

State Liability for Failure to Prevent Human Rights Violations Committed by Non-State Armed Groups

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How to cite this paper: Mbonigaba, C. (2026). State Liability for Failure to Prevent Human Rights Violations Committed by Non-State Armed Groups. *Beijing Law Review*, 17, 624-642.
<https://doi.org/10.4236/blr.2026.172033>

Received: May 22, 2026

Accepted: June 23, 2026

Published: June 26, 2026

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Abstract

This article seeks to examine whether states have a legal obligation to prevent human rights violations committed by non-state armed groups (NSAGs). While the existing literature answers this question in the affirmative, this research demonstrates that such liability is divided between states supporting NSAGs and states attacked by NSAGs. The study therefore indicates that state liability for failure to prevent human rights violations applies, in principle, for states supporting NSAGs and generally does not apply to states attacked by NSAGs. The study reached this decision by a systematic historical analysis of various sources of law, mainly the international conventions, judicial decisions and works written by various lawyers from the nineteenth century to the current period. Nevertheless, this study determines that such form of liability is insufficient to protect victims of armed conflicts. The article recommends states to conclude an international convention providing for the strict liability for human rights violations committed by NSAGs.

Keywords

Non-State Armed Groups, State Liability, Civil War, Human Rights Violations

1. Introduction

On 14 May 2026, Human Rights Watch released a report stating that when the M23 rebel group backed by Rwanda seized control of Uvira city in the Eastern region of the Democratic Republic of Congo (DRC), the members of this rebel group committed gross human rights violations (Human Rights Watch, 2026). As a remedy against the violations, Human Rights Watch invoked the liability of

Rwanda. The issue of state liability for the conduct of NSAGs which first arose in the second half of the nineteenth century and continued until the 1990s, became a heated debate again.

Indeed, since the nineteenth century, the issue of state liability for failing to prevent human rights violations within its borders has been tied to the concept of state responsibility arising from negligence or any other fault. Initially, from the 19th century to 1945, this liability was primarily advocated by certain scholars who posited those states had a duty to ensure the safety of foreign nationals; that failure to carry out this duty could lead to the state's accountability (Brusa, 1898). Following 1945, this obligation became more formally recognized through various international treaties.

This study investigates whether states have a duty to prevent human rights violations committed by insurgents. In contrast with the existing literature, the study indicates that such liability does not exist, in principle, to states attacked by NSAGs. It rather shows that this liability applies generally to the states supporting NSAGs to fight other states. Moreover, in contrast with the existing literature, this study observes that the current bases of liability to hold supporting states liable for the conduct of NSAGs are insufficient. The study indicates that strict liability is the best standard of liability of supporting states for injuries caused by NSAGs to ensure better protection to the victims of acts done by NSAGs.

Before discussing the subject matter in detail, some clarification is needed for some concepts used in this work. First, there may be the confusion between state responsibility and state liability. State responsibility implies broader forms of reparations or state accountability while state liability implies civil liability and focuses on compensation to be paid to the victims (Sucharitkul, 1996). This article has preferred state liability to exclude situations of reparations of the damage not involving the payment of compensation. However, for practical reasons in some parts, this study has used state liability and state responsibility interchangeably. Second, in this article "failure to prevent" means the violation of the state of its obligation to take necessary measures to hinder the commission of a certain wrongful act. Finally, in this work "states supporting NSAGs" means states that accord support to NSAGs to fight against other states, while "states attacked by NSAGs" means states that are fighting against NSAGs.

2. From 1800 to 1900

2.1. The Early Lawyers

During the second half of the nineteenth century, numerous writers began exploring the issue of the liability of the state for failing to prevent the wrongful acts of private persons committed within its territory, connecting it with the issue of state liability due to the fault (Wiesse, 1898; Calvo, 1869). Prior to this period, rare writers had examined this question. In the 18th century Hugo Grotius noted that a community's responsibility for an individual's actions depended on whether there was an unlawful conduct of the community itself. Accordingly, he stated that a

civil community is not liable by the acts of its members if no wrongful conduct attributable to the community (Grotius, 1724). In the same perspective, Emer de Vattel asserted that if a king failed to suppress the injuries inflicted on a foreigner by his citizens, he would be responsible as if he had committed the act personally (De Vattel, 1758). Nevertheless, neither Grotius nor Vattel addressed the question of whether states had an obligation to prevent losses sustained during the internal armed conflict.

The 19th-century authors became special as they tried to answer the question of whether a state had a duty to indemnify losses suffered in the internal armed conflict. One such thinker was Pascale Fiore, who argued that when an internal armed conflict broke out, the state had to deploy all available resources to stop the war; that its liability could be engaged if it neglected to carry out this obligation (Fioré, 1868). Brusa also contributed to this discussion, asserting that a state possesses the authority to command and inflict the punishment to the criminal acts committed on its territory; that if the state failed to exercise this power successfully, it had to compensate the victims. Brusa further linked the state duty to protect foreign nationals on its territory with the economic benefits deriving from the arrival of foreigners on its territory, arguing that if the state failed to curb injuries against them its liability could be engaged (Brusa, 1898). De Bar connected state liability with its duty to ensure the security to foreigners, stating that if aliens suffer any insecurity, the host state has a legal obligation to indemnify them. Nevertheless, in contrast with the previous writer, De Bar maintained that a state has no duty to indemnify any damage caused by NSAGs (De Bar, 1899).

