State Obligations towards the Conduct of Armed Non-State Actors in the Perspective of Due Diligence Principle

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Abstract

The state is a main responder in international law in general and in international human rights law in particular from the state-centred point of view. Thus, on the one hand, some acts of private actors, including armed non-state actors may be attributed to the state. On the other hand, the state has an obligation to protect its citizens and other human beings on its soil from the harmful acts of private actors, including armed non-state actors, through its due diligence duty and by taking necessary steps. By employing descriptive and

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analytical methods of research, this article examines as to whether the state is able to fulfil its obligations to protect its people within its territory and the capacity of states to fulfil such obligations in an armed conflict. This article shows the practical challenges of states in fulfilling their obligations in an armed conflict due to the acts of armed non-state actors within the territory of states and the function of transnational armed groups across national boundaries. Nevertheless, this article illustrates how states can ensure the protection of international law through a realistic approach of legal, as well as non-legal, measures before and after the armed conflict.

Keywords: State, Armed Non-State Actors, Due diligence Obligation, International Human Rights Law, International Humanitarian Law.

Introduction

The state is a main responder in international law in general and in international human rights law (IHRL) in particular from the state-centered point of view. Thus, on the one hand, some acts of private actors, including armed non-state actors (ANSAs)[1] may be

[1] For the purpose of this article, the term of Armed Non-State Actors (ANSAs) is employed to indicate the parties to non-international armed conflicts and are structurally organized and have de facto territorial control over a part of state territory and populations with an identifiable structure and administration. These groups usually fight against their parent government with political objectives as their aim, in order to establish an independent state or to get maximum autonomy to govern the areas where they are claiming to be in the majority or to alter the existing regime. While this working definition of ANSAs excludes guerrilla groups, bandits, relatively less organized groups, paramilitary groups, and military companies, it includes *de facto* regimes of ANSAs, which are partially or not partially recognized states that are not under the control of the state.

attributed to the state. On the other hand, the state has an obligation to protect its citizens and other human beings on its soil from the harmful acts of private actors, including ANSAs, through its due diligence duty and by taking necessary steps (see Hessbruegge, 2001). However, practically, states face many issues in fulfilling their obligations due to many reasons, such as the globalization, interdependency, and emergence of private actors, including privatization, function of multi-national corporations, the acts of ANSAs within the territory of states, and the function of transnational armed groups across national boundaries. These are real contemporary challenges to the monopoly of the state as an absolute powerful entity in the international system. Given these facts, many questions can be raised with regard to the obligations of states in contemporary international systems. Indeed, this is beyond the scope of this article. However, in terms of the acts of ANSAs, two questions may be raised and addressed in this article. First, as to whether the state is able to fulfil its obligations to protect its people within its territory and second, the capacities of states to fulfil such obligations since some states around the world have lost some of their territorial control to ANSAs.

Analysing the capacity of states in fulfilling their due diligence obligations in terms of the acts of ANSAs is very crucial due to the fact that, today, the gross violations of human rights and serious violations of international humanitarian law (IHL) by ANSAS in non-international armed conflicts (NIACs)[2] is an important issue in international law. On one hand, ANSAs have the ability to influence

[2] Non-international armed conflict takes place within the territory of a state with the involvement of at least one ANSA.

the international relations of states, and on the other hand they also possess the ability to make an impact on national and international security. This consequently creates a need for more scholarly research in this area. Nevertheless, the due diligence obligation of states towards acts of ANSAs is largely unaccounted for in the academic literature. On the other hand, many scholars have observed the due diligence obligation and the positive obligations of a state in terms of preventing, investigating, and punishing private actors, including state associated non-state actors and private persons and entities, for violating its citizens rights, especially the rights of women in its territory (e.g., see Ziemele, 2009; Benninger-Budel, 2008; Farrior, 2011; Goldscheid & Liebowitz, 2015; Tiroch, 2010; Hoppe, 2008; Hasselbacher, 2010 & Chirwa, 2004). This article aims to bridge the existing gap in the academic literature and seeks to make a contribution to the knowledge in this area by analyzing the normative framework of the due diligence obligation of states and the practical issues in fulfilling those obligations when it comes to the conduct of ANSAs in the territory of a state. Therefore, this article largely employs descriptive and analytical methods of research by reviewing the existing primary and secondary sources of relevant materials and sources, as well as the works of regional and international human rights monitoring bodies pertinent to the due diligence obligations.

1. Principle of Due Diligence

In general, states are obliged to respect and ensure respect of their obligations under international law, as these obligations arise from treaties to which they are a party, customary international law, and the domestic law of each state (Basic Principles and Guidelines

on Rights to a Remedy and Reparation for Victims, 2006, Annex). States are therefore bound by these obligations (Bassiouni, 2013). On the whole, the principle of due diligence is the procedures of the fulfilment of the state's duty to respect, and ensure respect for in international law by fulfilling the following steps:

> (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, [...] irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparations (Basic Principles and Guidelines on the Rights to a Remedy and Reparations for Victims, 2006, Annex, para.3).

