

STATE RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS COMMITTED IN THE STATE'S TERRITORY BY ARMED NON-STATE ACTORS

**TATYANA EATWELL
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DISCLAIMER

For the purposes of this paper, the term ‘violation’ is used to describe the act of unlawfully preventing or limiting the enjoyment of human rights. When used with reference to the conduct of armed groups, the term ‘violation’ should not be understood to imply any judgement on their legal status.

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KEY MESSAGES

- Armed violence perpetrated by armed non-state actors ('ANSAs') poses a significant threat to the enjoyment of human rights and freedoms by individuals. This is particularly so where a State has lost control over part of its territory as the result of the activities of an ANSA. This loss of control by the territorial State can result in a protection gap that in practice leaves victims of human rights violations without recourse to remedy.
- As a general rule a State is only responsible for its own acts. A State is not responsible for the conduct of private actors, including ANSAs because of the mere fact that the private actors are operating on the State's territory. There are exceptional circumstances in which the conduct of an ANSA will invoke a State's responsibility. This will be where an ANSA acts in complete dependence of a State, on the instructions of, or under the direction or effective control of a State, or where a State acknowledges and adopts the acts of an ANSA as its own. In addition, a State will be responsible for any violations of international law committed by an insurrectional movement that succeeds in establishing a new government or State and may be responsible for certain acts committed by an ANSA in the exercise of governmental authority in the absence or default of the official authorities.
- The promotion of respect for, observation and protection of human rights is incumbent upon all States at all times, including in times of armed conflict. Pursuant to international human rights law ('IHRL') States are required to (i) respect human rights and fundamental freedoms by not acting in a way that violates or unlawfully restricts those rights, for example by using torture as a method of interrogation, and also to (ii) secure those rights and freedoms. The latter obligation requires States to take diplomatic, legislative, judicial and other measures to ensure that its own organs and agents, and private actors, do not violate IHRL. Moreover, a State must exercise due diligence to prevent the commission of violations of human rights by private actors, and to investigate and prosecute those who perpetrate such acts.
- A State's obligations under IHRL are only engaged with respect to persons falling within that State's jurisdiction. If the State does not exercise jurisdiction, it is under no obligation to respect or ensure the rights and freedoms guaranteed by IHRL.
- In circumstances where a State has lost control over part of its own territory by virtue of the military occupation of the area by another State, or the activities of an ANSA controlled by another State, the approach of human rights courts and tribunals has been to restrict their consideration of the territorial State's obligations to its positive obligations to secure rights and freedoms of the individuals in that area. But in practice the protection the territorial State can provide will only go so far. The territorial State will have no authority or influence over the ANSA and its capacity to prevent harm will be severely limited.
- In cases where a third State in fact controls an area outside of its own territory by virtue of its military occupation of the area or control of the ANSA, human rights courts and tribunals have held that, that State will exercise jurisdiction such that its IHRL obligations will be engaged in full.
- However, difficulties arise in circumstances where an ANSA operates independently of any State and controls territory. These situations give rise to a 'protection gap' caused by the lack of control by any State over the area or the ANSA itself. The legal consequence of this loss of control is that no State will exercise jurisdiction such that it is capable of being held directly responsible for human rights violations committed by the ANSA. Provided that the territorial State has fulfilled its due diligence obligations to prevent human rights violations by the ANSA, the victims of human rights violations committed by the ANSA will be left without recourse to remedy.
- UN human rights mechanisms and institutions have sought to close this protection gap by invoking the responsibility of the ANSA itself. However, there is a lack of agreement as to whether ANSA's are bound by IHRL, and if so, what the nature of an ANSA's obligations might be. The development of a shared understanding of the human rights obligations of ANSAs is required if holding ANSAs responsible for the human rights violations they commit is to be an effective means of filling the protection gap.

1. INTRODUCTION

Armed violence perpetrated by armed non-state actors (ANSAs)¹ poses a significant threat to human rights, whether it is perpetrated within² or outside of a situation of armed conflict.³

The root causes of armed violence are complex and are likely to differ in each case, but the impact on the human rights and freedoms of individuals caught up in armed violence is often the same. In situations of armed conflict, urban centres are increasingly used as battlegrounds, leading to an increase in civilian casualties and the destruction of essential civilian infrastructure such as hospitals, schools and emergency services. Civilians are killed, raped, enslaved, tortured, arbitrarily detained, and forcibly displaced. The use of ‘siege warfare’ forces civilians into starvation.⁴ Outside of situations of armed conflict, people may be killed, tortured, kidnapped or trafficked by organized criminal gangs and groups that carry out acts of terrorism. Typically, criminal gangs will use violence to intimidate and control the local population, punish ‘offenders’ and control and defend their ‘territory’.⁵

Both within and outside of situations of armed conflict, a state may lose control over part of its territory to an ANSA. For example, according to the Syrian Observatory for Human Rights, in 2017 the Government of Syria controlled only 19.3 percent of the territory of the Syrian Arab Republic as a result of the armed conflict that erupted in Syria in 2011. The so-called Islamic State controlled 39.1 percent, and the Syrian Democratic Forces controlled 22 percent of Syrian territory.⁶ Since

1 There is no legal definition of ‘armed non-state actor’ (ANSA). For a discussion of the different types of ANSA and how they may be categorized, see A. Bellal, ‘What Are Armed Non-State Actors? A Legal and Semantic Approach’, in E. Heffes, M. Kotlik and M. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice*, T.M.C. Asser/Springer, forthcoming 2019.

2 A. Bellal (ed), *The War Report: Armed Conflicts in 2017*, Geneva Academy of International Humanitarian Law and Human Rights, 2018, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%20Armed%20Conflicts%20in%202017.pdf> (last accessed 13 December 2018).

3 X. M. Galvez Lima, ‘El Salvador: High Level of Armed Gang Violence but Not an Armed Conflict Under IHL’, in A. Bellal (ed), *The War Report: Armed Conflicts in 2017*, Geneva Academy, 2018, pp. 64–70. In 2015, the Geneva Declaration ranked Honduras, Venezuela and Swaziland as the second, third and fourth states, below Syria, ranked first, and above Afghanistan, ranked fifth, with the highest rates of violent deaths per 100,000 population. Of the top five states, only Syria and Afghanistan are classified as ‘emerging from or experiencing armed conflict’. See Geneva Declaration Secretariat, *Global Burden of Armed Violence 2015: Every Body Counts*, May 2015, p 58, <http://www.genevadeclaration.org/measurability/global-burden-of-armed-violence/global-burden-of-armed-violence-2015.html> (last accessed 13 December 2018).

4 For example, ‘siege warfare’ has been used by state and non-state armed groups during the Syrian conflict. See M. Gasser, ‘Syria Conflict: Siege and Suffering’, International Committee of the Red Cross (ICRC), 1 February 2016, <https://www.icrc.org/en/document/syria-conflict-siege-warfare-and-suffering-madaya> (last accessed 18 November 2018).

5 J. M. Hazen, ‘Understanding Gangs as Armed Groups’, 92 *International Review of the Red Cross* 848 (June 2010) 384–385.

6 Syrian Observatory for Human Rights, ‘A Year on Astana Agreement, the Winners Are Iranians, Russians, Turks, the regime, and the Biggest Losers Are Opposition Factions, Tahrir al-Sham and ISIS’, 4 May 2018, <http://www.syriaohr.com/en/?p=91151> (last accessed 13 December 2018).

2014, the self-proclaimed ‘Donetsk People’s Republic’ and ‘Luhansk People’s Republic’ have controlled parts of the Donbass region in eastern Ukraine.⁷ Other examples of ANSAs that have controlled territory include the Taliban in Afghanistan,⁸ the Naxalites in Chhattisgarh, India,⁹ the self-proclaimed Moldavian Republic of Transnistria in Moldova,¹⁰ the Liberation Tigers of Tamil Eelam in Sri Lanka¹¹ and the Sudan People’s Liberation Army in Sudan.¹² ANSAs may establish government-like institutions and infrastructure in order to maintain law and order and provide services ordinarily associated with government such as the provision of law and order, education and health services and immigration control. In such cases, the acts of the governing ANSA may impinge upon a range of human rights and freedoms far broader than those affected by armed violence. For example, an individual’s right to education may be violated by an ANSA that prohibits girls or any other social group from attending school;¹³ the ANSA could deny individuals their right to the enjoyment of property or establish courts that do not provide the essential guarantees for a fair trial.

The ability of some ANSAs to control territory to the exclusion of the state authorities, and the threat that the activities of ANSAs can pose to the enjoyment of human rights, raises the following question: to what extent is a state responsible for violations of human rights committed by ANSAs, particularly in circumstances where the state has lost control over that territory?

The Geneva Academy’s In-Brief *Human Rights Obligations of Non-State Armed Actors* provides an analysis of the practice of the United Nations Human Rights Coun-

7 T. Ash, J. Gunn, J. Lough, O. Lutsevych, J. Nixey, J. Scherr and K. Wolczuk, *The Struggle for Ukraine*, Chatham House Report, 2017, p. 20, <https://www.chathamhouse.org/sites/default/files/publications/research/2017-10-18-struggle-for-ukraine-ash-gunn-lough-lutsevych-nixey-sherr-wolczukV5.pdf> (last accessed 13 December 2018). See further Organization for Security and Co-operation in Europe (OSCE) Special Monitoring Mission to Ukraine, *Findings on Formerly State-Funded Institutions in the Donetsk and Luhansk Regions*, 30 March 2015, <https://www.osce.org/ukraine-smm/148326?download=true> (last accessed 13 December 2018).

