

# Human Rights Obligations of Territorial Non-State Actors

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## Introduction

International human rights law imposes obligations on states. Conceptually, however, human rights obligations are unlimited in their addressees. They are grounded in human dignity, which inheres in all individuals regardless of who is in a position to affect these obligations. This perception is embodied in the Universal Declaration of Human Rights (UDHR), the foundation of international human rights law, which speaks of the *entitlement* of “everyone” to the rights enumerated in it and does not indicate the addressees of the concomitant obligations.<sup>1</sup> There is thus nothing in human rights theory that precludes the imposition of legal obligations on actors other than states. Indeed, states are hardly the only entities capable of infringing upon human dignity. Optimally, protection of human rights should therefore extend to all situations in which these rights are threatened, irrespective of who puts them in jeopardy. Some domestic legal systems already impose human rights obligations on individuals. The

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1. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/801 (Dec. 10, 1948).

present international legal structure, under which human rights obligations are imposed only on states, is therefore neither self-evident nor immutable. Yet despite continuous challenges, the international legal system remains largely state-centered. Imposition of human rights obligations directly on non-state actors (NSAs) would be a significant modification of international law that would require the careful delineation of the contours of such NSAs and their pertinent obligations.

This Article considers the extension of international human rights law to encompass a particular category of NSAs, namely those that exercise effective territorial control to the exclusion of a government (territorial NSAs). Examples of such entities include, as detailed below, Transnistria, the Turkish Republic of Northern Cyprus (TRNC), Somaliland, the Palestinian Authority, Tamil Eelam (until 2009), as well as South Ossetia and Nagorno-Karabach. Part I discusses the need for extending international human rights law to NSAs, suggesting that it is particularly appropriate to do so for territorial NSAs. This section also considers the breadth of such an extension. Part II assesses the present state of the law by examining state practice, decisions of judicial and quasi-judicial bodies, and reports of experts in order to determine whether human rights obligations already apply to NSAs as a matter of customary international law. The Article concludes with observations about the direction in which the notion of NSA responsibility for human rights violations may be developing at present.

## I. *Lex Ferenda*

### A. Why Impose Human Rights Obligations on NSAs?

Human rights law was designed to curb the use of public power over those who are subject to that power. For this reason it applies first and foremost to the state, as the holder of public power.<sup>2</sup> Criminal and civil law regulate the conduct of other legal actors under both domestic and international law. Thus, for example, individuals are not bound by the prohibition on arbitrarily denying the right to life, but by the penal prohibition on killing.<sup>3</sup> The almost exclusive attachment of human rights obligations to states is premised on two interrelated notions. One is that domestic law can effectively regulate action within a state's jurisdiction. Ordinarily, the state itself would have an interest in addressing human rights violations under its jurisdiction, making the intervention of international law unnecessary. The other notion is that states would not accept international regulation of private entities.<sup>4</sup> Since the emergence of the international human rights regime, however, the structure of domestic and international society has evolved and power relations have changed. NSAs have emerged that

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2. Nigel S. Rodley, *Can Armed Opposition Groups Violate Human Rights?*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE* 297, 299 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

3. See *id.* at 300-01.

4. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *Yale L.J.* 443, 466, 469 (2001).

are increasingly wielding powers similar in character to those of states and often exceed the latter in their effectiveness. Insofar as such actors are empowered by the state, act according to its instructions, directions or control, or effectively replace it, the state is internationally responsible for those acts. The state is also responsible when it endorses the acts of NSAs.<sup>5</sup> But NSAs often have the capacity to act beyond the control of states; it is sometimes the case that states have neither the interest in, nor the resources for, holding NSAs accountable under domestic law. Consequently, maintaining states as the exclusive holders of human rights obligations may lead to an inadequate guarantee of these rights.

This realization has led to the development of new bodies of law establishing the accountability of NSAs for acts that essentially constitute violations of human rights; thus, some types of NSAs—and individuals within them—are already directly bound by certain international legal norms that essentially protect human rights, albeit under a different legal classification and in narrowly-circumscribed contexts. These norms include, first and foremost, international humanitarian law and international criminal law. However, the present framework of responsibility applicable to NSAs does not provide an adequate response to the full array of human rights that they may infringe upon. International humanitarian law, which applies to armed groups, covers only a small number of rights regarded as a minimum core that can (and must) be complied with in any situation; naturally, international humanitarian law applies only during armed conflict. International criminal law imposes criminal responsibility on individuals for acts that violate human rights, such as genocide, crimes against humanity, and certain violations of the laws of armed conflict, but because it constitutes the most severe type of sanctions, international criminal law is limited to the gravest human rights violations.<sup>6</sup> Consequently, NSAs that exercise powers similar to those of states often remain unaccountable for their abuse of that power because their conduct does not amount to international crimes and is not related to an armed conflict. For example, the Al Shabaab clan in Somalia (the most powerful and effective armed faction in Somalia, which, by the end of 2009, controlled more territory than any other faction in Somalia) imposes a harsh religious code on behavior.<sup>7</sup> This conduct is tantamount to the violation of numerous rights, including freedom of religion, freedom of expression, freedom of movement and the right to equality. The rights in question are not protected by international

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5. Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 53d Sess., arts. 36, 42-44, U.N. Doc. A/56/10; 56 U.N. GAOR Supp. No. 10 (2001).

6. Ratner, *supra* note 4, at 466.

7. See, e.g., *AMM & Others v. Sec'y of State for Home Dep't*, [2011] UKUT 00445, [90] (appeal taken from the UKAIT) ("In the areas of their control, Al-Shabab was enforcing 'a particularly draconian version of Sharia law, which goes well beyond the traditional interpretation of Islam in Somalia . . . and in fact amounts to a repressive form of social control'. Al-Shabab were concerned 'with every little detail of daily life, including men's and women's style of dress, the length of men's beards, the style of music being listened to and the choice of mobile phone ringtone.'") (citations omitted).

criminal law or by the laws of armed conflict. The fact that Al Shabaab's conduct may be sanctioned under domestic Somali law offers no remedy, because the domestic legal system is unable to enforce the law on the group's members.

There is, therefore, a need to bridge the gap between the extensive powers of NSAs and the limited forms of responsibility that apply to them at present by extending the reach of international human rights obligations.<sup>8</sup> Yet states are reluctant to attribute human rights obligations to NSAs under international law, or, for that matter, under domestic law.<sup>9</sup> First, states are generally loath to extend any international law to such entities, as such extension could in some instances further the latter's endeavors to acquire international status.<sup>10</sup> Second, as a matter of *fact*, human rights ordinarily constitute domestic matters. Even if states have accepted that *legally* human rights are no longer exclusively a domestic issue because of the insufficiency of domestic law to guard the victims, in *practice* international intervention, legal or otherwise, is still disfavored. The regulation of states' human rights obligations by international law remains the exception to the primacy of regulation by domestic law.

The tension between the need to regulate the conduct of NSAs that are beyond the effective reach of states and the reservations regarding attaching human rights obligations to NSAs is evident in the debate on corporate liability for human rights violations. Great strides have been made in the development of corporate accountability for human rights, but consensus was reached on the adoption of Guiding Principles on Business and Human Rights<sup>11</sup> only on the understanding that any corporate responsibility stems from societal expectations rather than human rights law.<sup>12</sup> An example of the objection to entrenching corporate responsibility in human rights law is the failed attempt in the United States in *Kiobel v. Royal Dutch Petroleum Co.*<sup>13</sup> to recognize civil corporate liability under the U.S. Alien

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8. A further challenge would be to create mechanisms for enforcing these obligations. See, e.g., Ratner, *supra* note 4, at 461.

9. See, e.g., Mohamad v. Palestinian Authority, 132 S. Ct. 1702 (2012).

10. See, e.g., Beate Rudolf, *Non-State Actors in Areas of Limited Statehood as Addressees of Public International Law Norms on Governance*, 4 HUMAN RIGHTS & INT'L LEGAL DISCOURSE 127, 128 (2010).

11. See Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corps. and Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie). These principles were adopted by the Human Rights Council. See Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, 17th Sess., May 30–June 17, 2011, A/HRC/RES/17/4 (June 16, 2011).

12. See Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corps. and Other Bus. Enters., *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Human Rights Council, ¶ 9, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie).

13. *Kiobel v. Royal Dutch Pet. Co.*, 621 F.3d 111, 133–44 (2d Cir. 2010). The case was pending before the Supreme Court on the issue of extraterritorial applicability of the statute when the Article was completed.

Tort Statute,<sup>14</sup> although state practice is far from uniform.<sup>15</sup>

Nonetheless, one can perceive of some instances in which states might be willing, if not eager, to recognize the applicability of human rights obligations to NSAs. States might be willing to do so in situations where such applicability would exempt *the states themselves* from responsibility. This means of evading responsibility may become increasingly attractive as a counterweight to the growing phenomenon of holding states responsible for failure to prevent conduct which amounts to human rights violations by NSAs over which they exercise some control.<sup>16</sup>

## B. Requisite Characteristics for Imposition of Human Rights Obligations on NSAs

Since international human rights obligations have been formulated with states in mind as duty holders, the obligations are tailor-made for states. They correspond to the manner in which states operate and to their actual and normative capacities. There is, therefore, no doubt that states are capable of discharging these obligations. Extension of human rights obligations to NSAs cannot be based on a similar assumption, namely that all NSAs possess characteristics that justify the imposition of human rights obligations or that all NSAs are capable of discharging such obligations. NSAs are not a homogenous group of actors, but rather are defined merely by the exclusion of their members from the community of states. The term “NSA” does not positively indicate any common features.<sup>17</sup> In order to determine whether human rights obligations should be imposed on NSAs, it is necessary to first identify the characteristics of an entity that would justify and enable the imposition of human rights on it.

