

Human Rights Obligations of Non-State Actors. By Andrew Clapham. Oxford: Oxford University Press, 2006. Pp. 648. \$50.00 (Paperback).
Reviewed by Vladimir Pavlovic

I. Introduction

International law has traditionally been concerned with state actors. Entities other than states, including in some cases individuals,¹ have mostly been considered bound by international law only insofar as it could be imposed upon them by states. In line with the state-centric approach, international law of human rights law has been thought of as providing protection to individuals from abuse of power by states: rights were bestowed on individuals and obligations imposed on states.

More recently, non state actors have surfaced as a new class of human rights violators, and the need to regulate their conduct became apparent. Unsurprisingly, the result was the emergence of a body of doctrine requiring states to protect individuals in their jurisdictions from human rights abuses by non-state actors.² One need not be a legal scholar to realize that the state-centered approach to this issue is imperfect, and that enforcement of human rights law would be much more effective if perpetrators could be targeted directly. But such a solution would be perceived at odds with the most basic understanding of international law as we know it today, as well as rather difficult to enforce in practice due to a wide variety of non-state actors. Perhaps these are the reasons why so many authors have tackled the problem in a piecemeal fashion,³ and why one rarely finds a comprehensive treatment.

In his second major work on the subject, Andrew Clapham delivers a thorough and insightful study. His first book, *Human Rights in the Private Sphere*,⁴ sought to underscore the blurring of the line distinguishing private and public spheres in international law and the resultant consequences for human rights law. The new, significantly expanded, work can be said to have two main qualities. First, it is a resourceful manual for aspiring claimants of human rights breaches by non-state actors or, for that matter, any non-state actor seeking to refute such claims. Second, it is a brave piece of human rights advocacy and accepting its principal conclusions requires, as the author points out, a change in the way we think about international law.

The book is a product of prodigious research. No document is left unexamined, no statement unread. Every known source of international law is invoked: treaties, conventions –

¹ The Nuremberg trials marked the first occasion of the application of international law to individuals.

² In the latest example, the International Court of Justice in the *Bosnian Genocide* case held that Serbia had a positive obligation to do everything in its power to prevent the genocide in Srebrenica performed by Republika Srpska. Because of its non-state status Republika Srpska had no equivalent obligation; for other examples of a state's positive obligation to prevent human rights violations, see *Ilaşcu v. Moldova*, App. No. 48787/99 (Eur. Ct. H.R. 2004) and *Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988).

³ There are numerous examples of authors ascribing human rights obligations to specific non-state actors. For corporations, see e.g., David Weissbrodt and Muria Kruger, *Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 Am. J. Int'l L. 901 (2003); for international organizations, see e.g., Mac Darrow, *BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND, AND INTERNATIONAL HUMAN RIGHTS*, Oxford: Hart Publishing (2003); for private military contractors, see e.g., Nathaniel Stinnet, Note: *Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses*, 28 B.C. Int'l & Comp. L. Rev. 211 (2005).

⁴ Andrew Clapham, *HUMAN RIGHTS IN THE PRIVATE SPHERE*, Oxford University Press (1996).

including official commentaries and unofficial comments; countless documents produced by the International Law Commission; findings of reconciliation commissions, reports and statements of inter-governmental and non-governmental organizations; agreements between private parties; and many more.

The principal thesis of the book is that any non-state actor capable of violating human rights is therefore capable of bearing the corresponding human rights obligations, and can be bound by international law to do so. In other words, any non-state entity that violates human rights law, by virtue of having committed that very violation has capacity of bearing human rights obligations, since it could have refrained from violating it. When this thesis is coupled with the author's very broad definition of non-state actors⁵ it becomes clear that there is no entity, individual or group, private or public, that does not fall under the proposition. Hence, human rights law applies to a non-exhaustive list of individuals, organizations and associations of any kind, as well as states.

Still, the book does not, nor does it claim to, answer every question in the self-created infinitude of possibilities: indeed, it dodges certain hard questions regarding the best way to think about human rights law, familiar indeed to international lawyers. In one instance, while the author acknowledges – and attempts to resolve – the case of a clash of human rights claims between two private persons or groups, he overlooks the question of conflicting human rights claims between private individuals and public entities, and considers only the private person's side. For example, ignoring the relative importance of free trade in promoting human rights, Clapham simply examines only the rights raised by the individuals' claims against the World Trade Organization (WTO). More generally, while steadfast in his contention that human rights are more important than any other kind of benefits that society can conceivably draw from international (or national) law, he only parenthetically makes a case as to why such pious adherence is justified. The imperfections, however, do not warrant viewing this book as anything less than a rigorous undertaking. Among other things, the sheer amount of research as well as the author's most systematic approach testify to the contrary. But for all its potential usefulness in, for example, human rights litigation, one should resist a temptation to view this book's utility as a practical resource as its principal contribution.

Recalling Martti Koskenniemi's famous utopia/apology argument,⁶ we know that in making an international legal argument, a competent international lawyer must be realistic enough to avoid the charge of being utopian, yet be principled enough to escape the allegation of being merely apologetic of politics of states. Although even the arguments successful in this regard cannot cause compliance with international law, they do appeal to the legal (and less legal) audiences, thus shaping the audiences' values and identities. In this sense (and only in this sense), an argument has some power in forming a future outlook on international law and, in a very qualified sense, in effecting compliance.

Constructing an argument that successfully escapes both apology and utopia requires high proficiency in international legal language. Clapham uses his considerable skill to avoid both dangers, simultaneously acknowledging the limitations of international law in inducing compliance as well as of the human ability to construct complex arguments: he does not set up

⁵ For an illuminating discussion about the definition of the term "non-state actors," see Philip Alston, *The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATE ACTORS AND HUMAN RIGHTS (Alston, ed.), Oxford University Press (2005).