8 Council for Foreign Relations, ‘War in Afghanistan’, Global Conflict Tracker, updated 26 October 2018, <https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/war-in-afghanistan> (last accessed 29 October 2018); International Crisis Group, *The Insurgency in Afghanistan’s Heartland*, Asia Report no 207, 27 June 2011, p 8, <https://www.crisisgroup.org/asia/south-asia/afghanistan/insurgency-afghanistan-tan-s-heartland> (last accessed 13 December 2018).

9 G. Khanna and L. Zimmerman, ‘Development for Peace the Decline of Naxalite Violence in India’, Oxford Research Group, 28 September 2017, <https://www.oxfordresearchgroup.org.uk/Blog/development-for-peace-the-decline-of-naxalite-violence-in-india> (last accessed 13 December 2018); Human Rights Watch, ‘“Being Neutral is Our Biggest Crime”: Government, Vigilante and Naxalite Abuses in India’s Chhattisgarh States’, 2008, pp 21–22, <https://www.hrw.org/reports/2008/india0708/> (last accessed 13 December 2018).

10 Moldova’s loss of control of Transnistria to the self-proclaimed Moldavian Republic of Transnistria has been the subject of a number of cases in the European Court of Human Rights (ECtHR). For example, see ECtHR, *Ilascu and Others v Moldova and Russia*, Judgment (Merits and Just Satisfaction), App no 48787/99, 8 July 2004.

11 Z. Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life During War*, Cornell University Press, 2011, pp 111–113.

12 Ibid, pp 148–150.

13 For example, see ECtHR, *Catan and Others v Moldova and Russia*, Judgment (Merits), App nos 43370/04, 8252/05 and 18454/06, 19 October 2012, §147.

cil (HRC) that shows a trend in favour of holding ANSAs accountable for human rights violations, notwithstanding a lack of general agreement as to whether and to what extent ANSAs are actually bound by international human rights law (IHRL).¹⁴ However, it is important that the increased focus on the human rights obligations of ANSAs should not divert attention away from the international obligations of states. International human rights law requires states to refrain from acting in a way that violates human rights, but also to protect individuals from human rights violations committed by state and non-state actors. The legal framework that governs the responsibility of states for violations of human rights by ANSAs is, therefore, a point of departure from which questions relating to the observation of human rights norms by ANSAs should be considered.

Two fields of international law are applicable to the question of state responsibility for human rights violations committed by ANSAs: IHRL and the law of state responsibility. The body of IHRL is found in a comprehensive framework of multilateral treaties, general principles of international law and customary international law. As subjects of international law, states are under an obligation to ensure that the treaties to which they are a party, and customary international law, are respected. Failure to do so will engage that state's responsibility.¹⁵ The conditions on which the acts of a person or entity, including an ANSA, will be attributable to a state are governed by the law of state responsibility. State responsibility entails legal consequences for that state, such as the duty to provide reparation to the person or entity that has suffered loss as a result of the violation.¹⁶

Section 2 of this paper provides an overview of the nature of a state's obligations under IHRL, the question of jurisdiction and the application of IHRL. Section 3 examines the legal framework that governs a state's obligation to protect human rights in light of the particular challenges faced by states in confronting armed violence. Drawing on the jurisprudence of the International Court of Justice (ICJ) and of international human rights courts and tribunals, it focuses on the extent to which the state's human rights obligations are applicable in circumstances where the state has lost control over a part of its territory due to the activities of one or more ANSAs, and with respect to sporadic acts of violence, such as terrorist attacks. Section 4 considers the circumstances under which an act of an ANSA will be attributable to a state, thereby engaging the responsibility of the state for the act itself.

¹⁴ See further A. Bellal, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, Academy In-Brief no 7, Geneva Academy, December 2016, https://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf (last accessed 16 December 2018); D. Murray, *Human Rights Obligations of Non-State Armed Groups*, Hart, 2016; K. Fortin, *The Accountability of Armed Groups Under Human Rights Law*, Oxford University Press, 2017.

¹⁵ Art 1, International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001 (ASR), *Yearbook of the International Law Commission*, 2001, vol 2, part 1, p 32. 'State responsibility' is distinguished from 'accountability'. The concept of 'accountability' is broader than responsibility. A finding that a state is accountable implies that it must provide an explanation in the face of allegations of unlawful conduct, but ultimately may not be under any international obligation to provide a remedy. See Fortin, *The Accountability of Armed Groups Under Human Rights Law*, supra fn 14, p 5.

¹⁶ See Art 31 ASR, supra fn 15, p 91. See also Fortin, *The Accountability of Armed Groups Under Human Rights Law*, supra fn 15, p 5.

2. INTERNATIONAL HUMAN RIGHTS LAW

A. SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

The promotion and encouragement of respect for human rights and freedoms is cited by the UN Charter as one of the purposes of the UN.¹⁷

The Charter commits all Member States to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'¹⁸ and to take 'joint and separate action' in cooperation with the UN to achieve that end.¹⁹ The General Assembly reiterated this commitment to the promotion of human rights and freedoms in 1948 with the adoption of the Universal Declaration of Human Rights (UDHR),²⁰ which called for the universal protection of the fundamental human rights and freedoms.

Since 1948, the UDHR has been elaborated upon by a comprehensive framework of multilateral conventions that are widely ratified by states. These conventions can be divided into four categories: (i) the two 'universal' conventions, the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR); (ii) regional conventions such as the European Convention on Human Rights and Fundamental Freedoms, 1950 (ECHR);²¹ (iii) conventions that address specific rights and freedoms, such as the Convention against Torture, 1984; and (iv) conventions that address the rights and freedoms of particular groups, such as the Convention on the Rights of the Child, 1989.

In addition, certain fundamental rights and freedoms are considered to be part of customary international law. These rights and freedoms include the right

¹⁷ Art 1(3), Charter of the United Nations, 1945.

¹⁸ Art 55, *ibid.*

¹⁹ Art 56, *ibid.*

²⁰ Universal Declaration of Human Rights, UNGA Res 217 A(III), 10 December 1948, part 1, p 71.

²¹ Also, Inter-American Convention on Human Rights (IACHR), 1969; African Charter on Human and Peoples' Rights (ACPHR), 1981; and Arab Charter on Human Rights, 2004.

to life,²² freedom from arbitrary detention,²³ the fundamental principles of the right to fair trial,²⁴ the prohibition of torture,²⁵ and freedom from slavery and from racial discrimination²⁶.

B. THE NATURE OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF STATES

The obligations of states under IHRL can be divided into two categories: negative and positive obligations. The terms ‘negative’ and ‘positive’ are not used to imply any value judgement on the respective obligations. Rather, they are used to denote the state’s requirement not to act in a way that violates human rights (negative obligations) and the requirement *to act* – take positive steps – to implement measures to ensure that individuals are protected from violations of their rights and freedoms by state organs and by private persons or entities (positive obligations).²⁷ As noted by the UN High Commissioner for Human Rights,

Everyone has rights and obligations under human rights law. The state holds primary responsibility, as not only must it respect human rights and respond when it violates them, but it also has the duty to protect against violations by third parties and to create an environment where all rights are respected. While, for example, armed actors, landlords and businesses must all respect human rights and be accountable for violations they commit, the State, through its policies, programmes and laws, must act to stop these violations and prevent their repetition.²⁸

22 Human Rights Committee (HRCtee), General Comment no 14: Article 6 (Right to Life). Nuclear Weapons and the Right to Life, 9 November 1984, §1; Draft General Comment no 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, Revised Draft Prepared by the Rapporteur (Advanced Unedited Version), July 2017, §2. See also African Commission on Human and Peoples’ Rights (ACommHPR), General Comment no 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), November 2015, §5.

23 International Court of Justice (ICJ), *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, 24 May 1980, §91; Report of the Working Group on Arbitrary Detention, Deliberation no 9 Concerning the Definition and Scope of Arbitrary Deprivation of Liberty Under Customary International Law, 24 December 2012, A/HRC/22/44, §37 and §§43-45; International Committee of the Red Cross, Customary International Humanitarian Law Database, Rule 99 (Deprivation of Liberty).

24 HRCtee, General Comment no 29, Art 4: Derogations During State of Emergency, UN doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, §11; HRCtee, General Comment no 32, Art 14, Right to Equality Before Courts and Tribunals and to Fair Trial, UN doc CCPR/C/GC/32, 23 August 2007.

25 ICJ, *Questions Relating to the Obligations to Prosecute or Extradite (Belgium v Senegal)*, Judgment (Merits), 20 July 2012, §99; UN Committee Against Torture, General Comment no 2, Implementation of Article 2 by State Parties, UN doc CAT/C/GC/2, 24 January 2008, §1.

26 ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment (Preliminary Objections), 5 February 1970, §34. The ICJ refers to the prohibition of genocide as well as ‘the basic rights of the human person, including protection from slavery and racial discrimination’ as obligations ‘*erga omnes*’, meaning obligations that are the concern of all states.

27 HRCtee, General Comment no 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, §8.

28 Annual Report of the United Nations High Commissioner for Human Rights, Addendum, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia, UN doc A/HRC/22/17/Add.3, 7 January 2013, Summary, p 2.

