ARTICLE 30: THE MULTIFUNCTIONAL "ABUSE CLAUSE"

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Abstract: article 30 of the Universal Declaration of Human Rights, despite what a first reading might suggest, contains an abuse clause that is central in human rights law. This clause contains a general principle against the abuse of rights, which can have several uses, including the guiding of the process of interpretation, permitting certain restrictions of rights, forbidding extraterritorial state abuses, and serving as a basis of implied non-state human rights obligations. On the other hand, it is also important to note that the direct use of a similar clause by the European Court of Human Rights can be problematic, reason why an indirect approach that requires ascertaining that limitations of rights are necessary, proportionate and legitimate is preferable and still permits to forbid abusive exercises of rights. Altogether, the clause serves the original purpose of the drafters of preventing persons, groups or states with a totalitarian bent from taking advantage of human rights institutions with the intention of thwarting liberties, and is not only applicable to fascist or Nazi actors, but also to every other actor that would act contrary to the values of human rights law. Initially seen as an exhortation, practice has led to the development of many functions of the clause.

Keywords: abuse of rights, implied obligations, systemic interpretation, restriction of rights, object and purpose, extraterritorial obligations, general principles, non-state actors.

Introduction

Article 30 of the Universal Declaration of Human Rights (hereinafter, UDHR) reads:

> "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

It could be tempting to regard that article as insignificant in the sense that it merely has a political exhortation or a self-evident indication, in contrast to other provisions of the Declaration with a clear impact on international legal practice related to the protection of concrete guarantees founded upon human dignity. After all, article 30 may be read by some as simply reminding that, in light of the risk of abuses that states and non-state actors can perpetrate in practice, they cannot construe any aspect of the Declaration in a way that would institutionally or legally empower them to carry them out.

Nevertheless, even though it was originally treated as an appeal by its drafters, who feared totalitarian actors could once again take over state power, a closer look at the development and

application of later provisions similar to and inspired by article 30 reveals that, far from being innocuous, this so-called savings or "abuse clause" is quite multifaceted and rich, serving the goal of preventing the consolidation of abusive interpretations and conduct that could subvert the foundations upon which the declaration is built.

In that regard, practice reveals that the savings clause under discussion can be used as a general principle, either to help choosing the interpretation most consistent with the spirit of the Declaration or other human rights norms; preventing the abuse of rights, by means of outlawing apparently lawful conduct; consolidating the upholding of the integrity of the object and purpose of human rights norms in relation to reservations, the interim obligation of signatory and contracting states under the law of treaties, or else; preventing the fragmentation of international norms in ways that would be detrimental to the protection of human rights, while promoting an internal and external systemic interpretation of human rights norms; enabling direct and indirect uses that permit (lawful) necessary and proportionate restrictions and state action against exercises of rights that would be inimical to the enjoyment of rights by others; serving as an additional support of horizontal human rights obligations, forbidding extraterritorial state abuses and the circumvention of state obligations; and being a legal basis of implied and express non-state obligations that are correlative to the enjoyment of human rights by others.

This Chapter will explore the previous uses and different elements of article 30 of the UDHR in the following fashion: the first section, on the background, will explore the *travaux préparatoires* of the provision, its influence in future similar articles, and the original vagueness it had as a consequence of how it was envisaged by its drafters. Afterwards, a second section will explore the elements required for article 30 to become operative, and its underlying rationales as currently understood. A third section will then address the uses of the "abuse clause" as a general principle, and its direct and indirect interpretative and implementation functions. Finally, the fourth section will explore how the savings clause studied in this Chapter can be the basis of several state and non-state obligations.

1. The Political and Legal Background of Article 30: its drafting history and enduring legacy

To properly understand the motivation behind the inclusion of article 30 in the UDHR, it is necessary to take into account that the abuses and ravages of World War II were still recent, and the different delegates considered that the war and the international crimes perpetrated during it had been the consequence of the action of factions with totalitarian ideologies that had slowly and subtly taken over the control of states. In this sense, for instance, it has been said that the inclusion of article 30 was made "to check and prevent the growth of nascent Nazi, fascist, or other totalitarian ideologies"; that the idea that some such clause was important "emerged from past experiences of fascist and other extremist parties gaining power in pre-war Europe through the exercise of protected political rights […] democracies do not need to wait until a totalitarian-type political party fulfils its program and seizes power"; and that, "shortly after World War II", there was "a growing concern at the international level" on how the war and abuses came to be. It can thus be said that past experiences made the representatives discussing the drafting of the UDHR consider that it was important to prevent the misuse and abuse of democratic institutions and freedoms before it was too late, by means of warning that such abuses were not endorsed by the Declaration in any way whatsoever.

Far from considering that the –then— recent experience would sooner or later become a forgotten historical episode, the risk of fascist or totalitarian groups expanding their influence and creeping even into democracies again was correctly regarded as still latent and something akin to a danger that could never be fully eradicated, and which called for action. Furthermore, the discussions on what would become article 30 reveal the apprehension that individuals, groups and states could technically avail themselves of the invocation of provisions on the exercise of liberties enshrined in the Declaration in ways that would be contrary to its spirit and objectives. In this regard, for instance, this Chapter will later examine cases in which some have attempted to act contrary to the spirit of human rights while invoking them, as happened with the conduct of some who wanted to propagate racist messages through leaflets and

pretended to shield their activities by invoking freedom of expression.

1.1. **The drafting history of article 30 UDHR**

The previous considerations are better illustrated by looking at the drafting history related to the inclusion of the content of what now is article 30. First, it is necessary to mention the original proposal, made by the representative of Lebanon, Mr. Malik, in which it was indicated that he:

> [S]uggested that the following words should be added at the end of the Declaration:
> "Nothing in this Declaration shall be considered to recognize the right of any person to engage in any activity aimed at the destruction of any of the rights and freedoms prescribed therein."
> He felt that the intention of the proposal should be clear. The Declaration granted all kinds of rights to mankind. Persons who were opposed to the spirit of the Declaration or who were working to undermine the rights of men should not be given the protection of those rights. It might be possible, particularly in the early [8] days of a despotic regime, for would-be tyrants to engage in activities under cover of and without infringement of the Declaration. Many Articles of the Declaration were open to such abuse and a provision of that nature was an essential protection. Its object was to prevent any persons from engaging in any subversive activities which might be in any direct or indirect manner damaging to the rights of man.
> Colonel Hodgson (Australia) enquired why the Article was limited to "persons", since in the past it had frequently been States which were the chief offenders against human rights. He proposed the phrase ". . . right of any State or any person . . ." should be used.
> Mrs. Mehta (India) pointed out that the Declaration dealt with the rights of individuals and not of States.
> Mr. Malik (Lebanon) said that the observation of the representative of India was strictly correct, but he had no objection if the Australian representative wished the rights of Governments to be included […]
> The Chairman put to the vote the proposal of the representative of Lebanon, as amended by the Australian representative, which was adopted by 8 votes, with 7 abstentions" (emphasis added).