⁶ See generally, Martti Koskenniemi, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (especially the Epilogue), Cambridge University Press (2006).

rigid novel rules and insist on their literal enforcement; nor does he see the world in a realist light, only seeking to provide pragmatic strategies for fighting human rights abuses; he does not enlighten us about the genealogy or hierarchy of human rights, nor does he necessarily employ hard logic to reach his conclusions. Rather, Clapham simply asks the reader to start thinking in a particular way, the human rights way. He promotes a mode of legal thinking that puts human rights above all else.

II. Descriptive Overview

Even from a cursory glance at the table of contents, one cannot help but notice the magnitude of the undertaking. Clapham peruses an astonishingly wide and varied landscape: far from dealing only with the recent usual suspects, corporations, he examines the obligations of other private as well as intergovernmental organizations, and reviews pertinent United Nations documents as well as the relevant jurisprudence of regional human rights bodies and national legal systems.

The book is introduced by a discussion of four recent trends of crucial importance to the subject at hand: globalization, privatization, fragmentation, and feminization. These ideas have no doubt changed the setting of human rights law in recent times. Going through the book mindful of these overarching aspects is helpful to its understanding, although one from time to time wishes there were a clearer connection between the general and the particular, especially with respect to feminization. While Clapham rightly notices the increasing prominence of feminization in the human rights discourse, the impression is that the subject does not receive due attention. Glimpses of it are visible in the discussion of subjects such as female circumcision and of refugee law, but some readers, galvanized by the prominent place of feminization in the introduction, might expect a more detailed treatment. Still, the four trends never leave the reader, who is grateful for their inclusion chiefly because their role as doctrinal lighthouses is critical for the proper understanding of a work containing such an abundant and varied material. Indeed, Clapham's subsequent detailed analyses of case law or meticulous explanations of legal documents benefit significantly from this broader perspective on the current international legal environment.⁷

Building on the introduction, Clapham devotes the first part of the book to a reformulation of the traditional approach to human rights law. First, he rebuts the principal conceptual objections against expanding a scope of human rights, chiefly by exposing the illogicalities of these objections. Next, he deals with the wisdom of applying international law only to those entities that fit into the traditional mold of 'subjects' of international law, thus elucidating the critical limitations to a staunch adherence to an inflexible doctrine. In its place, he proposes a methodology that focuses on the capacity of an actor to bear human rights obligations, irrespective of its 'subject' status. Concluding the theoretical exploration, Clapham suggests a new catalogue of human rights – no longer based on a hierarchy of sources, sketching instead six overlapping kinds of human rights classified by their legal characteristics, rather than by philosophical or historical bases: customary/general international law, *jus cogens*, treaty law, international crimes, *erga omnes*, and inter-governmental standards.

Clapham next employs his novel methodology in exploring the application of human rights law to certain specific non-state actors. Besides commercial corporations, and private

⁷ The inclusion of broader ideas was suggested by Henry Steiner in a review of Clapham's previous book on the subject, 86 Am. J. Int'l L. 844, 845 (1995).

military contractors – the most widely detectable violators of human rights recently – the book ventures into the familiar but, despite the attention it has received, still developing, field, of the responsibility of international organizations,⁸ such as the United Nations (UN) and even the only conglomerate of states today that is not formally a state – the European Union (EU). There is certainly something heartening in the earnestness and the attention with which Clapham examines the organizations that profess respect and advancement of human rights to be one of their important goals. It is a testimony to the diligence and thoughtfulness of the author in a field where novel challenges emerge constantly. One such challenge is the responsibility of state provinces (one might call them sub-state actors) for human rights breaches, which comes to mind especially in light of the recent *Bosnian Genocide* case, where one craves input by a scholar as sharp and knowledgeable of the subject as Clapham.⁹ Still, the most conspicuous omission in the scope of the book is certainly the absence of a discussion about the North Atlantic Treaty Organization (NATO). Especially in recent years, NATO has been such a major and controversial player in world affairs that it surely deserves more than two passing references in the book. By choosing not to discuss NATO, Clapham also neglects similar non-state actors, such as the coalition currently in Iraq, or any future ad hoc conglomerate of states that may engage in a discrete intervention. Although one can be fairly certain that Clapham would, in line with his general approach, advocate responsibility in accordance with capacity, both in cases of sub-state actors and informal state coalitions, the simplicity of such a holistic formula becomes striking in light of the numerous vast differences among NATO, WTO, EU, and, say, Nike. These differences deserve a more detailed formulation.

Clapham also examines regional human rights institutions, involving principally the European Court of Human Rights (ECtHR) and the Inter-American system. He provides a detailed analysis of the effects of regional human rights documents, in particular the European Convention on Human Rights, which renders this part of the book most helpful in regard to practical enforcement of human rights law.

The book's conclusion indicates Clapham's foresight of likely criticisms of the novel ideas proposed in the book and reveals some of the techniques he uses to mitigate these

⁸ International law has been concerned with the responsibility of international organizations much longer than it has dealt with non-state actors in general. One of the first excursions into this realm was the *Reparations Advisory Opinion* by the International Court of Justice (April 11, 1949). This attention has resulted recently even in the production of Draft Articles on Responsibility of International Organizations by the International Law Commission. For a keen criticism of the Draft Articles, see *International Organizations, Responsibility or Accountability?*, a speech by Jose Alvarez, available at: <http://www.asil.org/aboutasil/documents/CCILspeech061102.pdf>, last accessed on April 21, 2007.

