HORIZONTAL HUMAN RIGHTS LAW

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What duties, if any, does international human rights law establish for individuals, corporations, and other private actors? For many years, the conventional answer has been that it places duties on states to respect the rights of individuals and creates few or no private duties.¹ In other words, human rights law is aligned vertically, not horizontally. But that view has regularly been challenged. Most recently, in 2003, the United Nations Commission on Human Rights (Commission), historically the most important incubator of human rights agreements, received two proposed instruments that might appear to realign human rights law horizontally: private actors would have duties as well as rights, and they would owe those duties to society as a whole or to individuals within it. The draft Declaration on Human Social Responsibilities (Declaration) would identify duties that all individuals owe to their societies; and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (draft Norms) would set out duties of businesses under human rights law.² The Human Rights Commission did not embrace the proposals before its replacement by the Human Rights Council in 2006, and the Council has not considered them. Both received some support, however, and it seems likely that their proponents will continue to pursue adoption of their principles in one form or another. This article argues that if adopted, those principles would cause serious damage to human rights law.

The effort to incorporate private duties into human rights law is not new. From the inception of the modern human rights movement, some advocates have urged the recognition of human duties as well as rights. Those duties have fallen into two categories, which raise very different concerns. The first category comprises duties owed by the individual to the society or state, such as a duty to obey the laws of the state. Although these duties may appear to be horizontal, in the sense that they are owed to others in the duty holder’s society, in practice they

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¹ See, e.g., THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 1 (1988) (“As used in this book, the international law of human rights is defined as the law which deals with the protection of individuals and groups against violations by governments of their internationally guaranteed rights, and with the promotion of these rights.”); CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 309 (2003) (“human rights violations can, in principle, be committed only by states and/or the persons acting on behalf of the state”).

are vertical, enforced by the government acting on behalf of the society. They run conversely to the vertical duties of the government to promote and protect the individual's human rights. As part I explains, these converse duties have the potential to undermine human rights because the government may rely on them to offset the duties it owes to the individual under human rights law. To cabin this danger, human rights law generally refuses to list converse duties and restricts the authority of governments to use such duties to limit human rights.

The second category of private duties, analyzed in part II, comprises correlative duties—that is, private duties to respect the human rights of others. These duties are truly horizontal, in the sense that they run between actors on the same legal plane, and, unlike converse duties, they appear to further, rather than undermine, the enjoyment of human rights. But for practical and political reasons, human rights law does not impose many correlative duties directly; it merely contemplates that governments should protect many human rights from violation by private actors and leaves the specification and enforcement of the duties to the governments themselves. Human rights law specifies a smaller, but still large, number of private duties, again leaving their enforcement to governments. Through international criminal law, it directly places a few duties, such as the duty not to commit genocide; and, through institutions like the International Criminal Court, it enforces those duties under limited circumstances. These duties may be conceptualized as forming a pyramid, with the lowest level representing the least degree of involvement by international law, and the top level the highest.3

This approach to private duties has several important benefits. It addresses violations of human rights by private actors without opening the door to converse private duties owed to states. It takes advantage of the resources of national governments, which are vastly greater than those of international institutions, to specify, place, and enforce duties, but it does not leave those tasks completely to governments; international law plays a crucial role in specifying, placing, and enforcing duties itself in certain cases. To maintain these benefits, proposals for new private duties should meet a two-part test. First, they should do no harm: they should be limited to correlative duties and should not provide a basis for converse duties. Second, they should do some good. The proposals should build on, rather than undermine, the existing pyramid of correlative duties: either they should clarify indirect duties or, if they seek to establish new direct duties, they should show that the imposition of indirect duties would be inadequate.

As part III demonstrates, the draft Declaration on Human Social Responsibilities fails at the first step. It is a collection of converse duties that raise the very concerns that led to the rejection of lists of private duties in human rights agreements. The Declaration would, and indeed is

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3 It has been suggested that only correlative duties that apply directly against private actors (the third and fourth stages in the pyramid) are really horizontal, and that all duties of states, including duties to take actions to protect rights against violation by private actors, are vertical. Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 45, 48–49 (Craig Scott ed., 2001). But in the parallel discussion of the horizontal and vertical effects of constitutional rights, positive duties of governments to protect constitutional rights are treated as giving those rights horizontal effect, albeit indirectly. Stephen Gardbaum, "The "Horizontal Effect" of Constitutional Rights," 102 MICH. L. REV. 387, 434–37 (2003). Similarly, “[t]he absence of direct enforcement for private parties at the international level does not necessarily bar horizontal effect; it merely means that the enforcement of the obligations for non-State entities is indirect, i.e. through the obligations that States have under the provisions concerned." NICOLA JÄGERS, *CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY* 38 (2002).
intended to, provide governments with excuses to limit the exercise of human rights. Not surprisingly, it was drafted by a former representative of Cuba and its proponents figure disproportionately among the least democratic governments in the world.

Part IV finds that the draft Norms arguably pass the first step because they set out correlative rather than converse duties, although they may open the door to the latter. The Norms fail to meet the next criterion, however. They are an effort to develop a comprehensive code of conduct for businesses, an effort to which human rights law is not particularly well suited because, as applied to corporate conduct, its obligations are both over- and underinclusive. And even in areas where human rights law might usefully constrain corporate conduct, the draft Norms would not be more effective than the existing system of indirect duties to which corporations are already subject.

The conclusion, part V, reiterates that the rejection of these proposals would not mean that private duties have no place in human rights law. They do have an important role, and human rights law should do more to develop specific private duties to promote and protect human rights. But advocates of new proposals for private duties should ensure that their proposals strengthen, rather than weaken, the existing system of horizontal human rights law.

I. RESTRICTIONS ON CONVERSE PRIVATE DUTIES

At the beginning of the modern human rights movement, proposals for human rights instruments often included suggestions for duties. Although advocates sometimes presented the duties as correlating to human rights—that is, as duties to respect or fulfill particular rights—most of the proposals were actually duties owed by the individual to the community or state, stemming from the view that human beings have moral and legal duties as well as rights, and that international law should not recognize one without the other. The first of these instruments, the American Declaration of the Rights and Duties of Man, adopted by Latin American countries and the United States in 1948, emphasizes human rights and duties equally, as its title suggests.4

The negotiators of the Universal Declaration of Human Rights considered taking the same approach.5 They decided, however, that while human beings undoubtedly owe duties to their societies, any effort to write such duties into international law on a basis of equality with human rights would provide governments with excuses to limit those rights. As a result, they decided not to list private duties at all. At the same time, they recognized that converse duties owed by individuals to the state would still exist in domestic law, and that such duties would sometimes have to outweigh or limit the exercise of human rights. They therefore turned their attention to setting out restrictions on governments’ ability to limit human rights. The Universal Declaration has been the seminal document for human rights law, and its progeny, especially the two International Covenants on Human Rights and the American and European Conventions on Human Rights, have followed its approach, relegating private duties to their margins and constraining the ways that governments can employ private duties to limit the exercise of human rights.

4 American Declaration of the Rights and Duties of Man, May 2, 1948, NINTH CONFERENCE OF AMERICAN STATES, ACTS AND DOCUMENTS 289 (1953) [hereinafter American Declaration].
5 Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].
The Human Rights Declarations of 1948

Although the period of negotiation of the American Declaration partly overlapped with that of the Universal Declaration, the American Declaration was completed and adopted first, in May 1948, at the same conference that created the Organization of American States. The American Declaration devotes one chapter each to rights and duties. Many of the rights were later included in the Universal Declaration: civil and political rights such as the rights to life, to freedom of opinion and expression, and to basic protections in criminal proceedings; and economic, social, and cultural rights such as the rights to health, education, work, and social security. Some of its duties correspond to particular rights, but only one or two are correlative. Instead, most of the duties that correspond to rights state that everyone has a duty to exercise what had previously been described as a right. For example, the declaration lists rights to an education, to participate in government, and to work, and also lists duties to acquire an education, to vote and to serve in office if elected, and to work. In addition to duties that correspond to specific rights, the American Declaration names some duties that have no explicit relationship to any particular rights. They include duties of each person:

- “to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be”;
- “to render whatever civil and military service his country may require for its defense and preservation”;
- “to cooperate with the state and the community with respect to social security and welfare, in accordance with his ability and with existing circumstances”; and
- “to pay the taxes established by law for the support of public services.”

Except for the few correlative duties, all of the duties in the declaration are explicitly or implicitly owed to the state, the community, or the country as a whole. In that sense, they express societal interests that could limit or outweigh the rights set out in the declaration. The “duty to work,” for example, might remove the option to choose not to exercise the right to work, and could even be read as requiring the right holder to work wherever the society might require. In the latter case, the “right” could be largely or entirely subordinated to a communal decision. More general duties, such as the duty to obey the law, could subordinate all rights in this way. The obvious question is: Which should prevail in a conflict between such duties and the newly recognized rights? More generally, which societal interests may limit human rights?

The American Declaration answers these questions in its Article XXVIII: “The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.” Although this provision does not refer explicitly
to duties, the needs of security, general welfare, and advancement of democracy may be informed by the declaration's duties, many of which speak to precisely those interests. The duty "to render whatever civil and military service his country may require for its defense and preservation," for example, logically relates to the phrase "the security of all" in the limitations provision. The connection between limitations and duties is further emphasized by the placement of Article XXVIII: it is the last provision in the chapter on rights, coming just before the chapter on duties and providing a link between the two.\footnote{\textit{Id.}, Art. XXXIV.}

The effect of Article XXVIII may be to subordinate rights to duties, despite the apparent intent of the framers to treat the two equally. If rights are limited by security, general welfare, and the advancement of democracy, and if governments may look to the duties of individuals in giving content to those three interests, then the rights set out in the declaration may be limited by its duties. Moreover, since the interests and duties are drawn in general language and left to be interpreted by the government acting on behalf of the state, a government might respect rights only when it decided that they were not outweighed by a converse duty.

The Latin American delegations that supported the inclusion of duties in the American Declaration initially urged their inclusion in the Universal Declaration as well, as did other delegations.\footnote{\textit{The "Humphrey Draft, "reprinted in MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, App. I, at 271 (2001).}} The first draft of the Universal Declaration, prepared by John Humphrey, the director of the UN Human Rights Division, does not include a long list of duties, but it does place them prominently. One of the four principles with which the draft begins states "[t]hat man does not have rights only; he owes duties to the society of which he forms part,"\footnote{MORSINK, supra note 12, at 241.} and its first article states: "Everyone owes a duty to his State and to the [international society] United Nations. He must accept his just share of responsibility for the performance of such social duties and his share of such common sacrifices as may contribute to the common good."\footnote{Humphrey Draft, Art. 2, \textit{in GLENDON, supra note 13, at 271.}}

Like the American Declaration, Humphrey's draft of the Universal Declaration also addresses potential conflicts between rights and duties: "In the exercise of his rights every one is limited by the rights of others and by the just requirements of the State and of the United Nations."\footnote{In addition to serving in 1947 on the committee that reviewed the initial drafts of the declaration and as the rapporteur of the Human Rights Commission, in 1948 Malik chaired both the Economic and Social Council and the Third Committee of the General Assembly during their consideration of the declaration. For an engaging description of Malik and his contributions to the negotiation, see GLENDON, \textit{supra} note 13.} The inclusion of duties immediately proved to be controversial, however. Charles Malik, the Lebanese representative who played several key roles in the negotiation of the declaration,\footnote{MORSINK, \textit{supra} note 12, at 243.} questioned "whether an individual owed such a duty of loyalty regardless of the characteristics of his State." He said:

\begin{quote}
Here and elsewhere in this article, in discussing the link between societal interests, on the one hand, and the duties placed by society on an individual, on the other, I do not mean to suggest that such interests may be brought into opposition to rights only if the interests manifest themselves as duties. A right to social security, say, might conflict with the society's interest in providing for its national defense, if the country has resources that arguably do not enable it to provide both fully, without the expression of that interest in the form of duties of individuals. But many societal interests do limit rights by taking the form of private duties, especially duties to obey laws restricting freedoms of speech, religion, work, movement, assembly, association, political participation, education, and so forth.
\end{quote}
The world was faced with a tendency to "statism," or the determination by the state of all relations and ideas, thus supplanting all other sources of convictions. The state insisted on the individual’s obligations and duties to it. This . . . was a grave danger, for man was not the slave of the state, and did not exist to serve the state only.  

At the birth of the modern human rights movement, the negotiators of what became the seminal document thus had to address the relationship between human rights and human duties. Their answer would determine not only whether the Universal Declaration would be communitarian or individualistic, but also, more specifically, what they meant by "rights." Were rights merely names for interests (albeit important interests) that could be outweighed by other, more important interests if the community so decided? Were rights more powerful than other interests, prevailing over them in the event of conflict, and subject to balancing only against other rights? Or were rights absolute, immune from restriction on any basis whatsoever, even respect for other rights? 

The negotiators rejected the third approach. Like the American Declaration, Humphrey’s draft made clear that the exercise of rights could be limited by the rights of others, and this language was eventually adopted by the General Assembly without controversy.  

Deciding between the first and second approaches presented the real difficulty. The key issues were (1) whether to include a list of duties to offset and balance rights, and (2) how to define the limitations that could be placed on rights. Following the lead of the American Declaration, listing individuals’ duties to the state alongside the rights that they have against the state would strongly suggest that rights are mere interests, to be balanced against duties as part of a general (perhaps utilitarian) process through which the state decides what action to take. And if rights can be limited by “the just requirements of the State,” as the Humphrey draft stated, then those requirements may turn out to include every interest that the community represented by the state holds, thus demoting rights to mere interests to be balanced along with all others.

The next iteration of the draft Universal Declaration offered the negotiators a choice between two answers to the problem. In the summer of 1947, after Humphrey presented his draft to a small committee of the Human Rights Commission, the committee asked Professor René Cassin of France to redraft it. His first effort provided two alternative approaches to duties:

[First alternative:] Article 3: Man is essentially social and has fundamental duties to his fellow-men. The rights of each are therefore limited by the rights of others.

[Second alternative, Article 3:] As human beings cannot live and develop themselves without the help and support of society, each one owes to society fundamental duties which

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18 Id. at 242.

19 See Jeremy Waldron, Introduction to THEORIES OF RIGHTS 15 (Jeremy Waldron ed., 1984) (distinguishing “three ways in which the special force of rights may be understood”: (1) a right is a “particularly important interest” that can be outweighed by other interests; (2) a right is to be “protected and promoted to the greatest extent possible before other interests are even taken into consideration,” but may be balanced against other rights; and (3) a right is a “strict constraining requirement[ ] on action”).

20 Of course, finding a balance between conflicting rights might be quite difficult. See Myres S. McDougal, Harold D. Laswell, & Lung-chu Chen, Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry, 63 AJIL 237, 267 (1969) (“The precise delineation of the rights of any particular individual in any particular context must, however, always require an infinitely delicate reconciliation with the comparable rights of other individuals . . .”).
are: obedience to law, exercise of a useful activity, willing acceptance of obligations and sacrifices demanded for the common good.

Article 4: In the exercise of his rights, everyone is limited by the rights of others.\(^{21}\)

The first alternative would simply refer to duties without specifying them, and also leave open their relationship to rights. The second alternative was more in line with the American Declaration and the Humphrey draft, in that it would continue to set out some general duties, such as obedience to law. Unlike those drafts, it would leave open the relationship of duties to rights. It would make clear that the exercise of rights is limited by others’ rights, but not address whether rights could be limited in other ways as well.

