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# **The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health**

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## I INTRODUCTION

The question whether corporations are subjects of international law has given rise to a lively academic debate. (Van Genugten 2000:80, Malanczuk 2000, Clapham 2000: 189) The starting point for this paper is that, in the field of human rights it is becoming clear that international human rights standards are already applied to the behaviour of corporations. We outline the legal arguments below. The issue remains controversial and some lawyers would prefer that: ‘When non-State actors do not comply with human rights norms, they should be criticized for “abusing” the rights of individuals rather than committing “violations”.’ (Weissbrodt 1998:194). But the reasons for such a distinction are, at least according to Weissbrodt (1998: 195) seemingly tactical and political rather than imbued with legal meaning: ‘The term “human rights violation” should be limited to misconduct by governments, so as to avoid giving greater recognition and undue status to non-State entities.’

Of course in legal terms the corporation is sometimes assimilated to other non-state entities such as rebel groups and terrorists, hence the nervousness about placing non-state actors on the same plane (linguistically) as nation states. Unlike rebel groups corporations have no aspirations to international recognition, but, there is a fear that treating corporations in the same way we treat states may implicitly suggest that corporations have the right and obligation to take on state like functions. The commitment was made in Vienna at the World Conference that the promotion and protection of human rights should be: ‘the first responsibility’ of governments.<sup>1</sup>

In the context of the right to health, the issue is clear, governments have obligations to ensure that the highest standard of health care is made available; where corporations play a role they may help to fulfil these obligations. On the other hand, in some cases, their action may *obstruct* or *undermine* the enjoyment of the right to health. The right holder has a right to health no matter who is the immediate provider of health care. This is confirmed in the General Comment of the Committee on Economic Social and Cultural Rights on the right to the highest attainable standard of health in the International Covenant on Economic, Social and Cultural Rights, which in addressing the accessibility (affordability) dimension of the right to health states in part:

Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, *whether privately or publicly provided*, are affordable for all, including socially disadvantaged groups. (Emphasis added).<sup>2</sup>

In fact the General Comment does not balk at using the language of violations for non-state actors. In the section on state obligations to protect the Comment simply states that violations of

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<sup>1</sup> At para. 1 of Part I of the Vienna World Conference on Human Rights Declaration and Programme of Action. ‘Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.’ A/CONF.157/23, 12 July 1993.

<sup>2</sup> CESCR, General Comment n° 14, E/C.12/2000/4, at para. 12(b)(iii).

this obligation include ‘such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from *violating* the right to health of others.’<sup>3</sup> (Emphasis added).

The General Comment makes it clear that non-state actors have themselves responsibilities and failure to fulfil these responsibilities constitutes a violation of the right to health. From a theoretical point of view it is unlikely that these non-state actor responsibilities stem from the treaty itself. The non-state actors are not parties to the treaty. Rather the responsibilities stem from the customary international human rights to health. The Committee simply monitors the extent to which the states are ensuring under their treaty obligations that the relevant non-state actors are not violating this customary right and undermining the right which has to be protected by the state. We will return later to the nature and scope of the customary international right to health. Suffice to say at this point that the theory that non-state actors have human rights responsibilities regarding the realization of the right to health is reflected in the General Comment at paragraph 42:

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 realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.

Recent scholarship has drawn on this approach and determined: ‘It can be concluded that the right to health can be applicable in the legal relations of corporations.’ Jägers (2002: 69).

As is perhaps already apparent, articulating the legal regime for the relevant rights and responsibilities in the context of corporate health care is not simple. As we shall see much depends on the applicable legal order. This paper takes a strict approach and separates out distinct legal orders so that we concentrate on the bare bones, the skeleton, rather than a holistic picture of the body. Once we understand the anatomy of the subject, in other words the way that lawyers understand the relevant rights and obligations, it may be easier to design relevant policies at the national and international levels.

Let us start with a look at the international law of state responsibility. This legal regime operates at the international level to determine which acts at the national level can be attributed to the state for the purposes of a claim against that state at the international level.

## **II THE INTERNATIONAL LAW OF STATE RESPONSIBILITY**

There is a distinction in the law of state responsibility between responsibility for empowered entities and responsibility for entities under a state’s control. We shall take each category in turn.

### **➤ State Responsibility for Empowered Corporations**

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<sup>3</sup> Ibid para. 51.

The international law of state responsibility has been clearly developed to cover privatised state corporations which retain public or regulatory functions. In 2001 the articles on 'Responsibility of States for internationally wrongful acts' were finally adopted by the International Law Commission and annexed to a General Assembly Resolution.<sup>4</sup> Already in the early days of the process of drafting these articles, around 1930, the German Government suggested that the principles of state responsibility could apply exceptionally to situations where the state authorizes private organizations to carry out certain sovereign rights. The example they gave at that time was the situation where a private railway company is permitted to maintain a police force. The International Law Commission (ILC) cited this example in 1974, in the context of their own work on state responsibility. But today, in an age of privatised detention centres, prison transfers, airports, housing associations, and even water services, the image of private railway police is only a starting point.

The final Commentary of the International Law Commission gives a wide scope to the sorts of entities that could fall within the scope of the relevant Article, Article 5 of the Articles on State Responsibility. This Article is aimed at attributing state responsibility for the activities of what the ILC label 'the increasingly common phenomenon of para-statal entities which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatised but retain certain public or regulatory functions.'<sup>5</sup> Article 5 reads:

The 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.

The Commentary explains the intended scope of this article:

(2) The generic term 'entity' reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations.

An examination of the comments received from governments and of the statements made at the General Assembly during the final debate on the articles gives no reason to doubt that states do not consider these formulations as reflecting the current approach of international law to this topic. The state will be responsible at the international level for the acts and omissions of these privatised entities where such behaviour constitutes an internationally wrongful act, and the entity was 'acting in that capacity in the particular instance'.

We have then two cumulative tests, first, the entity was empowered under internal law,

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<sup>4</sup> A/Res/56/83, adopted 12 December 2001.

<sup>5</sup> A/56/10, Report of the ILC, adopted at its 53<sup>rd</sup> session, 2001, Commentary to the draft articles, Article 5 para. (1) of the Commentary, at p. 92.

and second, that the conduct concerned ‘governmental activity and not other private or commercial activity in which the entity may engage.’<sup>6</sup> The state will be responsible for the acts of these empowered non-state actors where they carry out governmental activity, but not commercial activity. The example given by the ILC is that the exercise of police powers granted to a railway company will be regarded as acts of state under international law, but activity unrelated to those powers, such as the sale of tickets, will not be attributable to the state.<sup>7</sup> The state is only responsible for the acts of non-state actors when they have been empowered to exercise governmental authority and are in fact acting in such a capacity.

The International Law Commission has avoided trying to list what constitutes *fields of governmental authority*. Instead they simply state

Beyond a certain limit, what is regarded as ‘governmental’ depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.<sup>8</sup>

Article 5 covers those entities that have been privatised or granted governmental powers by internal law. The commentary concludes in this way: ‘The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.’<sup>9</sup>

Do corporations involved in health care come within the scope of Article 5? The answer, will, it seems, depend on the ‘history and traditions’ of a particular society. Where health care has been considered ‘governmental’, and there is a degree of empowerment by internal law, then denial of the right to health could be considered an act directly attributable to the state under the law of state responsibility. This is the theoretical starting point for international lawyers. However, in the context of a practical approach to the private sector and the right to health, it is unlikely to prove a useful avenue to pursue for an organization such as the World Health Organization. Speculating on whether a particular society has a tradition of governmental provision of health care, and searching for the pertinent internal law which has empowered a large company to operate would clearly distract from the main message of ‘health for all’.