⁹ The subject is touched on in the discussion of independence movements where the author offers a two-fold approach: first, if a movement has enough characteristics of a state, and/or if it makes a commitment to respect human rights, it should be held responsible directly; second, the state in which the movement is located might be held accountable for the movement's breaches of human rights if that state has the capacity to prevent the movement's actions. Note that these two approaches are complementary and not mutually exclusive, which is one of Clapham's principal contributions in this book. But neither one is well suited to the facts of the situation in Bosnia, where Republika Srpska surely never constituted a state nor did it make any commitments to respect human rights; applying Clapham's second approach would result, paradoxically, in holding Bosnia and Herzegovina responsible for genocide and other human rights breaches by Republika Srpska, in addition to holding Serbia accountable (and, applying the capacity criterion strictly, potentially other militarily powerful states that had a capacity to prevent genocide). On this point, note the dissenting opinion of Judge Skotnikov in the *Bosnian Genocide* case, who asserted that, under the Convention, duty to prevent genocide is for the state in whose jurisdiction genocide occurs: the duty, according to Judge Skotnikov, is one of result, not of conduct; see Declaration of Judge Skotnikov, <http://www.icj-cij.org/docket/files/91/13705.pdf>; last accessed on April 21, 2007.

criticisms. Notable in this regard is the discussion about dignity and democracy. Here, Clapham wrestles with the broadest and the most basic – but also the most problematic – conditions concerning the conception of human rights. On the one hand, he seeks to root the human rights movement in certain inherent principles, widely considered either axiomatic to the human condition (dignity) or of unquestionable value (democracy). But Clapham also confesses that neither dignity nor democracy can alone be decisive in human rights cases, since both sides to the dispute are able to structure their claim in terms as if one or the other concept supported it. In an attempt to resolve this exceedingly difficult question, he suggests a solution based on cautious judicial activism – urging us to put our trust in judges to balance conflicting interests, especially in light of frequently passive legislature. While not a groundbreaking solution, it is illustrative of the honesty with which Clapham approaches this study as well as his eagerness to grapple with difficult issues, even when the outcome is less than favorable to his preferred position.

III. Methodology

The book is organized around two principal substantive parts: the examination of the types of non-state actors that can be bound by international law and the study of the jurisprudence of fora involved in the enforcement of human rights. The legal playfield in the first part is mostly that of legal documents or statements¹⁰ and scholarly articles, while the second part is comprised mostly of case law. As one would expect, documents binding non-state actors directly as well as judicial holdings unequivocally applicable to them are rare. Clapham is, however, unflinching in face of this – certainly foreseeable – scarcity: he infers human rights obligations of specific non-state actors from the vague language of various documents or statements and suggests novel general principles of international law as stemming from scant case law, all for the purpose of extending traditionally state obligations to non-state actors.

Probably the bravest assertion Clapham makes in this book is proposing a single way of looking at all non-state actors. One must wonder about the propriety of such a comprehensive approach. As Alston noted, “defining all actors in terms of what they are not” threatens to “obfuscate almost any debate.”¹¹ Clapham correctly expounds the inadequacy of understanding international law as dealing with the world as a mono-centric place, i.e. through the state/non-state paradigm; but whereas one might think that a multi-faceted strategy will be advocated, the solution recommended, that human rights duties apply to all state and non-state actors to the extent of their capacity to bear those duties, is a unitary legal approach that applies to an even greater universe than that of states. It is difficult to see, even on a very general level, how a single theory could apply successfully to a world of such diversity of actors.

Clapham suggests, for example, that states are only momentarily the only members of human rights treaties and that therefore it “makes sense to talk about the *parties* to a human rights treaty rather than use the expression *states parties*, which indicates that states are exclusive members of every human rights regime.”¹² This contention is supported solely by the proposition that the European Union might become a party to the European Convention of Human Rights (ECHR), pursuant to the Protocol 14 of the Convention. Although the EU’s

¹⁰ Some of these documents or statements could, in a traditional analysis, constitute either *opinio juris* or acknowledgments of the practice of a particular state.

¹¹ Alston, *supra* note 4.

¹² Clapham at 91 (emphasis in original).

admission as a party to the ECHR faces certain obstacles,¹³ as a practical matter, Clapham has a point in that such accession will probably take place in the near future. Accepting his larger conclusion requires a huge leap, however. The European Union is a federation-like organization and, in that sense, much akin to a state. To conclude that all non-state actors – including corporations and private military contractors, for example – might become parties to treaties, on the force of an analogy with the possible European Union accession to ECHR, is extremely tenuous, and a good illustration of the shortcomings of a totalistic approach towards a body of vastly diverse subjects.

Whatever the potential flaws of the proposed grand theory that any actor (state or non-state) with capacity to bear human rights obligations can be bound by international human rights law, Clapham cannot be denied consistency in its application. Still, at least in today's international legal order, some of his contentions seem overconfident, not only in light of certain inconsistencies but also because one cannot escape the sense that the author avoids dealing with certain fundamental questions in human rights law.

In one instance, discussing the International Covenant on Civil and Political Rights, the author daringly interprets the explicit refusal of the Human Rights Committee to interpret the obligations under the Covenant as extending directly to non-state actors, as a suggestion by the Committee that non-state actors still might be directly bound by human rights obligations under general (or customary) international law.¹⁴ He further supports this bold conclusion by construing the broad language of several General Comments by the Committee as an invitation for liberal interpretation, unfettered by the Comments' explicit references to obligations of states to prevent violations by non-state actors. In another example, in the context of rebels, insurgents, and belligerents, the author asserts the principle that "international law has moved beyond recognition of insurgency during armed conflict to a new type of recognition for human rights purposes."¹⁵ This principle is, remarkably, derived from a single example of a written agreement between a state of El Salvador and a rebel group on its territory to respect certain human rights, and with the author's acknowledgment that, in general, such agreements have been only entered into "in some cases," that they "may" contain commitments to respect human rights, and that they are "sometimes" based on the capacity of the parties to fulfill the obligation.¹⁶