The drafting committee accepted one aspect of the approach of the first alternative: to recognize that humans have duties without specifying them. But it went further to limit the ways that duties could override rights. It added the word “only” to Cassin’s second sentence, so that the key language became: “These rights are limited only by the equal rights of others.”\(^{22}\) If rights can be limited only by others’ rights, then they cannot be limited by general duties to the state, beyond those duties necessary to respect others’ rights. The committee thus tacitly distinguished between correlative duties (the duties that follow from others’ rights) and converse duties (those owed to the state), and made clear that while humans may well have both types, only the first can limit human rights.

Malik’s (and others’) concerns about the dangers of duties had evidently swayed the drafting committee. But when the full Commission considered the committee’s work at the end of 1947, some delegates argued that the draft gave duties too little weight. The Commission left largely unchanged the short reference to duties,\(^{23}\) but it adopted a proposal by Panama and the Philippines stating, “In the exercise of his rights everyone is limited by the rights of others and by the just requirements of the democratic State.”\(^{24}\) The effect of the added language was to return to the idea that the government could limit the exercise of rights for reasons other than the rights of others, but to restrict those limits: they could be imposed only to meet the just requirements of a democratic state.

For the rest of the negotiation, the question became which language best expressed the idea that rights could be limited only by certain interests. At the Commission’s last session on the declaration, in the spring of 1948, Eleanor Roosevelt, the chair of the Human Rights Commission, asked a subcommittee to address the question of duties and limitations on rights. It proposed:

Everyone has duties to the community which enables him freely to develop his personality. In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of general welfare in a democratic society.\(^{25}\)

\(^{21}\) MORSINK, supra note 12, at 243.

\(^{22}\) Id. at 244 (emphasis added). It also reversed the order of the sentences, and changed the (now) second sentence to read: “Man also owes duties to society, through which he is enabled to develop his spirit, mind and body in wider freedom.” Id.

\(^{23}\) The language became, “The individual owes duties to society through which he is enabled to develop his spirit, mind and body in wider freedom.” Id.

\(^{24}\) Id. (emphasis added). The language was Article 2 of the draft approved by the Commission at its December 1947 session. The complete draft, known as the “Geneva Draft,” is in GLENDON, supra note 13, at 289.

\(^{25}\) MORSINK, supra note 12, at 245.
The phrases “necessary to secure,” “requirements of general welfare,” and (perhaps most important) “in a democratic society” had the effect of restricting the range of interests that could limit human rights.

The Commission adopted the language, but added the “just requirements of morality [and] public order” to the general welfare as bases for limits on rights. The addition resulted from a technical concern—the difficulty of translating “general welfare” into French—but it led to a general discussion that demonstrated how convinced most Commission members were, by this stage of the negotiation, that governments must be afforded the narrowest possible justification for limiting rights. The delegate from Uruguay, for example, expressed concern about the addition because “so many crimes had been committed in the name of public order.” In the course of the discussion, the Soviet representative proposed allowing limits on rights in accordance with “the just requirements of the democratic State,” which was closer to Humphrey’s original draft. By this point, however, delegates to the Commission saw that language as insufficiently protective, and it was rejected by a vote of 4 in favor, 11 opposed, and 1 abstention.

During the last phase of the negotiation, in the Third Committee of the General Assembly in the fall of 1948, all fifty-eight UN members, not just the eighteen members of the Commission, had the opportunity to revisit the question of duties. Some Latin American delegates again proposed listing more duties, using the American Declaration as the model, but they were opposed by Roosevelt, Cassin, and others who had gone through the negotiation in the Commission. They successfully argued that the short statement that everyone has unspecified duties was as much as the Third Committee should (or had time to) adopt. The statement of duties was finalized in what became Article 29(1) of the declaration: “Everyone has duties to the community in which alone the free and full development of his personality is possible.”

As for the related question of governmental limits on rights, the Third Committee continued to consider ways of restricting the grounds for such limits without prohibiting them altogether. It adopted a Uruguayan proposal to substitute the phrase “prescribed by law solely for the purpose of securing” for “necessary to secure” because, in the words of the proponent, “the limitations set by the public authorities could only be so set in accordance with pre-established standards, i.e. in accordance with provisions legally enacted. Thus human beings would have

26 “Ordonneau, the French delegate, explained that [adding 'la morale' and 'l'ordre public' to the French version of the language was necessary] 'so as to cover everything that was contained in the English idea of general welfare'...” The Egyptian delegate then proposed adding morality and public order to the English text to make them track one another more closely. Id. at 249.

27 Id. The Australian and Lebanese delegates raised similar points. Id. At the same session, the Commission also decided to move the language from Article 2 to the next-to-last article in the declaration, on the motion of the Chinese representative, who argued that an article on limitations on the exercise of rights and freedoms “should not appear... before those rights and freedoms themselves had been set forth.” Id. at 245.

28 Id. at 249–50. The Soviet delegate may not have helped his cause by emphasizing that “it was the laws of States that fixed the limits for the exercise of human rights and freedoms,” id. at 249, since that was precisely the concern of most members of the Commission.


31 Universal Declaration, supra note 5, Art. 29(1).
the guarantee that they would be governed according to rules and not according to the whim of their rulers.” The Soviet Union tried again to have the declaration allow rights to be limited in accordance with the “corresponding requirements of the democratic state.” But by this time, many delegates were alive to the dangers that Charles Malik had identified eighteen months earlier. Benigno Aquino, the Philippine representative, said that the amendment “would destroy the intent and meaning of the article. Since the definition of ‘the corresponding requirements’ of a State would lie with that State, it could under the terms of the USSR amendment annul individual rights and freedoms contained in the Declaration.” Similarly, the Mexican representative emphasized that the effect of such proposals “would be to permit the State to impose such limitations as it pleased upon the rights and freedoms of the individual.” The Soviet proposal was rejected by a vote of 23 to 8, with 9 abstentions. The final language was adopted as Article 29(2):

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The focus of the negotiators’ attention on private duties thus shifted from considering which duties to set out, to deciding not to list such duties at all beyond a general statement that private duties do exist and restricting how the state could use such duties to limit individuals’ rights. This approach did not result from the belief that international law could place duties only on states. The day before the General Assembly adopted the Universal Declaration, it adopted the Genocide Convention, which prohibited everyone, not just states, from committing genocide. Rather, the drafters of the Universal Declaration decided not to list private duties but, instead, to include restrictions on states’ potential use of such duties to curtail the exercise of human rights, because they saw the danger that governments might otherwise rely on those duties to limit human rights in unpredictable, unacceptable ways.

Listing individual duties to the state would reinforce the government’s authority to use duties to restrict the exercise of rights because it could point to the human rights instrument itself as evidence that duties to obey the law and render service to the state were examples of the “requirements of the State.” By rejecting the approach of the American Declaration and

32 MORSINK, supra note 12, at 250; see also Daes, supra note 30, Add.1, at 12–13.

33 MORSINK, supra note 12, at 22.

34 Id. at 23. Morsink reports that Greece and Lebanon made similar comments. Id.

35 Id. at 250. The Mexican statement was against a proposal by New Zealand that, Mexico argued, would have had the same effect as the Soviet proposal. Id.

36 Id. at 22.

37 Universal Declaration, supra note 5, Art. 29(2). In a third paragraph of Article 29, the Third Committee added one uncontroversial limit on the exercise of rights: “These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.”

38 Of course, most delegates did not believe that the Universal Declaration would be legally binding in any event, although a few "tried to breathe some legal life into the document" by connecting it with the references in the UN Charter to human rights, or by suggesting that its principles might be considered general principles of law within the meaning of the Statute of the International Court of Justice. HUMPHREY, supra note 29, at 73–74.

refusing to list duties, the drafters of the Universal Declaration indicated that rights were more important than mere interests to be balanced against offsetting duties. At the same time, they did not adopt the absolutist view that all human rights must outweigh all other interests, all the time. A common view of the Universal Declaration’s negotiators holds that they were overwhelmingly from the West and biased in favor of a particularly Western, individualistic view of the relationship between the individual and the state. But this notion overstates both the uniformity of their backgrounds—they came from every region of the world except sub-Saharan Africa—and their bias in favor of absolute rights. They saw quite clearly the importance of duties to the community. As social creatures, humans must comply with duties to one another individually and collectively for society to work. Every society must therefore impose some duties on private actors, and would do so even without the encouragement a list of such duties in an international declaration might offer. The refusal to list duties meant that the duties imposed by society would continue to be the creatures of domestic, rather than international, law.

But giving states free rein to determine which duties and other interests should outweigh human rights would have left the scope of human rights completely to the discretion of governments, which was not at all what most negotiators of the Universal Declaration had in mind. As the Mexican and Philippine representatives said, if national governments could decide which “requirements of the State” could justify limits on human rights, they could limit rights as they pleased. Hence the significance of Article 29(2) as a way to filter out those interests not important enough to limit human rights. Article 29(2), however, was only a first, rough answer to the central question, which remained: which societal interests can outweigh human rights? The negotiators of the human rights agreements that followed the Universal Declaration would develop more specific answers to that question in the succeeding years.

Human Rights Treaties of the 1950s and 1960s

In the two decades after the declarations of 1948, governments negotiated four general human rights agreements: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights. Those agreements specify the allowable limits on certain

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40 For example, Oscar Arias Sánchez, the president of Costa Rica, has written:

[Many societies have traditionally conceived of human relations in terms of obligations rather than rights. This is true, in general terms, for instance, for much of Eastern thought. While traditionally in the West the concepts of freedom and individuality have been emphasized, in the East the notions of responsibility and community have prevailed. The fact that a Universal Declaration of Human Rights was drafted instead of a Universal Declaration of Human Duties undoubtedly reflects the philosophical and cultural background of the document’s drafters who, as is known, represented the Western powers who emerged victorious from the Second World War.](http://www.interactioncouncil.org)

rights more clearly than the declarations, at the same time revealing that those limits do not apply at all to other rights. They also further marginalize references to private duties.

**Specifying limits on rights.** The four agreements tighten restrictions on governments' authority to limit the exercise of human rights. The ICESCR adds a restriction based on the rights themselves: “the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”\(^{42}\) The unitalicized language is from Article 29(2) of the Universal Declaration; the additions make clear that governments may not impose limitations that are incompatible with the rights being restricted, even for the purpose of promoting the general welfare. The effect is to place the rights more firmly above mere interests to be balanced against other interests. Nevertheless, the language on restrictions in the ICESCR is still vague, perhaps because the obligations it imposes on governments to achieve its rights progressively are themselves somewhat flexible.\(^{43}\)

The civil and political rights protected by the ICCPR, the European Convention, and the American Convention place governments under stricter obligations.\(^{44}\) Perhaps for that reason, the drafters of those agreements devoted more attention to the acceptable limits governments may place on the exercise of those rights.\(^{45}\) The agreements restrict very narrowly the ways that governments may limit some rights, such as the rights to life and liberty.\(^{46}\) They provide more general justifications for limiting others, including freedom of movement, religion, expression, assembly, and association, stating with some variations that these rights may not be restricted

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\(^{42}\) ICESCR, supra note 41, Art. 4 (emphasis added). Besides the general limitations provision in Article 4, the ICESCR contains a specific limit in Article 8(1), which provides that the right to form and join unions, and the right of unions to function freely, are “subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.” \(^{Id.}\), Art. 8(1)(a), (c).

\(^{43}\) See \(^{Id.}\), Art. 2(1) (“Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . . ”); see also Alexandre Charles Kiss, Permissible Limitations on Rights, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 290, 291 (Louis Henkin ed., 1981) [hereinafter INTERNATIONAL BILL OF RIGHTS] (“One may . . . conclude that a general limitation clause was deemed sufficient for rights asserted as general principles, as in the Universal Declaration, or for rights which are difficult to define with precision,” as in the ICESCR). Kiss attributes the specific limit in Article 8 of the ICESCR to the idea that it is “the only provision in that Covenant which recognizes specific rights that can be protected by courts or similar bodies against invasion by the state,” and therefore requires a limitation clause—like those, Kiss suggests, in the ICCPR—that is “more stringent and pointed to the particular right.” \(^{Id.}\).

\(^{44}\) ICCPR, supra note 41, Art. 2(1); European Convention, supra note 41, Art. 1; American Convention, supra note 41, Art. 1(1).

\(^{45}\) Kiss, supra note 43, at 292; see HUMPHREY, supra note 29, at 85 (A general limitations clause “applicable to the whole covenant . . . could become an escape clause because it would have to be drafted in such general terms. A right begins to have meaning only when you know all the limitations placed on it.”).

\(^{46}\) For example, the ICCPR provides that no one may be arbitrarily deprived of life and that the “sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime,” pursuant to a final judgment by a competent court. ICCPR, supra note 41, Art. 6. The American Convention is similar, although it adds more restrictions on the death penalty. American Convention, supra note 41, Art. 4. The European Convention sets out other specific circumstances under which deprivation of life is acceptable. European Convention, supra note 41, Art. 2.

With respect to the right to liberty, the ICCPR prohibits slavery, servitude, and imprisonment for debt absolutely, severely restricts forced labor, prohibits arbitrary arrest or detention, forbids deprivation of liberty “except on such grounds and in accordance with such procedure as are established by law,” and sets out specific safeguards for criminal proceedings. ICCPR, supra, Arts. 8, 9, 11, 14. The European and American Conventions are similar. See European Convention, supra, Arts. 4, 5, 6, 7; American Convention, supra, Arts. 6, 7, 8, 9.
except as prescribed by law and as necessary to protect national security, public safety, order, health, or morals, or the rights and freedoms of others. The European Convention generally, and the ICCPR and the American Convention with respect to some of the rights, also require limits to be “necessary in a democratic society.”

The advance in specificity over Article 29(2) should not be exaggerated. These bases for limiting rights are sometimes vague, may overlap with one another, and vary confusingly from right to right. Perhaps inevitably, they include general terms, if not as general as the language of Article 29(2), and the American Convention includes in addition to its specific limitations clauses a provision that echoes Article 29(2). Moreover, the ICCPR and the two regional agreements add a new type of across-the-board restriction, allowing governments to derogate from their obligations regarding certain rights in public emergencies.

Nevertheless, the agreements demonstrate that the drafters made a serious effort to tailor grounds for limits to specific rights and to avoid the most open-ended bases for those limits. Similarly, the drafters tried to protect against the abuse of derogation, requiring, for example, that derogation extend only as far as “strictly required by the exigencies of the situation,” that it be notified to the other parties, and that (under the ICCPR and the European Convention) for derogation to be justified, the emergency must threaten the very life of the nation. The advance in specificity over Article 29(2) should not be exaggerated. These bases for limiting rights are sometimes vague, may overlap with one another, and vary confusingly from right to right. Perhaps inevitably, they include general terms, if not as general as the language of Article 29(2), and the American Convention includes in addition to its specific limitations clauses a provision that echoes Article 29(2).

