental organizations must “be concerned with matters falling within the competence” of the ECOSOC, have purposes that are compatible with those of the United Nations, have recognized standing or a representative character, possess a “democratically adopted constitution” and some organizational features, have a representative structure and “mechanisms of accountability to [their] members”, and have democratic decision-making processes, among others. Otherwise, their consultative status may be denied, suspended or withdrawn.

Regimes of accountability may be imposed on non-state entities or created by them, can be based on duties or on non-binding standards, and can protect the interests or rights of third parties. In this regard, for instance, NGOs are advised to be accountable to their donors and members and provide a framework to ensure this. They and other actors can even determine, for instance, that failure to act in accordance with human rights demands permits affected individuals to denounce violations before bodies appointed by those actors.

On the other hand, regimes that contemplate some adverse effects of violations and sanction them do not necessarily have to be based on international legal obligations, but can also be based on the respect of soft law commitments. In this sense, for instance, there is a possibility of removal from the non-binding Global Compact initiative, which is applicable to those companies that fail to submit an annual progress report on its implementation or to inform about alleged systematic or egregious abuses they are accused of having committed.¹⁴⁵² About this mechanism, Ban-Ki Moon declared “more than 2,400 companies [have been removed] from the Compact for failing to report to their stakeholders on progress they have made.”¹⁴⁵³

There are other mechanisms to promote human rights standards apart from *reporting*, such as the *publication* of failures of non-state actors that adhere to them to comply with them. Another example of a regime of “supervision” of soft law is that of the monitoring initiatives of Geneva Call regarding non-binding norms that seek to regulate the conduct of even non-state entities in relation to a “Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action.”¹⁴⁵⁴

An additional mechanism that can be used to seek to protect human dignity from non-state entities is k) interpreting norms and principles in its light and striving to make normative

¹⁴⁵² Cf. “859 Companies Delisted for Failure to Communicate on Progress”, available at: <http://www.unglobalcompact.org/news/8-02-01-2010> (last checked on: 12/03/2012).

¹⁴⁵³ Cf. “Crucial for more businesses to join UN corporate responsibility pact, says Ban”, available at: <http://www.un.org/apps/news/story.asp?NewsID=38786&Cr=business&Cr1> (last checked: 12/03/2012).

¹⁴⁵⁴ Cf. Elena Pariotti, op. cit., at 101.

manifestations compatible with it. For instance, domestic norms that can be used to protect individuals can be interpreted in light of international human rights law and principles on the protection of human dignity, to ensure that they are protected from non-state abuses.

Another way in which the respect of norms that protect human dignity can be promoted in regard to non-state entities, or in which violations attributable to them can be discouraged or addressed, is through l) non-contentious means of dispute settlement or solution, such as negotiation, mediation or conciliation, in which non-state entities can participate or their conduct can be examined. They do not necessarily have to apply binding norms.

According to the “Corporate Responsibility (CORE) Coalition”, those means permit to “bridge” accessibility gaps that prevent individuals from seeking protection, allowing them to request the declaration (and condemnation) of the existence of threats or violations, and offer venues for the resolution of disputes regarding them.¹⁴⁵⁵

It is also important to mention that those mechanisms can be found in domestic law; and that due to the shortcomings of procedures with merely recommendatory outcomes, they can and must be complemented by judicial mechanisms or by strategies based on binding norms, to ensure that even if the outcome of those strategies is not binding, it will be more persuasive because of its being based on or supported by obligatory norms or mechanisms of protection.

Similarly, it is possible to use m) non-contentious supervision, examination and follow-up mechanisms that seek to promote and/or protect norms or standards (binding or not) that directly or indirectly demand protection from non-state violations. That supervision can be international, as happens with reporting mechanisms, or domestic, conducted for instance by human rights institutions (public or private with public functions) that can contribute to the protection of human rights from non-state violations and comply with the duty of States to protect and promote human rights even if affected individuals do not request protection. The use of these mechanisms can *identify* problems, areas where legislative or other action is needed, or victims who must be repaired. Therefore, these mechanisms can have a preventive or an *ex post facto* character, and can lead to recommendations or conclusions with strong legal effects. Interestingly, judicial entities can conduct some of these mechanisms, as happens with advisory opinions.

Additionally, the conduct of n) investigation and research permits to obtain information on violations or challenges and required action of a legislative, enforcement or other nature. They can be vital components of the promotion of human rights and guarantees and be taken into

¹⁴⁵⁵ Cf. Corporate Responsibility, the corporate responsibility coalition, “Protecting rights, repairing harm: How state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities”, op. cit., pp. 1, 11.

account to strengthen their framework, because they permit to study how to make regulations and guarantees more effective or complete, how to better protect victims, or which situations must be addressed, among others.

On the other hand, contentious mechanisms can be resorted to: *ex post facto*, 1) after a violation takes place, and end up in the declaration of the responsibility of those that that have breached human rights duties and the order that they repair victims; or *ex-ante*, 2) with preventative purposes, that is to say to prevent violations, as happens with precautionary or provisional measures, for instance.

Additionally, it can be said that the contentious protection of human rights *and* humanitarian global legal goods can be national or international.

The contentious protection of victims of non-state violations can be indirect, when State conduct is examined taking into account its duties to prevent or respond to non-state violations, and if it is successful it can protect individuals directly from State breaches and indirectly protect them non-state violations that States should prevent/have prevented or responded to. Interestingly, State duties can sometimes be invoked in contentious procedures to prevent non-state violations, as indicated in the next paragraph. Additionally, it is necessary to recall that direct protection from States alone can sometimes fail to protect some victims or ensure that they receive full reparation.

On the other hand, it must be added that both direct and indirect mechanisms of protection from non-state violations can have preventive or remedial (*ex post facto*) functions and effects. Concerning indirect mechanisms of protection, for instance, States or functional authorities can be asked by a national or international judicial or quasi-judicial entity to not expel individuals to places where their human rights can be violated by non-state entities or where these actors can create risks of violations, as can be seen in the jurisprudence of the Committee against Torture and the European Court of Human Rights,¹⁴⁵⁶ the latter of which considered in the case of *Sufi and Elmi v. the United Kingdom* that:

“Owing to the absolute character of the right guaranteed [to not be tortured or subjected to inhuman or degrading treatment or punishment], Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection [...] [individuals must not even be exposed to] harm [that] would emanate not from the intentional acts or omission of public authorities or non-State bodies [as may

¹⁴⁵⁶ See footnote 742; Committee Against Torture, *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, CAT/C/22/D/120/1998, op. cit., paras. 6.4 through 7.

happen when they are at risk] “due to the direct and indirect actions of the parties to [a] conflict”¹⁴⁵⁷ (emphasis added).

Additionally, contentious and non-contentious mechanisms of promotion and protection of human rights that can be used to address non-state conduct can be international, domestic or transnational. Additionally, they can be public or non-state mechanisms, as for example arbitration or some conciliation procedures. Moreover, they can also be or indirect or direct, preventive or remedial.

In that regard, there can be quasi-judicial or judicial dispute settlement mechanisms that are contentious, such as arbitration (that can be domestic or international, or take place in accordance to *lex privata*), and there can be procedures of *motu proprio* investigations of alleged violations that can initiate with no application of victims being necessary, as happens with domestic or international criminal procedures or with investigations conducted by human rights institutions that can adopt recommendations or binding decisions.

Additionally, non-state behavior may be examined in processes that are not based on the examination of potential, imminent or past breaches of duties, but rather on non-binding regulations that can be examined and guaranteed (as far as this is possible). One example of this is the possibility that National Contact Points examine corporate conduct in light of the OECD Guidelines for Multinational Enterprises, which have human rights components.

It is interesting to note that the use of contentious mechanisms does not exclude that of non-contentious ones, and may even complement or encourage it.

Furthermore, because of the importance of the protection of human dignity, the synergy and complementarity of different mechanisms that can be used to achieve it must be encouraged, especially because each of them has weaknesses and strengths not possessed by the others. This is illustrated by an example, in which a complaint filed by Friends of the Earth Norway and the Forum on Environment and Development against Cermaq ASA regarding alleged violations of the OECD Guidelines for Multinational Enterprises ended in an “agreement [...] finalized after mediation in the new Contact Point for responsible business, Norway’s National Contact Point for the OECD Guidelines”.¹⁴⁵⁸

It is important to note how, in addition to their being able to participate as defendants in contentious processes with preventive or remedial purposes (or a combination thereof), if lawmakers so decide or at least permit, non-state actors can also formally or informally contribute

¹⁴⁵⁷ Cf. European Court of Human Rights, *Case of Sufi and Elmi v. the United Kingdom*, Judgment, 28 June 2011, paras. 213, 281-282.

¹⁴⁵⁸ Cf. “Agreement on OECD complaint”, Reuters, 11/08/2011, available at: <http://www.reuters.com/article/2011/08/11/idUS43037+11-Aug-2011+HUG20110811> (last checked: 12/03/2012).

in contentious mechanisms that can offer an indirect or direct protection from non-state threats. That contribution may consist in filing applications and presenting claims; representing victims; or providing information and opinions related to facts, law or specialized knowledge, for instance as experts, witnesses, representatives of victims; or through *amicus curiae*, reports or shadow reports, among other possibilities.

These (and other) forms of participation are not limited to public judicial remedial procedures that examine allegations of breaches of law, and therefore can also take place in some mechanisms with features of confidentiality; in those that examine non-binding norms; or can serve to request or support requests related to the prevention or sanction of violations, for instance. In this way, for example, two non-state entities, Amnesty International (an NGO) and Friends of the Earth International (a “grassroots environmental network”), *cooperating* between themselves:

“[F]iled an official complaint against oil giant Shell for breaches of basic standards for responsible business set out by the Organisation for Economic Co-operation and Development (OECD) [...] The complaint was filed with UK and Netherlands government contact points for the OECD [...] Shell will be under scrutiny for its environmental and human rights impacts during a hearing in the Dutch Parliament on the company’s activities in Nigeria”.¹⁴⁵⁹

This example illustrates how mechanisms can be supported by non-state cooperation and be complemented by or lead to the use of other strategies of protection and promotion. This is, in turn, compatible with the idea that it is important to *combine* strategies that integrate soft and hard law and persuasive and coercive components, and to have a comprehensive approach that includes different mechanisms and norms that are directly or indirectly relevant for the effective protection of human dignity. For example, norms and mechanisms on environmental law, criminal law or the prohibition of the use of force can sometimes help to protect human rights and guarantees.

8.2. Possible features of mechanisms that can promote or protect human dignity in relation to non-state actors

The distinction between contentious and non-contentious mechanisms to promote and protect human dignity and to repair damages must not lead to the consideration that they are completely different and unrelated, insofar as mechanisms that can be classified in one of those categories share some relevant traits with some from the other category. Therefore, it must be

¹⁴⁵⁹ Cf. Amnesty International, “Shell accused over misleading figures on Nigeria oil spills”, 25/01/2011, available at: <http://www.amnesty.org/en/news-and-updates/shell-accused-over-misleading-figures-nigeria-oil-spills-2011-01-25> (last checked: 12/03/2012).

explored which are some of those traits that mechanisms can have regardless of their contentious character or lack thereof.

In the first place, mechanisms can have preventive or remedial purposes or have both of them. In this way, for instance, precautionary and provisional measures or urgent appeals can be adopted by some judicial or quasi-judicial bodies or by special rapporteurs or working groups, and seek to contribute to the prevention of conduct or effects that are contrary to human rights and guarantees or international legal goods.¹⁴⁶⁰

The same purpose can be sought by State or other entities by means of denouncing threats of violations; regulating non-state behavior in order to encourage conduct that is consistent with the respect of human dignity and discourage behavior contrary to it; or striving to generate material, cultural and psychological conditions and factors that are conducive to the respect of human dignity, for example. Moreover, as indicated above, international entities, be them experts or working groups, when conducting contentious procedures or not, can often adopt preventive measures, for example urgent appeals,¹⁴⁶¹ and request protection from non-state threats if their mandates implicitly or expressly permit them to do so, asking authorities to grant that protection, which is based on positive duties of authorities and horizontal human rights effects. Moreover, they can sometimes interact with non-state actors directly, and can so logically ask them not to violate human rights or to cease ongoing violations.¹⁴⁶²

Additionally, contentious and other mechanisms of promotion and protection of human rights can serve to protect from non-state abuses either directly or indirectly. In this regard, some (national or international) judicial or non-judicial bodies and entities may *directly* request or order non-state actors to do or refrain from doing something for human rights to be respected or protected (e.g. the International Criminal Court, national judges, or the Committee on the Rights of Persons with Disabilities can do this).¹⁴⁶³ Conversely, some mechanisms may be used to request or order certain actor to protect human rights from non-state abuses because it either has a duty to do so or is urged to protect despite not having a binding obligation. NGOs, for instance,

¹⁴⁶⁰ Cf. ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 468; articles 41 of the Statute, 63.2 of the American Convention on Human Rights, 25 of the Rules of Procedure of the Inter-American Commission on Human Rights, 27 of the Rules of Procedure of the Inter-American Court of Human Rights; Manual of Operations of the Special Procedures of the Human Rights Council of August 2008, paras. 43-45 (“Urgent Appeals”).

¹⁴⁶¹ *Ibid.*

¹⁴⁶² Cf. Manual of Operations of the Special Procedures of the Human Rights Council of August 2008, paras. 43-45, 81-83.

¹⁴⁶³ Cf. articles 43.6, 54.3.f, 56.1, 59.5, and 68.b of the Rome Statute of the ICC, or 4, 11 and 12 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

can request this in their statements and press releases, and so can States and other entities within or outside contentious mechanisms ending in a binding decision or a recommendation.

This, in turn, reveals how mechanisms of promotion or protection can be based on duties or non-binding regulations (for example, as the process before the National Contact Points in regard to the OECD Guidelines for Multinational Enterprises).¹⁴⁶⁴ Sometimes both types of regulation can be taken into account when using a mechanism of protection or promotion of human rights.

On the other hand, those mechanisms may have an obligatory outcome, as happens e.g. with judgments, conciliation or normative legal agreements entered into; or they can have non-binding results, as happens with non-binding agreements or recommendations adopted by supervisory international bodies or some mechanisms handled by some human rights institutions or entities (as States, international organizations, NGOs, etc.) that seek to shame alleged State or non-state offenders.

To this it must be added that the non-binding character of the outcome of a mechanism neither prevents it from having binding legal effects indirectly nor implies that the norms on which the mechanism is based or which it reinforces have to be non-binding. For instance, quasi-judicial bodies that can only adopt recommendations can examine human rights obligations. Both obligatory and voluntary mechanisms could be handled properly or be motivated by extra-legal (e.g. political) considerations (reasonable or not from a non-legal perspective), especially in a field in which activism plays an important role.¹⁴⁶⁵ This is one of the reasons why the distinction between *lex lata* and *lex ferenda* is so important and cannot be ignored.

On the other hand, previous ideas found in this section reveal that it is possible for non-state entities to contribute and/or cooperate to the promotion and protection of human rights. This confirms that they may not only violate them and that non-state entities, both those with public or private purposes, can contribute to that promotion and protection. A wide non-state participation is important because each actor may have its own temptations, flaws, shortcomings and limitations, and it is important for others to check them and complement their initiatives in an open and democratic way from social, economic and legal points of view.¹⁴⁶⁶

Regarding the ways in which non-state entities can contribute to the protection of human dignity by cooperating with other entities, it can be said that they can, for instance, file claims,

¹⁴⁶⁴ Cf. Jernej Letnar Cernic, "The 2011 Update of the OECD Guidelines for Multinational Enterprises", *ASIL Insights*, op. cit.

¹⁴⁶⁵ Cf. George J. Andreopoulos, Zehra F. Kabasakal Arat, and Peter Juviler, "Rethinking the Human Rights Universe", op. cit., pp. 335-337; Amartya Sen, op. cit., pp. 343-344.

¹⁴⁶⁶ Cf. Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., pp. 35-36.

represent victims, denounce violations, shame alleged offenders (States or not), request protection, or set in motion mechanisms of protection of *lex privata* (such as processes, sanctions or exclusions against perceived offenders of regulations that can and should have a human rights dimension). Additionally, non-state actors can help to administer, implement or oversee regimes¹⁴⁶⁷ that benefit the exercise of human rights directly or indirectly. Accordingly, it is also possible to classify mechanisms of promotion and protection based on the role played (or not) by non-state entities.

Moreover, the study of some mechanisms conducted above also reveals that human dignity can be protected in different ways, not limited to judicial contexts or to international and national levels. In this sense, for instance, the transnational, domestic or international conduct of non-state actors operating outside (but not necessarily against) public legal systems may be manifested in the adoption of regulations or manifestations (e.g. condemnations of violations) that permit to enhance or trigger the protection of human dignity from non-state abuses.

On the other hand, judicial and non-judicial mechanisms can be to expressly or implicitly defend human rights, and can be found in international, domestic, transnational or private normative ambits. This is confirmed by norms and practices on universal jurisdiction; the extraterritorial protection of human rights; transnational litigation; or some domestic norms, such as some found in the United States of America, Colombia and the United Kingdom, which demand or permit legal protection from non-state violations of human rights.¹⁴⁶⁸

The multiplicity of levels and actors that can contribute to protect human dignity is crucial because every legal level can have shortcomings that make it necessary for others to complement or reinforce the protection they can offer, especially in a globalized world where gaps and lack of coordination can be taken advantage of by actors to elude control.

Those actors can do this for different reasons, including: first, the possible 1) weakness of some authorities that act alone and lack the freedom, power or resources possessed by violators. To counter this, the cooperation of other actors can help to make up for those deficits and offer effective protection of shared legal goods. Absence of control can also be conscious and obey to 2) (selfish) interests, support of offenders, bias or mistakes in one level of governance, legal system or by one actor. For this reason, the framework of the effective protection of human dignity cannot rely exclusively on one of them, and in practice different actors

¹⁴⁶⁷ Cf. Luis Pérez-Prat Durbán, op. cit., pp. 34-38; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors: Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, The Hague Conference, 2010, pp. 13-17.

¹⁴⁶⁸ Cf. August Reinisch, op. cit., pp. 53-61; Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 1255-1260.

and mechanisms must complement each other and be coordinated in light of shared legal goods, preferably in a coordinated fashion that operates in practice in a global legal space with substantive (shared interests) and procedural (concerning complementarity) dimensions.

It must also be mentioned that the protection of international legal goods in domestic law or *lex privata* can be based on the protection of those legal goods qua international legal goods, for instance when *jus gentium* is received in internal normative systems; or it can be indirect, for example when domestic law is interpreted in light of international law. This acknowledges that domestic authorities and certain non-state actors can contribute to the observance of international law. It is quite important that they are able to do so because of the imperfections and limitations of *jus gentium*. Apart from protecting *international* law, actors can also protect global legal goods that are *shared* by different legal systems and actors, which are sometimes shaped by their interaction and are commonly protected in different normative systems and actions.

Continuing with the analysis of features of mechanisms for the protection of human dignity, it is convenient to illustrate how mechanisms, *even* judicial, quasi-judicial or adjudication-based ones, among others, can and must interact and complement each other for that protection to be effective, and why all the features and forms of protection discussed in this Chapter are relevant.

One first example is found in article 31 of the United Nations Convention against Transnational Organized Crime, which aims to tackle actions of non-state entities that can affect human rights and operate in an effective or surreptitious way in the current globalized context, although they are able to participate even outside it. For those reasons, it is necessary to tackle their challenges with cooperation strategies and in clever ways that integrate different initiatives.

After mentioning different mechanisms, related to law-enforcement, protection of victims, and cooperation and assistance, which can be *ex post facto* measures but can also have a preventive dimension, article 31 of that Convention completes the picture mentioning preventive judicial and non-judicial mechanisms, and stressing the importance of cooperation in which State and non-state entities participate, of research and evaluation, of education and dissemination, and of information. All of those elements are important for the protection of (shared) legal goods, and many of them can address some causes of crimes and violations. Strategies that seek to regulate non-state conduct (e.g. adopting codes of conduct) employed by judicial and non-judicial authorities and entities are also highlighted. As can be seen, that article stresses the importance of *combining different mechanisms* that have been examined in this Chapter. It reads:

“Prevention

1. States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime.

2. States Parties shall endeavour, in accordance with fundamental principles of their domestic law, to reduce existing or future opportunities for organized criminal groups to participate in lawful markets with proceeds of crime, through appropriate legislative, administrative or other measures. These measures should focus on:

(a) The strengthening of cooperation between law enforcement agencies or prosecutors and relevant private entities, including industry;

(b) The promotion of the development of standards and procedures designed to safeguard the integrity of public and relevant private entities, as well as codes of conduct for relevant professions, in particular lawyers, notaries public, tax consultants and accountants;

(c) The prevention of the misuse by organized criminal groups of tender procedures conducted by public authorities and of subsidies and licences granted by public authorities for commercial activity;

(d) The prevention of the misuse of legal persons by organized criminal groups; such measures could include:

(i) The establishment of public records on legal and natural persons involved in the establishment, management and funding of legal persons;

(ii) The introduction of the possibility of disqualifying by court order or any appropriate means for a reasonable period of time persons convicted of offences covered by this Convention from acting as directors of legal persons incorporated within their jurisdiction;

(iii) The establishment of national records of persons disqualified from acting as directors of legal persons; and

(iv) The exchange of information contained in the records referred to in subparagraphs (d) (i) and (iii) of this paragraph with the competent authorities of other States Parties.

3. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences covered by this Convention.

4. States Parties shall endeavour to evaluate periodically existing relevant legal instruments and administrative practices with a view to detecting their vulnerability to misuse by organized criminal groups.

5. States Parties shall endeavour to promote public awareness regarding the existence, causes and gravity of and the threat posed by transnational organized crime. Information may be disseminated where appropriate through the mass media and shall include measures to promote public participation in preventing and combating such crime.

6. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that can assist other States Parties in developing measures to prevent transnational organized crime.

7. States Parties shall, as appropriate, collaborate with each other and relevant international and regional organizations in promoting and developing the measures referred to in this article. This includes participation in international projects aimed at the prevention of transnational organized crime, for example by alleviating the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime" (emphasis added).

A second example is the decision adopted by the Human Rights Council in Resolution A/HRC/RES/17/4 of 6 July 2011 to contribute to address the challenges to human rights created by potential corporate abuses, among other ways by means of establishing a Forum on Business and Human Rights, whose work is to be guided by the working group on the issue of human rights and transnational corporations and other business enterprises. It is entrusted with:

"[D]iscuss[ing] trends and challenges in the implementation of the Guiding Principles and promot[ing] dialogue and cooperation on issues linked to business and human rights, including challenges faced

in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices”.

Participation in the Forum is, in turn:

“[O]pen to the participation of States, United Nations mechanisms, bodies and specialized agencies, funds and programmes, intergovernmental organizations, regional organizations and mechanisms in the field of human rights, national human rights institutions and other relevant bodies, transnational corporations and other business enterprises, business associations, labour unions, academics and experts in the field of business and human rights, representatives of indigenous peoples and non-governmental organizations in consultative status with the Economic and Social Council; the Forum shall also be open to other non-governmental organizations whose aims and purposes are in conformity with the spirit, purposes and principles of the Charter of the United Nations, including affected individuals and groups, based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996, and practices observed by the Commission on Human Rights, through an open and transparent accreditation procedure in accordance with the Rules of Procedure of the Human Rights Council”¹⁴⁶⁹ (emphasis added).

In turn, the functions of the working group are related to the dissemination of principles on corporations and human rights, the examination of issues related to their implementation and of recommendations regarding them, and to their effectiveness. Those tasks must be conducted in cooperation and contact with State and non-state entities of various socio-legal levels,¹⁴⁷⁰ can be considered to be embedded in a campaign that seeks to deal with the challenges to human rights and guarantees posed by a particular type of non-state entities; and integrates strategies of education, research and studies, dissemination of information and cooperation with actors and different legal systems and levels of governance. Even though those tasks and actions are based on a normative framework that, unfortunately, largely fails to recognize the binding character of corporate human rights obligations (with the possible obvious exception of *jus cogens* duties), their combination constitutes a good strategy because it is multifaceted and acknowledges that in order to deal with the threats posed to humanitarian legal goods by non-state entities, isolated actions are insufficient and different dimensions must be included.

This confirms that strategies that seek to protect human dignity from non-state threats cannot be reductionist or limited and must integrate different actors, given the multidimensionality of problems, sources, aspects and implications of the challenges, all of which must be addressed; and also due to the presence of alliances, cooperation among offenders and their taking advantage of social opportunities, legal gaps and lack of coordination.

The interplay of different mechanisms and the importance of not limiting strategies of promotion and protection to just some of them can also be gleaned from the Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance of 2001. It exhorts to tackle the roots and sources of

¹⁴⁶⁹ Cf. Human Rights Council, Resolution 17/4, *Human rights and transnational corporations and other business enterprises*, A/HRC/RES/17/4, 6 July 2011, paras. 12-13.

¹⁴⁷⁰ *Ibid.* para. 6.

violations; to educate, instruct and train; to permit non-state cooperation, bearing in mind the roles and responsibilities of States and the possible violations that can be committed by other entities, whose respect of human dignity must be ensured; to use both persuasion and culture strategies and enforcement measures and legal proceedings; and to having a “social and international order” of protection of human rights and human dignity in which non-state entities can contribute.¹⁴⁷¹

To conclude, it is convenient to mention that all measures and mechanisms that can be used to protect human dignity from non-state violations and to regulate non-state burdens or obligations must comply with the conditions of respecting fundamental rights, the principle of legality, peremptory law, and other requirements of legal capacities of non-state entities (see Chapter 5, *supra*). When employed, the conditions of measures of restrictions of rights and suspension of duties must be satisfied as well. After all, it is necessary and obligatory to protect human dignity from non-state abuses, as those that constitute terrorism, but this must be done respecting the rule of law and human rights.

On the other hand, any State or non-state entity that uses *ab initio* permissible (lawful) mechanisms against potential or actual non-state abuses must take measures to avoid affecting human and fundamental rights. Additionally, it must be stressed that entities targeted by sanctions still retain any human rights duties they have, with which they must comply.¹⁴⁷²

¹⁴⁷¹ Cf. Durban Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001, paras. 10-22, 115 of the Declaration, and paragraphs 57, 74, 93, 95, 104, 112, 213 and 215 of the Programme of Action.

¹⁴⁷² Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 8, *op. cit.*, paras. 3-15.

CONCLUSIONS

If practitioners and legal scholars ignore human needs due to their being too fond of some abstract theories and fictions about what human rights are or not, ignoring what their content is, what their foundation demands and how they are affected in practice, they do a disservice to human beings, because their knowledge and role gives them the opportunity to contribute to improve the legal protection of human dignity, which is often missed. This happens when some argue that international law ‘cannot’ or ‘should not’ directly protect individuals from non-state violations. This is reminiscent of so many cases throughout history, depicted among others in the painting “the unwed mother” by Jean-Louis Forain, which conveys the helplessness of someone affected by law *as applied by* bored and disinterested legal practitioners that may not care about her fate and may be more concerned about their private interests -as Leo Tolstoy depicted in his novel “Resurrection”-,¹⁴⁷³ about theories they learned and blindly accept, or about formalities and complex but unnecessary legal theories.



‘The unwed mother’, by Jean-Louis Forain. Bristol Museum & Art Gallery

In light of these considerations, in my opinion it is not acceptable to deny individuals an effective protection of human dignity from violations attributable to non-state entities. This demands going beyond the paradigm of exclusive-State duties, which often fails to offer

¹⁴⁷³ Cf. Leo Tolstoy, *The Awakening/The Resurrection*.

protection to some victims, has been overcome in some cases, and is not required under international law, as can be revealed by its analysis and that of the practical and theoretical evolution of human rights movements and of the international *corpus juris*, that encompasses human rights and guarantees.

Certainly, a State-centered scheme could go against the nature of human rights and guarantees, making them relevant only in certain relations instead of always benefiting individuals. This is acknowledged in practice. For instance, when it is said that the Security Council must respect human rights for its resolutions to be consistent with the principle of legality (given the presence of human rights in the Charter of the United Nations and in customary and peremptory law), it is implicitly recognized that such non-state body can violate human rights, the relevance of which does not depend on the presence of States –logically, States must respect human rights even when implementing those resolutions, and retain their human rights duties-.

Moreover, as commented in Chapter 8, international law and other normative systems can and often do protect human dignity from non-state threats, sometimes unconsciously or implicitly,¹⁴⁷⁴ for instance implementing civil and criminal norms that protect human rights directly or indirectly. The norms of those systems must be compatible with human rights and guarantees, and ought to be interpreted in their light.

The protection of human rights and guarantees can also be formal or informal, promoted by States or by other actors, substantive or procedural, and legal or extra-legal, but must always seek to effectively protect their foundation: human dignity, which all actors must respect. Other values and principles, such as liberty, equality, autonomy or integrity, are closely related to dignity and must be protected as well, but their defense can never be contrary to the inherent worth of individuals, and the human rights system cannot be perverted by theories or norms that ignore it.

If human dignity is not fully and effectively protected by law, there may be different negative implications, including: firstly, implementing law in accordance with arguments that hold that the protection from non-state violations is not within the scope of the legal framework of the protection of human rights. This could lead to ignoring legal possibilities, the demands of their foundations, and normative and practical developments. If those theories are believed in by practitioners and lawmakers, they may deny protection to human beings who suffer or are about to be attacked by non-state entities based on that belief. This can impede the full protection of human beings, demanded by their *non-conditional* dignity, and discriminates against some victims based on the identity of violators, ignoring the non-conditional nature of human dignity.

¹⁴⁷⁴ Domestic law and norms that are not originally international ones but share their legal goods can protect individuals against non-state threats consciously or spontaneously.

Those theories can thus become self-fulfilling apocalyptic prophecies, and their mistakes must therefore be exposed.

For that reason, it must be acknowledged that individuals can be protected from non-state entities through different mechanisms, thanks to the contribution of different actors, and based on different norms (see Chapters 6 and 8); and that their protection must often be extended *de lege ferenda* due to the presence of some procedural and substantive limitations and gaps in positive law, which must be detected.

Furthermore, not only norms but also legal theories can have expressive functions and practical implications. In connection with this, it must be said that theories that explore *when* and *why* human dignity must be protected from non-state actors have the potential to change practice, especially when they explain why denying protection goes against human dignity, equality and obligations of authorities, as explained in Part I.

Additionally, denials of protection of human rights from non-state abuses send a dangerous and wrong message. Victims may feel abandoned and potential non-state offenders emboldened due to their belief that their violations are not considered unlawful and are tolerated or even 'permitted' under *jus gentium*, which goes against the idea that their abuses are legally relevant insofar as they affect essential legal goods.

According to theories such as that of the *Lotus* approach, according to which what law does not prohibit is permitted, it could be considered that non-state conduct that is not expressly prohibited could be permitted. However, this conclusion is at odds with legal values and principles, and the fact that there may be different ways in which conduct can be addressed by law, as argued by Simma, indicates that if an act is not expressly prohibited it does not necessarily mean that it is permitted. Chapter 6 argues why non-state actors have implicit duties to not harm and to respect peremptory human rights. Moreover, it is possible to use mechanisms that are not based on obligations to defend human rights, granted that the principle of legality and fundamental rights are respected.¹⁴⁷⁵

When these issues are examined, it is possible to observe that some persons (or sides) focus exclusively or excessively on the wrongdoings of some entities and ignore (consciously or not) those committed by others, or even excuse them or consider them to be permissible!

Unlike what those arguments actually suggest, all victims and individuals deserve protection and respect because they have an identical human nature and worth. Human rights

¹⁴⁷⁵ Cf. Declaration of Judge Simma to: International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, op. cit., paras. 8-10.

and solidarity with *all* victims call for that protection, and should be given preference over criteria of selectiveness and exclusion.

Therefore, indirect and direct mechanisms of protection must be used to protect victims of all abuses, State or not, and it is important to not cling to misleading theories with purposes, contexts and origins that may have changed.¹⁴⁷⁶ If some objections to that protection reflected positive law or established doctrine, then they would have to change, because human dignity is far more important than narrow and exclusivist theories and norms that answer to particular ideologies and theories.

It is ironic that some of those who consider that meta-legal considerations, as some natural law or other considerations, must be excluded and are irrelevant, unconsciously or deliberately hold fast to different theoretical *dogmas* that are not immutable.¹⁴⁷⁷ Human dignity, more important than theories in practice, must be protected in a complete, non-conditional and non-discriminatory fashion, which demands considering that the identity of participants of violations are just one factor that must be taken into account to determine how to protect individuals, not if they must be protected.

These ideas can be illustrated with the example of Colombia, because it would be inconsistent from the point of view of the protected content of rights and unfair with victims to claim that only either guerrillas, State agents or paramilitary groups have violated human rights or that only the victims of one of them deserve protection, because all parties have committed violations and affected victims, as commented in reports of the United Nations or the Inter-American Commission on Human Rights. Interestingly, it is somewhat startling that those reports hold non-state armed groups accountable only under international humanitarian law. Nevertheless, it must be recalled that IHL and human rights law share the foundation of human dignity and some human rights. This not only means that the protection offered in one branch of the humanitarian *corpus juris*, can be offered in others, but also that those reports implicitly acknowledge that non-state actors can have human rights responsibilities. Still, omission of allusion to human rights duties of non-state actors and recognition of State duties makes the non-recognition of human rights violations of non-state entities as such the more disappointing, and

¹⁴⁷⁶ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 25-58, 531-548.

¹⁴⁷⁷ For instance, in a different context, to put one example, some say, for instance, that communism is a modern quasi-religion, while others appeal to a *laicism* that attempts to exclude even the expression of religious beliefs protected by human rights and permit them only in “secret” while publicly imposing non-religious ideologies on others, something that is contradictory and hypocritical if conscious. Cf. an interesting analysis concerning related issues offered in: “*Lautsi: Crucifix in the Classroom Redux*”, Editorial, *European Journal of International Law*, vol. 21, 2010.

their being sometimes called human rights “abuses” or “destruction” is often nothing but a (timid?) recognition of their being violations¹⁴⁷⁸ or a subtle (unacceptable) evasion.

Claiming that only one party to conflicts violates human rights or human dignity can part of the strategy of those who ideologically or otherwise agree with those who oppose that party. However, the use of this argument can backlash and lead to loss of its legitimacy, as evinced by outraged claims of victims of non-state violations who rightly say that it is unfair that only violations committed by States or some parties to conflicts are condemned as human rights violations by some NGOs or international bodies and that they ignore other abuses.

This sense of outrage is not exclusive to Colombia, and is a phenomenon identified in doctrine. Indeed, the fairness and legitimacy of law are at stake regarding the full protection of human dignity from non-state abuses, being it unacceptable that some victims are excluded in the name of what human rights or international law “are supposed to do”, ignoring what human rights are really meant to do and what their principles, values and foundations demand, and also ignoring that international law can and should change. Moreover, some theories that have proved to be problematic, as those of legal personality,¹⁴⁷⁹ are often invoked to deny protection. If those theories were correct, they would have to change *de lege ferenda* to ensure the full protection of human dignity and consistency with its non-conditional character.