Clapham also shows little concern for the relative weight of sources comprising a traditional international law analysis. As a general matter, he invokes reports of non-governmental organizations, such as Human Rights Watch and Amnesty International as often indicating the existence of, and sometimes even establishing, international legal principles. In a specific example, Clapham interprets the overtly non-binding Tripartite Declaration by the

¹³ As of October 12, 2006, Russia was the only state that has not ratified Protocol 14, although its opposition is likely not a result of the potential accession of EU into ECHR, but of the fact that the principal aim of Protocol 14 is a reform of the Court towards more efficiency, which Russia perceives as undesirable, probably because of its burning issue of Chechnya. The Protocol can come into force only when all states have ratified it. On the EU side, the proposed Constitutional Treaty allows for the Union's accession to the Convention – but the Treaty has been rejected. In light of the rejection and the ECJ's opinion "*Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*" Opinion 2/94 (March 28, 1996), holding that the treaties establishing the European Communities do not empower it to accede to the European Convention on Human Rights, there is currently no legal basis for the accession on the EU side. It should be noted that the accession is practically plausible since member states have granted certain powers to the Union and, therefore, there would be little or no overlap in the responsibility of the Union and the member states before the courts.

¹⁴ Clapham at 328-29.

¹⁵ Clapham at 273.

¹⁶ Clapham at 272.

International Labor Organization as an “authoritative interpretation of some of the International Labour Conventions and Recommendations”¹⁷ (supported by a reference in the Tripartite Declaration to the human rights contained in the Universal Declaration). In his words: “despite the fact that the Tripartite Declaration contains only recommendations, the Declaration provides material evidence that the international labour law regime has come to include human rights obligations for national and multinational enterprises” and

“[e]ven though the [core ILO] Conventions might be seen as primarily addressed to states, their impact reaches well beyond those states that can become contracting parties. As companies increasingly come within the reach of these Conventions, it will not be enough simply to avoid conduct that violates their terms. Positive obligations also accrue.”¹⁸

While the value of the Tripartite Declaration as an interpretative tool may be little contested, Clapham builds high on this conclusion: he jumps from an already controversial premise that states parties to the non-binding Tripartite Declaration are obliged to respect the Conventions, to an even more daring assertion that these obligations extend to states non-parties, to a rather quixotic conclusion that corporations are subject to the Declaration, not only regarding negative obligations but also with respect to the positive ones.

The role of customary international law is highly lauded in the book. Clapham proposes that customary law, traditionally applicable to states, can impose obligations on non-state actors as well, regardless of the many difficulties that such position faces, stating simply that the “international legal order considers these rights and obligations as generally applicable and binding on every entity that has the capacity to bear them.”¹⁹ The most general problem with this position is that customary law is created by observing actions and pronouncements of states. Of course, it is well known that the Nuremberg trials have established that individuals can be directly subjected to international law through custom. Although the Nuremberg principle, raised to a more abstract level, makes Clapham’s assertion technically correct,²⁰ the evidence of state practice and *opinio juris* supporting the application of a customary law obligation to non-states is very scarce indeed. Discrete examples, such as that it is possible to litigate against corporations in the United States for the violation of the “law of nations,”²¹ certainly can support that international law is in the process of evolving towards imposing customary law onto certain non-state actors. These scant instances, however, are hardly sufficient at present to constitute customary international law applicable to any non-state actor.

As in his previous book on the subject, Clapham seeks to dispose of the outdated distinction between public and private spheres – principally in order to change the traditional conception of human rights as tools preventing the abuse of individuals by states. The newly proposed system does allow for a conceptual leap of imposing human rights obligations on private entities, but it also produces significant instances of conflicting rights. From common examples, such as the one of a conflict between the advocates of promoting human rights through free trade and those contending that free trade actually has a harmful effect on rights – to the more complex ones related to dignity, Clapham once again sincerely acknowledges the problem, although he does so chiefly on a general level.

¹⁷ Clapham at 212.

¹⁸ Clapham at 215.

¹⁹ Clapham at 87.

²⁰ Individuals are not states; customary law applies to individuals; hence, customary law applies to non-state actors.

²¹ Clapham at 87.

It is at least arguable that free trade improves human rights. Participation in the world trading system protects and fulfils human rights by increasing the number of jobs as well as the quality and variety of available goods and services. Economic measures such as non-discriminatory competition laws are ultimately means for reaching greater general welfare.²² Admittedly, these measures do not result in as apparent or immediate an advancement of human rights as do acts of policy or enforceable judicial decisions. But restrictive economic measures undoubtedly result in a loss of general economic welfare, rendering the realization of human rights more difficult. In the discussion devoted to the WTO, Clapham devotes practically no attention to this idea, nor does he try to address the dilemma of how best to protect human rights in a situation where either free trade must be restricted in order to preserve some human rights (resulting in loss of certain economic rights in the long term but protection of certain, say, labor rights in the short term) or certain violations of rights ought to be tolerated to promote free trade (resulting in the reverse from the above). As noted previously in this review, in cases of individual claims against the WTO, he focuses solely on the individual's side. Clapham's lack of acknowledgement of the issue of conflicting rights in instances such as this one (even if the opposing claims are not articulated) undercuts slightly the book's general attempt to erase the distinction between the private and the public.