In sum, states are obliged to deter, prevent, investigate, prosecute, and punish perpetrators, whether state or private actors, and provide remedies to the victims under the principle of due diligence obligations (Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 2010, para. 46 & Report of the Special Rapporteur on Violence against Women, 2006, para. 19).

While the principle of due diligence is not a recent phenomenon in international law (see *Alabama Claims of the United States of America against Great Britain*, United Nations, 2012 & Expert

Meeting on Private Military Contractors, 2005), it came to dominate the state's positive obligation in the fields of IHRL and IHL after the landmark decision of the Inter-American Court of Human Rights (Inter-Ame.Ct.H.R) in the case of *Velásquez Rodríguez v. Honduras,* (Velásquez case) in 1988. In this case, the court clearly illustrated the state's due diligence obligations for the acts or omissions of the state towards the acts of the public or private actors. According to the court:

> [I]n principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention (para.172).

Further, in this case, the court indicated the state's obligation to take the necessary steps to protect victims from the abuse of state actors and non-state actors, including ANSAs. Since then, this principle was mainly developed through the work of the different UN mechanisms (Amnesty International, 2005), and has especially been used to assess the obligation of states in relation to the protection

of women from the violence against women (Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, 2004, para. 74).

At present, the principle of due diligence is used in different branches of international law to apply in all circumstances in order to protect individuals and civilians from the abuse of the harmful acts of the state actors and ANSAs.

A. Obligation to Prevent

The prevention of the violation of IHL and IHRL is the main duty of the state in the due diligence procedures. The obligation to prevent constitutes a number of measures, including all legal, political, administrative, and cultural measures. However, these measures may differ in accordance with the state's law and conditions (*Velásquez case*, 1988, para. 175). States can prevent violations of international law emanating from the acts of ANSAs by adopting these options in accordance with their law (constitutions), local conditions, and capacity. Thus, taking appropriate measures to protect the lives of citizens within the territory and the power of the jurisdiction of a particular state indicates the state's preventive obligation (see *Osman v. United Kingdom*, 1998, para.115 & *Herrera Rubio v. Colombia*, 1987, para.10). This obligation is equivalent to the responsibility to protect (see Schabas, 2008). According to the United Nations General Assembly (UNGA) resolution 60/1 of 2005 (2005 World Summit Outcome), "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary

means" (para. 138). The duty to protect is "consistent with existing obligations under international human rights, humanitarian and refugee law, which are binding on all States" (Report of the Secretary-General: Responsibility to Protect, 2013, para. 6).

I. Practice of Human Rights Monitoring Mechanisms

The practice of international and regional bodies widened the obligation of states to take effective measures to prevent violations of the right to life of individuals and groups of people. In its judgment of *Kilic v. Turkey*, the European Court of Human Rights (Eur.Ct.H.R) indicated that it is a state's responsibility "to take appropriate steps to safeguard the lives of those within its jurisdiction"(2008, para. 62) and the African Commission on Human and People's Rights (AfrCommHR) stated that "[g]overnments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties"(*The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, 2001, para. 57). In cases of disappearance, the Human Rights Committee (HRC) stated that "States parties should take specific and effective measures to prevent the disappearance of individuals" (*Herrera Rubio v. Colombia*, para. 10 (3)).

Apart from the obligation of a state to protect individuals or groups of peoples from the common private actors, in a few instances, the international and regional bodies also asserted the responsibility of a state to prevent acts of ANSAs. For instance, in the context of the armed conflict in Colombia, the Inter-American Commission on Human Rights (Inter-AmeCommHR) indicated the positive obliga-

tions of the Colombian government towards paramilitary and other ANSAs, including the Revolutionary Armed Forces of Colombia (FARC) and National Liberation Army (ELN), in its Annual Report of 1996. The Commission pointed out that "the State may also incur international responsibility for the illicit acts of private individuals or groups when the state fails to adopt the necessary measures to prevent the acts" (para. 80).

On the other hand, the lack of domestic regulations to regulate the right to life is also a violation of the state's positive obligation to prevent, even in a situation of the armed conflict, as stated by various human rights monitoring bodies. For instance, in some cases, the Eu.Ct.H.R indicated the obligation of the state to prevent violations of the right to life of civilians in armed conflicts. In its judgments in cases of *Isayeva, Yusupova and Bazayeva v. Russia and Isayeva v. Russia*, the Eur.Ct.H.R indicated the state's positive obligations to regulate the use of forces in the war against Chechen fighters. In this case, the applicants alleged that the two children of the first applicant were killed; the first and second applicants were injured and the cars and possession of third applicant were destroyed due to the indiscriminate bombardment of Russian military planes of a civilian convoy on 29 October 1999 near Grozny (2005, para. 3). The Court found the violation of the right to life due to the failure of the government to "invoke the provisions of domestic legislation at any level which would govern the use of force by the army or security forces in situations such as the present one" (para. 198).

In 1998, the HRC in its Concluding Observation on Algeria indicated the elements of the due diligence principle to be done by the government of Algeria. While the HRC did not indicate the respon-

sible parties of the atrocity against civilian in Algeria, this comment came in light of armed conflict involving several Islamic groups, especially the Islamic Salvation Army (FIS) and the Armed Islamic Group (GIA) (Zegveld, 2002, p.169). The HRC was concerned about the lack of preventive measures and urged the authority "to prevent those attacks and, if they nevertheless occur, to come promptly to the defence of the population" (HRC, 1998, UN Human Rights Committee: Concluding Observations: Algeria, para. 6).