Certainly, the history and theoretical evolution of *jus gentium* reveals that humanitarian considerations and concerns have inspired practice, theories and change, and that they must be taken into account to evaluate if law is appropriate and to guide its interpretation and modify it when necessary.¹⁴⁸⁰ After all, law is instrumental and must answer to human and social needs, including needs of respect, protection and facilitation of the enjoyment and exercise of human rights and guarantees in universal and comprehensive ways.¹⁴⁸¹

On the other hand, based on the non-conditional character of human dignity, non-state entities must be permitted to condemn, shame or contact State and non-state actors to persuade them to conform to humanitarian standards. Such initiatives emphasize that *all* violations are unacceptable and can and must be addressed and that their victims must be protected.

¹⁴⁷⁸ Cf. Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102. 26 February 1999, paras. 55 of Chapter I, 5-15 and 18-19 of Chapter IV (especially paragraph 14), or para. 5 of the Final Considerations; Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, A/HRC/19/21/Add.3, 31 January 2012, Summary and paras. 76-77, 83-89; Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, E/CN.4/2006/9, 16 May 2006, para. 17; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 73-75.

¹⁴⁷⁹ Cf. Chapter 5, supra.

¹⁴⁸⁰ Cf. Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 10-22.

¹⁴⁸¹ Cf. Chapter 1, supra.

According to this idea, States cannot elude their obligations and responsibility. Additionally, this implies any non-state entity that perpetrates or contributes to a violation must repair victims; all individuals deserve protection before and after violations takes place; and fundamental and human rights must be respected by mechanisms that seek to protect human dignity.¹⁴⁸²

It can be added that the exclusion of some victims, partisan claims and strategies, and the discriminatory treatment of victims are not only contrary to the foundations of human rights but can also further humiliate and victimize individuals. Additionally, they may generate victim competition or make victims feel tempted to take justice into their own hands, being it necessary to prevent both dynamics.

The fact that human dignity is non-conditional additionally demands that *all* victims be repaired, that the human rights of all individuals be respected and protected, whether they commit crimes or not and regardless of *who* threatens those rights. Moreover, non-state cooperation in the protection of that dignity is legitimate and must be permitted.

If the necessity of protecting human dignity from all violations in accordance to the demands of the foundations of human rights is ignored, individuals will be abandoned by international law and may often not even have the prospects of *successful and effective* remedies and protection, because violators may elude State control, given their power or due to social and normative gaps, despite the diligent efforts of authorities. In those cases, victims may have no action against the respective State, and can feel betrayed and think that the term *human* rights is a fallacy if they have no other venues of protection, in which case not all *human* beings would be effectively protected when the same rights are violated by different entities.

Additionally, non-state violators may consider that their conduct is tolerated and re-victimize individuals, whose right to have guarantees of non-repetition (see Chapter 7) will be thwarted, and whose “hope” to find legal protection when neither domestic nor international remedies offer them prospects of effective protection will be frustrated. At least in serious cases and other events it is necessary for victims to have access to international remedies.

Theories that completely deny possibilities of international protection of human rights from non-state actors not only disregard existing legal norms, values, principles and foundations, such as human dignity, equality and effectiveness, but also fail to respond to the problems mentioned above, which require law to change if it does not sufficiently protect all victims. Even if they admit the positive formal or informal impact that non-state actors can certainly have on the promotion and defense of human rights (which is to be encouraged and permitted, as discussed in Chapter 1), they will ignore the need to legally address non-state entities conduct that violates

¹⁴⁸² Cf. Introduction, Chapters 5 and 7, *supra*.

legal goods, which must be regulated. Moreover, those theories would be contradictory because the same legal sources that can create or permit non-state contribution and participation can regulate non-state duties and legal burdens, especially because non-state entities can certainly be subjects or addressees of international norms, as discussed in Chapter 5.

Apart from considerations of consistency and meta-legal arguments, non-state violations are to be considered as legally relevant and deserving regulation because they affect humanitarian legal goods. Since different normative systems and actors can share those goods, all of them can respond to those violations. Non-state entities have always been able to violate rights based on the inherent worth of individuals, just as for long they have been relevant actors in the international and domestic societies and able to impact on shared interests protected by law.

That being said, current social dynamics and opportunities, such as delegation, privatization, empowerment of non-state actors, alliances between actors, contacts and networks, globalization, interdependence, international and transnational action of public or private actors,¹⁴⁸³ and gaps and interdependence, among others, create more possibilities of non-state threats. Therefore, the need of tackling them by international norms capable of overcoming local limitations and demanding universal protection is more pressing than ever (it must be added that protecting individuals is, will be and has been always pressing).

Taking this into account, and considering that human rights and guarantees demand an intense protection of vulnerable individuals, legal protection from State abuses cannot be the only available one. In sum, the principle of effectiveness and the legal foundations and principles of the humanitarian *corpus juris* demand protection from non-state violations. Otherwise, *jus gentium* can turn into a deficient, hypocritical or discriminatory system, as Part I explains.

The concept of *erga omnes* obligations confirms the previous ideas. While most authors focus on their horizontal dimension, which alludes to their being owed to a community –the community dimension of the world society, or of more limited societies in the case of *erga omnes partes* obligations-, Antonio Cançado mentions the following:

“In [his] view, we can consider [...] obligations *erga omnes* from two dimensions, one horizontal and the other vertical, which complement each other. Thus, the obligations *erga omnes* of protection, in a horizontal dimension, are obligations pertaining to the protection of the human beings due to the international community as a whole. In the framework of conventional international law, they bind all the States Parties to human rights treaties (obligations *erga omnes partes*), and, in the ambit of general international law, they bind all the States which compose the organized international community, whether or not they are Parties to those treaties (obligations *erga omnes lato sensu*). In a vertical dimension, the obligations *erga omnes* of protection bind both the organs and agents of

¹⁴⁸³ Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 4-12; Elena Pariotti, op. cit., at 95.

(State) public power, and the individuals themselves (in the inter-individual relations)¹⁴⁸⁴ (emphasis added).

In my opinion, the fact that the international community endorses substantive guarantees and that their legal goods can be violated by non-state entities permits to argue that *erga omnes* obligations are protected by correlative implicit obligations. For instance, according to the case law of the European Court of Human Rights, violations of human rights treaties by State agents can be considered wrongful acts committed by those agents, and to be able to generate their responsibility in addition to the generation of State responsibility,¹⁴⁸⁵ even though those treaties expressly mention duties of *States* and not of their agents.

For those who object saying that State agents can expressly have criminal responsibility and only they can have international responsibility, it can be responded that individuals who participate in non-state groups or act on their own can also have international criminal responsibility, and that not every State violation amounts to a crime attributable to State agents,¹⁴⁸⁶ despite which they can have legal responsibility. Moreover, all actors have a duty to respect peremptory law, whether or not they are State agents or organs (See Chapter 6, *supra*).

Express or implicit human rights obligations of non-state actors reinforce the protection of individuals and are consistent with the principle of effectiveness. When they are necessary for that protection to be effective but they do not exist, they must be created *de lege ferenda*, lest human rights are not effective in practice in some events. This is further required by the need to prevent impunity, lack of access to remedies and other shortcomings. While voluntary strategies have some advantages that binding ones do not, the fact that merely voluntary strategies often have those problems makes it necessary for them to be *complemented* by duties and strong mechanisms of protection.

For example, the shortcomings and limitations of the Global Compact's effectiveness may partly respond to its non-binding character. Curiously, corporations opposed the creation or *recognition* (this is unacceptable, since this attitude amounts to disregarding the possible *recognition* of important human rights duties) of human rights norms on the conduct of corporations that could be binding.¹⁴⁸⁷ These considerations, coupled with the identification of events in which non-binding standards, as those found in codes of conduct, are used to elude

¹⁴⁸⁴ Cf. Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *op. cit.*, para. 77.

¹⁴⁸⁵ Cf. European Court of Human Rights, Grand Chamber, *Case of Kononov v. Latvia*, Judgment, *op. cit.*, paras. 236-237.

¹⁴⁸⁶ Cf. Inter-American Court of Human Rights, Advisory Opinion OC-14/94, *op. cit.*, para. 56.

¹⁴⁸⁷ Cf. John H. Knox, "The Human Rights Council Endorses "Guiding Principles" for Corporations", *op. cit.* With race to the bottom and elusion of law phenomena, a lowest common denominator of binding norms protecting human beings from abusive actors that entitle them to claim protection is needed.

pressure or adverse effects and to have a good reputation, confirm the importance of complementing non-binding standards and initiatives with effective and binding norms that have both expressive *and* other effects (e.g. coercion). Moreover, the latter norms can be supervised by judges or other authorities, and can be invoked by victims and supporters, who can demand their implementation. For this reason, they increase the chances of changing non-state conduct.

Additionally, national or private initiatives often have limitations, and exclusive reliance on them may encourage or fail to counteract the bottom dynamics, mere lip service to human rights, or other practices that are contrary to the effectiveness of the protection of the non-conditional dignity of individuals. It is evidently necessary to make powerful entities, potential abusers and authorities know that they are *bound* by humanitarian standards everywhere.

This being said, and as commented in Chapter 4, approaches exclusively based on international law or hard law approaches are insufficient as well. This is because persuasive and cultural strategies (permitted¹⁴⁸⁸ by law and sometimes required by obligations of authorities) and the contribution of multiple actors are crucial for the effectiveness and completeness of the protection of human dignity, especially because international strategies have shortcomings as well. Therefore, action from different actors and systems must complement that from others, especially because just as violations can ignore formal boundaries and distinctions, so must the protection of human dignity incorporate both legal and extra-legal (including meta-legal) components from different normative systems and actors.

Just as economic and social studies have indicated that non-state entities can contribute to the provision of certain goods, their cooperation is relevant for the protection of international legal goods.¹⁴⁸⁹ Certainly, the effectiveness of the protection of human dignity often depends or is largely based on non-state participation and contribution. This happens, for example, with information provided by non-state actors to international supervisory bodies or with their initiating or participating in mechanisms to protect human rights. The link between the effectiveness of the human rights system and non-state participation, which must be permitted in an increasingly inclusive system,¹⁴⁹⁰ has been identified by the Council of Europe Commissioner for Human Rights, who said that:

¹⁴⁸⁸ Cf. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, op. cit., paras. 27, 31, 83.

¹⁴⁸⁹ See footnotes 443, 452 and 762, *supra*.

¹⁴⁹⁰ Cf. Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion"; Andrea Bianchi, op. cit., pp. 186-190; Luis Pérez-Prat Durbán, op. cit., pp. 34-38.

“The important role of NGOs in shedding light on human rights violations experienced by vulnerable persons and in facilitating their access to justice must be officially recognised. This would be fully in line with the principle of effectiveness in which the Convention is grounded.”¹⁴⁹¹

The regulation of the positive and negative roles of non-state entities does not imply that State obligations of protection are irrelevant, but on the contrary that non-state promotion of human rights and guarantees is entitled and permitted and violations are forbidden. Moreover, non-state actors can call for compliance with *State* duties as well. For this reason, far from undermining the *integral* human rights system, non-state participation strengthens it.

Logically, non-state entities can make mistakes or act simply to further partisan agendas, and they can engage in unlawful conduct. For this reason, they must thus be democratically checked by other private actors and by public entities, as required by the rule of law. Control of their actions must respect the principle of legality and other conditions, examined in Chapter 5.

Altogether, just as each legal system may have shortcomings and advantages, each actor can have problems and strengths (flexibility, etc.). That is why the interaction and cooperation of different entities and systems is so important. If they are coordinated and guided by the purpose of protecting shared legal goods, common standards may emerge in a global legal space and the protection of shared legal interests will have more prospects of effectiveness.¹⁴⁹² This explains why it is important to allow actors to participate and contribute to the promotion of human rights and to acknowledging the roles and functions that different entities can have in this field.

The importance of non-state action for human rights to be effective is recognized in a passage on “Cooperation with civil society” found in the General Comment No. 5 of the Committee on the Rights of the Child, which says:

“Implementation is an obligation for States parties, but needs to engage all sectors of society, including children themselves. The Committee recognizes that responsibilities to respect and ensure the rights of children extend in practice beyond the State and State-controlled services and institutions to include children, parents and wider families, other adults, and non-State services and organizations. The Committee concurs, for example, with general comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health, paragraph 42, of which states: ‘While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the

¹⁴⁹¹ Cf. Council of Europe, “Access to justice for persons with disabilities: Commissioner Hammarberg intervenes before the Strasbourg Court”, 18/10/11, available at: http://www.coe.int/t/commissioner/news/2011/111018tpiromania_en.asp (last checked: 13/03/2012).

¹⁴⁹² Cf. how non-state entities can prompt States to comply with their humanitarian obligations and contribute to the promotion of humanitarian guarantees, as examined, among others, in: Daniel Thürer, *op. cit.*, at 44; ASIL, *Proceedings of the 92nd Annual Meeting: The Challenge of Non-State Actors*, *op. cit.*, pp. 22-23; Elena Pariotti, *op. cit.*, pp. 95, 98, 104-105.

realization of the right to health. States parties should therefore provide an environment which facilitates the discharge of these responsibilities¹⁴⁹³ (emphasis added).

It is important to stress that the need to protect human beings from non-state violations, apart from being based on legal and extra-legal considerations, must take into account the *raison d'être* of the humanitarian *corpus juris*: the protection of human dignity from all threats and solidarity with all victims. This indicates that the crux of human rights is the *protection* of the inherent worth of individuals. This is why it is wrong to dismiss the suffering of some victims, which cannot be accepted even if legal or political theories endorse that dismissal, ignoring that law can and must protect all victims and that norms and theories that oppose this must be modified or replaced with proper ones, lest they discriminate against some victims.

It must be taken into account that in international humanitarian law, that protects human dignity and human rights, the Martens clause (in its original version or as adapted to modern treaties) appealed to the laws of humanity and the dictates of public conscience.¹⁴⁹⁴ It called for dealing with new needs and problems in the context of armed conflicts in order to protect actual and potential victims. Likewise, some norms of the humanitarian *corpus juris* permit the extension of protection to cover guarantees against non-state threats. Furthermore, a proper understanding of the function of promotion of human rights or of the possibilities of direct and indirect protection have led some bodies to condemn or examine non-state violations. Sometimes, though, the extension of protection must be achieved by normative changes given the presence of some hurdles that an evolutionary interpretation cannot overcome.

Concerning this, it must be recalled that the appeal to protect human dignity has a meta-legal dimension as well, and demands not only a proper and fair implementation and interpretation¹⁴⁹⁵ of *lex lata* but also its correction and extension *de lege ferenda*, to make it possible to tackle new or old challenges that are unaddressed or only partially addressed in law.

As explained throughout this book, tackling those challenges often requires regulating rights, duties and other legal capacities of potential offenders (respecting the rule of law and essential guarantees).

Regarding this, the Chairman of a Seminar on Good Governance Practices for the Promotion of Human Rights mentioned that the participants of the conference “underlined the

¹⁴⁹³ Cf. Committee on the Rights of the Child, General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, para. 56.

¹⁴⁹⁴ Cf. Frits Kalshoven and Liesbeth Zegveld, op. cit., pp. 22, 85, 132, 156, 171; Erika R. George, “The Criminal Enterprise? Corporations and International Human Rights Issues of Accountability and Liability at Home and Abroad”, in Willem J.M. Van Genugten et al. (eds), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference*, T.M.C. Asser Press, 2009, pp. 170-171, on the need to address new challenges posed by non-state actors and its relation to the purposes and content of the ‘Martens Clause’.

¹⁴⁹⁵ It must be borne in mind that interpretation is always present when applying law. Cf. Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 579, 596.

following needed actions for the future” concerning responsible actors, that allude to both the positive and negative roles they can play in relation to human rights:

“[A]ct against impunity of state/non-state actors, bearing in mind sensitivity of conflict situations (such as through effective courts, truth and reconciliation commissions or national human rights institutions) [...] promote joint action between national and transnational actors, including the private sector”¹⁴⁹⁶.

Human beings are neither angelical nor demonic, but sometimes behave as if they were.¹⁴⁹⁷ The same can be said of other non-state entities, which can promote and protect human rights or violate them. Those roles are not immutable and one entity can play both roles, ‘fall from grace’ or ‘redeem itself’, reason why mechanisms that seek to make non-state culture and behavior respectful of human rights are so important. Moreover, an effort must be made to persuade potential offenders to contribute to the protection of human dignity, which is something that the notion of silent complicity recognizes. It is pertinent to cite Secretary-General Ban Ki-moon, who said:

“[The] activities [of Businesses] have a profound impact on people’s lives and on key global issues [...] Our challenge is to make sure that business is not part of the problem — but the source of solutions.”¹⁴⁹⁸

Altogether, theories that insist on the idea that only States violate human rights ignore reality and the fact that States are constructs and collective entities that operate through non-state actors. Additionally, they may ignore that throughout history, even when many adhered to ideas of State prevalence, non-state actors have had international power and influence; and may also ignore that there are many non-state actors that have the capacity to violate human rights or frequently do so (drug cartels, criminal groups, terrorist groups, armed groups, etc.).

If it is accepted that States can violate human rights, and it is known that they operate through non-state actors, that some acts of the latter are attributable to the former in legal terms, and that entities with the power to violate human rights and guarantees must be controlled to protect individuals, it can be concluded that apart from States other actors have power to attack essential rights based on the inherent worth of human beings. Because of this, it would be unsustainable, unfair and contradictory to not protect potential and actual victims from non-state violations.

¹⁴⁹⁶ “Chairman’s Statement”, Seminar on Good Governance Practices for the Promotion of Human Rights, organized by the United Nations Office of the High Commissioner for Human Rights and the United Nations Development Programme in cooperation with the Government of the Republic of Korea, Seoul, 2004, at 5.

¹⁴⁹⁷ Cf. Immanuel Kant, *Perpetual Peace, a Philosophical Essay*, op. cit., pp. 152-155; Fernando Mires, *El fin de todas las guerras: Un estudio de filosofía política*, LOM ediciones, 2001, pp. 118-119 (I disagree with some of the last author’s ideas).

¹⁴⁹⁸ Cf. Secretary General of the UN, *Secretary-General Stresses Role of Businesses in Support of Human Rights*, SG/SM/13869 HR/5073, available at: <http://www.un.org/News/Press/docs/2011/sgsm13869.doc.htm> and <http://www.business-humanrights.org/Links/Repository/1009055> (both last checked on 13/03/2012).

If it is known that non-state entities have been able to exert an influence on the shaping of international decisions and processes and impact on State behavior even during the peak of the “Westphalian” period, it must be recognized that they have the capacity to violate human rights and guarantees. This makes it necessary to legally protect the non-conditional human dignity from them. Since non-state entities can be addressees of *jus gentium*, they can have legal capacities that seek to achieve this.

Who can deny that violations of human rights are frequently or easily committed by some non-state actors? Those and other threats must be acknowledged, prevented and responded to, which is not only demanded by human dignity but also by the need to regulate the conduct of actors with the capacity to affect legal interests.

The human suffering that can be caused by non-state actors is another factor that challenges denials of the relevance of protection from them in human rights law. Their violations can be addressed directly or through the mediation of authorities in substantive or procedural terms. Some international norms, such as those protecting individuals from actors with a perceived capacity to violate human rights (e.g. corporations, armed groups, etc.), demand that authorities forbid and tackle non-state abuses internally. International norms can both impose a general duty to do this and regulate in detail how States must respond to certain abuses. Therefore, indirect international strategies of protection are often used to address situations of frequent interaction of individuals with non-state entities for factual or normative reasons (e.g. concerning rights of persons with disabilities *vis-à-vis* some functional authorities or in the workplace),¹⁴⁹⁹ or to regulate pertinent conduct in contexts in which individuals are frequently or especially vulnerable to non-state abuses, as happens with the protection from domestic violence or the protection of children.¹⁵⁰⁰

It can be said that it is necessary to address problems that individuals face concerning non-state threats (human and meta-legal dimension), as permitted by the normative substratum that demands their protection (directly or indirectly, according to the principles of effectiveness and equality and in light of the protection of human dignity, I might add). The following words of Antonio Cançado confirm these ideas:

“In two other recent cases, *A versus United Kingdom* (1998) and *Z and Others versus United Kingdom* (2001), the European Court affirmed the obligation of the respondent State to take positive

¹⁴⁹⁹ Cf. common article 3 to the Geneva Conventions of 1949 and Protocol II to them; Guiding Principles on Business and Human Rights, *op. cit.*; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, *op. cit.*; Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights; Rome Statute of the ICC; Statutes of the ICTY and ICTR, among others.

¹⁵⁰⁰ Cf. articles 1 and 3 of the “Convention of Belém do Pará”; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 74-75, among others.

measures to protect the children against ill-treatment, *including that inflicted by other individuals [...] It is precisely in this private ambit that abuses are often committed against children*, in face of the omission of public power, - *what thus requires a protection of the human rights of the child erga omnes, that is, including in the interindividual relations (Drittwirkung)*.

This is a context in which, definitively, the obligations of protection *erga omnes* assume special relevance. The foundation for the exercise of such protection is found in the American Convention on Human Rights itself. The general obligation [...] *to respect and to ensure respect for the protected rights - including the rights of the child [...] requires from the State the adoption of positive measures of protection* (including for preserving the preponderant role of the family, foreseen in Article 17 of the Convention, in the protection of the child [...]), applicable *erga omnes*. In this way, Article 19 of the Convention comes to be endowed with a *wider dimension, protecting the children also in the inter-individual relations*¹⁵⁰¹ (emphasis added).

In light of what has been said, it is pointless to deny that non-state entities can violate human rights and guarantees or participate in their violation, and that their conduct can thus be legally relevant and must be addressed by law, which must protect individuals according to both legal and meta-legal criteria. Furthermore, currently there are norms and legal practices that seek to offer protection from those entities directly or indirectly, and there are also doctrinal and official acknowledgments of the necessity of this protection.

The Vienna Declaration and Programme of Action can be understood as confirming these ideas. It says:

“The World Conference on Human Rights also expresses its dismay and condemnation that gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in different parts of the world. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law”¹⁵⁰² (emphasis added).

The underlined sentences refer to conduct that is contrary to human rights and, in consequence, to human dignity, that can be frequently or evidently perpetrated by non-state entities.

For instance, acts of racism, xenophobia and discrimination are frequently (but not only)¹⁵⁰³ committed by individuals and non-state groups; poverty and the lack of enjoyment of economic, social and cultural *or other* rights may be caused by non-state behavior; non-state actors commit acts of terrorism and violate human rights;¹⁵⁰⁴ women, migrants, persons with disabilities and other vulnerable persons, none of whom must be excluded from protection, are often victims of non-state abuses and sometimes receive indirect international protection against

¹⁵⁰¹ Cf. Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 63-64.

¹⁵⁰² Cf. Vienna Declaration and Programme of Action, World Conference on Human Rights, op. cit., para. 30 of Part I.

¹⁵⁰³ It must be recalled that virtually all human rights can be affected by States and non-states. See sections 1.3 and 2.3, *supra*.

¹⁵⁰⁴ Cf. Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, op. cit., paras. 2, 5, 33, and 48, *inter alia*.

those abuses; and the rule of law is relevant not only in relation to authorities (that may be non-state entities) but also in relation to all actors whose conduct is or must be regulated by law expressly or implicitly (being it necessary to regulate all conduct that affects legal goods).

Both direct and indirect mechanisms and norms that seek to protect human rights answer to the same legal foundations, in light of which it can be said that expressions such as non-state “destruction” or “abuse” of human rights actually indicate that non-state actors can victimize individuals and violate human rights, just as States can. This idea seems to be accepted in international decisions, practice and works that consider human rights abuses committed by non-state actors as contrary to internationally recognized human rights.¹⁵⁰⁵ Denying that non-state entities can engage in negative legally relevant conduct that need to be addressed normatively is inconsistent and risky, because as said before such denial may make those who believe in it to either refrain from using law in the way that it can be used to protect all victims from non-state threats directly or indirectly, or not modify and improve law *de lege ferenda* according to this goal.

The inconsistency and fallacy of denying that non-state actors violate human rights is revealed both by the existence of positive duties of protection and facilitation of human rights, which have horizontal effects that address the recognized fact that non-state actors can hinder the exercise of human rights; and by the fact that international criminal law, as mentioned by Lauterpacht, sometimes protects human rights, and clearly members of non-state groups can violate that law and not only State agents.¹⁵⁰⁶

That being said, ignoring the positive cooperation and promotion of human rights by non-state entities must be avoided as well, because they can democratize or open up legal processes and contribute to the effectiveness of human rights mechanisms and norms, reason why a multi-actor and multi-level framework is better suited to protect shared or common legal goods.

That non-state violations of human rights are frequent is revealed in everyday examples. For instance, violations occur when children are recruited by non-state armed groups and when those groups injure individuals; when environmental, security and other problems with human rights implications are caused by corporations, armed groups or other entities; when populations are negatively affected by decisions and operations of international organizations;¹⁵⁰⁷ when human beings are victims of bullying; when pirates treat crews and others as means for attaining their private ends; when individuals are falsely and unjustly slandered and accused by a self-

¹⁵⁰⁵ Cf. Part I, *supra*.

¹⁵⁰⁶ Cf. Hersch Lauterpacht, *op. cit.*, pp. 35-37; <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last checked on 13/03/2012).

¹⁵⁰⁷ Cf. e.g. European Court of Human Rights, *Case of Sufi and Elmi v. the United Kingdom*, Judgment, *op. cit.*, para. 82; José Manuel Cortés Martín, *op. cit.*, pp. 26-27. 53-58, 131, 137-143.

righteous NGO; when individuals are abused domestically; when foreigners are attacked by xenophobic persons and racist gangs; when children are abused; or when crimes against human dignity are committed. Those and other non-state violations affect legal goods of the world community, and victims must be effectively protected against them by international law, which has the purpose of protecting the inherent worth of individuals. That protection must be granted also when States are unable or unwilling to grant it.

Sometimes, apart from being entitled to promote human rights simultaneously, for instance by means of persuasion or by contacting potential offenders, non-state actors and authorities are allowed to participate in formal procedures of implementation or lawmaking that can enhance the protection of human rights.

Non-state entities can certainly promote human rights in practice: NGOs disclose, reveal and condemn violations of non-state and State actors, and shame them and make them refrain from violating human rights; international organizations sometimes seek to regulate and supervise the behavior of non-state entities that can potentially violate human rights; and corporations adopt private regulations and practices that can promote and enhance the respect and exercise of human rights and guarantees (e.g. related to employment), among other examples.

The contribution of non-state actors can complement that of States, and is frequently crucial because some entities, such as transnational criminal organizations, pirate groups or terrorist networks, also cooperate among themselves and operate in networks. This demands a coordinated response from multiple actors working jointly to protect legal goods shared by different normative systems, including the protection of human dignity.

Disaggregated studies confirm that, from a factual point of view, individuals ultimately commit all violations. In addition to this, it must be considered that some abuses are more likely (not exclusively) to be committed by collective actors, given their resources and abilities. Both considerations must be taken into account, among other reasons to acknowledge that non-state responsibility may coexist with the responsibility of other actors, State or not.¹⁵⁰⁸ This happens with war criminals and the armed groups they belong to, for instance. That coexistence is necessary to properly develop a framework that protects human dignity in a complete way and from all violations, because it requires full reparations, which more often than not require the participation of all entities that participate in violations in the provision of reparations, as examined in Chapter 7.

¹⁵⁰⁸ See Chapter 7, *supra*.

Just as responsibilities can coexist, legal capacities based on the protection of human dignity can be complementary to others, and therefore State duties that prohibit abuses or command protection of human rights can exist alongside non-state duties and other legal capacities and norms, including those norms found in voluntary or soft law instruments.

Hence, it is not only necessary but also possible to integrate and coordinate actions from different actors and systems concerned with the protection of human dignity in order to tackle the challenges posed by entities that cooperate with others to commit violations in a global landscape.¹⁵⁰⁹ The mechanisms that can be used to protect human dignity from non-state violations can be found in different normative systems, e.g. public legal systems or *lex privata*, and also in non-legal normative frameworks.

Moreover, Part I explored how every single human right, *stricto* or *lato sensu*, and every human guarantee, can be affected (negatively or positively, directly or not) by non-state actors. For this reason, it is not convenient to draft exhaustive lists of rights to be protected from them. It is preferable to regulate general obligations that demand protection from non-state violations and complement them with specialized norms that deal with the specific needs of certain individuals, rights or with the particular challenges posed by some actors¹⁵¹⁰ (see Chapter 6).

On the other hand, just as non-state entities can affect the exercise of all human rights, all non-state entities can potentially violate them, even those actors that frequently promote them. For example, NGOs can falsely accuse someone of violating human rights or can politically or otherwise cooperate with or support groups that engage in violations.

Nevertheless, this general potentiality does not detract from the fact that in order to design effective and proper regulations it is important to identify those actors that frequently commit violations or that can pose serious challenges due to their powers, praxis or dynamics. Specialized studies and regulation on them are warranted, but it is important to ensure that human dignity is effectively and fully protected from all potential offenders, that mechanisms of protection can and must be used when any non-state violation is committed, and that all actors have substantive prohibitions from violating human rights.

The two possible roles that all non-state entities can have also indicate that actors that can frequently or seriously engage in human rights abuses, and also those that neither abuse them frequently nor have their promotion as one of their tasks, can also contribute to the promotion and protection of human rights. For instance, studies have explored the positive impact that the activities of corporations with a human rights culture can have and how they can even

¹⁵⁰⁹ See, for example, Security Council Resolution 1373 (2001); Chapter 8 and section 4.1, *supra*.

¹⁵¹⁰ See Introduction and section 1.2, *supra*.

promote the effectiveness of humanitarian legal goods.¹⁵¹¹ For instance, their possible contribution to the generation of employment can certainly benefit the enjoyment of human rights.

Since protection from all violations is required, it is logical that several human rights instruments demand protection from violations that take place in ambits, relations or spheres that are considered to be private.¹⁵¹² The same requirement demands that measures that implement protection in private contexts must respect the human and fundamental rights of alleged offenders (including their presumption of innocence). Additionally, essential rights can conflict, and those collisions or tensions must be resolved by methods as the prevalence of *jus cogens* and the application of the test of proportionality –when applicable guarantees are respected-,¹⁵¹³ being it necessary to ensure that none of those rights is ignored. On the other hand, conceptions that are not part of positive human rights and embody controversial political ideas cannot prevail over true human rights and dignity, and must not be invoked to elude legitimate democratic processes and consent.

It cannot be forgotten that law is instrumental. Whether this is accepted or not in a theoretical level, law is used as such in practice. Because of this, scholars and practitioners must strive to make law and legal doctrines serve human beings –or, at the very least, to not harm them-. Several authors even call for making essential human interests occupy the central place of legal analysis and also prevail over all interests and activities regulated by law, including economic ones.¹⁵¹⁴ This may be seen by some as contrary to the separation between law and extra-legal considerations, but this separation is not absolute. No matter how much some scholars argue that law is a “pure” system, it is not hermetic, and in practice what practitioners believe (rightly or wrongly, according to different criteria) may consciously or not find its way into legal practice by means of interpretations, regulation or implementation.

Having said this, extra-legal and meta-legal considerations must be critically examined, and it must be evaluated if they must be received in law from a *lex ferenda* point of view. On the other hand, non-legal normative systems and actors without formal rights of participation in legal processes can often interact and impact on law and the protection of legal goods.

¹⁵¹¹ Cf. Elena Pariotti, op. cit., pp. 104-105.

¹⁵¹² Cf. European Court of Human Rights, Fourth Section, *Case of Hajduová v. Slovakia*, Judgment, op. cit., para. 45; Concurring Opinion of Judge A. A. Cançado Trindade to: Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 58, 61-62, 64, Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, op. cit., paras. 87, 90; para. 9 of the Opinion; section 1.1, supra.

¹⁵¹³ See section 1.1, supra.

¹⁵¹⁴ Cf. Olivier De Schutter, United Nations Special Rapporteur on the Right to Food, “CAP reform must put an end to dumping” – UN expert, 12 October 2011, available at: <http://www.srfood.org/index.php/en/component/content/article/1-latest-news/1674-cap-reform-must-put-an-end-to-dumping-un-expert> (last checked: 14/03/2012).

For these reasons, it is necessary to apply and create mechanisms and norms that permit to better protect victims from all potential and actual violations. The election of protection mechanisms must be made taking into account that when it is not mandatory to use the same remedies available against State abuses, the chosen ones must be effective and permit to prevent and respond to violations and repair victims.¹⁵¹⁵ Some norms and mechanisms of protection are found in international humanitarian law, the law of refugees, criminal law, or human rights law, among other branches of domestic and international law, and some of them permit to protect victims from non-state threats directly and others indirectly.

An underlying rationale of this book has been the following: non-state challenges to the protection of human dignity have existed throughout history, but additionally there are special challenges of protection in the global context. Law can and must address both factors to serve human beings, and law and doctrine have begun to respond to those challenges.¹⁵¹⁶

Concerning the need to protect human dignity effectively and completely, it can be said that when it is analyzed if alternative mechanisms of protection can and must be offered, it is necessary to examine the vulnerability of rights and individuals and the powers of actors –related to their positive and negative roles- from both an extra-legal and a legal perspective. That analysis is also useful to design appropriate regulations that take into account the particularities and special needs and challenges of rights and actors, respectively. For instance, the specificities of actors must sometimes be taken into account by secondary rules of responsibility.

Nevertheless, some common principles must bind all actors and guide the responsibility of all of them, to ensure a minimum shared core legal protection of all victims. In other words, specialized protection must not diminish the scope and effectiveness of the general protection from all violations. This is possible because specialized norms on the protection of human rights are compatible with broader human rights guarantees, as explored in Part I.

Specialized substantive and procedural responses to non-state threats that are compatible with a general protection, and specialized studies that examine how to better deal with concrete challenges, can deal with issues such as the special protection of rights and individuals that are vulnerable to certain non-state abuses; or the responsibility and duties of corporations, armed groups or international organizations, among other actors. They can help to offer appropriate responses to challenges of certain actors taking into account their special features, such as for instance the limited liability and “freedom of movement across legal orders” that some

¹⁵¹⁵ Cf. Chapters 3 and 4, *supra*.

¹⁵¹⁶ Cf. Elena Pariotti, *op. cit.*

corporations have, or the functional nature of international organizations, that conditions the regulation of their responsibility.¹⁵¹⁷

Needless to say, the studies and proposals offered herein must be examined critically but in a way that is always faithful to certain values and principles that should guide the design of the content of law, its interpretation and application. Moreover, those central values and principles must never be compromised, as advised by Mahatma Gandhi and by Daniel O'Connell.¹⁵¹⁸ Among them, the respect and protection of human dignity in a non-conditional, effective and comprehensive way must be paramount. Even if law improves, there will always be possibilities of better dealing with new and old challenges from the point of view of its content, interpretation, respect, enforcement and implementation,¹⁵¹⁹ and therefore the study of how to protect human dignity is never-ending.