Additionally, Wiese also dismissed the doctrine of the state obligation to prevent losses caused by revolutionists. Although Wiese insisted that the state responsibility could be engaged in case of any fault, including negligence or lack of due diligence to prevent the harm caused by private persons, he pointed out that this responsibility did not apply to the harm caused by rebels (Wiese, 1898).

Conclusively, in the nineteenth century, there was a clear consensus among writers regarding the idea that states should be held responsible for failing to prevent illegal acts done by private persons. However, the authors had different opinions about the state's obligation to prevent losses suffered during the internal armed conflict, including those inflicted by rebels. Certain authors argued that states should be accountable for such losses, while others dismissed this argument.

2.2. Conventional Law and State Practice

From 1800 to 1900, various states concluded treaties relating to the facilitation of trade and navigation providing for the state liability to prevent injuries caused by NSAGs. But these treaties conditioned the liability on negligence attributable to the host state. Among these treaties, the Treaty of commerce and navigation between Mexico and The Netherlands, dated September 22, 1897 and the treaty between Mexico and France concluded in 1886 may be cited.

On the other hand, other similar agreements completely overlooked this issue,

failing to mention a state's potential liability for not preventing wrongful conducts of NSAGs. These agreements seemed to reject the idea that states had a legal obligation to prevent such conducts. Instead, the agreements emphasized the principle of equality between aliens and nationals and the total non-responsibility of the host state for the damage caused by rebels (Treaty between Peru and Argentina, 1874)¹. Therefore, all in all, analyzing the all relevant treaties concluded in such a period, it may be concluded that from 1800 to 1900, there was no unanimity among treaties in relation to a legal obligation of states to prevent injuries caused by rebels. Some of them endorsed state liability, while others did not.

With regard to state practice, in various disputes between states that occurred between 1800 and 1900 about the subject matter, the issue of the state responsibility for failure to prevent the damage caused by NSAGs insurgents emerged. However, in all of these disputes no state ever admitted having a legal obligation to prevent losses caused by rebels.

For instance, in 1861, an American national residing in China incurred losses when his property was destroyed by NSAGs opposing the Chinese government. He sought the intervention from the United States to request compensation from China. The United States dismissed his claim asserting that no state could be held liable for the damage caused by NSAGs if no fault could be established against it. The United States explained to the victim that this exclusion of liability on the subject matter was a principle of international law (Moore, 1906).

Moreover in 1862 during the American civil war, the cargo belonging to the government of Peru was attacked and destroyed by the Confederate NSAGs. Afterwards, Peru sought compensation from the United States. However, the United States dismissed the claim, stating that the US government had done what it could to prevent the damage. In a third dispute, in 1885 a British citizen sustained injuries in Colombia due to the wrongful conduct of rebels who burnt his neighborhood shortly having captured the area. This citizen asked the United Kingdom government to seek compensation from the Colombian government on his behalf. However, the UK government refused to endorse his claim arguing that the Colombian government's liability could not be established as it was powerless to prevent the damage. In another dispute that took place in 1896, an American citizen in Rio de Janeiro suffered losses when rebels opposed to the Brazilian government caused the damage to his property. He sought the intervention of the U.S. Department of State in his case to request Brazil to indemnify him. The U.S. Department of State refused to entertain this request, arguing that the Brazilian government had no power to prevent injuries (Moore, 1906).

Having examined all disputes noted above, it may be concluded that the nineteenth century's state practice did not support state liability for failure to prevent losses caused by insurgents. Accordingly, customary international law did not support the doctrine of state liability for failure to prevent losses caused by NSAGs. The opinions of some authors who propounded that such liability existed

¹Treaty between Peru and Argentina, 9 March 1874.

had no support of any empirical evidence.

2.3. Case Law

In relation to judicial decisions, the state liability for failure to prevent injuries caused by insurgents depended on the status of the concerned state. This liability applied to the states supporting NSAGs but was excluded for states attacked by rebel groups. The basic argument for this exclusion was that states attacked by insurgents had no control over insurgents whereas states supporting rebels had such control.

In the *Hanna*, the US-British mixed claims commission refused to hold the American government liable for failure to prevent injuries caused by the Confederate insurgents during the American civil war. During the war, these NSAGs caused the damage against the assets of John Hanna, a British citizen. When the Commission noted above examined the subject matter, it determined that the American government was not responsible for the damage suffered. To motivate its decision, the commission stated that the US government had no capacity to prevent injuries inflicted by insurgents (*Hanna v. the United States of America*, 1873).