For example, if a police officer (an organ of the state) arbitrarily kills a person, the state will be in breach of its negative obligations not to act in a way that violates that individual’s right to life. On the other hand, if the police knew that the officer was not fit to carry firearms and nevertheless allowed them to do so, or knew that the officer (or any other person) intended to kill the victim but did nothing to stop them, then the state will also have failed to fulfil its positive obligations to secure the victim’s right to life.

Box 1: Human Rights Obligations of States: ‘Positive’ and ‘Negative’ Obligations

The human rights obligations of states can be divided into two categories: negative obligations and positive obligations.

Negative obligations:

State organs or agents must not to act in a way that violates or unlawfully restricts the rights and freedoms of individuals that are guaranteed by the relevant human rights treaty.

Positive obligations:

The state must adopt legislative, diplomatic and other measures to protect individuals from violations of their rights by the state’s organs or agents, and from the harmful acts of private actors.

C. JURISDICTION AND THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW

The ICJ has confirmed that IHRL applies at all times, including during an armed conflict, whether that armed conflict is international or non-international in character, except in so far as a state may have derogated from its obligations.²⁹

Common to the ICCPR and most of the regional³⁰ and sectoral human rights treaties³¹ is the provision that a state party is only under a duty to respect and ensure the rights guaranteed by the Convention of persons *within the state’s jurisdiction*.³²

29 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, §25; ICJ, *Legal Consequences of Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion (Wall advisory opinion), 9 July 2004, §106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgment, 19 December 2005, p 168.

30 European Convention on Human Rights (ECHR), 1950, IACHR and ACPHR.

31 For example, Art 2(1), UN Convention Against Torture, 1984, and Art 2(1), UN Convention on the Rights of the Child, 1989.

32 Art 2(1), International Convention on Civil and Political Rights, 1996. See also Art 1, ECHR; Art 1(1), IACHR; and Art 3(1), Arab Charter on Human Rights, 2004. The ACHPR is an exception. Art 1 of the Charter, pursuant to which state parties ‘shall recognize’ the rights and duties guaranteed by the Charter, and give effect to those rights, does not mention ‘jurisdiction’. In practice the ACommHPR has applied state’s obligations under the ACHPR extra-territorially. See ACommHPR, 227/99 *Democratic Republic of Congo v Burundi, Rwanda and Uganda*.

In other words, a state's exercise of jurisdiction over territory or a person will trigger that state's obligations under IHRL. Therefore, before the question of a state's responsibility for violations of human rights committed by an ANSA can be answered, it is first necessary to determine the question of jurisdiction.³³

1. LIMITED JURISDICTION IN CASES OF LOSS OF CONTROL OVER TERRITORY

For the purposes of international law, a state's jurisdiction is primarily territorial: the state is presumed to exercise jurisdiction throughout its own territory.³⁴ This presumption persists but is limited in exceptional circumstances when a state has lost control over part of its territory,³⁵ and that territory is fact controlled by:

- Another state by virtue of its military occupation of the territory³⁶
- A separatist regime that is in fact acting under the 'decisive authority' and control of a third state³⁷
- An international organization³⁸

Common to these 'exceptional circumstances' is the control of the state's territory by another subject of international law, either another state or an international organization. In cases where one state exercises control over the territory of another state, the former state will be considered to exercise 'extraterritorial jurisdiction' over that territory for the purposes of engaging that state's obligations under IHRL.

2. TERRITORY THAT IS IN FACT CONTROLLED BY ANOTHER STATE: THE EXERCISE OF EXTRATERRITORIAL JURISDICTION

The UN Human Rights Committee has long established that State Parties to the ICCPR 'must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party'.³⁹

Human rights courts and UN human rights mechanisms have formulated similar tests based on the notion of 'effective control' over territory in order to determine

³³ Art 2 ASR, supra fn 15; *Ilascu and Others* judgment, supra fn 10, §311. See also M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principle and Policy*, Oxford University Press, 2011, p 19.

³⁴ *Ilascu and Others* judgment, supra fn 10, §312.

³⁵ *Ibid*, §333.

³⁶ E.g. *Wall* advisory opinion, supra fn 29, §109; *Catan and Others* judgment, supra fn 13, §106.

³⁷ E.g. ECtHR, *Cyprus v Turkey*, Judgment (Merits), App no 25781/94, 10 May 2001.

³⁸ E.g. ECtHR, *Azemi v Serbia*, Decision, App no 11209/09, 5 November 2013.

³⁹ HRCttee, General Comment no 31, supra fn 28, §10. See also Case no 52/79, *Lopez Burgos v Uruguay*; Case no 56/79, *Lilian Celiberti de Casariego v Uruguay*. The ICJ confirmed the principle that a state's jurisdiction can extend beyond its own territory in *Wall* advisory opinion, supra fn 29, §109.

when a state exercises extraterritorial jurisdiction.⁴⁰ In addition, the European Court of Human Rights (ECtHR) and the Inter-American Commission on Human Rights have applied a 'personal' model of jurisdiction based upon the state's 'authority and control' over the individual victim or facility in which the alleged human rights violation took place.⁴¹

Accordingly, human rights courts have held that a state will exercise extraterritorial jurisdiction in circumstances where it exercises effective control over territory by virtue of its military occupation of that territory,⁴² or in circumstances where a separatist regime is in fact acting under the state's 'decisive authority' and control.⁴³

3. CIRCUMSTANCES THAT DO NOT JUSTIFY LIMITING THE TERRITORIAL STATE'S JURISDICTION

The ECtHR has not accepted that the refusal by a (lawful) local administration to comply with the state's central government will amount to exceptional circumstances that justify limiting the territorial state's jurisdiction.⁴⁴ In this regard, the Court has stressed that '[t]he higher authorities of the State are under a duty to require their subordinates to comply with the Convention and cannot shelter behind their inability to ensure that it is respected'.⁴⁵

Further, the ECtHR has held that a state will exercise jurisdiction fully over territory maintained as a 'no-man's land' according to the terms of a ceasefire agreement, even if that territory is 'rendered inaccessible by the circumstances'.⁴⁶ According to

⁴⁰ E.g. UN Committee Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention: United States of America, UN doc CAT/C/USA/CO/2, 25 July 2006, §§14–15; ECtHR *Loizidou v Turkey*, Judgment (Merits), App no 15318/89, 18 December 1996, §§52, 56; *Al Skeini v United Kingdom*, Judgment, App no 55721/07, 7 July 2011, §138; *Catan and Others* judgment, supra fn 13, §106. The ACHPR does not contain a jurisdiction clause, but the findings of the ACommHPR in *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, supra fn 32, suggest that a state's obligations under the ACHPR will apply extraterritorially when a state exercises 'effective control' over another state's territory (§§63–64, 91).

⁴¹ For example, *Al Skeini* judgment, supra fn 40, §137; *Issa and Others v Turkey*, Decision (Admissibility), 16 November 2004, §71; *Ocalan v Turkey*, Judgment (Merits and Just Satisfaction), App no 46221/99, 12 May 2005, §91. See further M. Milanovic, *Extraterritorial Application of Human Rights Treaties*, supra fn 33.

⁴² E.g. *Catan and Others* judgment, supra fn 13, §106. See also *Wall* advisory opinion, supra fn 29, §109; *DRC v Uganda*, supra fn 29, §179.

⁴³ E.g. *Cyprus v Turkey*, supra fn 37.

⁴⁴ E.g. ECtHR, *Assanidze v Georgia*, Judgment (Merits), 8 April 2004. The Court's decision is in line with Art 4 ASR, which codifies state responsibility for the conduct of its organs. Art 4(1) states: 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.'

⁴⁵ *Ibid*, §146. The Court further affirmed that any reservation made by a state pursuant to Art 57, ECHR upon ratification of the Convention purporting to limit the territorial jurisdiction of the state would be invalid. See §140.

⁴⁶ ECtHR, *Sargsyan v Azerbaijan*, App no 71503/01, Judgment (Merits), 16 June 2015, §123.

the ECtHR, ‘the need to avoid a vacuum in Convention protection’⁴⁷ must be taken into account. For the Court,

in the present case it has not been established that Gulistan is occupied by the armed forces of another State or that it is under the control of a separatist regime. In such circumstances the Court, taking into account the need to avoid a vacuum in Convention protection, does not consider that the respondent Government has demonstrated the existence of exceptional circumstances of such a nature as to qualify their responsibility under the Convention.⁴⁸

The Court’s reasoning appears to contradict its earlier decision in *Azemi v Serbia*,⁴⁹ in which it effectively recognized that there will be a gap in Convention protection where territory is administered by an international organization. The cases may be distinguished on the basis that in *Azemi* the territory was administered by another subject of international law, albeit not a party to the Convention.

4. LEGAL CONSEQUENCES OF LIMITED STATE JURISDICTION

A state that has lost control over its territory is not relieved of all of its human rights obligations. The scope of the territorial state’s jurisdiction, and of its human rights obligations, will be limited to its positive obligations to ‘ensure’ or ‘secure’ the rights and freedoms of the population of that part of its territory.⁵⁰ This means that the state will continue to be under ‘a duty to take all appropriate measures that it is still within its power to take’ to secure the rights and freedoms of individuals in the area, even though its authorities are no longer in control of the area.

The content of a state’s positive obligations is discussed in more detail in Section 3.

This raises the question of whether the territorial state’s exercise of limited jurisdiction, and therefore the qualification of that state’s obligations under IHRL, gives rise to a protection gap.