II. Preventive Measure under International Criminal Law

Under international criminal law (ICL), the Genocide Convention obliged states to "undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present Convention" (1948, art.v) to "prevent the acts it seeks to prohibit" (International Court of Justice (ICJ), 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, para. 429) as "a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed" (ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, para. 432). That is to say, the violation arises from the state's omission (see ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, para. 432). This is the common obligation of the state to prevent the violation of international law in its effective power. As found by the ICJ in the case of Armed Activities on the Territory of the Congo, "Uganda's responsibility is engaged both for any acts of

its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including *rebel groups acting on their own account*" (2005, para. 179, emphasis added).

There are a number of other international instruments that oblige states parties to perform the same obligation to prevent despite the fact that the content of these instruments vary in terms of their wording. Such instruments include Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 4 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents of 1973, Article 11 of the Convention on the Safety of United Nations and Associated Personnel of 1994 and Article 15 of the International Convention on the Suppression of Terrorist Bombings of 1997 (see ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 2007, para. 429). As indicated by the HRC with respect to the prohibited acts provided in Article 7 of the International Covenant on Civil and Political Rights (ICCPR), "[i]t is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity" (HRC, 1992, General Comment No. 20: Article 7, para. 2).

III. Preventive Measure under IHL

IHL obliges state parties to the four Geneva Conventions of 1949 (four GCs) and their Additional Protocols (APs) to prevent and bring to an end the acts that are undermining these instruments. This obligation is applicable to both international and NIACs. In order to prevent violations of these instruments, the state may take different measures, including penal sanction (International Committee of the Red Cross (ICRC), 2004). For instance, the 1997 Ottawa Convention on Anti-Personnel Mines provides for state parties to "take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control" (art. 9). Under the Second Protocol of the Cultural Property Convention of 1954, state parties are obliged to adopt "legislative, administrative or disciplinary measures" (1999, art. 21) to prevent and suppress the violation of this Convention. Under the Amended Protocol II of the 1980 Convention on Certain Conventional Weapons, states are obliged to "take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control" (art. 14(1)).

Thus, enacting effective preventive measures in the domestic law of the state in line with international norms is one of the options for state parties to fulfil their preventive obligation in order to protect their citizens from the harmful acts of ANSAs in NIACs.

IV. The Practical Relevance of the Duty to Prevent

Indeed, practically, the following questions can be raised with respect to the fulfilment of the state's obligation to prevent. First, does the state have the obligation to prevent each and every harmful act of ANSAs? Second, can we expect the government to suppress or destroy an ANSA as part of its obligation to prevent the future atrocities of the ANSA since the ANSA governs a part of the state's territory as a *de facto* regime and attacks the civilian population from there? Does the state have the capacity to fulfil the above said obligations?

The practical reality suggests that the state cannot take responsibility for all the acts of ANSAs in NIACs as it often goes beyond the state's capacity. However, it cannot also absolutely deny omission of the state's obligation in such situations. As stated in the UN Secretary-General Report on Responsibility to Protect (2013):

> The greatest challenges to preventing atrocity crimes often occur in situations of armed conflict. However, this does not diminish the responsibility of the State to prevent such crimes, nor can it excuse their inaction. States must continue to apply relevant international norms and do their utmost to protect their populations. Failure to ensure that security forces are trained to comply with international humanitarian and human rights law can increase the risk of war crimes and other atrocity crimes (para. 28).

Thus, in order to avoid such atrocities, the state should take reasonable measures during the armed conflict as well as in peace times by instructing and providing training to their security forces

to strictly follow the main principles of IHL to avoid and minimize civilian casualties.

The practice of the human rights bodies also asserts the difficulty of the state to bear the responsibility for each and every act of private actors, including ANSAs. It could be said that in NIACs or other situations like occupations, "a State is prevented from exercising its authority in part of its territory" (*Illascu and Others v. Moldova and Russia*, 2004, para. 312). However, "obligations remain even where the exercise of the State's authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take" (*Illascu and Others v. Moldova and Russia*, para. 313). Hence, states may reasonably take some action by adopting some measures to prevent and protect individuals and civilians from the harmful acts of private and ANSAs. According to the Eur.Ct.H.R, the state's positive "obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising" (*Kilic v. Turkey*, para. 63 & *Osman v. United Kingdom*, para. 116).

In a higher threshold armed conflict, assessing the positive responsibility of a state is difficult as the assessment always relies on proportionality to balance civilian casualties. In the *Isayeva, Yusupova and Bazayeva v. Russia* judgment, the Eur.Ct.H.R stated that this case is not "in itself sufficient to decide on a violation of the positive obligation of the State to protect the right to life, in the circumstances of the present case is also directly relevant to the proportionality of the response to the alleged attack" (para. 198). Thus, the obligation

to prevent is limited to "certain well-defined circumstances" (*Osman v. United Kingdom*, para. 115) and the grounds where "the authorities knew or ought to have known of the existence of a real and immediate risk to the life of an identified individual, and that they failed to take measures within their powers which, judged reasonably, might have been expected to avoid that risk" (*Osman v. United Kingdom*, para. 116). Therefore, in such situations, the state can make full use of all available means to reasonably prevent the harmful acts of ANSAs, including genocide, war crimes, crimes against humanity, and other atrocities (see ICJ, 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, para. 430).