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<sup>6</sup> Ibid at para. 5.

<sup>7</sup> Ibid.

<sup>8</sup> ILC Report (supra) 2001, Commentary to art. 5 at para 6 at p. 94

<sup>9</sup> Ibid para 7.

## ➤ **State Responsibility for State Controlled Corporations**

There is, however, another category of situations which is not so narrow. Where a state actually controls or directs a company to act in a certain way, then there will be state responsibility for the acts of the company, where there is evidence that the corporation was exercising public powers, or that the state was using its ownership interest in, or control of, a corporation specifically in order to achieve a particular result. This is the conclusion of the ILC in their commentary to Article 8, which reads:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

## ➤ **Consequences of Corporate Behaviour Being Attributed to the State**

In these two different categories of cases the state may be responsible under international law. This is important as not only do all the rules regarding countermeasures by other states apply, meaning that states would be entitled to sanction the culpable state in ways which would otherwise be illegal, but it also means that where human rights bodies exist, such as the six UN human rights treaty bodies, or the regional human rights courts, or even the new Special rapporteur on the right to health, then the state can be held responsible under international law for the behaviour of the company.

Although the possibilities for individual complaints vary under each treaty, and according to the optional procedures accepted by various states, the principle remains that states, and their governments, are actually responsible for the acts of corporations who violate international law. These acts are attributable to the state.

So far this situation has only arisen obliquely in the context of airport noise and corporal punishment in private schools before the European Court of Human Rights,<sup>10</sup> and with regard to private prison health and education services at the level of the UN human rights treaty bodies.<sup>11</sup> But with increasing privatization and decentralization it is likely to become a primary means for determining the responsibility of states for the behaviour of non-state actors.

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<sup>10</sup> See Clapham *Human Rights in the Private Sphere* (1993) and 'The Privatisation of Human Rights' *European Human Rights Law Review* launch issue pp 20-32.

<sup>11</sup> The OHCHR paper 'the Private Sector as Service provider and its role in Implementing Child Rights' lists examples from New Zealand, Netherlands, Mongolia, Ukraine, Finland, Croatia, Algeria, Venezuela, Spain, Mozambique, and Bulgaria. Submitted to the UN Committee on the Rights of the Child day of discussion, 20 September 2002.

## ➤ **The positive obligations of the state under international human rights law**

The different regional human rights bodies have developed a set of positive obligations which oblige states to act to protect individuals and groups from private actors, including corporations. The extent to which human rights law should be seen as encompassing such obligations was discussed at the time of the drafting of treaties such as the International Covenant on Civil and Political Rights,<sup>12</sup> and it is now clear that state responsibility at the international level is engaged not only through acts, but also through omissions, and that failure to act to prevent, investigate or punish certain human rights abuses committed by private actors will result in a finding that the state has failed in its international human rights obligations. This sort of indirect accountability for corporations is often overlooked as one considers the ability of the human rights regime to deal with corporate accountability. Nevertheless, greater attention is now being paid to the potential for the UN treaty bodies and the ILO mechanisms to address the issues of state responsibility for these governmental omissions and the consequent indirect accountability of the corporations themselves.<sup>13</sup> It is however, at the regional level that we have witnessed the most interesting developments.

## ➤ **The Inter-American System**

The Inter-American Court and Commission of Human Rights have both considered the obligations of the state with regards to protecting people from private actors including corporations. Indeed, the Inter-American Court of Human Rights delivered a key judgment on the positive obligations of States under the American Convention on Human Rights. The Court highlighted that states have a “duty to ensure” all rights in the treaty.

174. The State has a legal duty to take reasonable steps to prevent human rights violations ...

175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obliged to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures....

182. The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.<sup>14</sup>

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<sup>12</sup> See Clapham >Revisiting *Human Rights in the Private Sphere*: Using the European Convention on Human Rights to protect the Right of Access to the Civil Courts= in C. Scott (ed) *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) 513-535.

<sup>13</sup> For a carefully considered overview of the various bodies and their work in this area see C. Scott 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights', A. Eide, C. Krause and A. Rosas, eds *Economic, Social and Cultural Rights: A Textbook*. 2<sup>nd</sup> ed (2001) , 563-595.

<sup>14</sup> Velásquez Rodríguez v Honduras 28 ILM 291 (1989).

While the core of the *Velásquez Rodríguez* case concerned the duty to investigate disappearances, it remains equally authoritative for having confirmed that positive obligations exist for the state in other circumstances. The Inter-American Commission has dealt with the health implications of corporate activity on indigenous lands in the *Yanomami v Brazil* petition, and in its report on Ecuador's regulation of the oil companies.<sup>15</sup> The *Velásquez* judgement was recently cited by the African Commission on Human and Peoples' Rights in a key decision issued in 2001. Let us now turn to that decision.

## ➤ **The African Approach under the African Charter of Human and Peoples' Rights**

In 2001, the African Commission, decided a complaint focused on the behaviour of an oil consortium between the state oil company and Shell in Nigeria.<sup>16</sup> According to the summary:

The Communication alleges that the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems. (Para 2)

With regard to the right to health the Commission develops a number of important safeguards:

50. The Complainants allege that the Nigerian government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter by failing to fulfill the minimum duties required by these rights. This, the Complainants allege, the government has done by -:
- Directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population,
  - Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage
  - Failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations

Article 16 of the African Charter reads:

*"(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.*

*(2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."*

Article 24 of the African Charter reads:

*"All peoples shall have the right to a general satisfactory environment favourable to their development."*

51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.<sup>17</sup> As has been

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<sup>15</sup> *Yanomami v Brazil*, Case 7615, 5 March 1985, Res. No. 12/85, IACH, Annual report, 1985 paras 10 and 11; and IACHR, Report of the Situation of Human Rights in Ecuador, OAS Doc. OEA/Ser.L/V/II.96 (1997) Referenced and discussed in Jägers 2002: 155-6.

rightly observed by Alexander Kiss, "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."<sup>18</sup>

52. The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual<sup>19</sup>.
53. Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.
54. We now examine the conduct of the government of Nigeria in relation to Articles 16 and 24 of the African Charter. Undoubtedly and admittedly, the government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken as outlined in the preceding paragraph and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.

The Commission found the Government in violation of the right to health, among other rights, and made the following appeals. The Commission:

**Appeals to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:**

...

- Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;
- Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and

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<sup>16</sup> 155/96 The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria, 20<sup>th</sup> Session, 13-27 October 2001.

