Part IV The Content of International Responsibility, Ch.51.1 Responsibility for Violations of Human Rights Obligations: International Mechanisms

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(p. 725) Chapter 51.1 Responsibility for Violations of Human Rights Obligations: International Mechanisms

1 Introduction

In a lecture delivered in 2000 Alain Pellet took up the subject of ' "human rightism" and international law'.[1] Explaining his use of the term 'human rightism', he noted that this phrase might be deployed in a number of different ways. For example, it might be used to criticize the moralism of human rights activists, and to highlight the dangers associated with the transformation of human rights into a secular religion. Pellet expressed some sympathy with these concerns, but stated that for him the primary meaning of human rightism is more 'neutral' and technical, ie that the focus is on the relations between human rights and international law, and, in particular, on what he takes to be the habitual exaggeration by human rights activists of the autonomy of human rights with respect to general international law. In his words:

> human rightism may be defined as the 'stance' that consists in being absolutely determined to confer a form of autonomy (which, to my mind, it does not possess) on a 'discipline' (which, to my mind, does not exist as such): the protection of human rights.[2]

Pellet's aim in calling attention to human rightism was to 'sound a note of caution against the confusion of categories: law, on the one hand, human rights ideology, on the other'.[3] In his assessment, the greatest dangers are presented by two common analytical procedures. One consists in the belief, or in moves to promote the belief, 'that a particular (p. 726) legal technique belongs specifically to human rights when it is well known in general international law', leading to unjustified claims for 'special treatment'.[4] The other danger consists in the 'tendency to indulge in wishful thinking and take sketchily emerging trends or, worse still, trends that exist solely in the form of aspirations, as legal facts'.[5] This second worry, of course, has a very long pedigree, and is expressed perhaps most famously in Jeremy Bentham's response to the French Declaration of the Rights of Man and the Citizen, in which Bentham criticizes the concept of the rights of man as 'nonsense upon stilts', and reminds its proponents that 'a reason for wishing that a certain right were established, is not that right—want is not supply, hunger is not bread'.[6] But if Pellet sought to renew awareness of the need to 'resist the temptation to present political projects … as scientific truths',[7] he attached no less importance to the first-mentioned ill-effect of human rightism. Emphasizing the character of human rights as a branch of international law, he called on human rights activists to 'be careful to avoid cutting the branch from the tree, for it would wither'.

In this chapter we follow Pellet's lead, and investigate the relationship between human rights and general international law. However, whereas his analysis was pitched broadly and backed up with examples that in the main concern the sources of obligation, the law of treaties, and the modalities for enforcing norms, our focus will be on the extent of State responsibility. In particular, we will concentrate on three issues bearing upon the responsibility of States for human rights abuse: the scope of State acts, the duty to exercise due diligence, and the territorial reach of obligations. These three issues by no means account for all aspects that could be considered, but they will suffice to illustrate a number of important points about the shape and dynamics of the relationship between human rights norms and State responsibility principles. They will help us to grasp how the law of State responsibility has informed developments in the field of human rights, and how developments in the field of human rights have informed the law of State responsibility. At the end of our discussion, the three issues will also provide an illuminating backdrop against which to assess Pellet's claims regarding the non-independence of human rights with respect to general international law, the categorical confusions of ideology for law and political projects for scientific truths, and the twin dangers of human rightism.

2 The requirement of State action for a breach of human rights

For whose actions in violation of human rights is the State responsible? In terms of the general law of State responsibility, this prompts enquiry into the 'attribution' of conduct to the State. Alongside the State's obvious responsibility for the conduct of State organs, the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts and accompanying commentary make clear that conduct may be attributed to the State in a variety of circumstances. While all of these circumstances may implicate the international protection of human rights, some have featured especially prominently in human rights activism and jurisprudence.

(p. 727) In the first place, the State will be responsible for the conduct of persons or entities empowered to exercise governmental authority.[8] According to the Commentary, whether a contract entails empowerment to exercise 'governmental authority' depends on what is considered governmental in a particular society, having regard to 'its history and traditions'.[9] One straightforward case of entities being empowered to exercise governmental authority, referred to in the Commentary, is the practice in some countries of engaging private security firms to serve as prison guards.[10] In this context, a key part of the State's potential responsibility relates to its obligations to protect human rights, among them inmates' rights to life, humane treatment, respect for private and family life, and nondiscrimination in the exercise of these rights. Thus, the Commentary lends support for ongoing efforts to hold States accountable for violations of inmates' rights in privately-run prisons.[11] As we shall see in the next section, however, prison privatization is by no means the only situation in which States have been held accountable for ensuring that private entities performing public functions act in a way consistent with human rights.