Similarly, the concept of a state's lack of capacity to prevent losses caused by NSAGs was highlighted in the 1892 *Venezuelan Steam Transportation Company* case rendered by the commission between Venezuela and United States. In the case, the commission pointed out that a state was not liable for losses caused by private persons, but that this liability could be initiated if the state willfully refused to exercise due diligence to prevent such losses. Nonetheless, the commission noted that the state could never be held liable for injuries inflicted on its territory if those injuries were caused by insurgents. As a ground of non-liability, the commission mentioned the lack of control by the state over rebels (Moore, 1898).

Moreover, the lack of fault on the part of the host state, especially the inexistence of the lack of due diligence became a ground of non-liability. This occurred in the *Hormiguero* case whereby the claims commission set up between Spain and the United States refused to hold responsible Spain for the losses sustained by the American citizen in the Cuban civil war. The reason mentioned by the commission was that Spain had no control over the insurrection; that it had committed no fault (Crandall, 1910).

As previously noted, various judicial bodies held accountable states supporting insurgents for failing to prevent losses inflicted by those NSAGs. A pertinent example of this can be found in the *Alabama* settled in 1872. In the case, the British government was held liable for injuries caused by the Confederate insurgents against the United States as the British government failed to exercise due diligence to prevent NSAGs to use its territory to launch the military operations against the victim state (*United States of America v. Great Britain*, 1871)².

²Alabama claims, *United States of America v. Great Britain*, award of 8 May 1871, Reports of international arbitral awards, Vol. XXIX.

From the discussions above, we can conclude that, from 1800 to 1900, states attacked by NSAGs were not liable for injuries caused by insurgents whereas states supporting NSAGs were liable for such injuries. This difference arises from the fact that states attacked by insurgents had no power to prevent the wrongful acts of revolutionists while states supporting rebels to attack other states had it.

3. Between 1900 and the Second World War

From the early decades of the twentieth century to 1945, only a small number of writers dealt with the issue of state accountability for failing to prevent the damage caused by insurgents. In 1915 Edwin Borchard argued that as a rule a state was not responsible for injuries inflicted by private persons, but that its liability would occur if its acts amounted to a breach of a norm of international law. The author highlighted two categories of the state's duties, namely the duty to elaborate the legislations, the administrative and judicial measures to prevent foreigners to suffer losses from illegal acts of private persons and the duty to exercise due diligence to prevent these losses.

Concerning the duty to prevent losses, Borchard appraised the level of protection required for a country to be held liable. He observed that if the source of harm was well-known, a higher standard of protection could be needed, and that if the attack from private persons was too quick to be prevented, the required level of due diligence would be minimal. In this latter scenario, he explained that if the unlawful conduct was too rapid to intercept, the injuries inflicted by private persons could never be attributed to the state unless complicity could be established on the part of the state (Borchard, 1915).

Borchard showed little sympathy to the less organized states. He asserted that complicity of these states was not required to make them liable whenever an alien suffers injuries from acts of private persons. He explained that the lack of security in those states was fundamentally the primary factor of the turmoil and was in itself a breach by a state of its international obligations. Lastly, the writer appraised the question of whether a state could be held responsible for failure to prevent losses caused by NSAGs. He gave an affirmative answer, but conditioned the state liability to the failure of the state to use due diligence to prevent the damage or suppress the insurrection (Borchard, 1915). Nonetheless, the question is how a state could be negligent to suppress the insurrection that threatens its existence.

3.1. Conventional Law

The codifications of rules concerning the liability of states for injuries caused by private persons from 1900 to 1945 were made under the League of Nations auspices and by private legal institutions. With regard to the League of Nations, in the report drafted by Gustavo Guerrero on the subject matter in 1926, it was pointed out a state was not liable for injuries sustained by aliens on its territory due to acts of riot or civil war. However, the report highlighted that its liability could be engaged in case of the state's failure to suppress the damage or punish wrongdoers.

Nevertheless, the report explained that the legal obligation imposed on a state was restricted to the area that was under its control (*Questionnaire no.4, 1926*). This seems to indicate that wrongful acts committed in the territory controlled by insurgents were not attributable to the state.

Conversely, in its Bases of discussion prepared in 1929 for the Hague conference for the codification of international law, the Preparatory Committee affirmed that a state was liable for the conduct of rebels³. The ground invoked by the Committee was the state's failure to exercise due diligence to prevent the wrongful conduct. Still, the Committee's arguments maintained their low legal value since the Bases of discussion in which they were drafted have never been converted into a binding international convention (*Bases of Discussion Drawn up by the Preparatory Committee of the Conference for the Codification of International Law, 1929*).

