

Svitlana Andreichenko, PhD in Law

VIOLATION OF INTERNATIONAL LEGAL OBLIGATION TO PROTECT AS THE BASIS OF INTERNATIONAL RESPONSIBILITY OF STATES FOR THE CONDUCT OF PRIVATE INDIVIDUALS

In this article considered a concept of international legal obligation to protect for justification the state's responsibility for the actions of individuals that violate recognized by international law values with the absence of connection between the conduct of these individuals and the state. International human rights law clearly affirms that states have a responsibility to respect, to protect and to promote human rights. This responsibility exists not only when the state directly commits a human rights violation, but also when the state fails to protect there rights under their jurisdiction from such violations.

Nowadays, the threat of international law may come not only from public but also from private entities. Taking into account the existence of a certain instrument in international law to direct bring individuals to international responsibility, we can say that these opportunities is not enough for effective protection of international legal values. That is why the question on which extent the states can and should take responsibility for the actions of individuals is becoming more acutely ¹.

Traditionally, there are the rule in international law according to which states are responsible only for their own actions. Already Hugo Grotius in his work "De jure belli ac pacis" and also Emer de Vattel on this basis followed the view that the actions of the states and individuals should be divided. The state cannot be accused of any omission or improper behavior of its subjects ².

The principle according to which the state is not responsible for any acts committed by individuals also recognized at the level of customary international law.

International Law Commission in commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 noted:

¹ Seibert-Fohr, A. (2013). Die volkerrechtliche Verantwortung des Staats fur das Handeln von Privaten: Bedarf nach Neuorientierung? *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 73, 37.

² Seibert-Fohr, A. (2013). Die volkerrechtliche Verantwortung des Staats fur das Handeln von Privaten: Bedarf nach Neuorientierung? *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 73, 40.

«In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State»¹. As a result, in case of “purely” private actions, incriminating someone’s behavior to state in general understanding, of course, is excluded.

The issue of international responsibility of states for the actions of individuals was paid a lot of attention in foreign legal science, but those problems are not explored in the doctrine of Ukrainian science of international law. Among the domestic and foreign scholars, who in his writings raised this topic, could be called Buromenskiy M.V., Boutkevitch V.G., Zaybert Fort A., Lukashuk I.I., Conforti B., Klephem A., Reynich A., Malcolm D., Santarelli N., Ziemel I.

The purpose of this paper is to determine the approach of justification the state’s responsibility for the actions of individuals that violate recognized by international law values with the absence of connection between the behavior of these individuals and the state.

Such approach may be the theory of international legal obligations of the state to provide protect.

On the one hand, the state cannot be responsible for the actions of individuals in the absence of any recent ties with public authorities. On the other hand, if the state, however, is required to take certain protective measures, and if they do not comply with the relevant obligations, they perform the same offense that arise to their international legal responsibility, even when the action causing the damage inflicted by individuals². International Law Commission indicate, that state may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is

¹ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001). *Yearbook of the International Law Commission*, vol. II, P. 2, 38.

² Seibert-Fohr, A. (2013). Die volkerrechtliche Verantwortung des Staats für das Handeln von Privaten: Bedarf nach Neuorientierung? *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 73, 42.

not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it ¹.

International norms in the human rights field have developed obligations according to which States must protect individuals' Human Rights from the actions of other particular actors and thus must prevent, punish and treat properly and accordingly any Human Rights violation even when they are committed by a non-state actor. These obligations are known as guarantee and protection obligations ², or positive obligations.

As noted by Malcolm D. Evans, although there is now an increasing willingness to recognise the responsibility of non-State actors for human rights abuses, this is still done as a matter of human rights law through the prism of State responsibility. In other words, it is because the State has not prevented, investigated or provided a remedy that there has been a human rights violation ³.

Santarelli N.C. emphasizes: «If we take into account that international law proclaims that human rights are to be universally effective, we must consider that the universality of human rights is related not only to a space or geographical consideration but also to the victims and protected subjects: human beings. Moreover, we should say, the goal of Human Rights law is the protection of every human person's rights and dignity, whether or not his rights are endangered by the actions of a State»⁴.

R. Cook notes: «International human rights law clearly affirms that States have a responsibility to respect, protect and promote human rights. This responsibility exists not only when the State directly commits a human rights violation, but also when the State fails to protect those under their jurisdiction from such violations» ⁵.