Within each agreement, they vary both in that some of the grounds for limits appear in some provisions but not in others and in that some of the grounds are stated in different terms that have no apparent difference in meaning. See generally Kiss, supra note 43, at 293–308. Kiss suggests that the second type of variation in the ICCPR is due to the fact that the clauses “were drafted, revised, and adopted at different times” in the negotiation, and that “no difference in substance was intended.” Id. at 294. For a slightly different conclusion with respect to the varying statements that limits be provided by law, see MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 208 (1993). There are also variations between agreements, some of which are important. The European Convention, for example, includes a clawback clause with respect to the right of privacy, while the ICCPR and the American Convention do not. Compare European Convention, supra note 41, Art. 8, with ICCPR, supra note 41, Art. 17 and American Convention, supra note 41, Art. 11. For a comparison of the clauses in the ICCPR and the European Convention, see Higgins, supra note 47, at 283–85.

American Convention, supra note 41, Art. 32(2) (“The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”).

With respect to restrictions on the right to freedom of movement set out in Article 12 of the ICCPR, for example, the drafters spent much of their time trying “to formulate limits which would adequately balance the interests of the state and of the individual without nullifying the right.” Stig Jagerskiold, The Freedom of Movement, in INTERNATIONAL BILL OF RIGHTS, supra note 43, at 166, 171; see NOWAK, supra note 48, at 206. They considered, but eventually rejected as impracticable, an exhaustive list of all possible restrictions. Id. at 207. At the same time, they rejected grounds for limits such as “general welfare” because they were “too far-reaching, so broad, in effect, as to leave no right.” Jagerskiold, supra, at 171.

There are many indications in the travaux préparatoires of the ICCPR that abuse of the derogation privilege was feared and many refinements in drafting were designed to eliminate possibilities for abuse. Compare European Convention, supra note 41, Art. 4; European Convention, supra note 41, Art. 15; American Convention, supra note 41, Art. 27; see Joan F. Hartman, Working Paper for the Committee of Experts on the Article 4 Derogation Provision, 7 HUM. RTS. Q. 89, 121 (1985) (“There are many indications in the travaux préparatoires of the ICCPR that abuse of the derogation privilege was feared and many refinements in drafting were designed to eliminate possibilities for abuse.”).
agreements also warn governments not to limit rights more strictly than allowed by the agreements themselves. The most important way that the limitations have been given concrete meaning is through case-by-case adjudication by the bodies of independent experts created by the agreements to interpret their provisions: the Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of and Commission on Human Rights, which have sought to prevent the limitations provisions from becoming free passes that would allow governments to limit rights whenever they please.

While the provision-by-provision approach may thus further restrict the grounds on which governments may limit the rights to which it applies, it does not take those rights completely out of the realm of interest balancing. They remain interests, albeit particularly important ones, that can be limited under certain conditions by countervailing interests. The provision-by-provision approach does make clear, however, that other rights no longer fall within that realm. The specific limitations clauses do not address most of the rights in the agreements, which by necessary implication may not be limited by those clauses. Similarly, the derogation clauses make clear that they do not allow derogation from many rights, including the rights to nondiscrimination, to life, and to be free from torture, slavery, and retroactive criminal laws. Those rights are therefore more like "trumps," in Ronald Dworkin's phrase, that outweigh other societal interests, no matter how pressing and important.

Private duties. Notably absent from the language balancing rights with other societal interests are references to converse duties. While the Universal Declaration treats duties and limits as closely related, including them both in the same article, the four general human rights treaties negotiated in the ensuing years marginalize converse duties at the same time that they devote a great deal of attention to limits. The European Convention, the first human rights treaty

53 ICCPR, supra note 41, Art. 5(1); European Convention, supra note 41, Art. 17; American Convention, supra note 41, Art. 29; see also ICESCR, supra note 41, Art. 5(1). Thomas Buergenthal argues persuasively that Article 5(1) of the ICCPR adds a "mens rea requirement to the limitations and derogation powers given to governments by the other clauses. If the aim of a limit or derogation] in fact is the destruction of any of the rights that the Covenant guarantees, then it would be 'impermissible' under Article 5(1). Thomas Buergenthal, To Respect and to Ensure: State Obligations and Permissible Derogations, in INTERNATIONAL BILL OF RIGHTS, supra note 43, at 72, 87. To the same effect, see NOWAK, supra note 48, at 96-97. The regional agreements make this requirement explicit. European Convention, supra, Art. 18; American Convention, supra, Art. 30.


55 Kiss, supra note 43, at 291 ("The fact that there is no general limitation clause in the [ICCPR] has an important consequence: limitations are permitted only where a specific limitation clause is provided and only to the extent it permits."). On the question of "inherent limitations" in the European context, where it has been more controversial, see P. VAN DIJK & G. J. H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 763-65 (3d ed. 1998).

56 ICCPR, supra note 41, Art. 4(1); European Convention, supra note 41, Art. 15(2); American Convention, supra note 41, Art. 27(2). Other nonderogable provisions in the ICCPR and the American Convention include the right to be recognized as a person before the law and the freedoms of conscience and religion, while the latter agreement makes nonderogable several other provisions, including the right to participate in government.

57 Ronald Dworkin, Rights as Trumps, in THEORIES OF RIGHTS, supra note 19, at 153, 153 ("Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.").

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signed after the Universal Declaration, does not mention private duties at all. Even the American Convention, a descendant of the American Declaration in many other respects, mentions duties in the most general terms and omits any reference to duties to the state: “Every person has responsibilities to his family, his community, and mankind.”

The two covenants refer to private duties only in their preambles, which state (in identical language): “Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.” This language conflates the language of Article 29(1) of the Universal Declaration with the “proclamation” of that declaration by the General Assembly, which pronounces the Universal Declaration to be “a common standard of achievement for all peoples and all nations, to the end that every individual and organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures . . . to secure their universal and effective recognition and observance.” The proclamation helps to show the distinction between converse and correlative duties and the relative degrees of danger the drafters of the Universal Declaration saw in each. Although they chose not to mention converse duties beyond the general reference in Article 29(1) to duties to the community, the proclamation does refer to correlative private duties such as promoting respect for human rights. Yet even the reference to such duties was placed outside the main body of the declaration.

The covenants’ preambular paragraphs subordinate the general converse-duty language of Article 29(1) to the correlative-duty provision in the proclamation. The result is to reduce even further, in two respects, the danger that the reference to duties in Article 29(1) might be used to limit rights. First, by linking the idea that individuals have duties with the reference to “a responsibility to strive for the promotion and observance of human rights,” the preambles suggest that at least one (and perhaps all) of these duties is correlative rather than converse. Second, by placing the provision in the preambles to the covenants rather than in an article, the negotiators diluted the legal significance of the language, suggesting that the correlative responsibility to strive for the promotion and observance of human rights is not a duty directly placed by international law. The effect is not just to defuse the danger of converse duties: the preambles also comport with the creation of a system to address correlative duties, which part II of this article describes in detail.

The African Charter of 1981

The African Charter on Human and Peoples’ Rights, adopted by the Organization of African Unity in 1981, deviates from the course taken by the earlier general human rights treaties, in that it lists private duties and includes much looser restrictions on governments’ authority to limit the exercise of rights. The African Commission on Human and Peoples’ Rights, however, has interpreted the Charter in ways that minimize its deviation from the rest of human rights law in these respects.

58 See European Convention, supra note 41.
59 American Convention, supra note 41, Art. 32(1).
60 ICCPR, supra note 41, pmbl.; ICESCR, supra note 41, pmbl.
61 Universal Declaration, supra note 5, pmbl.
Like the American Declaration, the African Charter lists a number of converse duties owed by an individual to the nation. For example, Article 29 of the Charter states, inter alia, that each individual has the duty:

To serve his national community by placing his physical and intellectual abilities at its service;

... Not to compromise the security of the State whose national or resident he is;

... To preserve and strengthen social and national solidarity, particularly when the latter is threatened; [and]

... To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law.

Some of the negotiators of the African Charter may have wanted to include duties because an emphasis on individual duties to the community is "firmly ingrained in African tradition." In addressing the meeting of experts that prepared the first draft of the Charter, President Léopold Senghor of Senegal stated:

In Europe, Human Rights are considered as a body of principles and rules placed in the hands of the individual, as a weapon, thus enabling him to defend himself.

In Africa, the individual and his rights are wrapped in the protection the family and other communities ensure everyone.

... Rights in Africa assume the form of rite which must be obeyed because it commands. It cannot be separated from the obligations due to the family and other communities.

Therefore, contrary to what has been done so far in other regions of the world, provision must be made for a system of "Duties of Individuals", adding harmoniously to the rights recognized in them by the society to which they belong, and by other men.

Other negotiators represented socialist governments whose ideology, like that of the Soviet Union, questioned the entire idea of individual rights standing apart from societal interests.
Many governments, regardless of their ideology, must have seen the potential of converse duties to limit the ability of individuals to exercise their rights in ways the government might find threatening. That the latter motive was at work is shown by the specification of the Charter that the duties are owed not to local, ethnic, or traditional communities but, rather, to the state or the national community, whose call will be heard through the national government. Whatever their source, a government could cite these duties as excuses to limit or override human rights. Critics of a national leader during wartime or any other professed crisis can always be, and usually are, accused of compromising the security of the state or failing to preserve and strengthen social and national solidarity.68

The Charter’s restrictions on the authority of the government to limit the exercise of human rights are weak or nonexistent. The general limitation provision in Article 27 states that “[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”69 This language not only applies to all of the rights in the Charter, but turns the limitations directly against the individual’s exercise of human rights, rather than restricting the authority of governments to impose limits on that exercise. The Charter does not seem to require even that limits must be set out in domestic law, as Article 29(2) of the Universal Declaration and the four treaties described in the previous section do. As a result, the language could cast a cloud over the exercise of all rights, since the right holder cannot look to the law to find the boundaries of rights before exercising them.70 Moreover, specific provisions of the Charter also appear to allow governments to limit the exercise of certain rights to whatever boundaries domestic law sets.71 As Richard Gittleman has written, these clawback clauses seem to give an individual “no greater protection [with respect to those rights] than she or he would have under domestic law.”72

Most human rights scholars have strongly criticized these provisions of the African Charter.73 One of the few exceptions, Makau Wa Mutua, argues that in the “uniquely African crisis”

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69 African Charter, supra note 62, Art. 27(2).

70 See Wolfgang Benedek, Peoples’ Rights and Individuals’ Duties as Special Features of the African Charter on Human and Peoples’ Rights, in REGIONAL PROTECTION OF HUMAN RIGHTS BY INTERNATIONAL LAW, supra note 66, at 59, 86.

71 See, e.g., African Charter, supra note 62. Arts. 6 (“No one may be deprived of his freedom except for reasons and conditions previously laid down by law.”); 8 (“Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.”); 9(2) (“Every individual shall have the right to express and disseminate his opinions within the law.”); 10(1) (“Every individual shall have the right to free association provided that he abides by the law.”); 12(1) (“Every individual shall have the right to freedom of movement and residence . . . provided he abides by the law.”) (emphasis added).

72 Gittleman, supra note 65, at 159.

73 BUERGENTHAL, supra note 1, at 178 (the duty to preserve and strengthen national solidarity is “an invitation to the imposition of unlimited restrictions on the enjoyment of rights”); Benedek, supra note 70, at 89 (noting “a danger that states could try to use duties to derogate certain human rights”); Cees Flinterman & Evelyn Ankumah, The African Charter on Human and Peoples’ Rights, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 171, 173 (Hurst Hannum ed., 4th ed. 2004) (stating that “the clawback clauses and the duties owed by the individual have the potential to undermine many of the substantive guarantees in the Charter”); U. O. Umozurike, The African Charter on Human and Peoples’ Rights, 77 AJIL 902, 911 (1983) (“The concept of duties stressed in the Charter is quite likely to be abused by a few regimes on the continent . . . [that will] emphasize the duties of individuals to their states but will play down their rights and legitimate expectations.” Umozurike nevertheless believes that including duties as well as rights “maintain[s] a proper balance”).
brought about by colonialism—that is, the creation of states that divided and recombined pre-colonial nations—the African Charter’s emphasis on duties “could provide a new basis for individual identification with compatriots, the community, and the state,” by helping to “forge and instill a national consciousness.”

But even he acknowledges that governments might abuse these duties. To avoid this danger, Mutua and other scholars have looked to the African Commission on Human and Peoples’ Rights, a body of independent experts with the authority to prepare reports under the Charter, including in response to communications alleging violations of it.

The Commission has indeed taken some important steps to bring the Charter into line with other human rights agreements. Most important, it has read the individual clawback clauses out of the agreement, stating that “[t]o allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter,” and holding that the general limitations clause in Article 27 provides the only legitimate reasons for restricting the rights set out in the Charter. And it has held that even those reasons “must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. . . . Even more important, a limitation may never have as a consequence that the right itself becomes illusory.” The Commission has reached this result in part by relying on Article 60 of the Charter, which authorizes it to “draw inspiration” from international human rights law generally.

The Commission has not addressed the relationship between duties and rights. States might argue that the duties set out in Article 29 inform the references to “morality” and “common interest” in the Article 27 limitations clause, which thus allows governments to use duties to limit the exercise of rights. The Commission’s treatment of the clawback clauses strongly indicates that it would not read the Charter to permit governments to use these duties to undermine rights completely, but how they might limit rights is still unclear.

Moreover, the authority of the Commission is circumscribed. Its decisions are not legally binding: it can chastise governments, but they remain free to follow their own interpretations of the Charter. That may change with the advent of the African Court of Human and Peoples’ Rights, created in 2004, whose decisions, like those of the Inter-American and European Courts of Human Rights, are

74 Makau wa Mutua, The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties, 35 VA. J. INT’L L. 339, 367–68 (1995); see also Benedek, supra note 70, at 87 (“Given the rather weak ties of allegiance African nationals . . . have to their young states the enumeration of a list of such duties can be taken . . . as an indication of a particular need of African states with regard to national solidarity and nation-building.”).
75 Mutua, supra note 74, at 375.
76 Id.; see also Fatsah Ouguérgouz, THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS 421 (2003); Flinterman & Ankumah, supra note 73, at 173.
78 Media Rights Agenda, supra note 77, at 58, paras. 69–70.
81 For the authority of the Commission, see African Charter, supra note 62, ch. II.
binding on the parties to its constituent instrument. But there is no guarantee that the Court will follow the Commission’s view of the Charter, and there remains the awkward problem that the Commission’s interpretation struggles against the text of the Charter rather than flows easily from it. The best option, as Christof Heyns has pointed out, would be to revise the Charter “to ensure that it actually says, loud and clear, what it has been interpreted by the Commission to say.”

II. A PYRAMID OF CORRELATIVE PRIVATE DUTIES

The same human rights treaties that refuse to list converse duties owed by individuals to society recognize that private actors can violate human rights, and create the basis for a regime of correlative duties aimed at protecting human rights from such violations. This horizontal human rights regime addresses private duties in four ways. At its lowest level of involvement, human rights law contemplates that states have general duties to restrict private actions that interfere with the enjoyment of human rights, but leaves to governments the task of specifying the resulting private duties. At the next level, human rights law itself specifies the private duties that governments are obliged to impose. At both of these levels, international law imposes private duties indirectly, as a secondary effect of the duties it places directly on states. At a higher level of involvement, human rights law directly places duties on private actors but continues to leave enforcement of those duties to domestic law. Finally, at the highest level of involvement, human rights law enforces private duties at the international level, through international tribunals or other institutions.