More generally – though connected with the question of conflicting rights – Clapham's argument is based on an unspoken – but quite clear – premise that human rights obligations trump every other, possibly conflicting, body or provision of law. But the conceptual foundation of human rights remains unclear. The issue is complex, to be sure. Academic debate on the pedigree of human rights has produced wide-ranging arguments. Some scholars have proposed that human rights are inherent to the human person; others have been content with a positivist view, namely that the Universal Declaration constitutes an international bill of rights intended to be shielded from the political process; still others have proposed that human rights arose as an attempt to prevent a complete deformalization of international law. Clapham does not espouse unequivocally any of these views. Touching on the subject lightly, he relies on the notion of dignity for a complete genealogy of human rights law, citing Henkin's assertion that "human rights discourse has rooted itself entirely in human dignity and finds its complete justification in that idea."²³

The idea of dignity as source of human rights is not of much help in providing a foundation for the human rights movement, since it begs the question of where dignity comes from. In answering this question, Clapham takes a well-known, multi-faceted, route: he notes Kant's deontological definition of dignity as inherent in all humans, proceeding to present it as a positivist foundation of the movement, reminding that the Second World Conference on Human Rights in 1993 "chose human dignity as the value that generated human rights."²⁴ It seems clear that the attempt here is to accord dignity a status of an unquestionable virtue, while granting it a degree of democratic legitimacy. But however presented, dignity is a malleable notion and can most often be used on both sides of a human rights claim. Invoking dignity reveals the potential for manipulability and the fragility of the 'universal' in the language of human rights, as well as

²² See e.g., E-U Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi, *HUMAN RIGHTS AND INTERNATIONAL TRADE* (OUP, 2005), 39-41.

²³ Clapham at 536, citing Louis Henkin, *Religion, Religions, and Human Rights*, 26 *Journal of Religious Ethics* 229, 231 (1998).

²⁴ Clapham at 538-39.

the movement's vulnerability to politics. Indeed, nothing illustrates better the fundamental difficulties with the 'rights' approach than the invocation of dignity as its foundation or the use of dignity as a tiebreaker in cases of conflicting rights.²⁵ Clapham acknowledges these shortcomings,²⁶ but continues without much regard for their implications, especially in his discussions of particular documents based on dignity and courts invoking dignity to support their decisions.

This is a good place to talk about the principle of complementarity – the most original idea presented in the book. It seems to have potential to defeat, or at least sideline, the problems arising from the lack of clarity with respect to foundations of human rights. The gist of the idea is that international human rights obligations exist and apply at the same time and independently of each other, to states, non-states, and individuals. A victim of a human rights violation ought to have multiple claims: not only against the state that failed in its duty to protect the right in question but also against the direct perpetrators, be they formal or informal organizations, individuals, or both. The claims cannot be conflicting or mutually exclusive, but are instead complementary. The validity of such claims also should in no case depend on the ability of different jurisdictions to adjudicate them, or on any application of the traditional idea that human rights serve the purpose of protecting individuals from the abusive power of states. Similarly, different approaches to human rights in different jurisdictions are simply complementary to each other, regardless of conflicts that might arise.

This is a formidable and compelling argument – however, not without difficulties. Complementarity overcomes the foundational problem of human rights only in a limited sense, in that it shifts the focus from theory to practice. But in order to accept complementarity, one must still a priori believe in the primacy of human rights over any other law. Whereas human rights supremacy might be a defensible assertion, it is not self-evident. Clapham, however, does not attempt to make a case for it, and treats it as a patently obvious premise. More specifically, practically resolving claims framed in terms of dignity requires balancing of human rights in most cases. Here, once again, Clapham acknowledges the necessity of such balancing, while candidly revealing his discomfort with it. The balancing approach is an unwelcome practical outcome and one always undesirable to human rights lawyers. The reason is simple: at the bottom line, balancing requires a sort of human-rights utilitarian approach and promotes a vindication of the more important human rights claim. This in turn necessitates the relativization of human rights by proclaiming some rights more important than others, which is at odds with the fundamentally absolute nature of rights. It is hence understandable that Clapham carefully avoids affirming any definitive pecking order of human rights as a matter of principle, advocating instead a relatively commonplace solution of placing our trust in judges to balance opposing claims in specific cases.

While acknowledging the foregoing numerous shortcomings of foundations for human rights, the impression is that the author proceeds boldly without much concern for these inconsistencies. This audacity suggests deliberation rather than carelessness. Together with Clapham's attention to detail, his argumentative skills, as well as his academic reputation

²⁵ Dignity has, *inter alia*, been used by the drafters of the Universal Declaration, reportedly as a placeholder "for any more fundamental explanations of the theoretical basis for human rights." "Dignity was included in that part of any discussion or text where the absence of theory of human rights would have been embarrassing. Its utility was to enable those participants in the debate to insert their own theory." See Christopher McCrudden, *Human Dignity*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899687, last accessed on April 17, 2007.

²⁶ Clapham at 545.

indicate that there is something else to the book, possibly less obvious, and that Clapham's principal purpose might be something other than to show how to win a human rights case in a court, influence the existing institutions, or encourage more people to sue a particular non-state violator of human rights law.