5. TERRITORY CONTROLLED BY ANOTHER STATE: THE JURISDICTION AND RESPONSIBILITY OF THE CONTROLLING STATE

In cases where one state controls the territory of another, the protection gap is filled by invoking the jurisdiction of the controlling state. As the ECtHR has explained, ‘the acceptance that the territorial State had only limited responsibility under the Convention was compensated by the finding that another Convention State exceptionally exercised jurisdiction outside its territory and thus had full responsibility under the Convention’.⁵¹

⁴⁷ *Ibid.*, §148.

⁴⁸ *Ibid.*

⁴⁹ *Azemi v Serbia* decision, *supra* fn 38.

⁵⁰ *Ilascu and Others* judgment, *supra* fn 10, §333.

⁵¹ *Azemi v Serbia* decision, *supra* fn 38, §148.

Thus, the state that is in fact in control of territory, and therefore exercises jurisdiction over that territory, will be under an obligation to secure and respect the whole range of substantive rights and freedoms guaranteed by the applicable human rights treaty.⁵² Where this exercise of extra-territorial jurisdiction is by virtue of the state’s effective control over a subordinate local administration, the approach of the ECtHR has been to treat the subordinate local administration in the same way as official organs of the controlling state such that the controlling state will be responsible for policies and actions of that administration. According to the ECtHR,

[t]he fact that the local administration survives as a result of the Contracting State’s military and other support entails that State’s responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.⁵³

Thus, both the positive and negative obligations of the state that exercises effective control over an area will be engaged, filling the protection gap. That state will be responsible for (a) any failure to take all appropriate measures that are in its power to guarantee the rights and freedoms in the area, which will include taking steps to ensure that the local administration’s policies and actions do not violate human rights, and (b) any policies and actions of the local administration that violate human rights and freedoms guaranteed by the applicable human rights treaty.

6. TERRITORY ADMINISTERED BY AN INTERNATIONAL ORGANIZATION

A protection gap will exist in circumstances where the territory is administered by an international organization.

In *Azemi v Serbia*, a case arising out of the Kosovo conflict and brought against Serbia for acts of the Kosovan authorities committed during the period that Kosovo was governed by the UN Interim Administration Mission in Kosovo (‘UNMIK’), the ECtHR accepted that Serbia had not been in effective control of Kosovo during that period, and therefore could not be held responsible for the alleged violations by the Kosovan authorities.⁵⁴ The Court found that Kosovo had been under the effective control of UNMIK on the basis that UNMIK had been entrusted with executive, administrative and judicial powers in Kosovo.⁵⁵ However, as the UN is not a party to the ECHR,⁵⁶ even if the alleged acts could be attributed to UNMIK, the Court was not competent to adjudicate the claim.⁵⁷ Accordingly, the applicant had no recourse to remedy under the ECHR.

⁵² *Al Skeini* judgment, *supra* fn 40, §138, applying *Cyprus v Turkey*, *supra* fn 37, §§76–77. See also *and Others* judgment, *supra* fn 10, §316; *Loizidou*, *supra* fn 40, §52.

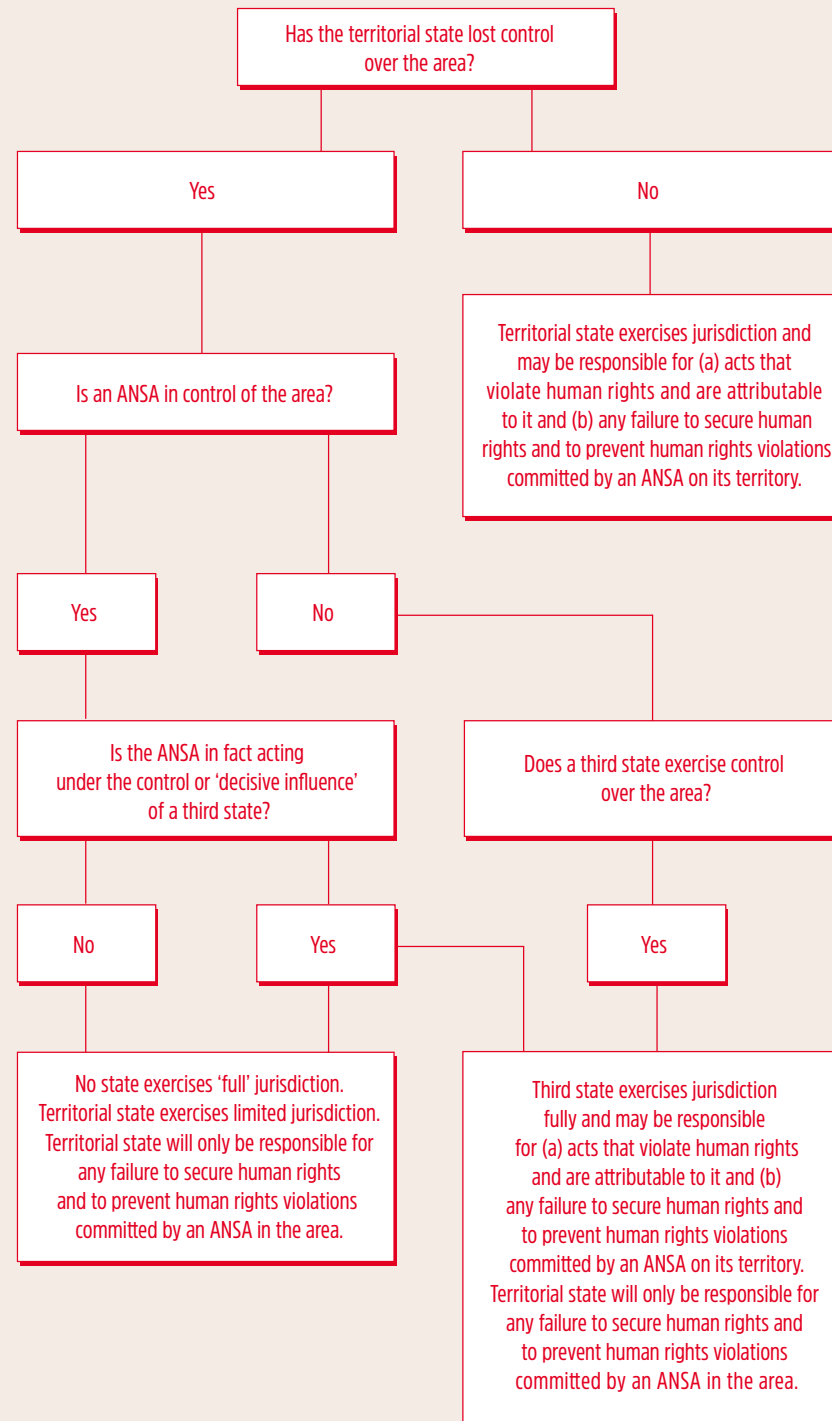
⁵³ *Ibid.*

⁵⁴ *Azemi v Serbia* decision, *supra* fn 38, §49.

⁵⁵ *Ibid.*, §§33–36.

⁵⁶ International organizations have a legal personality separate to that of their members. Therefore, an international organization will not be a party to a treaty by virtue of the fact that its members are parties to that treaty.

⁵⁷ *Azemi v Serbia* decision, *supra* fn 38, §§33–36.

Table 1: Determining a State's Jurisdiction over Territory Controlled by an ANSA

3. STATE RESPONSIBILITY FOR FAILURE TO SECURE RIGHTS AND FREEDOMS

The obligation to secure human rights requires State Parties to take 'legislative, judicial, administrative, educative and other appropriate measures to fulfil their obligations'.⁵⁸

These positive obligations apply to all the rights and freedoms guaranteed by the relevant human rights instrument and must be fulfilled without discrimination.⁵⁹ As explained above, the positive obligations of the territorial state will be engaged at all times and over the whole of its territory, even if that state has lost control over part of its territory because of the activities of an ANSA or another state.

A. LOSS OF CONTROL OF TERRITORY

Inherent in a state's loss of control over territory is a loss of authority and control over its institutions and administrations local to that area such as the police force, courts, local government, customs and immigration control, prisons, (state-run) hospitals and (state-run) schools.

This raises the question of how a state can fulfil its positive obligations with respect to the population of that territory if it has no authority and control over these institutions.

According to the case law of the ECtHR, '[t]he State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of rights and freedoms defined in the Convention'.⁶⁰

Such efforts will include measures needed to re-establish the state's control over its territory, as well as to protect and ensure the rights and freedoms of persons within

⁵⁸ HRCtee, General Comment no 31, supra fn 27, §7.

⁵⁹ Art 2(1), ICCPR states that 'Each State Party ... undertakes to respect and ensure to all individuals within its territory and jurisdiction the rights recognized in the present Covenant, *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*' (emphasis added). The list of bases of discrimination is non-exhaustive. Other human rights treaties contain similar non-discrimination clauses. Art 1, IACHR is almost identical except for its references to 'economic status' and 'any other social condition' instead of 'property' and 'other status'. Art 14, ECHR adds 'association with a national minority'. Art 2, ACHPR refers to 'fortune' instead of 'property'.

⁶⁰ *Ilaşcu and Others* judgment, supra fn 10, §333.

that territory.⁶¹ As the ECtHR has found with respect to measures taken by Moldova to restore control over Transnistria, '[t]he obligation to re-establish control over Transnistria required Moldova, firstly, to refrain from supporting the separatist regime of the "MRT", and secondly to act by taking all the political, judicial and other measures at its disposal to re-establish its control over that territory'.⁶²

Measures to re-establish control over territory may include military operations, (where relevant) criminal proceedings against members of the ANSA that controls the territory, the continued assertion of sovereignty over the territory and diplomatic efforts to resolve the conflict.