Conveniently, the lively debate in the early twenty-first century over the extent of states’ extraterritorial obligations under international human rights law<sup>18</sup> has provided insight into key elements on which the imposition of international obligations rests. First and foremost, states’ obligations are triggered by the exercise of effective territorial control, reflecting

14. Alien Tort Statute, 28 U.S.C. § 1350 (2006). *But see* In re South African Apartheid Litigation, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

15. For a review of state practice with regard to corporations, see Jordan Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT’L L. 801 (2002), as well as Erin E. McKenna, *Viera & Others v. Eli Lilly & Co. & Others, District Court Judgment, Case No 1:09-cv-00495-RLY-DML (SD Ind 2010)*; ILDC 1561 (US 2010), OXFORD REP. ON INT’L LAW DOMESTIC CTS., ¶¶ A1-A2 (Mar. 28, 2011), [http://www.oxfordlawreports.com/subscriber\\_article?script=yes&id=/oril/Cases/law-ildc-1561us10&recno=5&module=ildc&year=2010](http://www.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/law-ildc-1561us10&recno=5&module=ildc&year=2010).

16. See *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 291-96.

17. See Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in *NON-STATE ACTORS AND HUMAN RIGHTS 3* (Philip Alston ed., 2005).

18. See, e.g., *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* (Fons Coomans & Menno T. Kamminga eds., 2004); MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (2011); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT’L L. 119 (2005); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78 (1995).

the notion that power comes with responsibility.<sup>19</sup> Nothing in this principle, however, limits its applicability to states. There is some controversy over whether the exercise of effective control must be over a territory, or whether control over a person through the exercise of particular governmental functions is sufficient to trigger human rights obligations.<sup>20</sup> There is a growing acceptance that any control may give rise to obligations, whether or not that control is territorial.<sup>21</sup> Arguably, the same may apply to NSAs. In fact, under international humanitarian law, Common Article 3 of the Geneva Conventions already imposes certain obligations on NSA parties to a conflict even if they do not exercise territorial control.<sup>22</sup> The scope of Common Article 3 is nonetheless limited, focusing on obligations of abstention. Yet even under international humanitarian law, the expansion of Common Article 3 into Additional Protocol II applies only to “organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to . . . implement this Protocol.”<sup>23</sup>

Territorial control is significant for the imposition of human rights obligations in a number of ways. First, it constitutes evidence of a lack of control by the state, which justifies regulation of the situation by international law. Second, it is a necessary requisite for human rights law to be imposed as a comprehensive body of law rather than on a pick-and-choose basis. Since territorial control provides, at least *prima facie*, powers which affect the full gamut of human rights of individuals within the territory, it enables imposition of the full gamut of corresponding obligations. In contrast, non-territorial, functional control, such as withholding travel documents in a manner that impedes movement,<sup>24</sup> or disclosing information in a manner that intrudes on privacy, is identified by reference to specific powers and therefore gives rise only to specific obligations or clusters of obligations. Third, effective territorial control is necessary in order to protect rights as opposed to merely respecting them.<sup>25</sup> It emerges, therefore,

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19. *Al-Skeini v. United Kingdom*, App. No. 55721/07, HUDOC ¶¶ 74-80 (July 7, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606>.

20. *Compare* Human Rights Comm., *López Burgos v. Uruguay*, Commc'n No. R.12/52, ¶¶ 2.1, 12.3, U.N. Doc. Supp. No. 40. (A/36/40) (1981), and Human Rights Comm'n, *Montero v. Uruguay*, Commc'n No. 106/1981, ¶¶ 7.1, 9.3-9.4, U.N. Doc. Supp. No. 40 (A/38/40) (1982), with *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333.

21. *Al-Skeini*, App. No. 55721/07, HUDOC at 57-59.

22. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

23. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1, June 8, 1977, 1125 U.N.T.S. 609.

24. Human Rights Comm., *López Burgos v. Uruguay*, *supra* note 20, ¶¶ 2.1, 12.3; Human Rights Comm., *Montero v. Uruguay*, *supra* note 20, ¶¶ 7.1, 9.3-9.4.

25. MILANOVIC, *supra* note 18, at 210.

that while obligations based on non-territorial, functional control may be imposed ad hoc on numerous actors, a categorical imposition of international human rights law as a comprehensive body of law is only appropriate with respect to entities that exercise effective territorial control.

A second requisite for imposing human rights obligations on NSAs should be the existence of an organizational apparatus exercising public functions and capable of securing human rights, although the apparatus need not be sophisticated (in many instances, unfortunately, this same apparatus also enables the infringement of rights in the first place). There is no point in holding an NSA accountable under human rights law if it does not have the capacity to formulate and execute policy. This requisite is often circumstantially linked to the previous one: in order to establish and sustain territorial control, it is often necessary to possess an organizational apparatus. An NSA in effective control of territory is, therefore, likely to have such an apparatus. It is conceivable that non-state groups would maintain sufficient control over territory to remove the state's forces without establishing alternative governing mechanisms, but such groups would not be bound by international human rights law.<sup>26</sup>

A third requisite is independent functioning of the territorial NSA. Since obligations follow from the exercise of powers, obligations (and responsibility) should only attach to actors that are capable of acting independently and are therefore in a position to modify their conduct where required. Independence is inherent to statehood, but with respect to other entities it is anything but evident. The independence at issue is factual rather than normative, bringing to the fore the primacy of effective control over international title as a trigger for obligations; although in instances where the independence of an NSA is in question, formal authority of a state over it may constitute rebuttable evidence of factual subordination. Thus, NSAs that operate within the constitutional system of a state, such as municipalities and autonomous regions, are *prima facie* under state control and are not independent, and their acts are attributable, under international law, to the state.<sup>27</sup> International human rights law does not directly bind them. Even if the constitutional system is such that it allows a sub-state entity to act in a manner which constitutes a violation of human rights obligations by which the state is bound,<sup>28</sup> international responsibility remains with the state.<sup>29</sup>

Conversely, when a sub-state NSA denies the authority of the state over its territory and succeeds in effectively preventing the state from

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26. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶ 76, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004) (by Philip Alston).

27. Int'l Law Comm'n., *supra* note 5, at 84-92.

28. *LaGrand (Ger. v. U.S.)*, Provisional Measures, 1999 I.C.J. 9, 16 (Mar. 3); *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 65 (Mar. 31).

29. As long as the sub-state entity accepts its constitutional position in practice, the constitutional system can be, at least in theory, amended so as to put the sub-state entity's powers in line with the state's obligations. See, e.g., Int'l Law Comm'n, *supra* note 5, at 232-33.

enforcing its authority, as in the case of a breakaway region, holding the state responsible for the conduct of that NSA on the basis of the constitutional framework has limited utility at best. *Politically*, the risk of being held internationally responsible for conduct within a breakaway region might act as an incentive for the state to try to assert its control over the territory,<sup>30</sup> but *legally*, the obligation must follow effective control rather than vice versa. For example, there was little point in attributing responsibility to Sri Lanka for human rights violations by the Liberation Tigers of Tamil Eelam (LTTE), nor does it make sense to hold Moldova responsible for human rights violations by the authorities in Transnistria (beyond the obligation to take measures to protect individuals from those violations<sup>31</sup>), despite the fact that both of the breakaway regions have been subject to the authority of the central governments under domestic law.<sup>32</sup>

The priority of effective territorial control over formal authority in triggering human rights obligations exists even when that formal authority itself is grounded in international law. For example, under the law of occupation, an occupying power cannot evade its responsibilities under the Fourth Geneva Convention towards protected persons through agreement with the authorities of the occupied territories.<sup>33</sup> The formal authority of the occupying power, which stems from its effective control under the law of occupation and which establishes its status as an occupying power, gives rise to a presumption of effective control also for the purpose of international human rights law. Accordingly, if the local authorities of the occupied territory exercise powers granted to them under an agreement with the occupying power in a manner which violates the rights of individuals under its control, it may be argued that the occupying power remains responsible for that conduct. However, if in practice the local authorities are capable of acting at their own discretion, attaching the responsibility to the occupying power beyond the mere obligation to protect would serve little purpose. At the same time, independence does not mean exclusivity of control. While we might hold the Transnistrian authorities responsible under human rights law, this does not necessarily eliminate the responsibility of the Russian Federation for its own acts within the region. Effective

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30. One can, however, imagine more powerful incentives for regaining territorial control than the need to comply with international human rights law. Note Moldova's argument before the European Court of Human Rights "that they [Moldova] had discharged their positive obligations, both general, in terms of finding a solution to the conflict and re-establishing their control over Transdniestrian territory, and specific, in terms of securing the applicants' Convention rights," implying that reassertion of territorial control could be a legal obligation. *Ilașcu v. Moldova*, 2004-VII Eur. Ct. H.R. 260.

31. *Id.* at 267-72.

32. When signing the European Convention on Human Rights, Moldova made the following reservation: "The Republic of Moldova declares that it will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the conflict in the region is finally settled." *General Information*, 1997 Y.B. EUR. CONV. ON H.R. 35.

33. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 22, at 318.

control can be shared, and if it is, the resultant obligations would also be shared.