Secondly, the State will be responsible for the conduct of State organs or empowered entities acting in that capacity, notwithstanding that the organs or entities exceeded their authority or contravened instructions.[12] In this connection, the Commentary cites the opinion of the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez*.[13] This case arose out of an enforced disappearance in Honduras. Finding the Honduran State responsible under the American Convention on Human Rights, the Court observed that whenever an organ or official fails to respect the rights recognized, the State in question is responsible for a violation of the Convention. It went on: 'This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority'.[14] Likewise, in the earlier *Irish* case, revolving around claims of arbitrary detention, ill-treatment, and discrimination in Northern Ireland, the European Court of Human Rights declared that State authorities 'are strictly liable for the conduct of

their subordinates'.[15] Where the protection of human rights is concerned, the European Court said that the national authorities have a 'duty to impose their will on their subordinates and cannot shelter behind their inability to ensure that it is respected'.[16]

Thirdly, the State will be responsible for the conduct of private individuals or groups who are 'in fact acting on the instructions of, or under the direction or control of, the State in carrying out the conduct'.[17] The ILC Commentary explains that this is an exception to the general principle that the conduct of private individuals or entities is not attributable to the State, and is based on the existence of a 'specific factual relationship between the person or entity engaging in the conduct and the State'.[18] This form of responsibility was central to another decision of the Inter-American Court of Human Rights, in the case of *Blake*.[19] Again, the application arose out of an enforced disappearance, this time in (p. 728) Guatemala. The evidence indicated that the disappeared person had been abducted and killed by members of a 'civil patrol'. The Guatemalan Government argued that it could not be held responsible for the actions for civil patrols, as these were voluntary community organizings that had sprung up in areas of conflict. For the Inter-American Court, however, it was clear that civil patrols:

> enjoyed an institutional relationship with the Army, performed activities in support of the armed forces' functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision'.[20]

On this basis, the Court concluded that the patrols 'should be deemed to be agents of the State and … the actions they perpetrated should therefore be imputable to the State'.[21]

Let us highlight one final context in which attribution may occur. The State will be responsible for the conduct of private individuals or groups who are:

> in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.[22]

In *Elmi* the Committee against Torture considered an application by a Somali man who had fled violent persecution by clan militias opposed to his family and clan, and travelled to Australia.[23] Informed that he would be returned to Somalia, he argued that his forced return would violate the obligation of Australia under the Torture Convention not to send a person to a State 'where there are substantial grounds for believing that he would be in danger of being subjected to torture' (article 3). The Australian Government maintained that the complaint fell outside the Torture Convention, as the Convention covered only acts of torture 'committed by, or at the instigation of, or with the consent or acquiescence of a public official or any other person acting in an official capacity' (article 1(1)). To this extent, as noted in the ILC's commentary, the Torture Convention appears to be a *lex specialis*, dealing with a somewhat narrower range of involvements than would generally be attributable to the State.[24] Even so, the Committee rejected the Australian argument. While it was true that the threat faced by the applicant related to action by clan militias, rather than State officials, the Committee observed that Somalia had been without a central government for a number of years, that the international community negotiated with the warring factions, and that some of the factions had set up quasi-governmental institutions. The particular area to which the applicant would return was in fact under the effective control of the clan opposed to his family. In these circumstances, the Committee considered that the members of an armed clan could be regarded as 'public officials or other persons acting in an official capacity'. It followed that the applicant was indeed exposed to a danger

of torture within the meaning of the Torture Convention, with the result that his return to Somalia would, as he argued, violate the obligations of Australia.

3 The standard of due diligence

We have so far been examining the responsibility of the State for or in connection with its own acts which are violative of rights. This is a central dimension of State responsibility, (p. 729) but it is not the only dimension. Especially in the context of human rights, it is often the State's *failure* to act—its failure to ensure protection, including protection against invasions of human rights by non-State actors—that is the problem. That an internationally wrongful act may be constituted not just by actions but also by omissions is recognized in the ILC Articles.[25] Indeed, the Commentary remarks that:

> [c]ases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts.[26]

For all these cases, however, this dimension of State responsibility long remained relatively undeveloped. In what follows, we review some of the ways in which human rights lawmaking and jurisprudence have helped to change that situation.