In addition to the League of Nations, the private institutions also drafted rules governing the liability of states for the damage suffered by aliens on their territories. Writing its draft in 1927, the Institute of International Law asserted that while a state is not liable for the damage suffered by aliens in case of political violence, mob or civil war, its liability could be engaged if the fault could be found on its part either due to lack of due diligence to prevent the harm or due to the state's failure to accord equal protection to aliens as that accorded to its citizens (*Draft on International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigner, 1927*). Nonetheless, the Institute did not clarify whether the state could be liable for failure to prevent losses caused by NSAGs.

In relation to the private legal institutions, the Harvard Law School was among institutions that played a major role in designing rules relating to state liability. The special element with this School is that it conditioned state liability for injuries caused by rebels to the state's failure to accord justice to the victims of wrongful acts committed by rebels. In 1929 the school asserted that the responsibility of the state could be engaged if the state committed a certain fault, including the failure to accord aliens efficient redress for the harm sustained (*Draft convention on Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners, 1929*)⁴.

Indeed, from the early decades of the twentieth century to 1945, various conventions providing for the state's obligation to prevent injuries caused by insurgents were concluded by the American states. Under these conventions, a state could be held responsible for the damage caused by revolutionary movements if the lack of due diligence could be attributed to it. One such convention was the Convention Relative to the Rights of Aliens, adopted on January 29, 1902, which stipulated that a state was not responsible for the damage suffered by foreigners as a result of the conduct of insurgents during the civil war, unless in case of the

³Bases of Discussion Drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law.

⁴Draft convention on Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners, prepared by Harvard law school, 1929.

failure of the officials of the state to carry out their obligations. However, this convention did not clarify the specific obligations state officials have towards foreigners.

Another pertinent convention was the Convention on rights and duties of states in event of civil strife, signed on February 20, 1928. This convention did not address the concerns of victim states but rather focused on the responsibilities of aggressor states. Under this agreement, each participating state committed to ensuring that no vessels equipped, armed, or modified for military purposes would be present within its territory, which could be used to support rebellion against another state.

3.2. Case Law

From 1900 to 1945, the judicial bodies punished various states for supporting rebels to fight against other states. However, the same bodies refused to order victim states to pay compensation for injuries caused by insurgents. In relation to states supporting NSAGs, *Naulilaa* may be useful. According to this case, Portugal sought compensation from Germany due to its military attack against the Portuguese army in Angola during the first World War, alleging that the German colonial authorities in Namibia incited the indigenous Angolan militia to take arms against the Portuguese colonial authorities. Although the arbitrators rejected the allegations of Portugal about the alleged incitement from Germany to insurgents, it nonetheless held liable Germany for injuries suffered resulting from its military actions, as it should have considered that such actions would likely incite the local insurrection (*Portugal v. Allemagne, 1928*).

In terms of victim states, various judicial bodies took contradictory decisions. In *Fulda*, the mixed claims commission established between Venezuela and Germany in 1903 ordered Venezuela to compensate the damage suffered by the victim in spite of the lack of evidence of negligence on the part of the Venezuelan authorities. In its memorials before the commission, the Venezuelan government invoked force majeure asserting that the military blockade exercised against it by the European powers had made it unable to suppress the rebellion and prevent injuries against Luis Fulda, a German citizen. The Commission dismissed the defense of Venezuela and required it to compensate the damage suffered, citing the clause of the convention establishing the Commission whereby Venezuela consented to compensate injuries incurred in its civil war (*Germany v. Venezuela, 1903*). However, the Commissioners established no single fault on the part of the Venezuelan government.

Conversely, in the *Aroa Mines* case, the claims commission put in place to settle the disputes between the United Kingdom and Venezuela refused to order Venezuela to indemnify losses caused by NSAGs to the British investor during the war in 1903. As a ground of non-liability, the commission noted that there was no fault on the part of the Venezuelan government (*United Kingdom v. Venezuela, 1903*).

Based on the cases appraised above, it can be concluded that from 1900 to 1945,

states supporting insurgents to fight other states had a legal obligation to prevent the wrongful conduct of NSAGs. In relation to the states against which revolutionary movements were fighting, this study found not enough judicial decisions supporting their eventual liability for failure to prevent injuries caused by such movements.

4. From the Second World War to the Present Day

4.1. From the Diplomatic Protection of Aliens to International Human Rights Law

What is discussed above about state liability for the conduct of NSAGs, since the nineteenth century to the Second World War, concerned traditional international law on responsibility of States for damage done in their territory to the person or property of foreigners. Before 1945 there were two contradicting rules, namely the international standards of justice and the principle of equality between aliens and nationals (Garcia-Amador, 1956).

The first rule was invoked by developed states to justify the diplomatic protection of aliens abroad while the second rule was used as a defense of developing nations to resist against such diplomatic protection. The international standards of justice were considered as safeguards against the violation of international obligations a state had towards foreigners. Accordingly, aliens could enjoy better treatment than nationals of the host state if this state treated badly its own citizens. This position was disputed by weaker nations invoking the principle of equality between aliens and nationals, under the Calvo doctrine. These states considered the diplomatic protection as a violation by powerful states of the principles of non-intervention and of equality between aliens and nationals (Garcia-Amador, 1956).