The early version of the provision reveals several interesting aspects. First and foremost, that the Lebanese representative was moved by the fear that isolated or abusive interpretations of provisions of the UDHR could be made in ways that could thwart its purposes, either directly or indirectly. Moreover, the fear that this could be made by would-be "despotic" regimes before they showed their true colors, and the importance of preventing this before it was too late, are all too evident. Hence, to offset these risks, he proposed the inclusion of a savings clause that reinforced the protection of the human rights to be enshrined in the UDHR against abusive interpretations from which no one should benefit.

While the Lebanese delegate had spoken of individuals (persons) in his original draft, as shown in the previous excerpt, the Australian one thought that such phrasing was too narrow, considering that it was frequently the case that human rights

violations were perpetrated by states. While at first glance it may seem that the Australian representative's remarks are very much in line with the understanding of some that human rights violations are perpetrated –only— by states and, accordingly, that they are the ones that can have human rights obligations, such a hasty conclusion would be far from the truth, considering that he merely stated that states "frequently", but not exclusively, commit such violations. As section 4.2 of this Chapter will demonstrate, in fact article 30 can serve as a basis of non-state human rights obligations, and so has been recognized in doctrine and case law. Altogether, the exchange between the representatives on Mr. Malik's proposal would end up leading to the first expansion of the draft provision, with the addition of states as actors that, alongside individuals, could not abuse the content of the UDHR.

Contrasting this with the final version of the article, though, it is clear that the first drafts omitted to include, alongside persons and states, groups, which are currently also considered to have no "right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms". The inclusion of groups, again, responds to the experience of the takeover of power by totalitarian groups prior to World War II. In this sense, Johannes Morsink explains that:

> "[T]he idea linked behind the right and the article was clearly linked to the Nazi experience. The issue was that a state could have a perfectly good legal system and yet at the same time commit gross human rights violations […] Roosevelt acknowledged that "some provision should be made whereby the legal fulfilment of this Covenant should be bound up with its spiritual fulfilment. The example of Hitlerian tactics had been cited […] The word "group" was added to Article 30 in the Third Committee. The French delegation proposed this amendment because "experience has shown that it was rarely States or individuals that engaged in activities that aimed at the destruction of human rights […] Pavlov immediately backed […] by constant infiltration and propaganda had paved the way for the fascist regimes […] pointed to the Ku Klux Klan […] the representative from Belgium, also "was firmly convinced of the necessity to stop the activities of subversive groups and thus to prevent a repetition of the experience of a number of countries in the years immediately preceding the war" […] The word "group" was included by 42 votes with 1 abstention and the whole article was adopted unanimously" (emphasis added).

In addition to the gradual inclusion of other subjects different from persons that would fall under the *ratione personae* scope of article 30, in the understanding that groups and states could not invoke any element of the UDHR in an abusive way with the intention to negatively affect the enjoyment and exercise of human rights either, the drafting history also reveals other amendments of a more technical nature. First, instead of using

Malik's wording that there is no possibility of deriving from the Declaration "the" right to engage in human rights destruction, the final version, thanks to a suggestion made by the Chairman, ended up referring to the absence of "any" such right, which is a better phrasing due to its being more encompassing and denying *any* potential abusive interpretation. On the other hand, instead of referring to the rights "prescribed" in the Declaration, the modification leading to the final version would talk of the rights "set forth" therein. In this regard:

> "The Chairman put to the vote a proposal that in the English text of the amendment the words "the right to engage" should be replaced by the words "any right to engage", and that the word "prescribed" should be replaced by the words "set forth"".

1.2. **The vagueness of article 30, and the pending later development of its content**

Interestingly, despite the proclaimed aspiration of the drafters that article 30 could serve to prevent the gradual erosion of human rights guarantees by extremists, the provision as such does not directly say much on how it was to be implemented if and when persons, groups or states were found to act as described therein. However, precisely such vagueness may explain why its content has been so influential in the drafting of similar articles and in the jurisprudential and doctrinal development of a wide range of possible uses of the clause, that include, as this Chapter later explores, the functions of guiding interpretation, justifying non-state obligations and extraterritorial state duties, or permitting certain restriction of rights, among others. Therefore, while authors as Eric A. Posner have criticized certain international human rights norms as too vague, such openness precisely lends itself well to evolutionary interpretations; the future construction of a common understanding of its content by legal communities (including the one in which European Court of Human Rights operates) that shape its meaning and the interpretation of its language in response to problems and social needs they face; and to an adjustment to future cases and problems not originally foreseen, as the example of the guarantee of freedom of expression and its protection in the internet demonstrates.

As to the vagueness of article 30 UDHR, it is interesting to note that since the very discussions on the proposals to include it in

the Declaration took place, such aspect was duly noted. In this regard, the representative of Uruguay, Mr. Victorica, argued that "[i]n his opinion the wording of the proposed Article was obscure". It is likely that the article originally served as a warning and exhortation, raising awareness of potential risks of misuse and abuse. As Jacob Dolinger said, after posing the question of "how does Article 30 provide a guarantee against the growth of a totalitarian ideology and consequential regime", Cassin defended the article on the basis that, far from being evident to everyone in practice that no one shall violate human rights, it had occurred that the spirit and rights of the Declaration had been utterly disregarded, reason why it was important to publicly state them. Accordingly, for Dolinger, "[T]he belief in the power of a mere proclamation was indeed the tonic of the assembled delegates".

But in addition to the possibility of its actual content being established by future developments, openness can also beget certain dangers. Indeed, there is a risk that a clause against abuses may be abused itself, reason why I argue that it is also subject, in turn, to the prohibition of abuse of rights. As to these risks, Torkel Opsahl and Vojin Dimitrijevic commented that with article 30 there is "an obvious legal and political dilemma in allowing the parties […] to be judges […] difficult and controversial decisions are called for", and that "[t]here is no evidence in the background and travaux préparatoires that these difficulties were apparent to the drafters of the UDHR, who were mostly concerned with the need to prevent the resurrection" of totalitarian regimes.

1.3. **The influence of article 30 UDHR in later human rights instruments**

That article 30 UDHR has been influential is demonstrated by the fact that "the savings clause in article 30 is found in essentially all subsequent human rights treaties". Apart from some interesting express mentions of article 30, many developments of its content are precisely based on the norms that replicate it or are inspired by it, including those of regional supervisory bodies.

Among the provisions that have been more or less evidently

based on article 30 UDHR, the following noteworthy ones can be mentioned. First, common article 5.1 of the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights says that:

> "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

The previous wording is interesting, first, because instead of referring to rights and freedoms "set forth" in the respective instrument, it talks of those that are "recognized" in it, which is consistent with the idea that the human dignity on which human rights are to be founded is "inherent". Secondly, *any and all* acts aimed at human rights violations are covered by it; and thirdly it is indicated that human rights restrictions or limitations cannot exceed those which are strictly permitted under the treaty, which makes sense insofar as the Covenants directly bind states (article 2), which in practice have the power to determine such limitations –although some non-state actors with territorial administration powers have also been found to be subject to those treaties.

At the regional level, article 29 of the American Convention on Human Rights stipulates that "[n]o provision" of that treaty can be interpreted as "permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein". Despite using a slightly different wording, the same logic of article 30 UDHR is found in its content: no person, group or state can act against –the terms destroy or suppress can be understood to refer to this same idea– the enjoyment and exercise of recognized human rights. The idea of not permitting excessive restrictions found therein, in turn, echoes common article 5.1 of the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. The African Charter on Human and Peoples' Rights does not include a provision that closely follows article 30 UDHR, but still does refer, in article 27, to the duty of individuals to respect the human rights of others, by saying that "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common

interest."