We may begin by referring to the path-breaking judgment of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case. The evidence before the Court did not reveal exactly who had abducted Manfredo Velásquez Rodríguez. What it did reveal was that a practice of enforced disappearance carried out or tolerated by Honduran officials existed at the relevant time, and that Velásquez Rodríguez had disappeared within the framework of that practice. On this basis, the Court determined that Velásquez Rodríguez had disappeared 'at the hands of or with the acquiescence' of Honduran officials, and that accordingly, the Government of Honduras had failed to meet its obligations under the American Convention.[27] Specifically, the Government had failed to ensure to Velásquez Rodríguez his rights to personal liberty, humane treatment, and life, in violation of articles 7, 5, and 4, read in conjunction with the basic obligation under article 1(1) to ensure the rights recognized to all persons within national jurisdiction. Explaining its conclusion, the Court said that:

> in principle, any violation of rights recognized in 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 the 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.[28]

Thus the Court breathed new life into the old 'due diligence' standard of diplomatic protection law, and used it as the basis for a legal duty

> to prevent human rights violations and to use the means at [the State's] 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.[29]

This idea that States have a duty to exercise due diligence in preventing and responding to allegations of human rights abuse connects with, and has been elaborated by a range of other developments in international human rights law. Within the jurisprudence of the (p. 730) European Court of Human Rights, it is expressed in the concept of 'positive obligations'. By positive obligations are meant obligations not simply to refrain from denying human rights, but to take specific measures to protect them. Rooted in the general undertaking in article 1 of the European Convention to secure the rights recognized to everyone within the State party's jurisdiction, positive obligations were initially associated mainly with the right to private and family life, but have now become an important element in the Court's interpretations of many Convention rights. Thus, for example, in *A v United Kingdom*, the Court confronted an application by a child who had been severely beaten by his stepfather. Charged with assault, the stepfather had been acquitted by the national courts on the ground that what had been involved was 'reasonable chastisement'. The child argued that this violated the provisions of article 3 of the Convention, under which '[n]o one shall be subjected to torture or to inhuman or degrading treatment', and the Court upheld this argument. Addressing the question of the State's responsibility, the Court said that article 1 of the Convention, read 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 illtreatment administered by private individuals.[30]

In the later case of *Z and Others v United Kingdom*, the European Court reiterated that the State has a 'positive obligation, under Article 3 of the Convention, to provide … adequate protection against [torture or] inhuman and degrading treatment'.[31] That case concerned the failure of the national authorities to take action to prevent the serious illtreatment and neglect of four children over a period of years, and the Court made clear that the State's positive obligation includes a duty to take 'reasonable steps to prevent illtreatment of which the authorities had or ought to have had knowledge'.[32]

In the case of *Edwards v United Kingdom* a similar approach was applied to the right to life.[33] The applicants' son had been detained in the same cell as a prisoner who suffered from acute mental illness, and who subsequently killed him. They argued that the introduction into their son's cell of a dangerously unstable prisoner constituted a violation of the State's obligations with respect to their son's right to life. Accepting this argument, the Court observed that, alongside the State's primary duty to secure the right to life by putting in place effective criminal law provisions and law enforcement machinery, there is also in appropriate circumstances a 'positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.[34] In this case the Strasbourg Court considered that the inadequate nature of the screening process on the cell-mate's arrival in prison, coupled with the failure of relevant agencies (medical profession, police, prosecution, and court) to pass information about him to the prison authorities, disclosed a breach of the State's positive obligation to protect the right to life.