¹ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001). *Yearbook of the International Law Commission, vol. II, P. 2, 39.*

² Santarelli, N.C. (2008). Non-state actors' human rights obligations and responsibility under international law. *Revista Electronica De Estudios Internacionales, 15, 1.* <<http://www.reei.org>> (2014, September, 21)

³ Malcolm, D. E. (2004). State Responsibility and the European Convention on Human Rights: Role and Realm. In Fitzmaurice, M., Sarooshi, D. *Issues of State Responsibility before International Judicial Institutions.* The Clifford Chance Lectures, 7, 150. Oxford, Hart Publishing.

⁴ Santarelli, N.C. (2008). Non-state actors' human rights obligations and responsibility under international law. *Revista Electronica De Estudios Internacionales, 15, 1.* <<http://www.reei.org>> (2014, September, 21)

⁵ Cook, R. (1994). State Responsibility for Violations of Women's Human Rights. *Harv Hum Rts J, 7, 125, 151.*

Thus States are obliged to both respect and protect rights. They must not only refrain from committing violations themselves through their agents and apparatus, but also must ensure that rights are not abused by others. This requirement to promote human rights enjoyment in a wider sense clearly includes impeding other individuals (i.e. non-state actors) from violating human rights, though this obligation can be difficult to identify and enforce. This is illustrated by the fact that, “in principle, states are not responsible for the actions of private persons or agencies... States are responsible, however, for their failure to meet their international obligations, even when the substantive breaches originate in the conduct of private persons»¹.

It should be noted that the positive obligations were recognized initially in regulating the rights of foreigners on cases when foreign citizens not on their own fault became the victims of criminal acts in the receiving state. According to customary law, states are obliged to take appropriate measures to prevent the possibility of committing such offenses, to compensate the damage and to conduct criminal proceeding (*Case Concerning United States Diplomatic and Consular Staff in Tehran* (1980)).

Since the late 20th century we can state a similar development in the area of human rights, which begins to cover also the obligation to provide protection in relation to its own citizens. The most famous of this issue is a case of *Velasquez Rodriguez* (1988), which examined the Inter-American Court of Human Rights.

The *Court held in this case* that «... in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. 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»².

¹ Cook, R. (1994). State Responsibility for Violations of Women’s Human Rights. *Harv Hum Rts J*, 7, 125, 151.

² *Velasquez Rodriguez Case*, 29 July 1988, § 172, Inter-Am.Ct.H.R., Series C no. 4.

The Court concluded that States are required to “ensure” the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the 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 violation¹. Moreover, the obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights².

The idea is to attract to account the subjects, even if they are only indirectly responsible for human rights violations, has received increased attention in the context of the European system of human rights protection. The European Court of Human Rights has very often used the notion of positive obligation, ie the obligation of the State to protect a person against violations of human rights committed by individuals or other entities.

In some cases the Court has inferred a positive obligation from articles of the European Convention on Human Rights that were exclusively couched in terms of a negative duty³. This is the case, for instance, in relation to Article 3, the prohibition of torture and inhuman or degrading treatment (*A v UK (1998)*, *DP and JC v UK (2003)*), or Article 8 - non-interference with private and family life (*Marckx v Belgium (1979)*, *X and Y v Netherlands (1985)*, *Rees v. United Kingdom (1986)*, *Hatton and others v United Kingdom (2009)*). In some other cases, the State is expressly bound by the Convention either to abstain from itself infringing directly the human right or to prevent someone else’s infringement of the right. The best example of an express obligation of prevention is offered by Article 2 (*L.C.B. v UK (1998)*, *Osman v UK (1998)*, *Yasa v.*

¹ *Velasquez Rodriguez Case*, 29 July 1988, § 166, Inter-Am.Ct.H.R., Series C no. 4.

² *Velasquez Rodriguez Case*, 29 July 1988, § 167, Inter-Am.Ct.H.R., Series C no. 4.

³ Conforti, B. (2004). Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations. *Issues of State Responsibility before International Judicial Institutions*. The Clifford Chance Lectures, 7, 130. Oxford, Hart Publishing.

Turkey (1998), Kilic v Turkey (2000), Keenan v. the United Kingdom (2001), Mastromatteo v. Italy (2002).