In the human rights system of the Council of Europe, the salient provision for the purposes of this study is article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which clearly follows article 30 UDHR when saying that "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

The previous articles demonstrate that, in spite of its somewhat initial vagueness, the drafters of later instruments agreed that it was important to warn against and prevent the possibility of different actors eroding human rights guarantees by abusively relying on certain uses and interpretations of international provisions, reason why they decided to include articles to that effect. In my opinion, while this is important, insofar as it demonstrates the influence and consciousness of the relevance of article 30 UDHR, more than the imitation of its content in other norms, it is precisely the fact that, unlike the Universal Declaration of Human Rights (section 1.2), the treaties in which those replicas are found are supervised by universal and regional bodies, which has been one of the factors contributing to the enduring relevance of the abuse clause. This is because, through their practice, those bodies have come up with ways that materialize and give effect to the objective of the "abuse clause", sometimes in divergent ways unique to each system, as explored in sections 2 and 3. After all, human rights treaties become "living instruments" thanks to case law and practical developments. That being said, in addition to the invocation of the articles inspired by article 30 UDHR, sometimes international bodies have directly implemented and relied on this article with interesting implications, as will also be explored later on in this Chapter.

2. The underlying logic and the main elements of article 30 UDHR

The study of the preparatory works of article 30 UDHR makes it clear that it was inserted because it was deemed important to stress that those who attempted to take advantage of legal

institutions and human rights norms with the intention and effect of acting contrary to the enjoyment of such rights by others ought to be regarded as abusive and behaving against the spirit animating the Declaration. Accordingly, such attempts ought to be regarded as falling outside the scope of international legal entitlements due to their abusive nature and, as a consequence, permit restricting the exercise of *only* those rights that could be used contrary to the rights of others, as the section on the *raison d'être* and *ratione materiae* scope of article 30 will explore. On the other hand, because of the underlying rationale of the clause, while totalitarian actors and their recent abuses certainly were in the thoughts of the drafters of the UDHR and prompted the insertion of the clause, it would be a mistake to limit the applicability of article 30 only to those who profess fascist, Nazi or similar ideologies, as this section will explore. Finally, in this section the elements that trigger article 30 and similar provisions will be identified, namely: intentionality and alterity.

2.1. **The underlying logic, aims and scope of article 30 UDHR, as currently understood**

While totalitarian abuses and takeover of state power explain the inclusion of article 30 UDHR, it would be a mistake to restrict its effects to those actors professing or adhering to such ideologies. In fact, the very words of article 30 suggest this when referring to "any activity or […] any act aimed at the destruction of any of the rights and freedoms" (emphasis added), without conditioning to the presence of certain totalitarian ideas. This makes sense, insofar as saying otherwise would needlessly reduce the scope of the clause against abusive interpretations and invocations of human rights norms, and would permit abuses by others, running contrary to the idea that the human dignity that is the basis of human rights is not conditional, and so that its respect and protection cannot be made subservient to the presence of actors with a certain identity or political stance, but rather must be given to human beings *against all possible abusers*, be them state or not, Nazi or not.

In this regard, the Inter-American Court of Human Rights mentioned in its Advisory Opinion OC-4/84, in relation to article 29 of the American Convention on Human Rights (inspired on article 30 UDHR, see section 1.3, supra), that such

article "was designed specifically to ensure that it would in no case be interpreted to permit the denial or restriction of fundamental human rights and liberties". In other words, the underlying logic of the article is to prevent acts contrary to the enjoyment and exercise of human rights and to foreclose the possibility of abusive interpretations contrary to that logic, regardless of *who* intended to rely on them. Likewise, the United Nations Special Rapporteur in the field of cultural rights has said that while the original intention of the drafters was "to impede the abusive exercise of certain rights of the International Covenant on Civil and Political Rights (hereinafter, ICCPR) by individuals and groups supportive of totalitarian ideologies", article 30 is also relevant towards others who, following different ideas or tenets, also ignore and act contrary to human dignity and human rights, reason why it is applicable to contemporary extremists, as explored in section 2.2.

The European Court of Human Rights, in turn, has also concurred with the idea that savings clauses as the one under examination can be used to prevent abusive interpretations and conduct of *any* actor, whatever ideology it espouses. In this sense, in *Lawless v. Ireland*, the Court said that "no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms" (emphasis added).

While the *ratione personae* scope of article 30 is broad, in accordance to the previous considerations, the same cannot be said of its *ratione materiae* scope, i.e. in relation to what rights can have their exercise limited by virtue of the application of the "abuse clause". This is so because, regardless of whether the supervisory bodies of a given human rights system adopt the direct or indirect applicability of the clause (explained in section 3.5, infra), the fact that some actors intend to invoke human rights abusively, contrary to the rights of others, does not permit authorities to limit any and all of their rights, but *only* those exercises that would actually permit to materialize designs contrary to the rights of others –and as long as the right in question permits restrictions, i.e. is not absolute (see section 3.5, infra). As expressed by the European Commission of Human Rights in *Glimmerveen and Hagenbeek v. The Netherlands*:

> "The general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention. To achieve that purpose, it is not necessary to take away every one of the rights and freedoms guaranteed from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms. Article 17 covers essentially those rights which, if invoked, will facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention […] The applicants are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities which are, as shown above, contrary to the text and spirit of the Convention and which right, if granted, would contribute to the destruction of the rights and freedoms referred to above.
> Consequently, the Commission finds that the applicants cannot, by reason of the provisions of Article 17 of the Convention, rely on Article 10 of the Convention" (emphasis added).

Similarly, in the case of *Robert Faurisson v. France*, the Human Rights Committee mentioned how, for the European Commission of Human Rights, "article 17 of the European Convention concerned essentially those rights which would enable those invoking them to exercise activities which effectively aim at the destruction of the rights recognized by the Convention".

Altogether, the *ratione personae* and *ratione materiae* scope of article 30 and similar provisions is consistent with the idea that there may be legitimate (correlative) duties of non-state actors that are necessary to ensure the enjoyment of human rights, i.e. "duties to respect the human rights of others", as has been argued by John H. Knox and confirmed by the notion that non-state obligations can be implicitly found in article 30 UDHR, as is explained in section 4.2 of this Chapter.