International law contemplates more correlative duties than it specifies, and it specifies many more duties than it directly places and enforces. As a result, these duties form a pyramid. At each level of the pyramid, the conceptual basis for private duties arising under human rights law is the same: the enjoyment of many human rights may be interfered with by private actors, not just by governments; private actions must therefore be addressed to protect human rights fully. But the conceptual basis does not explain why private duties are found at different levels of this pyramid. Why does international human rights law not place and enforce all private duties directly, as it does government duties? Conversely, why does it not leave private conduct entirely to national law? Why is it neither fully vertical nor fully horizontal, but something in between?

One possible justification for the disparate treatment of private actors and governments is that governments are more powerful and more capable of violating human rights on a massive scale. Even a relatively weak government probably wields more power over the human beings

82 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human Rights, Art. 30, June 10, 1998, Doc. OAU/LEG/EXP/AFCHPR/PROT(III) (entered into force Jan. 25, 2004), available at <http://www.africa-union.org>. Cases may be brought to the Court by the Commission as well as states party to the protocol creating it. Id., Art. 5. Individuals and nongovernmental organizations may bring cases only against states that have declared that they accept such jurisdiction. Id., Arts. 5(3), 34(6).

83 Heyns, supra note 80, at 691.

84 It may be more accurate to think of specification as a range (from “less specific” to “more specific”) rather than a switch (from “not specific” to “specific”). And while there are clearer differences between specification, placement, and enforcement, the dividing lines may not always be precise. In other words, the pyramid may be smooth-sided rather than a ziggurat.
within its jurisdiction than any other single entity. But this disparity in power does not explain such an enormous disparity in treatment. Private actors unquestionably have the power to harm one another in ways that impair human rights. Some private actors, such as multinational corporations and religious institutions, are powerful in their own right, even if they do not command armies. Small terrorist groups can perpetrate mass atrocities. Other private actions have enormous cumulative effects. Violence against women, perhaps the most pervasive human rights violation in the world today, is committed by husbands and fathers far more often than by government agents. Many human rights need protection from private actors as well as governments.

A common belief used to be that international law cannot place such duties on private actors because, unlike governments, they are not subjects of international law, and only subjects of international law can hold rights and duties under it. If this conception of international law was ever valid, it is not now. Private actors certainly enjoy rights under international law: human rights law itself demonstrates that. And private actors have duties as well, such as duties not to commit war crimes, crimes against humanity, or genocide. International law has the legal capacity to place direct horizontal duties on all private actors not to violate one another's human rights.

What it lacks is the practical and political capacity to enforce those duties. As a practical matter, international law could not possibly replicate the vast domestic resources devoted to regulating private invasions of interests denominated as human rights by international law, and as a political matter, it would be impossible even to try. To take just one example, the legal system of every country in the world already protects the right to life from private invasion, through laws regulating crimes and torts and through institutions devoted to implementing those laws. Neither national governments nor the vast majority of their citizens would support the enormous expansion of the authority and resources of international institutions that would be necessary for them to protect even this fundamental human right from private interference.

85 It has been suggested that multinational corporations are now more powerful than some governments. E.g., Jordan J. Paust, Human Rights Responsibilities of Private Corporations, 35 Vand. J. Transnat'l L. 801, 802 (2002) ("[D]ecisions and activities of many large multinational corporations are capable of doing more harm to persons and resources in ways that thwart human rights than decisions and activities of some nation-states."). Those making this argument tend to look only at economic size, not at indicia of power like armies, police forces, prosecutors, and courts, which governments generally have and corporations generally do not.

86 Countries have faced similar issues with respect to the horizontal effect of constitutional rights and have reached a variety of points on the spectrum between pure vertical duties, in which rights give rise to duties only for governments, and full horizontal effect, in which rights may be enforced directly in courts against private actors. Gardbaum, supra note 4 (reviewing the positions of Canada, Germany, Ireland, South Africa, and the United States, among other countries); see Mark Tushnet, The Issue of State Action/Horizontal Effect in Comparative Constitutional Law, 1 I-CON 79 (2003) (suggesting structural and political reasons why countries differ in their approach to the issue). Gardbaum describes how domestic legal systems may give constitutional rights different degrees of indirect horizontal effect by applying them to different types of litigation between private parties and to the actions of courts and the legislative and executive branches of government, as well as by imposing duties on governments to protect against private interference with them.

There are important differences between horizontality in the context of constitutional rights and in the context of international human rights law. Most important, human rights law, with important but limited exceptions, lacks clear lines of authority by which a supreme court or legislature can impose new rules or interpretations of existing rules on unwilling governments or private parties, and lacks an international structure through which those rules may be enforced. The formulation of horizontal human rights law therefore depends largely on the consent of states that vary greatly in their views of the relationship between the individual and the state, the scope of rights, and the role of governments in protecting rights against private interference, and its enforcement depends on the willingness of those states to lend their domestic legal systems to that end. These constraints are not present in the same way in the case of constitutional rights. Among other consequences, the variation in governments' own approaches to horizontal constitutional rights may make it more difficult for them to agree on a uniform approach to horizontal human rights law.
Moreover, as the previous part demonstrates, using international human rights law to establish private duties poses real dangers to the protection of human rights. Oppressive governments have regularly sought language setting out duties on individuals to serve as a pretext for restricting their rights. Any effort to incorporate correlative duties into human rights instruments must therefore take care not to open the door to converse duties that would allow governments to restrict rights and undermine the entire corpus of human rights law.

All of these considerations militate toward leaving private violations of human rights to domestic law. But powerful reasons argue against leaving private violations entirely to domestic law. In some cases, the nominally nongovernmental actor may be acting so much like a government, or in such close complicity with it, that it should be treated according to the same standards that apply to governments.\(^8\) Even where the actor is clearly acting in a private capacity, however, domestic governments may fail to prevent it from interfering with others' human rights. Governments are often controlled by elites with little interest in protecting the rights of others, and even democratically elected governments cannot always be trusted to protect the rights of minorities. There is a need, then, for international human rights law to play a role.

The pyramid of private duties described in this section is the product of these two cross-cutting pressures: on the one hand, the practical and political need to use domestic institutions wherever possible; and on the other, the need to use international law where domestic institutions are inadequate. Of course, these same pressures apply to the obligations of governments, but there, the balance tips decisively in favor of a larger degree of involvement by international law. The power of a government, unlike that of private actors, is not necessarily checked by any domestic laws, since governments may have the power to change the laws that purport to restrict them. The rise of modern constitutionalism, with the inclusion of bills of rights, is at its heart an effort to place duties and limits on governments that they cannot easily evade.\(^8\) One of the primary purposes of international human rights law, especially at its inception, was to place those constitutional limits on a higher plane, beyond the power of any individual government to abrogate. The balance has been struck differently with respect to private duties, as the following sections explain. But the different approach, while complex, offers real benefits. It addresses private violations of human rights without opening the door to converse duties to the state; where possible, it draws on the resources of national governments; and, where necessary, it provides international human rights law with a crucial, albeit limited, role in specifying, placing, and enforcing private duties.

**Private Duties Contemplated by Human Rights Law**

At the lowest level of the pyramid of private duties, human rights law only *contemplates* the duties and leaves their specification and enforcement to domestic law. The obligation on states

\(^8\) Holding private actors responsible for violations of human rights law when they are either acting as de facto governments, or acting together with governments in a common scheme, raises quite different issues from holding them responsible when they are acting as private actors. When private actors act as if they were a government, it may be appropriate to treat them as a government. This article addresses only situations in which the private actor is acting neither as a government nor in complicity with a government.

at this level is minimal: merely that governments use due diligence to ensure that human rights are protected from private interference. But the scope of the due diligence obligation is very broad, in that it applies to every right that is capable of being violated by private actors.

The most important basis for this obligation is Article 2 of the International Covenant on Civil and Political Rights, which requires each state party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."90 Perhaps the requirement to respect rights requires the government only to avoid violating the rights itself; if so, it could comply with its obligation to respect my right to life, for instance, by not depriving me of it.90 But the obligation to ensure the right goes beyond merely avoiding direct violation. It requires affirmative action to secure the right, or make it safe from loss or interference.91 And interference with my right to life may come not only through government action, but also from private action—murder, for example. To ensure my right to life, then, the state party must take affirmative steps to protect the right from interference by nongovernmental actors.92 This is the view taken by the independent experts of the Human Rights Committee, which has stated:

The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.93

Other human rights agreements, including the European Convention, the American Convention, and the Convention on the Rights of the Child, also require states parties to ensure (or secure) the rights they set forth, and are therefore susceptible to similar interpretations.94

89 ICCPR, supra note 41, Art. 2(1).
90 NOWAK, supra note 48, at 36 ("The duty to respect... means that the States Parties must refrain from restricting the exercise of these rights where such is not expressly allowed.").
91 See 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 827 (1993) (defining “ensure” as “Secure, make safe (against, from, a risk etc.); “Secure (a thing) for or to a person”); SARAH JOSEPH, JENNY SCHULTZ, & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL ANDapolitical Rights: CASES, MATERIALS, AND COMMENTARY 24 (2000) ("It is... likely that the general duty in article 2(1) on States to 'ensure' ICCPR rights entails a duty, of perhaps varying degrees of strictness, to protect individuals from abuse of all ICCPR rights by others."). Nowak emphasizes that the term “ensure” requires the state to take positive steps to give effect to the rights generally. NOWAK, supra note 48, at 36–37. Among the state’s duties of performance are “positive measures to protect against private interference” with respect to certain rights. Id. at 38.
94 European Convention, supra note 41, Art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention."); American Convention, supra note 41, Art. 1(1) (states parties “undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms”); Convention on the Rights of the Child, Art. 2(1), Nov. 20, 1989, 1577 UNTS 3 [hereinafter CRC] (states parties “shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction”). Although the European Court of Human Rights has read the European Convention to require states to protect rights against private interference, scholars have disagreed on the degree to which the term “secure” in the Convention leads to this result.
Although Article 1 of the African Charter requires its parties only to “recognize” its listed rights and to “undertake to adopt legislative or other measures to give effect to them,” the African Commission has read this language to reach the same result, stating that “if a state neglects to ensure the rights in the African Charter, this can constitute a violation [of Article 1], even if the state or its agents are not the immediate cause of the violation.”\(^9\) Similarly, although the ICESCR does not include the “respect and ensure” language, the Committee on Economic, Social and Cultural Rights has read it to require parties to protect rights, as well as to respect and fulfill them, and has stated that the obligation to protect requires states to ensure that private actors do not interfere with the enjoyment of rights.\(^9\) More explicitly, the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of Discrimination Against Women (CEDAW) require each state party not only to refrain from discrimination itself, but also to “prohibit and bring to an end, by all appropriate means” (CERD) and “take all appropriate measures to eliminate” (CEDAW) racial discrimination and discrimination against women by any person or organization.\(^9\)

These agreements often do not specify the private duties that governments should impose to ensure enjoyment of the human rights. In the absence of specification, the obligation on governments is merely to exercise “due diligence” to protect human rights from private interference.\(^9\) Under the due diligence standard, a state’s obligation to ensure human rights is an obligation of conduct, not of result. A state party to an agreement recognizing the right to life is

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\(^9\) Committee on Economic, Social and Cultural Rights, General Comment No. 12, UN Doc. E/C. 12/1999/5, para. 15 (May 12, 1999) (right to food); & General Comment No. 14, UN Doc. E/C.12/2000/4, para. 33 (right to health).


\(^9\) General Comment No. 31, supra note 93, para. 8 (in certain circumstances, a failure of a state party to ensure rights under Article 2 of the ICCPR would give rise to a violation by the party of the rights, as a result of its “permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”); see August Reinisch, The Changing International Legal Framework for Dealing with Non-state Actors, in NON-STATE ACTORS AND HUMAN RIGHTS 37, 79 (Philip Alston ed., 2005); Stephanie Farrow, State Responsibility for Human Rights Abuses by Non-state Actors, 92 ASIL Proc. 299, 302 (1998) (“The standard most frequently articulated has been drawn from traditional state responsibility doctrine governing protection of aliens from private violence—the ‘due diligence’ standard.”). The leading case is from the Inter-American Court of Human Rights. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 172 (July 29, 1988). Not all references by UN treaty bodies to states’ duties to protect human rights against private interference refer to “due diligence,” however. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations, State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries, UN Doc. A/HRC/4/35/Add.1, at 10 (Feb. 13, 2007) [hereinafter SRSG Report]. And the European Court of Human Rights, which has developed an extensive jurisprudence on the topic, has used other baseline standards, such as “reasonable and appropriate measures.” See, e.g., Plattform “Ärzte für das Leben” v. Austria, 139 Eur. Ct. H.R. (ser. A), para. 34 (1988). Nevertheless, “due diligence” captures the general approach of treaty bodies and international tribunals: that states must take measures, which vary depending on the circumstances and the nature of the rights in question, to protect the exercise of human rights from interference by private actors.
not in violation of the agreement merely because a murder occurs within its jurisdiction. But it may have violated its due diligence obligation if it has done nothing to prevent, punish, investigate, or redress it. In contrast, the obligation of a state to respect, or to refrain from violating, the right to life may well be an obligation of result, in that the state may be responsible for any arbitrary deprivation of the right to life even if it can point to steps it took to try to avoid such deprivation.

When the due diligence standard does apply, what does it require? It may seem obvious that states fail to meet the standard when they do nothing whatsoever. But which actions, beyond nothing, fall short of the standard? As always with respect to due diligence obligations, what diligence is due may vary greatly from case to case, depending on factors such as the resources available to the state, the likelihood of the violation (if it has not yet occurred), and the severity of the violation. At a minimum, the requirement suggests that a government would have to take reasonable steps to try to prevent violations. The mere existence of a violation by a private actor, however, would not by itself mean that the state did not meet its due diligence obligation to try to prevent it.\footnote{See Velásquez Rodríguez, supra note 98, para. 175.}

In addition, in appropriate cases the government would have to investigate violations, if they have occurred, and pursue punishment and indemnification.\footnote{Id., para. 174 (noting the state’s “legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”); see Farrior, supra note 98, at 302; Addendum to the February 2007 SRSG Report, supra note 98, at 21.}

The examples of CERD and CEDAW show that in some instances human rights law identifies the rights to which the due diligence obligation attaches. But in the absence of such an identification, which rights give rise to the obligation? Recall the Human Rights Committee’s view that the state protects individuals “against violations of Covenant rights by its agents, [and] also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.”\footnote{See note 93 supra and corresponding text (emphasis added).}

Some rights, such as rights in criminal proceedings, may by their nature be interfered with only by governments. Others, such as the protection against slavery, would be close to meaningless if they did not require restrictions on private conduct. Many, perhaps most, rights fall between these extremes.\footnote{For an analysis of whether specific rights may give rise to private duties, see JÄGERS, supra note 3, at 48–70.}

In the first instance, the state concerned has the responsibility to give this standard greater specificity by deciding to which rights it applies and the actions it requires. Leaving these decisions in the first instance to the state is not an oversight, but a key component of the human rights regime to which it has agreed. Private duties are already the subject of a vast, complicated web of domestic laws, including criminal, tort, and regulatory measures. Private duties under domestic law are the product of balances between many conflicting interests, balances that change over time and vary from country to country. Inserting international human rights law into this complex swirl of interests could upset a huge range of these balances in unpredictable ways. Moreover, governments and their citizens often do not expect to look to international law for guidance on determining private duties.