IV. Problems Defined

At this juncture, it is useful to recall briefly Martti Koskenniemi's famous critical legal studies argument about utopia and apology.²⁷ If an argument insists on a principled adherence to rules, it becomes too aspirational to influence any political decisions and is thus deemed utopian and inconsequential. But the more it allows for discretion and exceptions to the rules, the more it is seen as merely providing an excuse for whatever powerful political players do, and serves merely as apology for politics.²⁸ International legal argument always oscillates between these two poles, hopelessly seeking to break away both from being a mere excuse for realpolitik and being utterly idealistic. Does it ever succeed? And does walking a proper line make it more forceful? The questions are complex, and need to be answered with a qualification. The short answer is that regardless of how skillfully made, or how 'just' or 'noble' of a cause it might defend, in the short term international legal argument simply cannot help being inconsequential – arguments do not produce substantive outcomes but seek to justify them.²⁹ But even if merely providing legal justifications, these argumentative narratives are the most significant creations of international law. They trickle down the readership and, by allowing for universalization of claims and thus giving voice to underrepresented groups, influence our culture, society, and shape the way we think about the world, ultimately making us accept without qualification ideas that they promote and becoming a part of who we are.³⁰

An argument can be expressed through many prisms and points of view: in terms of human rights law, in this or that variety of morality, the need for security, through the lens of distributive justice, or some other idea. But it is necessarily told from a specific perspective – that of the teller, hence always promoting a particular approach.³¹ The extent to which these prismatic narratives change their readers' beliefs and attitudes depends on how convincing they are to the audience. Competence, then, or technique, is not unimportant to the potency of international law. The more technically savvy the narratives are, the more promise for long-term compliance they carry.

However technically sophisticated an international legal argument might be, it is never flawless. The world in which we live is exceedingly complex for human capacities. Because of such complexity, our inability to predict future events, and the necessity to manage our affairs through rules, we find ourselves in another predicament. The rules that we devise will always and inevitably be over-inclusive and under-inclusive,³² rendering the justifications based upon legal rules (not on politics – thereby striving to be law) necessarily vulnerable to criticism.³³ Take for example the Nuremberg trials. Regardless of any formal legal documents existing at the

²⁷ See generally, Koskenniemi, *supra* note 6.

²⁸ *Id.* at 17.

²⁹ *Id.* at 570.

³⁰ *Id.* at 513-61, especially 513-15 and 548-57.

³¹ *Id.* at 514.

³² There will surely always be some rules that are better than others in terms of inclusivity, striking the right line, but *a priori* it will never be possible to devise them in a sustainable manner.

³³ See, Koskenniemi, *supra* note 6, at 591.

time (e.g. a US/German treaty) that contained rules possibly favorable to, say, Goering's defense, most of us would agree that Goering's guilt cannot depend on technicalities of a treaty – or of customary international law for that matter – for if such a claim depended on the mechanical alignment of any factors, it would make a thin thread indeed. We simply know that Goering is guilty. But even in such a clear-cut case, a justification based on the pre-existing law must be produced. Most of the applicable law, however, will contain rules that could not foresee the exact circumstances of Nazi Germany's crimes and will suffer from under- and over-inclusivity. The argument, hence, needs to draw a predetermined conclusion from a defective framework. Such an argument, unsurprisingly, will have flaws in reasoning, regardless of how carefully logically supported or skillfully explained.

The two problems are related but not identical. Avoiding apology and utopia, or making a competent legal argument, arguably can be achieved by addressing both poles and being careful not to get stuck to either. The process of making an argument in this way requires meticulous logical execution and a most careful analysis. Walking a fine line between the two traps requires a sophisticated discussion and the use of formal legal rules and principles, inevitably creating contradictions and inconsistencies. The feat, then, is to overcome the potential criticisms of apology and utopia in international legal argument, while finding a way to escape the shortcomings of logical reasoning unavoidably generated in the very process of making that argument. It becomes obvious that, to succeed, one must overcome the dangers of apology and utopia arguing in a way that transcends Cartesian logic and western secular traditions of enlightenment – that bedrock of our intellectual culture. This requires, as Clapham rightly points out, a major shift in our way of thinking. The real question to ask, hence, in assessing this book is how successful Clapham is in manufacturing such an argument in his human rights manifesto.

V. International Law Redefined

The book presents a case for an international legal regime based largely, even exclusively, on respect for human rights – a regime that would hold states and non-states accountable for breaches of all human rights obligations, without regard for conflicts with other legal doctrines or for a less-than-unambiguous foundation for human rights. In this new international legal order, human rights are, in a sense, a strict liability doctrine: if an actor has capacity to bear human rights obligations, there can be neither justification nor excuse for misconduct. Invoking a more important principle of law or policy is no justification simply because there are no principles more important than human rights. Similarly, asserting, for example, that an actor is outside of a category meant to be bound by human rights obligations is not a valid excuse – for no actor can be outside of the state/non-state universe. The only way to avoid responsibility for human rights violations is not to commit them.

That Clapham cannot be charged with providing apology for politics is rather apparent, even from skimming his book: little concern is expressed with respect to the practical possibilities of trying human rights offenders. The difficulty that some human rights are enforceable in some jurisdictions and not in others is seemingly conquered through the concept of complementarity. The assertion is that human rights exist independently of humans and their dealings – it is only that some human societies have managed to discover these rights, or some of these rights, and some have not. The principal challenge to Clapham's argument, thus, is to avoid the charge of utopia.

A skeptical reader might be tempted to criticize Clapham's arguments as being too idealistic: after all, the author seeks to shatter the entire existing structure of international law that does not conform to noble ideals of human rights. But even such a cynic must admit that Clapham's argument features a degree of reality. Two examples are illustrative. First, this review points out that Clapham refused to wrestle with the question of conflicting human rights, so necessarily preferring some rights to others. But the problem of subjectivity of human rights – and the resultant potential for abuse – is not completely neglected; it is touched upon in the book, if only to show that the author is not oblivious to the idea: although unfazed in imposing the duty onto the international financial institutions in ensuring that “their actions do not contribute to human rights violations,” Clapham recognizes a widely held concern that the World Bank could become an enforcement arm for powerful governments' foreign policy agenda, *inter alia* through the “impos[ition of] their own version of human rights on other governments.”³⁴ Second, Clapham invokes the concept of dignity as a theoretical basis for all human rights, in spite of his apparent acknowledgment of the conceptual porousness of the term. Examples such as these two are emblematic of the strategy Clapham uses to save his argument from the draw of utopia: although unwavering in his conclusions, he acknowledges the conceptual fragility of the human rights edifice. As noted previously, due to a lack of enforcement mechanisms, international legal argument cannot cause compliance, except in a limited sense of appealing to the audience and changing their values from the bottom up. In this respect, Clapham's resoluteness in drawing conclusions, despite clear cognizance of theoretical problems with human rights, shows that he is mindful of the fragility of international law, and that his steadfastness is a strategy. It is this boldness that renders his argument successful in escaping from utopia.