Even if there is little a state can do to re-establish control over its own territory, a loss of control will not excuse its partial or total failure to act if 'minimum effort' to protect the rights and freedoms of persons in that territory was possible and should have been made.⁶³

However, in practice the measures taken by a state that has no control or authority over an area are unlikely to be effective. It is the measures implemented by the entity that in fact controls the area, whether that is another state, an international organization or an ANSA, that will have the most impact.

The requirement that a state should 'refrain from supporting the separatist regime' raises the question of whether engaging with the regime on matters of human rights will constitute 'support' for that regime. If that were the case, then the requirement would in fact act as a disincentive. States are likely to be reluctant to attempt to open a dialogue with a separatist regime, even if that dialogue is confined to the issue of human rights protection.

Case Study: The Positive Obligations of Moldova with respect to the self-proclaimed Moldavian Republic of Transnistria

In cases concerning the self-proclaimed Moldavian Republic of Transnistria ('MRT') in the eastern region of Moldova, the ECtHR has held that Moldova must 'take the diplomatic, economic, judicial or other measures to:

Re-establish control over the territory, namely by (a) refraining from supporting the ANSA, and (b) taking all political, judicial and other measures at its disposal to re-establish control

⁶¹ Ibid, §339.

⁶² Ibid, §340.

⁶³ Ibid, §334.

Ensure respect for individual rights, that are both in its power to take and in accordance with international law.

Source: *Catan and Others v Moldova and Russia*, Judgment (Merits), App nos 43370/04, 8252/05 and 18454/06, 19 October 2012, §109, applying *Ilascu and Others v Moldova and Russia*, Judgment, 8 July 2004, §§331-340.

The case of *Catan and Others* concerns the denial of the right to education by the MRT. The MRT had enacted a 'language law' according to which schools were required to teach in Cyrillic and not Latin script. Schools that refused were threatened with closure. The Court accepted that Moldova had complied with its positive obligations by paying for the rent and refurbishment of schools, equipment, transportation costs and staff salaries, thereby enabling schools threatened with closure by the MRT to continue operating.

Source: *Catan and Others* judgment (Merits), §147.

In a separate case, *Ilascu and Others*, the Court held that Moldova had failed to fulfil its positive obligations to protect the human rights of persons arbitrarily detained and tortured by the MRT. Moldova had raised the individuals' cases orally with the MRT. However, Moldova had not sought a formal agreement with the MRT guaranteeing respect for the detainees' human rights and had not raised the individual cases in negotiations concerning the settlement of the situation in Transnistria.

Source: *Ilascu and Others v Moldova and Russia*, Judgment, 8 July 2004, §§348-350.

B. OBLIGATION TO PREVENT THE COMMISSION OF HUMAN RIGHTS VIOLATIONS BY ANSAs

A state's obligation to secure the human rights and freedoms of individuals within its jurisdiction includes the obligation to prevent the commission of human rights violations by ANSAs. This is an obligation of due diligence. Due diligence requires the state to take all appropriate measures available to it to prevent the commission of human rights violations and harmful acts by ANSAs.⁶⁴ According to the Human Rights Committee,

[t]here may be circumstances in which a failure to ensure Convention rights as required by article 2 would give rise to violations by State Parties of those rights, as a result of the State Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.⁶⁵

⁶⁴ HRCtee, General Comment no 31, supra fn 27, §8.

⁶⁵ Ibid.

Thus, even if the state itself has not acted in a way that violates an individual's rights, it may still have failed to fulfil its human rights obligations if it has not taken steps to protect individuals from harmful acts of ANSAs operating within its territory.⁶⁶ As the Inter-American Court on Human Rights (IACtHR) has held,

in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.⁶⁷

International human rights law does not dictate the specific measures a state should take in order to protect individual rights and freedoms. What those measures are will depend on the circumstances of each case. Human rights bodies have stipulated that the measures taken by the state should be 'appropriate',⁶⁸ 'reasonable' and 'necessary'⁶⁹ to prevent the harmful acts in question.⁷⁰ The state is required to adopt measures 'based on the specific needs of protection of the subject of law, either because of his or her personal situation or because of the specific circumstances in which he or she finds himself'.⁷¹

1. OUTBREAK OF VIOLENCE, ARMED CONFLICT OR ACTS OF TERRORISM

According to the ECtHR, 'the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources' should be borne in mind such that the obligation must be interpreted 'in a way which does not impose an *impossible or disproportionate* burden on the authorities'.⁷²

However, the difficulties faced by a state in its efforts to protect its population

66 The state's obligation to protect individuals from the harmful acts of non-state actors has also been recognized by the ACommHPR, the Inter-American Commission on Human Rights and the ECtHR. See ACHPR, 74/92, *Commission nationale des droits de l'Homme et libertés v Chad*, § 20; IAmCHR, *Velasquez Rodriguez v Honduras*, Judgment, 29 July 1988, §172; and ECtHR, *Odievre v France*, Judgment, App no 42326/98, 13 February 2003, §40.

67 IAmCtHR, *Velasquez Rodriguez Case*, Judgment, Series C no 4, of 29 July 1988, §172.

68 *Ilascu and Others* judgment, supra fn 10, §313.

69 Art 2(2), ICCPR.

70 HRCtee, General Comment no 31, supra fn 27, §8; IACtHR, *Gonzalez et al ('Cotton Field') v Mexico*, Judgment, 16 November 2009, § 243; ACHPR, 272/2003, *Association of Victims of Post Electoral Violence and Interights v Cameroon*, §115.

71 IACtHR, *Gonzalez et al* judgment, supra fn 70, §243.

72 ECtHR, *Osman v United Kingdom*, Judgment, App no 23452/94, 28 October 1998, §116 (emphasis added).

from violence committed by ANSAs do not absolve the state of a failure to implement appropriate measures to protect individuals from violations of human rights. Whether or not the state will be responsible for the failure to prevent harm will depend upon what the state knew or ought to have known at the time about the ANSA's plans to commit the harmful acts⁷³ or the real and immediate risk of harm.⁷⁴ For example, the ECtHR has found that Russia was not responsible for failing to prevent hostage-taking by Chechen separatists who stormed the Dubrovka Theatre in Moscow as there was 'no evidence that the authorities had any specific information about the hostage-taking being prepared'.⁷⁵

A state's responsibility will be engaged if the state authorities fail to plan and control security operations so as to minimize, to the greatest extent possible, recourse to the use of lethal force.⁷⁶ Equally, a state's responsibility will be engaged if the state fails, in the planning and performing of that operation, to take all feasible precautions in the choice of means and methods used so as to avoid the incidental loss of civilian life.⁷⁷

Even if the harmful acts were entirely unforeseeable such that the state could not have prevented them, a state will not fulfil its international obligations if its response to those acts or its attempts to secure the safety of its citizens are unreasonably delayed.⁷⁸ On these grounds, the African Commission on Human and People's Rights found Cameroon responsible for its failure to take the necessary measures to prevent post-election violence that, through its investigations, the state knew or should have known was being planned,⁷⁹ and for its failure to respond promptly to that violence, a failure that 'promoted the magnitude of the violence, the serious violations of human rights and the destruction of property'.⁸⁰

73 ACHPR, 272/2003, *Association of Victims of Post Electoral Violence and Interights*, supra fn 70, §115; ECtHR, *Finogenov and Others v Russia*, Decision on Admissibility, 18 March 2010, §173.

74 ECtHR, *Finogenov and Chernetsova and Others v Russia*, Decision on Admissibility, App no 8829/03, 18 March 2010, §173; ECtHR, *Osman* judgment, supra fn 72, §116. These cases concerned claims that the state had failed to prevent violations of the right to life (Art 2 ECHR).

75 *Finogenov and Others* decision on admissibility, supra fn 73, §173. The ECtHR stressed that, 'not every presumed threat to life obliges the authorities to take concrete measures to avoid the risk. A duty to take specific preventive action (such as police protection, for instance) arises only if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an individual or individuals. This element is absent in the present case. There is no evidence that the authorities had any specific information about the hostage-taking being prepared.'

76 ECtHR, *McCann and Others v United Kingdom*, Judgment, App no 18984/91, 27 September 1995, §§146-150.

77 ECtHR, *Isayeva v Russia*, Judgment, App no 57947/00, 24 February 2005, §176.

78 ACHPR, 272/2003, *Association of Victims of Post Electoral Violence and Interights*, supra fn 70, §116.

79 *Ibid*, §§115, 117.

80 *Ibid*, §116.

Box 2: Obligation to Prevent Human Rights Violations

A state's positive obligations to secure human rights and freedoms apply throughout its own territory, *including territory that is in fact controlled by an ANSA or other subject of international law*.

The obligation to secure human rights includes the obligation to take all available measures to prevent the commission of harmful acts by the state's own organs and agents, and by private persons including ANSAs.