Moreover, it is important to be alert so that the inherent worth of all human beings is always recognized and properly respected and protected by law, and to ensure that no potential or actual victims are discriminated against concerning the universal protection of their dignity.

¹⁵¹⁷ Cf. Elena Pariotti, *op. cit.*, at 98.

¹⁵¹⁸ Cf. Mahatma Gandhi, *op. cit.*, pp. 344-345; Manfred Steger, *Gandhi's Dilemma: Nonviolent Principles and Nationalist Power*, St. Martin's Press, 2000, pp. 10-11; Michael J. Nojeim, *Gandhi and King: The Power of Nonviolent Resistance*, Praeger Publishers, 2004, at 92.

¹⁵¹⁹ On the difference between compliance and implementation, cf. Eric A. Posner, *op. cit.*, pp. 73-76 (I do not necessarily agree with all of Posner's analysis offered therein).

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ANEXO: RESUMEN, INTRODUCCION GENERAL Y CONCLUSIONES FINALES EN CASTELLANO

RESUMEN

La tesis doctoral presentada tiene como principal argumento que la protección internacional de la dignidad humana debe beneficiar a todas las víctimas con independencia de la identidad de los violadores de derechos humanos, que con independencia de su carácter estatal o no estatal siempre incurren en hechos con relevancia jurídica internacional al afectar bienes jurídicos del *ius gentium*.

La tesis tiene la siguiente estructura. La primera parte estudia por qué motivos el fundamento jurídico de los derechos humanos y los principios del derecho internacional de los derechos humanos y ramas y normas conexas exigen la protección de todas las víctimas de agresiones no estatales. Entre aquellos principios se encuentra el principio de igualdad y no discriminación, a la luz del cual puede afirmarse que dejar a seres humanos víctimas de violaciones contrarias a la dignidad humana desprotegidos y sin protección jurídica efectiva constituye discriminación en su contra. La dignidad humana, por su parte, fundamento de los derechos y garantías humanos, es incondicional y su protección no puede depender por ello de ningún factor ajeno a la identidad humana de sus beneficiarios, incluyéndose entre dichos factores ajenos la identidad de los agresores. Con posterioridad, la primera parte presenta las sugerencias del autor relativas a en qué momentos es necesario crear obligaciones internacionales de derechos humanos de los actores no estatales y en qué momento conviene supervisar internacionalmente el cumplimiento de aquellas obligaciones.

La segunda parte de la tesis se ocupa del estudio de la posibilidad de regular conductas no estatales en el derecho internacional. Al respecto, se examinan las condiciones para la creación de obligaciones no estatales, como el respeto de derechos fundamentales y del *ius cogens*; aspectos de subjetividad internacional, al hilo de cuyo estudio se defiende la tesis de que todo actor cuyo comportamiento regula el derecho internacional es uno de sus sujetos; y la posibilidad de que actores no estatales participen en la generación de normas jurídicas internacionales que protejan la dignidad humana. Con posterioridad, se examinan aspectos de la responsabilidad internacional de los actores no estatales que violen los derechos humanos y los motivos por los cuales el derecho de las víctimas a reparaciones integrales exige la participación de actores no estatales en la provisión de reparaciones. Por último, en la tesis se examina qué

estrategias y mecanismos pueden emplearse para proteger la dignidad humana frente a agresiones no estatales, incluyendo mecanismos judiciales y no judiciales, estatales y no estatales.

INTRODUCCION

Es innegable que tanto el *ius gentium* en general como la rama del derecho¹⁵²⁰ internacional de los derechos humanos han experimentado mejoras significativas que han incrementado la posibilidad de proteger a las víctimas de violaciones de la dignidad humana y de los derechos humanos.

Desde la emergencia formal de la referida rama, que suele entenderse como ocurrida tras la conclusión de la segunda Guerra mundial debido a desarrollos en sistemas regionales, como en un comienzo el europeo, y al marco universal en las Naciones Unidas, las normas y procedimientos internacionales sobre la protección de derechos humanos han evolucionado de forma considerable en diversos aspectos: por ejemplo, en primer lugar, hoy día no se discute que existen normas internacionales sobre derechos humanos que son vinculantes y no meramente declarativas. Adicionalmente, instrumentos que en un comienzo no son vinculantes, como por ejemplo la Declaración Universal de Derechos Humanos, pueden adquirir incluso un rango consuetudinario en todo o en parte.

Por otra parte, se ha fortalecido el acceso de las víctimas a los procedimientos contenciosos sobre derechos humanos y su participación en los mismos, es decir su *ius standi* y *locus standi* en el plano internacional, que les permite reclamar protección y reparación.

En este sentido puede indicarse, por ejemplo, cómo desde la entrada en vigor del Protocolo 11 al Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales las presuntas víctimas no necesitan acudir a una Comisión y tienen la capacidad de presentar sus casos ante el Tribunal Europeo de Derechos Humanos directamente. En el sistema regional Americano, por su parte, a pesar de que los peticionarios presenten casos ante la Comisión, que se encarga posteriormente de redirigirlos a la Corte

¹⁵²⁰ Este ordenamiento jurídico es frecuentemente llamado derecho internacional, lo cual a mi juicio no es del todo acertado pues cubre mucho más que las relaciones entre grupos políticos que asumen la forma estatal, lo cual podría llevar a engaños de quienes no conocen en detalle este derecho. Al respecto, ver: Harold Koh, "Why Do Nations Obey International Law?", *The Yale Law Journal*, vol. 106, 1997, pp. 2626; Antonio Gómez Robledo, *Fundadores del Derecho Internacional (Vitoria, Gentili, Suárez, Grocio)*, Universidad Nacional Autónoma de México, 1989, pp. 14-15, 98-99; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", *Global Legal Goods Working Papers*, N° 2/2011, pp. 45-46, disponible en SSRN: <http://ssrn.com/abstract=1753036>

Interamericana de Derechos Humanos si así procede, los sucesivos Reglamentos de la Comisión y la Corte han otorgado mayor capacidad de participación e influencia a las presuntas víctimas, cuya opinión, por ejemplo es actualmente un factor decisivo en la determinación sobre el envío de un caso a la Corte. Además, esas personas pueden presentar ante la Corte peticiones y argumentos que difieran de los sostenidos por la Comisión.¹⁵²¹

Otras regiones han experimentado desarrollos en otros niveles: el sistema regional africano sobre derechos humanos ha comenzado a operar con una Comisión y, aunque por el momento esto sea limitado, una Corte Africana de Derechos Humanos puede examinar casos. A pesar de que la región asiática aún no tenga un marco de protección regional de derechos humanos propio diversos autores y personalidades claman por su creación.

Aparte de los progresos en el ámbito de la participación procedimental, la dimensión sustantiva de la protección también ha mejorado. Al respecto, el contenido de la rama jurídica de los derechos humanos se ha incrementado como consecuencia de la adopción de diversos instrumentos vinculantes y no vinculantes. En este sentido, es posible identificar incluso una etapa de especialización normativa que se presenta con posterioridad al periodo de internacionalización de los derechos humanos. Esto es así en tanto después que se admitiese que los derechos humanos no concernían exclusivamente a la competencia de los ordenamientos jurídicos internos y que en consecuencia podían regularse en el derecho internacional, diversos esfuerzos se han ocupado de elaborar normas que puedan abordar adecuadamente las necesidades de protección de sectores vulnerables, como los de la infancia, las mujeres, los indígenas o personas con discapacidad, entre otros. No obstante, esta dimensión no se ocupa exclusivamente del reconocimiento de más derechos de ciertas *personas* o de reforzar su protección para atender necesidades, en tanto las normas y la jurisprudencia también se preocupan de forma especializada de proteger de manera reforzada *derechos* vulnerables, intentando protegerlos frente a amenazas que resulten preocupantes, como por ejemplo la tortura, el genocidio o la discriminación. De igual manera, debe existir una preocupación *especializada* frente a *violadores* relevantes, sean estatales o no.

Los anteriores desarrollos han sido reforzados por dos factores que no operan únicamente en el campo de los derechos humanos sino que se enmarcan en el ordenamiento jurídico internacional en general y han contribuido a que el mismo experimente una necesaria

¹⁵²¹ Ver Corte Interamericana de Derechos Humanos, *Caso González y otras ("Campo Algodonero") Vs. México*, Sentencia del 16 de noviembre de 2009, párr. 232; artículo 25 del Reglamento de la Corte Interamericana de Derechos Humanos, aprobado por la Corte en su LXXXV Período Ordinario de Sesiones, 2009; artículo 45 del Reglamento de la Comisión Interamericana de Derechos Humanos, aprobado por la Comisión en su 137º periodo ordinario de sesiones, 2009.

evolución: la emergencia del reconocimiento de las normas imperativas o de *ius cogens* y de las obligaciones cuyo respeto concierne a la comunidad internacional en general, es decir a las obligaciones *erga omnes*.

A pesar de los desarrollos examinados hasta el momento, que ciertamente no han madurado en su plenitud, como lo ponen en evidencia las demandas para una expansión de las posibilidades de acudir a órganos supervisores internacionales o las solicitudes para que se fortalezca el contenido material de los derechos humanos en ciertos aspectos, hay un aspecto de los derechos humanos que tiende a ser ignorado o incluso rechazado por algunas de las personas que se ocupan de su estudio y práctica, o que por lo menos se considera misterioso y más controvertido de lo necesario, a saber: la posibilidad de proteger los derechos humanos frente a violaciones atribuibles a entidades no estatales. A menos de que esta problemática sea abordada de forma apropiada, las metas del sistema jamás se alcanzarán en su plenitud y existirán contradicciones internas que harán al sistema ignorar sus fundamentos.

Las anteriores ideas serán explicadas y desarrolladas en detalle más adelante, pero en el entretanto resulta apropiado mencionar algunas cosas al respecto. Primero, como se declaró en la Declaración y Programa de Acción de Viena sobre la Conferencia Mundial de Derechos Humanos de 1993, la dignidad humana constituye el origen de los derechos humanos, y su protección debe tener en cuenta la universalidad, indivisibilidad e interdependencia de estos derechos.

La centralidad de la dignidad en un marco sobre derechos humanos, que se reitera en otros instrumentos, es en consecuencia esencial para determinar cómo debe diseñarse, interpretarse y aplicarse aquel marco. No estando su contenido completamente desarrollado en el derecho positivo, es imprescindible examinar la concepción filosófica de la dignidad humana, que como se explica en el Capítulo 1 es el valor inherente de todo ser humano, el cual es incondicional o, en otras palabras, no depende de ningún estatus o de circunstancias contingentes, como por ejemplo la naturaleza de un agresor. Más aún, teóricamente la dignidad humana constituye un *a priori* del cual derivan los derechos humanos, que se protegen, entre otras formas, imponiendo obligaciones, prohibiciones o determinadas capacidades jurídicas a las entidades que pueden violarlos, o respondiendo de forma directa o indirecta a todas las amenazas con anterioridad y posterioridad a las violaciones de los derechos humanos.

Una de las consecuencias de esta lógica debería ser la protección *integral* de la dignidad humana, es decir contra todas las amenazas, no únicamente frente a las que puedan atribuirse a algún Estado. De lo contrario, algunas víctimas quedarían desprotegidas y las violaciones en su contra quedarían impunes. Esto obedece al hecho de que la protección de la dignidad humana,

de la que se ocupan los derechos humanos junto a otras ramas y normas, se centra en los seres humanos y víctimas, y no debería depender en la identidad de los autores de amenazas. Adicionalmente, el carácter universal e interdependiente de la protección de los derechos y garantías cuyo fundamento es la dignidad humana exigen una aproximación integral en lugar de una limitada que excluya a algunos individuos del ámbito de protección jurídica.¹⁵²²

Siendo esto así, resulta difícil sostener que negar la protección a *algunas víctimas*, cuyos *derechos humanos* han sido o pueden ser violados, sea coherente con una protección comprensiva, universal, integral e interdependiente¹⁵²³ de la dignidad humana, como se exige en derecho. De hecho, esta exclusión puede bien constituir una violación adicional y mayor cuando no se brinde ninguna protección efectiva a las víctimas: la vulneración del principio de igualdad y no discriminación. En consecuencia, no puedo negar que me resulta sorprendente ver cómo algunos defienden la exclusión de algunas víctimas del ámbito de protección ofrecido por el derecho de los derechos humanos y otros marcos normativos que buscan proteger la dignidad humana, es decir la exclusión de las víctimas de abusos no estatales.

Lo anterior es más sorprendente si se tiene en cuenta que algunos ordenamientos jurídicos internos, en los cuales emergió el reconocimiento de la protección de los derechos humanos con carácter previo a su reconocimiento internacional, ya recogen de forma expresa la posibilidad de proteger los derechos humanos frente a amenazas no estatales, exigiendo en ocasiones determinados requisitos, como se discute en algunas secciones de este texto. Por estas y otras razones, sostengo que el campo de los derechos humanos no podrá acercarse a la obtención apropiada de sus metas a menos que se procure proteger a *todas* las víctimas, con independencia de la denominación formal de los violadores.

De no ser así, se dará más importancia a consideraciones formales artificiosas que al sufrimiento y a las necesidades de protección reales de los seres humanos. En relación con estas consideraciones, es menester tener en cuenta que un análisis desagregado revela que el Estado no es sino una entidad ficticia operada por personas,¹⁵²⁴ y que en el transcurso de la historia muchos actos que se han atribuido a los Estados han tenido un origen no estatal que

¹⁵²² Ver la Parte I, infra; Zehra F. Kabasakal Arat, "Looking beyond the State But Not Ignoring It", en George Andreopoulos *et al.*, *Non-State Actors in the Human Rights Universe*, Kumarian Press, Inc., 2006, pp. 5-6; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", *op. cit.*, pp. 24-25.

¹⁵²³ *Ibid.*

¹⁵²⁴ Al respecto, ver: Eric A. Posner, *The Perils of Global Legalism*, The University of Chicago Press, 2009, pp. 40-41, 71; Harold Koh, "Why Do Nations Obey International Law?", *op. cit.*, pp. 2627, 2633; Hersch Lauterpacht, *International Law and Human Rights*, Steven & Sons Limited, 1950, pp. 40; Sentencia del Tribunal Militar Internacional encargado del juicio y castigo de los principales criminales de guerra del Eje europeo, donde se afirmó que: "Crimes against international law are committed by men, not by abstract entities [States], and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

puede remontarse en consecuencia a otras entidades.¹⁵²⁵ En estos y otros eventos las necesidades de protección de los individuos son las mismas dada su igual vulnerabilidad, como se explica en el Capítulo 1.

Además, la ausencia de protección de las víctimas de violaciones no estatales no solo constituye una contradicción con los fines del sistema, razón por la cual las interpretaciones jurídicas deberían intentar superar limitaciones y proteger a todas las víctimas, sino que por otra parte genera contradicciones normativas internas. Basta decir que la dignidad humana es la piedra angular y el fundamento del ámbito de los derechos humanos, como se ilustra en instrumentos como la Declaración Universal de Derechos Humanos y como ha sido sostenido por diversos autores, y esta característica tiene necesariamente implicaciones hermenéuticas.¹⁵²⁶ Aparte de la consideración de que la necesidad de proteger la dignidad humana debe llevar al reconocimiento de ciertos derechos inseparables de la misma, debe reconocerse que ignorar los derechos de algunas víctimas conlleva ignorar su dignidad humana y dejarlos desprotegidos, con independencia de la concepción de dignidad humana que se defiende.

Algunas de estas concepciones consideran que los seres humanos son fines en sí mismos y que cualquier intento de convertirlos en instrumentos para la obtención de otros fines implica la negación de su personalidad y dignidad, como se discute por Kant.¹⁵²⁷ Algunos autores estiman que los seres humanos tienen un valor intrínseco y que tienen valor en sí mismos por el simple hecho de su naturaleza, como explican algunas concepciones judeocristianas y no religiosas, razón por la cual es posible hablar de derechos inalienables de todo ser humano.¹⁵²⁸

¹⁵²⁵ Ver Fred Halliday, "The Romance of Non-state Actors", en Daphné Josselin y William Wallace (eds.), *Non-state Actors in World Politics*, Palgrave (ed.), 2001, pp. 27-34.

¹⁵²⁶ Ver Carlos Villán Durán, *Curso de Derecho Internacional de los Derechos Humanos*, Editorial Trotta, 2006, pp. 63, 92; Jordan J. Paust, "The Other Side of Right: Private Duties Under Human Rights Law", *Harvard Human Rights Journal*, Vol. 5, 1992, pp. 54, 56; Chris Jochnick, "Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights", *Human Rights Quarterly*, Vol. 21, 1999, pp. 55, 59-60; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006, Capítulo 11.

¹⁵²⁷ Ver Andrew Clapham, *Human Rights: a Very Short Introduction* (versión EPUB), Oxford University Press, 2007, pp. 9-10, 22; Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*, traducido por Thomas Kingsmill Abbott, Penn State Electronic Classics Series Publication, 1785, pp. 44-47, 50, disponible en: <http://www2.hn.psu.edu/faculty/jmanis/kant/Metaphysic-Morals.pdf> (última revisión: 2/11/2011); Immanuel Kant, *The Critique of Practical Reason*, traducido por Thomas Kingsmill Abbott, Penn State Electronic Classic Series Publication, p. 89, disponible en: <http://www2.hn.psu.edu/faculty/jmanis/kant/Critique-Practical-Reason.pdf> (última revisión: 2/11/ 2011); Immanuel Kant, *The Metaphysical Elements of Ethics*, traducido por Thomas Kingsmill Abbott, Penn State Electronic Classics Series Publication, p. 26, disponible en: <http://www2.hn.psu.edu/faculty/jmanis/kant/metaphysical-ethics.pdf> (última revisión: 2/11/ 2011); Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 535-547.

¹⁵²⁸ Ver, por ejemplo, papa Juan XXIII, *Encíclica Pacem in Terris*, 1963, párrs. 3, 9-10, 30; Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights", *The American Political Science Review*, Vol. 76, 1982, p. 306.

Al respecto y en relación con la necesidad de lidiar con toda violación puede añadirse que permitir la impunidad de algunas violaciones de derechos humanos permite a los violadores manipular y usar a las víctimas como medios para sus propios fines y, a la luz de otras concepciones, niega el valor intrínseco de las víctimas. Adicionalmente, puede que las víctimas no sean reparadas, lo cual es contrario a lo que dictamina el derecho internacional, y ha de añadirse que la impunidad puede terminar estimulando violaciones adicionales, posibilidad contra la cual han de emprenderse acciones.¹⁵²⁹

En consecuencia, sostengo que es injusto limitar la protección jurídica a aquellas víctimas que tengan la “fortuna” de haber sido agredidas por un Estado. Si los movimientos de derechos humanos se caracterizan en buena medida por la solidaridad con las víctimas y su sufrimiento, como menciona Andrew Clapham¹⁵³⁰, el sufrimiento de las víctimas tanto de Estados como de entidades no estatales es semejante y merece la misma atención y respuestas efectivas. Más aún, si las obligaciones estatales sobre derechos humanos se basan en la posibilidad de que esas entidades pongan en peligro el goce de aquellos derechos, debe ser tenido en cuenta que los peligros que suponen las acciones y omisiones de otras entidades son en consecuencia relevantes en términos jurídicos y la conducta de estos actores digna de ser regulada (como puede entenderse con análisis como el de Nijman),¹⁵³¹ y a su vez las víctimas deben tener los mismos derechos o, en ciertas circunstancias, al menos una protección alternativa igualmente efectiva o incluso más efectiva (caso en el que pueden y deben ser cumulativos los mecanismos protectores).

Por otra parte, desarrollos jurídicos evidencian cómo entidades no estatales como las organizaciones internacionales o los grupos armados no estatales pueden tener de forma

¹⁵²⁹ Ver Capítulo 7, *infra*; Declaración y Programa de Acción de Viena, Conferencia Mundial de Derechos Humanos, A/CONF.157/23, 12 de Julio de 1993, párrs. II.60, II.91; Claire de Than y Edwin Shorts, *International Criminal Law and Human Rights*, Sweet & Maxwell (ed.), 2003, pp. 12-13; Corte Interamericana de Derechos Humanos, *Caso Gelman Vs. Uruguay*, Sentencia, 24 de febrero de 2011, párr. 206. Debe mencionarse que hay una tendencia a responsabilizar a todo actor que viole principios considerados como importantes por la comunidad internacional, como se analiza en: José Manuel Cortés Martín, *Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional*, Instituto Andaluz de Administración Pública, 2008, pp. 56-58. Por otra parte, la Corte Interamericana de Derechos Humanos ha considerado que la tolerancia de una violación de derechos humanos que no es tratada adecuadamente por el derecho “impide que la sociedad conozca lo ocurrido y reproduce las condiciones de impunidad para que este tipo de hechos vuelvan a repetirse”, como se manifiesta en: Corte Interamericana de Derechos Humanos, *Caso de la “Masacre de Mapiripán” Vs. Colombia*, sentencia, 15 de septiembre de 2005, párr. 238. En el mismo sentido, el Preámbulo del Estatuto de Roma de la Corte Penal Internacional declara que “poner fin a la impunidad de los autores” de crímenes internacionales puede “contribuir [...] a la prevención de” nuevas violaciones.

¹⁵³⁰ Ver Andrew Clapham, *Human Rights: a Very Short Introduction*, supra, pp. 11, 28, 30, 131; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., p. 107.

¹⁵³¹ Ver Janne E. Nijman, “Non-state actors and the international rule of law: Revisiting the ‘realist theory’ of international legal personality”, *Amsterdam Center for International Law Research Paper Series, Non-State Actors in International Law, Politics and Governance Series*, 2010, pp. 36, 40; Nicolás Carrillo, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, op. cit., p. 46.

indiscutible obligaciones internacionales con componentes de derechos humanos.¹⁵³² Esta consideración desmiente la negación de la relevancia de los derechos humanos por fuera del esquema individuo-Estado.

No puede ignorarse que hay autores que sostienen que el fundamento de los derechos humanos difiere de la noción de dignidad humana o que debería ser distinto. A pesar de mi desacuerdo con estas concepciones, es imprescindible examinarlas. Algunas de estas propuestas consideran que el fundamento de los derechos humanos es o debería ser la noción de *emancipación*, es decir la consideración de que las personas deben ser protegidas de quienes estén en una posición de poder.¹⁵³³ Es lógico que estas posturas defiendan la protección de los seres humanos frente a Estados y entes no estatales, debido a que los Estados no son las únicas entidades con la capacidad de tener más poder y capacidad de dominar o amenazar víctimas.

Aunque la teoría de la emancipación no se acepta de manera oficial por la mayoría de la doctrina como el único fundamento de los derechos humanos, puede no obstante considerarse como reflejo de uno de los valores o dimensiones especializadas de estos derechos, cuya importancia ha sido reconocida por creadores del derecho, jueces y actores jurídicos. De hecho, la jurisprudencia de los órganos universales que supervisan instrumentos de derechos humanos se hace eco de esto, porque en algunos casos ha considerado que ciertos actores están vinculados por obligaciones de respetar derechos humanos a pesar de su naturaleza no estatal en razón de que operan en la práctica con poderes y prerrogativas que se asemejan a las estatales, o bien porque se encuentran en una posición de poder y se hace necesario proteger a las víctimas potenciales y actuales frente a posibles abusos atribuibles a ellos.¹⁵³⁴ En ocasiones, algunos jueces y autoridades internas han seguido un razonamiento similar al valorar si se ha presentado una violación de derechos humanos.

¹⁵³² Ver el artículo 3 común a los Convenios de Ginebra sobre Derecho Internacional Humanitario de 1949; artículo 96.3 del Protocolo Adicional a los Convenios de Ginebra del 12 de agosto de 1949 relativo a la protección de las Víctimas de los Conflictos Armados Internacionales (Protocolo I), junto al comentario del CICR a ese artículo, disponible en: <http://www.icrc.org/ihl.nsf/COM/470-750123?OpenDocument> (última revisión: 2/11/ 2011); Nicolás Carrillo, "The Links between the Responsibility of international organizations and the Quest towards a More Reasonable and Humane International Legal System", *international organizations Law Review*, Vol. 7, 2010, p. 442; artículo 59 del Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales; o los artículos 43 y 44 de la Convención sobre los derechos de las personas con discapacidad; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., p. 73.

¹⁵³³ Ver Capítulo 1, *infra*; y Michael Goodhart, "Human Rights and Non-State Actors: Theoretical Puzzles", en George Andreopoulos et al., *Non-State Actors in the Human Rights Universe*, Kumarian Press, Inc., 2006, pp. 36-37.

¹⁵³⁴ Ver Sergio García Ramírez, *Los derechos humanos y la jurisdicción interamericana*, Universidad Nacional Autónoma de México, 2002, pp. 117-119; Corte Interamericana de Derechos Humanos, *Caso Suárez Rosero Vs. Ecuador*, Sentencia, 12 de noviembre de 1997, párr. 98.

Sería poco razonable negar la solidez de estas decisiones, aunque es necesario no perder de vista las limitaciones de una aproximación *exclusivamente* emancipadora de los derechos humanos, pues ella dejaría muchas situaciones sin protección y negaría garantías a muchas víctimas. Como se manifestó atrás, los seres humanos merecen protección por el simple hecho de ser seres humanos, con independencia de quién es el violador y, ha de añadirse, de cuándo o en qué circunstancias se comete una violación. Siendo esto así, existen diversas situaciones en las que el contenido de derechos íntimamente conectados con la dignidad humana es pisoteado sin que el violador se encuentre en una posición fáctica de mayor poder. Dejar a las víctimas desprotegidas en estos eventos supone el mismo problema de dejar desprotegidas a las víctimas de los actores no estatales y limitar la protección frente al Estado: ambas alternativas son limitadas, reduccionistas, inconsistentes con valores y fundamentos y discriminan a algunas víctimas.

Lo anterior no implica que la protección jurídica que se ofrece a las víctimas de las entidades no estatales que se encuentren en una posición de poder haya de eliminarse, sino que la misma debe complementarse con garantías que se ofrezcan a otras víctimas. Después de todo, la teoría de la emancipación no vislumbra como central la protección frente a violaciones que se cometan por fuera del contexto de abusos de poder o de una inadecuada ejecución de las funciones de autoridades “funcionales”. Esta y otras teorías serán estudiadas con mayor detalle en el Capítulo 1 y serán comparadas con la noción de la dignidad humana como fundamento de los derechos humanos y otras normas pertinentes.

Aparte de ser contrario a los fundamentos de los derechos humanos, apoyar la exclusión de la protección de las víctimas de entidades diferentes a los Estados genera contradicciones internas en la rama de los derechos humanos, que solo pueden evitarse con una aproximación integral que ofrezca protección a todas las víctimas. Al respecto, por ejemplo, es posible considerar que la afirmación de que los Estados tienen obligaciones para prevenir y enfrentar violaciones atribuibles a actores no estatales, y que en caso contrario su responsabilidad se genera, no es consistente con la negación de la existencia de violaciones no estatales. Una negación en este sentido sería irónica y podría percibirse como ejemplificativa de una doble moral por parte de las víctimas afectadas.

Debido a las limitaciones y la injusticia de una protección de los derechos humanos estatocentrista, ha habido intentos y medidas que persiguen disminuir sus problemas, aunque ha de decirse que algunos de ellos han demostrado ser insuficientes. Entre ellos se pueden mencionar los siguientes:

Desde una perspectiva semántica y simbólica, ha resultado inevitable reconocer que existen amenazas no estatales al goce y disfrute de los derechos humanos. Esto ha llevado a órganos internacionales, autores e incluso ONGs, entre otros, a acuñar términos y etiquetas que incluso cuando no emplean la expresión “violaciones de derechos humanos” describen la posibilidad de que un actor no estatal afecte negativamente el contenido de los derechos humanos. En este sentido, por ejemplo, se encuentran las expresiones de abusos o destrucciones de derechos humanos, que han sido usadas tanto frente a Estados como a actores no estatales. Estos rótulos han permitido no prejuzgar sobre la posibilidad de considerar a alguna de estas entidades como responsable en términos jurídicos por no cumplir con obligaciones que las vinculan o por actuar de manera contraria a la garantía del disfrute de normas de derechos humanos y otras normas que protegen la dignidad humana.¹⁵³⁵

La Comisión Interamericana de Derechos humanos, por su parte, ha acudido al empleo de comunicados de prensa, informes y resoluciones en las que condena o critica conductas atribuibles a entidades tan distintas como grupos armados no estatales u organizaciones internacionales, o en las que examina conductas no estatales a la luz de normas protectoras de la dignidad humana. Esto le permite superar limitaciones al examen de conductas no estatales que limitan su competencia en los procedimientos contenciosos.¹⁵³⁶ La Corte Interamericana de Derechos Humanos, a su vez, ha considerado en *obiter dicta* y *ratio decidendi* que puede haber violaciones de derechos humanos cometidas por actores diferentes a los Estados.¹⁵³⁷ La importancia de reconocer que las entidades no estatales pueden violar derechos humanos es considerable, especialmente frente a acciones de promoción, porque dicho reconocimiento es relevante incluso si las entidades en cuestión no están vinculadas por obligaciones jurídicas, en tanto para el adecuado desarrollo de sus funciones y el cumplimiento de deberes de promoción de derechos humanos y dignidad humana es necesario condenar *todas* las violaciones y recordar a los Estados y otras autoridades pertinentes sobre sus deberes de prevenir y responder a aquellas violaciones.

¹⁵³⁵ Ver Capítulo 2, *infra*; Ilias Bantekas y Susan Nash, *International Criminal Law*, Cavendish Publishing Limited, 2003, p. 14; Robert Dufresne, *Review of: Liesbeth Zegveld, The Accountability of Armed Opposition Groups in International Law*, *European Journal of International Law*, Vol. 15, 2004, p. 227; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, p. 49.

¹⁵³⁶ Ver Resolución 03/08 y comunicado de prensa N° 28/08 de la Comisión Interamericana de Derechos Humanos; Comisión Interamericana de Derechos Humanos, *Tercer informe sobre la situación de los derechos humanos en Colombia*, OEA/Ser.L/V/II.102. 26 de febrero de 1999, párrs. 5-9; Comisión Interamericana de Derechos Humanos, *Informe sobre terrorismo y derechos humanos*, OEA/Ser.L/V/II.116, 22 de octubre de 2002, párr. 48.

¹⁵³⁷ Vid. Corte Interamericana de Derechos Humanos, *Caso Velásquez Rodríguez Vs. Honduras*, Sentencia de fondo, 29 de julio 1988, párrs. 166, 172-174, 176, 177; Corte Interamericana de Derechos Humanos, *Caso González y otras (“Campo Algodonero”) Vs. México*, Sentencia, 16 de noviembre de 2009, párrs. 236, 252, 254; Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-18/03, *Condición Jurídica y Derechos de los Migrantes Indocumentados*, 17 de septiembre de 2003, párrs. 140-153.

Por otra parte, algunos autores y organizaciones no gubernamentales de derechos humanos se han percatado de que el apoyo de comunidades y víctimas puede perderse si se ignoran las violaciones no estatales con base en consideraciones eminentemente formalistas, que en cualquier caso podrían ser superadas con determinados análisis jurídicos, y de que negar la ilegalidad e injusticia de estas violaciones es insostenible tanto como desde un punto de vista jurídico como de uno moral. Por estas y otras razones, algunos de ellos han condenado violaciones no estatales o han requerido su cese, con tal de que una crítica únicamente a los Estados no sea (justamente) percibida como parcializada o, peor aún, en apoyo de violadores no estatales.¹⁵³⁸

Algunos límites de los desarrollos que no consiguen aceptar expresamente la *violabilidad* de normas que protegen la dignidad humana por parte de entidades no estatales son las siguientes: en primer lugar, negarse a aceptar que los actores no estatales pueden cometer *violaciones* y no simplemente abusos de derechos humanos (aunque esto sería comprensible si acaso fuese correcto que es imposible que existan obligaciones no estatales sobre derechos humanos) es inaceptable y ofensivo desde la perspectiva de las víctimas, en tanto impediría acciones jurídicas y, desde un punto de vista simbólico, haría que las demandas de las víctimas sean más débiles dada la ausencia de apoyo legal (aunque haría que fuese necesario un cambio del derecho *de lege ferenda*).

En relación con los órganos que aceptan la posibilidad de que existan *violaciones* no estatales, ha de decirse que sus acciones incrementan la protección potencial, y la satisfacción simbólica y expresiva de las víctimas. Esto no es de poca monta: de hecho, es necesario resaltar cuán importante puede resultar para una víctima tener un sentido simbólico de gozar de un derecho, y que la importancia de la existencia de acciones jurídicas de protección basadas en el reconocimiento de la violabilidad de derechos humanos por parte de entidades no estatales constituye uno de los elementos que revisten de importancia a la protección jurídica además de a las consideraciones extra-jurídicas, siendo las dos necesarias para tantas víctimas. Con todo, a menos que la aceptación en cuestión se vea acompañada de herramientas jurídicas, el poder del reconocimiento se verá debilitado junto a la función simbólica, aunque ha de decirse que el reconocimiento permite (y ordena) a entidades con el deber o la facultad de garantizar bienes

¹⁵³⁸ Vid. Chris Jochnick, *supra*, p. 58; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 44, 50 (especialmente el pie de página 94); Nicolás Carrillo, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, *op. cit.*, pp. 5, 22.

jurídicos internacionales a usar mecanismos internos o de otro carácter que protejan aquellos bienes frente a entidades no estatales, como acontece con autoridades internas.¹⁵³⁹

En cualquier caso, debe ser tenido en cuenta que pueden existir derechos que no estén acompañados por acciones de protección directas u obligaciones cuyo cumplimiento no tenga una supervisión procedimental internacional directa o cuya violación no se vea acompañada de sanciones internacionales.¹⁵⁴⁰ En cualquier caso, esto no supondría una negación de que los derechos y las violaciones existen. En consecuencia, no es correcto afirmar que las normas que protegen la dignidad humana no tienen efectos sustantivos o procedimentales indirecto frente a las violaciones no estatales simplemente porque no existe protección frente a ellas, aunque este reconocimiento bien puede revelar la necesidad de implementar o diseñar mecanismos directos o indirectos de implementación de la norma en cuestión.

Por estas razones, admitir que las víctimas de las violaciones de normas que protegen la dignidad humana son aquellas personas cuyos derechos y garantías normativas relacionadas con la dignidad son violados, con independencia de quién comete la violación, es crucial, debido a que se presenta una violación en todos aquellos eventos y el derecho debería *de lege ferenda*,¹⁵⁴¹ imponer obligaciones a los agresores si es que no lo hace *de lege lata*. Con independencia de las obligaciones y capacidades procedimentales (negativas o pasivas) del violador, en todos aquellos casos se presenta una violación de la dignidad humana y las normas que la protegen. Este es el motivo por el que es tan importante apoyar una noción de deberes

¹⁵³⁹ Vid. Comité de Derechos Humanos, Observación general No. 31 [80], *Naturaleza de la obligación jurídica general impuesta a los Estados Partes en el Pacto*, CCPR/C/21/Rev.1/Add. 13, 26 de mayo de 2004, párrs. 4, 13-15; Concurring Opinion of Judge Leval, United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum*, Docket Nos. 06-4800-cv, 06-4876-cv, Decisión del 17 de septiembre de 2010, p. 30, especialmente el pie de página 30; Antonio Cassese, "Remarks on Scelle's Theory of "Role Splitting" (*dédoulement fonctionnel*) in International Law", *European Journal of International Law*, Vol. 1, 1990, pp. 225-231; United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decisión del 11 de julio de 2011, p. 12; John H. Knox, "Horizontal Human Rights Law", *American Journal of International Law*, Vol. 102, No. 1, 2008, pp. 43-44; Amartya Sen, "Elements of a Theory of Human Rights", *Philosophy & Public Affairs*, Vol. 32, 2004, pp. 326-328, 345.