The notion that international human rights law should bind a group with an identifiable political structure exercising effective control over territory and population has been put forward by Philip Alston, Special U.N. Rapporteur on Extrajudicial, Summary or Arbitrary Executions. He suggested, “in some contexts it may be desirable to address the activities of such groups within some part of the human rights equation.”<sup>34</sup> Emphasizing that “in an era when non-State actors are becoming ever more important in world affairs, the Commission risks handicapping itself significantly if it does not respond in a realistic but principled manner,” he clarified that “condemnation of such groups and insisting that they respect international human rights law should not be taken as equating them with States” or seeking to give them legitimacy.<sup>35</sup> Thus, addressing such territorial NSAs within the human rights context could mean sending complaints to them regarding executions and calling for them to respect relevant norms. In cases where NSAs are willing to “affirm their adherence to human rights principles and to eschew executions it may be appropriate to encourage the adoption of formal statements to that effect.”<sup>36</sup> Furthermore, in reporting on violations committed by governments, it may be appropriate to “provide details of the atrocities perpetrated by their opponents in order to provide the Commission with an accurate and complete picture of the situation.”<sup>37</sup>

Territorial entities that fulfill the requisites proposed above take diverse shapes. In Somalia, the government has ceased to exercise effective control over any part of the state’s territory and has been replaced by numerous territorial NSAs. In other regions, breakaway entities exercise effective territorial control to the exclusion of the government, for example, Transnistria in Moldova, the TRNC in Cyprus,<sup>38</sup> and, until 2009, the LTTE in Sri Lanka. One might also include Taiwan in this category, depending on how one views the relationship between it and mainland China. Territorial NSAs of a different character altogether include the Palestinian Authority in the West Bank and the Hamas regime in the Gaza Strip. The Palestinian Authority operates in non-sovereign territory under Israeli occupation but in many respects independently of it, while the Hamas regime exercises effective territorial control to the exclusion not of a state but of the Palestinian Authority, which is recognized as the representative of the Palestinians’ right to self-determination.<sup>39</sup>

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34. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 26, ¶ 76.

35. *Id.*

36. *Id.*

37. *Id.*

38. In these cases the issue may be not whether to hold the NSA responsible, but of correctly identifying the government that is in effective control. *E.g.* Ilaşcu v. Moldova, 2004-VII Eur. Ct. H.R. 339 (Kovler, J., dissenting).

39. The discussion in this Article excludes U.N.-mandated international territorial administration, the conduct of which is governed by specific norms that, if emanating

In addition to the factual criteria for holding an NSA bound under international law, the question arises whether the imposition of human rights obligations on territorial NSAs should also be guided by normative criteria, such as the legality of the entity's existence under international law (to the extent that the existence of a territorial NSA is at all regulated under international law),<sup>40</sup> the legality of its conduct under other branches of law, or its legal entitlements. In this context, the relevance of the right to self-determination may arise. This right has been recognized as a "prerequisite to the full enjoyment of all fundamental human rights."<sup>41</sup> One argument may be that NSAs striving for self-determination may not be burdened with human rights obligations until they achieve their goal. However, this argument is misplaced: self-determination has been cited as a requisite for the enjoyment of human rights in the context of the demand for decolonization, in rejection of the claim that human rights can be guaranteed even under foreign domination. It supports a claim for a right to political independence. But NSAs operating independently of states—whether with the benefit of the right to self-determination or not—already possess the qualities of governance that the right to self-determination aims to guarantee. Thus, an NSA's failure to achieve self-determination in its fullest sense—political independence—is no ground for exemption from obligations and responsibility. Any other interpretation would lead to the absurd result that an NSA that lacks the right to self-determination is also exempt from human rights obligations. More generally, if human rights obligations are intended to serve as a check on abuses of power, it would seem that factual, rather than normative, factors should trigger such obligations.

### C. The Scope of Human Rights Obligations of Territorial NSAs

Human rights are inherent to the individual, but they are a political enterprise, reflecting a certain vision of society. By prescribing the limits and requirements of social conduct, they purport to shape society in a certain fashion.<sup>42</sup> Any analysis of the scope of human rights must, therefore, refer to the context in which they operate. This is not to suggest, however, that human rights are relative. They are universal in that they inhere in every individual, everywhere, and at all times. But as legal entitlements, human rights have been directed primarily at states as duty-holders and envisage a state-centered international society. The existing human rights catalogue is, by definition, a catalogue of human rights in state-individual

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from U.N. Charter Chapter VII resolutions, may even have hierarchical superiority over general international law. The Article is limited to a discussion of the lowest common denominator—customary international law.

40. E.g. S.C. Res. 541, ¶¶ 1-2, U.N. Doc. S/RES/541 (Nov. 18, 1983) (regarding the illegality of the establishment of the TRNC).

41. Resolution on the Right of Peoples and Nations to Self-Determination, G.A. Res. 637 (VII), U.N. Doc. A/RES/637(VII) (Dec. 16, 1952).

42. See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 14-16 (2d ed. 2003) (describing how the aspirational features of human rights theories can impact political and social practices).

relations. An international human rights catalogue tailored for other relationships, namely between individuals and actors other than states, might well differ from the one currently prevailing.<sup>43</sup> Had the human rights project been tailored for intrafamilial relations, for example, it would probably not have included the right to fair trial, but might have included a right to compassion. Accordingly, in considering the expansion of international human rights law to territorial NSAs, the question arises whether the latter's scope of functions entails applying to them a modified human rights catalogue. It is submitted that if territorial NSAs are defined by virtue of their capacity to exercise public functions, the same spectrum of obligations that applies to states should apply to them, regardless of whether they actually engage in the full scope of public functions. Furthermore, if territorial NSAs claim to be states, or claim a right to become states by virtue of the right to self-determination, they cannot in good faith reject the applicability of norms that attach to statehood.

Another question is whether the interests that are presently recognized under international human rights law as justified grounds for *limiting* human rights are applicable to NSAs. These permissible limitations protect interests that are regarded as legitimate and worthy of protection. Some of these interests would be legitimate and worthy of protection even if pursued by NSAs. This would be particularly true for interests that involve the protection of other human rights, such as public health, the rights and freedoms of others, and public order. Other interests, however, might not enjoy the same normative force where NSAs are concerned. For example, one ground for limiting human rights is the protection of national security. This limitation derives from a state's right to protect its existence, territorial integrity, and political independence against force or threat of force.<sup>44</sup> NSAs do not, generally speaking, have a right to independence or territorial integrity, nor to non-interference. *Prima facie*, then, national security is not a relevant ground for limiting NSAs' obligations. However, particular NSAs may have a right to self-determination, from which derive the rights to independence and territorial integrity. Arguably, the obligations of such NSAs merit some limitations in order to protect these other interests. According to this line of thought, however, delineating the extent of an

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43. See, for example, the understanding of a changing emphasis insofar as the obligations of corporations are concerned: "In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review." Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corp. and other Bus. Enters., *supra* note 11, ¶ 12. The unarticulated context of human rights has been criticized, for example, for perpetuating the public-private divide. See, e.g., Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387, 389 (1999) ("Human rights discourse . . . largely excludes abuses committed by private actors."). This particular critique is of little relevance for present purposes, because territorial NSAs operate in the public sphere; however, the critique illustrates the ingrained bias of the human rights project.

44. See U.N. Comm'n on Human Rights, *Status of the International Covenants on Human Rights*, ¶ 39, U.N. Doc. E/CN.4/1985/4, Annex (Sept. 28, 1984).

NSA's obligations requires a debate over the legitimacy of its existence and of its interests. This creates the difficulty, reminiscent of the *ius ad bellum* and *ius in bello* distinction, of rendering the individuals under the NSAs' control hostage to political disputes. Under human rights law, no less than under international humanitarian law, protection of the individual should not depend on political circumstances. Accordingly, the human rights catalogue should remain intact regardless of the type of the entity in question.

Conversely, one might query whether territorial NSAs have legitimate interests that states do not. Again, in order to avoid the politicization of determining human rights obligations, the catalogue of human rights should remain intact. Rather, the differences between the interests of territorial NSAs and the interests of states, whether the latter are wider or narrower, should be expressed in the weight attached to these interests in specific circumstances, and not in the adoption of differentiated grounds for restricting rights. That weight would be reflected in the assessment of the need for the limitation on the right and its proportionality with respect to the harm caused. The extent of external scrutiny of NSAs might also be different from that applicable to states. For example, the margin of protection from external scrutiny that states enjoy derives from the prohibition on interference in domestic affairs. If this prohibition does not protect territorial NSAs, there might be greater inclination by outside actors to scrutinize territorial NSAs' policies.

A final issue is the territorial reach of NSAs' human rights obligations. Although territorial NSAs are defined by their exercise of effective territorial control rather than by formal title to territory, they may also be capable of exercising functional control extraterritorially. Thus, the possibility that NSAs have extraterritorial obligations has not been entirely discounted. For example, the U.N. Secretary-General's Panel of Experts on Sri Lanka explained that it did not consider the LTTE's abuses outside the conflict zone (which covers the area where it is in effective territorial control) due to "uncertainty" as to extra-territorial obligations.<sup>45</sup> In other words, the experts, who regarded the LTTE as bound by human rights law as a matter of positive law, did not rule out the possibility that even if the applicability of human rights obligations to NSAs is initially triggered by effective territorial control, such obligations may subsequently extend beyond the controlled territory.<sup>46</sup>

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45. U.N. Secretary-General, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, ¶ 243 (Mar. 31, 2011), available at [www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf). For other reservations regarding the findings relating to the LTTE, see *infra* notes 130, 143 and accompanying text.

46. According to the Panel, the LTTE was bound to respect the most basic human rights of persons within its power, since it exercises "*de facto* control over a part of a State's territory." U.N. Secretary-General, *supra* note 45, ¶ 188.