With the emergence of international human rights law shortly after the Second World War, those rules became obsolete. Indeed, the international human rights law granted to all persons the protection of their rights without any distinction between aliens and nationals. This protection was considered enough whereby foreigners did not need any other special protection compared to the citizens of the host states.

Indeed, from the Second World War to the present day, new bases of international responsibility for supporting states appeared in various courts and literature. These bases concerned the attribution of NSAG conduct, aid or assistance, occupation/control of territory, and breach of a due-diligence duty to prevent. This is discussed in the next paragraphs in detail.

4.2. Bases of International Responsibility for Supporting States

4.2.1. Attribution of NSAG Conduct

Under international law the conduct of NSAGs is attributable to the state if the group acts under the instructions of or under the direction or control of the state (Levine-Spound, 2026). This was affirmed by the International Court of Justice (ICJ) in the 1986 *Military and paramilitary Activities in and against Nicaragua*

case (*Nicaragua* case). In this case, the ICJ determined that the United States provided substantial support to the *contras* insurgents to fight against Nicaragua. However, the court refused to hold the United States liable for human rights and humanitarian law violations committed by insurgents due to the fact that the United States had no effective control over the military operations in which violations were committed (*Nicaragua v. United States of America*, 1986). However, in the case the court did not provide the sufficient explanation of the concept “effective control”.

The ICJ explained the scope of effective control test in the 2007 *Genocide convention case*. In this case, Serbia and Montenegro was charged of supporting the Republika Srpska and other insurgents to commit genocide against the people of Bosnia and Herzegovina. In its decision, the ICJ refused to hold Serbia and Montenegro liable for this genocide due to lack of effective control over insurgents. To assert liability, the court contended that the defendant state had to exercise control over each operation in which violations were committed (*Bosnia and Herzegovina v. Serbia and Montenegro*, 2007)⁵.

Some courts questioned the theory of effective control. In *Tadić* case, The International Criminal Tribunal for the former Yugoslavia (the ICTY) developed the overall control standard. In this case, the tribunal determined whether acts of the NSAG could be attributed to the supporting state to elevate an internal armed conflict to the international armed conflict. The ICTY stated that the conduct of the insurrectional movement could be attributed to the supporting state if the state had overall control over the movement, whereby the state would have control in relation to the coordination or general planning of military activities of the movement (*Prosecutor v. Duško Tadić*, 1999)⁶. Nonetheless, both the overall control test and effective control test provide little protection to the victims of acts committed by NSAGs as it is difficult for the victims of these acts to prove that the concerned state had effective or overall control over the group that committed the alleged violations. Strict liability is better to ensure the enhanced protection of the victims of violations committed by NSAGs.

4.2.2. Aid, Assistance or Complicity

Article 16 of the International Law Commission (ILC) Articles on state responsibility deals with the situation of aid or assistance by the state in the commission of an internationally wrongful act. This article provides that a state which “aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if that state does so with knowledge of the circumstances of the internationally wrongful act”. State liability is conditioned of the knowledge by the assisting state of the violation of international law committed by another state. The rationale behind this condition is that the assisting state is presumed not to be aware of the wrongfulness of acts of another state (Sassòli, 2002). The main challenge is that the ILC Articles have zero

⁵ *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, I.C.J. Reports 2007, p.43.

⁶ *Prosecutor v. Duško Tadić*, Judgment: Case No. IT-94-1-A, 15 July 1999, p.56.

article providing for state liability for aiding or assisting NSAGs. This gives little protection to victims of acts committed by NSAGs with the assistance of a foreign state.

Various courts held states liable for assisting NSAGs to commit human rights violations. For instance, this occurred in the 2005 *Mapiripán massacre* case rendered by the Inter-American Court of Human Rights. In the case, Colombia was charged of supporting a paramilitary group, the *Autodefensa Unidas of Colombia* to commit massacre against the population of Mapiripán, in the Colombian central part. The Court ordered Colombia to compensate the victims due to the assistance provided by the Colombia military to the armed group (*Mapiripán massacre v. Colombia, 2005*)⁷.

Apart from aid or assistance, in some cases complicity with the NSAG has been cited as a basis of liability of the supporting state. This occurred in the *Ilaşcu case*. In this case, the subject matter was not about an innocent country whose territory had been used to attack another state. Instead, the case was about the complicity of the state whereby Russia was held liable for colluding with the separatist insurgents, refusing to prevent them to acquire weapons used in their violations of international law (*Ilaşcu and Others v. Moldova and Russia, 2004*)⁸.

4.2.3. Occupation or Control of Territory

Article 1 common to the Four Geneva Conventions requires states parties to respect and ensure respect for the conventions. This article has been interpreted as including the obligation states parties to ensure private parties including NSAGs to respect rules of international humanitarian law.