- The obligation to exercise due diligence is not absolute – the obligation does not impose a *disproportionate or impossible* burden on the state.
- A state will comply with the obligation if it has taken all available measures that are '*appropriate*', '*reasonable*' and '*necessary*'.
- Whether a state has fulfilled its due diligence obligations will depend on the circumstances of each case. In particular, a court may consider:
 - The priorities of and resources available to the state
 - Whether the state *knew or ought to have known* at the time that the ANSAs planned to commit the harmful acts
 - Whether the state *acted promptly* in response to a threat of or commission of harmful acts by an ANSA
 - Whether, in the planning and preparation of a security operation against an ANSA, the state has *taken all feasible precautions* to avoid the incidental loss of civilian life
- A state may not be held responsible for failing to prevent acts in circumstances where:
 - The acts were unforeseen or not reasonably foreseeable
 - There was no real possibility of the state preventing the acts

ANSAs controlled by another state

Where an ANSA is in fact acting on behalf of another state, that state will be under an obligation *to secure and to respect* human rights with regard to the area. The controlling state is capable of being held responsible for violations committed by the ANSA.

The Protection Gap

Where the ANSA operates independently of any state, there will be a protection gap. The territorial state will not be responsible for violations committed by an ANSA. In practice, there will be very little the state can do to protect the rights of people in the area.

C. OBLIGATION TO INVESTIGATE, PROSECUTE, PUNISH AND TO PROVIDE REDRESS

Even if a state has fulfilled its obligations to exercise due diligence to prevent violations of human rights, it may still be responsible for its failure to properly investigate, prosecute, punish and provide redress to the victims of those violations.

A state is not relieved of the obligation to investigate allegations of human rights violations because those violations have been committed during an outbreak of violence or armed conflict. In *Gulec v Turkey* the ECtHR stressed that, 'neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, or, as in the present case, a demonstration, as illegal as it may have been'.⁸¹

The state must investigate allegations of violations of human rights promptly. The investigation must be effective and thorough, and conducted by an independent and impartial body.⁸²

81 ECtHR, *Gulec v Turkey*, Judgment, App no 21593/93, 27 July 1998, §81.

82 HRCttee, General Comment no 31, supra fn 27, §15; *Isayeva* judgment, supra fn 77, 24 February 2005, §§209–213.

4. STATE RESPONSIBILITY FOR ACTS COMMITTED BY ANSAS

As a general rule, a state is not responsible for the acts of private persons or entities. Exceptions to this rule are based upon the existence of a specific factual or legal link between the state and the ANSA that has committed the act in question.

According to the law of state responsibility, as codified by the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 (ASR),⁸³ the acts of an ANSA will be attributable to the state, and therefore the state will be legally responsible for them where there is a legal⁸⁴ or specific factual relationship between the ANSA and the state,⁸⁵ or in certain cases where an ANSA exercises ‘governmental authority’ in the absence or default of the official authorities.⁸⁶

A. CONDUCT OF A STATE’S DE FACTO ORGANS

It is the first principle of the law of state responsibility that the conduct of any state organ is an act of the state.⁸⁷ The term ‘state organ’ covers all persons or entities that make up the organization of the state and act on the state’s behalf.⁸⁸ The state will be responsible for the conduct of its organs, even if that organ exceeds its authority (acts *ultra vires*), provided that the organ is acting in that capacity.⁸⁹

The reference to ‘organ’ is not limited to central government or to a person or entity classified as ‘organ’ by the domestic laws of the state.⁹⁰ According to the case law of the ICJ, persons or groups should be equated to state organs, even if they have no formal or legal status under the domestic laws of the state, if they in fact act with ‘complete dependence’ on the state.⁹¹

The ‘complete dependence’ test for organ status imposes a high evidential thresh-

⁸³ ASR, supra fn 15, pp 31–143.

⁸⁴ Art 5, *ibid*, p 42.

⁸⁵ Arts 8, 10 and 11, *ibid*.

⁸⁶ Art 9, *ibid*, p 49.

⁸⁷ Art 4, *ibid*, p 40.

⁸⁸ *Ibid*, p 40, §1.

⁸⁹ *Ibid*, §3. See also Art 7 ASR, p 45.

⁹⁰ Commentary to Art 4 ASR, §§1 & 6.

⁹¹ ICJ, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, §§391–392, applying ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, 27 June 1986, §110.

old. The circumstances in which an ANSA will be equated with a state organ ‘must be exceptional’.⁹² The ANSA must be proven to be ‘ultimately merely an instrument’ of the state.⁹³ As the ICJ has explained,

[i]n such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.⁹⁴

Thus, only ANSAs that in fact have no independence whatsoever from the state would satisfy the test.

B. CONDUCT OF ANSAS EMPOWERED TO EXERCISE ELEMENTS OF GOVERNMENTAL AUTHORITY

According to Article 5 ASR, the conduct of a person or entity ‘which is empowered by the law of that state to exercise elements of the governmental authority shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance’.⁹⁵

Article 5 ASR applies to ‘parastatal entities’ – persons or entities that are not state organs but are nevertheless authorized to exercise governmental authority.⁹⁶ For example, a private military and security company (PMSC) contracted by a state to carry out specific tasks that would normally be carried out by the state’s armed forces or security services, such as the provision of security, intelligence analysis,

⁹² *Bosnia and Herzegovina* judgment, supra fn 91, §393.

⁹³ *Ibid*, §392.

⁹⁴ *Ibid*.

⁹⁵ Art 5 ASR, supra fn 15, p 42. See also Art 7, p 45 and commentary thereto p 45, §2.

⁹⁶ Commentary to Art 5, *ibid*, §1.

operational coordination⁹⁷ or immigration control,⁹⁸ or acting as prison guards or interrogation officers.⁹⁹ Only the conduct of the parastatal entity carried out in performance of its contract with the state, or within the parameters of its authorization, will be considered an act of the state.¹⁰⁰ For example, a PMSC may be contracted by a state to provide security to government officials. That PMSC may also be contracted by a private company to provide security to its personnel. Article 5 will only be engaged with respect to the PMSC's conduct carried out in the performance of its contract with the state.

C. ANSA'S ACTING ON THE INSTRUCTIONS OF, OR UNDER THE CONTROL OF, THE STATE

The acts of an ANSA committed on the 'instruction of, or under the direction or control of, the state' are attributable to that state.¹⁰¹ Underlying this rule of attribution is the principle that a state should not escape responsibility for violations of international law by employing an ANSA to carry out armed operations or other tasks on its behalf.

The 'instructions' standard requires that the ANSA is instructed to commit a particular act or carry out a particular task by the state. For example, a state that instructs an ANSA to plant and detonate a bomb in a market place will be responsible for any unlawful killings and injuries resulting from that act.

97 See generally, J. Elsea, M. Schwartz and K. H. Nakamura, *Private Security Contractors in Iraq: Background, Legal Status and Other Issues*, Congressional Research Service, Updated 25 August 2008, p 4, <https://fas.org/sgp/crs/natsec/RL32419.pdf> (last accessed 13 December 2018); Dutch Advisory Council on International Affairs, *Employing Private Military Companies: A Question of Responsibility*, 18 January 2008, <https://aiv-advies.nl/6c6/publications/advisory-reports/employing-private-military-companies-a-question-of-responsibility> (last accessed 13 December 2018). There is a growing body of academic literature that addresses the question of state responsibility for the conduct of private security companies: C. Lehnardt, 'Primary Military Companies and State Responsibility', in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Oxford University Press, 2007; C. Beaucillon, J. Fernandez and H. Raspail, 'State Responsibility for the Conduct of Private Military and Security Companies Violating Jus ad Bellum', in F. Franconi and N. Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, Oxford University Press, 2011; H. Tonkin, *State Control over Private Military and Security Companies in Armed Conflict*, Cambridge University Press, 2012; S. Macloed, 'Private Security Companies and Shared Responsibility' 62 *Netherlands International Law Review* 1 (2015). See also Swiss Department of Foreign Affairs and ICRC, *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, 17 September 2008.

98 For example, PMSCs contracted by Israel to provide border control at the Erez crossing between Gaza and Israel and the Sha'ar Ephraim crossing in the northern West Bank. See Foundation for Middle East Peace, *Report on Israeli Settlement: Settlement Time Line*, vol 16(2), March–April 2006, p. 5.

99 For example, in 2003 the US Government hired the firm CACI to provide interrogators in its detention centres in Iraq, including Abu Ghraib Prison. See CACI, 'CACI in Iraq – Frequently Asked Questions', www.caci.org/iraq/iraq_faqs.shtml (last accessed 13 December 2018). See further Tonkin, *State Control over Private Military and Security Companies in Armed Conflict*, supra fn 97, 1.4 and ch 5.

100 Commentary to Art 5 ASR, supra fn 15, p 43, §5.

101 ASR, supra fn 15, p 47.

The ICJ has confirmed that the level of control required is one of 'effective control'.¹⁰² 'Effective control' is a particularly high degree of control. For example, arming, financing, training and otherwise supporting an ANSA does not constitute 'effective control'. The state must be proven to have directed or enforced the harmful acts.¹⁰³ Moreover, the 'effective control' standard requires that a state exercises control over a specific operation carried out by the ANSA.¹⁰⁴

Affiliation or claims of loyalty by an ANSA to the state will not be sufficient to prove effective control. The ANSA must be subject to the state's chain of command at the time the violations were committed.