#### D. Enforcement of Territorial NSAs' International Human Rights Obligations

If, or when, territorial NSAs are recognized as bound by international human rights law, enforcing their obligations will remain a challenge. Without doubt, territorial NSAs would be under a duty to provide reparation for breaches of these obligations. This is a general principle of law,<sup>47</sup> and it is reasonable to regard it as applicable to all international actors that are capable of breaching obligations, including territorial NSAs.

The international legal duty to provide reparation accrues regardless of the existence of formal institutions for its enforcement, but undoubtedly the absence of such institutions is a major obstacle. However, the present structure of the international human rights regime is not conducive to enforcement of territorial NSAs' human rights obligations. Treaties and treaty-monitoring bodies—both courts and U.N. committees—are all reserved to states and interaction with states. It is, therefore, impossible to enforce the obligations of territorial NSAs directly on them through these mechanisms. Moreover, if states are reluctant to grant formal status to territorial NSAs, they are unlikely to adopt formal mechanisms for enforcement of NSAs' obligations.

Within domestic contexts, jurisdictional limits may constrain adjudication of claims under international law against NSAs. This is demonstrable in the practice of the United States, which is perhaps the most conducive forum for adjudication based on international human rights law because it permits parties to bring suit based on violations of the law of nations.<sup>48</sup> In 2011, in *Ali Shafi v. Palestinian Authority*, the U.S. Court of Appeals for the District of Columbia Circuit addressed the question of whether, for the purposes of applying the Alien Tort Statute, NSAs could be held responsible for torture under customary international law.<sup>49</sup> The court held that there was no cause of action against the respondents because there was no consensus that torture by private actors violated international law.<sup>50</sup> This decision followed the court's ruling almost two decades earlier in *Tel-Oren v. Libyan Arab Republic*, where it stated that it did not believe that "the law of nations imposes the same responsibility or liability on non-state actors, such as the [Palestine Liberation Organization] PLO, as it does on states and persons acting under color of state law."<sup>51</sup> The analysis in *Tel-Oren* revolved around the responsibility of individuals, but Judge Bork, in a concurring opinion, addressed the specific characteristics of the PLO, clarifying that "a finding that because of its governmental aspirations and because of the role it has played in the Middle

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47. See *Factory at Chorzów (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26).

48. See Alien Tort Statute, 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

49. *Ali Shafi v. Palestinian Authority*, 642 F.3d 1088, 1095-97 (D.C. Cir. 2011).

50. See *id.*

51. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776 (D.C. Cir. 1984) (*per curiam*).

East conflicts the PLO should be subject to such rules would establish a new principle of international law.”<sup>52</sup> The fact that, subsequent to the *Tel-Oren* ruling, the Palestinian Authority had acquired effective territorial control<sup>53</sup> in practice but also under international law,<sup>54</sup> does not appear to have been relevant for the Court in *Ali Shafi*.

These rulings do not represent a blanket rejection of NSA liability under international law as a matter of substantive international law; indeed, *Ali Shafi* distinguished torture from other acts such as piracy and genocide, for which responsibility *can* lie with NSAs.<sup>55</sup> Rather, their concern is with the jurisdiction of U.S. courts under domestic law, which the Supreme Court has interpreted to encompass only those violations of international law that satisfy a minimum threshold of specificity and universality.<sup>56</sup> Practical concerns informed this interpretation: in *Ali Shafi*, the court reiterated that “the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”<sup>57</sup> The court was guided by the Supreme Court’s instruction on the need for “great caution in adapting the law of nations to private rights.”<sup>58</sup> It candidly admitted the true bar to U.S. courts holding an NSA bound by international human rights law, namely that this “could open the doors of the federal courts to claims against nonstate actors anywhere in the world alleged to have cruelly treated any alien.”<sup>59</sup> According to U.S. jurisprudence, the state/non-state distinction is not merely a convenient parameter for determining whether a claim should be admitted, but a proxy for identifying the specificity of the alleged violation of international law, since “state action, or complicity therewith, may also be a powerful indicia of a violation that ‘is sufficiently definite to support a cause of action’ . . . .”<sup>60</sup>

Given the obstacles to adjudication, what remains are political means of enforcement through the numerous political U.N. bodies entrusted with monitoring human rights situations around the world, such as the Human Rights Council and its sub-organs, the General Assembly’s Third Committee, and the ECOSOC and its sub-organs; states and international organizations can also unilaterally enforce human rights norms. The U.N. Security Council has also declared certain NSAs—specifically, armed opposition

52. *Id.* at 806 (Bork, J., concurring). Judge Bork also described the particular difficulty in attributing responsibility for torture to a NSA given the norm’s formulation. *Id.* at 849.

53. In 1984, the Palestinian Authority did not yet have any territorial control, nor had a declaration of independence been yet made; there was, therefore, no territorial NSA or purported state.

54. See Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palestine Liberation Organization, art. I, Sept. 28, 1995, 36 I.L.M. 557 (1997).

55. *Ali Shafi*, 642 F.3d at 1094-97.

56. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33, 738 (2004).

57. *Ali Shafi*, 642 F.3d at 1095 (quoting *Sosa*, 542 U.S. at 732-33).

58. *Sosa*, 542 U.S. at 694; see also *Ali Shafi*, 642 F.3d at 1093.

59. *Ali Shafi*, 643 F.3d at 1094.

60. *Estate of Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1357 (11th Cir. 2010).

groups—accountable for human rights violations and imposed enforcement measures on individuals associated with such groups.<sup>61</sup> The value of political action is often contested on the ground that in the absence of coercive enforcement, states are free to ignore criticism. But unlike states, territorial NSAs—especially those campaigning for formal status—are vulnerable to international censure and may be particularly amenable to political pressure; their very existence, let alone their formal status, depends on political clout. Political enforcement may, therefore, hold some promise in that regard. As compliance with human rights law becomes an increasingly visible criterion for recognition of international status,<sup>62</sup> political demands in this area may also prove particularly powerful. That said, the fact that NSAs do not participate in international relations diminishes the opportunity to influence them through interaction and political pressure.

## II. *Lex Lata*

### A. Introduction

There is no treaty law on international human rights obligations of NSAs. The universal and regional human rights instruments<sup>63</sup> are all formulated in terms of states' obligations, with the exception of the UDHR, which speaks of the rights of "everyone," ostensibly leaving open the question of the duty-holder's identity. The UDHR also provides that nothing in it "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,"<sup>64</sup> suggesting that perhaps not only states but also groups and individuals may be obligated under it.<sup>65</sup> However, reliance on the UDHR as positive law is difficult. The

61. See, e.g., Aristotle Constantinides, *Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council*, 4 *HUM. RTS. & INT'L LEGAL DISCOURSE* 89 (2010).

62. EUR. PARL. ASS'N., *The Consequences of the War Between Georgia and Russia*, Res. No. 1633 (2008), <http://www.assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17681&Language=EN>; Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 *EUR. J. INT'L L.* 36, 40, 42–43 (1993).

63. Arab Charter on Human Rights, League of Arab States art. 3, May 22, 2004, reprinted in 12 *Int'l Hum. Rts. Rep.* 893; African (Banjul) Charter on Human and Peoples' Rights art. 1, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 *I.L.M.* 58; American Convention on Human Rights art. 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 *U.N.T.S.* 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 *U.N.T.S.* 221.

64. Universal Declaration of Human Rights, *supra* note 1, art. 30.

65. The Human Rights Committee's view is "that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them . . ." High Comm'r for Human Rights, CCPR General Comment No. 26: Continuity of Obligations, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997). Thus, obligations may devolve on to certain NSAs, namely international territorial administrations. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Kosovo (Serbia), ¶ 4, U.N. Doc. CCPR/C/UNK/CO/1 (Aug. 14, 2006).

UDHR's drafters intended for it to reflect aspirations rather than positive law. Its content may have become customary law through its entrenchment in the universal covenants and state practice, but those avenues only concern state obligations. Accordingly, even if the UDHR addresses the obligations of NSAs, those obligations remain within the UDHR's original, aspirational ambit.<sup>66</sup>

Reference is sometimes made to the possibility of holding NSAs accountable under human rights law on the basis of agreements concluded with them or of their voluntary undertakings.<sup>67</sup> Both agreements and unilateral undertakings replace a principled applicability of human rights law to NSAs by ad hoc arrangements. However, *how* an NSA may commit itself is a secondary question, the preliminary one being *whether it can* commit itself. If NSAs are *incapable* of being bound by international human rights law, a commitment on their part would not make them any more accountable under such law. This incapability can be compared to an NGO declaring itself bound by the prohibition on the use of force. Such a declaration, regardless of how public and unequivocal it may be, cannot render the NGO bound by the prohibition, since the prohibition does not apply to NGOs. Thus, whether NSAs are capable of being bound by international human rights law depends not on their subjective stance, but on the law. This is not to say that contractual or voluntary undertakings by NSAs are entirely without value. First, breach of a legal commitment is itself a violation of an international obligation, which may carry international responsibility (to the extent that NSAs have such responsibility) irrespective of human rights law. Second, such an undertaking may carry weight in the progressive development of customary international law. While customary international law is traditionally based on practice and on *opinio juris* of states, there are increasing calls to incorporate NSAs as creators of law.<sup>68</sup> The limits of these calls and their relevance to the creation of human rights

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66. For a detailed analysis of the UDHR as a source of obligations upon NSAs, see Rodley, *supra* note 2, at 305-07.