The obligation to prevent is further restricted in the IHL regime since this body of law tolerates civilian and individual casualties in the course of hostilities. Thus, it might give space to states to justify their behaviour in NIACs. However, the above discussed practice indicates that the state should take reasonable measures, including legal and non-legal measures, to prevent viola tions of human rights and humanitarian law at the domestic level.

The fulfilment of a state's obligation to prevent depends on many factors, including its capacity in terms of human resources and availability of other resources, like weapons, technology, the cooperation of international and regional powers, the geographical distance, and the threshold of NIACs etc. As pointed out by Zegveld:

> The limitation of the state's positive obligations to due diligence is realistic. Since the state is not an all-powerful entity, it cannot give an absolute guarantee at the international level that no harmful actions will be committed in its

> territory by armed opposition groups. Supreme legal authority is a necessary but not sufficient condition for protection, nor is the existence of a government exercising a degree of territorial control. Whenever the state must make an effort in order to achieve a particular material result, international bodies must take account of the fact that a degree of factual capacity, which can be employed to that effect, is required. Moreover, it should be kept in mind that the state is entitled under international law to defend its territorial integrity against armed attacks by armed opposition groups. International bodies must balance this entitlement against the state's obligation to protect civilians from armed groups (2002, pp. 182-3).

Combinations of these practical realities show that the assessment of the state obligation to prevent depends on several factors, including a specific incident.

V. Options of States to Fulfil the Duty to Prevent

By adopting some necessary measures, the state may fulfil its obligations of the duty to prevent. Such measures can be taken during armed conflict, before armed conflict, and after the end of armed conflict by adopting and reconciling the war wounded society in order to prevent future atrocities.

Adopt the Precautionary Measure during the Armed Conflict: States can reduce or avoid casualties of the civilian population and civilian property by strictly following the precautionary measures during an armed conflict with ANSAs. It could be argued that the failure to adopt or follow precautionary measures during armed

conflict is an omission of a state's obligation. The Eur.Ct.H.R, for instance, in the case *of Ergi v. Turkey*, indicated the inadequate precautionary measures taken by the Turkish authorities. The application was brought by Mr. Muharrem Ergi on behalf of the applicant himself to challenge the death of his sister Havva Ergi and her younger daughter during an ambush of the Turkish security forces at the applicant's village intended to capture members of the Workers Party of Kurdistan (PKK) on 29 September 1993. The security forces open fired indiscriminately and this led to the death of Mr. Ergi's sister. However, the security forces were not able to capture or kill any of the PKK members (see paras. 6-10). In this case, the court considered "whether the security forces' operation had been planned and conducted in such a way as to avoid or minimise, the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush" (para. 79) and found that "the Turkish authorities failed to protect Havva Ergi's right to life on account of the defects in the planning and conduct of the security forces' operation" (para. 86).

IHL also obliged both the government forces as well as ANSAs to respect the principle of precautionary to avoid the incidental casualty of civilians and civilian objectives. Many of the provisions of the law of international armed conflict are also applicable to NIACs as a matter of customary law (see Fenrick, 2004 & Boelaert-Suominen, 2000). However, some specific conventions of the law of NIAC provide precautionary obligations to the state parties in order to prevent the effect of other parties, including ANSAs, on civilians and specific civilian objectives. For instance, under the Ottawa Convention, state parties should "ensure the

destruction of all anti-personnel mines in mined areas under its jurisdiction or control" (1997, art. 5 (1)). This obligation is also applicable to the areas previously controlled by ANSAs and now liberated by government forces (see Zegveld, 2006, p.178). In addition, the Second Protocol on Cultural Property also obliges states parties to take precautionary measures in order to avoid damage to cultural property (1999, ats. 7-8). It is also relevant to say that state parties should plan in advance to prevent attacks of ANSAs to destroy cultural property under this convention.

Adopt the Early Warning Measures during the Peace Times: A state can prevent an armed conflict by adopting early warning measures to manage multi-ethnic/cultural societies. This is because the present NIACs are the result of incompatibility among different ethnic and cultural groups in a single system. While there are many factors that contribute to NIACs around the globe, in general, it can be said that the failure of a state formation (unitary state or federal state), the notion of identity, the concept of security, and feelings of well-being are the main reasons for the conflicts. Thus, the emergence of ANSAs is a result of these factors. Under certain circumstances, ANSAs or secessionist movements also emerge to protect their people from socioeconomic inequality and discrimination from the majority's ethnic or religious government.