In a General Comment adopted in 2004 the Human Rights Committee has affirmed that the duty to exercise due diligence and take positive measures to protect human rights likewise applies in connection with the International Covenant on Civil and Political (p. 731) Rights.[35] While observing that obligations under the Covenant 'do not, as such, have direct horizontal effect' between private individuals, the Committee stated that:

> the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities.[36]

Thus, there may be

> circumstances in which a failure to ensure Covenant rights … would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[37]

In explicating Covenant commitments in this way, the Committee echoed the Inter-American and European interpretations to which we have just referred. At the same time, it echoed the work of the Committee on Economic, Social and Cultural Rights. With regard to the International Covenant on Economic, Social and Cultural Rights, that latter Committee has long adopted a tripartite formulation under which the obligations of States parties are parsed as obligations to 'respect, protect and fulfil' the rights recognized. Thus, for example, in a General Comment on the right to the highest attainable standard of health, guaranteed in article 12 of the Covenant, the Committee on Economic, Social and Cultural Rights observes that the 'right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil'.[38] The obligation to respect the right to health requires States to 'refrain from interfering directly or indirectly with the enjoyment of ' that right. The obligation to protect the right to health requires States to 'take measures that prevent third parties from interfering with' that right. And the obligation to fulfil the right to health—which in turn implies obligations to facilitate, provide, and promote—requires States to 'adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of ' that right.[39]

We have touched on three ways which human rights courts and other supervisory bodies have framed responsibility for omission to act. First, States have a duty to exercise *due diligence* to prevent violations and respond appropriately when they occur. Second, States have *positive obligations* to take adequate steps to safeguard human rights. Third, States have obligations not just to respect human rights, but also to *protect* and *fulfil* them. A consistent implication is that the State is responsible for providing protection against infringements of human rights both by State officials and by private individuals or entities. With regard to protection against private individuals, there is one context in which the challenge to State complacency has been exceptionally sustained and far-reaching: violence against women. Activism concerning violence against women has long been linked to an explicit critique of approaches to State responsibility oriented primarily to State acts. Feminists have shown that failure to take seriously the 'omissive' responsibility of States is (p. 732) not neutral but gendered. For insofar as no or inadequate steps are taken to curb abuses in the 'private' sphere, women are disproportionately affected. Under the influence of this critique, initiatives by international organizations, governments, and non-governmental organizations today assert and specify the obligations of States to prevent, investigate and punish acts of violence against women, whether committed by State officials or private individuals. These initiatives, which include the United Nations General Assembly's Declaration on the Elimination of Violence against Women, adopted in 1993[40] and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,[41] mark the definitive retooling of the 'due diligence' standard.

4 Territorial scope of protection

To this point we have considered for whose actions in violation of human rights the State bears responsibility, and on what basis the State may be held responsible for omission to act. Let us now turn to the final issue announced above, the question of the territorial scope of human rights obligations. This has received considerable attention in recent years, especially, though by no means solely, within the framework of the European Convention on Human Rights. An important milestone was the 1995 judgment of the European Court of Human Rights in *Loizidou v Turkey, Preliminary Objections*.[42] The applicant was a Cypriot citizen, who claimed to be the owner of land in Northern Cyprus to which Turkish forces prevented her from returning. After attempting unsuccessfully to enter the Turkish-occupied part of Cyprus to reassert title to the land, she argued that Turkey was responsible for the violation of a number of her rights, among them her right to 'peaceful enjoyment of … possessions'. The Turkish Government urged the Court to declare the complaint inadmissible on the ground that (*inter alia*) the Government could not be held responsible for the events in question. Under the European Convention, States parties are required to secure the rights recognized to everyone 'within their jurisdiction' (article 1). Yet, according to the Government, the events of which the applicant complained fell outside the jurisdiction of Turkey; rather, they came within the jurisdiction of the Turkish Republic of Northern Cyprus (TRNC). Against this background, the Court put forward its interpretation of the concept of 'jurisdiction' as a factor limiting responsibility under the European Convention. In the first place, it said that the concept of 'jurisdiction' under article 1 'is not restricted to the national territory of the High Contracting Parties'.[43] The Court continued:

> [T]he responsibility of a Contracting Party may … arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[44]

(p. 733) In the later merits phase of the case,[45] the Court found that the presence of Turkish troops engaged in active duties in northern Cyprus indicated that indeed Turkey exercised effective control of the area. The Court added that it was 'not necessary to determine whether … Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC".'[46] In the circumstances, the military presence was sufficient to engage the responsibility of Turkey for those policies and actions.