67. With respect to unilateral undertakings by the Palestinian Authority and Hamas, see Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, Human Rights Council, 12th Sess., Sept. 14-Oct. 2, 2009, ¶¶ 305-07, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009); HUMAN RIGHTS WATCH, UNDER COVER OF WAR: HAMAS POLITICAL VIOLENCE IN GAZA 20-21 (2009). As for agreements, see Interim Agreement on the West Bank and the Gaza Strip, *supra* note 54, which sets up the Palestinian Authority. Article XIX, entitled "Human Rights and the Rule of Law," stipulates: "Israel and the Council [referred to today as the Palestinian Authority] shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law." *Id.* art. XIX. Polisario, on behalf of The Sahrawi Arab Democratic Republic, has signed or ratified several human rights instruments, including: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Sept. 13, 2000, O.A.U. Doc. CAB/LEG/66.6; African Charter on the Rights and Welfare of the Child, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49; African (Banjul) Charter on Human and Peoples' Rights, *supra* note 63. See HUMAN RIGHTS WATCH, HUMAN RIGHTS IN WESTERN SAHARA AND IN THE TINDOUF REFUGEE CAMPS 20-21 (2008), available at <http://www.hrw.org/sites/default/files/reports/wsahara1208web.pdf>.

68. See, e.g., Roozbeh B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173, 173-74, 198-99 (2010).

law should nonetheless be acknowledged: they are made primarily in the context of the laws of armed conflict, inter alia on the ground that NSAs are already subject to certain obligations under these laws.<sup>69</sup> Accordingly, at issue might be a proposition on the desirability of regarding NSAs as capable of creating customary international law, not generally, but only in those areas where they are already subject to the law. Thus, the Special Rapporteur's statement on the possibility of holding NSAs accountable on the basis of their unilateral undertakings has to be read in the context in which it was given, namely NSAs involved in armed conflict,<sup>70</sup> where treaty law already expressly provides a mechanism by which NSAs may commit themselves.<sup>71</sup> With respect to human rights law, this would of course be a circular argument, since practice is sought precisely in order to establish *whether* NSAs are subject to the law. If so, their undertakings may constitute relevant practice in the future. A third significance of contractual and voluntary undertakings is that they may serve as factual evidence of effective and independent conduct if obligations are imposed on territorial NSAs; failing that, they could at least estop NSAs from denying that they are bound by the human rights regime in particular instances.<sup>72</sup>

Another basis put forward for holding NSAs bound by human rights law as a matter of existing law is the fact that various substantive human rights norms have been identified as customary or even peremptory norms<sup>73</sup> and are therefore binding on all international legal actors<sup>74</sup> (including territorial NSAs). However, the customary and peremptory character of human rights norms has been established in the relations between individuals and *states*. To conclude that they are also binding upon NSAs would beg the question whether territorial NSAs are, in fact, "international legal actors" for the purpose of human rights law.

There is, therefore, no alternative to examining whether customary international law—created by states—imposes human rights obligations on territorial NSAs. The distinction between state practice and *opinio juris*,

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69. See, e.g., Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 26, ¶ 76.

70. *Id.*

71. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 96, June 8, 1977, 1125 U.N.T.S. 3.

72. It has been argued that attributing human rights obligations to territorial NSAs exclusively on the basis of voluntary undertakings, whether unilateral or through agreements, may send an unfortunate message that human rights law is discretionary. CARSTEN STAHN, *THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION: VERSAILLES TO IRAQ AND BEYOND* 484 (2008). However, international human rights law is in fact discretionary—whether it is entrenched in treaties or in customary international law, which originated in voluntary conduct. Only peremptory human rights norms are not discretionary. On what falls within this category, see ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW* 53–60 (2006).

73. For example, the prohibition on torture and on racial discrimination. See ORAKHELASHVILI, *supra* note 72, at 55.

74. Andrew Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement* 10–15 (Feb. 2010) (draft for comment), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1569636](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636).

difficult under the best of circumstances,<sup>75</sup> is particularly difficult in the present context, where the practice more often consists of articulating stances rather than performing tangible measures. It is also difficult to locate articulations of states' positions regarding NSAs' human rights obligations. This is not because there is any dispute that violations of human rights may *emanate* from the actions of NSAs; states in fact acknowledge this. For example, in *GRB v. Sweden*, the author of a 1998 communication to the Committee Against Torture appealed against removal to Peru, arguing that there was a substantial risk that the Sendero Luminoso (which was in effective control of areas within Peru) would subject her to torture.<sup>76</sup> Sweden recognized that while the acts of the Sendero Luminoso were not attributable to the Peruvian authorities, "depending on the circumstances in the individual case, grounds might exist to grant a person asylum although the risk of persecution is not related to a Government but to a non-governmental entity."<sup>77</sup> Rather, the difficulty in locating states' positions on the responsibility of NSAs lies in the fact that typically human rights violations by NSAs would trigger the obligations of states to protect potential victims from the conduct of third parties. Thus, regardless of who carries out the act itself, the obligation and responsibility usually lies with some state, obviating the need to consider the NSAs' obligations.

Even where the conduct of a territorial NSA against which the state has no obligation to protect is at issue, the question of territorial NSAs' obligations arises in only a few instances as a matter of substantive international law due to jurisdictional bars to inquiry into the matter in both international and domestic fora; fewer still are the instances where this question is raised before judicial bodies.

## B. State Practice

A main context in which the question of territorial NSAs' obligations has been addressed is asylum and deportation proceedings, where asylum claimants have argued that their lives were at risk due to NSAs operating in the place of destination. The obligations of the NSAs arise only indirectly in these situations, since the focus of the debate is on the compatibility of the state's attempt to deport the individuals with the prohibition on refoulement (the removal of a person to a place where his or her life and security may be at harm). Asylum proceedings involve determining whether the conduct in the place of destination, namely by the NSA, amounts to persecution under the 1951 Convention on Refugees<sup>78</sup> or to a violation of

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75. See, e.g., Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L. L. 523 (2004).

76. See Comm. Against Torture, 20th Sess., G.R.B. v. Sweden, Comm'n No. 83/1997, U.N. Doc. CAT/C/20/D/83/1997 (June 19, 1998).

77. *Id.* ¶ 4.14. For the same reason, perhaps, there was no discussion of whether a NSA could commit torture.

78. Persecution is not defined in the Convention; however, acts that are recognized as persecution are characteristically also violations of human rights. Under E.U. law, to qualify as "persecution" an act must "be sufficiently serious by its nature or repetition as

human rights under the human rights treaties. The question is particularly acute with respect to Article 1 of the U.N. Convention Against Torture, which defines torture as acts carried out in an official capacity or with official instigation, consent, or acquiescence.<sup>79</sup> Consequently, where asylum is sought from risk of torture, determining whether, as a matter of fact, the risk to the applicant falls within the ambit of the Convention necessarily raises the question whether an NSA is capable of acting in an “official capacity.”<sup>80</sup> While this is a determination of fact, not of legal responsibility,<sup>81</sup> in a few cases the pronouncements by states offer insights into their positions with respect to the legal obligations pertaining to territorial NSAs. An example of the explicit refusal of a state to regard NSAs as bound by the prohibition on torture is the Australian position taken before the Committee Against Torture. In *Elmi v. Australia*, Australia argued that during the drafting of the Convention Against Torture there was no agreement that the definition of torture should extend to private individuals acting in a non-official capacity; accordingly, the prohibition should not apply to members of Somali armed bands.<sup>82</sup> This position is understandable given the potential ramifications of holding Somali clans capable of committing torture: it would severely limit the ability of states to turn away scores of asylum claimants from Somalia (and possibly from other regions).

The reluctance of states to hold territorial NSAs responsible for human rights violations is also evident in political statements. For example, the European Union has issued statements deploring executions in Gaza on numerous occasions but has carefully refrained from attributing legal obligations to the NSAs beyond those they undertake voluntarily. These statements note that the European Union considers capital punishment to be cruel and inhuman, implying that it is a human rights violation. However, they then proceed merely to declare that “[t]he de facto authorities in Gaza should refrain from carrying out any further executions of prisoners and comply with the de facto moratorium on executions put in place by the Palestinian Authority, pending abolition of the death penalty in line with

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to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms . . .” Council Directive 2011/95/EU, art. 9(a), 2011 O.J. (L 337) 9, 15.

79. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113.

80. *See id.*

81. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 29 (1989) (“Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.”). Consequently, terminology such as “human rights violations” should be construed as meaning “conduct that would amount to violations of obligations if carried out by a state or endorsed by it,” rather than a statement on the normative capacity of NSAs.

82. Comm. Against Torture, 22d Sess., *Elmi v. Australia*, Commc’n No. 120/1998, ¶ 4.8, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999).

the global trend,”<sup>83</sup> avoiding any mention of obligations under human rights law. Similar statements have been made with respect to Taiwan.<sup>84</sup>

States and international organizations have also referred to NSAs carrying obligations under international human rights law. For example, the E.U. Commission has expressed concern, in a periodic practice review, about “human rights violations” by the Palestinian Authority.<sup>85</sup> European institutions have also commented on conduct by the self-proclaimed Transnistrian authorities. In resolutions that address general practices as well as individual incidents and persons, the European Parliament expressed concern about the “lack of respect for fundamental freedoms and human rights” in Transnistria<sup>86</sup> and criticized “the latest example of human rights violations in Transnistria.”<sup>87</sup> The resolution addressed the “degrading treatment” of the applicants in *Ilaşcu v. Moldova*, who, among other things, were “prohibited from returning to their homes.”<sup>88</sup> It also discussed “the serious violations of human rights in Transnistria . . . particularly leading to the denial of the rights of Romanians with the closure of Romanian-language schools and the profanation of a Romanian cemetery in Transnistria, as well as the violation of the political rights and liberties of the entire population living in the area . . . .”<sup>89</sup> The Parliament also went so far as to mention that “the self-proclaimed Transnistrian authorities continue to refuse to comply with the ECHR ruling requiring them to put an end to the unlawful and arbitrary detention” of the applicants in *Ilaşcu v. Moldova*.<sup>90</sup> The Parliament not only attributed to the non-state Transnistrian authorities primary obligations to respect human rights but also implied that these authorities were bound by a judicial ruling of an institution reserved for states that was not even addressed directly to them. International organizations also refer to the human rights obligations of territorial NSAs when they engage with NSAs on human rights issues in post-conflict and pre-independence situations, where the goal is to promote democratic principles<sup>91</sup> or to support state-building.<sup>92</sup>

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83. Press Release, E.U. Missions in Jerusalem and Ramallah, Local EU Statement on Gaza Executions (July 27, 2011); see Press Release, E.U. Missions in Jerusalem and Ramallah, Local EU Statement on Death Sentence in Gaza (Jan. 19, 2012).