Clapham's competence in the language of international law, while helping him stand clear of apology and utopia and highlighting his superb lawyerly skills, also reveals the book's potential to provide future claimants with the ability to articulate their claims in a widely comprehensible (and appealing) manner. It is here that Clapham delivers his best result: he tells his story in a legally competent language, convincing to legal and non-legal audiences, using familiar terms and principles to advocate in a subtle way the larger goals of the human rights movement – such as social justice.

The principle of social justice lurks in the background of almost every chapter of the book. If the main thesis, that any actor (state or non-state) capable of bearing human rights obligations is bound by international law to respect those obligations, is raised to a more abstract level, it could be expressed as the proposition that one is responsible not only for what one does but also for what one can, but chooses not to, do. This principle has often been used to advocate social justice in various contexts (not least legal – consider positive and negative obligations) and Clapham employs it munificently and competently. Occasional discussions about respecting, protecting, and promoting (or fulfilling) human rights illustrate the point.

In the chapter devoted to corporations and human rights, Clapham invokes a document developed by the United Nations Sub-Commission on the Promotion and Protection of Human Rights (the Norms³⁵), and finds in it several kinds of duties of corporations. After a less controversial conclusion that corporations have a duty to *respect* human rights by refraining from

³⁴ See Clapham at 142.

³⁵ The Norms refer to the ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,’ developed in 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights.

activities that amount to abuses of those rights, Clapham asserts that corporations also have a duty to *protect* human rights. Protection translates into a positive duty of due diligence – i.e. a “duty to ensure that the contractors with which they do business are complying with the Norms.”³⁶ But when it comes to probably the most controversial duty – to *promote* human rights – Clapham admits that this obligation is “less clear in legal terms” and that it is unlikely to “translate into a concrete obligation giving rise to a remedy for its breach in a court of law”³⁷ Human rights lawyers know all too well that the duty of due diligence of corporations, defined here as duty to protect, is exceedingly difficult to enforce, and that even the duty to respect is enforceable in a judicial forum only in rare cases.³⁸ Framing human rights obligations of corporations in terms significantly beyond what is currently attainable (respecting and protecting), but refraining from extending them to their logical extreme (promoting) provides another example of the technique that allows Clapham to escape utopia and produce a persuasive argument.

An equally fervent but less skilled writer than Clapham might have argued that corporations have a duty to devote a percentage of their often exorbitant profits toward promoting human rights in the communities in which they operate. Logically and morally, this is a defensible position. It has been presented in a slightly different form, for example by Herbert Simon, a Nobel Prize winner in economics, who argued that over 90% of income in developed countries is due to the social capital – including technology and organizational and governance skills – and that a flat tax rate of over 90%, serving the purpose of returning the wealth to its real owners might be morally (only morally, to be sure) sustainable. Applied to the legal context at hand³⁹ one might advance a position that corporations ought to be legally bound to pay very high taxes or simply to redistribute a high percentage of their earnings to the community in which they operate, at least until all members of that community can enjoy all of their human rights – most notably economic and social rights, including, say, a right to education. As noted before, while this position might be morally, and even logically (although certainly not economically), sturdy, it simply crumbles in the face of realities of the current international legal order.

The principle that one is not only responsible for her own deeds but also for her omissions is not new. It has been discussed in length by various philosophers, including recently, for example, Peter Singer – arguing for philanthropy.⁴⁰ As a knight of social justice, Clapham is undoubtedly an ardent supporter of this principle; indeed, it seems fairly certain that he is a supporter of some form of Simon’s proposition as well. Crucially, it would be possible to invoke some of the abundance of international human rights documents to support this proposition as a legal principle, and some readers might wonder what makes Clapham shy away from doing it. Of course, as an international legal postulate, this position is simply unsustainable because it is utterly utopian. Hence, instead of advocating a logically sound and morally compelling but realistically unsustainable position of a most idealistic form of distributive social justice,

³⁶ Clapham at 231. He similarly imposes on corporations an obligation to secure *fulfillment* of human rights by refraining from activities that would challenge governmental efforts to promote human rights.

³⁷ Clapham at 232.

³⁸ *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002) is the major case where a non-state actor was charged with violation of the Alien Tort Claims Act in the U.S. but it was brought under U.S., not international, law. Even if one considers ATCA to be an act of ratification of international law into the U.S. domestic legal system, instances are very rare where international law imposes direct obligations on individuals.

³⁹ Admittedly, income in developing countries can be attributed to less than 90% of these states’ social capital, but this does not defeat the general point.

⁴⁰ See generally Singer, *WRITINGS ON ETHICAL LIFE*, Harper Perennial (2001).

Clapham couches the idea in the existing language of international human rights, thereby making a universal claim with a touch of realism, that is comprehensible – indeed compelling – to the community of international lawyers as well as potentially convincing and appealing to the wider audience. This appears to be the best result possible because, if one believes that international law cannot cause compliance, then to go about advancing an argument by producing appealing narratives is as close as one can get in making international actors comply with a norm.