The state can solve this incompatibility through early preventive actions by accommodating all ethnic and cultural groups into its systems by providing guarantees to them in the constitution to be treated equally. "A firm national commitment to ensuring fair treatment and fair opportunities for all citizens provides a solid basis for conflict prevention. Efforts to ensure accountability and good

governance, protect human rights, promote social and economic development and ensure a fair distribution of resources point toward the necessary means" (Report of the International Commission on Intervention and State Sovereignty, 2001, Responsibility to Protect, para. 3.2). The recent report of the UN Secretary-General on Responsibility to Protect: State Responsibility and Prevention (2013) concentrated on pre-conflict and post-conflict measures to prevent the future outbreak of conflict. The report includes early preventive measures, including constitutional protection, structural policy, strengthening national institutions, ensuring the rule of law and transitional justice mechanisms, and security sector reform to prevent future conflicts. Constitutional arrangements are vital to guarantee the security of different ethnic groups to help them feel safe within the territory of the state. Further, this constitutional arrangement can also solve the issue of the formation of the state since all the ethnic and religious groups are accommodated in this arrangement (see para. 35).

Post-Conflict Measures: In post-conflict societies, the state can prevent future outbreaks of conflicts through structural policies and by ensuring the rule of law through the establishment of institutional mechanisms. Structural reforms and policies are required for the reasons that the root causes of many contemporary armed conflicts are the result of structural violence, including "systematic discrimination in employment, land deprivations, forced deportations or removal, structural inequalities for particular groups or ethnicities in terms of access to political power, in voting or legislative representation, cultural power, or access to educations amongst others" (Sirleaf, 2013). Structural policies would help to build up an environment of resilience and address these root causes of conflict to "remove

core sources of grievances and build State structures that contribute to impeding the commission of atrocity crimes or successfully overcoming periods of instability" (Report of the Secretary-General: Responsibility to Protect, 2013, para. 31). Thus, identifying the root causes of an armed conflict is necessary to address the grievances of the different groups of people affected by the armed conflict.

This operational plan may also help to ensure accountability (Report of the Secretary-General: Responsibility to Protect, 2013, para.31). Further, durable peace can be built up through strengthening "national institutions, including legislative bodies, which establish the foundations of good governance based on the rule of law, democratic principles and values, and accountability" (Report of the Secretary-General: Responsibility to Protect, 2013, para.47). Moreover, the state can take the following steps to ensure the non-occurrence of atrocities in the future since these arrangements would guarantee the identity of the different groups.

> Legislative protection for human rights, minority rights and the rights of refugees and internally displaced persons; an independent and effective judiciary; national human rights institutions; effective, legitimate and accountable security forces; and a diverse and robust civil society, including a pluralistic media, are all related to the rule of law and can contribute to strengthening the capacity of a society to overcome the risks associated with atrocity crimes. When the rule of law is weak or under stress, national institutions are less able or unable to function properly and populations are left vulnerable (Report of the Secretary-General: Responsibility to Protect, 2013, para.47).

These are the available options for a state to prevent violations of international norms. Indeed, the obligation to prevent future conflicts always depends on the dedication of the state. The international community and local civil societies can also take part in this effort since the conflict affects the entire international community. Some of the internal violence is an obvious threat to the international peace and security as well. Thus, the contribution of the international community is also necessary to prevent future violence in post-conflict societies.

Granting Amnesty to the member of ANSAs: Apart from these institutional arrangements before and after the armed conflict, the state can also prevent the future conflict by reducing sentences and granting full amnesty to ANSAs who merely participated in the armed conflict after the conclusion of the hostility. Granting amnesty would enhance the peace process as it aims to "encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided" (Commentary to the Protocol Addition II to the Geneva Conventions of 1949, p. 1402). Amnesty can be granted in two phases, such as before and after the conclusion of the armed conflict. The former would encourage ANSAs to surrender to the government, while later can be granted through different means as part of the reconciliation process. The practice of states asserts the granting of amnesty though different means, including through special agreements, legislation, or other measures to persons who participated in NIACs against the state (Henckaerts & Doswald-Beck , 2005, p. 611).

The law of NIAC encourages authorities to grant amnesty to the fighters after the end of armed conflict (see Protocol II to the

Geneva Conventions of 1949, art. 6). Granting amnesty has gained customary status in international law except for instances of war crimes (see Henckaerts & Doswald-Beck , 2005, rule. 159) and other international crimes. In general, amnesty is not applicable for international crimes (see Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 2000, para. 22). The practices of international (see Prosecutor v. Anto Furundzija, 1998, paras.151-157 & HRC,1992, CCPR General Comment No. 20: Article 7, para. 15) and regional (see Inter-AmeCommHRs, 1994, Report of the Situation of Human Rights in El Salvador) bodies reaffirm not granting amnesty for the commission of international crimes. In some instances, the UN Security Council (Security Council resolution 1315 (2000), Preamble para. 5 & Security Council resolution 1120 (1997), para. 7) and the UN Commission on Human Rights (CommHR) (Report of the Working Group on Enforced or Involuntary Disappearances, 2002, para. 2) also confirmed the non-applicability of amnesty to ANSAs for the involvement in international crimes.