¹⁵⁴⁰ Vid. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, supra, pp. 74-75; Andrew Clapham, "The Role of the Individual in International Law", *European Journal of International Law*, Vol. 21, No. 1, 2010, at 29; Hersch Lauterpacht, op. cit., pp. 27, 34; Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Intersentia, 2001, pp. 58-62; United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, Decisión del 11 de Julio de 2011, pp. 11-13; International Law Association, Non-State Actors Committee, *First Report of the Committee on Non-State Actors: Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*, The Hague Conference, 2010, p. 21, donde se clarificó que no todos los actores que tienen un "estatus" jurídico internacional tienen las mismas capacidades o, en caso de tenerlas, las tienen en el mismo grado; y Kate Parlett, "The PCIJ's Opinion in *Jurisdiction of the Courts of Danzig*. Individual Rights under Treaties", *Journal of the History of International Law*, Vol. 10, 2008, pp. 136-137, donde se refuta el argumento de que una entidad no tienen personalidad internacional si no tiene derecho a acudir a un mecanismo internacional para protegerlo.

¹⁵⁴¹ La expresión alude a las regulaciones que a pesar de no existir deberían ser parte del derecho positivo, como se explica Michel Virally, *El devenir del derecho internacional : ensayos escritos al correr de los años*, Fondo de cultura económica, 1998, p. 242.

implícitos sobre derechos humanos, con el fin de fortalecer la posición de las víctimas. Esta cuestión se examina en el capítulo 6.

Para complementar la función de identificar la posibilidad de que existan conductas no estatales contrarias a la dignidad humana (que en términos no eufemistas suponen el reconocimiento de la violabilidad de las normas que la protegen), en vista de las limitaciones de la función declarativa que se cumple al calificar negativamente las violaciones de los derechos humanos, es imprescindible contar con otras medidas. Una de ellas es la competencia de los órganos y agentes internacionales que tengan a su cargo tareas relacionadas con la protección y promoción de los derechos humanos, como los pertenecientes a los sistemas convencional y extra-convencional de las Naciones Unidas, para interactuar con actores no estatales con el fin de procurar la prevención o el cese de violaciones o la promoción del disfrute de derechos humanos en relación con su conducta.¹⁵⁴²

Otros desarrollos que tienden a reforzar la posición de las víctimas de violaciones no estatales se han presentado en el campo del *soft law*. En este sentido, por ejemplo, los Principios y directrices básicos sobre el derecho de las víctimas de violaciones manifiestas de las normas internacionales de derechos humanos y de violaciones graves del derecho internacional humanitario a interponer recursos y obtener reparaciones mencionan expresamente en el Principio 15 que los entes no estatales pueden tener obligaciones de reparar a las víctimas, lo cual tiene sentido debido a que en no pocos casos la reparación integral a la que las víctimas tienen derecho sólo puede realizarse si *todas* las entidades que participaron en una violación participan a su vez en las reparaciones, bien sea porque los medios a disposición del Estado sean insuficientes incluso si el mismo ha fallado en la prevención o respuesta a una violación no estatal o porque el contenido de las medidas de reparación nunca puede ser satisfecho del todo a no ser que aquellas entidades estén involucradas en el esquema de reparación, como se examina en el Capítulo 7.

¹⁵⁴² Vid. Capítulos 1 y 8, *infra*, especialmente el Manual de los Procedimientos Especiales de Derechos Humanos de las Naciones Unidas de agosto de 2008, párrs. 81-83; Comité contra la Tortura, *Sadiq Shek Elmi Vs. Australia*, Comunicación No. 120/1998: Australia, CAT/C/22/D/120/1998, Dictamen del Comité contra la Tortura en virtud del artículo 22 de la Convención contra la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes, 25 de mayo de 1999, párrs. 6.5 al 7; Comité de Derechos Humanos, *Observaciones finales del Comité de Derechos Humanos sobre Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 de agosto de 2006 (en adelante, el caso 'UNMIK'), párr. 4.

Pensemos, por ejemplo, en algunos componentes del derecho a las reparaciones: el derecho a conocer la verdad sobre una violación o las garantías de no repetición.¹⁵⁴³ Ha de admitirse que en muchos eventos, incluso si el Estado coopera con una violación, la totalidad de la verdad o segmentos relevantes sobre el episodio jurídicamente relevante que constituye una violación son solo conocidos por el violador directo, que puede perfectamente ser un ente no estatal. En tal caso, únicamente con su participación en las reparaciones es posible satisfacer a la víctima por completo en relación con aquel elemento de la satisfacción, que a su vez constituye una parte de las reparaciones.

Adicionalmente, ¿quién sino el agresor puede garantizar que no intentará cometer otra violación en el futuro? Incluso si el Estado ha participado en algún modo en la violación y promete no involucrarse en manera semejante en una violación, la víctima no se sentirá tranquila a no ser que los otros participantes prometan no involucrarse en otras ofensas, y el público en general también se beneficiará del entrenamiento de agentes para la prevención de violaciones similares en el futuro y de las garantías dadas por todos los agresores y asistentes al respecto. La identificación de abusos y abusadores potenciales también debe ser tomada en cuenta en términos generales y abstractos con el fin de desarrollar e implementar medidas (normativas y de otro carácter) de protección frente a ellos.

Las anteriores consideraciones se apoyan en la evolución de la jurisprudencia internacional, que actualmente es clara en cuanto a que las responsabilidades de distintas entidades involucradas en una violación del derecho pueden ser complementarias y no son en modo alguno exclusivas. Al respecto, por ejemplo la Corte Internacional de Justicia ha considerado que los Estados pueden ser cómplices en violaciones de derechos humanos cuyo principal perpetrador sea un agente estatal o no estatal, como por ejemplo el genocidio,¹⁵⁴⁴ que claramente supone una violación de diversos derechos humanos, como el derecho a la vida. La Comisión de Derecho Internacional, por su parte, también ha estimado que los Estados pueden

¹⁵⁴³ Ver, *inter alia*, Principios 18, 22 y 23 de los Principios y directrices básicos sobre el derecho de las víctimas de violaciones manifiestas de las normas internacionales de derechos humanos y de violaciones graves del derecho internacional humanitario a interponer recursos y obtener reparaciones; Preámbulo y artículo 24 de la Convención Internacional para la protección de todas las personas contra las desapariciones forzadas; Comité de Derechos Humanos, *Abubakar Amirov y Aizan Amirova c. la Federación de Rusia*, Caso N° 1447/2006, CCPR/C/95/D/1447/2006, 22 de abril de 2009, párrs. 11.7, 13; Corte Interamericana de Derechos Humanos, *Caso Barrios Altos Vs. Perú*, Sentencia, 14 de marzo de 2001, párrs. 43, 48.

¹⁵⁴⁴ Vid. Corte Internacional de Justicia, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia y Herzegovina Vs. Serbia y Montenegro)*, Sentencia, 26 de febrero de 2007, párrs. 419-420.

ser responsables por ayudar o asistir a violaciones del derecho internacional atribuibles a organizaciones internacionales o viceversa.¹⁵⁴⁵

La anterior lógica puede ser trasplantada a otras situaciones que involucren a otros actores. De hecho, distintos actores no estatales pueden ser responsables en distintos grados frente a una misma violación, bien sea como autores o partícipes. La posibilidad de que se genere una responsabilidad jurídica internacional de los actores no estatales, constituyendo esta posibilidad en términos generales un prerrequisito para la posibilidad de determinar la responsabilidad simultánea de diversos actores, incluyendo a los Estados, se basa en la posibilidad de que las normas internacionales se ocupen directamente del comportamiento de un actor en tanto se hayan creado de conformidad con los procedimientos de las Fuentes del derecho internacional y respeten normas fundamentales e imperativas.

En relación con esta cuestión, autores como Theodor Meron o Kate Parlett han considerado que la Corte Permanente de Justicia Internacional admitió la posibilidad de que entes no estatales como los individuos fuesen destinatarios de normas jurídicas internacionales en su opinión consultiva sobre la jurisdicción de las cortes de Danzig, en tanto en su razonamiento aceptó que el objeto de un tratado internacional bien puede ser la creación de derechos y obligaciones individuales.¹⁵⁴⁶ La discusión sobre si esta posibilidad fue de hecho aceptada en la opinión consultiva en cuestión sigue abierta a consideración de algunos, debido a que la corte permanente mencionó que un tratado no podía “crear directamente derechos y obligaciones para individuos privados” pero que su objeto podía ser “la adopción por las partes de algunas reglas definitivas que creen derechos y obligaciones individuales”, que podrían tener efectos en sus ordenamientos jurídicos internos,¹⁵⁴⁷ aunque los autores mencionados atrás sugieren que en la práctica la corte fue cautelosa y empleó un lenguaje que evadiese críticas a la vez que permitiese al derecho convencional regular los derechos y deberes de los individuos. Cualquiera sea la respuesta a la cuestión sobre la posición de la corte, hoy día se acepta ampliamente que es posible que el derecho internacional regule el comportamiento no estatal y, aún más, que proteja los derechos humanos frente al mismo de diversas formas y con diversos niveles de intensidad, como explica John Knox: bien sea imponiendo obligaciones a los Estados,

¹⁵⁴⁵ Vid. Comisión de Derecho Internacional, artículos 14, 42 y 58 del proyecto de artículos sobre la Responsabilidad de las organizaciones internacionales adoptado en 2011, A/66/10, 2011.

¹⁵⁴⁶ La traducción de la cita es mía. Ver Theodor Meron, *The Humanization of International Law*, Martinus Nijhoff, 2006, p. 40; Kate Parlett, “The PCIJ’s Opinion in *Jurisdiction of the Courts of Danzig*. Individual Rights under Treaties”, op. cit., pp. 120, 143-145; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 71-73, Hersch Lauterpacht, op. cit., pp. 27-29.

¹⁵⁴⁷ Vid. Corte Permanente de Justicia Internacional, *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have passed into the Polish service, against the Polish Railways Administration)*, Opinión Consultiva, Series B, No. 15, 3 de marzo de 1928, pp. 17-18.

de conformidad con las cuales sea por ejemplo obligatorio para ellos crear determinado deber o derecho en su derecho interno que tenga efectos frente a determinado actor no estatal, o incluso de forma más compleja e intensa.¹⁵⁴⁸

El derecho internacional puede entonces ocuparse de los actores no estatales directamente y sin la mediación del derecho interno. De hecho, incluso antes de que se redactase la Declaración Universal de Derechos Humanos, los juicios de Núremberg constituyeron una materialización de la posibilidad no sólo de *vincular* a actores no estatales (seres humanos, en estos casos) por regulaciones internacionales, sino además de *aplicar y ejecutar* estas normas directamente en el plano internacional. Más aún, con posterioridad algunas normas convencionales y consuetudinarias sobre derechos humanos, principios jurídicos y normas de *soft law*, entre otras, han contemplado la posibilidad de dirigir recomendaciones o imponer deberes a los individuos¹⁵⁴⁹, o incluso de restringir sus derechos cuando ello sea necesario para proteger los derechos de los demás, lógicamente después de que se haya efectuado un análisis apropiado de la proporcionalidad de los derechos involucrados.¹⁵⁵⁰

Adicionalmente, aparte de las exhortaciones a los individuos o la posibilidad de que sus derechos sean limitados en ciertas circunstancias, normas y órganos internacionales incluso han ordenado a los Estados a crear prohibiciones internas con el fin de proteger y promover derechos humanos, como por ejemplo las relativas a la discriminación racial, con la orden de que los Estados protejan a los individuos de la violencia o violaciones cometidas por otros individuos o actores; e incluso han creado y hecho posible hacer cumplir obligaciones que vinculen directamente a actores no estatales directamente y sin mediación estatal, como las de naturaleza penal.

Incluso si se analizan desarrollos previos, resulta difícil no advertir cómo por ejemplo la prohibición y persecución de la piratería constituye un reconocimiento de la relevancia de los actores no estatales para la protección de intereses comunes en una sociedad internacional y de la posibilidad de crear normas internacionales que se ocupen de su defensa frente a esos actores directamente. Fue su consideración como *hostis humanii generis* o enemigos de la humanidad en virtud del riesgo que creaban para la seguridad y libertad de los mares, intereses caros a la sociedad internacional, que llevó a la emergencia de una regla de jurisdicción “cuasi

¹⁵⁴⁸ Vid. John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 20-31.

¹⁵⁴⁹ Vid. Capítulo 5, *infra*.

¹⁵⁵⁰ Vid. Capítulos 1 y 8, *infra*.

universal”, que puede ser concebida más propiamente como una regla que ofrece soluciones a posibles conflictos de jurisdicción otorgando al Estado que detenga piratas a juzgarlos.¹⁵⁵¹

También es importante mencionar, como se estudia en los capítulos 1 y 8, cómo la emergencia de normas sustantivas que imponen obligaciones a entes no estatales y su garantía judicial o cuasi judicial en procedimientos contenciosos no son los únicos mecanismos que pueden existir para proteger normas basadas en la dignidad humana frente a amenazas atribuibles a aquellas entidades, especialmente porque las estrategias no judiciales son esenciales y complementarias a las judiciales, y también porque los actores no estatales pueden además desempeñar un papel positivo en la protección de las normas en cuestión, lo cual hace aconsejable otorgarles ciertas facultades en aquellos eventos.

Algunos autores sostienen que únicamente cuando ciertas capacidades sustantivas (ej. poderes de creación normativa) o algunas capacidades procesales (ej. solicitar la protección de un derecho o estar expuesto al examen de cumplimiento de obligaciones) son asignadas directamente por normas jurídicas internacionales a un actor es posible considerar al actor en cuestión como un sujeto del derecho internacional. Sin embargo, como se examina en el Capítulo 5, esto no es necesariamente cierto, y existen teorías alternativas como la de la matriz de capacidades y la de la subjetividad entendida como el ser destinatario del derecho que me parecen preferibles a una noción limitada de la personalidad jurídica o de la subjetividad, cuya defensa puede conllevar algunos efectos indeseados relativos a la ausencia de protección de bienes jurídicos esenciales y de seres humanos.¹⁵⁵²

Como se estudia en el Capítulo 1, resulta esencial admitir que existen eventos en los que para el derecho internacional es imprescindible imponer obligaciones a diversas entidades con tal de ser justo, satisfacer necesidades humanas, cumplir sus propósitos, lidiar con retos a diversos bienes jurídicos y adaptarse a las condiciones sociales y prácticas actuales, entre las que debe mencionarse que los Estados no pueden ser *considerados* como los únicos actores de la sociedad internacional, incluso en términos formales, como ponen de relieve el hecho de que

¹⁵⁵¹ Vid- Antonio Cassese, “When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium Case*”, *European Journal of International Law (EJIL)*, Vol. 13, 2002, pp. 857-858.

¹⁵⁵² Acerca de estas teorías, ver: José Antonio Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, Tecnos, 2003, p. 186; Manuel Díez de Velasco, *Instituciones de Derecho Internacional Público*, Tecnos, 2005, pp. 258; Roland Portmann, *Legal Personality in International Law*, Cambridge University Press, 2010, pp. 274-275; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 64-65; Malcolm N. Shaw, *International Law*, Cambridge University Press, quinta edición, 2003, p. 176; Elena Pariotti, “Non-State Actors, International Law, and Human Rights”, en Sanford R. Silverburg (ed.), *International Law: Contemporary Issues and Future Developments*, Westview Press, 2011, pp. 102, 104; Comisión de Derecho Internacional, proyecto de artículos sobre la responsabilidad de las organizaciones internacionales, con comentarios, A/66/10, 2011, pp. 8-9, párr. 8 del comentario al artículo 2; Gaetano Pentassuglia, “Review of: Meijknecht, Anna. *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*”, *European Journal of International Law*, Vol. 14, 2003, p. 391.

las organizaciones internacionales, los grupos armados y otras entidades tienen incluso la capacidad de celebrar tratados y la capacidad de otros actores de participar y ejercer influencia en negociaciones sobre normas internacionales, como lo ilustran las historias legislativas del Estatuto de Roma de la Corte Penal Internacional y de la Convención sobre la prohibición de las minas antipersonal. Estas cuestiones se estudian con mayor detalle en el Capítulo 5.

Además, debe decirse que los Estados no son y de hecho no *han* sido las únicas Fuentes de amenazas al respeto del goce y disfrute de derechos que derivan de la dignidad humana y que tampoco han sido los únicos participantes de la sociedad mundial y de marcos normativos supranacionales, como explican Fred Halliday, Jordan Paust y otros autores, motivo por el cual llamar al *ius gentium* derecho internacional adolece de cierta imprecisión.¹⁵⁵³

Al respecto, ¿quién puede negar que el derecho a la vida, cuyo disfrute es acertadamente considerado como condición para el goce de otros derechos humanos,¹⁵⁵⁴ ha sido violentado por numerosos actores no estatales en el transcurso de la historia? Adicionalmente, estudios sobre relaciones internacionales han indicado que no siempre es posible determinar con facilidad si la iniciativa u origen de una acción ha de ser atribuida a un Estado o a otro actor.¹⁵⁵⁵ Después de todo, los Estados actúan a través de sus agentes, cuyas motivaciones y participación son merecedoras de un estudio detallado, como sugieren los estudios desagregados de aquellos entes, y los agentes en cuestión pueden además ver su responsabilidad comprometida junto a la de los Estados en cuyo nombre actúan¹⁵⁵⁶ o participar en y pertenecer a otras entidades. Adicionalmente, hoy día se presenta un factor adicional que no puede seguir siendo ignorado: el hecho de que los Estados hayan perdido peso, apoyo y poder y de que en muchos casos no desean o son incapaces de lidiar con problemas creados por otros actores en relación con el goce y disfrute de derechos y garantías fundamentados en la dignidad humana, en ocasiones debido a dificultades como el poder de aquellos actores o a la

¹⁵⁵³ Vid. Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion", *Virginia Journal of International Law*, Vol. 51, Número 4, 2011; Fred Halliday, op. cit.; Daphné Josselin y William Wallace, "Non-state Actors in World Politics: a Framework", en Daphné Josselin y William Wallace (eds.), *Non-state Actors in World Politics*, Palgrave, 2001, pp. 4-10, 15, 19.

¹⁵⁵⁴ Vid. Corte Interamericana de Derechos Humanos, *Case González y otras ("Campo Algodonero") Vs. México*, Sentencia, 16 de noviembre de 2009, párr. 245.

¹⁵⁵⁵ Vid. Fred Halliday, op. cit., pp. 22-35; Eric A. Posner, op. cit., pp. 53-55.

¹⁵⁵⁶ Vid. Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-14/94, *Responsabilidad internacional por expedición y aplicación de leyes violatorias de la Convención (arts. 1 y 2 Convención Americana sobre Derechos Humanos)*, 9 de diciembre de 1994, párr. 56; Principios I a IV de los Principios de Derecho Internacional reconocidos por el Estatuto del Tribunal Militar Internacional de Núremberg y por el fallo de este Tribunal; Sentencia del Tribunal Militar Internacional encargado del juicio y castigo de los principales criminales de guerra del Eje europeo.

importancia que se otorgue a intereses que difieran de los esenciales relativos a los seres humanos que deberían ser protegidos prioritariamente.¹⁵⁵⁷

Al respecto, se ha estudiado cómo los Estados que actúan solos e incluso en esquemas tradicionales de cooperación son incapaces de enfrentarse a entidades que tengan un poder mayor al propio en distintos aspectos, como los económicos, militares, logísticos o de otro carácter.¹⁵⁵⁸ El poder y las capacidades de algunos entes no estatales en relación con desafíos nuevos y antiguos que generan pueden incrementarse en un contexto globalizado en el que se generan dinámicas y oportunidades que pueden aprovechar.¹⁵⁵⁹

Además, es menester destacar que fenómenos tan variados como la privatización, la delegación de poderes (incluso algunos tradicionalmente vinculados con la soberanía), la competición entre ordenamientos jurídicos internos para atraer inversión extranjera u otras actividades que puedan generar una disminución de estándares que favorezcan a los habitantes de los Estados, como por ejemplo fenómenos de dumping laboral, *race to the bottom* o la posibilidad de que violadores potenciales elijan los ordenamientos jurídicos menos garantistas de la dignidad humana basados en una lógica de *forum shopping*,¹⁵⁶⁰ entre otros, hacen necesario

¹⁵⁵⁷ Ver, entre otros, Alfred Van Staden y Hans Vollaard, "The Erosion of State Sovereignty: Towards a Post-territorial World?", en Gerard Kreijen et al. (eds.), *State, Sovereignty, and International Governance*, Oxford University Press, 2002, pp. 167-168; Sandra Lavenex, "Globalization, Global Governance and the *Bonnum Commune*: a Conceptual Investigation", *European Journal of Law Reform*, Vol. 6, 2004, pp. 381, 388; Celestino del Arenal, "La nueva sociedad mundial y las nuevas realidades internacionales: un reto para la teoría y para la política", en *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2001*, Bilbao, 2002, pp. 23, 27-29, 34, 52-53, 64-66; Antonio Cassese, "Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law", op. cit., pp. 216; Francisco Galindo Vélez, "Consideraciones sobre la determinación de la condición de refugiado", en Sandra Namihás (Ed.), *Derecho Internacional de los Refugiados*, Pontificia Universidad Católica del Perú – Instituto de Estudios Internacionales, Fondo Editorial, 2001, pp. 125-126; Alexandra Gatto, "Corporate Social Responsibility in the External Relations of the EU", en *Yearbook of European Law*, 24, 2005, p. 423.

¹⁵⁵⁸ Ibid.; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., pp. 3, 6, 9, 20, 26, 45, 49-50.

¹⁵⁵⁹ Ibid.; Anna Badia Martí, "Cooperación internacional en la lucha contra la delincuencia organizada transnacional", en Victoria Abellán Honrubia and Jordi Bonet Pérez (dirs.), *La incidencia de la mundialización en la formación y aplicación del Derecho Internacional Público, Los actores no estatales: ponencias y estudios*, Bosch Editor, 2008, p. 319; 'We the Peoples': *The Role of the United Nations in the 21st Century*, Naciones Unidas, 2000, pp. 11-12; Gáspar Biró y Antoanella-Iulia Motoc, *Working paper on human rights and non-State actors*, E/CN.4/Sub.2/2005/40, 11 de julio de 2005, párrs. 42-45; Kofi A. Annan, "Foreword", *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, Oficina de las Naciones Unidas contra la Droga y el Delito, 2004, pp. iii-iv. Disponible en: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

¹⁵⁶⁰ Vid. August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors", en Philip Alston (ed.), *Non-State Actors and Human Rights*, Oxford University Press, 2005, pp. 54-55, 75-76; Menno T. Kamminga, "The Next Frontier: Prosecution of Extraterritorial Corporate Misconduct before Non-US Courts", en Willem J.M. Van Genugten et al. (eds.), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference*, T.M.C. Asser Press, 2009, p. 172; *Proteger, respetar y remediar: un marco para las actividades empresariales y los derechos humanos*, Informe del Representante Especial del Secretario General sobre la cuestión de los derechos humanos y las empresas transnacionales y otras empresas comerciales, John Ruggie, A/HRC/8/5, 7 de abril de 2008, párr. 14; Koen de Feyter, "Globalisation and human rights", en: Felipe Gómez Isa y Koen de Feyter (eds.), *International Human Rights Law in a Global Context*, 2009, pp. 81-82; Alexandra Gatto, supra, p. 423; Janne E.

contar con normas internacionales que establezcan estándares mínimos comunes que no puedan ser ignorados por países débiles, egoístas o con otros problemas pertinentes.

La existencia de normas internacionales que protejan a los individuos frente a violaciones no estatales directa o indirectamente, siendo la última posibilidad alusiva a la orden de que autoridades internas o de otro carácter protejan en lugar de regular el comportamiento no estatal directamente, supone un beneficio adicional: en tanto algunos Estados pueden desear responder adecuadamente a las amenazas no estatales a la dignidad humana pero son en la práctica incapaces de hacerlo debido a su escaso poder, otras entidades pueden verse facultadas a proteger a las personas y tener autorización jurídica a sus iniciativas en virtud del reconocimiento del carácter ilegal de las violaciones o amenazas en cuestión, bien sea de forma facultativa u obligatoria, como cuando su acción complementaria necesaria.

El factor del poder estatal no ha de subestimarse o descartarse a la ligera. En este sentido, por ejemplo, ha de considerarse que no sólo muchas de las economías más poderosas en el mundo son corporativas,¹⁵⁶¹ sino además que múltiples actores han visto incrementado su poder suave, sistémico o incluso duro, incluso en comparación con diversos Estados, a los cuales pueden presionar.¹⁵⁶²

La anterior consideración, sumada al hecho de que varios actores cuya conducta siempre ha sido o cuando menos suele ser problemática desde el punto de vista de la protección del valor inherente de los seres humanos, como los grupos criminales transnacionales, han forjado alianzas con otros actores y se han aprovechado de algunas posibilidades que ofrece la globalización,¹⁵⁶³ hacen que sea imposible negar que con frecuencia los Estados que actúan solos o por medio de acciones aisladas no puedan tener muchas posibilidades de proteger a los seres humanos de forma efectiva.

De hecho, me inclino a pensar que actualmente hay casos en los que ni siquiera una simple cooperación entre Estados sea suficiente para ofrecer la protección en cuestión. Esta

Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", op. cit., p. 7; Elena Pariotti, op. cit., p. 98; José Manuel Cortés Martín, op. cit., pp. 227-228; Zoe Salzman, "Private Military Contractors and the Taint of a Mercenary Reputation", *New York University Journal of International Law and Politics*, vol. 40, 2008, pp. 860-866; Corporate Responsibility, the corporate responsibility coalition, "Protecting rights, repairing harm: How state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities", "briefing paper for the UN Secretary General's Special Representative on Business and Human Rights", 2010, p. 7, disponible en: <http://www.business-humanrights.org/media/documents/ruggie/core-submission-to-ruggie-nov-2010.pdf> (última revisión: 06/02/2012).

¹⁵⁶¹ Vid. Alexandra Gatto, supra, p. 423.

¹⁵⁶² Vid. Celestino del Arenal, op. cit., pp. 27-28, 34, 52-53, 64-66; Francisco Galindo Vélez, op. cit., pp. 125-126; Janne E. Nijman, "Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality", op. cit., p. 3.

¹⁵⁶³ Ibid.

consideración hace hincapié en la importancia de ideas como las de Friedmann, quien argumentó que el derecho internacional de la cooperación podía incluir un componente no estatal, el cual puede ser esencial para la protección integral de la dignidad humana, como se evidencia por el hecho de que de no ser por la contribución formal e informal de diversos actores no estatales, como algunas ONGs, los sistemas de protección de derechos humanos, tanto locales como internacionales (regionales y universal) no habrían progresado ni se habrían desarrollado para ofrecer la poca o mucha protección que han brindado a múltiples personas que pudieron tener una última esperanza en el ámbito internacional tras infructuosos intentos de obtener protección interna.¹⁵⁶⁴ Aquellos entes incluso han comenzado a examinar y valorar conductas no estatales con el propósito de solicitar la protección de garantías humanitarias y sobre derechos humanos frente a ellas, y con el fin de recomendar o redactar normas para tal propósito, como se explica en los Capítulos 5 y 8.

A la luz de lo discutido hasta el momento, apoyo la idea de que es necesario contar con normas internacionales que vinculen a los entes no estatales directamente y les prohíban cometer violaciones de derechos humanos y garantías humanitarias, y de que existan normas que faculten y apoyen a algunos actores no estatales, de forma democrática, para que desarrollen actividades que persigan promover y proteger la dignidad humana (ver el Capítulo 1, *infra*).

Sin embargo, debe ser tenido en cuenta que es necesario ser cauteloso en relación con las cuestiones discutidas. Al respecto, es menester considerar que algunos autores han advertido cómo proyectos de normas que regularían obligaciones no estatales podrían tentar a los Estados a distraerse de sus propias obligaciones o a invocarlas como excusa para la comisión de abusos, y además que los destinatarios no estatales podrían verse tentados a aprovecharse de regulaciones no vinculantes para sugerir que futuras normas u obligaciones

¹⁵⁶⁴ Sobre estas cuestiones, ver Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion", en Gerard Kreijen et al. (eds.), *State, Sovereignty, and International Governance*, Oxford University Press, 2002, pp. 133-134; Voto concurrente del juez A.A. Cançado Trindade a: Corte Interamericana de Derechos Humanos, *Caso Castillo-Petruzzi y otros Vs. Perú*, Sentencia (Excepciones Preliminares), 4 de septiembre de 1998, párr. 35; ASIL, *Proceedings of the 92nd Annual Meeting: The Challenge of Non-State Actors*, The American Society of International Law, 1998, pp. 22-23; Daniel Thürer, "The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State", en Rainer Hofmann (ed.), *Non-State Actors as New Subjects of International Law*, Duncker & Humblot (ed.), 1999, pp. 44-45, 47; Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", en Gunther Teubner (ed.), *Global Law Without a State*, Dartmouth (ed.), 1997, pp. 188-190; Thomas Buergenthal, "The Evolving International Human Rights System", *American Journal of International Law*, Vol. 100, 2006, pp. 803-804; Anna Badia Martí, op. cit., pp. 337-338, 342-343; Luis Pérez-Prat Durbán, "Actores no estatales en la creación y aplicación del Derecho Internacional", en Victoria Abellán Honrubia y Jordi Bonet Pérez (Dirs.), *La incidencia de la mundialización en la formación y aplicación del Derecho Internacional Público: los actores no estatales: ponencias y estudios*, Bosch (ed.), 2008, pp. 34-38.

vinculantes no son necesarias o para obtener ventajas inmerecidas.¹⁵⁶⁵ A pesar de todo lo anterior, considero que los riesgos de una ausencia de regulación superan con creces aquellos que supondría la regulación de la conducta no estatal, que puede hacerse con cuidado y procurando evitar riesgos como los mencionados, respetando el imperio de la ley y los derechos fundamentales de todos los entes involucrados, como se discute en el Capítulo 5.

Por ejemplo, puede señalarse cómo en el derecho internacional humanitario los entes armados no estatales están vinculados por el artículo 3 común, el derecho consuetudinario y en ocasiones normas convencionales.¹⁵⁶⁶ Como revelan interpretaciones jurídicas y el propio artículo citado, las obligaciones en cuestión no entrañan modificación alguna del estatus de las entidades en cuestión que pudiese legitimar sus violaciones¹⁵⁶⁷ y, por el contrario, señala expectativas sobre el comportamiento no estatal cuyo incumplimiento se expone a críticas. A su vez, los Estados siguen vinculados por sus propias obligaciones humanitarias. Esta es una consideración cardinal que se tiene en cuenta en el artículo 4.5 del Memorando de entendimiento entre las Naciones Unidas y el grupo *Justice and Equality Movement* de Sudan y en el Manual de los Procedimientos Especiales de Derechos Humanos de las Naciones Unidas de agosto de 2008, donde se menciona que:

“La interacción entre quienes tengan mandatos y los representantes de un actor no estatal o autoridad *de facto* puede tener lugar en el país en cuestión. El contexto de tales encuentros y las condiciones en las que se desarrollen han de buscar asegurar que la participación basada en el mandato no sea entendida como apoyando ninguna reclamación particular hecha por el actor no estatal o autoridad *de facto* en cuanto a representatividad, legitimidad u otras cuestiones”¹⁵⁶⁸ (subrayado añadido; traducción hecha por el autor).

En consecuencia, los argumentos que se oponen a las obligaciones de determinados autores basados en su posible legitimación a pesar de las violaciones que cometan no son de recibo en cuanto es posible evitar este fenómeno. En este sentido, cabe añadir que catalogar a una entidad como violadora de normas que protegen la dignidad humana dista mucho de ser halagador y, por el contrario, indica posibles violaciones que pueden atribuirse a la entidad en

¹⁵⁶⁵ Ver, entre otros, John H. Knox, “Horizontal Human Rights Law”, op. cit., pp. 32-46; John H. Knox, “The Human Rights Council Endorses “Guiding Principles” for Corporations”, *ASIL Insights*, Vol. 15, Issue 21, 2011, p. 1 (version en PDF, disponible en: <http://www.asil.org/pdfs/insights/insight110801.pdf>, última revisión: 04/11/2011); Mary Ellen O’Connell, “Enhancing the Status of Non-State Actors Through a Global War on Terror?”, *Columbia Journal of Transnational Law*, Vol. 43, 2005, pp. 457-458; Alexandra Gatto, op. cit., p. 431; Nicolás Carrillo, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, op. cit., p. 34.

¹⁵⁶⁶ Ver Tribunal Penal Internacional para la Ex Yugoslavia, *Prosecutor v. Anto Furundzija*, Sentencia, 10 de diciembre de 1998, párrs. 159-160; artículo 3 del Estatuto actualizado del Tribunal Penal Internacional para la Ex Yugoslavia.

¹⁵⁶⁷ Vid. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., p. 51.

¹⁵⁶⁸ Vid. Manual de los Procedimientos Especiales de Derechos Humanos de las Naciones Unidas de agosto de 2008, párr. 82.

cuestión y la necesidad de regular su conducta.¹⁵⁶⁹ Además, esta indicación señala a otros la posibilidad o el deber de responder a violaciones que se cometan o vayan a cometer por medio de la creación o mejora de acciones o normas o la implementación de regulaciones existentes.

En resumen, vincular a un actor por medio de obligaciones de derechos humanos y humanitarias y emplear otros mecanismos admisibles sustantivos o incluso procedimentales de protección de la dignidad humana para defender a los individuos de amenazas no estatales es posible y *se exige de lege ferenda* si la protección no se otorga de manera suficientemente efectiva y completa por la *lex lata*. Las autoridades y operadores jurídicos están obligados a intentar interpretar las normas con el fin de brindar la anterior protección en la medida de lo posible. Naturalmente, para cumplir con la juridicidad esto no puede hacerse de manera arbitraria: las obligaciones creadas por normas internacionales deben ser tanto accesibles como predecibles, siendo estas dos garantías reconocidas en el derecho internacional que han sido examinadas en la jurisprudencia, como pone de relieve el caso Kononov que examinó la Gran Sala del Tribunal Europeo de Derechos Humanos.¹⁵⁷⁰

La imposición de obligaciones relacionadas con la protección y el respeto de la dignidad humana a actores no estatales es una de las medidas que pueden usarse para proteger a los seres humanos, y en ocasiones puede ser incluso necesario que estas obligaciones tengan una naturaleza penal. Ciertamente, algunas normas del derecho penal internacional comparten la finalidad de proteger la dignidad humana junto al derecho internacional de los derechos humanos, y en consecuencia ambas ramas pueden ser concebidas como dos caras de una misma moneda, aunque en realidad resultaría más apropiado hablar de un dado con múltiples caras (de carácter sustancial y procedimental) de las que no son sino dos caras, debido a que existen otras normas formalmente clasificadas en otras ramas que comparten el fundamento y la meta en cuestión, como acontece con el derecho internacional humanitario, tal y como se describe en el instrumento CSCE, el Documento de Helsinki 1992, “El desafío del cambio”, Declaración de la cumbre de Helsinki.¹⁵⁷¹

¹⁵⁶⁹ De modo similar, Andrew Clapham ha considerado que imponer obligaciones de derechos humanos a una entidad no aumenta su legitimidad sino que simplemente limita su conducta, como se discute en: Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 52-53.