D. ANSAS EXERCISING GOVERNMENTAL AUTHORITY IN ABSENCE OR DEFAULT OF THE OFFICIAL AUTHORITIES

Article 9 ASR states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities in circumstances such as to call for the exercise of those elements of authority.¹⁰⁵

The circumstances envisaged by Article 9 ASR are exceptional and will occur only rarely.¹⁰⁶ For example, these situations may arise 'during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative', or when lawful authority is gradually being restored after the conflict has ended.¹⁰⁷

Article 9 requires that the exercise of governmental authority must be 'called for'. This means that the circumstances must justify the attempt to exercise governmental authority, such as policing to re-establish law and order,¹⁰⁸ civilian self-defence units to fight against an invading enemy¹⁰⁹ and customs and immigration controls.¹¹⁰

For example, in the aftermath of the Iran Revolution, members of what became known as the Revolutionary Guard performed customs duties at Tehran Airport,

102 *Bosnia and Herzegovina* judgment, supra fn 91, §400, applying *Nicaragua* judgment, supra fn 91, §115.

103 *Nicaragua* judgment, supra fn 91, §115.

104 *Ibid.*

105 ASR, supra fn 15, p 49.

106 Commentary to Art 9 ASR, supra fn 15, p 49, §1.

107 *Ibid.*

108 *Ibid.*, §6.

109 *Ibid.*, §2.

110 *Ibid.*; Iran-United States Claims Tribunal, *Kenneth P. Yeager v Islamic Republic of Iran*, 1987, 17 Iran-US CTR 92.

without authorization to do so and before the Revolutionary Guard was officially recognized as an organ of government.¹¹¹ The Iran-US Claims Tribunal considered the conduct of the Revolutionary Guard to be attributable to Iran such that Iran was responsible for the unlawful expulsion of a US citizen.¹¹²

It is questionable whether Article 9 will apply to the conduct of an armed opposition group.¹¹³ Nevertheless, it has been suggested that in these cases Article 9 will apply to 'acts that relate to the continuance of daily life in armed conflict' that would include the provision of healthcare and education, but not 'acts intimately related to [the ANSA's] military struggle'.¹¹⁴

E. SUCCESSFUL INSURRECTIONAL MOVEMENTS

Article 10 ASR states that the conduct of (1) an insurrectional movement which becomes the new government of a state and (2) an insurrection or other movement which succeeds in establishing a new state in part of the territory of a pre-existing state or in a territory under its administration, shall be considered an act of that state under international law.¹¹⁵

The application of Article 10 ASR is contingent upon the successful overthrow of the pre-existing government, or the establishment of a new state by an 'insurrectional movement'.¹¹⁶ The state will be responsible for the conduct of the insurrectional movement committed during its struggle against the former government. Importantly, no distinction is made between successful insurrectional movements

111 Yeager, *supra* fn 111. The newly established government formally recognized the Revolutionary Guard as an organ of government in May 1979. The conduct that was the subject of the Yeager case took place in February 1979.

112 Ibid.

113 J. Crawford, *State Responsibility: The General Part*, Cambridge University Press, 2013, p 168; T. Eatwell, 'State Responsibility for the Conduct of Armed Group Governors', 29 November 2016, <https://ssrn.com/abstract=2997706> (last accessed 13 December 2018).

114 K. Fortin, 'The Relevance of Article 9 of the Articles on State Responsibility for the Internationally Wrongful Acts of Armed Groups' in J. Summers and A. Gough (eds), *Non-State Actors and International Obligations*, Brill Nijhoff, 2018, p 383. See also S. Verhoeven, 'International Responsibility of Armed Opposition Groups' in N. Gal-Or, C. Ryngaert and M. Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place*, Brill Nijhoff, 2015, p. 295. For arguments before the adoption of the ASR, see H. Silvanie, 'The Responsibility of States for Acts of Insurgent Governments' 33 *AJIL* 1 (1939); G. Schwarzenberger, *International Law*, 3rd ed, Stevens, 1957, vol 1, pp 629-630; D.P. O'Connell, *International Law*, 2nd ed, Stevens, 1970, p 970; P. Reuter, 'La Responsabilité Internationale', *Droit internationale public*, 4th ed, Presses universitaires de France, 1973, p 204.

115 ASR, *supra* fn 15, p 50.

116 The term 'insurrectional movement' is not defined in the ILC's Commentary to Art 10 ASR. However, the Commentary suggests that the threshold application of Additional Protocol II to the Geneva Conventions 1949 (APII) may be taken as a guide. For the ILC, the definition of 'dissident armed forces' provided by Art 1(1) APII 'reflects ... the essential idea of an "insurrectional movement"'. Art 1(1), APII refers to 'dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

on the basis of perceived legitimacy or legality.¹¹⁷ The state cannot absolve itself of responsibility for human rights violations committed by its new government in its former guise as an insurrectional movement because that movement's purpose was 'just'.

The overthrow of the government of former President of the Central African Republic, François Bozizé, by a coalition of armed groups called Séléka in March 2013 is an example of a situation that would fall within the scope of Article 10. As noted by a 2013 report by the Office of the High Commissioner for Human Rights (OHCHR), 'in accordance with article 10 of the draft articles on Responsibility of States for Internationally Wrongful Acts, the Séléka, after it seized power, engaged the State responsibility of the Central African Republic for all violations committed by Séléka members in the country during the armed conflict'.¹¹⁸

According to the International Law Commission (ILC), 'the rule should not be pressed too far in the case of governments of national reconciliation formed following an agreement between the existing authorities and the leaders of an insurrectional movement'.¹¹⁹ For the ILC, a state should not be made responsible for the conduct of an insurrectional movement 'merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed Government'.¹²⁰

F. A STATE'S ACKNOWLEDGMENT AND ADOPTION OF ACTS BY AN ANSA

Article 11 ASR states that '[c]onduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own'.¹²¹

For example, the express endorsement by Ayatollah Khomeini of the seizure of the US embassy in Tehran by militants in 1979, and the maintaining of the situation by the Iranian Government in order to put pressure on the US Government, was held by the ICJ to have transformed the legal relationship between Iran and the militants such that '[t]he militants, authors of the invasion and jailers of the hos-

117 Commentary to Art 10 ASR, *supra* fn 15, p 51, §11.

118 OHCHR, Situation of Human Rights in the Central African Republic, UN doc A/HRC/24/59, 12 September 2013, §25.

119 Commentary to Art 10 ASR, *supra* fn 15, p 51, §7.

120 Ibid. However, it is not clear if the rule will apply to a coalition government that involves an equal distribution of power within government, rather than merely drawing a handful of members of the opposition into government. See J. d'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by democratically elected insurgents' 58 *International & Comparative Law Quarterly* 2 (2009); T. Eatwell, 'State Responsibility, "Successful" Insurrectional Movements and Governments of National Reconciliation', in J. Summers and A. Gough, (eds), *Non-State Actors and International Obligations*, Brill Nijhoff, 2018.

121 ASR, *supra* fn 15, p 52.

tages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible'.¹²²

G. STATE RESPONSIBILITY FOR COMPLICITY IN VIOLATIONS OF HUMAN RIGHTS BY ANSAs

The ASR do not contain a rule of attribution according to which a state will be responsible for complicity – or in the terminology of the ASR, ‘aiding or assisting’¹²³ – in violations of human rights by an ANSA. However, the ICJ has applied, by analogy, Article 16 ASR, which covers state responsibility for aiding and assisting violations of international law committed *by another state*, to the question of state responsibility for complicity in genocide.¹²⁴

Austria has applied the principles provided by Article 16 ASR to the question of state responsibility for the conduct of ANSAs provided with weapons by third states. A discussion paper circulated to EU Member States outlining Austria’s position on the lifting of the EU arms embargo in Syria states that ‘[s]hould supplied arms be used by armed opposition groups in Syria in the commission of internationally wrongful acts, the States who had supplied these arms and had knowledge of these acts would incur State responsibility for their aid and assistance in the commission of such acts’.¹²⁵

¹²² *United States of America v Iran* judgment, supra fn 23, §74 (emphasis added).

¹²³ The ILC abandoned the use of the term ‘complicity’ because of its association with domestic criminal law. The term ‘complicity’ is used in this paper as shorthand for ‘aid or assistance for the commission of a wrongful act’ and should not be understood as denoting criminal responsibility of states.

¹²⁴ *Bosnia and Herzegovina* judgment, supra fn 91, §420. Art 16 ASR provides that: A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: that State does so with knowledge of the circumstances of the internationally wrongful act; and the act would be internationally wrongful if committed by that State. See Art 16 ASR, supra fn 15, p 65. Art 58 ASR provides a similarly worded rule of attribution regarding state responsibility for aiding and assisting in the commission of an internationally wrongful act by an international organization.

¹²⁵ J. Borger, ‘The Austrian Position on Arms Embargo in Syria – Official Document’, *The Guardian*, 15 May 2013, para 4, <http://www.guardian.co.uk/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf> (last accessed 13 December 2018).

Box 3. State responsibility for acts of ANSAs

In general, a State will only be responsible for the conduct of its organs. A State will not be responsible for the conduct of private persons or groups. However, there are exceptions to this rule. The acts of private persons or groups, including ANSAs, will be treated as acts of a State in certain exceptional circumstances, thereby engaging the State’s responsibility for those acts.

The acts of an ANSA will be considered an act of a State when:

- The ANSA is authorised to exercise elements of governmental authority
- The ANSA is acting on the instructions of, or under the effective control of the State
- The ANSA is exercising elements of governmental authority in the absence or default of the official authorities
- The ANSA becomes the new government of the state or establishes a new state, or
- The state acknowledges and adopts the acts of the ANSA as its own.

Source: Articles 5, 8, 9, 10 and 11 ASR.