2.2. **Contemporary relevance of the "abuse clause" towards preventing the legitimation of abuses of extremists with different ideologies**

As argued above, it is important not to construe the excerpts and analyses found in section 1 as limiting the applicability of article 30 exclusively to abusive conduct carried out by those who sympathize with far-right ideologies espoused by Nazis, fascists and others, excluding its relevance in relation to others. If this were so, the scope of the abuse clause would certainly be needlessly and excessively narrow, and would leave the door open for attempts to abusively invoke human rights provisions by others, and for violations by those who espouse other ideologies or have joined different groups which have also demonstrated a clear disregard for human dignity. In this regard, in reports presented by the Special Rapporteur in the field of cultural rights to the Human Rights Council and the General

Assembly of the United Nations in January and July 2017, respectively, invoking precisely article 30 UDHR, it is stressed that what matters for the purposes of determining if the provision is applicable is not the specific denomination of an ideology but, rather, the fact that human rights and dignity are disregarded by those who espouse it in their practice. In this sense, the Rapporteur argued in its January 2017 report that:

> "Fundamentalists sometimes seek to advance their agenda internationally or to shield themselves from scrutiny by deploying the language of human rights and religious freedom in particular. The Special Rapporteur stresses in this respect the importance of article 30 of the Universal Declaration of Human Rights, as well as of common article 5 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights, which warn that nothing in these instruments shall be interpreted as implying for any State, group or person any right to engage in any activity aimed at the destruction of any of the rights and freedoms recognized therein. The original intention of the drafters was to impede the abusive exercise of certain rights of the International Covenant on Civil and Political Rights by individuals and groups supportive of totalitarian ideologies, which have many commonalities with some extremist and fundamentalist movements. While these provisions can be the object of government misuse, they also serve as a purposeful marker of the need to consider the rights of others when interpreting certain rights in context. As underscored previously, it is crucial to combat fundamentalism, extremism and violent extremism, and to do so taking into consideration the human rights framework and in particular the regime of limitations to human rights" (emphasis added).

The previous citation also underscores a non-negotiable aspect: even when facing groups and actors that utterly disregard human rights, countering their actions must be done in a way that is lawful and consistent with human rights law. This idea has also been espoused by bodies such as the Inter-American Commission on Human Rights, which mentioned in its Report on Terrorism and Human Rights that "states should take into account relevant commitments under all international human rights instruments to which they are bound in identifying and applying their international human rights obligations to anti-terrorist initiatives."

2.3. **Elements for the applicability of article 30 UDHR: intentionality and alterity**

The reference to conduct "aimed at the destruction" of human rights in article 30 UDHR has been interpreted as referring to an element of intentionality or design, which would be required for that article to become operative –needless to say, failure to identify such mental element would in no way preclude the possibility of using other bases of restriction of rights whenever they are proportionate, lawful, and necessary in light of the necessity of protecting the human rights of others.

As to intentionality, Stephen P. Marks commented that article 30 UDHR and article 9 of the 1986 Declaration on the Right to Development share the logic of excluding abusive conduct and interpretations, and that there is a condition of "intentionality" made even more clear by the latter Declaration when excluding interpretations "that would imply "that any State, group, or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights."" Likewise, in *Robert Faurisson v. France* the Human Rights Committee noted that the European Commission of Human Rights had considered that individuals "who were prosecuted for possession of pamphlets whose content incited to racial hatred and who had invoked their right to freedom of expression, could not invoke article 10 of the European Convention (the equivalent of article 19 of the Covenant), as they were claiming this right in order to exercise activities contrary to the letter and the spirit of the Convention" (emphasis added), suggesting that the intentionality of the individuals was relevant for the resolution of the case.

Using the same words of the Commission, in the case of Lawless v. Ireland, the European Court of Human Rights excluded the applicability of article 17 because "G.R. Lawless has not relied on the Convention in order to justify or perform acts contrary to the rights and freedoms recognised therein" (emphasis added). Interestingly, article 29 of the American Convention on Human Rights seems to require no intentionality, perhaps sufficing –as the wording suggests— that an actor "suppress[es] the enjoyment or exercise of the rights and freedoms" for it to be applicable, apparently not requiring mental elements.

Finally, and flowing from the element of correlation between the prevention of abuses and the protection of human rights (section 2.1, supra), for article 30 to become operative it is necessary to demonstrate not only an intention to act against such rights, but also which rights would be denied or affected by an allegedly abusive exercise of freedoms. Otherwise, the applicability of the "abuse clause" cannot prosper. This stresses the importance that the invocation of the clause is supervised, to prevent "abusive" uses of such clause (section 1.2, supra). In this way, in a passage that confirms the two elements for the applicability of the

savings clause, the Human Rights Chamber for Bosnia and Herzegovina said that for article 17 to be invoked:

> "[T]he applicant needs to show an act of the respondent Party aimed at the destruction of any of the rights and freedoms protected by the Convention or its Protocols, or aimed at their limitation to a greater extent than is provided in the Convention. However, the applicant has failed to substantiate, in relation to which rights the respondent Party misused its powers, and how it misused them. Therefore, the Chamber decides to declare this part of the application inadmissible as manifestly ill-founded" (emphasis added).

In relation to alterity, in the case of X v. Colombia, the respondent state argued that for allegations based on article 5.1 of the ICCPR to prosper, the claimants must demonstrate "in what way a State, a group or person was granted the right to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms recognized" in that treaty.

Ultimately, if an abusive conduct falls within the scope (section 2.1) of article 30 UDHR and the elements discussed here are met, then such conduct cannot be protected under the Declaration. Altogether, if article 30 UDHR is applicable because the elements are met and a conduct falls under its scope, it de-legitimizes and makes it impossible to regard certain abusive interpretations and conduct as falling under the protection of human rights law, considering that, as Momir Milojevic has said, according to his "conception of abuse, persons who commit such acts will be outside the law". What this concretely means will depend on the circumstances and the interpretation of the supervisory bodies: it may mean that states and non-state actors are under implied human rights obligations (section 4), that abusive interpretations are to be excluded (section 3), or that limitations or denials of the invocation of rights can take place (section 3).

2.4. **A requirement of a high threshold?**

There may –or not— be a third element in addition to intentionality and alterity, though: the seriousness of the respective conduct. In this sense, Momir Milojevic has considered that the "abuse clauses" provide "for the prohibition of activities of a highly dangerous kind. It remains to be seen whether activities that are not aimed at "destruction" constitute abusive acts."

Likewise, E.V.O. Dankwa and Cees Flinterman suggested that a high threshold must be met for the clauses to be applicable, when they posited that abuse clauses seek to address "situations where a state party may seek to justify violation or neglect on the basis that it was either necessary or unavoidable for the

promotion of another right. […] Similarly, in respect of groups or individuals, Principle 57 [of the Limburg Principles] prohibits their destruction of any of the rights recognized in the Covenant by relying on any of the other rights". After all, the notion of "unavoidable" the authors refer to is much more demanding than that of necessary, in light of how bodies as the Inter-American Court of Human Rights have referred to necessity as "not synonymous with "indispensable," [but implying] "the existence of a 'pressing social need'" and that for a restriction to be "necessary" it is not enough to show that it is "useful," "reasonable" or "desirable."'"

It may seem that not any threat to human rights guarantees, but only those that make recourse to as drastic a provision as article 30 UDHR indispensable, given what is at skate, justify its being used for the purposes of justifying limitations of rights. This could be seen by some as being confirmed by the fact that article 17 of the European Convention on Human Rights has only been applied in limited circumstances. In this regard, considering that the Communist Party in the Federal Republic of Germany "according to its own declarations, proclaimed the goal of proletarian revolution and the dictatorship of the proletariat", the application of the clause it embodies:

> "[S]afeguard[ed] the free functioning of democratic institutions […] [and] prevented the Communist Party from relying on those Convention articles that guarantee freedom of opinion, expression and association. In subsequent decisions regarding incitement to racial discrimination and anti-Semitism the Commission and the Court repeatedly recalled the 'general purpose' of the abuse clause 'to prevent totalitarian groups from exploiting in their own interests the principle enunciated by the Convention […] Article 17 was meant to protect democracy against new emerging totalitarian regimes […] However, the Convention organs have stretched its material scope to any act that is incompatible with the Convention's underlying values" (emphasis added).