<sup>17</sup> See also General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural rights

<sup>18</sup> Human Rights in the Twenty first Century: A Global Challenge Edited by Kathleen E. Mahoney and Paul Mahoney. Article by Alexander Kiss " Concept and Possible Implications of the Right to Environment at page 553

<sup>19</sup> See Scott Leckie " the Right to Housing " in Economic, social and cultural rights (ed) Eide, Krause and Rosas, Martinus Nijhoff Publishers 1995

- Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

The Commission found violations of the African Charter of Human and Peoples' Rights in several respects, but, in particular, it referred to the obligations of states with regards to private actors in the context of the people's rights to natural resources and the right to food. With regard to the first set of obligations the Commission stated:

The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter. (Para 58)

With regards to the right to food the Commission found:

The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves. (Para 65)

There are reasons to believe that the Commission will continue to develop its approach to these issues, taking an approach which demands that human rights are protected, not only from the state, but also from the activities of corporations and other non-state actors in the private sphere.<sup>20</sup>

## ➤ The European Court of Human Rights

In Europe, the European Court of Human Rights has had occasion to address the positive obligations of states in a number of contexts,<sup>21</sup> we might just mention here that, in the context of the right to enjoy private and family life, governments have been found in violation of their obligations where the Spanish local authorities failed to regulate the operation of a waste treatment plant resulting in interference with respect for the applicants' home, private and family life.<sup>22</sup> Similarly, Italy was held to have violated the Convention where it failed to provide effective protection for the applicants with regard to toxic substances released from a factory. The failure to provide the relevant information about pollution from the plant to the applicants resulted in a violation of their rights to privacy.<sup>23</sup>

<sup>20</sup> See R. Murray *The African Commission on Human and Peoples' Rights and International Law* (2000).

<sup>21</sup> K. Starmer, 'Positive Obligations under the Convention', J. Jowell and J. Cooper, eds *Understanding Human Rights Principles* (2001).

<sup>22</sup> *Lopez Ostra v Spain*, 9 December 1994.

<sup>23</sup> *Guerra v Italy*, 19 February 1998 at para. 60.

In another set of cases the European Court of Human Rights has clearly stated that the rights in the Convention create obligations for States which involve ‘the adoption of measures designed to secure respect for private life *even in the sphere of the relations of individuals between themselves*’.<sup>24</sup> This has also been affirmed by the Court in the context of the right to counter-demonstrate: ‘Like Article 8, Article 11 sometimes requires positive measure to be taken, even in the sphere of relations between individuals, if need be.’<sup>25</sup> The statements by the Court, that the Convention covers the sphere of relations between private individuals, has had important consequences beyond the scope of state responsibility for positive obligations as determined in that international court. First, the extension into the private sphere implicitly demands that we consider the actual obligations of these private actors between themselves. (Ratner 2001:465) We can only judge the failure of the state to intervene if we know the sort of obligations which are owed to individuals by other private actors. Second, the extension of the scope of human rights in to the private sphere has meant that, where national courts have had occasion to deal with a complaint against a private actor, they will consider that that actor has human rights obligations which stem from the European Convention. This is sometimes known as the horizontal or *Drittwirkung* effect of the relevant Convention article.<sup>26</sup>

➤ **The international responsibilities of corporations regarding the right to health and horizontality of the right to health in national law.**

Our next challenge is see what are the responsibilities of corporations that the various bodies are referring to in the context of scrutinizing states for ensuring that corporations fulfil such responsibilities. The starting point for such an investigation should be the synthesized text

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<sup>24</sup> *Case of X and Y v. The Netherlands* (1985) Series A, vol. 91, para. 23 (emphasis added).

<sup>25</sup> *Case of Plattform ‘Ärzte für das Leben’* (1988) Series A, vol. 139, para. 32.

<sup>26</sup> See Clapham (1993a: 163-206) Toebes (1999: 327) in her book length treatment of the right to health in international law casts doubt on the horizontal effect of the right to health as contained in the different human rights treaties that include this right. Basing herself on the texts of the articles she concludes: ‘The obligation to protect should be distinguished from the horizontal effect of rights. Whereas the obligation to protect concerns a State duty to protect individuals from acts of third parties, the horizontal effect concerns the effect of rights between individuals. Some human rights provisions are explicitly designed for horizontal relations, i.e. to protect the individual against harmful acts of the other. An example is the right to strike in Article 8(1)(d) ICESCR. It is, however, questionable whether horizontal effect can be derived from health-related provisions under discussion. They are explicitly directed towards States: ‘the Contracting Parties undertake’ (11 ESC) and ‘the steps to be taken by the States Parties (...) shall include ...’ (12 ICESCR). It is difficult to maintain that such definitions embrace third party responsibility.’ See also her more recent ambiguous approach to the issue of responsibilities for corporations with regard to the right to health Toebes (2001: 189-90). Our position is that the responsibilities will stem not from the treaty itself but from the emerging customary law, and at the national level from the national law, which may be reflecting the international obligation to protect the right to health, or in some cases could be actually ensuring that the horizontal effect of the international right is enforceable. To take a textual approach to the horizontality of international human rights is nor really a reliable way to determine whether or not an international tribunal will eventually declare that the right applies even in the sphere of relations between individuals. Consider the text of Article 8 of the ECHR and the subsequent case law. (Clapham 1993b)

currently before the UN Sub-Commission for the Protection and Promotion of Human Rights.<sup>27</sup>  
The relevant paragraphs read as follows:

7. Transnational corporations and other business enterprises shall provide a safe and healthy working environment as provided by the relevant international instruments and national legislation as well as international human rights law.

12. Transnational corporations and other business enterprises shall respect civil, cultural, economic, political and social rights and contribute to their realization, in particular the rights to development; adequate food and drinking water; the highest attainable standard of physical and mental health; adequate housing; education; freedom of thought, conscience and religion; and freedom of opinion and expression; and refrain from actions which obstruct the realization of those rights.

14. Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety; and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.

Some of this is fairly unproblematic, but the difficult question remains, what exactly does it mean to say that corporations *shall contribute to the realization* of the right to the highest attainable standard of physical and mental health.

In order to go further into this problem we need to briefly discuss what are the actual obligations which stem from the right to health. We will look first at the right as it has been elaborated in treaties and then draw some conclusions concerning the scope of a customary international law right to health.

## ➤ **The Right to Health in the International Human Rights Treaties**

### ➤ **The International Covenant on Economic Social and Cultural Rights (1966)**

The International Covenant on Economic, Social and Cultural Rights (CESC, 1966) provides, together with the Convention on the Rights of the Child (CRC, 1989), the most comprehensive disposition on the right to health. According to article 12(1) of the Covenant, States Parties recognize “the right of everyone of the enjoyment of the highest attainable of the physical and mental health”, and article 12(2) lists a number of steps to be taken by the States Parties to achieve “the full realization of this right” such as: (a) the right to maternal, child and reproductive health - the provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child; (b) the right to healthy natural and workplace environments - the improvement of all aspects of environmental and industrial hygiene; (c) the right to prevention, treatment and control of diseases - the prevention, treatment and control of

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<sup>27</sup> Responsibilities Of Transnational Corporations And Other Business Enterprises With Regard To Human Rights, E/CN.4/2002/13.

epidemic, endemic, occupational and other diseases; and (d) the right to health facilities, goods and services - the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The CESCR General Comment on article 12 of the Covenant, which clarifies the nature and the content of such a right and States Parties' obligations, mentions that the reference in article 12.1 to "the highest attainable standard of physical and mental health" is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health is an inclusive right, embracing a wide range of social-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, a healthy environment<sup>28</sup> and access to health-related education and information, including on sexual and reproductive health<sup>29</sup>.