However, some of the contemporary practice illustrates granting amnesty to even persons (ANSAs as well as state actors) who were involved in international crimes through peace agreements or "some form of inability or unwillingness to prosecute, subjected such acts to prosecution by the courts of other States" (Schabas, 2002, p. 918). The Belfast Agreement is an example of such a practice (see Schabas, 2002). Indeed, by granting amnesty to ANSAs, the state could easily escape from its own abuses during war times. However, growing concerns suggest that both ANSAs and state actors are not eligible to receive amnesty for the commission of

international crimes. In addition, granting the amnesty by the parent state does not prevent other states and international tribunals from prosecuting the perpetrators for the commission of international crimes.

In sum, while factual situations illustrate that the state is limited in fulfilling its preventive obligation towards the acts of ANSAs in the intensive NIAC, still it can ensure the protection of international law through a realistic approach of legal as well as non-legal measures before and after the armed conflict.

B. Obligation to Investigate and Prosecute/Punish

The due diligence obligation also relies on the effective investigation and prosecution/punishment of perpetrators if they are found to be the culprits of atrocities. ICL, coupled with the practices of international and regional human rights bodies, have developed a state's obligation to investigate and prosecute the perpetrators since the investigation and punishment of perpetrators are necessary to fulfil the due diligence obligation of states in international law. Without an effective investigation, states cannot determine the wrongfulness of any acts or decide to provide the compensation for the victim (see HRC, 1992; CCPR General Comment No.20: Article 7, para. 14).

Unlike the law of international armed conflict (e.g., see Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146), the law of NIACs is not straightforward with regard to the obligation of the state to investigate and prosecute. However, the state cannot neglect

its obligation since investigation and prosecution are also one of the options to states to suppress and prevent future violation of international law, including IHL. Further, this obligation has now gained customary status. The ICRC study on *Customary International Humanitarian Law* has extended states' obligations to "investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects" (2005, rule. 158). Thus, states' obligations are relevant in NIACs to investigate and punish ANSAs who are involved in serious violations of the law of NIAC, customs of war, and the grave violations of IHRL. According to the UNGA resolution 60/147:

> In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him (Basic Principles and Guidelines on Rights to a Remedy and Reparation for Victims, annex, para. 4).

In ICL, the Genocide Convention obliges states to investigate and prosecute a person who was involved in the crime of genocide through ""a competent tribunal" of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction" (Genocide Convention, 1948,

art. vi). The CAT confers a number of positive obligations to state parties to investigate and punish perpetrators of torture. This includes a preliminary inquiry into the facts (1984, art. 6 (2)); extraditing or submitting the case to its own authority to prosecute those found to be suspects for involvement in torture (art. 7 (1)); ensure a prompt and impartial investigation when there are satisfactory grounds to believe that torture has been committed (art. 12); and ensure examination of individual cases alleged by an individual (art. 13). The CAT also obliges the ensuring of a fair and adequate compensation to the victim of the torture (art. 14). In addition, the Vienna Declaration and Programme of Action of 1993 reaffirms the freedom from torture and prosecution of perpetrators for violations of torture in both IHRL and IHL and in NIACs as well (see Chap.III, sec.11, paras. 56-60).

Further, the ILC Draft Code of Crimes against the Peace and Security of Mankind of 1996 suggested that states prosecute or extradite perpetrators involved with international crimes by violating the IHRL and IHL (art. 9). The Rome Statute also obliges states to prosecute at the national level. As provided in the preamble of the Rome Statute, "effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" (Rome Statute, 1998, preamble para. 4) and it is "complementary to national criminal jurisdictions"(Rome Statute, art. 1). Having said that, the Rome Statute obliges national authorities to be actively involved in the investigation and prosecutions of perpetrators for the commission of international crimes. It has been noticed that many states around the world have taken some initiatives to investigate and prosecute perpetrators for international crimes by enacting new laws or using an existing one following the entry into force of the Rome Statute (Pfeiffer, 2013). While cooperation among states is

required for such investigations and prosecutions, such inter-state collaborations are still lacking in the present ICL since it is hard to find a binding document on all states in this regard (Pfeiffer, 2013). International cooperation is required to prosecute perpetrators due to the fact that in some instances the "perpetrators operating across national borders" as well to "protect witnesses who have fled abroad and to ensure their appearance in court"(Pfeiffer, 2013).

Unlike the obligation to prevent provided in the international and regional human rights treaties, the obligations to investigate and prosecute are not straightforward in those documents. However, the practices of international and regional human rights bodies elaborated the due diligence obligation of the states to investigate and punish the culprits of human rights violations in their territories or under their powers of jurisdiction. In its decision on V*elasquez case*, the Inter-Ame.Ct.H.R held that the state is legally obliged "to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation" (para. 174).

In its numerous cases, the Eur.Ct.H.R confirmed the due diligence obligations of effective investigation with respect to the violation of the European Convention on Human Rights (ECHR). In a few instances, the Eur.Ct.H.R pointed out the state's responsibility to investigate the incidents that arise from the use of force in connection with armed conflict with some ANSAs. For instance, in *McKerr v. United Kingdom*, the court stated "the State's general duty under Article 1 of the Convention to '"secure to everyone within {its} ju-

risdiction the rights and freedoms defined in {the} Convention,'" also required by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force" (para. 111). Effective investigation is required owing to the fact that only effective investigation "is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstance" (*McKerr v. United Kingdom*, para. 113) and identifying responsible perpetrators violating the provisions of the ECHR (*McKerr v. United Kingdom*, para.113). Further, effective investigation ensures "the effective implementation of the domestic laws" (*McKerr v. United Kingdom*, para. 111). In general, the investigation requires a number of facts in relation to the incident, "including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death" (*McKerr v. United Kingdom*, para. 113).