84. Press Release, European Union, Statement by the High Representative, Catherine Ashton, on the Executions in Taiwan, A 090/11 (Mar. 4, 2011).

85. European Comm’n, *Implementation of the European Neighbourhood Policy in 2010 Country Report: Occupied Palestinian Territory 2*, 4–6 (Joint Staff Working Paper No. 303, 2011) (“However, concerns about human rights violations, in particular by the security forces, have not declined . . .”).

86. Resolution on Human Rights in Moldova and in Transnistria in Particular, 2006 O.J. (C 291 E) 414, 415 (2006).

87. Resolution of 12 July 2007 on Human Rights Violations in Transnistria (Republic of Moldova), 2007 O.J. (C 175 E) 613, 613–14 (2007).

88. *Id.* at 613.

89. *Id.* at 614.

90. Resolution on Human Rights in Moldova and in Transnistria in Particular, *supra* note 86, at 415.

91. OSCE field operations address the implementation of human rights standards by states, NGOs, and individuals. But responsibility remains with the states. 1 OSCE

A statement exceptional both in its explicitness and in its attachment of obligations to NSAs was made by Israel before the Committee on Economic, Social and Cultural Rights.<sup>93</sup> In that statement, Israel said that “[t]he fact that the Palestinian Council does not represent a State does not, in itself, preclude its responsibility in the sphere of human rights protection.”<sup>94</sup> Israel grounds this position in general international law and in the agreements between Israel and the PLO.<sup>95</sup> The willingness of Israel to hold the Palestinian Authority accountable under human rights law, so different from the caution and reservation that other states express, is directly related to Israel’s denial of its own responsibility with respect to the exercise of those powers and responsibilities that it had transferred to the Palestinians.<sup>96</sup>

A state’s immediate stake in attributing human rights obligations to NSAs is also evident in Moldova’s periodic report to the Human Rights Committee, where it argued that “the secessionist regime structures have violated in a systemic and deliberate way the human rights and fundamental freedoms in this region,”<sup>97</sup> and proceeded to provide examples of the “authoritative and antidemocratic character of the secessionist regime of Tiraspol, which violates in a flagrant way the human rights and fundamental freedoms.”<sup>98</sup> Moldova’s stake in the matter included not only the rejection of its own responsibility, which the Human Rights Committee had already acknowledged was limited with respect to Transnistria because of

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OFFICE FOR DEMOCRATIC INSTS. & HUMAN RIGHTS (ODIHR), OSCE HUMAN DIMENSION COMMITMENTS: THEMATIC COMPILATION 25-30 (2d ed. 2005).

92. Press Release, EU-PA Human Rights, Good Governance and Rule of Law Subcommittee, Human Rights and Rule of Law at the Heart of the EU - Palestinian Relationship, PR/05/2010 (Feb. 26, 2010) (“Prime Minister Fayyad has made enormous progress in preparing the Palestinian Authority for statehood based on the rule of law and in the spirit of good governance, even under the current difficult political environment. The EU is working in close partnership with the Palestinian Authority to assist its efforts in the field of human rights, good governance and the rule of law on the basis of jointly agreed objectives.”).

93. See U.N. Econ. & Soc. Council, Implementation of the International Covenant on Economic, Social and Cultural Rights, Additional Information Submitted by States Parties to the Covenant Following the Consideration of Their Reports by the Committee on Economic, Social and Cultural Rights, Israel Addendum, U.N. Doc. E/1989/5/Add.14 (May 14, 2001).

94. *Id.* ¶ 4.

95. *Id.* (“[T]his is also evident under article XIX of the *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip* . . . . Similarly, under article II (C) (4) of the *Wye River Memorandum*, the Palestinian Police is obliged ‘to exercise its powers and responsibilities with due regard to internationally accepted norms of human rights and the rule of law, and be guided by the need to protect the public, respect human dignity and avoid harassment.’” (emphasis added)).

96. *Id.* ¶ 3. (“In light of this changing reality, and the jurisdiction of the Palestinian Council in these areas, Israel cannot be internationally responsible for ensuring the rights under the ICESCR in these areas.”).

97. Human Rights Comm., Second Periodic Reports of State Parties, Republic of Moldova, ¶ 15, U.N. Doc. CCPR/C/MDA/2 (Dec. 26, 2007).

98. *Id.* ¶ 17.

Moldova's limited control,<sup>99</sup> but also the delegitimization of the Transnistrian regime. Turkey similarly attempted to reject claims of state responsibility before the European Court of Human Rights (ECtHR) on the ground that a territorial NSA—the TRNC—was responsible.<sup>100</sup> Turkey claimed the following:

[T]he “TRNC” is a democratic constitutional State with impeccable democratic features and credentials. Basic rights are effectively guaranteed and there are free elections. It followed that the exercise of public authority in the “TRNC” was not imputable to Turkey. The fact that this State has not been recognised by the international community was not of any relevance in this context.<sup>101</sup>

Unlike the Israeli-Palestinian Authority situation, Turkey's denial of its own responsibility did not hinge on establishing the TRNC's responsibility because Turkey denies occupying the TRNC altogether and, therefore, denies holding any residual legal responsibility for the human rights of the local population. Another difference is that Turkey's argument does not necessarily indicate its position on the responsibility of NSAs, because it treats the TRNC as a state, albeit an unrecognized one. In another instance of alleged occupation, the Russian Federation has denied its responsibility under the European Convention on Human Rights (ECHR) for the acts of the Transnistrian authorities. However, it did not impute the acts to the Transnistrian authorities themselves but to Moldova.<sup>102</sup> Again, this offers little indication of the Russian Federation's stance towards NSAs, since it did not identify the Transnistrian authorities as an alternative duty-holder. Moreover, the Russian Federation—or Turkey for that matter—will not likely argue for NSA responsibility before the ECtHR nor under the specific provisions of the ECHR, which is clearly binding only on states.

A nuanced approach is evident in annual human rights reports of the U.S. Department of State. In some cases, a report on a particular state addresses the conduct of territorial NSAs that operate within that state, following its review of the state's government practices. For example, the annual report on Moldova does not refer specifically to the area of Transnistria, but instead addresses the conduct of Transnistrian authorities within the same report on the Moldovan government.<sup>103</sup> Similarly, the reports on the practices of the “entities” Somaliland and Puntland, as well as of al Shabaab, which is regarded as having “controlled most of the south

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99. Human Rights Comm., 75th Sess., Concluding Observations of the Human Rights Committee: Republic of Moldova, ¶ 4, U.N. Doc. CCPR/CO/75/MDA (Aug. 5, 2002) (“While accepting that the Moldovan authorities' control over the Transnistrian region is limited and that parallel structures of governance have established themselves there, the Committee must nonetheless be in a position to assess the enjoyment of Covenant rights in the entire territory under the jurisdiction of the State party.”).

100. See *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) at 21–22 (1995).

101. *Id.* at 22.

102. See *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 260.

103. U.S. DEP'T OF STATE, 2011 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: MOLDOVA (2012).

and central regions,” are incorporated with the sections on the practices of the Transitional Federal Government of Somalia.<sup>104</sup> Until the Sri Lankan military defeated the LTTE in 2009, the conduct of the LTTE was reviewed in the same report as the conduct of Sri Lanka.<sup>105</sup> In a different fashion, the report on Cyprus contains two separate sections: one on the Republic of Cyprus and the other on “The Area Administered by Turkish Cypriots,” in which only the conduct of the TRNC is reviewed.<sup>106</sup> The report on Israel and the Occupied Territories also contains two sections: one on Israel and the other on the Occupied Territories. The latter addresses conduct within the Occupied Territories by Israel, the Palestinian Authority, and Hamas.<sup>107</sup> Differently still, the report on Taiwan is completely separate from the report on the People’s Republic of China,<sup>108</sup> and there is no reporting on Polisario’s conduct in either the Western Sahara or Algeria reports.<sup>109</sup> This may be explained by the fact that Polisario operates with permission from Algeria. Under U.S. policy, which does not recognize the independence of the Sahrawi African Democratic Republic under Polisario’s rule, Algeria remains answerable for Polisario’s conduct.<sup>110</sup> Yet such reasoning is not entirely consistent with the separate reporting on the Transnistrian and TRNC authorities, for which the Russian Federation and Turkey could be held responsible. It may be that the latter cases differ from that of Polisario because holding the Russian Federation and Turkey answerable would imply that human rights law reaches extraterritorially, a doctrine which the U.S. contests;<sup>111</sup> this, in turn, raises the question why the report on the Occupied Territories addresses conduct by Israel. Be that as it may, the overall picture is clearly one of partial acknowledgement of

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104. U.S. DEP’T OF STATE, 2011 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SOMALIA (2012).