As a result, for international human rights law to do more than set a general due diligence obligation for many private duties would be very controversial. Not surprisingly, the baseline position of human rights law toward these duties defers to governments, which are expected
to specify and enforce the duties. But, as the next section shows, the baseline is often only the starting position. Human rights law may provide more specification of private duties, either through agreement or authoritative interpretation by international bodies. Duties regularly migrate from the lowest level of the pyramid to the next level.

Private Duties Specified by Human Rights Law

Human rights law specifies private duties through agreements and (more often) through international institutions with the authority to interpret such law. As these agreements and institutional interpretations grow, so does the number of duties at the second level of the pyramid of private duties. Duties are more apt to be specified the more susceptible they are to violation by private actors and the more unable domestic law is to address them satisfactorily.

Labor rights are an example of the first category. To be meaningful, labor protections must address not only governments, but also private employers. Thus, labor agreements typically specify duties that state parties are required to impose on private actors. Similarly, antidiscrimination treaties deal not only with discrimination by governments, but also with discrimination by private actors, on the ground that the latter can be just as destructive of the protected rights. CERD, for example, requires state parties to "guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law," including with respect to "[t]he right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks." To comply, parties must regulate the activities of private owners of such places or services. CEDAW requires its parties to "take all appropriate measures to eliminate discrimination against women," including, among other steps, to ensure them equal rights to "bank loans, mortgages and other forms of financial credit."

International criminal treaties address many private threats to human rights. Because international criminal law developed on a different historical track than human rights law, it is often treated as a separate field, but there is a great deal of overlap between the two. In particular, international criminal law creates private duties correlating to certain human rights, such as the right to life. It often specifies private duties in areas that are difficult or impossible for the domestic law of any single state to tackle effectively. Treaties requiring states to prosecute or extradite those accused of drug trafficking or terrorist activities respond at least in part to the difficulty of establishing jurisdiction over private actors that do not operate in one location, or that affect activities of an international nature such as civil aviation. In addition, they respond to the belief that some particularly heinous actions are the proper subject of international attention. These concerns supported agreements on some private actions, such as piracy and slavery, long before the birth of the modern human rights movement.

103 See, e.g., ILO Convention No. 98, July 1, 1949 (requiring parties to safeguard workers' rights to organize and bargain collectively); ILO Convention No. 105, June 25, 1957 (requiring parties to abolish forced labor); ILO Convention No. 138, June 26, 1973 (requiring parties to set a minimum age for employment); ILO Convention No. 155, June 22, 1981 (requiring parties to regulate occupational safety and health); ILO Convention No. 182, June 17, 1999 (requiring parties to ban the worst forms of child labor). ILO Conventions are available at <http://ilo.org/ilolexl/english/>.

104 CERD, supra note 97, Art. 5(f).

105 CEDAW, supra note 97, Art. 13(b).

Where human rights treaties contemplate but do not specify private duties, binding decisions of international bodies, or nonbinding decisions that inform subsequent agreement and practice, may give greater content and specificity to the duties. Regional tribunals like the European and Inter-American Courts of Human Rights and the new African Court of Human and Peoples' Rights can issue decisions that bind the parties to the underlying treaties. The most active of these tribunals is the European Court, much of whose case law involves the specification of indirect private duties. The duties it has detailed vary according to the nature of the underlying obligation. It has construed the European Convention's prohibition on slavery and forced labor, for example, as requiring each party to prohibit the practice altogether and to enforce the prohibition through criminal sanctions, on the ground that "limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective." At the other extreme, while it has construed the Convention’s "right to respect for . . . private and family life" as requiring states to regulate private industry to secure proper respect for that right, in that context it asks only whether “a fair balance was struck between the competing interests of the individuals affected . . . and the community as a whole.” The “margin of appreciation” left to the state party to determine for itself how to comply with its positive obligation to secure human rights from interference by private actors varies greatly, depending on the nature of the right in question.

Although the “treaty bodies” created by the global human rights treaties are not authorized to make binding decisions, their non-legally binding views can have persuasive effect, setting out interpretive positions around which state practice may coalesce. These bodies have addressed private duties, but they often state only in general terms that parties have obligations under the treaties with respect to private behavior without describing those obligations in detail. Nevertheless, such statements may clarify that due diligence obligations extend to particular rights and establish a basis for further specification in the future.
Some treaty body interpretations are more specific. The most important example may be the CEDAW Committee's general recommendation declaring that gender-based violence (that is, "violence that is directed against a woman because she is a woman or that affects women disproportionately") that "impairs or nullifies the enjoyment by women of human rights," including the rights to life, security of person, and equality in the family, is discrimination covered by CEDAW. The committee stated that the obligation on parties under Article 2(e) "to take all appropriate measures to eliminate discrimination against women by any person" therefore included the obligation to address gender-based violence, and it recommended specific steps parties should take in that respect:

(i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;

(ii) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women; [and]

(iii) Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.

The committee's interpretation became the basis for a declaration adopted by the UN General Assembly. The declaration tracks the recommendation in many respects, including by stating that

States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

\[ \ldots \]

(c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;

(d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence.

from violating the right to food of others . . . "). See generally CLAPHAM, supra note 108, at 319–34 (reviewing treaty bodies' statements on private duties).

113 E.g., Comm. on Economic, Social and Cultural Rights, General Comment No. 14, UN Doc. E/C.12/2000/4, para. 35 (the duty to protect the right to health requires parties, inter alia, "to prevent third parties from coercing women to undergo . . . female genital mutilation"); & General Comment No. 18, UN Doc. E/C.12/GC/18, para. 25 (2005) ("The obligation to protect the right to work includes the responsibility of States parties to prohibit forced or compulsory labour by non-State actors.").


115 Id., para. 24(t). The committee concluded that states may "be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation." Id., para. 9.

116 Declaration on the Elimination of Violence Against Women, GA Res. 48/104, Art. 4(c), (d) (Dec. 20, 1993). In the interest of full disclosure, I should note that I was the U.S. representative to the working group of the UN Commission on the Status of Women that drafted the declaration.
One interpretation of the declaration is that it is a subsequent agreement to be taken into account in interpreting CEDAW. Even if it is not such an agreement, it provides a framework for subsequent practice, which may itself be taken into account to the extent that it establishes the agreement of the parties regarding its interpretation.

Specifying through an international mechanism the scope and content of the private duties to which human rights give rise may be more uniform and predictable than applying a due diligence standard. But before a duty may be specified, it is necessary to have a relatively clear and uniform understanding of what the duty should be. The insertion of international human rights law into domestic laws governing private duties will often be controversial and difficult. The process of specification that the human rights regime has developed, while slow, has real advantages. When states are able to agree on more specific private duties, as in the labor field, they can do so immediately. When they cannot, human rights law gives an important role to international tribunals and quasi tribunals with particular expertise in human rights, which may then set out such duties incrementally, drawing on previously accepted interpretations of the law and the subsequent practice of states. Through this process, states that may be reluctant to accept duties to regulate private actors (and private actors that may be reluctant to accept them indirectly) have time to become accustomed to the idea, as the specification progresses from a nonbinding interpretation, to gradual acceptance, to binding agreement or decision. Of course, the regional agreements, whose institutions can impose binding interpretations, and the global agreements differ importantly in this respect, since the latter leave greater discretion to their parties to decide whether and how to accept the interpretations of their provisions. But even under the regional agreements, states retain an important degree of discretion: for duties that have been partially specified, the rest of the specification is left to the state; and even for clearly specified duties, the state still holds the authority (and the responsibility) to write the duties into domestic law and to enforce them.

Private Duties Placed by International Law

In contrast to the large number of indirect private duties at some stage of specification through the process described in the preceding section, international law places only a few correlative duties directly on private actors. By placement, I mean that international law not only specifies the duties, but provides that they directly bind private actors as a matter of international law, rather than indirectly bind them through the operation of domestic law.

117 The law of treaties requires interpretation of treaty provisions to take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." Vienna Convention on the Law of Treaties, Art. 31(3)(a), opened for signature May 23, 1969, 1155 UNTS 331. Although few General Assembly resolutions would qualify as such subsequent agreements, this resolution was adopted unanimously (thereby including all of the parties to CEDAW) and arguably establishes the parties' agreement regarding the interpretation of CEDAW.

118 Treaty interpretation also looks to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Id., Art. 31(3)(b).

119 See INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARIsm: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 11 (2002) [hereinafter BEYOND VOLUNTARIsm] (International standards "can help to harmonise rules at a time of weak national regulation. They can act as a common reference point for national law, setting benchmarks, drawing attention to core minimum requirements and establishing clearly what is not permissible.".).
Virtually all of these duties are found in international criminal law. The paradigmatic example is the Genocide Convention, which states that "genocide . . . is a crime under international law" that the parties "undertake to prevent and to punish," through both domestic tribunals and "such international penal tribunal as may have jurisdiction." The Convention specifically provides that "[p]ersons committing genocide . . . shall be punished, whether they are . . . public officials or private individuals." The 1973 convention on apartheid is similarly explicit, stating that apartheid and "similar policies and practices of racial segregation and discrimination," are crimes violating the principles of international law, and that "[i]nternational criminal responsibility shall apply . . . to individuals," not just government representatives. Although the provenance of crimes against humanity and war crimes is more complicated, in their current form they are both understood to be international crimes that impose direct responsibility upon individuals, including individuals that are not state actors. The Rome Statute creating the International Criminal Court gives it jurisdiction over "the most serious crimes of concern to the international community as a whole," specifically including war crimes and crimes against humanity as well as genocide.

Although international law clearly places these duties directly on private actors, the status of another set of duties is less clear. For example, does international law place a direct duty on all individuals not to engage in slavery? The 1926 Slavery Convention requires parties to "prevent and suppress the slave trade" and "bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms." It is therefore an example of a second-level indirect horizontal duty; the duty is directly placed on state parties to impose private duties through the operation of their domestic law. Similarly, a 1956 supplementary convention...
requires parties to “bring about progressively and as soon as possible the complete abolition or abandonment” of several slaverylike practices, including debt bondage and serfdom. But the 1956 treaty also provides that the acts of enslaving another person and of conveying slaves from one country to another “shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties.” More recent agreements similarly require their parties to criminalize torture and forced disappearances and to prosecute or extradite offenders. Steven Ratner and Jason Abrams suggest that “a violation of international law becomes an international crime if the global community intends through [either of these approaches or through authorizing the prosecution of offenses such as piracy] to hold individuals directly responsible for it.” If these treaties hold individuals “directly responsible” for violations, they should be included in the third stage of the pyramid, together with the prohibitions against genocide, apartheid, war crimes, and crimes against humanity.

But the treaties do not in fact hold individuals directly responsible. Instead, like the obligations discussed in the preceding section, they place the responsibility on governments to take certain steps with respect to private actors. The responsibility on governments is very specific and therefore of the highest level of involvement within the second stage, but the specification does not by itself make the obligation direct. Some might argue that this distinction is merely semantic: a treaty that requires a state to impose such a specific duty on private actors essentially imposes the duty on them itself. The language of international law must be taken seriously, however. A legal obligation that international law directly places on an individual differs from one that it imposes indirectly, through a duty on governments. In the first case, the international community as a whole exercises prescriptive jurisdiction over individuals in a way that makes them directly subject to international law apart from the mediating intervention of domestic law. In the second, domestic jurisdiction over individuals is left intact.

128 Id., Arts. 3(1), 6(1) (emphasis added).
129 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts. 4(1), 7(1), Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 85 [hereinafter Convention Against Torture]; International Convention for the Protection of All Persons from Enforced Disappearance, GA Res. 61/177, Arts. 4, 7(1), 11(1) (Dec. 20, 2006) [hereinafter Disappearances Convention] (not yet in force). Although both conventions are primarily directed against state actors, they include within their scope private actors acting with the “acquiescence” of the state (with respect to disappearances) or “a public official or other person acting in an official capacity” (torture). Disappearances Convention, supra, Art. 2; Convention Against Torture, supra, Art. 1(1).
130 Ratner & Abrams, supra note 124, at 10.
131 The Disappearances Convention does provide that “[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.” Disappearances Convention, supra note 129, Art. 5 (emphasis added). To that extent, then, the convention could be read as establishing a new direct obligation on individuals.
132 Cf. Bruno Simma & Andreas L. Paulus, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, 93 AJIL 302, 313 (1999). However, there is no reason why offenses such as torture and disappearances may not be called “international crimes,” since the term “international” may be justified by their specification by international law.
133 Jordan Paust has taken a far more extreme position than Ratner and Abrams, arguing that human rights law directly places a vast range of duties on private actors. He writes: “Most human rights instruments speak generally of particular rights of each person or everyone without any mention of or limitation concerning which persons or entities owe a corresponding duty. Thus, most duties are generally not limited to state actors and do reach private persons or entities.” Paust, supra note 85, at 810. The statement of a right without reference to a correlative duty...
For this reason, the political and practical pressures against regulation of private conduct by international human rights law greatly increase in strength when the regulation is direct rather than filtered through domestic laws. Politically, individuals and other private actors are more likely to accept the legitimacy of international norms when they have been incorporated into domestic law. Individuals acknowledge that their governments have jurisdiction to determine and enforce their rights and duties; they are less likely to accept that international bodies controlled by foreign governments have such jurisdiction. In addition, the practical problem of enforcement arises. Very few international institutions have the power to enforce prohibitions directly against private actors, even though once an obligation is placed by international law, a much stronger argument can be made for using international institutions to ensure that it is met.

As a result of these pressures, the practice of states seems to operate on the very strong presumption that almost all international legal duties on private actors will be mediated through domestic law: that placement and enforcement even of specific duties will usually be through domestic procedures, not international ones. To overcome this presumption, it does not suffice for a violation to be particularly heinous, since even such abhorrent international crimes as torture and slavery do not fall within this category. To warrant direct imposition by international law, violations must be considered both of extraordinary international significance and extraordinarily ill-suited to domestic enforcement.

Private Duties Enforced by Human Rights Law

Finally, in some cases international law not only specifies duties and places them directly on private actors, but also provides for their enforcement through international institutions. Indeed, as just suggested, a primary difference between duties directly and indirectly placed on individuals is that the former open the door to enforcement by international institutions. Since the creation of the International Criminal Court, most of the duties directly placed on private actors may be enforced, under certain circumstances, at the international level.

Some scholars seem to believe that this link is a necessary one, in the sense that a duty does not exist at the international level unless it can be enforced there. Carlos Vázquez, for example, suggests that an international norm applies directly to nonstate actors only if "an international mechanism is established for enforcing" it, or if there is "language indicating an intent to subject [the actors] to international enforcement mechanisms in the future." Even if the language appears to establish a direct obligation of private parties, Vázquez would not treat it as

would not necessarily imply that everyone in the world bears the duty, but in any event Paust’s description is inaccurate. Human rights treaties explicitly provide that it is the states party to the treaties that have the duties to ensure and achieve the realization of the human rights set out in the agreements. E.g., ICCPR, supra note 41, Art. 2(1); ICESCR, supra note 41, Art. 2(1); CERD, supra note 97, Art. 5; CEDAW, supra note 97, Art. 2(1); CRC, supra note 94, Art. 4. The Universal Declaration does not include such a statement of duties because it was not intended to be legally binding, but the clear intention of the governments adopting it was that the duties were to be held by states. In the process of drafting the declaration, the members of the General Assembly adopted a resolution stating that the human rights in the declaration "presuppose the existence of corresponding duties on the part of States," which the drafters put off formulating until the conclusion of "an appropriate instrument." MORSINK, supra note 12, at 239. The "appropriate instrument" turned out to be the two covenants. Paust also reads Article 5(1) of the covenants, which state in identical terms that the covenants give no state, group, or person a right to destroy or limit the rights set out in them, as meaning that everyone has a duty not to destroy or limit the rights. Paust, supra, at 813. But the absence of a right to do something is not the same as a duty not to do it.

such if its enforcement appears to be left to domestic law. But, as Ratner has written, this approach "confuses ... the existence of responsibility with the mode of implementing it." Treaties that purport to place duties directly on private actors should be read as meaning what they say, just as any other treaties would be. Certainly, one way that international law may place duties directly on individuals is by subjecting them to the jurisdiction of an international tribunal with the power to enforce the duties, but the duty not to commit genocide was directly imposed on individuals by the Genocide Convention long before an international tribunal was authorized to enforce that prohibition.