Is it then safe to consider that only serious situations in which central values and institutions or rights are at stake permit using article 30 UDHR? I do not think so. In spite of what the previous excerpts may suggest, I consider that they are relevant in the context *of* the Council of Europe, in light of the fact that, there, the application of article 17 of the European Convention on Human Rights is understood as making it possible to lead to a blank denial of the exercise of rights without conducting a specific review of proportionality and necessity (see section 3.5, infra). Thus, given the severity of the direct applicability of article 17, it is reasonable to require a high threshold for *its* applicability. Conversely, if the clause simply confirms the possibility of restricting rights when necessary in a proportionate manner, requiring such a threshold may not seem reasonable, since otherwise many minor abuses would be permitted in spite

of their affecting the exercise and enjoyment of the human rights of others. The analysis of the question of how to understand the word "destruction" of human rights confirms this, because in doctrine some have considered that the expressions "destruction" or "abuse" of human rights are either considered to equate with or correspond to the notion of human rights "violations"; while those who consider that only states have human rights obligations sometimes prefer to use such expression(s) when referring to the conduct of non-state actors that is contrary to those rights.

3. Concrete uses of the principle enshrined in the "abuse clause"

As discussed by Antonio Cançado Trindade, general principles of law are different from rules and norms. Moreover, they can have a substantive or procedural nature, guide the conduct of the addressees of international law and the interpretation and application of rules, and also be applied directly in concrete cases. Similarly, Antonio Remiro Brotóns has explained how general principles of law serve, for instance, to fill gaps, guide interpretation and the settlement of disputes. Taking this into account, is it possible to consider that article 30 UDHR embodies a general principle? Certainly, general principles can be found in treaties and international instruments (as the UDHR). Concerning our question, Torkel Opsahl and Vojin Dimitrijevic have argued that there is a "principle of interpretation stated in article 30"; while Hurst Hannum has considered that:

> "[T]he savings clause in article 30 is found in essentially all subsequent human rights treaties and […] may simply reflect the general principle of international law which does not allow a treaty party to act in a way which would defeat the object and purpose of the treaty while purporting to rely on its provisions" (emphasis added).

Contrasting the functions general principles can serve, and how article 30 UDHR has been understood, there is support for regarding the latter as embodying one of the former. This conclusion permits to identify the different functions that the savings clause can have, including but not limited to the orientation of interpretation and the exclusion of certain abusive

constructions; the use of the abuse of rights doctrine; favoring a systemic interpretation; and permitting to restrict rights under some circumstances. This section will explore concrete ways in which the principle found in article 30 can be found to guide interpretation or help resolving concrete problems –on validity of reservations, restrictions of rights, or else.

3.1. The savings clause and the guidance of interpretative processes

Concerning the idea that principles can help to guide interpretation, it is interesting to note that provisions somewhat similar to the clause have been considered to "prevent reliance on the rights […] to justify infringement of the rights and freedoms of others […] [and to] ensure that rights set out therein are not destroyed or limited by misinterpretation and misuse" (emphasis added); while M.J. Bossuyt has similarly argued that the "abuse clauses" serve:

> "[T]o provide protection against any misinterpretation of any provision of the covenants which might be used to justify infringement of any rights and freedoms recognized in the covenants or the restriction of any such right or freedom to a greater extent than was provided for therein" (emphasis added).

The nature of article 30 UDHR as a general principle thus makes it multifunctional and able to fulfil several purposes, including the guidance of interpretation and the prohibition of the abusive evasion of responsibilities. As is often the case, given the openness of principles as that enshrined in the abuse clause, it may be sometimes necessary to resort to equity to have help in the process of interpretation. In this regard, B. G. Ramcharan has said that, in relation to the question of "[w]hat are acts "aimed at the destruction" of human rights […] To apply provisions containing such words a human rights organ must make recourse to equitable notions".

3.2. The "savings clause" and preventing the abuse of rights

On the other hand, the prohibition of abuse of rights has been considered as a "long-standing general principle of law" and a "systematic principle" of human rights instruments; and provisions as article 30 UDHR or article 17 of the European Convention on Human Rights are thought of as precisely being concerned with "the prohibition of abuse of rights", as the

Human Rights Chamber for Bosnia and Herzegovina indicated.

One concrete manifestation of this may be found in the idea that general principles, as the principle of effectiveness, require that chosen interpretations lead to effective protection in practice. The "abuse clause" can also serve such function, for instance when it is used to prevent the circumvention of state obligations, as has happened in cases when states have attempted to use apparently legal mechanisms to avoid complying with their human rights obligations. This can be seen, for example, in a Decision on admissibility and merits of the Human Rights Chamber for Bosnia and Herzegovina, which considered that:

> "However, the Chamber finds that, if States could simply withdraw the citizenship of one of their citizens in order to expel him without being in violation of Article 3 of Protocol No. 4 to the Convention, then the protection of the right enshrined in that provision would be rendered illusory and meaningless. A measure of the national authorities, which has as its sole object the evasion of an obligation, is equivalent to a violation of that provision. This is also implicit from the rationale underlying Article 17 of the [European] Convention [on Human Rights, based on article 30 UDHR]" (emphasis added).

Another example of the "abuse clause" being pertinent for forbidding abusive interpretations is provided in the prohibition of extraterritorial abuses, based on the idea that if it is not permitted to carry out violations inside the territory of one state, it would make no sense for it to be permitted to perpetrate them abroad. Concerning this, it has been said that:

> "According to article 5 (1) of the Covenant [inspired on article 30 UDHR, see section 1.3 supra] […] It would be unconscionable to so interpret the responsibility under article 2 of the Covenant [on Civil and Political Rights] as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory".

Altogether, interpretations that would lead to a lowering of guarantees or the undermining of human rights pillars, such as state obligations, are to be excluded as abusive. As section 4.1 will explore, abuses of right are contrary to human rights obligations, and thus unlawful. As Momir Milojevic considers, those who commit abuses "will be outside the law; they will be breaking the law".

3.3. The function of the "abuse clause" to counter-fragmentation: systemic harmonization

Another interesting use that the savings clause found in article 30 UDHR and similar provisions can have is contributing to integrating different elements of human rights instruments

(internal harmonization) and helping to take into account human rights considerations in the application of other norms of international law mainly devoted to other legal interests (external harmonization), in line with what articles 31.2 and 31.3 of the Vienna Convention on the Law of Treaties of 1969 require. This systemic approach, facilitated by the clause, thus helps to counter fragmentation, in line with the conclusions on systemic interpretation found in the study of the International Law Commission on fragmentation.