Regarding the normative content of article 12, it must be said straight away that the right to health does not mean a right to be healthy since such a right embodies the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health. On the other hand, the notion of "the highest attainable standard of health" takes into account both (a) the individual's biological and socio-economic preconditions and (b) the State's available resources<sup>30</sup>.

According to the Committee, States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind and the obligation to take steps towards the full realization of article 12. The right to health imposes three types of obligations on States: the obligations to respect, to protect and to fulfill<sup>31</sup>.

First, the obligation to respect requires States to avoid measures that could prevent the enjoyment of the right. Therefore, States are under the obligation to respect the right to health by, *inter alia*, refraining from (i) denying or limiting equal access for all persons to preventive, curative and palliative health services; (ii) prohibiting or impeding traditional preventive care, healing practices and medicines; (iii) marketing unsafe drugs; (iv) applying coercive medical treatments; (v) limiting access to contraceptives and other means of maintaining sexual and reproductive health; and (vi) censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters.

Second, the obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees. Obligations to protect include, therefore, the duties of States (i) to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; (ii) to ensure that privatization of the

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<sup>28</sup> *Idem*, at paragraph 4.

<sup>29</sup> *Idem*, at paragraph 11.

<sup>30</sup> *Idem*, at paragraphs 7-9.

<sup>31</sup> *Idem*, at paragraphs 33-37

health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; (iii) to control the marketing of medical equipment and medicines by third parties; (iv) to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and (v) to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons.

Finally, the obligation to fulfil requires States to take positive measures that enable individuals and groups to enjoy the right to health. The obligation to fulfil requires States, for instance, (i) to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation; (ii) to adopt a national health policy with a detailed plan for realizing the right to health; (iii) to ensure provision of health care, including immunization programmes against the major infectious diseases; (iv) to ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions; (v) to ensure the appropriate training of doctors and other medical personnel, the provision of sufficient number of hospitals, clinics and other health-related facilities with due regard to equitable distribution throughout the country; (vi) to provide public, private or mixed health insurance system which is affordable for all; (vii) to promote medical research and health education; and (viii) to promote information campaigns, in particular with respect to HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, the abuse of alcohol and the use for cigarettes, drugs and other harmful substances.

In its Comments, the Committee confirms that States parties to the CESCR have a “core obligation” to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including the right to health. These core obligations, which have already been discussed before domestic courts in some countries<sup>32</sup>, include obligations such as: (i) to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; (ii) to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; (iii) to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; (iv) to provide essential drugs; (v) to ensure equitable distribution of all health facilities, goods and services; and (vi) to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns to the whole population<sup>33</sup>.

We have here, thanks to the detailed work of the Committee a comprehensive description of the meaning of the right to health, at least in the context of the 1966 Covenant. In a recent book Nicola Jägers has taken the right to health, as elaborated by the Committee, and sought to determine what might be the responsibilities of corporations with regard to the realization of this right. She follows the approach of the Committee and breaks the rights down into the familiar separate obligations to respect, protect and fulfil the right. The following paragraphs contain her conclusions:

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<sup>32</sup> See the case of South Africa analyzed below.

<sup>33</sup> CESCR, General Comment n° 14, cited (note 1), at paragraph 43.

For a corporation the duty to respect the right to health may require that the corporation abstains from operations that may cause environmental problems that are detrimental to the health of employees and the people residing on the land where the corporation operates. Moreover where corporations knowingly market unhealthy products, a violation of the obligation to respect the right to health will occur. An example of the latter is the aggressive marketing of powdered milk by multinationals in developing States....<sup>34</sup>

For corporations the duty to protect the right to health will come into play especially with the regard to the ‘underlying determinants’<sup>35</sup> of the right to health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment. The duty to protect may require a corporation to adopt guidelines in order to ensure that the activities of business partners will not lead to violations of other individuals’ right to health. For example, a corporation should ensure that their subcontractors promote healthy working conditions....

It is conceivable that the obligation to fulfil comes into play when a corporation operates in a remote part where the state is not capable of providing for health facilities. In such a case a corporation may be under the obligation to fulfil the right of its employees to health by providing for health care services and hospitals.

The focus here is on the rights of employees rather than a general obligation on corporations to fulfil the right to health of everyone. This reflects the approach in the doctrine which suggests that the responsibilities grow greater the closer the nexus between the corporation and the right holder (Ratner 2001). We might also point add that such an approach reflects the fact that the corporations themselves have agreed that they will promote and respect human rights in their sphere of influence. The Shell Management Business Primer (1998: 22) includes the following paragraphs:

The responsibilities of Shell companies, as articulated in the business principles, include the promotion of equal opportunity and non-discrimination in employment practices; ensuring that freedom of association and the right to organise are respected, guaranteeing that Shell companies do not use slave labour, forced labour or child labour; ensuring that healthy and safe working conditions are provided; that security of employment is created and that the rights of indigenous people and communities are respected.

The individual operating companies must, within their capacity to take action, ensure that these principles are implemented and respected. Within areas where it has control, such as on company sites or in defining employment conditions, the company has full responsibility for meeting human rights standards.

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<sup>34</sup> Jägers 2002: 87, she continues ‘Due to lack of clean water the use of powdered milk leads to an increase in infant mortality. In 1981 the World Health Organisation (WHO) set up a code for the manufacture of powdered milk, insisting that they must not provide free samples of their product.’

<sup>35</sup> UN Doc. E/C.12/200/4, 4 July 2000, para 4. Footnote in the original. This reference is to General Comment 14 discussed above.

## ➤ Other UN Human Rights Treaties and the Day of Discussion of the Child Rights' Committee

In addition to the right to health spelt out in the Covenant specific instruments for the protection of special groups, also refer to the right of health. First, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965) provides, in article 5(e)(iv), that States Parties undertake “to prohibit and eliminate racial discrimination in the enjoyment of the right to public health, medical care, social security and social services.”

Second, the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW, 1979) sets forth the specifically right to health care of women focused on equal access to health care facilities. Article 12 of the Convention reads as follows:

- “1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”

Third, the Convention on the Rights of the Child (CRC, 1989), in article 24, recognizes the right of the child to the enjoyment of the highest attainable standard of health in a very wide provision<sup>36</sup>. Such an article is broader than any other provision in this field. Notwithstanding, this right is not understood as an absolute right, i.e., a right to be healthy since it must be envisaged in the light of the socio-economic level of the State. Indeed, according to article 4 of

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<sup>36</sup> According to article 24 of the CRC,

- “1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
  - (a) to diminish infant and child mortality;
  - (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
  - (c) to combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
  - (d) to ensure appropriate pre-natal and post-natal care for mothers;
  - (e) to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
  - (f) to develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.”

the CRC, this provision has to be respected, fulfilled and protected by the state to the maximum extent of its available resources.