On a few other cases such as *Ergi v. Turkey and Isayeva, Yusupova and Bazayeva v. Russia* and *Isayeva v. Russia*, the Eur. Ct.H.R asserted states' positive obligations to regulate the use of force and the effective investigation of violations of the ECHR arising from the war against the Kurdish rebel and Chechen fighters. In *Ergi v. Turkey*, the Eur.Ct.H.R stated that the Turkish authority failed to conduct an effective investigation with respect to the death of Havva Ergi (see para. 86). In *Isayeva, Yusupova and Bazayeva v. Russia* and *Isayeva v. Russia*, the court found, inter alia, "the authorities failed to carry out an effective investigation into the circumstances of the attack on the refugee convoy on 29 October 1999. This rendered recourse to the civil remedies equally ineffective in the circumstances" (para. 225).

In the recent case of the *Ituango Massacres v. Colombia* at the Inter-Ame.Ct.H.R, the Colombian government has been accused of non-compliance with its obligation to investigate and prosecute perpetrators (paramilitary) who were involved in assassinating defenseless civilians and damaging their property, as well as causing forced displacement in the Municipality of Ituango. Further, there have also been allegations of inadequate reparations to the victims and their next of kin (para. 2). The court held that:

> The State must take the necessary measures to activate and complete effectively the investigations to establish the responsibility of all the authors of the massacre and the persons responsible by act or omission for failing to comply with the State's obligation to guarantee the violated rights. The State must conduct criminal proceedings concerning the Ituango massacres, so that the facts are clarified and those responsible punished. The results of these proceedings must be published by the State, so that Colombian society may know the truth about the facts of this case (para. 399).

The court also found the failure of the government to comply with its obligation to investigate (see *Ituango Massacres v. Colombia*, para. 406). Further, in its Annual Report of 1996, the Inter-AmeComm-mHR indicated the positive obligations of the Colombian government towards paramilitary and ANSAs, including FARC and ELN, and stated that the Colombian government failed "to properly investigate and sanction those responsible for committing the acts and to provide adequate compensation to the victims" (para. 80).

On several instances, the HRC also came to the same conclusion. For instance, in *Amirov v. Russian Federation*, the Russian Federation was accused of violating the provisions of the ICCPR during the second military operation against Chechen rebels in 1999. That said, the HRC found that the right to life provision was violated and stated that "criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6" (2009, para. 11 (2)).

The practices of international and regional human rights bodies also suggest the necessity of independent, impartial, and effective investigation and prosecution. For instance, in Herreva Rubio v. Colombia, the HRC held that the state should "establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life" (para. 10 (3). See also *Bautista de Arellana v. Colombia*, 1995, para. 8 (6) & HRC, General Comment No. 31(80), 2004, para. 15). The Eur.Ct.H.R also stated that the investigation should be independent (see *McKerr v. The United Kingdom*, para. 111 & *Ergi v.Turkey*, para. 112). The preconditions of having effective and independent investigations are to remove all the impunity and to grant "guarantees of adequate safety to the victims, investigators, witnesses, human rights defenders, judicial employees, prosecutors and other agents of justice, as well as the former and current inhabitants of Ituango" (*Ituango Massacres v. Colombia*, para. 400).

Combinations of the above discussed facts suggest that "States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible

for the violations and, if found guilty, the duty to punish her or him" (Basic Principles and Guidelines on Rights to a Remedy and Reparation for Victims, 2006, Annex, para. 4) under IHL and IHRL. The lack of investigation is attributed to the state's international responsibility (see *Kawas-Fernández v. Honduras*, 2009, para.78; *Pueblo Bello Massacre v. Colombia*, 2006, para.145& *González et al. ("Cotton Field") v. Mexico*, 2009, para. 291).

I. Practical Relevance of the State's Duty to Investigate/ Punish

Now questions arise as to whether states can carry out investigations against harmful acts committed by ANSAs outside their effective control and capacity. As discussed above, states cannot carry out investigations on each and every act of the *de facto* regime of ANSAs since states do not have the capacity to do so. In some instances, human rights monitoring bodies have also accepted this practical challenge. For instance, the Eur.Ct.H.R in the case of *Ilascu and Others v. Moldova and Russia*, accepted the state's inability to carry out investigations in cases in which the perpetrators belong to *de facto* regimes or ANSAs outside the control of the state (see para. 347). In addition, there are a number of other factors that impede the carrying out of effective investigations and pursuing prosecution of ANSAs during armed conflicts. First, the capacity of the state is limited. Accordingly, during an armed conflict, state institutions seem generally to be ineffective in coping with effective investigation; second, there is no effective witness protection. That said, the witnesses often fear to appear in court, for instance, in the context of the armed conflict in El Salvador, the Special Representative for

El Salvador noticed the inadequate nature of trial procedures due to the fear of witnesses, even judges to the FMLN (Final Report on the Situation of Human Rights in El Salvador of J.A. Pastor Ridruejo, 1982, para. 110). Third, there is a lack of proper documentation and, fourth, if the armed conflict last for several years, the victims often escaped from their own country to another country to seek protection.