¹⁵⁷⁰ Vid. Capítulo 5, *infra*; Tribunal Europeo de Derechos Humanos, Gran Sala, *Caso Kononov Vs. Letonia*, Sentencia, 17 de mayo de 2010, párrs. 185-187, 235-239.

¹⁵⁷¹ Al respecto, el derecho penal sanciona algunas violaciones de derechos humanos y puede considerarse así la otra cara de la moneda de aquellos derechos. Sin embargo, sería descrito de forma más apropiada como una de las caras del dado de la protección de la dignidad humana, que admite más respuestas a las violaciones, como revelan la protección de la dignidad humana por parte del derecho de los refugiados o el derecho internacional humanitario, por ejemplo. Sobre estas ideas, ver Claire de Than y Edwin Shorts, op. cit., pp. 12-13, 29; John H. Knox, “Horizontal Human Rights Law”, op. cit., p. 24; Comisión Interamericana de Derechos Humanos, Informe No. 112/10, Petición interestatal IP-02, Admisibilidad, *Franklin Guillermo Aisalla Molina*, Ecuador – Colombia, 21 de octubre de 2010,

Como se dijo atrás, es posible emplear otras medidas de protección, aunque es necesario tener cuidado para asegurar que las mismas pueden proteger a los seres humanos de forma efectiva, pues de lo contrario algunas víctimas serían discriminadas y se verían desprotegidas, en contra de lo que exigen su valor inherente y el sistema jurídico. Algunas de aquellas medidas pueden consistir, por ejemplo, en recomendaciones o incluso normas no vinculantes, como las de algunos códigos de conducta; la promoción de una cultura respetuosa de los derechos humanos; el cumplimiento de los deberes de protección y prevención de los Estados y otras autoridades; la ejecución interna de medidas protectoras de la dignidad humana; u otras iniciativas internas, internacionales e incluso transnacionales.

En relación con los códigos de conducta, como consecuencia de la presión ejercida por otros actores y la propia sociedad, algunas corporaciones, ONGs y otras entidades se han percatado de la importancia de asumir compromisos para respetar la dignidad humana y otros valores.

La naturaleza jurídica de estos códigos es variada: algunos constituyen una expresión de auto regulación mientras que otros son manifestaciones heteronormativas¹⁵⁷²; algunos simplemente declara aspiraciones mientras que otros suponen un compromiso más fuerte e incluso, en ocasiones, jurídico, que puede emerger bien sea por su consideración como derecho no estatal a la luz de las teorías de derecho global de Günther Teubner que son examinadas en concepciones de derecho administrativo global o teorías de derecho global,¹⁵⁷³ o porque el derecho internacional o interno otorguen efectos a aquellas manifestaciones normativas, lo cual puede acontecer en virtud de las expectativas que generan y la protección de la confianza del público a la luz del principio de buena fe, por ejemplo. En cualquier caso, es necesario analizar estos códigos con cuidado, porque en ocasiones su creación puede obedecer a ejercicios simplemente retóricos destinados a mejorar la imagen pública de su creador o incluso a la intención de desviar la atención de la necesidad de crear regulaciones o acciones jurídicas más intensas a las que tengan acceso efectivo las víctimas.

Una medida complementaria a la creación de obligaciones jurídicas internacionales que resulta interesante es la creación de una atmósfera y cultura no estatal respetuosa de la dignidad humana. Los Comités y expertos de derechos humanos han resaltado que los Estados deben

párr. 117; CSCE, el Documento de Helsinki 1992, "El desafío del cambio", Declaración de la cumbre de Helsinki, 9 - 10 de Julio de 1992, párr. 47.

¹⁵⁷² Vid. Luis Pérez-Prat Durbán, *supra*, p. 33.

¹⁵⁷³ Vid. Gunther Teubner, "Global Bukowina: Legal Pluralism in the World Society", en Teubner, G. (ed.), *Global Law Without a State*, Dartmouth (ed.), 1997, pp. 12-19; Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law", *European Journal of International Law*, vol. 20, No. 1, 2009, pp. 52-55; Rafael Domingo, *¿Qué es el derecho global?*, Thomson Aranzadi, 2007, pp. 108, 159.

emplear todas las medidas jurídicas y legítimas que puedan usar con el fin de promover el respeto de los derechos humanos por parte de los actores no estatales, incluyendo el desarrollo de una cultura coherente con el respeto de la dignidad humana, que entre otras puede ser generada gracias a estrategias normativas dada la función y los efectos simbólicos y expresivos de las normas. Otros autores y autoridades han considerado que los mecanismos judiciales y no judiciales, como los boicots (legales), la socialización, la exclusión o las estrategias de persuasión son relevantes para proteger los derechos humanos frente a amenazas no estatales,¹⁵⁷⁴ lo cual refleja cómo distintos mecanismos deben y pueden interactuar entre ellos y no operar aisladamente.

Esta estrategia puede ser efectiva en relación con el fortalecimiento de la protección de la dignidad humana y las posibilidades de su respeto en tanto, como ha sido analizado por otros, crear obligaciones no estatales puede contribuir a cambiar su actitud y percepciones, tal y como ha acontecido con grupos armados no estatales que comenzaron a sentirse vinculados en términos jurídicos por el derecho internacional humanitario tras haber sido incluidos entre los destinatarios de obligaciones de dicho carácter.¹⁵⁷⁵

En consecuencia, las estrategias normativas, en las cuales el derecho internacional puede de forma innegable desempeñar un papel relevante, pueden fortalecer la promoción integral del respeto de la dignidad humana. Esto se une al imperativo de que los ordenamientos jurídicos persigan el respeto futuro y presente de los derechos humanos y la no repetición de violaciones previas, entre las cuales lógicamente deben ser incluidas las no estatales.¹⁵⁷⁶

Otro desarrollo relacionado con la búsqueda de la protección efectiva de los derechos humanos, cuya relevancia es innegable debido a que sin él muchas víctimas habrían quedado desprotegidas, es el desarrollo jurisprudencial y la exigencia del cumplimiento de los deberes

¹⁵⁷⁴ Vid. Ryan Goodman y Derek Jinks, "Incomplete Internalization and Compliance with Human Rights Law", *European Journal of International Law*, Vol. 19 No. 4, 2008, p. 735; Mauricio García Villegas, "De qué manera se puede decir que la Constitución es importante", en Álvarez Jaramillo *et al.*, *Doce ensayos sobre la nueva Constitución*, Diké, 1991, p. 40; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., p. 55; *Proteger, respetar y remediar: un marco para las actividades empresariales y los derechos humanos*, A/HRC/8/5, op. cit., párrs. 9, 26, 29-32, 84-85, 92; Daniel Thürer, op. cit., pp. 46-47; Bob Reinalda, "Private in Form, Public in Purpose: NGOs in International Relations Theory", en Bas Arts *et al.* (eds.), *Non-State Actors in International Relations*, Ashgate Publ., 2001, pp. 13, 35-36; Andrew Clapham y Scott Jerbi, "Categories of Corporate Complicity in Human Rights Abuses", *Hastings International and Comparative Law Journal*, Vol. 24, 2001, pp. 347-348; August Reinisch, op. cit., pp. 53, 67-68, 77; Alexandra Gatto, op. cit., p. 431; Gunther Teubner, op. cit., pp. 9, 12-13; Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors", op. cit., pp. 188-191; Menno T. Kamminga, op. cit., p. 186; Comité de Derechos Humanos, Observación general No. 31 [80], op. cit., párrs. 7, 15.

¹⁵⁷⁵ Vid. Fred Halliday, "The Romance of Non-state Actors", op. cit., p. 35; David Capie, "Influencing Armed Groups: Are there Lessons to Be Drawn from Socialization Literature?", en: Geneva Call, *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law*, "Conference Report—Geneva, 4-5 June 2007", 2008.

¹⁵⁷⁶ Vid. Corte Interamericana de Derechos Humanos, *Caso González y otras ("Campo Algodonero") Vs. México*, Sentencia, op. cit., párrs. 288-291.

estatales de garantizar y proteger los derechos humanos con una diligencia debida, cuyos estándares son más exigentes en algunos eventos como frente a personas y derechos vulnerables o en las ocasiones en las que el Estado tenga una posición de garante o cree un riesgo de violación no estatal de derechos humanos, supuestos en los que los deberes del Estado son más severos.¹⁵⁷⁷ Esta responsabilidad estatal fluye de una de las obligaciones generales (de medios y no de resultados) de los Estados bajo el derecho internacional de los derechos humanos: garantizar el goce y disfrute de los derechos humanos mediante medidas positivas incluso frente a amenazas privadas, lo cual exige la prevención y respuesta frente a intromisiones con el disfrute del contenido de derechos que sean atribuibles a actores no estatales, generándose responsabilidad estatal si no se presentan adecuadamente medidas pertinentes.

Frente a la emergencia de las prácticas de la privatización, las alianzas público-privadas y la delegación y transferencia de poderes a organizaciones internacionales y otras entidades, se ha considerado que las obligaciones estatales no cesan y que en consecuencia el Estado no puede evadirlas o intentar disminuir las garantías de los individuos por medio de la transferencia de sus competencias, razón por la cual debe supervisar la ejecución de acciones y la provisión de servicios que previamente estaban directamente a su cargo cuando ello sea realizado por otros actores públicos y privados, y asimismo debe garantizar que los derechos humanos sean protegidos de manera efectiva en relación con las actividades de las organizaciones internacionales u otros entes en cuestión.¹⁵⁷⁸

¹⁵⁷⁷ Vid. Comisión Interamericana de Derechos Humanos, *Caso Jessica Lenahan (Gonzalez) y otros Vs. Estados Unidos*, Caso 12.626, Informe de Fondo No. 80/11, 21 de Julio de 2011, párrs. 113-114, 122-134; Tribunal Europeo de Derechos Humanos, Sección Cuarta, *Caso Hajduová Vs. Eslovaquia*, Sentencia, 30 de noviembre de 2010, párrs. 41, 45-46, 50; Corte Interamericana de Derechos Humanos, *Caso de la Masacre de Pueblo Bello Vs. Colombia*, Sentencia, 31 de enero de 2006, párrs. 125-126; Comité de Derechos Humanos, Observación General 20 al artículo 7 del Pacto Internacional de Derechos Civiles y Políticos, 1992, párr. 11; Corte Interamericana de Derechos Humanos, *Caso Ximenes Lopez Vs. Brasil*, Sentencia, 4 de Julio de 2006, párrs. 138-141; Comisión Interamericana de Derechos Humanos, Comunicado de prensa 114/10.

¹⁵⁷⁸ Vid. August Reinisch, op. cit., pp. 78-82; Tribunal Europeo de Derechos Humanos, Press Unit, "Factsheet on Case law concerning the European Union", 2010, p. 3, disponible en: http://www.echr.coe.int/NR/rdonlyres/EA6F3298-FE75-48E7-B8A7-F9C5FF5EB710/0/FICHES_European_Union_EN.pdf (última revisión: 15/11/2011); Tribunal Europeo de Derechos Humanos, *Caso Matthews Vs. Reino Unido*, Sentencia, 18 de febrero de 1999, párrs. 34-35; Andrew Clapham y Scott Jerbi, op. cit., p. 339; Normas sobre las responsabilidades de las empresas transnacionales y otras empresas comerciales en la esfera de los derechos humanos, E/CN.4/Sub.2/2003/12/Rev.2, 26 de agosto de 2003, párr. 1; Corte Interamericana de Derechos Humanos, *Caso Ximenes Lopez Vs. Brasil*, Sentencia, 4 de julio de 2006, párr. 96.

El anterior razonamiento también explica por qué la Comisión de Derecho Internacional ha considerado que los Estados no deben eludir sus obligaciones aprovechándose de su membresía en organizaciones internacionales y vice versa.¹⁵⁷⁹

Por otra parte, las anteriores dinámicas revelan hasta qué punto la lógica que subyace en las obligaciones internacionales sobre derechos humanos de los Estados también están presentes en relación con ciertas actividades no estatales cuando los actores no estatales son autoridades funcionales *de facto* o en virtud de autorización normativa, o incluso en otras situaciones, y en consecuencia es posible que existan obligaciones positivas de aquellos actores junto a obligaciones de respeto (es decir, de abstenerse de violar derechos humanos), tal y como es posible, por ejemplo, en el contexto de la protección de los derechos de las personas con discapacidades, en el sistema regional europeo de derechos humanos, o en relación con la protección de individuos con derechos internacionalmente reconocidos que sean habitantes de territorios administrados por entidades diferentes de los Estados, entre otros casos.¹⁵⁸⁰ En ocasiones, existen mecanismos indirectos de protección junto a, en lugar de o además de las anteriores obligaciones no estatales directas.

Las obligaciones positivas de los Estados, de las que derivan sus obligaciones de procurar el fin de, sancionar o prevenir violaciones no estatales de derechos humanos, o de asegurar la reparación de las víctimas, han abierto las puertas de la protección jurídica internacional a muchas víctimas que de otra forma serían incapaces de obtener remedios jurídicos dadas las limitaciones de los mecanismos convencionales de protección en relación con los sujetos pasivos de los procedimientos contenciosos, que por el momento suelen ser únicamente los Estados, a pesar de las limitaciones de estos mecanismos, gracias la sanción de las autoridades internacionales a la pasividad de las autoridades funcionales bajo el entendido de que sus poderes se justifican si protegen y benefician a los seres humanos,¹⁵⁸¹ y en virtud de la consideración de que el ejercicio diligente de esos poderes y las funciones relacionadas con ellos son imprescindibles en una época en la que múltiples actores tienen el poder y la capacidad de operar a través de las fronteras o de una forma contraria a la dignidad humana, y en la cual además funciones y actividades con relevancia social son desempeñadas por entes no estatales, lo que exige al menos a los Estados a vigilar su ejercicio.

¹⁵⁷⁹ Ver los artículos 17 y 61 del Proyecto de artículos de la Comisión de Derecho Internacional sobre la responsabilidad de las organizaciones internacionales, adoptado en su sesión número 63, 2011.

¹⁵⁸⁰ Vid. Capítulo 6, *infra*; artículo 56 junto al artículo 1 del Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales; artículo 44.2 junto al artículo 4 de la Convención sobre los derechos de las personas con discapacidad; Comité de Derechos Humanos, *Observaciones finales del Comité de Derechos Humanos sobre Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 de agosto de 2006, párr. 4.

¹⁵⁸¹ Vid. Voto concurrente del juez A.A. Cançado Trindade a: Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-17/2002, *Condición Jurídica y Derechos Humanos del Niño*, 28 de agosto 2002, párr. 19.

En resumen, las obligaciones positivas han cobijado teorías de efectos horizontales de los derechos humanos¹⁵⁸² y han asegurado que al menos algunos efectos de las garantías de los derechos humanos se desplieguen entre entes no estatales y que los mismos tengan relevancia en la rama del derecho internacional de los derechos humanos. No obstante, la mera presencia de las obligaciones positivas de los Estados y otras autoridades no es suficiente para garantizar la protección exigida por un sistema coherente e integral, universal y comprensivo de la protección jurídica de la dignidad humana. Esto puede ser ilustrado con aquellos casos en los que el Estado ha cumplido con los deberes a su cargo porque ha actuado con la diligencia debida que se le exige en términos jurídicos, a pesar de lo cual se comete una violación que permanece impune debido a que el Estado ha sido incapaz de atajarla con los medios admisibles a su disposición. En un caso de esta naturaleza, no se genera responsabilidad estatal pero se presenta una violación del contenido de derechos humanos en términos sustantivos, materiales y fácticos, existiendo víctimas que deben ser protegidas de manera efectiva dado el impacto negativo en el goce de sus derechos.

Negar lo anterior equivaldría a negar que el Estado tiene una obligación de procurar prevenir o responder a las violaciones sustantivas no estatales, y la construcción teórica de las obligaciones positivas se desmoronaría debido a contradicciones internas. Negarse a ofrecer cuando menos una protección efectiva alternativa a las víctimas en aquellas situaciones sería injustificado y discriminatorio.

En la práctica se han presentado casos como el descrito atrás, como lo ilustra el caso *Mastromatteo*. A pesar de estar en desacuerdo con la conclusión sobre la responsabilidad estatal en ese caso, en gracia de discusión debe mencionarse que el Tribunal Europeo de Derechos Humanos consideró que el Estado demandado, Italia, actuó con diligencia debida y no podría ser considerado responsable por el asesinato del hijo del peticionario por parte del crimen. En consecuencia, el Tribunal no ordenó que el Estado compensase. Sin embargo, la lógica que subyace a la conclusión de una violación y el derecho de toda víctima a ser reparada exige que se adopten algunas medidas para que las víctimas no queden desprotegidas en casos como este.

Adicionalmente, los principios generales del derecho revelan que cuando se presenta una violación el agresor, cualquiera sea su identidad, está obligado a reparar: esto puede

¹⁵⁸² Vid. Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-18/03, *Condición Jurídica y Derechos de los Migrantes Indocumentados*, op. cit., párrs. 140-148; Comité de Derechos Humanos, Observación general No. 31 [80], *Naturaleza de la obligación jurídica general impuesta a los Estados Partes en el Pacto*, op. cit., párr. 8; Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-17/2002, *Condición Jurídica y Derechos Humanos del Niño*, 28 de agosto 2002, párrs. 87-91; John H. Knox, "Horizontal Human Rights Law", op. cit., pp. 20-27.

exigirse por el principio que exige que una entidad que cause un daño deba reparar a los afectados, que ha adquirido la condición de principio general del derecho con relevancia internacional.¹⁵⁸³ Por otra parte, puede considerarse que existen obligaciones automáticas, presuntas y/o implícitas que exigen el respeto del derecho imperativo por parte de todas las entidades y que tienen efectos frente a manifestaciones de diversos ordenamientos jurídicos. En caso contrario, quedarían en entredicho los efectos del derecho imperativo a través de sistemas formales y en relación con todos los agresores potenciales, además de su carácter absoluto e incondicional.¹⁵⁸⁴

La existencia de normas imperativas que protegen la dignidad humana entraña la posibilidad de que actores no estatales estén vinculados por ellas, pues en caso contrario serían imposible obtener las metas e intereses de la comunidad internacional relacionados con su respeto, y porque las normas de *ius cogens* prevalecen sobre toda interpretación y aplicación que las prive de efectos prácticos, en virtud de su naturaleza imperativa y el principio de efectividad.¹⁵⁸⁵ La objeción que eventualmente podría plantearse a estas consideraciones es que para que surja una obligación de esta índole el actor en cuestión debería tener personalidad jurídica. No obstante, es necesario preguntarse si la noción de la subjetividad jurídica realmente se exige por el derecho internacional o es, por el contrario, principalmente una cuestión académica y una herramienta teórica descriptiva. De hecho, la propia definición de la subjetividad jurídica internacional es controvertida, como se estudia en el Capítulo 5.

Cabe mencionar que mientras que estudios sobre la historia de la noción de la subjetividad, como los realizados por Janneke Nijman, parecen apuntar que en un comienzo, lejos de aludir a una participación jurídica formal exclusiva o presunta de los entes denominados Estados, la noción de la subjetividad no pretendía excluir a otros actores o participantes sino que procuraba ofrecer argumentos teóricos para otorgar una mayor participación, aunque sujeta a regulaciones normativas, a entidades al interior del Sacro Imperio Romano Germánico.¹⁵⁸⁶ Así,

¹⁵⁸³ Vid. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, 2006, pp. 169-170.

¹⁵⁸⁴ Vid. Roland Portmann, op. cit., pp. 162-167, 273-274, 276-277, 280-281; Tribunal Penal Internacional para la Ex Yugoslavia, *Prosecutor v. Anto Furundzija*, Sentencia, op. cit., párrs. 144-147, 151-157; Antonio Cassese, "Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law", op. cit., p. 227; Antonio Gómez Robledo, *El Ius Cogens Internacional: Estudio histórico-crítico*, Universidad Nacional Autónoma de México, 2003, pp. 169-170; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., pp. 17, 30-32.

¹⁵⁸⁵ Vid. Nicolás Carrillo Santarelli, "La inevitable supremacía del *ius cogens* frente a la inmunidad jurisdiccional de los Estados", *Revista Jurídica de la Universidad Autónoma de Madrid (RJUAM)*, No. 18, 2009, pp. 60-63, 74-76.

¹⁵⁸⁶ Vid. Janneke Nijman, "Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability or the Last Great Defence of the Holy Roman Empire", IILJ Working Paper 2004/2, *International Law and Justice Working Papers*, Institute for International Law and Justice, New York University School of Law, 2005, pp. 2-

incluso tras la paz de Westfalia, la personalidad de entes al interior del imperio no era del todo clara, y Leibniz diseñó un concepto de personalidad para equilibrar su deseo de acción independiente con la necesidad que percibía de que siguiesen dentro del imperio y sujetos a algunas limitaciones,¹⁵⁸⁷ lo que en mi opinión implica su participación no exclusiva en la arena internacional, lo cual es contrario a la idea de que la noción de personalidad confirma la participación exclusiva de los Estados, dada la continuación de la existencia jurídica del imperio.

En otras palabras, la subjetividad internacional se diseñó para estimular el reconocimiento de la relevancia jurídica de la acción estatal junto a la de otras entidades y no para excluir a entes no estatales, de manera contraria a teorías como las de Oppenheim y otros autores, cuyas conclusiones rebate de manera brillante Jordan Paust, quien demuestra cómo incluso durante períodos de la historia del *ius gentium* supuestamente Estado-exclusivistas otros entes han participado y visto cómo son reconocidas sus capacidades jurídicas, derechos y obligaciones.¹⁵⁸⁸ En consecuencia, entes no estatales relevantes pueden y deben ser regulados por el derecho internacional y considerados sus sujetos.¹⁵⁸⁹

No debe ignorarse que algunos análisis críticos de la noción de personalidad jurídica internacional que incluso ponen en tela de juicio su pertinencia han sido realizados por distintos autores y movimientos, como estudios feministas, Andrew Clapham, Rosalyn Higgins y otros.¹⁵⁹⁰ Para algunos de ellos, el concepto de personalidad jurídica internacional excluye a participantes relevantes, en ocasiones incluso de manera injusta, lo cual es un motivo, a su juicio, para acudir a nociones como las de *participantes* del derecho internacional, que superan los límites de la dicotomía objetos-sujetos. Otros consideran que el concepto tiene funciones y objetivos eminentemente descriptivos, y nada impide a un actor que no sea considerado como sujeto por la doctrina ser objeto de atención normativa internacional; mientras que, por su parte, otros autores perciben la existencia de un proceso de inclusión de entidades en el ordenamiento jurídico internacional, y claman por su continuación y expansión.

A la luz de estas consideraciones, es ineludible cuestionarse qué significa personalidad jurídica internacional, debido a que no existe acuerdo sobre la noción: diferentes autores asumen

3, 33-34, 52-57; Janne Elisabeth Nijman, *The Concept of International Legal Personality*, T.M.C. Asser Press, 2004, pp. 448-449.

¹⁵⁸⁷ Ibid.

¹⁵⁸⁸ Vid. Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion", op. cit., pp. 985-1000.

¹⁵⁸⁹ Ver el Capítulo 5, *infra*; Janneke Nijman, "Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability or the Last Great Defence of the Holy Roman Empire", op. cit., pp. 2-3.

¹⁵⁹⁰ Vid. José Manuel Cortés Martín, op. cit., pp. 109-110; Math Noortmann, "Non-State Actors in International Law", en Bas Arts et al. (eds.), *Non-State Actors in International Relations*, Ashgate, 2001, pp. 62-63; Janneke Nijman, "Sovereignty and Personality: a Process of Inclusion", op. cit., p. 141; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 59-63, 70-71.

posiciones divergentes sobre ella. Algunos de ellos apoyan una teoría que enfatiza la importancia del acceso pasivo o activo a procedimientos en la esfera internacional, mientras que otros hacen hincapié en la atribución directa de derechos u obligaciones a una entidad y otros autores resaltan como crucial el hecho de que una entidad se asemeje a los Estados en sus capacidades internacionales o de que posean una “totalidad” o “mínimo” de capacidades jurídicas internacionales (frecuentemente procedimentales)¹⁵⁹¹, ignorando el hecho de que ni siquiera los Estados tienen todas las capacidades jurídicas internacionales posibles, al existir derechos, deberes y acciones que tienen otros pero no ellos.¹⁵⁹²

En vista de la confusión teórica que rodea a la noción de la subjetividad o personalidad, es conveniente e interesante examinar la teoría de la *capacidades* jurídicas internacionales, que indaga si determinado actor tiene derechos, deberes o competencias reconocidos o generados por normas internacionales, cuestión sobre la cual la denominación formal de un ente como persona o sujeto del derecho internacional no influye. Esta concepción es muy útil, aunque es necesario tener consideraciones especiales frente a entes cuya existencia dependa del reconocimiento jurídico de subjetividad bien en ordenamientos jurídicos internos o en el internacional, como puede ser el caso de las organizaciones internacionales o ciertas corporaciones, aunque este sería un análisis relativo a la existencia de un actor en lugar de referirse a su personalidad, siendo estas cuestiones diversas.

Por último, aunque sin carecer por ello de importancia, debe señalarse que la necesidad de proteger a las víctimas por medios jurídicos frente a agresiones no estatales se ha reconocido y tenido en cuenta por autoridades internacionales y nacionales, en los ámbitos de la litigación transnacional, jurisdicción universal, derechos humanos u otras. En este sentido, la posibilidad que tienen los órganos judiciales y otros órganos y agentes estatales de proteger derechos fundados en la dignidad humana directamente y frente a agresiones no estatales constituye un paso significativo en la búsqueda de la protección completa de los seres humanos. Este es el caso, por ejemplo, de la posibilidad de invocar bases humanitarias fundamentadas en el *ius gentium* frente a violaciones no estatales cuando se aplica el *Alien Torts Statute* estadounidense frente a entes como individuos o corporaciones (que son partes privadas),¹⁵⁹³ o de la posibilidad

¹⁵⁹¹ Vid. Math Noortmann, “Non-State Actors in International Law”, op. cit., pp. 64-66; Manuel Díez de Velasco, *Instituciones de Derecho Internacional Público*, Tecnos, 2005, p. 258; José Antonio Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, Tecnos, 2003, p. 186.

¹⁵⁹² Vid. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 68-69.

¹⁵⁹³ Vid. United States Court of Appeals for the Seventh Circuit, *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, decisión del 11 de Julio de 2011, pp. 6-15; United States Court of Appeals for the Second Circuit, *S. Kadic et al. v. Radovan Karadzic*, decisión del 13 de octubre de 1995, donde se mencionó que “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals”; Roland Portmann, op. cit., p. 166; Mireia Martínez Barrabés, “La responsabilidad civil de las corporaciones por

de emplear bajo ciertas condiciones mecanismos diseñados para proteger derechos humanos en relación con actores no estatales bien sea directa o indirectamente, como acontece en el Reino Unido o en Colombia.¹⁵⁹⁴

Estos desarrollos son bienvenidos y necesarios, aunque la mayor parte de ellos se basa actualmente en el correcto funcionamiento ordenamiento jurídicos internos, e incluso si se consideran adecuados debe reconocerse que su impacto puede ser limitado por ciertos obstáculos, como el incremento del poder de diversos actores y los vacíos que no pueden ser llenados por normas internas debido a las limitaciones del alcance de sus ordenamientos jurídicos, que hacen que aquellos desarrollos sean insuficientes.

De hecho, esta insuficiencia no es exclusivamente un aspecto de los derechos internos, y tal y como ha sido indicado por autores y operadores jurídicos, es necesario y posible que diversos ordenamientos jurídicos y actores cooperen entre sí en pos de la obtención de fines comunes para que su consecución sea posible.¹⁵⁹⁵ Adicionalmente, para lidiar con los retos a la defensa de los derechos humanos que se presentan en la sociedad global actual, los actores involucrados en la protección y promoción de los derechos humanos y garantías humanitarias deben emplear herramientas y aprovecharse legítimamente de oportunidades disponibles en el contexto globalizado,¹⁵⁹⁶ como por ejemplo el adecuado empleo de ciertas tecnologías y mecanismos de acción conjunta en marcos o incluso asociaciones informales. Un elemento interesante de este esfuerzo común se revela por el hecho de que los intereses comunes no sólo pueden moldear la actitud de múltiples actores sino que además pueden ser a su vez moldeados de alguna manera por la participación de distintos actores, incluso por expresiones de *lex humana* que suplementan, complementan o influyen sobre la *opinio iuris* del derecho

violación de los derechos humanos: un análisis del *Caso Unocal*", en Victoria Abellán Honrubia y Jordi Bonet Pérez (Dir.), *La incidencia de la mundialización en la formación y aplicación del Derecho Internacional Público, Los actores no estatales: ponencias y estudios*, Bosch Editor, 2008, pp. 232-248.

¹⁵⁹⁴ Ver *Ibid.*; artículo 42 del Decreto 2591 de 1991 de Colombia; artículo 6.3.b del Human Rights Act 1998 del Reino Unido; Department for Constitutional Affairs, *A Guide to the Human Rights Act 1998: tercera edición*, 2006, pp. 8-9, 37, disponible en: www.justice.gov.uk/guidance/docs/act-studyguide.pdf (última revisión: 02/02/2012); <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/peoples-rights/human-rights/pdf/act-studyguide.pdf> (última revisión: 29/02/2012).

¹⁵⁹⁵ Vid. Janneke Nijman, "Sovereignty and Personality: A Process of Inclusion", *op. cit.*, pp. 133-134; Anna Badia Martí, *op. cit.*, pp. 337-338, 342-343; "Statement issued by the President of the European Court of Human Rights concerning Requests for Interim Measures (Rule 39 of the Rules of the Court)", disponible en: http://www.echr.coe.int/NR/rdonlyres/B76DC4F5-5A09-472B-802C-07B4150BF36D/0/20110211_ART_39_Statement_EN.pdf (última revisión: 15/11/2011), donde se mencionó que "[f]or the Court to be able effectively to perform its proper role in this area both Governments and applicants and applicants must co-operate fully with the Court"; Sandra Lavenex, *op. cit.*, p. 383; Pierre Calame, "Non-state actors and world governance", Discussion paper, 2008, pp. 22-23, disponible en: <http://www.world-governance.org/spip.php?article297> (última revisión: 27/12/2011); Tribunal Europeo de Derechos Humanos, *Annual Report 2011, 2012*, pp. 34, 36-37; *We the Peoples: The Role of the United Nations in the 21st Century*, Naciones Unidas, 2000, p. 13.

¹⁵⁹⁶ Vid. Kofi A. Annan, *op. cit.*, pp. iii-iv; Anna Badia Martí, *op. cit.*, pp. 319-320.

internacional formal tradicional, lo que abre las puertas a una sociedad verdaderamente global que supere la lógica de las relaciones *internacionales* y ponga los cimientos de vínculos necesarios para la existencia de una comunidad supranacional, que no puede emerger a no ser que se tengan en cuenta la opinión y participación de los seres humanos.¹⁵⁹⁷

Hasta cierto punto, una dimensión de la interacción sinérgica y la unión de esfuerzos, actores y ordenamientos jurídicos consiste en la generación de un espacio jurídico global, formado por la interacción e intersecciones de ordenamientos jurídicos internos e internacional junto a manifestaciones de acción y regulación privadas.¹⁵⁹⁸ En este espacio jurídico pueden sostenerse intereses comunes, y su defensa o violación puede afectar a individuos y pueblos ignorando fronteras. Estos intereses comunes pueden entrar en el mundo del derecho a través de fundamentos jurídicos, objetivos y principios, e incluso pueden constituir bienes jurídicos comunes a todos los ordenamientos jurídicos involucrados en el espacio anteriormente referido, al menos en cuanto a un núcleo compartido o un mínimo común denominador, que puede relacionarse con la protección de la dignidad humana y protegerse por medio de derechos humanos y garantías humanitarias, como se discute en el Capítulo 1.

Esta dinámica puede fortalecer la protección de la dignidad humana frente a amenazas no estatales. Esto es así, en primer lugar, porque puede ayudar a prevenir la impunidad de violaciones no estatales e incluso a prevenirlas, en tanto la presencia común de bienes jurídicos e incluso de políticas en diversos ordenamientos jurídicos puede asegurar que las conductas ilegales sean y deban ser reguladas y atajadas en diversos escenarios o al menos en algún nivel o espacio jurídico, permitiendo a otros operar en un escenario multi-nivel.¹⁵⁹⁹

Por otra parte, se enfatiza la relevancia de la posición de las víctimas, con independencia de divisiones formales entre normas o escenarios públicos o privados o internos y supra-internos, generándose una cultura jurídica común y enviándose un mensaje simbólico a la sociedad y operadores jurídicos que debe ser asimilado por quienes tengan la tarea de implementar y garantizar el derecho, quienes deberán interpretar las normas existentes a la luz de los objetivos de los bienes jurídicos globales para hacerlos efectivos.

¹⁵⁹⁷ Vid. Andrew Clapham, "The Role of the Individual in International Law", op. cit., pp. 29-30.

¹⁵⁹⁸ Adicionalmente, ver: Benedict Kingsbury, Nico Krisch, Richard Stewart, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1, New York University, pp. 12-18; Rafael Domingo, *¿Qué es el derecho global?*, op. cit., p. 108; Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., pp. 15, 17-19, 28, 32, 45.

¹⁵⁹⁹ Vid. Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", pp. 35-43, 46.

En tercer lugar, puede decirse que los propios actores no estatales estarán más legitimados para actuar en pos de la protección de la dignidad humana en virtud del reconocimiento de los bienes jurídicos globales, y su papel como actores y participantes jurídicos no podrá negarse. Esto es crucial debido a que muchos desarrollos del proceso hacia una protección completa y efectiva de la dignidad humana se deben a la participación no estatal. Por último, cabe señalar que los ordenamientos jurídicos, sus ramas y todos los actores involucrados en el espacio jurídico global que se orienta y coordina por los bienes jurídicos globales estarán llamados a acercarse a los demás por medio de vínculos, lo que contribuirá a generar ese espacio jurídico.