In a recent Day of Discussion organized by the Committee on the Rights of the Child concerning ‘The Private Sector as Service Provider and Its Role in Implementing Child Rights’ we find some interesting examples of the sorts of responsibilities the UN Committee consider relevant in this context. The Committee’s recommendations start by recalling that States parties have an obligation ‘to ensure that non-state service providers operate in accordance with its provisions, thus creating indirect obligations on such actors. The Committee recalls that even with regard to private social welfare institutions Article 3 of the Convention states that the best interests of the child shall be a primary consideration. In addition States parties are obliged according to the Committee to set standards with regards to health in conformity with the Convention ‘and ensure compliance by appropriate monitoring of institutions, services and facilities including of a private nature.’ Similarly Article 25 calls for periodic review of the treatment of children who have been placed in facilities, including private facilities, for the purposes of care, protection or treatment of their health. The Committee concluded that there are therefore ‘obligations for the State party for the setting of standards and monitoring *vis-à-vis* the private sector.’ The Committee further refers to General Comment 14 quoted above and in particular paragraph 42 (quotes at the start of this paper) concerning the responsibilities of non-state actors. The Committee recognized that ‘responsibilities to respect and ensure the rights of children extend beyond the State, including individuals, parents, legal guardians, and other non-state actors.’

When one considers the responsibilities of corporations in this context one can see that the responsibility not to discriminate with regard to the enjoyment of the right to health is reinforced in the context of racial and sex discrimination. With regard to the Conventions on the Rights of the Child the Committee has gone beyond the simple obligations to prevent and punish discrimination in the private sphere. The Committee has addressed the contracting out of services to a non-state actor and recommended that States undertake a comprehensive assessment of the political, financial and economic implications and the possible limitation on the rights of beneficiaries in general, and children in particular. In addition the Committee states that ‘Similar assessments should also be carried out for services provided by non-state providers that may not have been specifically contracted by State parties.’ In other words the demands under the human rights treaties for control of the behaviour of non-state actors go beyond that activity that is attributable to states under the rules of state responsibility.

## ➤ **Regional Human Rights Treaties**

Beside the UN treaties we have mentioned above, regional human rights instruments recognize also the right to health. Three documents, concluded within the framework of regional organizations, must be cited: (a) the European Social Charter (1961), (b) the African Charter on Human and Peoples’ Rights (1981) and (c) the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988).

Signed in 1961, the European Social Charter was negotiated and concluded within the framework of the Council of Europe. Article 11 of the Charter reads as follows:

“With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases [as well as accidents]<sup>37</sup>.”

The African Charter on Human and Peoples’ Rights (1981), in the context of the Organization of African Unity (OAU), states civil and political rights, and economic, social and cultural rights. According to article 16 of the Charter: (a) every individual shall have the right to enjoy the best attainable state of physical and mental health; and (b) State parties to the treaty shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The Inter-American system of protection of human rights, developed in the context of the Organization of American States (OAS), is based on the American Convention on Human Rights (1969). However, this treaty does not particularly stipulate economic, social and cultural rights but only contains a general clause according to which States parties should take measures to progressively realize economic, social and cultural rights (article 26). Such rights were further developed within the framework of a specific instrument, the Protocol of San Salvador, adopted in 1988. In the text of the Protocol, it is interesting to note that article 10 is the first treaty provision to use the term “right to health”. Accordingly,

1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.
2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:
  - (a) primary health care, that is, essential health care made available to all individuals and families in the community;
  - (b) extension of the benefits of health services to all individuals subject to the State’s jurisdiction;
  - (c) universal immunization against the principal infectious diseases;
  - (d) prevention and treatment of endemic, occupational and other diseases;
  - (e) education of the population on the prevention and treatment of health problems; and
  - (f) satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.”

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<sup>37</sup> The part in square brackets was added in the Revised European Social Charter of 1996.

## ➤ The Right to Health in Customary International Law

Since we have sketched the right to health embodied by international human rights instruments, we must now address a further question and enquire if such a right has attained the character of a norm of customary international law. In international law, contrary to treaty law, which is based on the consent of States and does not normally bind third parties,<sup>38</sup> customary international law, understood as a general practice accepted as law (Article 38 of the Statute of the ICJ), binds all States without exception and irrespective of their express consent.<sup>39</sup> The characterization of the right to health as customary international law would then broaden the field of application of such a right and its enforceability beyond the States parties to human rights treaties.

## ➤ The Formation of Customary International Law

Scholars have debated on the nature of a customary obligation. In principle, custom in international law is seen to be constituted by two elements: (i) first, an objective element, i.e., a state practice understood as material acts accomplished by states, and (ii) second, a subjective element which is the belief that such a practice is rendered obligatory by the existence of a rule of law requiring it. This idea of an *opinio juris sive necessitatis* requires from the states the ‘feeling’ that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts, that may be motivated by considerations of courtesy, convenience or tradition, is not in itself enough to constitute custom. That is the traditional theory on customary international law developed by the International Court of Justice (ICJ) in the *North Sea Continental Shelf* case<sup>40</sup>.

However, according to some authors and to the ICJ itself in the *Nicaragua* case, customary international obligations may also be evidenced through a normative instrument: (i) in the context of a treaty we may have a customary obligation to non-party states (and to the parties themselves) by a further acceptance of that obligation through state practice. In the *Nicaragua* case, for instance, the ICJ concluded that certain obligations under the UN and the OAS Charters - rules relating to the use of force in international relations - had become customary law due to the state practice of their members. Or (ii) in the context of non-binding instruments (examples would include Declarations contained in UN General Assembly Resolutions adopted by consensus) we may have evidence of customary obligations for all states where this is coupled with a degree of state practice. In the same *Nicaragua* case the ICJ stated that some obligations mentioned in some UNGA resolutions – such as Resolution 2625 (XXV) - should be understood as an acceptance by the States of the validity of the rule or set of rules declared by the resolution.<sup>41</sup>

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<sup>38</sup> See article 34 of the 1969 Vienna Convention on the Law of Treaties.

<sup>39</sup> We will not deal here with the questions that may arise from the “persistent objector” State. See *Fisheries case*, Judgment of December 18th, 1951: I.C.J. Reports 1951, p. 116.

<sup>40</sup> *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, at paragraph 77.

<sup>41</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at paragraphs 172-192.

The scholarship on this topic is extensive. Abi-Saab, for example, developing the approach of René-Jean Dupuy,<sup>42</sup> has argued that if States may create custom through a practice followed by *opinio juris* - the traditional customary international law, *une coutume sauvage*, they may also declare/crystallize/generate customary international law through a written instrument that does not necessarily constitute a treaty - the idea of *coutume sage*<sup>43</sup>. In another words, a treaty creates conventional obligations to its members, but it may also create customary obligations (for all States, either parties or non-parties to the treaty) depending on the further practice of the States. Moreover, initially non-binding instruments - that would be the case of UNGA resolutions, and other documents elaborated within the UN framework - may become (but not necessarily) binding, not as such, but, as evidence of custom, i.e., binding as customary international law due to the later state practice.