However, a state can investigate and punish perpetrators after the end of armed conflict as part of the procedure of the transitional justice process for violations of IHRL and IHL, and decide to provide effective remedies to victims. As discussed above, the state normally grants amnesty to ANSAs. Thus, effective investigation does not take place even after the end of armed conflict. There are some factual reasons in this regard. The states themselves commit violations during the armed conflicts, so investigating violations of ANSAs also impact the violations by states' forces. Further, the political motivation of the state and the pressure from outside powers has an impact on effective investigations after the end of armed conflict.

In short, although there are many factors that limit the obligation of the state to investigate and prosecute ANSAs for violations of IHL and IHRL, states still have the responsibility to fulfil their obligations by investigating and prosecuting ANSAs for the violations of international norms. This is one of the core obligation of the state in the due diligence procedures since investigation and prosecution would give some remedies for the victims of the conflict.

However, to some extent, it has been argued that the interests of justice can undermine the prospect of returning the peace since often ANSAs withdraw from the peace process negotiation if and

when they are indicted for war or other crimes. For instance, after the issuing of arrest warrants by the ICC to members of the Lord's Resistance Army (LRA) in Northern Uganda, concern was raised by local religious and civil society leaders stating that "criminal prosecutions undermined their efforts to encourage LRA combatants to defect and receive amnesty through Uganda's Amnesty Law (2000) and that retributive justice was insensitive to traditional approaches to achieving justice and reconciliation"(Kersten,n.d) Notwithstanding, prosecuting perpetrators of international crimes is vital to preventing future atrocities.

Conclusion

States are still the forefront responder of the international system to protect and promote international norms through their domestic institutions. States can fulfil their obligations by enacting effective preventive measures in their domestic law in line with international norms to protect their citizens from the harmful acts of ANSAs in NIACs. States also have the duty to investigate and prosecute perpetrators under IHL and IHRL. This is one of the core obligations of the state in the due diligence procedures since investigation and prosecution would give some remedies for the victims of conflict.

Although the obligations of states are limited due to the nature of contemporary NIACs and the lack of state capacity, states can still ensure the protection of international law through a realistic approach of legal as well as non-legal measures before and after armed conflict by adopting and reconciling its war wounded society in order to prevent future atrocities. Before armed conflict, the state can adopt

early warning/preventive measures to manage and ensure the equality of individuals and groups in multi-ethnic/cultural societies. During armed conflict, the state can strictly follow the main principles of IHL, including precautionary measures to avoid the civilian casualties. After armed conflict, the state can prevent future armed conflicts through the reconciliation process, including reforming institutional mechanisms to accommodate the different groups in the system.

It is also pertinent to note here that apart from the lack of capacity of a state to fulfil its due diligence obligations and the available options to do so, the political motivation of some states also hampers the fulfilment of due diligence obligations when it comes to the protection of ethnic or religious minorities within the territory of a state. This is evident in some of the contemporary NIACs such as Syria, Libya, and Sudan, and in the recently concluded conflict in Sri Lanka, where the state forces were actively involved in violating international norms that amounted to what was considered international crimes. In addition, in a few cases, some states used chemical weapons against their own peoples. For instance, Saddam Hussein's government in Iraq used chemical weapons against Iraqi Kurds in 1988 (see Nguyen, 2006) and there are ongoing allegations of the use of chemical weapons by the Assad government against its own people in Syria. Further, in some cases, states are more concerned with prosecuting ANSAs for taking up arms against them. To some extent, many states do not follow due process to try the perpetrators but instead execute them arbitrarily. For example, in the case of Sri Lanka, it has been reported that many of the Liberation Tigers of Tamil Eelam (LTTE) cadres who surrendered to the government forces have been executed and women fighters were executed after being

raped in custody by the Sri Lankan forces during the final stages of the armed conflict in 2009 (see Report of the Secretary-General's Panel of Expert on Accountability in Sri Lanka, 2011).

In addition, the practical realities obviously show that states' fulfilment of their due diligence obligations depends on international and regional geopolitics as well. This is because international and regional interests in addressing the violations of international norms during internal armed conflicts have generally been subjected to the political scrutiny of states. In addition, the political motivations of the permanent members of the United Nations Security Council are a barrier to imposing embargos on states that ignore their due diligence obligations. For instance, the present situation in Syria is highly subjected to individual permanent members' interests there, especially the dynamics between Russia and the United States, despite the fact that the Syrian government and ANSAs have failed to fulfil their obligations and are instead actively involved in committing gross violations of IHRL and serious violations of IHL. Therefore, the fulfilment by a state of its due diligence obligation depends on a set of factors, including capacity, political motivation, geopolitics, and international powers.

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