Giving international institutions a role in directly enforcing private duties, including through criminal sanctions, is the most intrusive possible role human rights law can play with respect to domestic jurisdiction over private actors. It comes as no surprise that it exists only with respect to three such duties that clearly apply directly to private actors, and that even then the International Criminal Court may exercise jurisdiction only over crimes committed on the territory or by the national of a party (or a nonparty that has accepted the Court's jurisdiction), and must determine that a case is inadmissible if, inter alia:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; [or]

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

Unwillingness or inability to prosecute is not an easy standard for the Court to meet; the Rome Statute provides that to determine unwillingness, the Court must consider whether the proceedings were undertaken or the decision not to prosecute was made "for the purpose of shielding the person concerned from criminal responsibility," whether there has been a delay in the proceedings or they were otherwise conducted in a manner that is "inconsistent with an intent to bring the person concerned to justice," and whether the proceedings were "not being conducted independently or impartially." To determine inability, the Court must consider whether the state is unable to carry out the proceedings "due to a total or substantial collapse or unavailability of its national judicial system." Thus, the Court may directly enforce duties against individuals only if the domestic system of enforcement has failed, and even then only with respect to particularly heinous crimes that are apt to escape effective domestic jurisdiction. The vast majority of horizontal duties under human rights law remains subject solely to indirect placement and enforcement.

135 Id. at 934.
136 Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 YALE L.J. 443, 481 (2001). As noted above, however, I do not share Ratner's view that treaties that merely oblige states to prosecute or extradite offenders do place duties directly on private actors.
137 Rome Statute, supra note 124, Art. 12. With respect to crimes committed on board an aircraft or vessel, the question is whether the state of registration is a party or has accepted jurisdiction. Id.
138 Id., Art. 17(1).
139 Id., Art. 17(2).
140 Id., Art. 17(3).
III. The Draft Declaration on Human Social Responsibilities

In the last years of its existence, the UN Human Rights Commission gave increased attention to private duties under human rights law. One of its most important efforts in this regard began in 2000, when the Commission asked the Sub-Commission on the Promotion and Protection of Human Rights to consider the topic of human rights and human responsibilities. In 2001 and 2002, the Commission authorized reports by a member of the Sub-Commission acting as special rapporteur, and in 2003 the rapporteur submitted his final report, which included the "Pre-draft Declaration on Human Social Responsibilities." Although the draft claims that it sets out moral rather than legal obligations, it is written in the same style as human rights declarations and states that the responsibilities it sets out are of "equal value and importance to life in society" as legally recognized human rights. Any declaration of this type adopted by the United Nations could do more than set a moral or political standard; it could be the precursor to a legal standard, and at the same time could affect how existing legal standards are interpreted.

The duties in the draft declaration generally represent converse duties owed by individuals to society. Its preamble states that "the individual not only has rights that give a legal framework to his freedom but also duties towards the society in which he or she lives," acknowledges "with regret" that human rights law does not set out those duties, and suggests "that it would be useful and necessary to define the social duties or responsibilities of the individual towards the community in which he or she lives." Some of the duties in the declaration are so vague that their effect on human rights law would be unclear. For example, the declaration provides that "[e]very person has the duty to behave in a fraternal manner toward others," and that "[e]very person . . . has the duty to contribute . . . to the eradication of social ills." But other duties could provide a basis for governments to limit rights. Echoing the general limitations provision of the African Charter, the draft declaration would place a duty on each person "to exercise his or her recognized rights and freedoms, with due consideration and respect for . . . the security of his or her society and the morality prevailing in it." Other duties are linked to specific rights. As in the American Declaration, these duties are converse rather than correlative: duties to the society as a whole to exercise the right in certain ways, rather than to respect or fulfill specific rights of others. Thus, rather than attempt to delineate duties that the

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142 Martínez Report, supra note 2.

143 Draft Declaration, supra note 2, Arts. 1, 3.

144 Id., Art. 5.


146 The declaration also sets out some duties owed by states, e.g., "towards achieving the establishment of an international and social order in which the rights and freedoms enshrined in the Universal Declaration of Human Rights and other international instruments can be made effective," "to revitalize the principle of international cooperation, particularly that related to the materialization of the right to development," and to "abstain from promoting or supporting . . . the activities of individuals, groups, institutions or organizations that are in contradiction with the provisions of the Charter of the United Nations." Draft Declaration, supra note 2, Arts. 7, 8, 10.

147 Id., pmbl.


right of freedom of expression might place on private actors, the draft declaration proposes a
duty that would limit that right: "Every person linked to the mass media has the duty to provide
information with due objectivity and discretion based on sound reasoning, the verified truth
of the information given and absolute fidelity to what is said by the sources consulted about
it."  The draft declaration includes similar duties regarding the exercise of religious freedom,
the right to vote, and the right to work.

The special rapporteur cited as inspiration for his work the "Universal Declaration of Human Responsibilities" drafted by Hans Küng, the Catholic theologian, and adopted by the InterAction Council, a group of former heads of government, which continues to press for its adoption by the United Nations. Like the special rapporteur, the InterAction Council has indicated that its declaration would not be legally binding but at the same time has emphasized that it wants the Universal Declaration of Human Responsibilities to have the same status as the Universal Declaration of Human Rights. Some of the responsibilities in the InterAction Council's declaration are so general that they defy easy categorization as correlative or converse. It states, for example, that "[e]veryone has a responsibility to promote good and to avoid evil in all things." The declaration sometimes uses the language of correlative duty, but, as Ben Saul has shown, for the most part the correlations are "ambiguous, imprecise, and incomplete.

Most human rights find no correlative duties in the declaration, and there is no apparent reason for their exclusion. Some of the duties that it does include could be read as softer paraphrases of the duties that would normally follow from human rights. And some of the duties would restrict rights: "The freedom of the media . . . must be used with respon-
sibility and discretion. Sensational reporting that degrades the human person or dignity
must at all times be avoided." 150

150 Draft Declaration, supra note 2, Art. 17.
151 Id., Arts. 18 ("duty not to legitimize or incite religious fanaticism, as well as to promote respect for the beliefs
of others"); 19 ("duty to participate in the established procedures to facilitate his or her participation in the political
life of a specific community to which he or she belongs, or in the society as a whole, in particular, by exercising his
or her right to vote"); 24 ("right and the duty to work to the degree permitted by his or her physical and intellectual
capacities") (emphasis added).
152 InterAction Council, A Universal Declaration of Human Responsibilities (Sept. 1, 1997) [hereinafter Inter-
Action Declaration]. The group has included Jimmy Carter, Valéry Giscard d'Estaing, Malcolm Fraser, and Hel-
mut Schmidt.
153 See, e.g., InterAction Council, Chairman's Report on the High-Level Expert Group Meeting, "Human Rights
and Responsibilities in the Age of Terrorism," paras. 15, 17 (Apr. 1–2, 2005) [hereinafter InterAction Report] (noting
that the Universal Declaration "began as a series of principles, not law. . . . [O]ur document on responsibility
also starts with principles. . . . A World Charter on Responsibility, adopted by the United Nations, would not have
legal force. But like the Universal Declaration of Human Rights, it will be a light on the hill."). Some of these sup-
porters may not realize that the Universal Declaration of Human Rights is now viewed as "at least significant evi-
dence of customary international law." Hurst Hannum, The Status of the Universal Declaration of Human Rights in
154 InterAction Declaration, supra note 152, Art. 3.
155 E.g., id., Art. 5 ("Every person has a responsibility to respect life. No one has the right to injure, to torture or
to kill another human person.").
156 Ben Saul, In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities, 32 COLUM. HUM.
157 Instead of a responsibility not to discriminate against one another on the basis of gender, race, or religion, for
example, the InterAction Declaration says that "Every person, regardless of gender, ethnic origin, social status, political
opinion, language, age, nationality, or religion, has a responsibility to treat all people in a humane way." Inter-
What is the purpose of these two declarations? Statements of correlative duties might be taken as trying to strengthen compliance by private actors with others' human rights. But, as noted, the draft Declaration on Human Social Responsibilities does not include correlative duties, and the correlative duties in the draft Universal Declaration of Human Responsibilities are so unclear that they would be more likely to cause confusion about existing correlative duties than to strengthen them. Nor are declarations of converse duties necessary to help states enforce duties already placed on individuals under national laws.¹⁵⁹

Rather, the purpose of both declarations is to change the current balance between human rights and human duties. Their proponents believe that human rights law elevates human rights at the expense of human duties. The report presenting the draft Declaration on Human Social Responsibilities to the Human Rights Commission refers to the “need to find a solid balance between the rights of the individual and his/her social duties or responsibilities.”¹⁶⁰ Similarly, the InterAction Council seeks “to bring freedom and responsibility into balance.”¹⁶¹ The special rapporteur and the InterAction Council trace the imbalance to the Universal Declaration itself, which they believe reflects the individualistic bias of the powerful Western countries that had just won the Second World War.¹⁶² The preamble to the resolution authorizing the study that led to the draft Declaration on Human Social Responsibilities allocates the blame slightly differently, stating that “human responsibilities were an integral part of the negotiating process leading to the Universal Declaration of Human Rights and are an integral part of the Universal Declaration itself, but have since been ignored.”¹⁶³

As part I of this article shows, however, human rights law already strikes a balance between human rights, on the one hand, and societal interests giving rise to human duties, on the other. Human rights agreements set out rights together with authorizations to governments to limit and derogate from certain rights under specified circumstances. Duties are not specified at the international level, but they are allowed at the domestic level as long as they meet those requirements. Decisions to exclude lists of duties from human rights instruments stemmed not from a failure to understand the role of duties in human life, but from a realistic concern that governments could rely on such lists to limit rights as they chose. The refusal to list converse duties in international human rights law thus plays a key role in finding a balance between rights and duties. At the very least, efforts to “restore” the balance by reemphasizing duties would “upset this balance,” as Kathleen Mahoney has said, “and create uncertainty and confusion about the meaning not just of the Universal Declaration of Human Rights, but also of many other human rights instruments.”¹⁶⁴ Beyond confusion, the declarations could change the existing balance toward greater limits on rights by providing governments with more excuses to override rights

¹⁵⁹ Daes, supra note 30, at 37 (the Universal Declaration does not set out detailed duties of the individual to the state “for the simple reason that the cardinal object of the Declaration is the protection of the rights of individuals in relation to the State. History has shown that there is a need for such protection, whereas there is no imperative necessity to safeguard the State against individuals.”).

¹⁶⁰ Martinez Report, supra note 2, at 3.

¹⁶¹ InterAction Declaration, supra note 152, at 1 (Introductory Comment).

¹⁶² Martinez Report, supra note 2, at 3; InterAction Report, supra note 153, at 1. The idea that the drafters of the Universal Declaration (not to mention the many subsequent human rights treaties) ignored social duties because they were all Westerners infatuated with individualism is simply wrong, as part I explains.

¹⁶³ UNHRC Res. 2000/63, supra note 141.

when they decide that other interests justify doing so—the authority that the Soviet Union sought during the negotiation of the Universal Declaration. The end result could be to undermine the entire concept of human rights, whose essence is “that a hard core of autonomy, integrity, and dignity of the individual is not to be sacrificed even to the national interest and the welfare of the group.”

Some of the proponents of these declarations may misunderstand the current state of human rights and duties and fail to comprehend the extent to which declarations like these would weaken human rights law. But many undoubtedly hope to achieve precisely that result. In this respect, the background to the draft Declaration on Human Social Responsibilities is revealing. It grew out of earlier efforts to insert duties into human rights law in the context of the negotiation of the Human Rights Defenders Declaration. In 1984, when the Human Rights Commission first began work on that declaration, some governments agreed to authorize the drafting exercise on the condition that the declaration address the responsibilities as well as the rights of human rights defenders. During the negotiation of the declaration, representatives of democratic states strongly resisted setting out detailed duties, fearing that governments would use them to restrict the rights of groups and individuals trying to defend human rights, who are often at special risk of government oppression. The chief proponent of inserting such duties was Cuba, which fought simultaneously for duties and against rights for human rights defenders. The delegates successfully resisted Cuba’s efforts to specify duties, but the battle delayed the negotiation for more than a decade before the General Assembly adopted the declaration in 1998. The Cuban delegate to those negotiations was Miguel Alfonso Martínez, the longtime Cuban representative on human rights issues in Geneva.

The link between rights and responsibilities made in the context of the Human Rights Defenders Declaration continued after that declaration was adopted. In 2000, on the same day that the Human Rights Commission voted for the appointment of a special rapporteur to monitor whether the rights of human rights defenders were being respected, Cuba and other governments succeeded in obtaining a resolution authorizing the study of human rights and responsibilities. When the Commission decided to authorize a rapporteur on the issue of human rights and responsibilities the next year, the rapporteur turned out to be Martínez, who was also a nominally independent expert on the Sub-Commission on Human Rights. The draft

165 Louis Henkin, Introduction to INTERNATIONAL BILL OF RIGHTS, supra note 43, at 3 n.*; see MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 69 (2001) (“Human rights exist to adjudicate these conflicts [between individual and group interests], to define the irreducible minimum beyond which group and collective claims must not go in constraining the lives of individuals.”).

166 Its full name is the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. GA Res. 53/144, annex (Dec. 9, 1998) (emphasis added).

167 As the U.S. representative to the negotiation in 1992 and 1993, I experienced this negotiating dynamic personally.

168 Articles 17 and 18(1) of the declaration simply restate, with slight variations, the language of Article 29(1) and (2) of the Universal Declaration. The negotiators did add two general provisions on responsibilities, which are more dangerous. Article 18(2) and (3) provide that “[i]ndividuals, groups, institutions and non-governmental organizations” have a role and a responsibility “in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes,” and “in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.” Id., Arts. 17, 18.

Declaration on Human Social Responsibilities therefore continues and reflects Cuba’s interests in narrowing human rights by expanding human duties.

Governments that share those goals have supported the draft declaration, while many others have strongly defended the existing system against the damage that declarations of converse duties would do to it. As a result, the series of votes on the topic in the Human Rights Commission have been extremely close. The initial resolution in 2000 authorizing the Sub-Commission to study the topic passed by one vote, 22-21, with 10 abstentions. In 2003 the Commission failed on a tie vote (25-25-3) to authorize Martínez to circulate the draft declaration to governments for comment. In 2004 the same effort succeeded by one vote.

In 2005, at its last full meeting, the Commission requested that Martínez prepare a new version of the declaration; again, the measure was adopted by a majority of one. The request failed only because the UN Economic and Social Council (ECOSOC), whose approval was necessary, rejected it by 25-23-2.