Despite the criticism of some scholars, who have raised concerns about the dangers of a “relative normativity” in international law<sup>44</sup>, the wide acceptance of treaties and non-binding instruments by the international community seems to constitute evidence of customary international law in some fields<sup>45</sup>. The key-point, in this matter, is the idea of “acceptance” that follows from the State practice. First, regarding a particular treaty, we may consider that from a quasi-universal acceptance of that treaty the obligations mentioned in there have become customary law (or simply reflect existing custom). Second, the higher is the number of states that have accepted an obligation embodied by a non-binding document - an UNGA resolution, for example - the higher is the probability of an understanding of such an obligation as customary international law binding all states.

As Theodor Meron has pointed out, in both cases it may be argued that there is an implicit recognition of international obligations by applying the classical theory of acquiescence<sup>46</sup>. This implicit recognition must follow from the state practice in some way: that would be the case, *inter alia*, of unilateral acts of states (mainly actions taken and statements made by state representatives to international organizations), participation in a certain treaty regime (even if the state does not become party to that treaty later), national legislation and domestic jurisprudence. The state practice not only creates the rule but also defines its content. Hence, the state practice represents the determining criterion to establish whether a particular right has matured into customary law.

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<sup>42</sup> DUPUY, René-Jean, “Coutume sage et coutume sauvage”, in *La communauté internationale - Mélanges offerts à Charles Rousseau*, Paris, Pedone, 1974, pp. 75-86.

<sup>43</sup> See ABI-SAAB, Georges, “Cours général de droit international public”, *RCADI*, (207) : 1-463, VII (1987) pp. 173-8.

<sup>44</sup> See WEIL, Prosper, “Vers une normativité relative en droit international ?”, in *Écrits de droit international*, Paris, PUF, 2000, pp. 21-56.

<sup>45</sup> See ABI-SAAB, Georges, “La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté”, in *Le droit international à l'heure de sa codification - Études en l'honneur de Roberto Ago*, vol. I, Milano, Giuffrè, 1987, pp. 53-65.

<sup>46</sup> MERON, Theodor, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989, p. 89.

## ➤ A customary international law right to health

The answer, therefore, to the question whether or not the right to health has become customary international law depends on the analysis of the state practice in this field. Do States consider the right to health customary international law? To answer such a question we have to consider the material acts accomplished by states. From this we may conclude the existence of an *opinio iuris* within the international community.<sup>47</sup> We consider four criteria to be important: (a) the wide acceptance of non-binding instruments dealing with the right to health; (b) the wide participation in multilateral treaties that establish the right to health; (c) the reference to such a right in national legislation, mainly at the constitutional level; and (d) the implementation of the right to health before municipal courts.

First, let us consider the non-binding instruments - the so-called *soft law* - that deal with the right to health. Their wide acceptance by the international community is to be seen an initial evidence of the customary character of the right to health. In this context, the most relevant document to be mentioned is the Universal Declaration of Human Rights, adopted by the UNGA in 1948 with no negative votes. Article 25 of the UDHR reads as follows:

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Although this text is frequently considered too broad and vague - the meaning of term 'health' is not explained, and the states' obligations that are required to guarantee the rights set forth are not spelled out, the importance of the 1948 Declaration as an universally known and recognized human rights document can not be underestimated. It remains as an important instrument to address states which have not signed or ratified human rights treaties.<sup>48</sup> Moreover, in the light of the UDHR, a further UNGA resolution - the 1969 Declaration on Social Progress and Development, resolution 2542 (XXIV) - sets forth the importance of the achievement of "the highest standards of health and the provision of health protection for the entire population, if possible free of charge." The Universal Declaration is of particular importance in the present context as the UDHR is not explicitly addressed to governments in the bulk of its articles and in an introductory paragraph mentions the responsibilities of organs of society.

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<sup>47</sup> HAGGENMACHER, Peter, "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale", *RGDIP*, 90 (1) : 5-125, 1986.

<sup>48</sup> See TOEBES, Brigit C.A., *The Right to Health as a Human Right in International Law*, Antwerpen-Groningen-Oxford, Intersentia, 1999, p. 40.

*Now, therefore, THE GENERAL ASSEMBLY proclaims*

This Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

This language is often used to found the international responsibilities of companies. Recall the phrase ‘members of society; in para 42 of general Comment 14. Consider also the preambular language of the Sub-Commission’s draft text on the responsibilities of corporations mentioned above:

*Recalling that the Universal Declaration of Human Rights proclaims a common standard of achievement for all peoples and nations, to the end that Governments, other organs of society, and individuals shall strive by teaching and education to promote respect for human rights and freedoms and by progressive measures to secure their universal and effective recognition and observance,*

Mary Robinson (1999: 14) as High Commissioner for Human Rights based her approach to the question on the paragraph from the Universal Declaration:

‘As I turn to the question ‘why should business care about human rights?’ the Declaration helps me with the answer; because business needs human rights and human rights needs business.

The preamble to the Universal Declaration states that ‘every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms.’ Business corporations included. Every organisation and individual has a legitimate right to be concerned and the responsibility to promote human rights.

David Weissbrodt (1998: 180), after considering the Universal Declaration in this context concludes: ‘Hence, although not its principal thrust, it appears that non-State entities have human rights duties under the Universal Declaration.’

Similarly, beyond the Universal Declaration, World Conferences held within the framework of the UN have discussed the right to health. The Vienna Declaration and Programme of Action (1993), mentions in the context of dumping of toxic waste, the right to health of everyone in Part I para 11. Such a reference to the right to health goes beyond the inhabitants of states parties to international treaties and is obviously addressed to activity by corporate non-state actors.

11. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. The World Conference on Human Rights recognizes that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone.

Further references explicitly refer to the Universal Declaration's right for everyone to a standard of living adequate for their health and well being, including food and medical care.<sup>49</sup> (Part I para. 31) and reaffirm a woman's right to adequate and accessible health care on the basis of equality. (Part II paragraph 41.)<sup>50</sup>

Another recent and important text in this field is the Commission on Human Rights resolution entitled 'The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (2002). The Commission, in the goal of promoting and protecting the progressive realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: (a) urges States to take steps, to the maximum of their available resources, to achieve progressively the attainable standard of physical and mental health by all appropriate means; (b) calls upon the international community to continue to assist the developing countries in promoting the full realization of such a right, including through financial and technical support as well as training of personnel; and (c) calls upon States to guarantee that the right to the enjoyment of the highest attainable standard of physical and mental health will be exercised without discrimination of any kind. The Commission also decided to appoint a special rapporteur whose mandate focuses on such a right, and it set forth some duties to be carried out by the rapporteur<sup>51</sup>. It would be strange for the Commission to appoint a Rapporteur to look at the realization of a right which is not considered a right owed to everyone. Special Rapporteurs do not confine themselves to examining the situation in states

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<sup>49</sup> 31. The World Conference on Human Rights calls upon States to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles to trade relations among States and impedes the full realization of the human rights set forth in the Universal Declaration of Human Rights and international human rights instruments, in particular the rights of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and the necessary social services. The World Conference on Human Rights affirms that food should not be used as a tool for political pressure.

<sup>50</sup> 41. The World Conference on Human Rights recognizes the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life-span. In the context of the World Conference on Women and the Convention on the Elimination of All Forms of Discrimination against Women, as well as the Proclamation of Tehran of 1968, the World Conference on Human Rights reaffirms, on the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels.