The basic theoretical premise for «vicarious» or «indirect» human rights liability of states for non-state activities is deduced from various human rights instruments, which demand that states not only «respect» human rights, but also «ensure», «protect», or «secure» them. Reinisch A. rightly observes: «It has become more and more evident that even existing international human rights instruments could be interpreted so as to lead to state responsibility for non-state activities. This awareness has found its expression not only in legal doctrine, but also in a number of decisions by international bodies»¹.

Thus, in accordance with Art. 2 (1) of International Covenant on Civil and Political Rights, each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. In accordance with Art. 1 of American Convention on Human Rights, States undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. **According to Art. 1 of Convention for the Protection of Human Rights and Fundamental Freedoms** High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

In general, the presence of positive obligations of the state is recognized in various areas of international law, for example, art. 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 («Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction»), art. 4 of the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973* (States Parties shall co-operate in the prevention of the crimes set forth in article 2, particular by: (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; (b) exchanging information and co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes), art. 15 of the International Convention for the Suppression of Terrorist Bombings 1997 (States Parties shall cooperate in the prevention of the offences set forth in

¹ Reinisch, A. (2005). The Changing International Legal Framework for Dealing with Non-State Actors. In Alston, P. *Non-State Actors and Human Rights. Collected Courses of the Academy of European Law*, 78. Oxford, Oxford University Press.

article 2, particularly: a) By taking all practicable measures, including, if necessary, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or engage in the perpetration of offences as set forth in article 2) etc.

This idea of a vicarious state responsibility for non-state acts was formulated even more expressly by the UN Committee on the Elimination of Discrimination against Women, which stated that: «discrimination under the Convention is not restricted to action by or on behalf of Governments... Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation»¹.

It should be noted that in case of not-fulfilment of state's duty to protect, in accordance with international law the state is responsible not by derivative accessorial liability for complicity with criminals, which would create full responsibility for the behavior of individuals, but special independent responsibility of a specific state. The such responsibility is excluded, if the state was shown the necessary attentiveness to prevent such actions. Therefore, in this case, we can also speak about the international legal obligations to act in good faith and prudently (*Sorgfaltspflichten*)².

Building on the traditional «due diligence» requirement under customary international law, human rights bodies have interpreted obligations to «ensure» as state obligations to take measures to prevent non-state violations of human rights. As a consequence, the UN Human Rights Committee held states responsible for failing to do so adequately. Also in its General Comments the Committee has used a concept of the «horizontal effect» of human rights provisions. In its General Comment on the ICCPR's torture prohibition it stated: «It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether in-

¹ General Recommendation 19 («Violence against women») UN Committee on the Elimination of Discrimination against Women, 30 January 1992, U.N. Doc. A/47/38, para. 9.

² Seibert-Fohr, A. (2013). Die volkerrechtliche Verantwortung des Staats für das Handeln von Privaten: Bedarf nach Neuorientierung? *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 73, 43.

flicted by people acting in their official capacity, outside their official capacity or in a private capacity».

States' obligations that seek the protection of Human Rights from non-state actors' abuses have a limited nature and are thus effective only in a limited way because a violation may occur in spite of a State's effort and actions to prevent and punish it¹.

Recognition principle (duty) of proper diligence, which includes, among other things, and takes into account what measures the government is able to realize and how these measures are suitable to prevent danger, let find differentiated responses. This approach makes possible a legal assessment of the legal relationship between the interest of the international community to provide protection on the one hand, and the necessary measure of public accountability on the other².

The development of international practice shows that states will show an increasing willingness to take responsibility for the actions of individuals who violate internationally recognized rights and freedoms. This trend contributes to the development of international legal mechanisms to protect human rights. In particular, the concept of positive obligations on States provides supervisors and courts significant power to require certain behavior from states contributing to the effective implementation of a number of rights and freedoms, because their implementation depends not only on the performance of its obligations of non-interference, but can also require the adoption of a number of positive measures to protect even in interpersonal relations.

¹ Santarelli, N.C. (2008). Non-state actors' human rights obligations and responsibility under international law. *Revista Electronica De Estudios Internacionales*, 15, 1. <<http://www.reei.org>> (2014, September, 21)

² Seibert-Fohr, A. (2013). Die volkerrechtliche Verantwortung des Staats für das Handeln von Privaten: Bedarf nach Neuorientierung? *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 73, 60.