Supporters of the draft declaration disproportionately represent the least democratic governments in the world. In its annual country-by-country evaluations, the nonprofit human rights organization Freedom House places countries in three categories—Free, Partly Free, and Not Free—according to the degree of their compliance with basic civil and political human rights. In the most recent vote on the declaration, in ECOSOC in 2005, the members in the Not Free category (including China, Congo, Cuba, Pakistan, Russia, and Saudi Arabia) all voted to authorize Martínez to continue work on the declaration, while the members in the Free category voted against by an overwhelming margin. Governments opposing the declaration included not only Canada, the United States, and Western European countries, but also Brazil, Costa Rica, Mexico, Nicaragua, Panama, Japan, Korea, Senegal, and Turkey. Notwithstanding the undoubted cultural differences between countries as to the proper balance between rights and duties, the primary division on the declaration is not between different cultures, but between democratic and authoritarian governments.

No one would suggest that every human right should be without limit. But human rights law, as it has developed in the international covenants and other human rights treaties, sets out those limits carefully, with the constant concern that they not allow the destruction of the rights; the limits themselves have limits. And some rights, such as the right to be free from...

175 For a list of the countries as evaluated by Freedom House in 2006 (based on their records in 2005), see id. (search “Freedom in the World” for 2006; then follow “Tables and Charts” hyperlink). For a list of the countries voting for and against authorizing Martínez to continue work on the declaration, see UN Doc. E/2005/SR.38, supra note 173, at 8–9. Of the ECOSOC members labeled Free by Freedom House, 21 voted against and 7 voted for; of those labeled Partly Free, 4 voted against and 7 voted for; and of those labeled Not Free, all 9 voted for.
176 Such differences may help to explain why some democracies, such as India, Jamaica, and South Africa, have supported continued consideration of the declaration.
177 Although the draft InterAction Declaration has not been presented for formal votes by governments, Ben Saul suggests that “a number of authoritarian countries . . . have supported [it because] it dilutes State responsibility towards individuals and increases individual responsibility towards the State.” Saul, supra note 156, at 605.
torture, lack limits of any kind. The balance between rights and countervailing social interests has been further clarified over the last several decades by the growing body of jurisprudence from human rights tribunals and state practice. Duties like those in the draft Declaration on Human Social Responsibilities seek to alter the balance that human rights law has already reached. Of course, undemocratic governments need no excuse to restrict the exercise of human rights beyond the limits now set by human rights law. But they should not be able to cite international declarations as their justification for doing so.

IV. NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESSES

In 2003, after five years of consideration, the Sub-Commission on the Promotion and Protection of Human Rights proposed Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.\(^178\) The draft Norms set out sweeping human rights duties for corporations that would apply directly, as a matter of international law.\(^179\) The following sections address, first, the possibility that pursuing adoption of the draft Norms would open the door to converse duties owed by the individual to the

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\(^{178}\) Draft Norms, supra note 2. For an analysis of the draft Norms by the special representative appointed by the secretary-general to identify and clarify international standards with respect to businesses and human rights, see John Gerard Ruggie, Business and Human Rights: The Evolving International Agenda, 101 AJIL 819 (2007). For a description by one of the principal drafters, which includes a detailed history of the process that led to their adoption, see David Weissbrodt & Muria Kruger, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 97 AJIL 901 (2003).

The application of international human rights law to corporations has received an immense amount of scholarly attention in recent years. A partial list includes CLAPHAM, supra note 108, at 195–270; HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS (Michael K. Addo ed., 1999); JÄGERS, supra note 3; NON-STATE ACTORS AND HUMAN RIGHTS, supra note 98; Larry Catá Backer, Multinational Corporations, Transnational Law: The United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law, 37 COLUM. HUM. RTS. L. REV. 287 (2006); Rebecca M. Bratspies, “Organs of Society”: A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities, 13 MICH. ST. J. INT’L L. 9 (2005); Surya Deva, UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction? 10 ILSA J. INT’L & COMP. L. 493 (2004); Claire Moore Dickerson, Human Rights: The Emerging Norm of Corporate Social Responsibility, 76 TUL. L. REV. 1431 (2002); David Kinley & Junko Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, 44 VA. J. INT’L L. 931 (2004); Paust, supra note 85; Ratner, supra note 136; Paul Redmond, Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance, 37 INT’L’LAW. 69 (2003); Amy Sinden, Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs, in THE NEW CORPORATE ACCOUNTABILITY 501 (Doreen McBarnet, Aurora Voiculescu, & Tom Campbell eds., 2007); Vázquez, supra note 134. Not all of these works address the draft Norms, although almost all do support some form of corporate responsibility for human rights violations under international law. Some scholars have made proposals of their own, of which two of the most detailed are Ratner, supra, and Kinley & Tadaki, supra.

\(^{179}\) The draft Norms are the most important, but far from the only, recent effort to describe correlative duties as directly applying to private actors. The Human Rights Commission has adopted resolutions condemning various kinds of private conduct as violating, threatening, or aiming at the destruction of human rights. See, e.g., UNHRC Res. 2004/44, pmbl., in 2004 UNHRC Report, supra note 171, at 153, 155 (expressing concern at the “gross violations of human rights perpetrated by terrorist groups”); UNHRC Res. 2005/15, para. 4, in 2005 UNHRC Report, supra note 172, at 58 (calling the dumping of toxic and dangerous products and wastes a “serious threat to human rights”); UNHRC Res. 2005/31, para. 1, in id. at 124 (describing hostage taking, “wherever and by whomever committed,” as “a serious crime aimed at the destruction of human rights”); UNHRC Res. 2004/46, para. 4, in 2004 UNHRC Report, supra, at 164 (declaring that gender-based violence against women, whether carried out by public or private actors, “constitutes a violation of the human rights and fundamental freedoms of women”). This article does not address those resolutions.
state; and, second, the probability that directly imposing human rights duties on corporations would not be superior to building on the existing pyramid of correlative duties.

Opening the Door to Converse Duties Owed by the Individual to the State

Unlike the draft Declaration on Human Social Responsibilities, the draft Norms include correlative, not converse, duties. Those duties are very broad: if adopted as a binding instrument, the Norms could be read to require every business in the world to comply with every human right. ¹⁸⁰ They include some duties that correlate to particular human rights. Businesses must not discriminate.¹⁸¹ They may not engage in or benefit from certain international crimes.¹⁸² They must comply with specific obligations with respect to employment: they must not use forced labor or exploit children, and they must provide a safe and healthy working environment, pay wages that ensure an “adequate standard of living for [workers] and their families,” and ensure freedom of association.¹⁸³ Not all of the duties, however, clearly correlate to existing rights. For example, businesses must not engage in bribery, “shall act in accordance with fair business, marketing and advertising practices,” and “shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.”¹⁸⁴ But while these duties do not follow obviously from specific human rights (at least not widely recognized ones), neither do they create obvious justifications for limiting existing human rights. If adopted without change, the Norms would not place converse duties on individuals that governments could use to restrict their human rights.

Nevertheless, the draft Norms do raise the possibility of opening the door to such duties. Although the Norms have been described as a “restatement of international legal principles applicable to companies,”¹⁸⁵ they go far beyond current human rights law.¹⁸⁶ As a result, they

¹⁸⁰ See Draft Norms, supra note 2, para. 1 (“Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law...”); see also id., para. 12 (calling on such corporations and enterprises to respect and contribute to the realization of both economic, social, and cultural rights and civil and political rights, especially “the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience and religion and freedom of opinion and expression, and [to] refrain from actions which obstruct or impede the realization of these rights”).

The draft Norms define “other business enterprise” to include “any business entity, regardless of the international or domestic nature of its activities.” Id., para. 21. Confusingly, the Norms state that they “shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.” Id. It is unclear what effect this language would have on the applicability of the Norms to businesses that do not fall within one of these categories. John Ruggie reads it as exempting them. Ruggie, supra note 177, at 823. But David Weissbrodt, one of the members of the Sub-Commission working group that drafted the Norms, states that they “still apply to such businesses,” although implementation of the Norms will focus on businesses that meet the specified criteria. Weissbrodt & Kruger, supra note 178, at 910.

¹⁸¹ Draft Norms, supra note 2, para. 2.
¹⁸² Id., para. 3.
¹⁸³ Id., paras. 5–9.
¹⁸⁴ Id., paras. 11, 13, 14.
¹⁸⁵ Weissbrodt & Kruger, supra note 178, at 913.
¹⁸⁶ See Ruggie, supra note 178, at 827.
cannot simply be implemented by domestic or international courts; to become part of international law, they would have to be adopted through some type of intergovernmental process.\textsuperscript{187} States do not seem eager to adopt the Norms, at least in their present form,\textsuperscript{188} but quite a few governments do strongly support efforts to write converse duties into human rights law, as the previous part of this article explains. Although they have been stymied in their efforts, they will look for opportunities to renew them, and any standard-setting exercise aimed at setting out private duties under human rights law would provide such an opportunity. For example, they could offer their support to proponents of the Norms—or of similar efforts to devise direct corporate duties in the future—in return for support for a more general instrument that could address a wider range of private duties. Or they could simply try to insert converse duties into a standard-setting exercise nominally aimed at correlative corporate duties.

These possibilities may strike some as far-fetched. Even if more governmental support for the Norms materializes—which at the moment may seem unlikely—one might think it would be possible to draw a bright line around the scope of any exercise aimed at converting the draft Norms into binding direct obligations. After all, there are clear distinctions between corporate duties and duties of all private actors, and between direct correlative and converse duties. But those boundaries might be more difficult to maintain than they first appear. First, the justification for extending direct duties under human rights law to transnational corporations—i.e., that they are powerful actors capable of interfering with the enjoyment of human rights and “[w]ith power should come responsibility”\textsuperscript{189}—could argue for extending duties to all actors capable of interfering with human rights. The draft Norms already reach beyond transnational corporations, the entities most likely to abuse human rights on a large scale, to all business entities. But why stop there? Once one group of private actors is required to comply with direct correlative duties under human rights law, why should any other group be exempt? The justification for the Norms would logically expand to include any potential rights abusers, including religious institutions, nongovernmental organizations, universities, and, eventually, individuals.\textsuperscript{190}

Second, despite the fundamental differences between correlative and converse duties, the distinction between the two has often been confused in the past. In particular, proponents of converse duties have repeatedly sought to present them as duties that correlate to human rights, rather than as duties that run conversely to them, undoubtedly to make their proposals more attractive to human rights advocates. For example, Special Rapporteur Martínez, who drafted the Declaration on Human Social Responsibilities, used the language of correlative duty in presenting the Declaration, stating that “[e]very right, in one way or another, is linked to some obligation or some responsibility, and every time that a duty is fulfilled, it is very likely that the violation of some right is prevented.”\textsuperscript{191} The report of the InterAction Council accompanying

\textsuperscript{187} In theory, international bodies charged with interpreting human rights law, such as the UN treaty bodies and regional human rights courts, could reinterpret human rights agreements to give rise to direct duties on corporations. But doing so would require a fundamental change in the entire approach of such bodies toward private duties, as described in part II. They are highly unlikely to undertake such a transformation without direction from the parties to the treaties to do so.

\textsuperscript{188} See id. at 824 (quoting Weissbrodt & Kruger, supra note 178, at 901).

\textsuperscript{189} See Ratner, supra note 136, at 541–42.

\textsuperscript{190} Martinez Report, supra note 2, at 13.
its draft Universal Declaration of Human Responsibilities states, "Because rights and duties are inextricably linked, the idea of a human right only makes sense if we acknowledge the duty of all people to respect it." Similarly, the preamble to the African Charter provides that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone," language suggesting that duties are correlative, even though the text of the Charter sets out duties that are primarily converse. Human rights groups that support using the draft Norms as a basis for a standard-setting exercise would oppose the inclusion of converse duties, but they would not have control over the process. It would be up to governments, including those that have strongly supported the draft Declaration on Human Social Responsibilities, to decide which duties to include. However clear in principle the difference between correlative duties on corporations and converse duties on individuals, it would be difficult to prevent a drafting exercise based on a document as open-ended as the Norms from offering an opening to those who would like to amplify them with converse duties. In this respect, it is striking that one of the five members of the working group that drafted the Norms was none other than Miguel Alfonso Martínez, who has worked assiduously to insert converse duties into human rights law for over twenty years, first through the Human Rights Defenders Declaration and then through the Declaration on Human Social Responsibilities.

Failing to Improve the Current System of Correlative Duties

The risk of opening the door to converse duties might be worth taking if the Norms would improve upon the current system of correlative duties. Although that system includes extensive duties on states to protect human rights from abuses by corporations, no one would suggest that those duties are fully elaborated or implemented. In the pyramid of correlative duties described in part II, most corporate duties still stand at the lowest level, where human rights law only contemplates duties. Moreover, states do not always enforce the corporate duties that have been more clearly specified, such as those that concern labor rights. Yet the approach taken by the draft Norms is unlikely to prove more effective than the current system at setting out duties of corporations under human rights law or at improving compliance with those duties.

Setting out corporate duties under human rights law. Human rights law may appear to be an attractive source of rules for regulating corporations in part, at least, because it already constitutes a detailed body of law. Supporters of the Norms may feel that it would be simpler to redirect this body of law against corporations than to build a new international corporate code from scratch. Human rights law does not fit corporate conduct particularly well, however, because it is both over- and underinclusive. Human rights obligations designed with governments in mind cannot be transplanted to the corporate context without undergoing extensive revision. And many corporate abuses are of human interests that are undeniably important but have not been considered to be human rights.

194 Weissbrodt & Kruger, supra note 178, at 905 n.25.
195 For a survey of the treaty bodies’ views on indirect corporate duties arising from UN treaties, see SRSG Report, supra note 98.
As John Ruggie explains, simply placing on corporations the same duties as those already imposed on states might undermine both corporate entrepreneurship and government responsibility, and generate “endless strategic gaming” between corporations and governments over which is more responsible for fulfilling human rights in a particular situation. The problems Ruggie identifies are problems of overinclusion—that is, problems that result from extending the entire range of human rights duties on corporations without clarifying which ones should apply and to what extent, and the relationship the corporate duties should have to preexisting duties of governments. The great difficulty in avoiding such problems is that there is no easy way to determine which existing human rights duties should be translated from one sphere to the other and how they should be changed as a result. Ratner has undertaken the most detailed effort to devise a system for making such determinations. He has proposed a method for translating duties under current human rights law to the private context by taking into account four factors: the corporation’s “relationship with the government, its nexus to affected populations, the particular human right at issue, and the place of individuals violating human rights within the corporate structure.” He does not attempt to spell out how his factors would work in every case. Instead, he offers his proposal as a kind of conversion machine, with which interested parties could begin “to develop a corpus of law that would recognize obligations on businesses to protect human rights.”

Whether or not one accepts the particular factors Ratner proposes, his approach suggests the case-by-case complexity of converting state to corporate duties under human rights law. In this light, two advantages of the current system become apparent. First, rather than try to take on all of human rights law at one time, as any effort to write the draft Norms into law would have to do, the current system provides for an incremental approach that incorporates both suggestions by experts in human rights (e.g., in the form of treaty body opinions) and political input (in the form of governments’ decisions as to how to implement their obligations under human rights law). Second, because the existing system strongly presumes that governments are directly responsible for ensuring compliance with those obligations, it avoids the problems of overlapping competence and conflict that Ruggie describes.