<sup>51</sup> The Special Rapporteur is specifically requested: (a) to gather, request, receive and exchange information from all relevant sources (Governments, international organizations, non-governmental organizations etc.) on the realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; (b) to develop a regular dialogue and discuss possible areas of cooperation with all relevant actors; (c) to report on the status of the realization of such a right, in accordance with human rights treaty law into force; and (d) to make recommendation on appropriate measures to promote and protect the realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Commission on Human Rights resolution 2002/31, at paragraph 5).

parties to treaties. They normally rely instead on the customary international law nature of the rights in question.

Second, evidence that could lead to the conclusion of the customary character of the right to health is the wide participation to multilateral treaties that deal with the right to health. In this context, the most important international human right instrument, as mentioned above, is the Covenant on Economic, Social and Cultural Rights since it provides, in article 12, the most comprehensive disposition on the right to health. According to available sources,<sup>52</sup> by December 2002, 146 States had become parties to the CESC, what demonstrates the quasi-universal acceptance of the Covenant. This list includes China, and we might note that the United States has signed this treaty. The United States has not indicated that it does not intend to ratify this treaty. (A step which it did take with regard to the Rome Statute for the International Criminal Court.)

Other treaties that equally contain a special provision on the right to health have similarly wide acceptance: 165 States parties to the International Convention on the Elimination of All Forms of Racial Discrimination (1963), 170 States parties to the Convention on the Elimination of All forms of Discrimination Against Women (1979) and 191 States parties to the Convention on the Rights of the Child (1989). (Again this treaty is signed by the United States). We suggest that the quasi-universality of participation in these treaty regimes is a strong indicator of the necessary *opinio juris* concerning the right to health, and therefore, for the underlying customary rule. As pointed out by Villiger, the international community regards the conventions as so essential for its organization that, at this stage, even if the rules did not exist *qua* contractual obligation, they would have to do so *qua* customary international law<sup>53</sup>.

Thirdly, we must consider the reference to the right to health in national legislation as an evidence of State practice in this field. Many constitutions around the world include the right to health within the framework of individual rights and guarantees. In the Americas, for example, some countries like Bolivia, Chile, Colombia, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Suriname and Venezuela include a right to health in their constitutions either as a specific right or indirectly through the stipulation of State duties to protect health. Countries like Cuba and Nicaragua set forth in their constitutions a specific right to health and emphasize the State's role with regard to the provision of health care services<sup>54</sup>. In Africa, such a right is dealt within the constitutions of Algeria, Burkina Faso, Congo, Egypt, Ethiopia, Guinea, Lesotho and Libya. Another countries whose constitutions deal directly or not with the right to health we could mention include: Finland, Hungary, India, Italy, Philippine, South Africa and Russia<sup>55</sup>. In the words of Toebes, the fact that the right to health is codified in many constitutions implies that States generally recognize their responsibility regarding the health of their people, and if States recognize such a right at the constitutional level, they will also logically support the existence of an international human right to health<sup>56</sup>.

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<sup>52</sup> As mentioned at the United Nations High Commissioner for Human Rights website, [www.unhchr.ch](http://www.unhchr.ch).

<sup>53</sup> VILLIGER, Mark E., *Customary International Law and Treaties*, The Netherlands, Martinus Nijhoff, 1985, p 159.

<sup>54</sup> For further details, see TOEBES, op. cit. (note 21), pp. 79-81.

<sup>55</sup> Idem, *ibidem*.

<sup>56</sup> Idem, p. 83.

Lastly, further evidence of the customary character of the right to health in international law is to be found in the implementation of such a right before municipal courts. The next section we will proceed to the analysis of case law developed before the Constitutional Court of South Africa and the Supreme Court of India. We have included this examination, not so much to bolster the case for a customary international law right to health, but, in order to highlight that the obligations of corporate non-state actors with regards to the right to health are likely to be dealt with before national courts which recognize the horizontal effect the right to health (whether this is understood as an international human rights or as a constitutional right). Unlike a hearing before an international tribunal, hearings before national courts may consider the human rights obligations of non-state actors. So far this has happened only indirectly.

### ➤ **Human rights obligations concerning the right to health under constitutional law**

Recent cases have demonstrated the growing importance accorded in domestic law to the right to health and its implementation before municipal courts.

#### ➤ **South Africa**

A recent South African case, judged by the Constitutional Court of South Africa<sup>57</sup>, which deals with the right to access to certain drugs, demonstrates the growing importance accorded to the right to health. The case concerned a challenge to the government's policy on preventing the mother-to-child transmission of HIV, which was considered as a violation of two constitutional provisions: "the right to have access to health care services, including reproductive health care" (section 27) and the right of every child "to basic nutrition, shelter, basic health care services and social services" (section 28). The Court found that the government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically, the finding was that the government had acted unreasonably in (i) refusing to make an antiretroviral drug called "nevirapine" available in the public health sector where the attending doctor considered it medically indicated and (ii) not setting out a time frame for a national programme to prevent mother-to-child transmission of HIV<sup>58</sup>.

The Court began the judgment by making reference to the extent of the problems posed by AIDS: in South Africa, AIDS has been described as the most important challenge facing the country since the birth of the new democracy and government's fight against it as a top priority. One of the most common methods of transmission of HIV in children is from mother to child at and around birth, and the Government estimates are that since 1998, 70,000 children are infected in this manner every year<sup>59</sup>. As part of a programme to deal with mother-to-child transmission of HIV, the government imposed restrictions on the availability of "nevirapine" in the public health sector (two pilot sites per province), and as a consequence of this policy, doctors in the public

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<sup>57</sup> Constitutional Court of South Africa, *Minister of Health v. Treatment Action Campaign*, Case CCT 8/02 of July 5, 2002. See also HARE, Ivan, "Minister of Health v. Treatment Action Campaign: The South African AIDS Pandemic and The Constitutional Right to Healthcare", *EHRLR*, 5: 624-30, 2002.

<sup>58</sup> See Case CCT 8/02, at paragraph 2.

<sup>59</sup> See Case CCT 8/02, at paragraph 19.

sector who do not work at one of those pilot sites, were unable to prescribe the drug for their patients, even though it had been offered to the government for free by the manufacturers. This led the Treatment Action Campaign before the Courts - first at Pretoria, then at the Constitutional Court - arguing that this restriction was contrary to constitutional provisions that guarantees the right to have access to health care services.

First, the Court had to deal with the question regarding whether socio-economic rights are enforceable, and it clearly states that such rights are justiciable. According to the Court, “The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are. The question is whether the applicants have shown that measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution<sup>60</sup>.”

Second, similarly to the interpretation given to the international human rights instruments mentioned above, the Court reaffirms that the extent of the right to health has to be limited by national resources. In fact, the Court applies the South African Constitution rules that establish that the right of access to healthcare services requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights (section 27.2). The Treatment Action Campaign had argued that the “relativity” of such a right regarding the national resources stated in section 27.2 was of no relevance to a “minimum core” of protection for the right to health stated in section 27.1. However, the Court rejected this argument of a “minimum core” of protection, which has been developed by the UN Committee on Economic, Social and Cultural Rights<sup>61</sup>, by arguing that the subsections (1) and (2) of both sections 26 and 27 are linked in the text of the Constitution itself, and that they have to be interpreted together, i.e., subsection (2) limiting subsection (1). Since the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that a minimum core be provided to them, the State is not obliged to go beyond available resources or to realize socio-economic rights immediately - that was the reasoning of the Court in its previous jurisprudence<sup>62</sup>.