As to the internal dimension of harmonization promoted by the clause, it can be said that, as part of the instruments in which it is found, all the different components of said instruments must be analyzed taking into account the proscription of abusive interpretations and uses of rights and freedoms. In this way, for instance, the Southern African Development Community Tribunal considered that:

> "Article 2 (3) of the Covenant, when read in conjunction with Article 5 [closely following article 30 UDHR, see section 1.3 supra], thus forbids, in our view, any legislation or conduct which may render remedies ineffective or may obstruct the implementation of judicial remedies or may provide State immunity from enforcement of Court orders".

On the other hand, concerning external harmonization, the ICSID award in the Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic stated that, due to the necessity of taking into account "any relevant rules of international law applicable in the relations between the parties", when analyzing BITs as the one it studied, such treaties must "be construed in harmony with other rules of international law of which it forms part, including those relating to human rights", specifically including article 30 of the Universal Declaration of Human Rights.

While both the internal and external harmonization exercises are not limited to or expressly required by article 30 UDHR, the interplay of such provision is relevant because, internally, it forecloses any interpretation of any other element of the instruments such clause is inserted in that would be abusive and contrary to their underlying values (section 2.4, supra); while externally it requires considering whether the subjects participating in a given relationship or procedure, non-state ones included, have observed the obligations they implicitly have

under such provision (section 4.2) or have pretended to come up with abuses of rights.

3.4. The savings clause and the protection of the object and purpose of human rights instruments

Another interesting aspect of the principle enshrined in article 30 UDHR and similar provisions is that it can be understood as actually demanding that the object and purpose of the instruments they are included in are not frustrated or subverted by abusive interpretations. This was said by Hurst Hannum when he argued that:

> "[T]he savings clause in article 30 is found in essentially all subsequent human rights treaties and may be seen as an admonition that the Declaration's provisions must be implemented in good faith, so as not to undermine its very purpose. This may simply reflect the general principle of international law which does not allow a treaty party to act in a way which would defeat the object and purpose of the treaty while purporting to rely on its provisions" (emphasis added).

Accordingly, the savings clause is influential insofar as it must be taken into account when ascertaining if a given reservation is valid, considering that contravening the object and purpose would render one as invalid; when carrying out any interpretation of related norms, since consideration of the object and purpose is part of the general rule of interpretation; or when analyzing if the interim obligation has been observed or breached, among others.

3.5. Indirect and direct uses of the "abuse clause" –to restrict or to deny the exercise of rights?

One final use of the principle found in article 30 UDHR is related to helping resolve concrete legal issues (section 3, supra), specifically what can be done when an actor, be it a state, group or individual, is considered to have aimed to act contrary to human rights while purportedly exercising entitlements found in the respective human rights instrument. In this regard, it is necessary to note that practice has diverged, concretely because the European Court of Human Rights has considered that if article 17 of the European Convention on Human Rights is applicable, it is possible to forego the analysis of whether a restriction is necessary and balanced, and as a result thus endorse the denial of the exercise of a right. This is considered

as a “direct” application of the prohibition of abuse. Otherwise, such prohibition can be taken into consideration indirectly, by conducting an examination of the legality of a given restriction of rights –this latter option seems preferable to me, given how less prone to abuse it is when compared to direct applications. Most other human rights bodies use only the latter approach. As to the distinction between these so-called direct and indirect uses, Hannes Cannie and Dirk Voorhoof said that:

> “[I]n cases in which Article 17 is applied directly the balancing procedure described above is completely absent. As the decision strongly relies on the national authorities’ assessment and is exclusively based on a (superficial) content examination, the statements are simply not considered under the speech-protective scope of Article 10 ECHR. As a consequence, the applicant is categorically refused any protection under his or her right to freedom of clause’s application, to which is ascribed the benefit of avoiding some dangers Article 17 could otherwise bring into being” (emphasis added).

In the words of Tinatin Tskhvediani, a similar idea is expressed in the understanding that:

> “The engagement of Article 17 eliminates the need for a balancing process under Article 10, as the State is not required to show that there was a pressing need for interference, but only to prove the content (and not the impact) of the speech to this huge effect of removing the speech from the protection purely on the basis of content and the dangers of its abusive application, it has been relatively rare for the Court to refer to Article 17”.

Given the absence of a balancing analysis whenever abuse clauses are applied so directly, the rarity of its application, alluded to at the end of the previous excerpt and confirmed by Tajadura Tejada, is explained by the fact that such use is tempered out of awareness of how the power it conveys can be misused, reason why it is reserved for cases that allegedly meet a very high threshold of apparent evident actions aimed at the “destruction” of human rights (section 2.4, supra). In this sense, this possibility has been accepted in the European system in relation to Holocaust denial laws, since it is considered that “the revisionist expression refers to the “category of clearly established historical facts, such as the Holocaust”, it is removed from the protection by the abuse clause”. Others, as Peter Van Dijk, consider that the harshest direct use of the clause would take place when a situation is “off balance” because, rather than there being a situation in which one right is given more room than the other without any of them being fully denied, when the clause is directly used it is because the “core” of a right –as the right to life— is at stake, event in which, he argues, “Article 30 applies and an international intervention would be justifiable”.

Therefore, according to Svetlana Tyulkina, in such events some posit that "general restrictions on activities aimed at the destruction of any" human right may be placed, provided that the activities to be restricted are not considered the exercise of a "non-derogable" right.

According to the previous ideas, conversely, in events that do not reach the sufficient threshold, namely those:

> "[C]ases, where there is less explicit hate speech and the room for hesitations, instead of engaging Article 17, the starting point for the Court is that the expression could a priori be integrated into a public ECtHR examines with "close scrutiny" the interference under tripartite test: once the legality and the legitimacy of interference are established, the Court reviews the necessity and the proportionality of measures".

Contrary to the permission of outright bans of certain exercises of rights in exceptional circumstances, another use of abuse clauses, resorted to by the European Court in relation to apparently less evident cases (of conduct with a clear intention of acting contrary to the underlying values of human rights) and by other human rights bodies in the cases examined by the author of this Chapter, refers to how the abuse clause simply endorses and calls for the possibility of restricting or limiting the exercise and enjoyment of human rights, provided that such restriction is necessary, proportionate, and pursues a legitimate aim –such as the protection of the human rights of others.

This option of permitting adequate limitations of rights under certain circumstances certainly flows from the logic that article 30 seeks "to combat fundamentalism, extremism and violent extremism, and to do so taking into consideration the human rights framework and in particular the regime of limitations to human rights" (emphasis added). Indeed, as a result of the action of the drafters of the Universal Declaration of Human Rights, "in some articles […] an attempt has been made to put a general limit to the human rights by stipulating that no one will have the right to aim at the destruction of the rights and freedoms" (emphasis added).

While both the direct and indirect approaches described herein may be considered as giving expression to the eventual necessity of limiting rights, the former is too risky because of how prone to abuse it is. Certainly, it does not entail as detailed and close an examination as a balancing analysis that considers necessity,

proportionality and legitimacy of the aims. Moreover, it may fail to take into account nuances of cases and specificities of the circumstances. Furthermore, the "softer" indirect approach does not imply that abusive exercises of rights will be permitted at all, since restrictions can be permitted if the conditions of limitations are satisfied, but still the analysis under that approach will be more careful. In that regard, Luis Recaséns-Siches has said that, if incorrectly applied, the abuse clause may lead to blank denials that are unfair and will undermine the rights and freedoms. In turn, Hannes Cannie and Dirk Voorhoof have argued that:

> "[A]ll factual and legally relevant elements of the specific case, such as content, context, intention, impact and the proportionality of the interference, should be taken into consideration. If not, the common European fear, reflected in the abuse clause, risks working over- inclusively and creating an undesirable chilling effect in a democratic society".