Besides being a beneficiary of existing narratives and ideas previously proposed in those narratives, Clapham also engineers novel norms. The principle of complementarity is a good example. The term is not necessarily novel,⁴¹ but it is used in a somewhat novel manner, increasing the potency of the narrative, precisely because of its already existing familiarity. Clapham analogizes complementarity in law with a scientific approach in physics: Niels Bohr's ingenious proposition to describe light both as a wave and as a particle (instead of one or the other) helped scientists understand the nature of light as having different qualities depending on the point of view from which it was observed. Clapham uses this experience to propose that “[d]ifferent views may have to be seen as complementary in order to get a better understanding of the object under scrutiny.”⁴² While the concept is unquestioned in physics, it makes for quite a remarkable position in law. Practically, it means that the success of a human rights cause simply depends on the position we take; in other words, we simply ought to be inventive in finding a viewpoint from which vindication of human rights claims is possible. As noted previously, not only does this position presume the existence of human rights (those we know and some we might not yet know) in the absolute, irrespective of any practical application or acknowledgment of their existence, but also a priori places human rights on top of a hierarchy of all law. Although advancing a radical position, the analogy with such a revolutionarily beneficial experience in physics once again renders Clapham's argument clever and convincing rather than, say, outlandish.

The foregoing examples illuminate the technical skill with which Clapham ensures that his argument does not bear the label of being utopian (or apologetic), as well as the vigor with which he makes his case while recognizing that international law might only be able to offer a scintilla of resistance against politics. Clapham demonstrates an acute understanding of the limits of international law: he shows the awareness that the hope to produce compliance in the short term is a most brittle one, and that the most international law can do is use its language, through narratives, to effect a change in the long term. It is at once the best-case scenario for international law and the most intellectually honest position possible.

One of the strongest impressions in reading this book is the boldness with which Clapham makes his assertions. As shown previously, in light of the clear awareness of the potential weak spots in his argument, it indicates a strategic choice rather than an oversight. Clapham is a human rights advocate and does not hide it. From the most general level, to specific instances, the reader is never in doubt what Clapham is all about: “[h]uman rights law is driven, not by steady accretion of precedents and practice, but rather by outrage and solidarity.”⁴³

⁴¹ Note that Clapham has used all three terms in his earlier writings as well; see e.g. Clapham, *Issues of complexity, complicity, and complementarity: from the Nuremberg trials to the dawn of the new International Criminal Court*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE*, Sands (ed.), Cambridge University Press (2003). Note also that complementarity is mentioned in the Rome Statute of the International Criminal Court (ICC) establishing the ability of ICC to try international crimes both in national courts and the ICC – a different idea than that presented here.

⁴² Clapham at 57.

⁴³ Clapham at 107.

This attitude is precisely what the author exudes throughout this book: an outrage towards the violators of human rights and the call for solidarity of like-minded people. The two categories are indeed an alternative to pure reason, the eyes through which Clapham proposes that the problems ought to be viewed in hope of overcoming the limitations of legal technique.

Aware of the imperfections of a traditional western-style analysis Clapham moves away from the mainstream intellectual tradition, appealing to notions so cemented in our civilization as to be practically indubitable, rather than relying solely on logic and reason. But how good is this? What is there to prevent us from concluding that Clapham's narrative is a mere swing back to dogma? The answer to these questions far surpasses the reach of this review. Simplifying to the extreme, it can be said that, in choosing between two inadequate and opposite methods of arguing – dogma and reason – an invitation to view the world through the values of a different kind, such as solidarity: axiomatic – perhaps because based on collective human experience – but certainly not dogmatic, and agreeable with reason – but not based on it, might be the only way to escape valid criticisms of both. It certainly seems the least remorseful.

VI. Conclusion

Andrew Clapham seeks to put forth a human rights manifesto that will hold everyone and anyone responsible for violations of human rights. And he is bold about it. This candor allows him to escape certain criticisms. Clapham's principal concerns are not the practicalities of human rights enforcement; thus he is not even coming close to the danger of being charged of providing apology for politics. Whether he can be criticized on the grounds of being utopian is a closer question. I think he cannot. A scholar as astute and methodical as Clapham certainly cannot be accused of ignoring inadvertently some of the questions this review labeled as 'hard;' nor can he be attacked on the grounds that he is oblivious to understanding that as a practical matter, at least in the short term, his contentions will simply be ignored. Indeed, by using competent legal language, he overcomes the criticism of utopia while recognizing the limitation of international legal argument. But Clapham's mastery in the language of international law does not make him condescending. Mindful of the unavoidable inadequacies of a logically reasoned analysis and, by extension, of limitations of even extensive technical proficiency in executing an international legal argument, he steers away from conducting a conventional legal study, proposing instead that human rights should be viewed through concepts most of us accept as a matter of our civilizational heritage. Clapham does not seek merely to teach us how to go about enforcing human rights. He wants to do his part in making us accept the values promoted by them as unquestionable. In doing this, he targets the subconscious, the subliminal, the instinctive in humans.

Hence, Clapham's book is potentially very gratifying. The catch is that one must look closely enough into it to achieve the gratification – the first glance probably will not do it. A neutral reader ought to resist the initial impulse to assess the book by expecting a conventional international legal study, based on the traditional precepts of the profession and secular traditions of enlightenment, ordinarily executed through hard logic and meticulous reasoning. An international lawyer seeking arguments fitting into a traditional legal analysis, then, might be disappointed. That is, she might be disappointed if she is not willing to go a step further and accept a true paradigm shift, the true Bohrian legal thinking that Clapham proposes. Accordingly, if this book is viewed, for example, as a manual for litigators attempting to sanction human rights violations, and if it is measured from the standpoint of such a manual, the book, for

all its usefulness, has certain shortcomings. But if it is viewed as a piece of a subtle (yet vigorous) advocacy of a worldview based on absolute respect for human rights, it cannot but be praised for its competence, verve, and intellectual honesty.