The government policy imposing restrictions on the availability of “nevirapine” in the public health sector was considered by the Court a breach of the State’s obligations under section 27(1) read with section 27(2) of the Constitution. Accordingly, once that restriction is removed, government would be able to devise and implement a more comprehensive policy that would give access to health care services to HIV-positive mothers and their newborn children, and would include the administration of the drug where that is appropriate. The policy as reformulated must meet the constitutional requirement of providing reasonable measures within available resources for the progressive realization of the rights of such women and newborn

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<sup>60</sup> See Case CCT 8/02, at paragraph 25.

<sup>61</sup> According to the Committee, “a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. (...)” See CESCR General Comment n° 3, 14/12/90, at paragraph 10.

<sup>62</sup> The Court mentions the Soobramoney and the Grootboom cases. See Case CCT 8/02, at paragraphs 29-39.

children<sup>63</sup>. In its conclusions, the Court then states the Government is ordered without delay mainly to: i) remove the restrictions that prevent the drug from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites; and ii) permit and facilitate the use of the drug for the purpose of reducing the risk of mother-to-child transmission of HIV.

The outcome of the case was not only a further confirmation of the importance of the right to health but also the justiciability of such right. In fact, even today many would still argue that socio-economic rights are unenforceable as such since they do not impose concrete obligations upon States and they constitute mere “aims to pursue” by governmental authorities. Although national resources limit the extent of socio-economic rights, such rights may be enforced before municipal courts.

The South African example is particularly important due to the fact that the South African Constitution specifically states that the rights in the Constitution are to be respected by non-state actors.

### **South African Constitution 1996**

7. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights ...
8. (1) The Bill of Right applies to all law and binds the legislature, the executive, the judiciary and all organs of the state.
  - (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the rights and of any duty imposed by the right.
  - (3) In applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
    - (a) in order to give effect to a right in the Bill, must apply or if necessary develop, develop the common law to the extent that legislation does not give effect to that right; and
    - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
  - (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.

12.(1)(c) to be free from all forms of violence from either public or private sources.

- 36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-
- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;

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<sup>63</sup> See Case CCT 8/02, at paragraphs 80-81 and 122.

- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

## ➤ **India**

In India, the implementation of human rights before domestic courts in the last few years has been due to a very specific procedural technique developed by the Supreme Court in order to make access to justice a reality. Departing from the traditional rule of *locus standi*, the idea of a “public interest litigation” (PIL) was to broaden access to justice by providing that where a legal wrong or a legal injury is caused to a person or to a class of persons, who cannot approach the court, any member of the social group may address a writ by petition to the Supreme Court on his/her/their behalf. This was in a way an extension of the classic principle under which *habeas corpus* petition may be filed by anyone for the release of a person held under illegal detention. Public interest litigation has played an important role in the development of a human rights jurisprudence in India.

According to the Indian Constitution, the right to medical treatment, in case of emergency, is not a Fundamental Right as enumerated in Part III. There is a reference to this right only in the Directive Principles of the State Policy, which are not justiciable *per se*. In a general way, the Constitution guarantees the right to life in article 21, which states that no person shall be deprived of his life or personal liberty except according to procedure established by law. However, through PIL cases it has been judicially interpreted that the word “life”, in this article, does not mean a mere animal existence but rather a life befitting with human dignity. First, the Court stated that a right to life including the right to live with human dignity means the existence of such a right up to the end of natural life, what logically embodies the right to health<sup>64</sup>.

In another PIL case, when the petitioner addressed a writ to the Supreme Court on behalf of someone dying due to the non-availability of immediate medical treatment, the Court extensively dealt with the professional ethics of the medical profession and issued a number of directions to ensure that an injured person was instantaneously given medical aid. It confirmed then that the right to medical treatment is a Fundamental Right of the people under article 21 of the Constitution, and issued directions to the Union of India, the Medical Council of India, the Indian Medical Association etc. to give wide publicity to the Court’s decision on this regard. According to the Court,

“There can be no second opinion that preservation of human life is of paramount importance. (...) The patient whether he be an innocent person or be a criminal liable to punishment under the laws of the society, it is the obligation of those who are in charge of the health of the community to preserve life so that the innocent may be protected and the guilty punished (...)”<sup>65</sup>.

The right to health has been enforced in India also through PIL cases dealing with tobacco. After a writ petition initiated by the President of the Mumbai Regional Congress

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<sup>64</sup> See Supreme Court of India, the *Vincent v. Union of India*”

Committee against both the Union of India and major Indian tobacco companies, which argued that the Union of India had abrogated its duty to safeguard the public health by failing to control tobacco use, the Supreme Court ordered the states of the Indian Union to issue immediate orders banning smoking in hospitals, educational institutions, railways and public transport, courts and public offices, libraries and auditoriums nationwide. By its judgment, the Court then accomplished measures that had long been proposed and that were, at the time, under consideration before the Indian Parliament<sup>66</sup>.

Similarly to the interpretation given to the right to health by the South African jurisprudence mentioned above, before Indian courts such a right is understood to be limited by national resources. Moreover, as stated in article 41 of the Constitution, the State is supposed to provide for its citizens the right to public assistance in sickness and disablement, in accordance with its economic capacity. Therefore, article 21 has been read together with article 41, which mandates the State to provide, consistent with its economic capacity, for its citizens the right to public assistance in sickness and disablement.

Again although the cases are primarily concerned with the role of the state, the national courts have, as is illustrated by the orders to the various non-state actors, the power to order non-state actors to act in order to realize the right to health. This sort of national constitutional jurisprudence is likely to develop over the years to generate a set of right to health obligations which will be directly enforceable against non-state actors.

### **III CONCLUSION**

This paper has not dealt with ways in which corporations may themselves be held accountable human rights abuses which rise to the level of international crimes. In such situations there have been large settlements brought by the victims, of, for example, slave labour during World War II. (Ramasastry 2002). There have also been cases started against companies in the Courts of the United States (Zia-Zarifi 1999). Of course it is not hard to imagine right to health corporate abuses which rise to the level of international crimes: experimentation without consent in detention camps during an armed conflict, development of torture implements etc. However, the international criminal law regime is a separate regime and to include it here could have overly complicated the presentation. Nor have we considered the way in which the complicity concept has been applied in the context of the UN Global Compact (Clapham 2002). In the context of corporate responsibility work the expectations go beyond legal liability and encompass for example the notion that corporations will speak out to protect human rights in the country in which they operate, even when there is no particular nexus between the governmental violation and the activity of the corporation. (McIntosh 2003; Amnesty International & PWBLF 2000).

What we have presented is a framework for discussing the responsibilities of governments for human rights violations in the context of corporate activity. We hope this paper can stimulate discussion so that particular questions that have arisen, for example in the context of access to drugs, tobacco use, or toxic waste, can be addressed in a way which uses the relevant legal framework to articulate a policy which will be coherent with the developing international human rights law concerning non-state actors.

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