A la luz de las anteriores consideraciones, puede decirse que es imprescindible examinar si en la actualidad los marcos jurídicos ofrecen de manera suficiente y efectiva una protección de la dignidad humana frente a actores no estatales y a todas las amenazas por medio de diversos mecanismos. Este análisis debe realizarse sin perder en cuenta que el derecho se justifica si beneficia a los seres humanos¹⁶⁰⁰ y que los individuos estarán subprotegidos o, peor aún, desprotegidos si las normas que protegen la dignidad humana se consideran como relevantes únicamente en las relaciones con los Estados, lo que contraría el hecho empíricamente demostrable de la victimización a manos de entes no estatales y la demanda ética y sentido común de proteger a toda víctima.

De hecho, la mayor parte de las violaciones de derechos humanos y de normas que protegen la dignidad humana son atribuibles a actores no estatales,¹⁶⁰¹ pues en la vida cotidiana únicamente un porcentaje de los abusos son cometidos por los Estados, e incluso ellos son materializados por entes no estatales con un rol público. Ignorar esto perpetúa una situación trágica y envía un mensaje peligroso de impunidad de violaciones y de abandono de víctimas e irrelevancia normativa de su sufrimiento, lo cual choca con los ideales de derechos humanos de igualdad y *valor interno*, que alude al ser humano y no a otros que interactúen con él.

Esto es así porque la víctima, cuya protección debe constituir el centro de un discurso consistente sobre los derechos humanos, puede carecer de mecanismos de protección si las garantías internas no existen o no son efectivas por alguna razón. No es improbable pensar que

¹⁶⁰⁰ Vid. Voto concurrente del juez A.A. Cañado Trindade a: Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-17/2002, *Condición Jurídica y Derechos Humanos del Niño*, op. cit., párrs. 19, 25.

¹⁶⁰¹ Vid. Michael Goodhart, op. cit., pp. 24-27, donde se argumenta que los poderes del Estado existen precisamente *para proteger* a los individuos de violaciones no estatales, y que insistir en la responsabilidad exclusiva del Estado es artificioso y hace que se ignoren las necesidades de protección frente a amenazas no estatales. Más aún, teniendo en cuenta que como entes ficticios las violaciones del Estado también son atribuibles a entes no estatales (sus agentes), quienes también pueden ser responsables, puede observarse que en términos fácticos en últimas siempre hay individuos, quienes son entes no estatales (que pueden componer entes grupales), involucrados en las violaciones a la dignidad humana, y con frecuencia cometen violaciones por su propia cuenta o en estructuras grupales sin generar la responsabilidad del Estado.

aquellas víctimas, aparte de no compartir la “sabiduría” de académicos y autoridades que ignoran su necesidad de protección cuando sus derechos son conculcados por cualquier actor, pierdan la fe en el derecho y lo consideren como diseñado de manera injusta o incompleta, al no llegar su protección hasta ellos ni estar diseñado como debería, como ya ha acontecido.¹⁶⁰² Esas personas se enfrentarán a su sufrimiento y los daños que padecen sin contar con protección jurídica a sus derechos inherentes y reconocidos como superadores de consideraciones internas, factores que ciertamente son preocupantes y contra los cuales ha luchado el movimiento de los derechos humanos.

Bien sea porque el derecho a la alimentación ha sido violado y un actor no estatal ha tenido alguna participación en la violación, o porque alguien es asesinado por un agente no estatal, un régimen coherente y comprensivo de la dignidad humana no debe permitir que violaciones de esta índole queden impunes y debería cumplir su vocación de regular comportamientos con relevancia desde el punto de vista de los intereses jurídicos que protege. En caso contrario, el derecho fallará en su misión de ocuparse de realidades presentes en la sociedad en la que debe operar, lo cual sería un sinsentido. Por esta razón, es pertinente recordar que los romanos consideraban que *sic societas, sicut ius*,¹⁶⁰³ es decir, que toda sociedad tiene su propio ordenamiento jurídico, que también debe tener en cuenta sus características particulares y, en mi opinión, también las necesidades humanas, dado el carácter instrumental del derecho y el imperativo de que sirva los seres humanos: ciertamente, los actores no estatales pueden violar garantías de la dignidad humana y de hecho lo hacen, sin que los Estados estén siempre en la capacidad de defender a las personas. En consecuencia, el derecho de gentes debe hacer algo al respecto, directa o indirectamente, como exigen las circunstancias, algo que se discute a lo largo de este libro.

El derecho no puede omitir enfrentarse a nuevos desafíos y al reconocimiento de intereses y bienes comunes en un panorama globalizado, siendo necesario que se protejan aquellos intereses y valores respaldados por el derecho con mecanismos y dinámicas jurídicas que sean capaces de enfrentarse a los desafíos a su efectividad. Esto exige repensar el derecho internacional porque, como fue argumentado por Jessup y Scelle, es inapropiado hasta cierto punto etiquetar al ordenamiento jurídico como *internacional* debido a que abarca mucho más que la regulación de relaciones entre las ficciones jurídicas llamadas Estados, y a través de su historia también ha sido llamado, de manera más apropiada, derecho de gentes, término que

¹⁶⁰² Sobre estos asuntos, Vid. Chris Jochnick, op. cit., p. 58; Jordan J. Paust, “The Other Side of Right: Private Duties Under Human Rights Law”, op. cit., p. 62; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, pp. 43-44, 50, 53-54.

¹⁶⁰³ Vid. Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, p. 46.

abarca de manera más expresa sus dimensiones *inter-gentes*, *intra-gentes*, humanas, colectivas y cosmopolitas, no aclaradas del todo con la noción de vínculos y personas “internacionales”.¹⁶⁰⁴

En relación con lo anterior, debe mencionarse que desarrollos y tendencias como las relaciones transnacionales, la relevancia de la regulación privada por las normas internas e internacionales, y la creciente importancia de la protección de los intereses humanos ejercen presión para replantearse el conjunto de normas que deben ocuparse de la sociedad supra-interna. Considero que el mismo podría ser denominado *ius gentium humanis*, que incorporaría tanto las dimensiones de las relaciones interestatales como las relacionadas con los intereses y el comportamiento de otros actores, entre los cuales la protección de los seres humanos tendría una posición importante. Esto explica el uso del adjetivo *humanus*, que alude a la centralidad y protección de los seres humanos. En pos de la facilidad de lectura del texto, sin embargo, también usaré el término derecho internacional.

Es conveniente enfatizar que la protección de los seres humanos puede hacerse de diversas maneras, que no se limitan a la imposición de obligaciones y a la correspondiente generación de responsabilidad de los actores no estatales que las violen, porque existen otros mecanismos jurídicos y extrajurídicos que pueden usarse para brindar la anteriormente mencionada protección, incluyendo el fomento de una cultura no estatal respetuosa de los derechos humanos, cuya importancia ha sido señalada desde un punto de vista teórico por autores como Amartya Sen y por órganos internacionales, incluyendo algunos de las Naciones Unidas.¹⁶⁰⁵ En resumen, la protección de la dignidad humana debe ser integral, lo cual implica que la protección se brinde frente a todas las amenazas y a través de todos los medios admisibles efectivos, lo que exige que se permita y legitime la contribución de diversos actores que operan con el fin de proteger la dignidad humana, cuyas acciones se deben permitir y estimular por parte del derecho internacional y otros ordenamientos jurídicos, como los internos o incluso las manifestaciones de *lex privata*, debido a que un único ordenamiento jurídico no puede

¹⁶⁰⁴ Vid. Antonio Gómez Robledo, *Fundadores del Derecho Internacional (Vitoria, Gentili, Suárez, Grocio)*, op. cit., pp. 14-15, 98-99; Immanuel Kant, *Perpetual Peace, a Philosophical Essay* (traducido por M. Campbell Smith), George Allen & Unwin Ltd., London, 1917, pp. 119, 139, 142, 152, 157, 165-166; Rafael Domingo, *¿Qué es el derecho global?*, op. cit., pp. 71-72; Benedict Kingsbury, Nico Krisch, Richard Stewart, *The Emergence of Global Administrative Law*, op. cit., pp. 29, 31-32, 34; Elena Pariotti, op. cit., at 102; Antonio Remiro Brotons et al., *Derecho Internacional*, McGraw-Hill, 1997, pp. XLV-XLVI.

¹⁶⁰⁵ Vid. *Proteger, respetar y remediar: un marco para las actividades empresariales y los derechos humanos*, A/HRC/8/5, op. cit., párrs. 27-32; Amartya Sen, op. cit., p. 345; Oscar Schachter, “Human Dignity as a Normative Concept”, *American Journal of International Law*, Vol. 77, 1983, pp. 853-854; Corte Interamericana de Derechos Humanos, *Caso González y otras (“Campo Algodonero”) Vs. México*, Sentencia, op. cit., párr. 256; artículos 2 de la Convención sobre la eliminación de todas las formas de discriminación contra la mujer y 4 de la Convención sobre los derechos de las personas con discapacidad.

aspirar a ofrecer una protección efectiva completa a los seres humanos, especialmente uno con tan pocos recursos como el internacional.

Debe recordarse que el derecho internacional tiene una larga tradición referente a la presencia de mecanismos y doctrinas, como las de subsidiariedad y complementariedad,¹⁶⁰⁶ que reconocen que forma *parte* de un *esfuerzo jurídico conjunto* en el que las fronteras entre ordenamientos jurídicos se difuminan en virtud de una empresa común, el “principio de responsabilidad compartida” y la necesidad de que distintos actores y sistemas se complementen unos a otros en su promoción, como se aceptó por el presidente del Tribunal Europeo de Derechos Humanos, el propio Tribunal y la doctrina en un panorama más amplio de interacciones en un mundo globalizado.¹⁶⁰⁷

Esto, sumado a fenómenos sociales recientes, genera la emergencia del denominado espacio jurídico global, en el que actores e instituciones de diferentes ordenamientos jurídicos interactúan promoviendo metas comunes, lo cual obedece en parte a la imposibilidad para cada uno de ellos de hacer esto de forma aislada y a sus vacíos y limitaciones: el derecho interno puede estar demasiado enmarcado en la mentalidad estatal, que en muchos aspectos es egoísta y artificial;¹⁶⁰⁸ las manifestaciones normativas no estatales pueden no ser democráticas, pueden reflejar interpretaciones parcializadas de normas jurídicas o incluso carecer de compromisos o capacidad de coerción. El derecho internacional, por su parte, tiene por lo general pocos recursos y procesos de creación normativa estrictos, además de algunos operadores parcializados.

Adicionalmente, existen cuestiones de acción simultánea, distribución de poderes, gobernanza multi-nivel o sobre la elusión de debates internos legítimos que deben tenerse en cuenta.¹⁶⁰⁹ Estas consideraciones respaldan el que un esquema de protección de las víctimas frente a todas las amenazas a su dignidad deba diseñarse con una estrategia jurídica global,

¹⁶⁰⁶ Ver los artículos 17 del Estatuto de Roma de la Corte Penal Internacional, 2 del Protocolo Facultativo del Pacto Internacional de Derechos Civiles y Políticos, 46 de la Convención Americana sobre Derechos Humanos, o 35 del Convenio Europeo de Derechos Humanos, entre otros; Darryl Robinson, “The Mysterious Mysteriousness of Complementarity”, *Criminal Law Forum*, Vol. 21, No. 1, 2010; artículos 14 y 15 del proyecto de artículos sobre Protección Diplomática de la Comisión de Derecho Internacional, A/61/10, 2006; Paolo G. Carozza, “Subsidiarity as a Structural Principle of International Human Rights Law”, *American Journal of International Law*, Vol. 97, 2003, pp. 78-79.

¹⁶⁰⁷ Ver Tribunal Europeo de Derechos Humanos, *Annual Report 2011, 2012*, pp. 34, 36-37.

¹⁶⁰⁸ Vid. Celestino del Arenal, op. cit., p. 29; Antonio Cassese, “Remarks on Scelle’s Theory of “Role Splitting” (*dédoulement fonctionnel*) in International Law”, op. cit., p. 216; Rafael Domingo, *¿Qué es el derecho global?*, op. cit., pp. 174-181. Considero que los agentes del Estado e incluso los “ciudadanos”, categoría que excluye a los extranjeros, piensan con frecuencia en favorecer únicamente a los “suyos”, incluso si esto implica actuar contra otros, y por ello se requiere reforzar una categoría consciente y subconsciente más amplia de pertenencia a la humanidad.

¹⁶⁰⁹ Vid. John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge University Press, 2006, pp. 73-76; Paolo G. Carozza, op. cit., pp. 78-79; Anne Peters, “Humanity as the A and Ω of

En relación con la idea de que las medidas protectoras de los individuos frente a las amenazas no estatales deben ser múltiples y complementarias, debe resaltarse que lejos de apoyar una responsabilidad exclusiva y únicamente principal bien sea de los Estados o de los actores no estatales, sostengo que estos actores pueden ser en ocasiones únicamente cómplices o participantes en violaciones cometidas por Estados y que en otros casos pueden ser los principales agresores. Después de todo, la responsabilidad no es exclusiva en el derecho internacional,¹⁶¹⁰ y distintos actores pueden ver generada su responsabilidad de distintas formas en relación con una única violación.

En relación con estas consideraciones cabe decir que para que existan reparaciones verdaderamente integrales, que deben contar con elementos simbólicos por el contenido de satisfacción,¹⁶¹¹ que sólo puede ser satisfecho con la participación de todos los participantes en una violación; y para poder ocuparse de todas las amenazas, factores y participantes en las violaciones, en todos los casos en los que un actor no estatal esté involucrado en una violación de normas que protejan la dignidad humana, el derecho internacional debe ocuparse de tal actor directa o indirectamente para garantizar que se persiga la prevención de su participación y para responder de manera que se sancione a esa entidad y se le haga reparar a las víctimas. Otros ordenamientos jurídicos también deben ocuparse en estos casos para ofrecer esperanza y protección a las víctimas antes de que se empleen los mecanismos jurídicos internacionales.

Por otra parte, es importante insistir en la idea de que los actores no estatales no son únicamente “villanos” potenciales sino que también pueden ser colaboradores invaluable en la

Sovereignty”, *European Journal of International Law*, Vol. 20 No. 3, 2009, pp. 535-536; Hans-Otto Sano, “Good Governance, Accountability and Human Rights”, en Hans-Otto Sano, Gudmundur Alfredsson y Robin Clapp (eds.), *Human Rights and Good Governance: Building Bridges*, Martinus Nijhoff Publishers, 2002, pp. 137-141; Pierre Calame, op. cit., pp. 19-20, 22-23.

¹⁶¹⁰ Ver el Capítulo 7, *infra*. Adicionalmente, la responsabilidad de un actor no excluye la de otras entidades en relación con una misma violación, como se ha reconocido en la doctrina y la jurisprudencia y se ha demostrado por el hecho de que los Estados pueden ser cómplices en crímenes cometidos por actores no estatales o por la posibilidad de responsabilizar simultáneamente a un Estado y sus agentes por violaciones de derecho internacional causadas por un mismo acto. Ver Corte Internacional de Justicia, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia y Herzegovina Vs. Serbia y Montenegro)*, Sentencia, 26 de febrero de 2007, párrs. 419-420; Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-14/94, *Responsabilidad internacional por expedición y aplicación de leyes violatorias de la Convención (arts. 1 y 2 Convención Americana sobre Derechos Humanos)*, 9 de diciembre de 1994, párr. 56; Antonio Cassese, “When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case”, op. cit., p. 864, donde se manifiesta que “there may coexist state responsibility and individual [...] liability”; Corte Interamericana de Derechos Humanos, *Caso Castillo Petruzzi y otros Vs. Perú*, Sentencia, 30 de mayo de 1999, párr. 90.

¹⁶¹¹ Ver los Principios 18 y 22 de los Principios y directrices básicos sobre el derecho de las víctimas de violaciones manifiestas de las normas internacionales de derechos humanos y de violaciones graves del derecho internacional humanitario a interponer recursos y obtener reparaciones; artículos 31, 34 y 37 de los artículos sobre la responsabilidad de las organizaciones internacionales redactado por la Comisión de Derecho Internacional (versión adoptada en su sesión N° 63 en 2011) y 31, 34 y 37 de los artículos de la Comisión de Derecho Internacional sobre la responsabilidad del Estado por hechos internacionalmente ilícitos, adoptados en su sesión 53 en 2001.

protección completa de la dignidad humana, como evidencia el hecho de que esos actores han participado tanto en abusos como en desarrollos positivos, y la protección integral de los derechos humanos es impensable sin su participación, dadas las limitaciones jurídicas y psicológicas de los agentes de los Estados, que hacen que en ocasiones carezcan de flexibilidad, preocupación por “los otros” (es decir, quienes no son compatriotas), la multiplicidad de intereses que deben atender y sus prejuicios, que pueden no influir en entes no estatales o no hacerlo hasta el mismo punto.¹⁶¹² Incluso si las limitaciones anteriormente mencionadas se superan en algunos casos gracias al hecho de que los agentes estatales pueden tener en cuenta intereses humanitarios,¹⁶¹³ el hecho de que esto sea una simple posibilidad exige ser cauteloso y resalta la importancia del principio de complementariedad, que alude tanto a la protección en múltiples niveles en relación con sistemas jurídicos públicos como a la acción simultánea en relación con la actividad no estatal, como se discute en el Capítulo 4.

Para comenzar a concluir esta introducción, debe mencionarse que uno de los puntos centrales de este texto es la idea de la importancia de un ordenamiento jurídico legítimo y justo, es decir un sistema o sistemas jurídicos interconectados con una dimensión procesal que tenga en cuenta la participación y las opiniones de todos los entes afectados o interesados, que en nuestro caso son los seres humanos debido a que son ellos los actores principalmente afectados e interesados en los sistemas relacionados con la protección de la dignidad humana; siendo necesario a su vez que el sistema en cuestión cuente con normas cuyo contenido sea justo,¹⁶¹⁴ por lo cual es necesario que los sistemas jurídicos indaguen cuáles son las necesidades pertinentes de los individuos. Esto hace que sea inaceptable que se permita o fomente el sufrimiento humano de forma consciente o inconsciente como consecuencia de la idea de que algunos derechos basados en la dignidad humana “no deberían” ser protegidos frente a amenazas no estatales. Ello constituye una paradoja de la mayor crueldad.

¹⁶¹² Vid. Bob Reinalda, “Private in Form, Public in Purpose: NGOs in International Relations Theory”, op. cit., p. 25; Daniel Thürer, op. cit., pp. 40, 58; Pierre Calame, op. cit., pp. 9-10, 17, 22-23.

¹⁶¹³ Vid. Antonio Cassese, “Remarks on Scelle’s Theory of “Role Splitting” (*dédoublement fonctionnel*) in International Law”, op. cit., pp. 226-231; Nicolás Carrillo Santarelli, “Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods”, op. cit., p. 13; Harold Koh, “Why Do Nations Obey International Law?”, p. 2659.

¹⁶¹⁴ En relación con la justicia (en realidad *fairness*, término que no traduce exactamente justicia a mi juicio), Thomas Franck distinguió entre las nociones de rectitud procesal, como alusiva a la legitimidad, y la justicia sustantiva (*justice*), considerando que ambos componentes hacen al derecho justo, como se explica en: Thomas M. Franck, *Fairness in International Law and Institutions*, Clarendon Press – Oxford, 1998, pp. 3-24. He de mencionar que no estoy de acuerdo con la concepción de justicia sustantiva expuesta allí, que me parece algo limitada, debido a que es riesgoso y limitado centrarse en exclusiva en la justicia distributiva e ignorar otras consideraciones meta-jurídicas, pues esta postura podría llevar a justificaciones de abusos contra la ética y la moral, que sin confundirse con el derecho ni hacienda que éste se convierta en instrumento de la imposición de aquellas han de ser tenidas en cuenta para que el derecho no se convierta en instrumento que tolere o promueva abusos contra la dignidad humana y otros valores. Entre otras cosas, distinguiéndose del derecho positivo, estimo que las ideas de derecho natural aún pueden servir para examinar críticamente al positivo.

Después de todo, ¿por qué debería tolerarse el que individuos sean agredidos por corporaciones de seguridad privada; que no se prevenga o responda a la violencia doméstica; que no se impida la participación de grupos armados no estatales en atrocidades y acciones crueles, con el consentimiento de pueblos e incluso gobiernos; que las corporaciones puedan violar derechos laborales o de otra naturaleza de su empleado y los miembros de las sociedades en las que impactan o actúan; o que las iniciativas para que las organizaciones internacionales que cometen abusos de derechos humanos tengan *ius standi* sean opuestas, entre otras cuestiones?

Para una persona, estar en alguna de las anteriores situaciones o en otra en la que sus derechos sean o puedan ser violados con la participación de entes no estatales constituye una tragedia, y esa persona merece protección jurídica dada su naturaleza humana. El derecho debe corregirse si no se ocupa de esas necesidades, y tanto académicos como operadores jurídicos están llamados a considerar seriamente la adopción o propuesta de medidas *de lege ferenda* si el derecho no protege adecuadamente a todas las víctimas, como exigen la vocación y propósitos de los derechos humanos y otras garantías humanitarias, estudiadas en el Capítulo 1. Para todas las víctimas, potenciales y actuales, directas e indirectas, no importa *quién* viola sus derechos como el que sus derechos violados *sean* protegidos y *cómo* se ofrece esa protección (efectiva).

Se dice que Deng Xiaoping dijo que el color de un gato es irrelevante, siendo lo importante el que atrape al ratón.¹⁶¹⁵ No puedo compartir plenamente esta frase debido a que no suscribo la idea de que las metas, por nobles que sean, justifiquen todos los medios (lo que ciertas interpretaciones de la frase podrían entender), como se discute en el Capítulo 5 en relación con las condiciones para la asignación de capacidades jurídicas negativas a entidades no estatales. No todo está permitido, como recuerda el derecho de los derechos humanos en relación con las condiciones para restringir derechos con el fin de proteger otros derechos humanos, y es importante tener esto en cuenta porque, por ejemplo, tal y como es importante proteger a los individuos de actos terroristas, no toda medida de contraterrorismo es aceptable y los terroristas también tienen derechos. En consecuencia, en lugar de adoptar una filosofía pragmática, este libro persigue una tarea teleológica: cómo proteger a los individuos de todas las violaciones y agresores de la forma que exigen la dignidad humana y otros valores y bienes jurídicos esenciales de forma compatible con ellos.

¹⁶¹⁵ La frase que se le atribuye es la siguiente: “No importa que el gato sea blanco o negro; mientras pueda cazar ratones, es un buen gato.” Ver http://es.wikiquote.org/wiki/Deng_Xiaoping (última revisión: 24/09/2012).

Con todo, la frase citada no es del todo irrelevante, porque acierta al indicar cuán importante es tener en mente los objetivos. En este sentido, Mahatma Gandhi enfatizó la importancia de adherirse a los principios,¹⁶¹⁶ y uno de los principios que defiende es la protección de todas las víctimas, de todos los que sufren la violación de sus derechos humanos y de normas que protegen su dignidad humana.

Insisto: para las víctimas lo que importa no es tanto quién viola sus derechos sino que los mismos sean respetados en toda situación y por todo actor o violador potencial. Andrew Clapham resumió esta idea de manera brillante al decir que lejos de ser simplemente escudos contra el Estado, los derechos humanos deberían funcionar para proteger a la dignidad humana tanto de forma defensiva como proactiva frente a toda posible violación.¹⁶¹⁷ De hecho, los derechos humanos *lato sensu* y las garantías humanitarias, conceptos explicados en el Capítulo 1, constituyen un conjunto defensivo completo que ofrece armaduras y escudos contra cualquier posible golpe y armas y arcos para permitir la solicitud de medidas cautelares o de respuesta frente a cualquier violador potencial o real de la dignidad humana.

Esta tesis busca indagar de qué manera puede ser efectiva la protección jurídica integral de la dignidad humana contra toda posible amenaza en un contexto globalizado, lo cual puede requerir cambios. Para realizar este estudio, procederé de la siguiente manera: en una primera Parte examinaré los fundamentos normativos y teóricos de los derechos humanos y las garantías humanitarias, incluyendo la dignidad humana, la igualdad y no discriminación y los efectos horizontales y transversales de los derechos humanos, y de qué manera exigen que todas las víctimas sean protegidas de todas las amenazas en virtud del carácter incondicional y universal de la dignidad humana. También se examinará en qué ocasiones puede intervenir el derecho internacional para proteger de manera integral la dignidad humana frente a toda amenaza.

La segunda Parte de este trabajo se ocupará, en primer lugar, del análisis de cuestiones sustantivas del *ius gentium* que son relevantes para hacer efectivas las exigencias de los fundamentos, estudiadas en la parte anterior, y en consecuencia se analizarán las condiciones para asignar capacidades jurídicas que persigan brindar protección frente a amenazas no estatales, incluyendo el estudio de la subjetividad jurídica, de condiciones formales y sustantivas

¹⁶¹⁶ Gandhi dijo que “as the doctrine of *satyagraha* developed, the expression ‘passive resistance’ ceases even to be synonymous, as passive resistance has admitted of violence as in the case of suffragettes and has been universally acknowledged to be a weapon of the weak. Moreover passive resistance does not necessarily involve complete adherence to truth under every circumstance. Therefore it is different from *satyagraha* in three essentials: *Satyagraha* is a weapon of the strong; it admits of no violence under any circumstance whatever; and it ever insists upon truth.” (subrayado añadido). Cita de: Mahatma Gandhi, *The Essential Writings*, Oxford University Press, 2008, p. 326.

¹⁶¹⁷ Vid. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., p. 56, donde se menciona que “[i]f human rights once offered a shield from state oppression in the vertical relationship between the individual and the state, they now also represent a sword in the hands of victims of private human rights abuses.”

y de las Fuentes que pueden generar aquellas capacidades. Además, se prestará atención a las posibles obligaciones internacionales que pueden tener los entes no estatales y su posible responsabilidad cuando vulneren esas obligaciones, junto a otras modalidades de responsabilidad. Esta parte también se ocupará del análisis procesal y sustantivo de las formas en que pueden ser promovidas e implementadas las exigencias sustantivas y teóricas de la protección integral de la dignidad humana.

Por último, deseo exhortar a los lectores, incluso si están en desacuerdo con lo que se propone en estas páginas, a pensar sobre las cuestiones examinadas en este libro recordando que, como en mi opinión se muestra en el cuadro *Evicted* 1887 de Balford Fletcher, los seres humanos pueden sin duda alguna *sufrir* tanto por la acción u omisión del Estado (representado por el alguacil) como de entes no estatales (representados por los aldeanos insolidarios),¹⁶¹⁸ y que las personas merecen nuestro apoyo y simpatía, sentimientos que espero emerjan al ver la pintura, en tanto el arte debe transmitir sentimientos y sensaciones,¹⁶¹⁹ mientras que por su parte las ideas pueden transmitirse en debates doctrinales centrados en el ser humano, que debe ser protegido por el derecho, que debe servirle, siendo la noción de solidaridad un tópico constante de los derechos humanos, cuya importancia es innegable pues si aspiramos a proteger verdaderamente la dignidad humana y aquellos derechos pueden generar armonía normativa o establecer un mínimo común denominador jurídico a través de diversos ordenamientos jurídicos,¹⁶²⁰ al menos en relación con los derechos humanos y garantías de la dignidad humana imperativas, ellos deben servir para *humanizar* el derecho¹⁶²¹ en relación con *todas* las víctimas potenciales y actuales y para prevenir caer en la apatía o deshumanización, que constituyen peligros tristes, que se plasman en la pintura que se muestran en la pintura mostrada en las conclusiones finales (*"The unwed mother"*), y que deben evitarse al enfrentar trágicos eventos actuales y violaciones cotidianas.

¹⁶¹⁸ La imagen de la pintura y una descripción sobre la misma se ofrecen en la página web de la *Queensland Art Gallery*: http://qag.qld.gov.au/collection/international_art/blandford_fletcher (última revisión: 17/11/2011). La imagen se ofrece en las primeras páginas de este libro.

¹⁶¹⁹ Vid. Leo Tolstoy, *What is Art?*, Aylmer Maude (traductor), Crowell, 1899, donde se analiza el proceso de transmisión de sentimientos.

¹⁶²⁰ Vid. Nicolás Carrillo Santarelli, "Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods", op. cit., pp. 6, 15.

¹⁶²¹ Vid. Voto concurrente del juez A.A. Cançado Trindade a: Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-17/2002, op. cit., párrs. 48, 71; Voto concurrente del A. A. Cançado Trindade a: Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-18/03, op. cit., párrs. 25, 27, 88; Theodor Meron, "The Humanization of International Law", *American Journal of International Law*, Vol. 94, No. 2, 2000, p. 239.

CONCLUSIONES

Si los abogados y académicos del derecho ignoran las necesidades humanas en pos de su preferencia por ciertas teorías abstractas y ficciones con independencia de cómo afectan su implementación y consecuencias prácticas a los seres humanos, le fallan a los individuos, en tanto su conocimiento y papel les ha dado la posibilidad y oportunidad de contribuir a la protección de la dignidad humana, posibilidad que se habrá desperdiciado e incluso empleado de forma que perjudique a otros seres humanos. Esto ocurre cuando alguien dice que el derecho “no puede” o “no debe” proteger a los individuos de las amenazas no estatales. Esta situación se ilustra en la pintura “the unwed mother” de Jean-Louis Forain, que representa la vulnerabilidad de una persona cuya vida se ve influenciada por el derecho *tal y como es aplicado* por operadores jurídicos aburridos y desinteresados que no parecen estar preocupados por su destino y quizás están más interesados en formalismos y ciertas teorías abstractas y confusas, o incluso en sus intereses privados, como se analiza por Leo Tolstoy en su novela *Resurrección*.¹⁶²²



8: 'The unwed mother', de Jean-Louis Forain. Bristol Museum & Art Gallery

En consecuencia, no es justificable negar la protección efectiva y no simplemente teórica de la dignidad humana frente a violaciones atribuibles a entes no estatales, lo que exige ir más allá del paradigma de obligaciones exclusivamente estatales, que ha sido incluso superado en

¹⁶²² Vid. Leo Tolstoy, *Resurrección*.

algunos casos y no se exige en modo alguno ni por la evolución de la historia práctica y filosófica del movimiento de los derechos humanos ni por las características jurídicas del *corpus iuris* humanitario, que incluye a los derechos humanos y a las garantías humanitarias.

Ciertamente, el insistir en un esquema estatocentrista lleva a negar el carácter *humano* de los derechos y garantías humanitarios, convirtiéndolos en derechos existentes tan sólo en algunas relaciones. En este sentido, por ejemplo aquellos autores que defienden la necesidad de que las resoluciones del Consejo de Seguridad respeten los derechos humanos para que cumplan con el principio de legalidad, dado el rol de los derechos humanos en la Carta de las Naciones Unidas y en el derecho consuetudinario e imperativo, reconocen de forma implícita que un órgano internacional no estatal debe respetar los derechos humanos, que constituyen un parámetro de legalidad, que no es dependiente de su respeto por Estados para que sea relevante o aplicable, aunque lógicamente los Estados deben respetar los derechos humanos incluso en relación con la implementación de las referidas resoluciones, y mantienen sus deberes, incluso los positivos y las correspondientes responsabilidades vicarias.

Más aún, como se comenta en el Capítulo 8, el *ius gentium* y otros sistemas jurídicos y normativos pueden brindar protección a la dignidad humana contra amenazas no estatales y lo hacen con frecuencia, bien sea inconscientemente o implícitamente,¹⁶²³ por ejemplo a través de normas civiles y penales que protegen los derechos humanos directa o indirectamente de forma clara o de forma mínima exigiendo o asegurando la ausencia de contradicciones o la existencia de compatibilidad con aquellas garantías a través de estrategias interpretativas, o de forma deliberada y expresa.

La protección también puede ser formal o informal, promoverse por Estados y otros actores en términos sustantivos o procesales, por vías jurídicas o extra-jurídicas, pero siempre persiguiendo el fortalecimiento de la protección de la dignidad humana y teniendo el potencial de robustecer la efectividad del valor fundacional y el bien jurídico de la dignidad humana en el que se funda el *corpus iuris* humanitario. Esa protección también tiene manifestaciones especializadas, como la protección de la libertad, de la igualdad, de la autonomía o de la integridad, asegurándose así de que otros valores fundacionales íntimamente relacionados con la dignidad puedan ser protegidos, pero garantizando a su vez su compatibilidad con la dignidad humana e impidiendo la perversión del sistema que podría originarse por permitir la emergencia de teorías y normas que acaben atacando o ignorando la dignidad de algunos o todos los seres humanos.

¹⁶²³ El derecho interno y las normas internas que no sean originalmente internacionales pero compartan los bienes jurídicos de éstas pueden proteger a los individuos de amenazas no estatales conscientemente o espontáneamente.

Debe evitarse despreciar la posibilidad de esta protección dadas las implicaciones negativas que ello podría acarrear, que son múltiples: en primer lugar, las negaciones de que la protección de los individuos frente a amenazas no estatales se encuentra dentro del ámbito y alcance del marco jurídico de protección de la dignidad humana, a pesar de cómo principios y la práctica jurídica señalan lo contrario y cómo sus fundamentos reclaman aquella protección pueden ser creídas por operadores y legisladores, quienes podrían entonces negar protección a seres humanos que sufren o están a punto de ser atacados por entes no estatales, a pesar de que lo permitido u ordenado por el derecho e incluso impidiendo su evolución hacia una protección integral de los seres humanos, como exige su dignidad *incondicional*, siendo las exclusiones basadas en la identidad o naturaleza de los agresores una condición contraria a este valor. Las profecías cuya propia creencia entraña su cumplimiento que son promovidas por estas negaciones deben ser evitadas, exponiendo su carácter equivocado.

Por el contrario, reconocer que en la actualidad existen normas que permiten proteger a los seres humanos que son agredidos por entes no estatales, y que se necesita y permite más protección en tales situaciones, resalta cuán necesario es identificar limitaciones y vacíos de la *lex lata* para corregirlos de diversos modos, como por ejemplo mediante el diseño o el uso de mecanismos de protección y promoción de la dignidad humana que puedan integrar dimensiones no estatales positivas y negativas, *algunas* de las cuales fueron estudiadas en el Capítulo 8; o por medio de la cooperación entre ordenamientos jurídicos y actores (que también pueden desempeñar un papel positivo e indispensable) para proteger bienes jurídicos humanitarios compartidos (moldeados en interacciones) o comunes (quizás por coincidencia).

Adicionalmente, es necesario tener siempre en cuenta que existe un impacto simbólico del derecho y *cualquier manifestación normativa*, como bien pueden tenerlo las teorías sobre *cuándo* es posible proteger la dignidad humana por vías o normas jurídicas, debido a las implicaciones prácticas que estas teorías pueden tener y a la necesidad de coherencia jurídica, que no existe cuando se niega a los seres humanos que su dignidad puede ser desconocida por entes no estatales y sin embargo existen obligaciones de protección que vinculan a los Estados, como se analiza en los Capítulos 1, 2 y 3.