In *Banković v Belgium and Others*[47] the Court had occasion to return to this question of the overall scope and limits of responsibility under the European Convention. The applicants complained of violations of human rights in connection with the bombing by NATO forces of a television station in Serbia in 1999. The NATO State respondents countered that the victims were not within their jurisdiction, and in this context the Court accepted that contention. Referring to *Loizidou* and other earlier cases, the Court said that its recognition of the exercise of extraterritorial jurisdiction was 'exceptional', and occurred when the State in question:

> through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[48]

As the NATO States were not in effective control of Serbia and its inhabitants in this sense, the Court considered that those States could not be held responsible under the European Convention for violations arising out of the bombing of the television station. After *Banković* the European Court of Human Rights again confronted the issue of the Convention's territorial reach in *Ilaşcu and Others v Moldova and Russia*. This case concerned the trial and imprisonment of four Moldovan nationals in the Transdniestrian region of Moldova. The applicants brought proceedings against Moldova and Russia, complaining of violations of numerous rights under the European Convention, including very serious violations of the right not to be subjected to torture or other ill-treatment. Although a separatist regime—the Moldavian Republic of Transdniestria (MRT)—had been established in the region in 1991, the applicants argued that the Moldovan authorities remained responsible under the European Convention, inasmuch as they had failed to take appropriate steps to end the abuses. The applicants contended that the Russian authorities shared responsibility, since the region was under *de facto* Russian control, and the MRT received support from the Russian Federation. The Court accepted these arguments. Dismissing the Moldovan Government's argument that the Transdniestrian region was not within its jurisdiction, the Court said that:

> even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.[49]

On the evidence, a majority of the Court did not consider that the Moldovan Government had fully discharged that obligation. As for the Russian Federation, the Court explained that the acts complained of fell within its jurisdiction on account both of the political (p. 734) and military support which the Russian authorities had provided to the Transdniestrian separatists, and of the fact that the applicants had actually been arrested and initially guarded and ill-treated by Russian soldiers, who had then transferred them into the custody of MRT officials, with consequences that were or should have been anticipated.

In *Banković*, the European Court emphasized the character of the European Convention as a 'multi-lateral treaty operating … in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States'.[50] In its assessment, the 'Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States'.[51] What then of treaties that *are* designed to be applied throughout the world, or at any rate without regional specificity? In 1981 the Human Rights Committee expressed its views on a complaint against Uruguay, alleging violations of (p. 735) the International Covenant on Civil and Political Rights in connection with the enforced disappearance of a Uruguayan national. The evidence showed that the victim had been abducted in Argentina by members of the Uruguayan security forces, and later transferred to Uruguay.[52] Under article 2(1) of the Covenant, each State party undertakes to respect and ensure the rights recognized 'to all individuals within its territory and subject to its jurisdiction'. The Committee was clear that article 2(1) does not remove accountability for violations of Covenant rights committed by State agents abroad, whether with the acquiescence of the foreign government or in opposition to it. In its words:

> it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.[53]

Much later, the Committee was to develop this point in General Comment 31, mentioned already. In the interpretation put forward there, the reference in article 2 of the Covenant to 'all individuals within [a State party's] territory and subject to its jurisdiction' means that Covenant rights must be respected and ensured to all those within State territory, even if they are not nationals, and to all those within State jurisdiction, even if they are not situated within national territory. Thus, the enjoyment of these rights must be available to:

> those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.[54]

The Committee gives the example of:

> forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[55]

Shortly after the General Comment was adopted, the International Court of Justice provided endorsement of the Committee's interpretation in the context of proceedings concerning Israeli acts in occupied Palestinian territory. For the Court:

> the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.[56]

This question of the extent to which a State may be held responsible for violations of human rights that occur outside national territory (or, as in the Moldovan case, within an area of national territory over which effective control is lacking) has obvious urgency, perhaps especially today in the conditions of the global 'war against terror'. Scarcely less pressing, however, and arguably even more so, is the related question of the extent to which a State may be held to account where, though not directly responsible for violations of human rights in another country, it assists in or facilitates the commission of those violations. That question has recently been taken up in connection with calls to strengthen international control of arms transfers. Reflected in these calls is a 'supply-side' approach to curbing abuses, which concentrates on preventing transfers of arms to State and non-State actors who will foreseeably use them to commit serious violations of human rights and humanitarian law.[57] In this regard, the responsibility of States is asserted under the principle, recognized in article 16 of the ILC Articles, that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> **(a)** that State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> **(b)** the act would be internationally wrongful if committed by that State.