According to the International Court of Justice, an ANSA that in fact acts in ‘complete dependence’ on the state such that it is a mere instrument of that state, should be equated to a state organ. In these cases, the state will be legally responsible for all of the ANSA’s acts in the same way that it will be responsible for all the acts of its organs.

Source: *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p 43, pp 204–205, §§391–392, applying *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p 14, pp 62–63, §110.

5. CONCLUSION

A state is, at all times, under a positive obligation under IHRL to ensure the rights and freedoms of all individuals within its jurisdiction.

This positive obligation requires a state to be vigilant to the threats posed by ANSAs to human rights and freedoms and to take political, legislative, judicial and other appropriate measures to prevent human rights violations committed by ANSAs operating in that state's territory and in any other area under that state's effective control. Thus, even if a state has lost control over part of its territory, and the human rights violations in question are committed by ANSAs and not by state organs or agents, the state may still be responsible for failing to fulfil its obligation to take steps to prevent those violations.

A state's loss of control over part of its territory will make compliance with that state's positive obligations more difficult but does not provide an excuse for any failure to prevent the violation of human rights by that state. Nevertheless, IHRL does not impose an impossible burden upon states. In these circumstances, the extent to which the state is able to influence the party in control of that territory will be taken into consideration. However, the state must act. The state must employ all means at its disposal in an effort to ensure the human rights of the population living under the control of the ANSA. At the very least, the state must take all available measures to re-establish control over that territory and to seek assurance from the party in control of that part of its territory that the human rights and freedoms of the population will be respected.

A. THE PROTECTION GAP: DE FACTO CONTROL OVER TERRITORY BY AN ANSA

Difficulties arise with regard to the question of state responsibility for human rights violations committed by an ANSA in territory that is beyond the territorial state's, or any other state's, control. The approach taken by the UN Human Rights Committee and human rights courts to questions of jurisdiction suggests that in circumstances where an ANSA acts independently of any state, the territorial state's jurisdiction will be limited such that only its positive obligations to secure the human rights of persons in that area will be engaged. However, in practice measures taken by the territorial state to secure the protection of human rights in these circumstances are not likely to be effective. The state will have no authority or influence over the territory and, for as long as the state seeks to win back control of its territory from the ANSA, the ANSA is unlikely to comply with or respond to political and legal measures taken by the state.

It should be noted that the question of jurisdiction does not apply to the application of IHL. In situations of armed conflict to which the ANSA is a party, the ANSA will be responsible for violations of IHL it has committed pursuant to Article 3 common to the Geneva Conventions, 1949, and customary IHL. Moreover,

a State will be responsible for any acts of an ANSA that are attributable to it and that violate that state's obligations under IHL.¹²⁶ Certain protections afforded to civilians and persons who have laid down their arms overlap those afforded under IHRL, such as the prohibition of torture or freedom from inhuman and degrading treatment.¹²⁷ Some of the protections common to both IHRL and IHL, such as the right to life, freedom from arbitrary detention, and the right to a fair trial, will be interpreted according to the principles of IHL.¹²⁸ However, IHL does not protect the broad range of economic, cultural, political and social rights guaranteed under human rights law, such as the freedom of expression or right to property¹²⁹ that may be violated by an ANSA that 'governs' territory.

Therefore, in situations of armed conflict, the state's loss of control over part of its territory will give rise to a protection gap with respect to the substantive rights and freedoms guaranteed under IHRL, and not protected under IHL.

B. ADDRESSING THE PROTECTION GAP: INVOKING THE RESPONSIBILITY OF THE ANSA

According to the jurisprudence of the ECtHR, where a state has lost control over part of its territory, and it can be shown that the ANSA that controls that territory is in fact acting under the 'decisive influence' and control of another state, that third state will in fact exercise jurisdiction, its human rights obligation will be fully engaged and it will be responsible for any violations of IHRL committed by that ANSA.

In cases where part of a state is controlled by an ANSA (and the ANSA is not acting as proxy of a third state), there will be a gap in the protection of human rights and fundamental freedoms of individuals found in that area. In these circumstances, victims of human rights violations committed by ANSAs are highly likely to be deprived of legal redress. In theory, there are two ways in which this protection gap may be addressed: first, by upholding the presumption that a state exercises

¹²⁶ An armed conflict may be international or non-international. An international armed conflict is an armed conflict between two or more states. A non-international armed conflict is an armed conflict between a state and an ANSA or two or more ANSAs. In order to determine that a situation of violence is a non-international armed conflict, the situation must meet two conditions: there must be protracted violence between the parties and the ANSA must be 'organized'. For a detailed overview of the definition of armed conflict see Bellal, *Human Rights Obligations of Armed Non-State Actors*, supra fn 14, pp 16-18.

¹²⁷ Art 3 common to the Geneva Conventions, 1949.

¹²⁸ For example, with respect to the right to life, the ICJ remarked in *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, supra fn 30, §25, that:

[i]n principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

¹²⁹ See Fortin, *The Accountability of Armed Groups Under Human Rights Law*, supra fn 14, pp 27-32.

jurisdiction throughout its own territory, even if that territory is controlled by an ANSA, and second, by invoking the responsibility of the ANSA itself. However, each approach raises its own legal and practical difficulties.

With respect to the first possible approach, even if a state were considered to exercise jurisdiction in full over territory that is in fact controlled by an ANSA such that its IHRL obligations are fully engaged, the state's responsibility for the ANSA's acts would still need to be established. It is questionable whether the acts of the ANSA would be attributable to the territorial state for the purposes of establishing that state's responsibility. It is highly unlikely that the ANSA will act on the instructions of, or under the effective control of, the state. It is by virtue of the state's lack of control over the ANSA that the state has lost control over its own territory. Furthermore, there is little indication that the strict control-based tests applied to determine whether an ANSA is 'acting on behalf of' a state will be loosened or abandoned in order to broaden the scope of state responsibility for conduct that does not fall within the definition of 'the exercise of governmental authority'. The notion that a state may be directly responsible for violations of international law by an armed group over which that state exercises 'overall' control (rather than effective control) has been rejected by the International ICJ, for which 'the "overall control" test is unsuitable for it stretches too far, "almost to breaking point", the connection which must exist between the conduct of a State's organs and its international responsibility'.¹³⁰

The connection between conduct and responsibility is based on the 'fundamental principle governing the law of international responsibility, that a state is only responsible for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'.¹³¹

Certain acts of the ANSA committed in the exercise of governmental authority may be attributable to the state pursuant to Article 9 ASR. However, it is questionable whether Article 9 ASR will cover the acts of an armed opposition group, especially acts that would violate the state's obligations under IHRL.

The second approach, invoking the responsibility of the ANSA itself, shows more promise but is not without its own difficulties. The HRC, UN special procedure mechanisms and other UN bodies have sought to close the protection gap by fo-

130 *Bosnia and Herzegovina* judgment, supra fn 91, §406. The 'overall control' test was formulated by the Appeals Chamber of the International Criminal Tribunal of the Former Yugoslavia (ICTY) in *Prosecutor v Tadić*, IT-91-1-A, Appeals Chamber, Judgment, 15 July 1999, §131. However, the issue in that case was not whether a state (the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY)) was responsible for the acts of an ANSA (the armed forces of Republika Srpska (VRS)) but whether, because of the nature and degree of involvement of the FRY in the operations of the VRS, the ostensibly internal armed conflict in Bosnia and Herzegovina was in fact an international armed conflict. The court framed this question in terms of the law of state responsibility. The 'overall control' test has been applied to the question of classification of armed conflict in subsequent cases in the ICTY; however, it has been applied within the framework of the law on the use of force and not the law of state responsibility. For example, see ICTY, *Delalić Mucić et al ("Celebici Camp")*, Appeals Chamber, Judgment, IT-96-21, 20 February 2001, §20.

131 Ibid.

ocusing on the accountability of the ANSA itself.¹³² UN human rights treaty bodies have taken the position that an ANSA that exercises governmental authority and control over territory must respect human rights law.¹³³ For example, in its 2011 report on human rights in armed conflict the OHCHR took the position that,

[c]oncerning international human rights obligations, the traditional approach has been to consider that only States are bound by them. However, in evolving practice in the Security Council and in the reports of some special rapporteurs, it is increasingly considered that under certain circumstances non-State actors can also be bound by international human rights law and can assume, voluntarily or not, obligations to respect, protect and fulfil human rights.¹³⁴

This approach is understandable in light of the strict approach to state responsibility adopted by the ICJ and the capacity of some ANSAs to control territory and govern the people living in that territory. However, the principles that govern ANSA responsibility are not yet firmly established in international law. There is a lack of agreement as to whether human rights norms are binding on ANSAs, and if so, what the content of those human rights norms might be.¹³⁵ Thus, the development of a shared understanding of the human rights obligations of ANSAs is required if holding ANSAs responsible for the human rights violations they commit is to be an effective means of filling the protection gap.

132 See Bellal, *Human Rights Obligations of Armed Non-State Actors*, supra fn 14.

133 For a helpful summary of the views of the UN human rights and other bodies, see *ibid.*, pp 26–30.

134 OHCHR, *The International Legal Protection of Human Rights in Armed Conflict*, 2011, p 24.

135 Ibid.

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The Geneva Academy
of International Humanitarian Law
and Human Rights

Villa Moynier
Rue de Lausanne 120B
CP 1063 - 1211 Geneva 1 - Switzerland
Phone: +41 (22) 908 44 83
Email: info@geneva-academy.ch
www.geneva-academy.ch

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