En lo concerniente a los efectos que puede tener una u otra postura, baste con decir que negar que los actores no estatales pueden violar derechos humanos (error que puede ser identificado y corregido) puede enviar un mensaje erróneo y peligroso a potenciales o actuales agresores no estatales, quienes pueden sentir que sus actos no son ilegales (¡aunque violan bienes jurídicos mediante conductas que en consecuencia son jurídicamente relevantes y

contrarias a los objetivos y fundamentos de los sistemas jurídicos!), son toleradas o incluso *permisibles*.

Según la concepción que considera que aquello que no está prohibido por el derecho está permitido (la aproximación *Lotus*), todos los actos no estatales que no están prohibidos podrían ser considerados de manera errónea como actos permitidos; pero de conformidad con la concepción que estima que puede haber diversos grados de consideración jurídica de una conducta, que es defendida por Simma, es posible mencionar que incluso la ausencia de una prohibición de una conducta pueden no equivaler a un permiso de la misma, y por ello en tales eventos es posible crear y utilizar mecanismos no basados en obligaciones de conformidad con el principio de legalidad y el respeto de los derechos humanos.¹⁶²⁴

De hecho, es posible observar cómo cuando algunas personas (o partes) se concentran de forma exclusiva o excesiva en los abusos de algunas entidades e ignoran (conscientemente o no) aquellos que son atribuibles a otros, estas personas pueden sentirse inclinadas a excusar las agresiones de estos otros, ¡o incluso considerarlas permisibles! Es posible identificar este fenómeno, por ejemplo, en discusiones de internet en las que los partidarios de cierta ideología conciben (con justicia) los abusos de una parte en ciertos conflictos como condenable, pero acaban diciendo que los crímenes brutales, las torturas y las violaciones cometidas por “la otra parte” son o fueron necesarias y no equivocadas, ¡incluso cuando condenan una misma conducta, como por ejemplo la tortura, cuando es cometida por el adversario!

A diferencia de lo que sostienen algunas frases o “perlas de la sabiduría” que he escuchado, todas las víctimas e individuos merecen protección y respeto, dada su misma naturaleza y valor humanos, algo que resalta la exhortación que se encuentra al final de la introducción de este libro (algunas de estas “perlas”, esgrimidas de una forma no precisamente ecuaníme por algunos, sostienen que algunas víctimas, por su pertenencia a algún bando en un conflicto, merecen más protección y tienen más valor que otras, algo que choca contra principios humanitarios éticos y jurídicos). Mi idea de los derechos humanos y de la solidaridad con *todas* las víctimas, en lugar de apelar a criterios de selectividad y exclusión, clama por la protección del valor intrínseco de *todos* los seres *humanos*, cualquiera sea su conducta (siendo su dignidad inalienable e incondicional), pues todas las víctimas humanas comparten la condición humana inalienable y merecen protección *efectiva* jurídica y extra-jurídica.

En consecuencia, todos los mecanismos de protección directos e indirectos deben ser examinados en detalle, para asegurar que haya consistencia con lo que exige el fundamento

¹⁶²⁴ Vid. Declaración del juez Simma a: Corte Internacional de Justicia, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Opinión consultiva, 22 de Julio de 2010, párrs. 8-10.

jurídico y extra-jurídico de los derechos humanos y las garantías humanitarias (la dignidad humana), en lugar de conformarse con criterios de “objeciones” “teóricas” a la protección frente a entes diferentes a los Estados, siendo muchas teorías con frecuencia proclives a equívocos en tanto fueron elaboradas con ciertos propósitos y en contextos que pueden haber cambiado,¹⁶²⁵ e incluso si esto no es así la dignidad humana y los seres humanos son mucho más importantes que teorías exclusivistas y limitadas que responden a ciertas visiones del mundo y posturas *ideológicas*.

Es realmente irónico que algunos de quienes apelan a la exclusión de consideraciones meta-jurídicas, como aquellas del derecho natural u otro carácter, se aferran consciente o inconscientemente a diferentes dogmas teóricos,¹⁶²⁶ mientras el valor no negociable al que deberían en todo caso adherirse y defender por completo es el de la dignidad humana y la protección no discriminatoria, incondicional e integral que exige, siendo la identidad de los autores y participantes en violaciones tan sólo uno de los factores que deben tenerse en cuenta para brindar esa protección, sin que pueda alegarse para su exclusión sino para estudiarse con el fin de ofrecer una protección efectiva.

Acerca de esto, puede analizarse el ejemplo colombiano y concluirse que sería contradictorio, exclusivista e injusto considerar que tan sólo las guerrillas o grupos paramilitares o agentes estatales han violado normas que protegen la dignidad humana o que tan sólo las víctimas de alguna de estas partes merecen protección, cuando de hecho todas las partes han victimizado seres humanos y cometido violaciones de normas que protegen la dignidad humana, como se discute en informes de las Naciones Unidas o de la Comisión Interamericana de Derechos Humanos. Curiosamente, para algunas personas es inquietante desde un punto de vista simbólico que aquellos informes consideren que los grupos armados no estatales pueden tener responsabilidad únicamente bajo el derecho internacional humanitario, invocándose los derechos humanos tan sólo en relación con el Estado (aunque debe recordarse que el DIH y el derecho de los derechos humanos comparten el fundamento de la dignidad humana y algunos derechos humanos fundamentales *lato sensu*, que son derechos humanos a cabalidad, y esto evidencia cómo la protección ofrecida por una rama del *corpus iuris* humanitario, el DIH, puede ofrecerse en las demás, razón que hace que sea aún más decepcionante que las violaciones de

¹⁶²⁵ Vid. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 25-58, 531-548.

¹⁶²⁶ Por ejemplo, en otro contexto y con ánimo ilustrativo, puede decirse que algunos consideran que el comunismo es una cuasi-religión moderna, mientras que otros apelan a un *laicismo* que procura excluir incluso la expresión de creencias religiosas protegida por derechos humanos y la permiten sólo en “secreto” mientras intentan imponer públicamente ideologías no religiosas a otros, algo que es contradictorio y de doble moral si se hace conscientemente. Ver un análisis interesante sobre cuestiones relacionadas en: “*Lautsi: Crucifix in the Classroom Redux*”, Editorial, *European Journal of International Law*, vol. 21, 2010.

derechos humanos de entes no estatales no sean reconocidas como tales directamente, al menos bajo el rótulo de “abusos” o “destrucción” de derechos humanos.¹⁶²⁷

Afirmar que tan sólo una parte viola derechos humanos, el DIH o la dignidad humana puede ser efectivamente una estrategia a cuyo empleo estén tentados quienes apoyen con otra de las partes ideológicamente o por otras razones, pero la apropiación de este argumento en un discurso de derechos humanos puede ser contraproducente y conducir a la pérdida de legitimidad, como se evidencia por las reclamaciones airadas de víctimas de violaciones atribuibles a una parte en el país mencionado líneas atrás o en otros lugares y por quienes condenan aquellas violaciones de otras partes cuando dicen (justamente) que es injusto que sólo algunas violaciones cometidas por el Estado o una parte sean condenadas por algunas ONGs u organizaciones internacionales.

Esta sensación de ultraje no se presenta únicamente en el escenario colombiano, que tan sólo ilustra un fenómeno reconocido en la doctrina, y la justicia y legitimidad del derecho están ciertamente en juego en relación con la protección integral de la dignidad humana frente a abusos no estatales, siendo posible considerar que aquellas dimensiones no están presentes si únicamente son protegidas algunas víctimas y otras son, de hecho, despreciadas (acudiendo a discursos que resultan ser artificiosos) en nombre de lo que “se supone que hacen” el derecho internacional o los derechos humanos, ignorándose en tal evento qué están llamados a hacer tales sistemas e ignorando asimismo sus principios, valores y fundamentos, que de hecho exigen e incluso permiten en ocasiones una protección comprensiva, y cuando no la ofrezcan deben cambiar y evolucionar. Más aún, algunas teorías que han resultado ser no estáticas o problemáticas¹⁶²⁸ han sido invocadas para denegar protección, como ocurre con algunas teorías sobre la personalidad jurídica internacional. Incluso si su objeto fuese realmente limitado, debería cambiar *de lege ferenda* para que la dignidad humana pueda protegerse, como exigen fundamentos éticos y del derecho.

De hecho, hay elementos del trasfondo, el análisis teórico y la historia del *ius gentium* que revelan cómo consideraciones y preocupaciones humanitarias han inspirado la práctica, tradiciones, la evolución y el análisis académico y práctico, operando así incluso como

¹⁶²⁷ Vid Comisión Interamericana de Derechos Humanos, *Tercer informe sobre la situación de los derechos humanos en Colombia*, OEA/Ser.L/V/II.102. 26 de febrero de 1999, párrs. 55 del Capítulo I, 5-15 y 18-19 del Capítulo IV (especialmente el párrafo 14), o el párrafo 5 de las Consideraciones finales; Consejo de Derechos Humanos, *Informe anual de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos sobre la situación de los derechos humanos en Colombia*, A/HRC/19/21/Add.3, 31 de enero de 2012, Resumen y párrs. 76-77, 83-89; Comisión de Derechos Humanos, *Informe de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos sobre la situación de los derechos humanos en Colombia*, E/CN.4/2006/9, 20 de enero de 2006, párr. 17; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 73-75.

¹⁶²⁸ Vid. Capítulo 5, *supra*.

consideraciones meta-jurídicas que permiten juzgar y valorar el derecho, orientarlo y modificarlo,¹⁶²⁹ especialmente porque el carácter instrumental que el derecho tiene en la práctica (incluso desde la perspectiva de las autoridades y personas afectadas por él) hace que sea imperativo para el derecho atender a las necesidades humanas y sociales de regulación, que claman por la protección y satisfacción de necesidades humanas fundamentales, como aquellas relativas al respeto, la protección y la promoción del disfrute de derechos y garantías íntimamente relacionadas con el valor y la *dimensión* inherente de la dignidad humana, que es compartida por todos los individuos y es incondicional.¹⁶³⁰

Como se analiza en los Capítulos 1 y 8, y con base en las consideraciones de la Parte I, puede decirse que las entidades no estatales pueden ciertamente condenar, avergonzar y contactar a otros actores no estatales que hayan violado o puedan violar bienes jurídicos humanitarios, con el fin de persuadirlos a ajustar su comportamiento a su respeto e incluso a su protección. Naturalmente, esta lógica resalta que *todas* las violaciones son inaceptables y han de ser debidamente abordadas por el derecho, y por esta razón los Estados no pueden eludir sus obligaciones y responsabilidades excusándose en las obligaciones no estatales. De igual manera, debe añadirse que cualquier ente no estatal que participe en una violación debe reparar a las víctimas: que todos los individuos merecen protección antes y después de la comisión de una violación; y que los derechos fundamentales de los entes no estatales que puedan incurrir en abusos deben ser respetados, como se menciona en distintas partes de este libro.¹⁶³¹

Adicionalmente, es necesario prevenir la materialización de los riesgos de que la exclusión de las víctimas, los argumentos y las estrategias partisanas, y los tratos discriminatorios sea usada, lo cual puede humillar aún más a las víctimas, especialmente cuando la parcialización es rampante y los discursos sobre derechos humanos están politizados. Los anteriores fenómenos han de evitarse, además, porque pueden fomentar dinámicas como la competencia entre víctimas o la victimización por parte de víctimas que se sienten abandonados por el derecho y tentados a la justicia por propia mano, siendo ambas cosas injustificadas.

La coherencia y la necesidad de proteger la dignidad humana exige que sean protegidas *todas* las víctimas, quienquiera que sean, hayan cometido delitos o no, y sin que sea un factor condicionante el *quién* amenaza o viola sus derechos esenciales, tanto en términos teóricos como en el marco jurídico y según los fundamentos de los derechos humanos *lato sensu* y las garantías humanitarias, que justifica la protección indirecta y en ocasiones directa de la dignidad

¹⁶²⁹ Cf. Voto concurrente del juez A.A. Cançado Trindade a: Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-17/2002, op. cit., párrs. 10-22.

¹⁶³⁰ Vid. Capítulo 1, *supra*.

¹⁶³¹ Vid. Introducción y Capítulos 5, 7, *supra*.

humana frente a entes no estatales, siendo la negación de la existencia de violaciones atribuibles a estos entes no sólo injusta y peligrosa sino también contraria a la protección de la dignidad humana como fundamento de diversas normas jurídicas y no vinculantes, siendo este fundamento un punto de contacto afortunado entre el derecho y las necesidades humanas, lo cual contrarresta concepciones herméticas (aceptando algunas cierta apertura), lo cual hace que el derecho esté mejor orientado a la satisfacción de necesidades humanas básicas.

Es necesario superar la tendencia humana al maniqueísmo y las exclusiones, y la tendencia teórica a favorecer doctrinas sobre necesidades humanas, ignorando el carácter instrumental del derecho, la necesidad de que responda a la realidad y el hecho de que las doctrinas restringidas se diseñaron obedeciendo a ciertas razones que pueden haber ignorado realidades y necesidades que emergieron con posterioridad o que existieron incluso en la época de su gestación. Lo anterior ha de hacerse observando cómo nada impide la extensión de la protección de la dignidad humana frente a las amenazas no estatales, como se revela por ciertas garantías humanitarias y derechos humanos *lato sensu*, que revelan cómo esta opción y curso de acción requerido puede adoptarse incluso en el *corpus* de los derechos humanos *stricto sensu*, que de hecho exigen esa protección, aunque optando en ocasiones por ofrecerla de forma indirecta a través de la mediación de otros agentes, lo cual en ocasiones constituye una decisión justificada cuando ello no resulte ser discriminatorio y se garantice una protección efectiva alternativa, aunque siempre debe permitirse cuando menos una vigilancia no estatal paralela, dada la necesidad de asegurar una operación efectiva del marco de protección, como se observa en los Capítulos 1, 3 y 4.

Este marco se basa en las mismas exigencias *fundamentales* de proteger el valor inherente de los individuos frente a *todas las violaciones*,¹⁶³² lo cual revela cómo está *dentro* del ámbito del derecho de los derechos humanos y de todo el *corpus iuris* humanitario proteger a los seres humanos frente a violaciones no estatales.

En caso contrario, si se ignoran la posibilidad la posibilidad y *necesidad* de dar y extender la protección de la dignidad humana *de lege ferenda* (y en ocasiones *de lege lata*) de conformidad con las exigencias de los fundamentos del *corpus iuris* humanitario, no sólo dejarán abandonados a muchos seres humanos que sufren abusos no estatales, en ocasiones sin contar con una posibilidad de acciones *efectivas y exitosas* para obtener protección y reparaciones frente a sus agresores, como acontece cuando ellos eluden el control estatal dado su poder o aprovechándose de vacíos sociales y normativos, dinámicas y oportunidades, incluso cuando los Estados (u otras autoridades pertinentes) han intentado proteger a las víctimas de manera

¹⁶³² Vid. Parte I, *supra*.

diligente (como deben hacerlo), haciendo que sea probable que las víctimas se sientan abandonadas por el derecho en esos casos, e incluso traicionadas y con una sensación de que el término derechos *humanos* es una falacia y una mentira, al no ser protegidos todos los seres *humanos* de manera efectiva y teniendo en cuenta incluso idénticos patrones de violación del contenido de sus derechos por parte de diferentes actores (incluso participando antes de distintas categorías *formales* en una misma violación o en dinámicas similares).

Por otra parte, los agresores podrían sentir que su conducta es tolerada si la misma no es abordada adecuadamente por el derecho, sensación que puede a su vez estimular la impunidad y la re-victimización de los afectados, cuyas garantías de no repetición (vid. Capítulo 7) serán menoscabadas, y cuya “esperanza” de hallar protección cuando los recursos internos sean ineficaces será frustrada: esto puede suceder si los operadores y académicos dan más importancia a consideraciones formales que a las necesidades reales y a los objetivos del sistema, incumpliendo su papel y expectativas frente a ellos en relación con los objetivos del derecho y sus responsabilidades profesionales.

Por las anteriores razones, las teorías que niegan la dimensión (negativa) no estatal del *corpus iuris* humanitario, aparte de desconocer normas existentes basadas en los mismos fundamentos en que se basan las normas que examinan, ignoran los principios de igualdad y efectividad, inestimables en el derecho de los derechos humanos. Y mientras admiten el impacto positivo formal o informal que pueden tener los actores no estatales en su promoción y defensa (que debe permitirse y promoverse, como se discute en el Capítulo 1), ignorarán que es imprescindible regular las capacidades no estatales para afectar intereses jurídicos, no sólo cuando sean positivas y contribuyan a su efectividad, sino también cuando ataquen bienes jurídicos. En estos casos, las teorías también desconocerán el hecho de que la presencia de capacidades jurídicas positivas evidencia, en primer lugar, que las mismas Fuentes empleadas para crearlas pueden generar capacidades jurídicas negativas, o vice versa. En segundo lugar, los actores no estatales pueden ciertamente ser sujetos, es decir destinatarios del *ius gentium* y otros sistemas normativos que protegen sus propias normas humanitarias y de los otros que tengan bienes jurídicos moldeados por esos sistemas, como se discute en el Capítulo 5.

Aparte de las demandas de consistencia normativa y de consideraciones meta-jurídicas, no puede negarse que las violaciones no estatales, en tanto afectan bienes jurídicos humanitarios, son jurídicamente relevantes y deben ser abordadas directa o indirectamente por el *ius gentium* y otros ordenamientos jurídicos. Esto se basa en la violabilidad de los derechos humanos y otras garantías humanitarias (que en un sentido amplio abarcan a los derechos humanos) por parte de entes no estatales, posibilidad que siempre ha existido, tal como los

entes no estatales siempre han sido actores relevantes en la sociedad internacional o en las esferas interna o transnacional y han tenido la posibilidad de tener un impacto en intereses mundiales y el *ius gentium*.

Adicionalmente, es innegable que en el mundo actual hay fenómenos y dinámicas como la delegación, la privatización, el empoderamiento de actores no estatales, las alianzas entre actores, los contactos y redes, la globalización, la interdependencia, la acción en el plano mundial por actores internos públicos o privados,¹⁶³³ vacíos e interdependencia, entre otros, que generan situaciones en las que los individuos son vulnerables y están expuestos a amenazas no estatales, quizás incluso cuando el Estado u otra autoridad funcional o fáctica se esfuerce por protegerlos, a pesar de lo cual las amenazas se concretan.

Teniendo esto en cuenta, y considerando que los derechos y garantías humanas exigen una protección positiva intensa de los individuos en situación de vulnerabilidad, debe garantizarse que la protección jurídica contra el Estado no sea la única disponible. Esto revela cómo, tal y como acontece con el principio de efectividad, los fundamentos y principios jurídicos del propio *corpus iuris* humanitario requieren protección frente a violaciones no estatales, y en caso que esta no se presente el sistema puede tornarse deficiente, hipócrita o discriminatorio, como se explica en la Parte I.

En relación con lo anterior, es pertinente examinar el concepto de las obligaciones *erga omnes*. La mayor parte de los autores se concentra en su dimensión horizontal, que alude al hecho de que son debidas a una comunidad (la dimensión comunitaria de las sociedades mundial e internacional o de ámbitos más reducidos, en el caso de las obligaciones *erga omnes partes*). Antonio Cançado menciona de manera magistral cómo aquellas obligaciones también pueden tener una dimensión vertical, que es relevante para el objeto del presente estudio. En lo concerniente a esta dimensión, menciona que:

“A mi modo de ver, podemos considerar tales obligaciones *erga omnes* desde *dos dimensiones, una horizontal y otra vertical*, que se complementan. Así, las obligaciones *erga omnes* de protección, en una dimensión horizontal, son obligaciones atinentes a la protección de los seres humanos debidas a la comunidad internacional como un todo. En el marco del derecho internacional convencional, vinculan ellas todos los Estados Partes en los tratados de derechos humanos (obligaciones *erga omnes partes*), y, en el ámbito del derecho internacional general, vinculan todos los Estados que componen la comunidad internacional organizada, sean o no Partes en aquellos tratados (obligaciones *erga omnes lato sensu*). En una dimensión vertical, las obligaciones *erga omnes* de protección vinculan tanto los órganos y agentes del poder público (estatal), como los simples particulares (en las relaciones inter-individuales)¹⁶³⁴ (énfasis añadido).

¹⁶³³ Vid. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 4-12; Elena Pariotti, op. cit., p. 95.

¹⁶³⁴ Vid. Voto concurrente del A. A. Cançado Trindade a: Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-18/03, 17 de septiembre de 2003, op. cit. párr. 77.

Comparto plenamente las anteriores consideraciones de Cançado, debido a que el hecho de que la comunidad internacional prevea garantías sustantivas, aunado a la posibilidad de que entes no estatales violen el marco jurídico de protección de la dignidad humana, hace que sea posible pensar que las garantías apoyadas por obligaciones *erga omnes* están protegidas por obligaciones implícitas, tal y como el Tribunal Europeo de Derechos Humanos ha mencionado que una violación de tratados sobre derechos humanos por parte de agentes estatales resultaba ser ilegal para dichos agentes¹⁶³⁵ aún cuando las obligaciones positivas de los Estados mencionan expresamente la responsabilidad *de los Estados* y no la de sus agentes (quienes generan su responsabilidad). Similarmente, puede pensarse que hay obligaciones implícitas de todo ente no estatal que afecte bienes jurídicos humanitarios y se involucre en violaciones de contenidos jurídicos en cuyo respeto esté interesada la comunidad de manera especial. En cuanto a quienes objetan lo anterior diciendo que los agentes estatales sí pueden tener en todo caso responsabilidad penal expresa, baste recordar que los individuos que participan en grupos no estatales e incluso por su propia cuenta también pueden tener responsabilidad penal internacional, y que no toda violación estatal constituye un delito atribuible a agentes estatales.¹⁶³⁶ Incluso si no se aceptan las anteriores ideas, cuando menos el derecho imperativo impone deberes implícitos. Estas cuestiones se discuten en más detalle en el Capítulo 6, *supra*.

En cualquier caso, de manera expresa o implícita las obligaciones humanitarias no estatales son una garantía reforzada que debe emplearse de conformidad con el principio de efectividad de la protección jurídica de la dignidad humana, y cuando tales obligaciones sean necesarias para que esta protección sea efectiva pero no existen, deben ser creadas *de lege ferenda*. Lo anterior se justifica por la necesidad de enfrentar la posibilidad de impunidad, la falta de acceso a recursos jurídicos por parte de las víctimas, y otras limitaciones de las estrategias que son únicamente voluntarias, que deben ser complementadas por normas y medidas de protección más robustas, como se discute en el Capítulo 4, *supra*.

De hecho, como se discute en un artículo escrito por John Knox, las limitaciones de la efectividad del Pacto Mundial pueden deberse en parte a su carácter no vinculante. Curiosamente, las corporaciones fueron las entidades que más se opusieron al diseño o *reconocimiento* de normas que pudiesen tener un carácter vinculante y versaran sobre derechos

¹⁶³⁵ Vid. Tribunal Europeo de Derechos Humanos, Gran Sala, *Caso Kononov Vs. Letonia*, Sentencia, op. cit., párrs. 236-237.

¹⁶³⁶ Vid. Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-14/94, op. cit., párr. 56.

humanos dirigidas a entidades corporativas¹⁶³⁷ (esto es increíble, debido a que esta actitud implica el desprecio del posible *reconocimiento* del derecho existente por parte de otros). Estas consideraciones, sumadas a la identificación de eventos en los que los códigos de conducta son empleados por corporaciones con fines como el de eludir presiones o efectos adversos o de mejorar su imagen pública, hacen que sea recomendable que exista un marco jurídico vinculante y verdaderamente efectivo que tenga los efectos simbólicos y *prácticos* del derecho, que pueda ser examinado por jueces u otras entidades con jurisdicción facultativa u obligatoria para examinar sus normas, y que pueda además ser invocado por víctimas y quienes las apoyen, para que tenga el potencial para cambiar actitudes y comportamientos no estatales.

Adicionalmente, las iniciativas nacionales o privadas tienen limitaciones, y la dependencia exclusiva en ellas constituye una estrategia que puede terminar estimulando o ser incapaz de abordar fenómenos de *race to the bottom*, el respeto simplemente verbal de consideraciones humanitarias fundamentales, o incluso el desprecio práctico de su relevancia y efectividad. Es sin duda alguna necesario hacer saber a los entes poderosos que están *vinculados* por estándares humanitarios a través de las fronteras, especialmente cuando puede que den más importancia a otras consideraciones (ej. ganancias, ideología, etc.) e ignoren o incluso ataquen aquellas con un carácter humanitario.

Dicho esto, tal y como se comentó en el Capítulo 4, el autor no defiende que se persiga una estrategia que únicamente sea internacional o basada en normas vinculantes. Esto se debe a que estrategias persuasivas y culturales (permitidas¹⁶³⁸ y en ocasiones exigidas por el derecho en conexión con las obligaciones positivas de las autoridades) y la contribución de múltiples actores son cruciales para la efectividad e integralidad de la protección de la dignidad humana, y en consecuencia deben complementar estrategias y mecanismos vinculantes y de coerción, especialmente porque tal y como las violaciones ignoran distinciones y fronteras formales, así debe brindarse una protección de la dignidad humana que opere a través del espectro de posibilidades lícitas e incorpore componentes tanto jurídicos como extra-jurídicos (incluyendo a los meta-jurídicos) de los derechos humanos y campos relacionados con ellos.

Debe reconocerse que tal y como ha sido mencionado en estudios de economía y ciencias sociales que los entes no estatales pueden contribuir a la provisión de ciertos bienes, su cooperación también se reconoce en el panorama jurídico internacional. Ciertamente, la

¹⁶³⁷ Vid. John H. Knox, "The Human Rights Council Endorses "Guiding Principles" for Corporations", op. cit. Debido a los fenómenos del *race to the bottom* y elusión del derecho, se requiere un mínimo común denominador de normas que protejan a los seres humanos y les otorgue acciones de protección frente a actores abusivos.

¹⁶³⁸ Vid. *Proteger, respetar y remediar: un marco para las actividades empresariales y los derechos humanos*, A/HRC/8/5, op. cit., párrs. 27, 31, 83.

efectividad de la protección de la dignidad humana debe mucho con frecuencia a la participación, cooperación y contribución no estatal, reflejada en la entrega de información a órganos internacionales de supervisión o en su participación en procesos de protección. Este vínculo entre la efectividad del sistema y la participación no estatal, que debe permitirse en un proceso de inclusión,¹⁶³⁹ ha sido identificado por el Comisionado de Derechos Humanos del Consejo de Europa, Thomas Hammarberg, quien dijo que:

“El importante papel de las ONGs en las revelaciones sobre violaciones de derechos humanos experimentadas por personas vulnerables y en el facilitamiento de su acceso a la justicia debe ser reorganizado de forma oficial. Esto sería consistente con el principio de efectividad en el que se basa la Convención”¹⁶⁴⁰ (traducción del autor).

La regulación de los roles positivos y negativos de los entes no estatales no implica que las responsabilidades estatales puedan eludirse. Por el contrario, sugiere que la promoción no estatal de los derechos y garantías humanas está permitida, bien en relación con el Estado o frente a amenazas no estatales. En consecuencia, lejos de debilitar el sistema *integral* de derechos humanos que trasciende barreras formales, la participación no estatal lo fortalece.

Lógicamente, los entes no estatales pueden cometer errores o actuar con el propósito de promover su agenda partisana (si ella existe), y a pesar de sus afirmaciones en sentido contrario sus acciones pueden ser ilegales e incluso incompatibles con la protección de la dignidad humana. Por ello, deben ser controlados democráticamente por otros actores privados y por entes públicos, como exige el imperio del derecho, teniendo en cuenta las garantías y limitaciones de este principio y fundamentos, principios y normas del *corpus iuris* humanitario y del derecho de gentes.

En términos generales, puede decirse que así como cada sistema jurídico puede tener limitaciones, la participación cada actor también puede adolecer de ciertos problemas, y cada actor tiene con frecuencia además fortalezas únicas (flexibilidad, etc.). Por estos motivos, la interacción y cooperación de diversas entidades en pos de la protección de la dignidad humana es tan importante. Si esa interacción es guiada por una coordinación y cooperación centrada en bienes jurídicos legales y los actores se asisten mutuamente para alcanzar metas comunes, es posible que haya parámetros comunes y una protección efectiva en un espacio jurídico global integrado.¹⁶⁴¹ Esto justifica que se de la posibilidad de que participen actores que pueden

¹⁶³⁹ Vid. Janneke Nijman, “Sovereignty and Personality: a Process of Inclusion”; Andrea Bianchi, op. cit., pp. 186-190; Luis Pérez-Prat Durbán, op. cit., pp. 34-38.

¹⁶⁴⁰ Vid. Consejo de Europa, “Access to justice for persons with disabilities: Commissioner Hammarberg intervenes before the Strasbourg Court”, 18/10/11, disponible en: http://www.coe.int/t/commissioner/news/2011/111018tpiromania_en.asp (última revisión: 13/03/2012).

¹⁶⁴¹ Vid. cómo los actores no estatales pueden urgir al Estado a cumplir con sus obligaciones humanitarias y contribuir con la promoción de las garantías humanitarias, como por ejemplo se examina en: Daniel Thürer, op. cit.,

contribuir a promover bienes jurídicos comunes y que se reconozcan los papeles y funciones que pueden tener diversas entidades en cuanto a la promoción del disfrute de los derechos y garantías humanas. Al respecto, es pertinente citar un pasaje relacionado con la “[c]ooperación con la sociedad civil” que se encuentra en la Observación General N° 5 del Comité de los Derechos del Niño:

“La aplicación de la Convención es una obligación para los Estados Partes, pero es necesario que participen todos los sectores de la sociedad, incluidos los propios niños. El Comité reconoce que la obligación de respetar y garantizar los derechos del niño se extiende en la práctica más allá del Estado y de los servicios e instituciones controlados por el Estado para incluir a los niños, a sus padres, a las familias más extensas y a otros adultos, así como servicios y organizaciones no estatales. El Comité está de acuerdo, por ejemplo, con la Observación general No 14 (2000) del Comité de Derechos Económicos, Sociales y Culturales sobre el derecho al disfrute del más alto nivel posible de salud, en cuyo párrafo 42 se establece que: “Si bien sólo los Estados son Partes en el Pacto y, por consiguiente, son los que, en definitiva, tienen la obligación de rendir cuentas por cumplimiento de éste, todos los integrantes de la sociedad -particulares, incluidos los profesionales de la salud, las familias, las comunidades locales, las organizaciones intergubernamentales y no gubernamentales, las organizaciones de la sociedad civil y el sector de la empresa privada- tienen responsabilidades en cuanto a la realización del derecho a la salud. Por consiguiente, los Estados Partes deben crear un clima que facilite el cumplimiento de esas responsabilidades”.¹⁶⁴²

Es importante enfatizar que la necesidad de proteger a los seres humanos frente a violaciones no estatales, aparte de basarse en consideraciones jurídicas y extra-jurídicas, debe tener en cuenta la razón de ser del *corpus iuris* humanitario: la protección de la dignidad humana frente a todas las amenazas en su contra y frente a todas las entidades que desconozcan el valor inherente de los miembros de la humanidad, para aliviar el sufrimiento de las víctimas y tener solidaridad con ellas. Todas estas cuestiones se refieren a los seres que son protegidos, siendo por ello equívoco ignorar jurídicamente el sufrimiento de algunas víctimas, como las de violaciones no estatales, incluso si esto se hace basado en consideraciones teóricas o políticas, desconociendo tanto que el derecho puede y debe cambiarse *de lege ferenda* si es injusto, incluso en lo atinente a asuntos sobre su protección completa, que las teorías deficientes deben ser modificadas o reemplazadas por otras más apropiadas, como el hecho de que los seres humanos deben ser protegidos de conformidad con el principio de igualdad y no discriminación, con independencia de sus afinidades políticas o ideológicas o de otras consideraciones.

No debe olvidarse que en el derecho internacional humanitario, que comparte el fundamento y fin de la protección de la dignidad humana en algunas de sus normas y contiene algunos derechos humanos, la cláusula Martens (en su versión original o en su forma adaptada a tratados contemporáneos) apela a las leyes de la humanidad y las exigencias de la conciencia

p. 44; ASIL, *Proceedings of the 92nd Annual Meeting: The Challenge of Non-State Actors*, op. cit., pp. 22-23; Elena Pariotti, op. cit., pp. 95, 98, 104-105.

¹⁶⁴² Vid. Comité de los Derechos del Niño, Observación General N° 5 (2003), *Medidas generales de aplicación de la Convención sobre los Derechos del Niño (artículos 4 y 42 y párrafo 6 del artículo 44)*, CRC/GC/2003/5, 27 de noviembre de 2003, párr. 56.

pública,¹⁶⁴³ lo que abre las puertas a abordar normativamente nuevas necesidades y problemas en el contexto de los conflictos armados para proteger a las víctimas actuales y potenciales. De igual forma, algunas normas del *corpus iuris* humanitario permiten incluir o extender la protección de todas las víctimas, por ejemplo gracias a un entendimiento apropiado de las funciones de promoción de los órganos internacionales o a través de protección indirecta. En otros eventos, la referida inclusión puede obtenerse gracias a estrategias normativas. En relación con estas ideas, cabe mencionar que la apelación a la protección de la dignidad humana también tiene una dimensión meta-jurídica, que clama no sólo por aplicaciones e interpretaciones¹⁶⁴⁴ adecuadas y justas de la *lex lata* sino además por la corrección y extensión del derecho *de lege ferenda* para permitir lidiar apropiadamente con retos nuevos o viejos que no obstante son abordados de manera insuficiente o insatisfactoria.

Que no haya dudas: como se explica a lo largo de este libro, la protección completa de la dignidad humana contra violaciones no estatales, además de permitir y alentar la promoción de la dignidad humana por estos actores cuando ellos puedan contribuir a su defensa, debe asignar deberes y capacidades jurídicas negativas a violadores potenciales (respetando el imperio del derecho y garantías fundamentales) con el fin de proteger a las víctimas. Esto impone una carga (tanto jurídica como moral) a los académicos y operadores jurídicos, quienes deben esforzarse por promover estos fines y mecanismos.

Al respecto, en la declaración del presidente del seminario sobre prácticas de buena gobernanza para la promoción de los derechos humanos que se celebró en Seúl el 15 y 16 de septiembre de 2004 se menciona que los participantes de la conferencia “resaltaron las siguientes acciones requeridas para el futuro” (traducción del autor) en lo concerniente a actores responsables, que aluden a los roles tanto positivos como negativos que pueden tener en relación con el *corpus iuris* humanitario global:

“[A]ctuar contra la impunidad de los actores estatales/no estatales, siendo conscientes de la delicadeza de las situaciones de conflicto (como a través de tribunales efectivos, comisiones de verdad y reconciliación o instituciones nacionales de derechos humanos) [...] promover acciones

¹⁶⁴³ Vid. Frits Kalshoven y Liesbeth Zegveld, op. cit., pp. 22, 85, 132, 156, 171; Erika R. George, “The Criminal Enterprise? Corporations and International Human Rights Issues of Accountability and Liability at Home and Abroad”, en Willem J.M. Van Genugten et al. (eds.), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference*, T.M.C. Asser Press, 2009, pp. 170-171, sobre la necesidad de responder a nuevos desafíos de los actores no estatales y la relación de esta respuesta con los fines y contenido de la “cláusula Martens”.