In the 2005 *Armed Activities on the Territory of the Congo*⁹ case, the court held Uganda responsible for failure to take all necessary measures to prevent violations of the rebel movement in Ituri region of the Democratic Republic of Congo. The main factor of liability was the status of the occupying power held by Uganda over the area in which violations were committed. For the court, since Uganda had such a status, it had a duty to curb unlawful conduct of its armed forces and those of private entities operating in the area under its jurisdiction (*Democratic Republic of the Congo v. Rwanda, 2006*).

Another relevant case is *Chiragov* rendered on 16 June 2015 by the European Court of Human Rights. In this case, Mr Elkhan Chiragov and other applicants, Azerbaijani nationals from the district of Lachin, alleged that on 17 May 1992 they were forced to flee from their district due to the civil war that opposed the separatists of the Nagorno-Karabakh region and the government of Azerbaijan. They alleged that those separatists were supported militarily, politically and financially by the government of Armenia; that they were unable to return to their homes due to the Armenian occupation. The Armenian government denied those allega-

⁷Mapiripán Massacre v Colombia, 49 victims and their next of kin v Colombia, Merits, Reparations and Costs, Inter-American Court of Human Rights, 15th September 2005, p.42.

⁸Ilaşcu and Others v. Moldova and Russia, European Court of Human Rights, Judgment, 8 July 2004.

⁹Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6.

tions. Still, the Court held Armenia responsible for the damage suffered by the applicants. As a ground of liability, the Court mentioned the control exercised by Armenia over the territory of Nagorno-Karabakh (*Chiragov and Others v. Armenia, 2015*)¹⁰.

4.2.4. Breach of a Due Diligence Duty to Prevent

From the Second World War to the present day, a certain number of scholars have investigated the obligation of states to exercise due diligence to prevent wrongful actions of private individuals (Mazzeschi, 1992). In this context, due diligence has been assessed in accordance with the state ability to do its bests to prevent violations (Longobardo, 2025). The scholars noted that states were required to prevent wrongful actions carried out by private individuals, that if they neglect this duty, they could be held responsible. However, these scholars highlighted that this obligation is relative; that it is dependent on a state's exercise of due diligence to prevent such actions (Manjoo, 2013).

Various courts have held states liable for breach of a due diligence to prevent unlawful acts of private actors. In the 1980 *United States Diplomatic and Consular Staff in Tehran*, the ICJ asserted the responsibility of Iran for failure to prevent losses caused by armed militants against the US diplomatic and consular personnel (*United States Diplomatic and Consular staff in Tehran, 1980*). As a ground of this responsibility the court mentioned the failure of Iran to take appropriate steps to prevent the losses. In this case, the militants in question appeared on the territory that was under control of the defendant state.

Human rights courts also dealt with the subject matter. In *Osman*, the European Court of Human Rights held that the UK's duty to protect the lives of its people included not only the criminalization of the wrongful conduct, but also taking efficient measures to protect people of the real danger faced by the victims due to wrongful acts of private persons (*Osman v. The United Kingdom, 1998*)¹¹. The court took a similar decision in *Kaya*, whereby Türkiye was ordered to compensate losses caused by private persons for its failure to take reasonable measures to ensure the safety of the victims (*Mahmut Kaya v. Türkiye, Judgment, 2000*)¹². Additionally, the same approach could be found in *Tradesmen* case, in which the Inter-American Court of Human Rights ordered the Colombia government to indemnify injuries caused by the paramilitaries due to the failure of the Colombian armed forces to curb the violence committed against the victims (*the 19 Merchants v. Colombia, 2004*). Nonetheless, both the European Court of Human Rights and the Inter-American Court of Human Rights have always maintained that the state's duty to prevent human rights violations of private actors applies only to the area that is under the jurisdiction or control of the state. This seems to indicate that a state has no legal obligation to protect people that are in the area that is under control of NSAGs.

¹⁰*Chiragov and Others v. Armenia*, Judgment (Merits), 16 June 2015, p.12.

¹¹*Osman v. The United Kingdom*, European Court of Human Rights, 28 October 1998.

¹²*Mahmut Kaya v. Türkiye*, European Court of Human Rights, Judgment, 28 March 2000.

In any case, in relation to the liability of the supporting state for failure to exercise due diligence to prevent wrongful acts committed by NSAGs, this kind of liability provides insufficient protection to the victims of human rights violations committed by NSAGs. Requiring victims to prove that a certain state was negligent to prevent injuries caused by NSAGs seems difficult as the defendant state has control over the key information involving its liability. Accordingly, for humanitarian reasons, this work suggests the adoption of an international convention providing for strict liability of supporting states for violations committed by NSAGs.