The previous reasons and risks make it, in my opinion, preferable to use article 30 in relation to rights limitations as a confirmation of the possibility of restricting rights *that admit* such limitations –e.g. see articles 5.2 of the ICCPR or 30 of the American Convention on Human Rights—, rather than allowing authorities to fully deny the exercise of freedoms without conducting as detailed as analysis and without having established that the restrictions are adequate and legitimate, as the direct use would permit. Indeed, and perhaps motivated by thoughts as these, many pronouncements have opted to use the indirect restriction use of the abuse clauses. For instance, by referring to the principle embodied in clauses as the one examined in this Chapter, in the case of Garreth Anver Prince v. South Africa, the African Commission on Human and Peoples' Rights considered that restrictions are:

> "[I]nspired by well-established principle that all human and peoples' rights are subject to the general rule that no one has the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised elsewhere. The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages, which are to be obtained […] [there must be] a legitimate limitation on the exercise of the right" (emphasis added).

Furthermore, in the case of Robert Faurisson v. France, the Human Rights Committee was mindful of the fact that the European Commission of Human Rights, taking into account article 17 of the European Convention on Human Rights, "held that the authors, who were prosecuted for possession of

pamphlets whose content incited to racial hatred and who had invoked their right to freedom of expression, could not invoke" their freedom of expression. Nonetheless, instead of following the same train of thought, i.e. instead of merely endorsing a blank denial that prevented invocation of the right, the Committee –properly, to my mind— opted to conduct an analysis based on the idea that "[a]ny restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve a legitimate purpose". That this course of action does not necessarily imply permissibility of abuses is confirmed by the fact that, carrying out a more detailed analysis that was thus more appropriate and less prone to considerable mistakes, the Committee ended up concluding that the facts on what happened to "the authors, who were prosecuted for possession of pamphlets whose content incited to racial hatred and who had invoked their right to freedom of expression […] do not reveal a violation by France" of that freedom.

In the end, the more careful approach is better because it makes sure that legitimate exercises as, for instance, the "right of criticism", are not affected; while at the same time permitting dealing with abusive interpretations and conduct. For such reasons, it is laudable that in different judgments the European Court of Human Rights has "denied the arguments of the respondent State[s] invoking Article 17 in order to justify interferences with the applicants' freedom of expression", rather preferring to examine if the "impugned interferences" meet the conditions of restrictions, such as those set forth in Article 10.2 of the European Convention on Human Rights.

4. The "abuse clause" as a basis of state and non-state human rights obligations

An important and interesting conclusion drawn by some authorities and authors from the content of article 30 of the Universal Declaration of Human Rights is that it implicitly regulates obligations of non-state actors and/or strengthens state duties, preventing abusive elusions of responsibility. This proves to be important in the current context, in which discussions as to whether actors such as corporations can have international

human rights obligations –those who challenge this don't object to their procedural and substantive rights in investment regimes, which is ironic to my mind—, and in light of the heinous abuses that terrorist and other groups, and several individuals, commit against their fellow human beings. If non-state actors have duties, then breaching them obliges them to fully repair the damages they cause, given the automatic emergence of responsibility if there is an attributable breach to a duty-holder: thus, obligations are a foundation that helps to avoid impunity and the lack of protection of victims, considering how state-provided reparations are frequently not enough to repair victims when non-state actors have participated in abuses, among others because satisfaction cannot be then complete, e.g. since apologies should be made also by those other actors. Concerning states, it is also discussed by some if some of their conduct abroad, contrary to human rights, can engage the responsibility. To those questions, the answer that the logic of article 30 UDHR provides is: certainly. Both states and non-state actors alike –ought to— have duties. This is important because correlated obligations are frequently a condition for the enjoyment and exercise of human rights to have prospects of effectiveness.

As has been persuasively expressed by Jordan J. Paust, ""[t]he fulfillment of duty by each individual is a prerequisite to the rights of all". Why not consider only states as duty holders? Basically, because *factually* speaking any and all actors can potentially affect the proper enjoyment and exercise of human rights, and obliging all of them to respect them will grant direct actions to victims and increase the likelihood of observance by duty-holders in light of the potential sanctions and other negative consequences that their conduct can have, thus perhaps increasing compliance. In regards to states, it is important to be able to rely on the "abuse clause" to prevent interpretations of theirs that would have the intention or effect of lowering the standards of protection and diminishing human rights guarantees, for instance in relation to foreigners or those belonging to certain groups, who are as human as nationals and others and have the same dignity. In the light of the foregoing considerations, this section will explore how article 30 UDHR can be the basis of state and non-state obligations, further justifying and reinforcing them.

4.1. **The strengthening and confirmation of state obligations by the logic and content of article 30 UDHR**

In relation to states, it can be said that article 30 UDHR, firstly, requires states to protect potential victims from the abuses not only of their own authorities, but also from non-state violations attributable to individuals or groups alike. This confirms that human rights law can and must have horizontal effects or *Drittwirkung*. In this sense, Jordan J. Paust has reminded how international human rights bodies as the Human Rights Committee have expressed that "states have a duty to afford protection against [non-state violations] "*whether inflicted by people acting* in their official capacity, outside their official capacity or *in a private capacity*" and "States must not deprive individuals of the right to an effective remedy"" (emphasis in the original text).

On the other hand, and as explained in sections 1.3 and 3.5 above, article 30 UDHR and similar provisions prohibit states both from imposing restrictions to rights that are not envisaged in the respective instruments and from imposing limitations to a greater extent than what is permitted by them, since "Article 30 prohibits adding words or implying limitations that the drafters did not choose". In other words, the clause forbids limitations of rights and freedoms "to a greater extent than is provided" for in the pertinent instrument and provisions. Altogether, this prohibition of abusive restrictions serves both to legally protect individuals from misdeeds of unlawful restrictions of rights, which states so often engage in. That is to say, the clause serves to "exclude derogations motivated by the state's desire to destroy fundamental rights, such as the right to democracy."

Additionally, the abuse clause is contrary to states' attempts to circumvent their obligations based on technicalities that violate the spirit and underlying values (sections 2.1 and 2.4) of human rights law. This explains why, as explored in section 3.2 on the example of the withdrawal of citizenship by a state seeking to expel someone, such evasions are to be regarded as abuses of rights. Likewise, as seen in the same section, extraterritorial abuses, which are currently a hot topic, are to be seen as abusive and unlawful in accordance to the logic of article 30 UDHR and similar provisions.

In that regard, the Human Rights Committee has considered that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory". This is because, resorting to a systemic interpretation (section 3.3, supra), in light of the "abuse clauses", provisions as those on state obligations that refer to jurisdiction and/or territory cannot be construed as "imply[ing] that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it." Hence, consent of another actor with territorial or personal authority cannot be invoked to justify conduct contrary to human rights either, because it would also fall under the category of abuse of rights (section 3.2, supra).