¹⁶⁴⁴ Debe tenerse en cuenta que la interpretación siempre está presente cuando se aplica el derecho. Al respecto, ver Antonio Remiro Brotons et al., *Derecho Internacional*, Tirant Lo Blanch, 2007, pp. 579, 596.

conjuntas entre actores nacionales y transnacionales, incluyendo al sector privado”¹⁶⁴⁵
(traducción del autor).

Los seres humanos no son ni angelicales ni demoníacos, aunque algunos se asemejan más a arquetipos de uno de esos extremos que a otros entre ellos. Lo mismo puede decirse de todos los entes no estatales, que pueden contribuir¹⁶⁴⁶ o bien a la protección y promoción de la dignidad humana o a su violación, no siendo esos papeles inmutables y, debido a la libertad de acción, ciertamente un ente puede tener ambos roles simultáneamente o incluso “perder la gracia” o “redimirse” y cambiar su interacción con esa protección: este es el motivo por el cual son tan importantes los mecanismos destinados a procurar generar un cambio de cultura, comportamiento y actitud, como los examinados en el Capítulo 8, entre otros, siendo necesario esforzarse para intentar hacer que violadores actuales o potenciales se conviertan en protectores y promotores de la dignidad humana, como exige la figura de la complicidad silenciosa (ver el Capítulo 7, supra). Sobre esta posibilidad y la necesidad de cambio, el Secretario General Ban Ki-moon consideró que:

“[Las] actividades [de las empresas] tienen un gran impacto en la vida de las personas y en asuntos globales clave [...] Nuestro reto es asegurarnos de que las empresas no sean parte del problema, sino la fuente de soluciones”¹⁶⁴⁷ (traducción del autor).

Todas esas dimensiones deben ser tenidas en cuenta por el derecho de forma que se anticipen todas las posibles interacciones con el fin de cumplir su mandato de proteger de manera efectiva a los seres humanos y su valor inherente e inalienable incondicional y universal.

En líneas generales, desde un punto de vista filosófico y teórico, puede decirse que insistir en la falacia de la exclusividad estatal de la autoría de las violaciones de derechos humanos no sólo ignora la realidad sino el hecho de que el Estado es una ficción, una construcción opera precisamente a través de actores no estatales, como revelan los análisis desagregados del Estado y otros entes. Adicionalmente, una fijación en el Estado que puede calificarse de casi obsesiva ignoraría que a través de la historia, incluso en épocas en las que prevalecían teorías que apoyaban la idea de una supuesta participación internacional exclusiva del Estado, los actores no estatales han tenido poder y sus acciones han tenido un impacto

¹⁶⁴⁵ “Chairman’s Statement”, Seminario sobre “Good Governance Practices for the Promotion of Human Rights”, organizado por la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos y el Programa de las Naciones Unidas para el Desarrollo en cooperación con el gobierno de la República de Corea, Seúl, 2004, p. 5.

¹⁶⁴⁶ Vid. Immanuel Kant, *Perpetual Peace, a Philosophical Essay*, op. cit., pp. 152-155; Fernando Mires, *El fin de todas las guerras: Un estudio de filosofía política*, LOM ediciones, 2001, pp. 118-119 (no estoy de acuerdo con algunas de las ideas del último autor).

¹⁶⁴⁷ Vid. Secretario General de las Naciones Unidas, *Secretary-General Stresses Role of Businesses in Support of Human Rights*, SG/SM/13869 HR/5073, disponible en: <http://www.un.org/News/Press/docs//2011/sqsm13869.doc.htm> y <http://www.business-humanrights.org/Links/Repository/1009055> (última revisión de ambas páginas: 13/03/2012).

considerable en el derecho y la sociedad. En tercer lugar, la concepción criticada ignora que en la actualidad (y también en otros tiempos) hay actores no estatales con innegables relevancia y capacidad de afectar el disfrute de derechos y garantías derivadas de la dignidad humana (corporaciones, carteles del narcotráfico, mafias, etc.).

Si se afirma que los Estados pueden violar los derechos humanos, y se reconoce que aquellos entes actúan por medio de actores no estatales (desde una perspectiva extrajurídica), que algunos actos de tales actores son atribuibles a los Estados en términos jurídico-formales y que los entes con el poder de violar derechos y garantías humanas deben ser controlados y frenados, el hecho de que otros actores tengan poder o la misma o similar capacidad que los Estados para lastimar seres humanos *de facto* hace que sea insostenible, contradictorio, peligroso e irrazonable, incluso monstruoso, no proteger a víctimas actuales o potenciales frente a las violaciones no estatales. Si los entes no estatales han sido capaces de influir en resultados y decisiones de la sociedad internacional y de impactar en el comportamiento estatal, incluso durante el apogeo del período “westfaliano”, cuánto más debe reconocerse y tratar adecuadamente su capacidad de afectar valores y fundamentos jurídicos, como la dignidad humana, hoy día, cuando se acepta con claridad que los entes no estatales pueden ser destinatarios del derecho de gentes y que la dignidad humana debe ser protegida de manera universal e integral, con efectos frente a cualquier agresor potencial.

A la luz de las consideraciones expuestas en esta tesis, ¿quién puede negar que hay violaciones que se pueden cometer principalmente, frecuentemente o fácilmente con participación de entes no estatales? Esto exige, en consecuencia, que tales violaciones sean prevenidas o se responda adecuadamente a las mismas para proteger a las víctimas, debido a que la necesidad de regular jurídicamente el comportamiento de entes con capacidades de afectar intereses jurídicos y la necesidad de que sean responsables así lo exigen.

En consecuencia, resulta injustificado y poco acertado (pues en caso contrario se fomentan la impunidad y re-victimización, o las víctimas son abandonadas) ignorar las amenazas no estatales, debido a su relevancia jurídica y al sufrimiento humano que pueden causar. En este sentido, puede pensarse sobre cómo tratar directamente o con la mediación de las autoridades aquellas amenazas, como se exige en algunas normas internacionales, como en aquellas que protegen a los individuos de algunos entes con evidentes poderes y capacidad de abusar de ellos (ej. corporaciones, grupos armados, etc.), en las normas que regulan derechos que deben ser protegidos en situaciones de interacción frecuente con entes no estatales por razones fácticas o normativas (ej. derechos de las personas con discapacidad en relación con algunas

autoridades funcionales o en su lugar de trabajo)¹⁶⁴⁸, o en normas alusivas a contextos en los que los individuos son vulnerables de manera especial o frecuente frente a entes no estatales, como los de violencia doméstica o las relativas a protección de los niños.¹⁶⁴⁹

Al respecto, las siguientes palabras de Antonio Cançado revisten especial interés debido a que resaltan tanto la necesidad de enfrentar problemas reales de los seres humanos relacionados con amenazas no estatales (dimensión humana y meta-jurídica) como el sustrato normativo que exige la protección de esas personas (directa o indirectamente, de conformidad con el respeto de los principios de efectividad e igualdad, a la luz de la protección de la dignidad humana):

“En dos otros casos recientes, *A versus Reino Unido* (1998) y *Z y Otros versus Reino Unido* (2001), la Corte Europea afirmó la obligación del Estado demandado de tomar medidas positivas para proteger los niños contra malos tratos, *inclusive los infligidos por otros individuos* [...] Es precisamente en este ámbito privado dónde frecuentemente se cometen abusos contra los niños, ante la omisión del poder público, - lo que requiere así una protección de los derechos humanos del niño *erga omnes*, o sea, inclusive en las relaciones entre particulares (*Drittwirkung*).”

Es éste un contexto en que, en definitivo, asumen especial relevancia las obligaciones de protección *erga omnes*. El fundamento para el ejercicio de dicha protección se encuentra en la propia Convención Americana sobre Derechos Humanos. La obligación general [...] de respetar y hacer respetar los derechos consagrados - inclusive los derechos del niño, como estipulado en el artículo 19 - requiere del Estado la adopción de medidas positivas de protección (inclusive para resguardar el rol preponderante de la familia, previsto en el artículo 17 de la Convención, en la protección del niño [...]), aplicables *erga omnes*. De ese modo, el artículo 19 de la Convención pasa a revestirse de una dimensión más amplia, protegiendo los niños también en las relaciones inter-individuales”¹⁶⁵⁰ (subrayado añadido).

A la luz de lo que se ha dicho, puede afirmarse que es inútil negar que los entes no estatales pueden violar derechos y garantías humanas o participar en su violación, y que la relevancia jurídica de esa conducta debe hacer que la misma tenga una respuesta jurídica que contemple la protección del ser humano como su meta, existiendo en la actualidad normas y prácticas jurídicas que buscan brindar esa protección directa o indirectamente, y además hay reconocimientos doctrinales y oficiales de la necesidad de esta protección. En este sentido, conviene examinar por ejemplo el siguiente pasaje de la Declaración y Programa de Acción de Viena:

“La Conferencia Mundial de Derechos Humanos manifiesta asimismo su consternación y su

¹⁶⁴⁸ Vid. el artículo 3 común a los Convenios de Ginebra sobre Derecho Internacional Humanitario de 1949 y el Protocolo II adicional a estos Convenios; Principios Rectores sobre las empresas y los derechos humanos: puesta en práctica del marco de las Naciones Unidas para “proteger, respetar y remediar”, A/HRC/17/31, 21 de marzo de 2011; *Proteger, respetar y remediar: un marco para las actividades empresariales y los derechos humanos*, A/HRC/8/5, op. cit.; Normas sobre las responsabilidades de las empresas transnacionales y otras empresas comerciales en la esfera de los derechos humanos; Estatuto de Roma de la CPI; Estatutos del Tribunal Penal Internacional para la Ex Yugoslavia y del Tribunal Penal Internacional para Ruanda, entre otros.

¹⁶⁴⁹ Vid. artículos 1 y 3 de la “Convención de Belém do Pará”; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, op. cit., pp. 74-75, entre otros.

¹⁶⁵⁰ Vid. Voto concurrente del juez A.A. Cançado Trindade a: Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-17/2002, *Condición Jurídica y Derechos Humanos del Niño*, 28 de agosto de 2002, párrs. 63-64.

condena porque en distintas regiones del mundo se siguen cometiendo violaciones manifiestas y sistemáticas de los derechos humanos y se siguen produciendo situaciones que obstaculizan seriamente el pleno disfrute de todos los derechos humanos. Esas violaciones y obstáculos, además de la tortura y los tratos o penas crueles, inhumanos y degradantes, incluyen las ejecuciones sumarias y arbitrarias, las desapariciones, las detenciones arbitrarias, el racismo en todas sus formas, la discriminación racial y el apartheid, la ocupación y dominación extranjeras, la xenofobia, la pobreza, el hambre y otras denegaciones de los derechos económicos, sociales y culturales, la intolerancia religiosa, el terrorismo, la discriminación contra la mujer y el atropello de las normas jurídicas¹⁶⁵¹ (subrayado añadido).

Las frases subrayadas se refieren a conductas que contrarían los derechos humanos y, en consecuencia (si esos derechos están debidamente reconocidos en el derecho positivo) la dignidad humana (como lo hacen todas las violaciones de derechos verdaderamente fundados sobre la dignidad humana y que merezcan llamarse derechos humanos), y son cometidos con frecuencia o de forma evidente por entes no estatales.

En este sentido, por ejemplo, encontramos que actos de racismo, xenofobia y discriminación son cometidos frecuentemente (pero no exclusivamente, dada la posibilidad de que virtualmente todos los derechos sean afectados negativamente por Estados y entes no estatales)¹⁶⁵² por individuos y grupos no estatales; que la pobreza y la prevención del goce de derechos económicos, sociales y culturales *u otros* derechos humanos puedan tener como factor relevante de su causa comportamientos no estatales; que hay actos de terrorismo cometidos por entes no estatales, los cuales violan derechos humanos;¹⁶⁵³ que las mujeres, junto a los niños, migrantes, personas con discapacidad y otros (siendo apropiado identificar a personas con vulnerabilidad frecuente pero erróneo excluir a otros, incluyendo a quienes sean víctimas incluso si no han sido victimizados de manera frecuente ni identificados como vulnerables por parte de grupos ideológicos) son con frecuencia víctimas de entes no estatales e incluso son beneficiarios de protección indirecta ordenada o recomendada por órganos supervisores internacionales y en virtud de instrumentos internacionales; y que el imperio del derecho no es aplicable únicamente a las autoridades (incluyendo a las autoridades no estatales) sino que se extiende a toda entidad cuya conducta sea (y deba ser, dada su capacidad de afectar bienes jurídicos) regulada por el derecho.

Tanto los mecanismos y normas de protección directa como los de protección indirecta obedecen al mismo fundamento jurídico y revelan cómo los rótulos y términos destrucción y abuso no estatal de derechos humanos alude a la capacidad de actores no estatales de violar derechos humanos y victimizar individuos (tanto como pueden hacerlo los Estados), como

¹⁶⁵¹ Vid. Declaración y Programa de Acción de Viena, Conferencia Mundial de Derechos Humanos, Viena, 14 a 25 de junio de 1993, párr. 30 de la Parte I.

¹⁶⁵² Vid. secciones 1.3 y 2.3, *supra*.

¹⁶⁵³ Cf. Comisión Interamericana de Derechos Humanos, *Informe sobre terrorismo y derechos humanos*, op. cit., párrs. 2, 5, 33 y 48, *inter alia*.

parece aceptarse en decisiones internacionales, práctica y trabajos que se refieren a los abusos de derechos humanos cometidos por actores no estatales como contrarios a derechos humanos internacionalmente reconocidos.¹⁶⁵⁴ Negar que los entes no estatales pueden incurrir en comportamientos negativos jurídicamente relevantes que han de ser abordados normativamente es inconsistente y riesgoso, porque puede conducir a aquellos que creen en estas teorías a negarse a usar el derecho en formas en las que puede y debe ser usado para proteger a los individuos frente a amenazas no estatales de forma directa o indirecta o incluso puede llevarlos a no modificar y mejorar el derecho *de lege ferenda* en relación con este objetivo.

La referida inconsistencia se evidencia tanto por la existencia de deberes positivos de protección y facilitamiento de derechos humanos que tienen efectos horizontales en relación con actores no estatales como por el hecho de que el derecho penal internacional, como mencionó Lauterpacht, puede proteger derechos humanos en ocasiones, siendo claro hoy día que incluso los miembros de grupos no estatales pueden violar el derecho, y no únicamente agentes estatales.¹⁶⁵⁵ Lógicamente, ignorar la contribución y promoción de entes no estatales también es erróneo, pues estos entes pueden incrementar la democratización y efectividad de mecanismos y normas al contribuir con su diseño o aplicación, lo cual hace necesario reconocer el posible nivel de cooperación multi-nivel y de múltiples actores en la protección de bienes jurídicos comunes o compartidos.

En cuanto a la violabilidad de la dignidad humana y las normas que la protegen por parte de entes no estatales, no puede negarse que hay niños reclutados por guerrillas, otros grupos armados no estatales o que hay personas afectadas por ellos; que hay habitantes de lugares afectados por problemas ambientales, de seguridad y otra índole con implicaciones de derechos humanos causados en no poca medida por corporaciones, grupos armados u otros entes; que hay poblaciones afectadas negativamente por decisiones y operaciones de organizaciones internacionales;¹⁶⁵⁶ que hay víctimas de *bullying* cuyos victimarios desconocen su dignidad y derechos humanos; que hay piratas que tratan a las tripulaciones y a otros como medios para obtener sus fines privados; que hay individuos acusados o condenados injustamente por ONGs que se comportan de forma casi fanática y mienten sobre la responsabilidad de alguien; o que *todas* las personas víctimas de violencia doméstica (adultos y niños, mujeres y hombres), los extranjeros víctimas de ataques xenófobos y bandas racistas, los niños abusados de forma

¹⁶⁵⁴ Vid. Parte I, *supra*.

¹⁶⁵⁵ Vid. Hersch Lauterpacht, op. cit., pp. 35-37; <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (última revisión: 13/03/2012).

¹⁶⁵⁶ Vid. por ejemplo Tribunal Europeo de Derechos Humanos, *Caso Sufi y Elmi Vs. Reino Unido*, Sentencia, 28 de junio de 2011, párr. 82; José Manuel Cortés Martín, op. cit., pp. 26-27. 53-58, 131, 137-143.

impune por su vulnerabilidad, o las víctimas de un criminal cuya violación afecta los intereses de la comunidad ~~internacional~~ mundial deben ser protegidos de forma efectiva y no han de ser abandonados por el derecho para que éste cumpla con su propósito de proteger el valor inherente de todo individuos y para que no se fomente el deseo peligroso de justicia por mano propia; o que en ocasiones los Estados no desean o son incapaces de proteger protección frente a entes no estatales, lo que hace que sea necesario autorizar a otros Estados, entes y niveles de gobernanza otorgar o promover esa protección.

En ocasiones, aparte de estar autorizados para promover la protección de la dignidad humana simultáneamente a quienes deben hacer algo (incluso a través de técnicas de persuasión y contactando a la entidad involucrada en una violación con una autorización cuya extensión varía según cada caso), hay actores y autoridades, como las del ordenamiento jurídico del derecho de gentes, que tienen autorización para operar cuando las características de un caso lo requieran, debido a que es importante que se ofrezcan mecanismos que reflejen la especial relevancia que tienen todas las violaciones para el ordenamiento jurídico, sin que sea posible invocar esto como excusa para olvidar que todas las violaciones (no sólo las estatales o las no estatales) deben ser tratadas de forma efectiva.

Por estos motivos, no puede ignorarse que aparte de su impacto negativo, los entes no estatales son con frecuencia agentes positivos de la promoción de la dignidad humana, como por ejemplo las ONGs que revelan y condenan violaciones de entes estatales o no estatales con el fin de avergonzar a los implicados y hacer que cambien patrones de conducta; las organizaciones internacionales que procuran regular y supervisar el comportamiento de entes no estatales que pueden violar potencialmente derechos humanos; o las corporaciones que crean regulaciones privadas y adoptan prácticas que no sólo previenen violaciones sino que además promueven y mejoran el respeto y disfrute de derechos y garantías derivadas de la dignidad humana merced a la nueva cultura, entre otros.

Esta contribución de actores no estatales y de la cooperación de múltiples actores, que puede ser simultánea según la teoría de los bienes jurídicos globales, es necesaria cuando se observa que hay entidades como organizaciones criminales transnacionales, grupos de piratas o redes terroristas que no sólo forjan alianzas sino además redes y operan aprovechándose de oportunidades ofrecidas en el contexto global. Esto exige respuestas de múltiples actores que trabajen conjuntamente para proteger intereses jurídicos comunes, siendo la dignidad humana un valor e interés prevalente en los ordenamientos jurídicos. Adicionalmente, la formación de vínculos entre ordenamientos jurídicos y actores que reconocen valores jurídicos comunes debe

hacer que ellos reconozcan que proteger estos valores sólo es posible si se integran, coordinan y cooperan, para que no existan vacíos o posibilidades de impunidad o protección ineficaz.

Un estudio empírico con un análisis desagregado puede mostrar cómo, en últimas, todas las violaciones son cometidas por individuos, y además cómo algunas violaciones tienen mayores probabilidades de cometerse debido a las posibilidades que ofrecen ciertos grupos. Por este motivo, reconocer que las responsabilidades son simultáneas y no exclusivas (ej. un agente estatal y su Estado pueden ser responsables simultáneamente,¹⁶⁵⁷ y lo mismo se predica de criminales de guerra y sus grupos armados, por ejemplo) es un primer paso ineludible al diseñarse un marco de protección completa de la dignidad humana contra todas las violaciones posibles, que ha de contar con garantías de no reparación, que serán completas e integrales únicamente si *todas* las entidades involucradas en una violación están obligadas a participar en su provisión (ver Capítulo 7, *supra*).

Además de hacer que participen en la provisión de reparaciones a las víctimas cuando hayan cometido violaciones de derechos humanos u otras garantías que protejan la dignidad humana o cuando hayan participado en ellas, y debido al impacto positivo que puede tener la participación no estatal en la mejora de la protección de la dignidad humana (ver Capítulos 1, 4 y 8), es necesario que se desarrolle un marco que permita y recoja su contribución, bien sea formal o informal, asegurándose de que así como la creación de deberes y otras capacidades jurídicas a los entes no estatales para proteger a los individuos frente a ellos no hace que los deberes estatales sean menos rigurosos, aquella contribución, voluntaria o no, sea *complementaria* a los actos positivos de otros actores que exija el derecho, de la misma manera en que el trabajo de ONGs o la promoción de las garantías humanitarias y su disfrute por parte de entes no estatales, que es importante y debe ser apreciado, como se revela en estudios sobre bienes públicos y en otros análisis, ha de complementar las acciones públicas basadas en deberes positivos de protección y facilitación de derechos económicos, sociales y culturales u otros derechos humanos.

En consecuencia, y dadas las posibilidades de cooperación entre actores y la ineficacia de respuestas aisladas, es necesario diseñar e implementar una estrategia que integre y coordine las posibles acciones y coordinaciones de actores y sistemas normativos (jurídicos o no) que se ocupan de la protección de la dignidad humana, con el fin de enfrentar los desafíos de entes que cooperan entre sí para cometer violaciones en el contexto globalizado,¹⁶⁵⁸ como se discute en los Capítulos 4 y 8. En caso contrario, las iniciativas estarán condenadas al fracaso,

¹⁶⁵⁷ Vid. Capítulo 7, *supra*.

¹⁶⁵⁸ Vid. Consejo de Seguridad, Resolución 1373 (2001); Capítulo 8 y sección 4.1, *supra*.

debido a su aferramiento a formalismos que ignoran cómo en la práctica la protección de la dignidad humana es la misma, lo que exige la comprensión y coordinación de mecanismos que permitan y procuren proteger la dignidad humana y se encuentren en varios sistemas normativos, públicos o de *lex privata*, e incluso en contextos no normativos.

Esta última idea se relaciona a su vez con la noción de que *todo* derecho humano, *stricto* o *lato sensu*, y toda garantía humanitaria, puede ser afectada (negativamente por violación o positivamente por defensa) por actores no estatales, bien sea que aquellas garantías se refieran a derechos sociales, civiles o de otra índole (que comparten ciertas características y tienen algunas diferencias, a pesar de lo cual todos los tipos son verdaderos derechos humanos). Esto es posible, entre otras razones, debido a las posibilidades normativas y fácticas de que entes no estatales violen o participen en la violación de todo derecho, como se examina en los Capítulos 1 y 2, lo cual hace que sea desaconsejable redactar listas exhaustivas de derechos que deban ser protegidos frente a aquellos entes, siendo mejor regular obligaciones generales que requieren protección frente a entes no estatales cuando quiera que ellos puedan victimizar a alguien, las que deben ser complementadas en primer lugar por normas especializadas que ofrezcan una regulación conforme con los derechos y las necesidades específicas de ciertos individuos, o que tenga en cuenta los retos concretos de determinados actores,¹⁶⁵⁹ y en segundo lugar por deberes y otras capacidades jurídicas asignadas a entes no estatales (ver los Capítulos 5 y 6), las cuales deben cumplir con diversos requisitos que persiguen garantizar el respeto de los derechos fundamentales que tengan los violadores potenciales y del imperio del derecho.

Así como los entes no estatales pueden afectar negativamente el disfrute de todos los derechos humanos, debe decirse que potencialmente todo ente no estatal puede violar derechos humanos, incluyendo a aquellos que parecen contribuir a su promoción. En este sentido, por ejemplo, las ONGs pueden acusar falsamente a alguien de violar derechos humanos o incluso apoyar políticamente a grupos que cometen violaciones. Esto no niega que haya actores identificados como violadores frecuentes o potenciales en virtud de su poder, práctica o dinámicas, y ciertamente regulaciones y estudios especializados pueden ser necesarios frente a ellos, para asegurarse de que los seres humanos están lo suficientemente protegidos en términos jurídicos de todos los violadores potenciales, o al menos en términos abstractos, para que la regulación sea implementada por mecanismos que se desencadenan cuando una situación de violación en la que se involucren los actores se presente.

Igualmente, los entes estudiados y regulados por su posibilidad de cometer con frecuencia o de forma especialmente preocupante violaciones también pueden contribuir de

¹⁶⁵⁹ Vid. Introducción y sección 1.2, *supra*.

forma positiva a la mejora de la protección de los derechos humanos, como se observa en estudios concernientes al impacto positivo que pueden tener sobre la efectividad de los bienes jurídicos humanitarios las actividades de corporaciones con una cultura respetuosa de los derechos humanos o, mejor aún, relativa a su promoción.¹⁶⁶⁰

Debido a que se exige que los individuos sean protegidos frente a todos los actores, y a que como revelan los análisis desagregados los individuos llevan a cabo los actos de actores con forma de grupo, es importante recordar cómo diversos instrumentos de derechos humanos claman por la protección contra violaciones que se presenten en ámbitos, esferas o relaciones que se consideren como privados por parte de algunos.¹⁶⁶¹ Sin embargo, las medidas que implementan aquella protección deben respetar los derechos fundamentales de los presuntos agresores (incluyendo la garantía de la presunción de inocencia), y no debe ignorarse que los derechos esenciales pueden colisionar y que las respectivas colisiones o tensiones deben resolverse con métodos como el de la aplicación del test de proporcionalidad (cuando sea aplicable y se respeten las garantías pertinentes),¹⁶⁶² siendo necesario evitar favorecer concepciones que no sean parte de los derechos humanos positivos y constituyan ideas políticas controvertidas que sean esgrimidas con el fin de intentar que prevalezcan sobre verdaderos derechos humanos y que pueden atacar la dignidad humana de algunos individuos o eludir de forma ilegítima procesos democráticos y consentimientos legítimos y locales (al no justificarse ignorarlos).

No puede olvidarse que el derecho es instrumental. Si alguien está en desacuerdo con esta afirmación en un plano teórico, puede respondersele que el derecho se usa en todo caso de esta forma en la práctica. Precisamente por esta razón, los académicos y operadores jurídicos deben comprometerse a que el derecho y sus doctrinas sirvan a los seres humanos (o, como mínimo, a que no los lastimen, aunque estimo que esto es insuficiente), y de hecho hay autores que claman por colocar a los individuos en el propio centro del derecho y, en consecuencia, de todas las actividades reguladas por el derecho, incluyendo a la economía.¹⁶⁶³ Esto puede ser visto como contrario a la separación entre el derecho y las consideraciones extra-jurídicas por algunos, pero aunque esta separación existe hasta cierto punto la misma no es absoluta, pues a

¹⁶⁶⁰ Vid. Elena Pariotti, op. cit., pp. 104-105.

¹⁶⁶¹ Vid. Tribunal Europeo de Derechos Humanos, Sección Cuarta, *Caso Hajduová Vs. Eslovaquia*, Sentencia, op. cit., párr. 45; Voto concurrente del juez A.A. Cançado Trindade a: Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-17/2002, op. cit., párrs. 58, 61-62, 64, Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-17/2002, op. cit., párrs. 87, 90; párr. 9 de la Opinión; sección 1.1, *supra*.

¹⁶⁶² Vid. sección 1.1, *supra*.

¹⁶⁶³ Vid. Olivier De Schutter, Relator Especial de las Naciones Unidas sobre el Derecho a la Alimentación, "CAP reform must put an end to dumping" – UN expert, 12 de octubre de 2011, disponible en: <http://www.srfood.org/index.php/en/component/content/article/1-latest-news/1674-cap-reform-must-put-an-end-to-dumping-un-expert> (última revisión: 14/03/2012).

pesar de que algunos académicos han tratado de argumentar que el derecho es un sistema “puro”, el mismo no es hermético y en la práctica aquello en lo que creen los operadores jurídicos puede traducirse (de manera correcta o incorrecta, según diversos criterios) a la práctica jurídica merced a oportunidades que ofrecen múltiples interpretaciones permisivas o normas abiertas, que hacen que la elección consciente o inconsciente de los operadores tenga mayor o menor relevancia.

Adicionalmente, las consideraciones extra-jurídicas y meta-jurídicas deben ser tenidas en cuenta o analizadas (de forma crítica) por practicantes y académicos responsables desde una perspectiva de la *lex ferenda*, siendo a mi juicio un deber ético y cívico de quienes tengan un conocimiento jurídico especializado y competencias pertinentes intentar hacer que el derecho responda a la necesidades humanas y a la realidad, aunque haciendo que las primeras siempre prevalezcan sobre la segunda e incluso las guíen a través del derecho. Por otra parte, los sistemas normativos no jurídicos y los actores sin derechos de participación formal reconocidos pueden interactuar e impactar sobre asuntos jurídicos y sobre la manera en que son protegidos los bienes jurídicos, como se menciona en este libro.

Por las anteriores razones, es necesario pensar sobre cómo proteger mejor a las víctimas de todas las violaciones cometidas y potenciales y, como se mencionó previamente, sobre cómo los distintos niveles jurídicos, los mecanismos y el criterio de efectividad permiten elegir diferentes estrategias de respuesta a ciertas amenazas, siempre y cuando se brinde protección efectiva preventiva y de respuesta a las víctimas cuando no se exijan otras medidas, lo cual es necesario¹⁶⁶⁴ porque como seres humanos todas las víctimas tienen un valor inherente que es incondicional y exige una protección efectiva y no discriminatoria contra toda violación, estatal o no en su origen (formal). Algunas normas, prácticas y jurisprudencia del derecho internacional humanitario, el derecho de los refugiados, el derecho penal y los derechos humanos, entre otras ramas de diversos niveles jurídicos, ya ofrecen diversos mecanismos de protección directa o indirecta contra amenazas no estatales, y las restantes deben seguir el ejemplo.

Considero que los desafíos a la protección de la dignidad humana han existido a través de la historia y que los problemas especiales en el contexto global en relación con la protección de los seres humanos frente a entes no estatales hacen que sea necesario proteger jurídicamente su dignidad. La doctrina e incluso la acción jurídica han comenzado a enfrentarse a este reto, como menciona Elena Pariotti.¹⁶⁶⁵

¹⁶⁶⁴ Vid. Capítulos 3 y 4, *supra*.

¹⁶⁶⁵ Vid. Elena Pariotti, *op. cit.*

Precisamente porque la protección efectiva de la dignidad humana es una meta y la lógica subyacente a su garantía integral así lo exige, así como es posible ofrecer en ocasiones mecanismos alternativos de manera lícita, también es necesario examinar la situación de personas y derechos vulnerables o de actores (en sus papeles negativos y positivos) desde una perspectiva tanto jurídica como extra-jurídica, para diseñar de manera apropiada una regulación que tenga en cuenta sus particularidades, desafíos y necesidades, de la misma manera en que las especificidades de los violadores deben ser tenidas en cuenta por las reglas secundarias sobre responsabilidad.

Naturalmente, este enfoque no debe negar sino mantener y reforzar la protección general contra toda amenaza, que se hace eco de la idea de que las regulaciones especializadas son compatibles con garantías más amplias de los derechos humanos, idea expuesta en la Parte I.¹⁶⁶⁶ En consecuencia, no deben ignorarse los estudios y acciones jurídicas (normativas o relativas a la implementación) especializadas que se ocupen de las necesidades o retos especiales de ciertos derechos o actores, siendo los trabajos generales como el presente un simple punto de partida (naturalmente abierto a críticas y a la discusión, aunque siendo necesario que se resalte la importancia de un asunto cuyo tratamiento jurídico no puede ser aplazado, por el bien de los seres humanos).

Los anteriormente referidos estudios especiales, realizados en la doctrina y algunos foros jurídicos, que se ocupan por ejemplo de la responsabilidad o deberes de las corporaciones, los grupos armados o las organizaciones internacionales, entre otros actores, constituyen una tarea especializada en cuya realización es necesario tener presente todas las características pertinentes, exigidas y compatibles del *corpus iuris* humanitario general y las justificaciones (como las presentadas en este libro, abiertas a discusión) que informan y justifican estudios, regulaciones y mecanismos de protección especializados, que deben ser elaborados analizándose cómo pueden protegerse los seres humanos frente a algunos actores (o todos ellos) a la luz de las vulnerabilidades especiales de los individuos o de las dificultades que supone proteger a las personas frente a tales actores, como por ejemplo los retos de los grupos corporativos y su responsabilidad limitada o su “libertad de movimiento a través de ordenamientos jurídicos” (traducción nuestra), como comenta Pariotti, o las características particulares de la naturaleza funcional de las organizaciones internacionales, que condiciona la regulación de su responsabilidad.¹⁶⁶⁷

¹⁶⁶⁶ Vid. sección 1.3, *supra*.

¹⁶⁶⁷ Vid. Elena Pariotti, *op. cit.*, p. 98.

Con todo, la meta compartida de proteger la dignidad humana frente a todas las amenazas, incluyendo tanto las estatales como las no estatales, debería constituir un objetivo que también debería estar presentes en estudios con una naturaleza más genérica, como el presente libro, siendo todos los análisis, generales y especializados, lejos de tareas completadas, parte de un proceso en curso sobre el planteamiento de las cuestiones examinadas en estas páginas que deben ser analizadas críticamente pero aferrándose siempre a ciertos valores y principios a los que nunca debe renunciarse, como aconsejaron Mahatma Gandhi y Daniel O’Connell.¹⁶⁶⁸ Entre estos valores y principios, estimo que debe tener un lugar preeminente el respeto y la protección de la dignidad humana de forma incondicional, efectiva e integral. Incluso si el derecho es mejorado, siempre habrá espacio para que mejore aún más *de lege ferenda* o para que sea manejado mejor frente a viejos y nuevos desafíos en lo concerniente a su contenido, interpretación, cumplimiento, ejecución e implementación,¹⁶⁶⁹ por ejemplo.

Sin embargo, y precisamente por estos motivos, el estudio de este libro únicamente examina los fundamentos de mi propuesta para tratar el problema sobre cómo proteger a los seres humanos frente a los entes no estatales, y debe ser complementado por estudios más detallados de índole tanto general como específica, que se ocupen con más detenimiento de cuestiones que sólo fueron estudiadas sucinta o deficientemente en estas páginas, o incluso que no hayan sido examinadas en ellas. Estos estudios deben realizarse teniendo siempre presente la protección debida y exigida del valor intrínseco y no condicional de cada ser humano, reconocido o no por el derecho (siendo su reconocimiento un derecho humano y un deber *erga omnes* de todos los demás), siendo necesario que esa protección sea completa y no discriminatoria, como exige el derecho y como merece todo ser humano.

¹⁶⁶⁸ Vid. Mahatma Gandhi, op. cit., pp. 344-345; Manfred Steger, *Gandhi’s Dilemma: Nonviolent Principles and Nationalist Power*, St. Martin’s Press, 2000, pp. 10-11; Michael J. Nojeim, *Gandhi and King: The Power of Nonviolent Resistance*, Praeger Publishers, 2004, p. 92.

¹⁶⁶⁹ Sobre la diferencia entre cumplimiento e implementación, ver Eric A. Posner, op. cit., pp. 73-76 (debo mencionar que no estoy de acuerdo con toda la argumentación de Posner en el libro de la referencia).