4.3. Liability of the Attacked State

4.3.1. The Search of a Relevant Convention

In relation to the relevant convention about the liability of the attacked state, since the end of the Second World War and the establishment of the United Nations (UN), this latter continued the task that had already been started under the League of Nations in relation to the rules governing state responsibility. In the 1957 Draft Convention on the International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, the Special Rapporteur on the subject matter pointed out that negligence by the attacked state to take efficient measures to prevent injuries suffered during the internal armed conflict could lead to state liability (Document A/CN.4/106, 1957). Nonetheless, the Special rapporteur cited no strong legal basis to support his argument.

Instead, in 2001, James Crawford, another special rapporteur, focused on the subject matter. In his commentary to the Draft Articles on State Responsibility, Crawford concurred with the general rule of non-liability, but contended that state liability could be engaged if any fault could be successfully charged against the state, including the failure to prevent or punish wrongful conducts of revolutionists (*Yearbook of the International Law Commission*, 2001). Still, Crawford cited no sufficient legal basis supporting his opinion.

Additionally, after the Second World War, private bodies also made drafts discussing state responsibility for losses caused by private persons. In the 1962 Principles of International Law that Govern the Responsibility of the State, the American Juridical Committee indicated that a fault of officials of the country in relation to the damage caused by private individuals could make the country responsible for such damage. However, the Juridical Committee failed to answer the question of whether or not states were responsible for failure to prevent losses caused by NSAGs.

Indeed, the state's obligation to prevent human rights violations is widely found in various conventions relating to the punishment of certain crimes. These include the 1948 Genocide convention¹³, the 1984¹⁴ torture convention as well conventions relating to the suppression of terrorist activities (Convention on the Safety

¹³Convention on Prevention and Punishment of the Crime of Genocide, 9 December 1948.

¹⁴Torture Convention of 10 December 1984.

of United Nations and Associated Personnel, 1994)¹⁵. Although these conventions have a broad language on the duty of state parties to prevent the criminal activities under discussion on their territory, they are quiet about the issue of jurisdiction. In contrast with the international covenant on civil and political rights¹⁶ which restricts the state's obligation to the territory on which it has jurisdiction or control, the conventions on the prevention and punishment of international crimes noted above state nothing about the subject matter. Importantly, they fail to state anything about any eventual liability of the state for the failure to prevent criminal activities committed by insurrectional movements.

The Geneva conventions of 1949¹⁷ and the Additional Protocol I relating to the protection of victims of international armed conflicts obligate states parties to require their military commanders to prevent breaches of international humanitarian law which would be committed by soldiers under their command. Still, the victims of the non-international armed conflicts seem less protected as the Additional Protocol II relating to such conflicts provides nothing about the duty of military commanders to prevent the same violations. Above all, all of those international humanitarian law instruments are silent about the state's obligation to prevent the violations done by NSAGs.

International human rights instruments may be cited as legal bases for the attacked state liability to prevent the damage caused by NSAGs. Article 2 of the International Covenant on Civil and Political Rights (ICCPR)¹⁸ requires each state party to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The duty "to ensure human rights" was interpreted by courts as a positive obligation of the state party to take positive measures to prevent third parties to violate them (*Velásquez-Rodríguez v. Honduras*, 1988)¹⁹. Article 2 of the ICCPR noted above may be cited as a legal basis to hold the attacked state liable for injuries caused by NSAGs. However, to be liable, the state needs to have jurisdiction or control over the area in which attacks have been committed. Without this control, the attacked state would successfully invoke *force majeure* as a defense to dispute its liability.

4.3.2. Conditions of Liability

The question has been whether there is *opinio juris* or customary international law supporting the liability of the attacked state for injuries caused by NSAGs. The International Committee on Red Cross (ICRC) gave a positive answer. In its alleged customary international humanitarian law rule 149, the ICRC stated that "a state is responsible for violations of international humanitarian law attributable to it, including those committed by persons or groups acting in fact on its instructions, or under its direction or control". According to this alleged rule the liability

¹⁵Convention on the Safety of United Nations and Associated Personnel, 9 December 1994.

¹⁶International Covenant on Civil and Political Rights, 16 December 1966.

¹⁷Geneva Conventions of 12 August 1949.

¹⁸International Covenant on Civil and Political Rights, 16 December 1966.

¹⁹*Velásquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of July 29, 1988 (Merits), p. 166.

of the state for the conduct of persons acting under its instructions, control or direction, including NSAGs, is part of customary international law. However, the ICRC did not provide enough state practice on the subject matter. Therefore, since there is no enough state practice or *opinio juris* on the issue under discussion, it may be asserted that customary international law cannot be cited as a basis of liability of the attacked state for injuries caused by NSAGs.