105. See, e.g., U.S. DEP’T OF STATE, 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SRI LANKA (2009).

106. U.S. DEP’T OF STATE, 2011 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CYPRUS (2012).

107. U.S. DEP’T OF STATE, 2011 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: ISRAEL AND THE OCCUPIED TERRITORIES (2012).

108. U.S. DEP’T OF STATE, 2011 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: TAIWAN (2012); U.S. DEP’T OF STATE, 2011 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) (2012).

109. There is a separate report on Western Sahara, but it only concerns the responsibility of Morocco. U.S. DEP’T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: WESTERN SAHARA (2011). The report on Algeria only mentions that “Sahrawi refugees lived predominantly in camps near the city of Tindouf, administered by the Popular Front for the Liberation of the Saguia el Harma and Rio de Oro (Polisario)” and that “[n]either the government nor refugee leadership allowed the UNHCR to conduct a registration or complete a census of the Sahrawi refugees.” The last statement actually precedes the reference to Polisario; in so doing, the report avoids attaching responsibility directly to Polisario. U.S. DEP’T OF STATE, 2011 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: ALGERIA (2012).

110. ALEXIS ARIEFF, CONG. RESEARCH SERV., RS20962, WESTERN SAHARA 7 (2012), available at <http://www.fas.org/sgp/crs/row/RS20962.pdf>; see also HUMAN RIGHTS WATCH, *supra* note 67, at 21.

111. Human Rights Comm., 53d Sess., Concluding Observations of the Human Rights Committee: United States of America, ¶ 284, U.N. Doc. CCPR/C/79/Add.50 (Oct. 3, 1995).

the capacity of territorial NSAs to be held responsible under human rights law.

### C. Decisions of Judicial and Quasi-Judicial Bodies

The Committee Against Torture has taken a strong stance on the capacity of territorial NSAs to be obligated by human rights law, and, specifically, by the prohibition on torture (the only norm on which the Committee is mandated to present views). This prohibition is limited under the Convention Against Torture to acts carried out in an official capacity or with official instigation, consent, or acquiescence.<sup>112</sup> Although the Committee's mandate is limited to complaints against states, it has considered whether NSAs are also bound by the prohibition in the context of the prohibition on refoulement. Initially, in *G.R.B v. Sweden*, which involved the removal of an individual to Peru, the Committee stated that "the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention."<sup>113</sup> Nonetheless, in *Elmi v. Australia*, the Committee did not accept Australia's argument to the same effect and distinguished the case of Somalia from that of Peru.<sup>114</sup> It noted that for a number of years Somalia has been without a central government and that some of the factions operating in Mogadishu have set up quasi-governmental institutions. The Committee also noted that those factions exercise certain de facto prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions could fall, for the purposes of the application of the Convention, within the phrase "public officials or other persons acting in an official capacity" contained in Article 1.<sup>115</sup> The Committee looked at the conduct of NSAs that fulfilled public functions and found them capable of being bound by human rights obligations, not only in general, but even specifically by the prohibition on torture, when acting in a de facto "official" capacity.

The position of the ECtHR is less clear. In a number of cases, it considered applications against removal to Somalia that alleged removal would violate the right to life and the prohibition on torture. The normative framework the ECtHR applied is different from that of the Committee Against Torture, since the definition of torture under Article 3 of the ECHR is not limited to official conduct or endorsement.<sup>116</sup> Unlike the Committee Against Torture, the ECtHR looked to the conduct of the state (Somalia), finding that the state was unable to provide protection because it had no

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112. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, *supra* note 79, art. 1.

113. Comm. Against Torture, 20th Sess., *supra* note 76, ¶ 6.5.

114. Comm. Against Torture, 22d Sess., *supra* note 82, ¶ 6.5.

115. *Id.*

116. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 63, art. 3.

functioning government. In *Ahmed v. Austria*, it noted: “The country [Somalia] was still in a state of civil war and fighting was going on between a number of clans vying with each other for control of the country. There was no indication . . . that any public authority would be able to protect [the applicant].”<sup>117</sup> In *Sufi v. United Kingdom*, the court noted that “Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.”<sup>118</sup> Repeatedly mentioning the risk of ill-treatment by the al Shabaab, the court carefully avoided labeling such treatment as a “violation” of Article 3, referring instead to it as a “treatment proscribed by Article 3 in an al-Shabaab controlled area” and “being exposed to a real risk of Article 3 ill-treatment.”<sup>119</sup> The ECtHR’s factual findings could, therefore, be framed as establishing the failure of the state (Somalia) to protect from torture, as much as they established the ability of the NSA to violate the prohibition.

In contrast, in *Sheekh v. Netherlands*, the ECtHR seemed to open the door for considering NSAs capable of both violating human rights and responding to human rights needs (which do not necessarily constitute “obligations” on their part). It began by reiterating that “the existence of the obligation not to expel is not dependent on whether the risk of the treatment stems from factors which involve the responsibility, *direct or indirect*, of the authorities of the receiving country, and Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials.”<sup>120</sup> If the risk of violation exists irrespective of the receiving state’s responsibility even indirectly, the obligation must lie directly with the NSA. Moreover, the ECtHR referred to the NSA’s conduct as “human rights abuses.”<sup>121</sup> Nonetheless, as pointed out above, the ECtHR’s statements do not constitute normative determinations with respect to the conduct of the clan because the court is only mandated to determine the responsibility of a respondent state.

It is interesting to note the ECtHR’s approach to whether the applicants were able to obtain protection against the risk of human rights violations. While such protection is usually sought from the state (and thus its absence may constitute a violation of the state’s obligation to protect), in a number of cases the court noted that such protection was not forthcoming from the stronger clans in Somalia. In *Sheekh v. Netherlands*, for example, it considered the availability of protection specifically from the authorities in Somaliland and Puntland.<sup>122</sup> While this obviously cannot be viewed as imposing on the clans or on other territorial NSAs an obligation to protect,

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117. *Ahmed v. Austria*, 1996-VI Eur. Ct. H.R. (ser. A) 2207.

118. *Sufi v. United Kingdom*, App. Nos. 8319/07 and 11449/07, HUDOC at 49–50 (June 28, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105434>.

119. *Id.* at 66.

120. *Sheekh v. Netherlands*, App. No. 1948/04, HUDOC at 45 (Jan. 11, 2007) (emphasis added), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78986>.

121. *Id.*

122. *Id.* at 41.

it also cannot be taken as a mere factual statement lacking normative significance. The state cannot exempt itself from the obligation to protect by pointing towards a non-state entity, organization, or individual who happens to offer a similar service. For example, if individuals in a certain state are at risk of attack by racist movements, the state cannot rely on privately operated neighborhood watches to relieve it of the duty to act against potential violators. This is true not only for protection through means reserved for states such as legislation, but also for physical protection.<sup>123</sup> Protection offered by Somaliland and Puntland does not therefore, in itself, affect Somalia's obligations. Thus, it appears that the ECtHR was concerned with the conduct of the NSAs not merely as a factor in assessing the state's conduct; the NSAs' conduct also has some normative significance.

#### D. Reports of Internationally Appointed Experts

The wording that the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions adopted makes it abundantly clear that he regards NSA responsibility under international human rights law as a matter of *lex ferenda* rather than *lex lata*. In 2006, the four Special Rapporteurs assigned to a joint mission to Israel and Lebanon following the Second Lebanon War—one of whom was Philip Alston, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions—relied on Alston's earlier report in concluding that Hezbollah

remains subject to *the demand of the international community*, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights. The Security Council has long called upon various groups . . . to formally assume international obligations to respect human rights. It is especially appropriate and feasible to call for an armed group to respect human rights norms when it "exercises significant control over territory and population and has an identifiable political structure."<sup>124</sup>

This statement carefully remains within the political sphere. It speaks of a demand based on a document of ambiguous legal status, namely of what is possible rather than what is required under law. In contrast, the Goldstone Commission noted in 2009 that "it is clear that non-State actors that exercise government-like functions over a territory have a duty to respect human rights," applying this to both the Palestinian Authority and Hamas.<sup>125</sup> The Commission further emphasized that, "all parties to an

123. This is all the more true when the private bodies providing the protection are themselves acting in violation of human rights, as do the clans in Somalia. *Id.* at 30-31.

124. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Representative of the Secretary-General on Human Rights of Internally Displaced Persons, and Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, *Mission to Lebanon and Israel*, Human Rights Council, ¶ 19, U.N. Doc. A/HRC/2/7 (Oct. 2, 2006) (emphasis added) (footnote omitted).

125. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, 12th Sess., Sept. 14-Oct. 2, 2009, ¶¶ 305-07, U.N. Doc. A/HRC/12/48

armed conflict have the obligation to respect the enjoyment of human rights by all.”<sup>126</sup> The Commission provided an account of alleged human rights violations by the Gazan authorities and stated that “the Gaza authorities have an obligation to respect and enforce the protection of the human rights of the people of Gaza, inasmuch as they exercise effective control over the territory, including law enforcement and the administration of justice.”<sup>127</sup> The Commission also noted that the Palestinian Authority and the Gazan authorities voluntarily undertook this obligation.<sup>128</sup>

In 2011, the U.N. Secretary-General’s Panel of Experts on Accountability in Sri Lanka also seemed to accept the notion of direct NSA responsibility when it “proceeds on the assumption that, at a minimum, the LTTE was bound to respect the most basic human rights of persons within its power, including the rights to life and physical security and integrity of the person, and freedom from torture and cruel, inhuman or degrading treatment and punishment,” since it was “exercising *de facto* control over a part of a State’s territory.”<sup>129</sup>

Finally, the Officer of the High Commissioner for Human Rights Mission to Western Sahara and the Polisario-run refugee camps in Tindouf, Algeria refused to relieve Algeria from the responsibility to ensure that the rights stipulated in the human rights instrument to which it is party are upheld for all persons on its territory.<sup>130</sup> At the same time, it considered the SADR’s practice relating to the rights of association, expression and movement. While it did not label this practice a “violation,” it implied that the obligation to respect the enumerated rights lay with Polisario.<sup>131</sup>

## Conclusion

There is no doubt that territorial NSAs are capable of carrying out acts that, if carried out by states, would be regarded as violations of human rights law. Holding territorial NSAs obligated under international human rights law will naturally benefit the individuals under the effective control of these territorial NSAs, at least if this obligation can be enforced effectively. Yet, at present, customary international human rights law does not seem to extend beyond states, nor, obviously, does treaty law. Tentative

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(Sept. 25, 2009); *see also* Human Rights Council, Human Rights Situation in Palestine and Other Occupied Arab Territories, 10th Sess., Mar. 2-27, 2009, ¶ 22, U.N. Doc. A/HRC/10/22 (Mar. 10, 2009).

126. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, 12th Sess., *supra* note 125, ¶ 310.

127. *Id.* ¶ 1369 (footnote omitted).

128. *Id.* ¶ 1370. (“Before Hamas took full control of the Gaza Strip in June 2007, its leaders had publicly indicated that they would respect international human rights standards. In July 2009, the Gaza authorities formally stated to the Mission that they accepted the obligation to respect human rights and fundamental freedoms, including those enshrined in the Universal Declaration of Human Rights and in the Palestinian Basic Law.” (footnotes omitted)).

129. U.N. Secretary-General, *supra* note 45, ¶ 188.

130. See High Commissioner for Human Rights, *Report of the OHCHR Mission to Western Sahara and the Refugee Camps in Tindouf*, ¶ 39 (Sept. 8, 2006).

131. *Id.* ¶¶ 43-49.

steps, however, are discernible towards the inclusion of NSAs in the list of duty-holders. A review of practice in this respect indicates that effective territorial control and the exercise of public functions are not sufficient for states to consider an entity bound by international human rights law. Other normative and institutional factors are also at play.

States steer away from attributing human rights obligations to NSAs where doing so has legal implications, such as imposing obligations on themselves with respect to particular individuals or implying recognition of formal status of the NSAs. The potential link between states' acknowledgment of NSAs' human rights obligations and the latter being granted international status is supported by the fact that when states or the international community are sympathetic to NSAs' demands of international status, they are also more willing to acknowledge human rights obligations of NSAs. This link is most prominently apparent in the willingness to attach obligations and responsibility to the Palestinian Authority and Hamas. The international community has not only acknowledged the independent functioning of the Palestinian authorities in these spheres, but has also welcomed it; under such circumstances, however, independent functioning also entails obligations.

The link between a state's stance on the question of NSA responsibility and its immediate repercussions for the state's own responsibility also operates in the opposite direction: a state is willing to attribute responsibility to an NSA if this would exonerate the state from responsibility. In addition, states are less inhibited about imposing human rights obligations on territorial NSAs in generalized country situations that are removed from individual events or persons.<sup>132</sup> Statements in such contexts are arguably within the realm of policy rather than hard law and can less easily be construed as implied grants of status. They are, therefore, less intimidating.<sup>133</sup> In post-conflict and reconstruction situations, too, the engagement of NSAs in human rights discourse is a political tool for achieving domestic cooperative action<sup>134</sup> and is geared towards the adoption of best practices, rather than an expression of *opinio juris* as to binding legal obligations.

International human rights bodies, both legal and political, have demonstrated greater willingness than states to attach obligations to territorial NSAs, although their limited mandate does not permit any definitive conclusions on the matter. In view of their agenda, namely promoting the protection of the individual, it is not surprising that international human rights bodies are supportive of expanding the human rights obligations of any international actor.<sup>135</sup> The clearly circumscribed mandate of existing

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132. All general statements about the human rights practices of various entities are based on the collection of individual incident reports. However, since those are not recounted publicly, a country report has no direct practical consequences.

133. For a similar view in the context of Security Council thematic resolutions, see Constantinides, *supra* note 61, at 104-05.

134. See, e.g., EUROPEAN COMM'N, GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN UNION - 2009 63 (2010).

135. One must have no illusions that these bodies are immune to political influence or that they do not consider the wider implications of their decisions. See, e.g., Joshua L.

judicial and quasi-judicial bodies to resolve specific disputes between individuals and *states* is a double-edge sword. On the one hand, these bodies have no jurisdiction over NSAs, and, therefore, their pronouncements regarding NSAs' obligations have no formal power. On the other hand, this normative weakness allows these bodies greater room to maneuver in developing soft law relating to NSAs without the risk of becoming popular venues for NSAs to try establishing legal rights and status, a matter which causes concern in domestic courts. This is all the more true with respect to the treaty-monitoring bodies, as opposed to the ECtHR, because their views are not formally binding on states; they thus do not present an insurmountable challenge to states' policies.

The confidence with which international bodies invoke human rights law with respect to territorial NSAs involved in armed conflict can also be tied to the stage of development of NSA status under international law. First, the laws of armed conflict already provide NSAs with obligations and responsibility; thus, extending those to human rights law does not constitute a qualitative leap. Furthermore, the hostility towards international interference in matters essentially within the domestic realm does not come into play in international armed conflict. Even with respect to non-international armed conflict, the growing acceptance of the applicability of international humanitarian law paves the way for accepting the applicability of other branches of law, such as human rights law, despite the domestic context in which the conflict occurs. Moreover, the conflictual character of non-international conflicts renders it practically impossible to ignore the notion of NSA responsibility under international human rights law. First, when a territorial NSA is engaged in armed conflict with a state, clearly that state cannot be held accountable for harm that the territorial NSA caused to that state's population;<sup>136</sup> attaching obligations to the NSAs separately from the state is inescapable. Second, to attach responsibility under human rights law to one party to the conflict (the state) but not to the other (the territorial NSA) invites criticism by states of the illegitimacy of the law, as well as of partiality on the part of those putting forth the legal framework.<sup>137</sup> The European Union, for example, when endorsing an expert report on Sri Lanka, referred to the applicability of human rights law to all parties to the conflict.<sup>138</sup>

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Kessler, *The Goldstone Report: Politicization of the Law of Armed Conflict and Those Left Behind*, 209 MIL. L. REV. 69, 72-74 (2011).

136. Parties to an armed conflict have the duty to protect that population by taking defensive measures. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 71, art. 58.

137. For criticism on the lack of evenhandedness in the work of the Goldstone Commission, see Abraham Bell, *A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law*, 104 AM. SOC'Y INT'L L. PROC. 79, 84-86 (2010); Laurie R. Blank, *Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT'L L. 279, 293-95 (2010); Kessler, *supra* note 135, at 109-10, 115.

138. See Press Release, European Union, Declaration by the High Representative, Catherine Ashton, on Behalf of the European Union on the Report of the UN Secretary-General Panel of Experts on Accountability in Sri Lanka (May 10, 2011). The U.S. State

At the same time, one should not overstate the significance of human rights discourse in the instances mentioned here. Because they involved armed conflict, they were examined primarily through the prism of the laws of armed conflict, which overshadowed human rights discourse. An expert panel on Sri Lanka, for example, explicitly refrained from addressing human rights violations beyond those that it had also characterized as violations of international humanitarian law.<sup>139</sup> The binding nature of international human rights law on the LTTE thereby remained only theoretically significant. The expert panel's report does not go beyond those human rights that are regarded as fundamental, citing "the rights to life and physical security and integrity of the person, and freedom from torture and cruel, inhuman or degrading treatment and punishment."<sup>140</sup> Violations of those rights also constitute international crimes,<sup>141</sup> again an area in which responsibility of some NSAs has already been established. While conflict offers an opportunity for rhetoric on the applicability of human rights law to NSAs, it rarely calls for a move from rhetoric to practice. That said, it is somewhat ironic that the first tentative steps towards recognition of NSAs' responsibility under international human rights law emerged in the context of armed conflict, given that in the past it was precisely in this context that the responsibility of states under international human rights law was denied most vehemently.<sup>142</sup>

In conclusion, the limited practice that exists with respect to human rights obligations of territorial NSAs does not substantiate a claim that such obligations constitute customary international law at present.<sup>143</sup> Some statements and practices imply that NSAs have human rights obligations, but those are rarely explicit and are not uniform. Nonetheless, while NSA obligations under human rights law have not yet crystallized as a customary norm, international law is progressing towards the establishment of such obligations.

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Department has written that any "credible accountability effort must be even-handed and hold both parties to account." OFFICE OF GLOBAL CRIMINAL JUSTICE, DEP'T OF STATE, MEASURES TAKEN BY THE GOVERNMENT OF SRI LANKA AND INTERNATIONAL BODIES TO INVESTIGATE AND HOLD ACCOUNTABLE VIOLATORS OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 5 (2012), available at <http://www.state.gov/documents/organization/187605.pdf>.

139. U.N. Secretary-General, *supra* note 45, ¶ 243.

140. *Id.* ¶ 188.

141. *Id.* ¶¶ 248, 252.

142. David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISR. L. REV. 8, 13 (2009).

143. For a different view, see Constantinides, *supra* note 61, at 102-03.