Illustrating this principle, the Commentary notes that States may incur responsibility for providing 'material aid to a State that uses the aid to commit human rights violations'.[58] The Commentary cautions, however, that:

> [w]here the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful act.[59]

With regard to small arms (guns), one analyst has proposed more forthrightly that the principle of knowing assistance can be understood to 'prohibit States from transferring small arms to another State knowing that the other State will use the arms in violation of international law'.[60] Put affirmatively, it can be understood to require States to 'turn off the tap'.[61]

5 'Human rightism': some reflections

What general points can we glean from this brief survey of developments in the responsibility of States for the infringement of human rights? In particular, how does it orient us (p. 736) with respect to Pellet's account of human rightism and related phenomena, mentioned at the beginning? Before addressing these questions, we must re-emphasize that the issues we have addressed represent only a subset of ways in which State responsibility principles and human rights norms intersect. Most obviously, we have not said anything about the concepts of 'obligations *erga omnes*' and 'peremptory norms' and their overlap with human rights. Nor have we discussed the significance of human rights as constraints on the countermeasures that may be taken against a State which is responsible for an internationally wrongful act.[62] Nor have we broached the subject of compensation for the victims of human rights abuse.

Even without investigation of these and other matters, however, at least two points are surely clear. On the one hand, we have seen that the interpretation of human rights treaties has been shaped in notable ways by the general law of State responsibility, just as Pellet might maintain. Human rights courts and tribunals regularly express their analyses in terms that draw on concepts and principles of State responsibility, and increasingly human rights activists are likewise using ideas recognized in the law of State responsibility to support their initiatives. On the other hand, we have also seen that, for their part, the general principles of State responsibility have been shaped in notable ways by developments in the interpretation of human rights treaties. Anyone who doubts that has only to glance through the ILC's Commentary. Beyond the Commentary, the challenge to traditional understandings is currently perhaps most evident with regard to responsibility for omission (the duty to exercise due diligence, positive obligations, etc) and the implications of the principle of knowing assistance. In these areas, concerns as disparate (or maybe not so disparate) as violence against women, privatization of health services, and the need for improved international arms control have driven, and are continuing to drive, moves to push at the boundaries of State responsibility and expand the range of actions that governments should be expected to take against violence, injustice and social exclusion.

If, as Pellet contends, it is important not to exaggerate the autonomy of human rights with respect to general international law, our discussion in this chapter thus suggests that it may likewise be important not to exaggerate the autonomy of general international law with respect to human rights. But the non-independence of human rights is not Pellet's only preoccupation. For him, human rightism is also characterized by a tendency to engage in wishful thinking, and treat aspirations as if they were legal facts. Certainly it is true that accounts of human rights law are informed by normative theories of how the world should be. However, so too are accounts of international law, and everything else. The idea that there is some non-normative ground wholly outside ethics, politics and culture on which we can stand to discover legal facts can hardly be credited. That is not to say that there is nothing distinctive about law compared to ethics, politics, and culture. It is simply to say, as our discussion of State responsibility for human rights abuse clearly shows, that legal interpretations are developed for the sake of, and in conjunction with, projects for ordering social life. Perhaps the best approach is to set aside talk of autonomy and independence, branches and trees, and rather to recognize that human rights and international law are at

once enmeshed and distinctive—both in relation to one another and in relation to the larger political projects within which each is necessarily deployed.

(p. 737) Further reading

B Frey, 'Working Paper on the question of the trade, carrying and use of small arms and light weapons in the context of human rights and humanitarian norms', 30 May 2002, E/CN.4/Sub.2/2002/39

A Pellet, ' "Human rightism" and International Law', Gilberto Amado Memorial Lecture, delivered 18 July 2000 (New York: United Nations); the original French text ('"Droitsde l'hommisme" et droit international') is reprinted in *Droits fondamentaux*, no 1 (2001), available online at: <http://www.droits-fondamentaux.org>.

A Coyle, A Campbell, & R Neufeld (eds), *Capitalist Punishment: Prison Privatization and Human Rights* (Atlanta, Clarity Press, 2003)(p. 738)

Footnotes:

1 A Pellet, ' "Human rightism" and International Law', Gilberto Amado Memorial Lecture, delivered 18 July 2000 (New York, United Nations).

2 Ibid, 3.

3 Ibid, 2.

4 Ibid, 5.

5 Ibid, 5.

6 'Anarchical Fallacies' (1843), reprinted in J Waldon (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London, Methuen, 1987).