In its Commentary to Draft articles on Responsibility of States for Internationally Wrongful Acts of 2001, the International Law Commission (ILC) asserted the liability of the attacked state for the conduct of NSAGs if the state committed a certain fault. The fault mentioned by the ILC was the failure of the state to take various measures of vigilance to prevent or punish the wrongful act of the movement (International Law Commission, 2001). This was affirmed by the arbitral tribunal in *Ampal-American Israel Corp* case whereby Egypt was held liable for failure to prevent the attacks from the armed militants against the oil pipeline of the investor in Northern Sinai. In its decision, the tribunal contended that the standard of liability was not strict liability; that the standard of liability required was due diligence to protect the claimant's investment. However, it has to be noted that the tribunal held Egypt liable because the militants' attacks were committed in the area where the state had jurisdiction and control. Although Sinai was characterised by general lawlessness, the state retained some capacity to act and take all necessary measures to prevent the loss (*Ampal-American Israel Corp v. Egypt, 2017*)²⁰. Accordingly, in this case, the liability of the attacked state was based on two conditions, namely the exercise by the attacked state of control over the area in which wrongful acts were committed and the failure of the state to exercise due diligence to prevent the attacks.

5. Conclusion and Way Forward

This research has determined that since the nineteenth century, the doctrine of state's liability for failure to prevent human rights violations committed on its territory has been associated with the doctrine of state liability due to the fault including negligence and the failure to exercise due diligence to prevent the damage. Prior to the second World War, the doctrine appeared in the literature whereby various authors propounded that the state's main responsibility included the protection of foreigners residing on its territory, that any failure to protect them could lead to its liability. Since the Second World War, international conventions on the subject matter emerged whereby states parties found themselves under a legal obligation to prevent gross human rights violations on their territories. Nonetheless, these conventions seem to apply strictly on the territories that are under jurisdiction or control of the concerned states. The liability of the state for failure to exercise due diligence to prevent human rights violations seems not applicable to the territory that is under control of NSAGs. In contrast with the mainstream literature who have not separated the liability between states supporting insurgents

²⁰ *Ampal-American Israel Corp v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, 2017, 72.

and states attacked by insurgents, this study dissociated the eventual liability of either of such states.

In the nineteenth century, states supporting NSAGs were held accountable for their inability to suppress the wrongful acts of revolutionists. This inference was drawn from the evaluation of the *Alabama* settled by the Arbitration tribunal in the case between the British government and the United States, where the British government was held liable for not exercising adequate diligence to curb Confederate insurgents from utilising its territory to carry out attacks against the United States. In the same period, no state attacked by NSAGs found liable for failing to prevent their acts. This conclusion was reached by examining several cases, including the *Hanna* case judged by the claims commission established in 1871 between the United States and United Kingdom.

From the early decades of the twentieth century to 1945, states supporting rebels were held accountable for not preventing the damage caused by NSAGs. This aligns with an arbitral decision in the *Naulilaa* case rendered between the Portuguese government and Germany, whereby the German government was found liable for the damage incurred by Portugal due to its military attack against Portugal, which consequently led local residents to cause injuries against Portugal. Similarly, during this period, no judicial institution determined that states attacked by insurgents had a duty to prevent wrongful acts committed by NSAGs.

Before the Second World War, there were two contradictory rules related to state liability for losses caused by NSAGs against aliens. The first rule involved diplomatic protection used by powerful states to protect their nationals abroad. It asserted that aliens had a minimum standard of treatment whereby host states were required to provide them even if this would make aliens enjoy better treatment than nationals. The second rule concerned the principle of equality between aliens and nationals. It was invoked by developing nations to reject the special treatment of aliens which was considered as a form of abuse of power by powerful states against weaker states. The development of international human rights law after 1945 made those two rules obsolete. The new rules of human rights law provided equal treatment between aliens and nationals whereby foreigners had no ground to claim better treatment than nationals of the host state.

Since 1945, apart from rules relating to the protection of human rights, other bases of international responsibility for supporting states were developed. These bases concerned rules of attribution of the NSAG conduct to the state, in relation to the effective control and overall control over the group; the liability of the state for aid or assistance to the NSAG; occupation or control over the territory in which injuries were suffered; and the breach by the state of a due diligence duty to prevent wrongful acts of NSAGs.

However, with regard to the effective control or overall control by the state over the NSAG, this study revealed that both the overall control test and effective control test provide little protection to the victims of acts committed by NSAGs; it is difficult for the victims of the human rights violations to prove that the defendant

state had effective or overall control over the group that committed the alleged violations. Moreover, in relation to the liability of the supporting state for failure to exercise due diligence to prevent wrongful acts committed by NSAGs, this kind of liability also provides insufficient protection to the victims of human rights violations committed by NSAGs. Requiring victims to prove that a certain state was negligent to prevent wrongful acts done by NSAGs seems difficult as the defendant state has control over the key information involving its liability. Therefore, for humanitarian reasons, this study recommends having an international convention providing for strict liability of supporting states for human rights violations committed by NSAGs.

With regard to the liability of the attacked states, this study indicated that in principle these states are not liable for the conduct of NSAGs. The study determined however that the liability of the attacked state may be established in rare circumstances under two conditions, namely when the states have control over the area in which human rights violations were committed and when the states failed to exercise due diligence to prevent these violations.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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Appendix

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