At the same time that the draft Norms raise problems of overinclusion, they are underinclusive when it comes to some of the most important types of corporate misconduct. Current

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196 Ruggie, supra note 178, at 826.
197 Ratner, supra note 136, at 496–97.
198 Id. at 526–30.
199 Id. at 530.
200 Kinley and Tadaki propose an alternative approach: focusing on rights that are both universally recognized and relatively concrete, such as freedom from torture, or both important and particularly susceptible to harm from transnational corporations, such as environmental rights, indigenous rights, and four “core” labor rights. Kinley & Tadaki, supra note 178. In addition to the difficulty of obtaining consensus on which rights are the most important, they may underestimate the difficulty of determining which human rights should give rise to duties on corporations. For example, they state that there are some human rights duties that, “no matter what perspective is adopted, are inappropriate, if not practically impossible,” to place on transnational corporations, giving as examples the rights of criminal defendants, such as the presumption of innocence and freedom from arbitrary arrest. Id. at 967. But Ratner suggests that if a corporation seeking to remove a union activist gave false information to a prosecutor, it would “in some sense help [ ] to deprive the defendant of a fair trial.” Ratner, supra note 136, at 493. In the same way, the corporation might be considered to be violating the defendant’s rights to the presumption of innocence and not to be arbitrarily arrested—the very rights Kinley and Tadaki used to illustrate that some human rights could not give rise to private duties.
human rights law has little to say about bribery, consumer protection, or environmental degradation, for example. Therefore, proposals to place human rights duties on businesses must either add new obligations or leave unaddressed many areas in which corporate misconduct is common. The Norms take the former approach with respect to each of the three areas named above, while ignoring areas that one might argue are equally important, such as laws regulating the use of securities and prohibiting monopolies. In the three areas the Norms do address, they try to import obligations from sources outside human rights law. One difficulty with this approach is that these sources often fail to state specific duties. For example, the Norms would require companies to comply with international environmental law, but that law, like human rights law, sets out duties for states, not corporations, and defies easy transposition of its duties from one to the other. Moreover, international environmental law has very little to say about environmental harm with no obvious international effects. Although the Norms also require businesses to comply with national environmental laws and policies, many of those laws are evidently inadequate, so the Norms end up telling businesses to act in accordance with extremely general standards: “public health and safety, bioethics and the precautionary principle,” as well as “the wider goal of sustainable development.”

Turning these principles and goals into effective restraints on corporate conduct would be extremely difficult. Trying to derive those restraints from human rights law would increase the difficulty. The uncertain status of environmental rights in human rights law has not prevented states from taking steps to protect the environment: a society does not need to decide whether individuals have a human right to clean air and water before imposing duties on corporations to limit pollution. But proposals to base corporate environmental duties on human rights law would have to face exactly that question before they could develop such duties. Determining whether and to what degree environmental interests inhere in existing human rights law has not proved to be easy, and adding new, more explicit environmental human rights would lead to even more controversy. Rhetorically, at least, and often legally as well, human rights claims are made in order to override other interests. As one human rights group has argued, an advantage of using human rights law to frame claims arising from the Bhopal disaster, for instance, is that “[c]asting the Bhopal injuries in terms of human rights violations underscore[s] the sense of irreparable harm. If the right to life is absolute and inalienable, it cannot be bought

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201 Specifically, businesses are required to comply with “relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment.” Draft Norms, supra note 2, para. 14.

202 An obligation of a party to the Montreal Protocol to reduce its production of an ozone-depleting substance by 50 percent, for example, does not necessarily imply that every corporation within that party should reduce its production by the same proportion.


204 The best introduction to the issues remains HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan E. Boyle & Michael R. Anderson eds., 1996).

205 See ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 123 (2004) (“In the case of human rights, as with moral rights generally, the correlative obligation is conceived as being especially weighty. . . . [I]f we have a right to something, then the mere fact that depriving us of it would maximize social good is not itself a sufficient reason for doing so.”); IGNATIEFF, supra note 165, at 20 (“When political demands are turned into rights claims, there is a real risk that the issue at stake will become irreconcilable, since to call a claim a right is to call it nonnegotiable, at least in popular parlance.”); JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 17 (1987) (“Part of the rhetorical appeal of this concept is that having a right to something means having a strong enough claim to outweigh other claims to that thing.”).
and sold on the open market of civil liability." But precisely because human rights claims are so powerful, proposals to recognize new human rights attract strong opposition as well as support. As a result, interests such as environmental protection can hover on the doorstep of human rights law for years. Far from bringing these longstanding debates to a resolution, shifting the debate to the context of corporate duties might extend it, by leading new actors to enter the fray. Corporations that may not have felt that they had a stake in the status of environmental human rights when those rights were directed at governments would see the issue differently if the proposed rights were directed at them.

Thus, adding new human rights to the list of rights giving rise to corporate duties is far from as simple as the draft Norms seem to assume. Here again, the current system has demonstrated the value of an incremental approach. Efforts to have human rights law recognize environmental interests have taken place in treaty bodies and regional tribunals on a case-by-case basis. They have carefully found environmental rights to be comprehended by existing human rights in ways that set minimum standards but defer to reasonable national laws. Such rights have not displaced other efforts, both domestic and international, that have far exceeded the scope of human rights law in restricting private behavior so as to protect the environment.

Implementing corporate duties under human rights law. Proposals to impose direct duties on corporations under human rights law rest primarily on the assertion that doing so would help to ensure that corporations behave better: that they would commit fewer abuses of human rights as a result. On closer inspection, however, the direct placement of corporate duties would not improve upon the current system as regards any of the three main mechanisms to promote compliance with human rights norms: the rhetorical use of human rights language, domestic enforcement, and international monitoring.

Undoubtedly, being able to accuse a corporation of violating human rights law would provide rhetorical advantages. But the rhetorical power lies primarily in accusing the corporation of violating human rights, and human rights activists can and do use that rhetoric already, to encourage governments to regulate corporations more closely, consumers to boycott companies, and corporations themselves to adopt and comply with corporate codes. The question is not whether corporations and other nongovernmental actors can be accused of violating human rights, but whether they should be directly bound by the body of international

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206 Beyond Voluntarism, supra note 119, at 17 (quoting Michael R. Anderson, Public Interest Perspectives on the Bhopal Case: Tort, Crime or Violation of Human Rights? in Public Interest Perspectives in Environmental Law 153, 167 (David Robinson & John Dunkley eds., 1995)).


208 Beyond Voluntarism, supra note 119, at 18 (the language of human rights "has the ability to mobilise support around proposals to improve the lives of human beings and to censure perpetrators").

209 Reinisch, supra note 98, at 68 ("The threat of lost sales of products produced in an environmentally harmful way, by disregarding core labour standards, or otherwise having negative human rights implications has proven to be a highly effective deterrent against such activities.").

210 See Sean D. Murphy, Taking Multinational Corporate Codes to the Next Level, 43 Colum. J. Transnat'L L. 389 (2005).
human rights law. One does not necessarily imply the other, as Amartya Sen has explained. Amartya Sen, *Elements of a Theory of Human Rights*, 32 Phill. & Pub. Aff. 315, 321 (2004) (stating that “pronouncements of human rights are quintessentially ethical articulations, and they are not, in particular, putative legal claims, despite considerable confusion on this point”). Sen acknowledges that moral rights have often served as the basis for legislation, and that “this is indeed an important use of human rights,” but he emphasizes that to recognize this connection “is not the same as taking the relevance of human rights to lie exclusively in determining what should ‘appropriately be made the subject of coercive legal rules’.” *Id.* at 327. Some of the confusion between human rights and international human rights law may arise from the seminal role of the Universal Declaration with respect to modern human rights discourse in both the moral and the legal spheres.

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212 Fifteen years ago, Nigel Rodley made a cogent argument for using the term “human rights” only to describe a relationship between a person and a government, and never to describe a relationship between two private actors. Nigel S. Rodley, *Can Armed Opposition Groups Violate Human Rights? in Human Rights in the Twenty-First Century* 297 (Kathleen E. Mahoney & Paul Mahoney eds., 1993). But whether it ever made sense to draw such a sharp distinction, it is too late to maintain it now that the term is commonly used more broadly. That does not mean, however, that human rights necessarily give rise to the same duties for other private actors as they do for governments. Still less does it mean that international human rights law should give rise to the same duties.

213 August Reinisch even describes it as “the most efficient legal tool in securing human rights vis-à-vis corporate activities.” Reinisch, *supra* note 98, at 89.

214 The ATCA states in its entirety that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. §1350 (2000).
familiar when [the ATCA] was enacted” in 1789. The duties in the Norms would undoubtedly not qualify as having sufficiently “definite content,” in the unlikely event that they were adopted so widely as to suggest the requisite degree of acceptance. Even if they were clarified before being adopted, *Sosa* strongly suggests that the Court would not allow federal common law to permit suits for such a broad range of violations of human rights law. It emphasizes that “the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”

Of course, many domestic laws should be strengthened to improve the protection of human rights, and international human rights law can play an important role in specifying the duties that domestic law should impose on private actors. But that is exactly what the existing system does, by moving private duties from the first to the second level of the pyramid described in part II. Proposals to move such duties directly to the third level are distractions from the real need, which is to give the duties greater specificity so that they might be more effectively implemented domestically.

Duties must be placed on private actors, however, to bring international mechanisms to bear. The International Council on Human Rights Policy argues that the principal advantage of direct obligations over indirect ones is that the latter leave “action and enforcement . . . to national governments, which might be unable or unwilling to take the steps required to ensure that companies respect human rights.” International procedures, it suggests, “are necessary because enforcing human rights obligations on companies at national level is fraught with difficulties, and in many countries has proved largely ineffective.” This justification depends, then, not only on the direct *placement* of obligations by international human rights law, but also on their *enforcement* by international institutions. In other words, the obligations would reside at the highest level of the pyramid, together with genocide, war crimes, and crimes against humanity.

As Vázquez has explained, governments are very unlikely to agree to any highly effective international enforcement mechanism aimed at private actors within their jurisdiction, because such mechanisms would necessarily reduce the governments’ own authority over those actors. Many international compliance mechanisms are less intrusive than human rights or international criminal tribunals, however, relying instead on monitoring and transparency. Although neither treaty bodies that review parties’ reports on their own compliance and complaints from individuals under petition procedures, nor UN special rapporteurs that focus on a particular country or set of issues, have the power to compel compliance, their ability to draw attention to human rights violations can often lead the responsible government to take steps toward curtailing or at least ameliorating its actions. These human rights monitors can already look at corporate conduct under the existing system.

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216 *Id.* at 732–33 (footnote omitted).

217 *Beyond Voluntarism*, supra note 119, at 3.

218 *Id.* at 77.

219 *Vázquez*, supra note 134.

220 For suggestions as to how the monitoring mechanisms should do more in this respect, see *Jägers*, supra note 3, at 257–58.
against women, for example, addresses private as well as governmental violence against women. But the monitoring mechanisms currently focus on governmental conduct, evaluating whether governments with jurisdiction over private actors are adequately addressing their violations. A system that placed the duties directly on the private actors might lead monitors to pay more attention to corporate violations. To this end, the draft Norms state that “[t]ransnational corporations and other business enterprises shall be subject to periodic monitoring and verification by the United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms.”

While using monitoring mechanisms might be more politically palatable to governments, expanding their mandate in this way would undermine their already limited ability to police governmental compliance. These bodies do not have enough experts, funding, and technical support to carry out their already-massive mandates of overseeing governmental compliance with human rights law. The allocated budget of the UN Office of the High Commissioner for Human Rights, the principal human rights arm of the UN Secretariat, amounts to less than $86 million for 2006–2007, with another $85 million from voluntary contributions. These resources are inadequate to monitor fewer than two hundred governments effectively. The resources necessary to monitor compliance with all businesses, or even just those with transnational connections, would be much greater. Ruggie reports that “seventy-seven thousand transnational firms span the global economy today, with some 770,000 subsidiaries and millions of suppliers.” Without an enormous increase in their support, asking international bodies to monitor private compliance with human rights obligations more closely would result either in failure to do so effectively, or in decreased ability to carry out existing mandates, or both.

The last possibility seems the most likely. Governments already look for ways to minimize monitoring requirements. They often turn in reports late, if at all; vociferously oppose proposals for rapporteurs directed at them; and refuse to cooperate with rapporteurs once named. They would probably see an expanded mandate for monitoring mechanisms as an opportunity to redirect those mechanisms away from them. They might argue, with some academic support, that corporations are more capable of violating human rights than governments, and should therefore be monitored more closely than governments. Why pay more attention to Zimbabwe, for example, whose annual gross domestic product is only four or five billion dollars, than to ExxonMobil, whose profits in 2006 were nearly ten times as much? Giving international human rights institutions these vast new mandates without corresponding resources to fulfill them would undermine their capacity to carry out their key mission—to promote

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221 Draft Norms, supra note 2, para. 16.
223 Ruggie, supra note 178, at 823.
224 Some proponents of direct corporate duties recognize these problems. See Kinley & Tadaki, supra note 178, at 998 (noting that the “lack of sufficient resources is . . . capable of undermining any, or all, of these proposals [to use existing human rights institutions]. Each one of them would certainly add to the demands on the already stretched resources and the overburdened agenda of the [Human Rights] Commission specifically, and the UN generally.”); see also BEYOND VOLUNTARISM, supra note 119, at 156 (acknowledging that “existing UN human rights enforcement procedures are poorly-resourced and often ineffective”).
225 Paust, supra note 85, at 802.
compliance by governments with their human rights obligations—without enabling them to affect the conduct of thousands of international corporations. Corporations, or any other private actors, can only be regulated effectively by relying on the resources of governments, which dwarf those available to international human rights institutions. This is not to say that international law should not play a role, but the role should be aimed at setting minimum standards of governmental conduct, including toward private actors; monitoring governments and prodding them to meet those standards; and regulating directly only where national governments are incapable of doing so effectively. That is what the current system tries to do.

V. CONCLUSION

This article has sought to describe the history of proposals for private duties under human rights law, and to show that in the context of that history, the two most significant recent proposals for private duties pose real dangers to human rights law. The article should not be read as suggesting that corporations and other private actors cannot violate human rights. On the contrary, they can and do. Nor should it be read as arguing that international law should have nothing to say about private violations of human rights. It should and does. The question is whether such violations should be addressed through the current system of horizontal human rights law, under which most obligations of private actors are placed indirectly, or whether the system should be modified to place such duties directly, at least upon corporations. Efforts to develop new duties should not ignore the lessons of the last six decades of proposals for private duties under human rights law. Those who suggest new horizontal duties should take care, in doing so, not to open the door to converse vertical duties that would restrict human rights, and they should take equal care to strengthen the existing system of horizontal human rights law rather than to weaken it inadvertently.

The article has focused on two proposals that do not meet these criteria. It should not leave the false impression, however, that no proposals could meet them. More attention should be given to the need to specify private corporate duties—to move them from the first to the second stage of the pyramid of correlative duties. In particular, human rights law should elaborate the duties of governments with respect to corporations subject to their jurisdiction when those corporations violate human rights within the territory of governments unable or unwilling to regulate them adequately. Specification of those duties would address legitimate concerns about the conduct of multinational corporations in developing countries without threatening the current structure of human rights law.