7 A Pellet, ' "Human rightism" and International Law', Gilberto Amado Memorial Lecture, delivered 18 July 2000 (New York, United Nations), 16.

8 ARSIWA, art 5.

9 Commentary to art 5, para 6.

10 Commentary to art 5, para 2.

11 For a review of concerns and initiatives, see A Coyle, A Campbell, & R Neufeld (eds), *Capitalist Punishment: Prison Privatization and Human Rights* (Atlanta, Clarity Press, 2003) .

12 ARSIWA, art 7.

13 Commentary to art 7, para 6.

14 *Velásquez Rodríguez v Honduras, Merits, Inter-Am Ct HR, Series C, No 4* (1988); 95 ILR 232, 296 (para 170).

15 *Ireland v United Kingdom* (1978) 58 *ILR* 188, 263 (para 159). See also *Ilaşcu and Others v Moldova and Russia* (App No 48787/99), *ECHR Reports 2004-VII*, para 319.

16 *Ireland v United Kingdom* (1978) 58 *ILR* 188, 263 (para 159).

17 ARSIWA, art 8.

18 Commentary, to art 8, para 1.

19 *Blake v Guatemala, Merits, Inter-Am Ct HR, Series C, No 36* (1998).

20 Ibid, para 76.

21 Ibid, para 78.

22 ILC Articles, art 9.

23 *Elmi v Australia* Communication No 120/1998, Views of the Committee against Torture, 25 May 1999, CA T/C/22/D/120/ 1998.

24 See Commentary to art 55, para 5.

25 ARSIWA, art 2.

26 Commentary to art 2, para 4.

27 *Velásquez Rodríguez v Honduras, Merits, Inter-Am Ct HR, Series C, No 4* (1988); 95 *ILR* 232, 291 (para 148).

28 Ibid, 296 (para 172).

29 Ibid, 297 (para 174).

30 *A v United Kingdom* (App No 25599/94), *ECHR Reports 1998-VI*, para 22.

31 *Z and Others v United Kingdom* (App No 29392/95), *ECHR Reports 2001-V*, para 72.

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33 *Edwards v United Kingdom* (App No 46477/99), *ECHR Reports 2002-II*.

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38 Committee on Economic, Social and Cultural Rights, General Comment 14 'The Right to the Highest Attainable Standard of Health, Article 12', adopted 11 May 2000, E/C. 12/2000/4, para 33 (emphasis omitted).

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41 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Belém do Pará, 9 June 1994.

42 *Loizidou v Turkey, Preliminary Objections* (App No 15318/89), *ECHR, Series A, No 310* (1995) [GC]; 103 *ILR* 622.

43 Ibid, 642 (para 62).

44 Ibid.

45 *Loizidou v Turkey, Merits* (App No 15318/89), *ECHR Reports 1996-V* [GC]; 108 *ILR* 445.

46 Ibid, 466 (para 56).

47 *Banković v Belgium and Others* (App No 52207/99), *ECHR Reports 2001-XI* [GC].

48 Ibid, para 71.

49 *Ilaşcu and Others v Moldova and Russia* (App No 48787/99), *ECHR Reports 2004-VI* [GC], para 331.

50 *Banković v Belgium and Others* (App No 52207/99), *ECHR Reports 2001-XII* [GC] para 80.

51 Ibid.

52 *López Burgos v Uruguay*, Communication No 52/1979 (R 12/52), Views of the Human Rights Committee, 29 July 1981, A/36/40, 176.

53 Ibid, para 12.3.

54 General Comment 31, para 10.

55 Ibid.

56 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p 136, 180 (para 111).

57 See B Frey, 'Working Paper on the question of the trade, carrying and use of small arms and light weapons in the context of human rights and humanitarian norms', 30 May 2002, E/CN.4/Sub.2/2002/39, para 17.

58 Commentary to art 16, para 9.

59 Ibid.

60 B Frey, 'Working Paper on the question of the trade, carrying and use of small arms and light weapons in the context of human rights and humanitarian norms', 30 May 2002, UN Doc E/CN.4/Sub.2/2002/39.

61 See Amnesty International & Oxfam International, *Shattered Lives* (Control Arms Campaign, 2003), 73.

62 See ARSIWA, art 50(1)(b) and Commentary to art 50, paras 6–7.