In sum, in relation to states, the "abuse clause" confirms the horizontal human rights obligations that states have; prohibits abusive restrictions of rights; forbids the evasion of state obligations, as when states seek to rely on formalities such as where an abuse –the word itself should be sufficient to indicate wrongfulness— took place or on technicalities such as artificially or abusively removing conditions that rights-holders could invoke to argue that they are entitled to protection.

4.2. **The implied regulation of (necessary) non-state human rights obligations in "abuse clauses"**

As argued at the outset of section 4, non-state obligations and responsibilities are crucial for human rights to be truly effective and comprehensive, since states –social constructions— are not the only actors capable of negatively affecting their enjoyment and exercise. Even John Ruggie himself, the former United Nations representative on business and human rights, considered that corporations could negatively impact any and all human rights.

But what role does the clause play in relation to these considerations? As L. Charmaine Spencer posited, it "would be

superfluous if the protection was only from government", and so, following this logic, "[o]ther provisions in international agreements also suggest that there is necessarily a private responsibility aspect to [human] rights." In fact, the reference to human rights "destruction" by activities mentioned in article 30 UDHR has been understood by some as a –euphemistic— synonym or reference to non-state abuses, violations or conduct contrary to the content of human rights, especially by those reluctant to call them as so –even though they are certainly perpetrated in practice, and victims of non-state actors may feel excluded and slighted if the existence of those violations is refused to be recognized as such. Article 30 can thus be understood as reflecting the idea that respect of human rights by all actors is a condition for their enjoyment. Otherwise, abuse by any actor would frustrate that goal.

While article 30 does not *expressly* mention the expression "human rights obligations" or duties, it clearly indicates that nothing in the UDHR can be construed as permitting *any* actor to act against human rights. Accordingly, it is possible to say that it implicitly frowns upon and, even more, prohibits abuses, being prohibition a type of obligation. This is what Jordan J. Paust argued when saying that there are implied obligations under the provision, since "Article 30 thus ties the rights and freedoms enumerated in the Declaration to private duties". In another piece, he goes on to add that ""violations of human rights recognized in particular treaties and customary international law often reach perpetrators expressly or by implication […] there are correlative duties of groups and persons not to engage […] Article 30 […] contains an interpretive command". Finally, conducting a comparative law analyses of regional and universal human rights "abuse clauses", he concludes that:

> "Private duties are also expressly recognized in the preamble to and Articles 27 through 29 of the African Charter on Human and Peoples' Rights. Article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms contains a "group or person" provision similar to those in the Universal Declaration and the International Covenant […] the authoritative European Court of Human Rights has expressly recognized that private "terrorist activities . . . of individuals or groups . . . are in clear disregard of human rights," therefore affirming that duties of private individuals and groups exist under human rights law."

But it has not only been in doctrine where the idea that article 30 UDHR contains implied non-state obligations has been floated. The ICSID award in the Urbaser S.A. and Consorcio de Aguas

Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic case expressly cites article 30 and upholds this belief with persuasive arguments, which merit careful analysis and extensive citation, within which ideas of mine will be added in brackets. In the award, it was said that:

> "[U]pon reading the Declaration, it is evident that obligations arising therefrom do not lie exclusively on States. The Preamble expressly sets forth that the duties would lie both on institutions and on individuals. Article 1 states that its provisions apply to individuals even in private relationships. Article 30 declares that nothing in the Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms set forth herein. Article 29 sets forth that everyone has duties to the community. Therefore, business companies and international corporations are affected by the obligations included in international human rights law […] in order to ensure that such rights be enjoyed by each person, it must necessarily also be ensured that no other individual or entity, public or private, may act in disregard of such rights [confirming what is suggested in this Chapter, on the necessary correspondence between duties and rights for the latter's effectiveness], which then implies a corresponding obligation, as stated in Article 30 of the Declaration […](Art. 30) The Declaration may also address multinational companies [and all other actors and potential offenders, I might add] […] At this juncture, it is therefore to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights [being the starting point the rights-holders and their entitlements, and from them and article 30 all possible offenders are bound by respect obligations] […]The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights [and their abuse clauses]" (emphasis added).

Evidently, the award mentions corporations because it was one of those actors that participated in the proceedings alongside the state of Argentina. But as indicated by the mention of all persons, groups and states in the "abuse clause", all other actors can equally be considered to be bound by implied respect duties. In this regard, Stephen P. Marks has said that an approach "consistent with Article 30 of the Universal Declaration on Human Rights, which excludes [abusive] use of the Declaration by any state, group, or person", requires that states act in conformity with human rights law "in international agencies and lending institutions, as well as during Security Council consideration of sanctions", reason why "[t]rade, monetary and development policies that violate rights guaranteed […] would be suspect". This permits one to conclude that international organizations, which are non-state and different from their members –not necessarily states—, are also bound by the implied duty found in the "abuse clause".

Moreover, when discussing the clause in the drafting process, the Brazilian representative considered that "[i]t should be made evident that the enumeration of rights in the Declaration is not exhaustive but merely exemplary and that it does not preclude

the consideration of implied rights" (emphasis added). If so, one might wonder why it is not possible also to find implied obligations, especially those that are necessary for the guarantees of human rights to be comprehensive and effective against all potential and possible violations.

Altogether, as Andrew Clapham has said in relation to article 30 UDHR, in "general, rights are simply proclaimed as belonging to individuals. Individuals and groups are precluded from relying on their right to infringe or destroy the rights of others."

Conclusion

At first glance, the abuse clause found in the UDHR may seem redundant or insignificant. Yet, such hasty conclusion would be mistaken. Notwithstanding the apparent simplicity of article 30 or the idea of some that it simply reflects common sense, past and contemporary abuses make it extremely relevant, insofar as there may always be risks of actors intending to take advantage of human rights instruments in formalistic ways with the purpose of undermining its values and victimizing others. Yet, preventing and dealing with this must be done in strict accordance with the rule of law and the most faithful observance of human rights law. Otherwise, actions could be misguided, abused or lead to the erosion of the human rights edifice. Accordingly, rather than permitting *ex ante* bans of exercises of freedoms without much consideration, it is preferable to conduct a careful analysis of the legality, necessity, legitimacy and proportionality of restrictions; and they must be always subject to supervision in a multi-level framework.

The abuse clause not only confirms the permissibility of rights limitations, though, because it can also envisage implied obligations of non-state actors, necessary to better protect individuals from all potential offenders and to ensure they have direct rights and remedies against them, considering that state reparations are not always able to fully repair damage; and also turns state circumvention of its obligations based on formalistic arguments unlawful. This rationale of preventing apparently licit abuses underlies the provision, and so must be considered when interpreting any element of human rights law, must be taken into account when interpreting different international standards in a

systemic way, and can be employed to deprive abuses of rights of any legal effects whatsoever. Far from being accessory, redundant or tautological, then, the clause found in article 30 of the Universal Declaration of Human Rights and other instruments is a rich, central and necessary part of both the Declaration and the human rights *corpus juris*.

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