



UNIVERSIDADE CATÓLICA PORTUGUESA

The International Protection of Human Rights in Contemporary International Law

The era of Non-State Actors

Susana Isabel Esteves de Sousa

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Orientador: Catarina Santos Botelho

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To my parents,
To my sister, Beatriz,
Especially to my grandmother, Adosinda.

I want to express my gratitude to my supervisor, Professor Catarina Santos Botelho, for her unwavering support, constructive criticism, thoughtful reflection, and motivation.

Abstract

The 21st century has presented new challenges to the legal field, particularly the impact of globalisation. This phenomenon has transformed the world, creating more dynamic and diverse international relations, and expanding the power and influence of non-state actors. The concept of the latter still lacks a uniform international definition. Despite receiving greater attention from the international community, the contemporary international legal system has not yet provided a definitive response to the human rights obligations of non-state actors. Firstly, while there are regional systems specifically designed for this purpose, there is still no comparable global system. Secondly, although civil and political rights and economic, social and cultural rights should be treated equally in theory, practice does not support this understanding. Finally, the growing recognition of the notable presence of non-state actors in the international sphere has been matched by an inversely proportional political will to create new mechanisms. Due to a State-centric approach, States have the duty to protect, respect and fulfil human rights. However, the indirect responsibility of States for the actions of non-state actors is not clearly defined. Nevertheless, when faced with new proposals, States may be hesitant to make political decisions that could potentially threaten their sovereignty.

Resumo

O século XXI trouxe novos desafios ao direito, desde logo, o fenómeno da globalização, que alterou o mundo como o conhecíamos, dinamizando e diversificando as relações internacionais, e o aumento do poder e influência por parte de atores não estatais. Este último conceito é ainda desprovido de definição internacional uniforme, e não obstante ser alvo de crescente atenção por parte da comunidade internacional, a verdade é que o sistema jurídico internacional contemporâneo não fornece ainda uma resposta assertiva em relação às obrigações em matéria de direitos humanos dos intervenientes não estatais. Em primeiro lugar, apesar de haver sistemas regionais especificamente destinados a tal objetivo, não existe ainda um equiparável sistema global; em segundo lugar, se em teoria, os direitos civis e políticos e os direitos económicos, sociais e culturais, devem ser tratados do mesmo modo, a prática não corrobora tal entendimento; e, por último, o reconhecimento crescente da notável presença de atores não estatais na esfera internacional tem vindo a corresponder a uma inversamente proporcional vontade política de criação de novos mecanismos. Resultado de uma perspetiva centrada nos Estados, cabe aos Estados os deveres de proteger, respeitar e realizar os direitos humanos, mas a verdade

é que a responsabilidade indireta dos Estados pelas condutas dos atores não estatais assume-se uma rede porosa. Porém, confrontados com novas propostas, constata-se uma relutância por parte dos Estados em relação à tomada de uma decisão política que possa, em último plano, comprometer a sua soberania.

Keywords

Human rights law, globalisation, non-State actors, obligations, accountability.

Palavras-chave

Direito dos direitos humanos, globalização, atores não estatais, obrigações, responsabilidade.

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I. Introduction

The global crises we have witnessed in recent years reflect the characteristics of the new, more complex international order, which is certainly exacerbated by the prominence and protagonism of Non-State Actors (NSAs).

Not rarely, economic or political interests override the international community's interests and, as we will see, the international legal system does not yet provide an assertive response towards the protection of human rights in more complex environments. Whilst it is true that this is to some extent due to the fact that international law, in itself and by nature, depends on the will of States, it is necessary to fill in the gaps that often lead to situations of impunity.

If, on the one hand, we are witnessing a discourse that is increasingly characterised by the idea that human rights should guide any and all legal instruments, on the other hand, it is not enough to say so, but rather to try to respond to the challenges this poses.

Contemporary International Law faces the challenge of rethinking the international legal order in force since 1945. Indeed, the phenomenon of globalisation contributed to the complexification of international relations, and gave rise to the emergence of growing influence and power of NSAs, leading to the loss of centrality of the State, which is evident in practice, but not yet resolved in theory.

Although NSAs have taken on important roles with regard to the progressive enjoyment of all human rights throughout the world, they are still not bound directly by existing international human rights treaties.¹ As Ssenyonjo observes, “the growth in the wealth and power of NSAs has meant an enhanced potential for NSAs to promote or undermine respect for human rights”.² A paradox certainly exists that while there is an increasing predominance of these actors in the international arena, there does not seem to be a proportional concern to guarantee a response regarding their status and rights and duties.

At a certain point, we might be tempted to question whether International Human Rights Law (IHRL) makes any difference, *i.e.*, protects rights in practice. As Douglass Cassel notes, although “reliable quantitative measurement is probably impossible, by

¹ (Ssenyonjo, 2008, p. 726)

² (Ssenyonjo, 2008, p. 725)

strengthening domestic rights institutions, international human rights law has brought incalculable, indirect benefits”.³ Some invoke recent atrocities to question this claim, but “the fact that it has not triumphed everywhere does not mean it serves no useful purpose anywhere”.⁴

Throughout this work we will combine a doctrinal overview of the challenges faced by the contemporary international legal system in protecting human rights due to the growing influence of NSAs, while, in parallel, drawing on decisions of the existing world court, the International Court of Justice (ICJ), Commissions and Committees aimed at guaranteeing the effectiveness of human rights law, as well as regional courts. Finally, a section will be dedicated to the analysis of new proposals emerging as response to our globalised world, in which a plethora of non-state actors have significant influence: the possibility of opening the International Court of Justice to non-State actors in contentious cases, the creation of a “World Court of Human Rights”, a proposal that has received a variety of reactions from academia, and the creation of an International Constitutional Court.

II. The loss of centrality of States in the face of globalisation

i. The *raison d'être* of International Human Rights Law

Notwithstanding the fact that many countries protect human rights through legislation, not all of them actually implement them. Furthermore, applying these laws internationally can be problematic due to cultural differences and the unwillingness of some countries to conform to globally accepted standards. It is important to balance the need to maintain diplomatic relations with countries whose human rights record is questionable, while also ensuring that human rights are respected and upheld.

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948, serves as the foundation for international legislation in this field and although not legally binding, it is widely accepted as a template for human rights

³ (Cassel, 2001, p. 122)

⁴ *Ibidem*. See also (Liesa, 2020)

worldwide.⁵ At the regional level, the Declaration has been referenced in conventions, charters and resolutions of regional intergovernmental organizations.⁶ The fact that its principles have been incorporated into domestic legislation has been suggested by some authors as a reason to support that the declaration is now part of customary law.⁷ The subjective element, *opinio juris*, is demonstrated through references to the UDHR in UN resolutions and declarations, as well as in national court decisions. Nevertheless, the same is not true regarding the material element, state practice. As noted by Oscar Schachter, “Constitutions with human rights provisions that are little more than window-dressing can hardly be cited as significant evidence of practice”.⁸ Clearly, oftentimes there is a gulf between law in books and the law in action.⁹

However, there is a consensus on the customary nature of certain rights, such as the right to life¹⁰, freedom from arbitrary detention¹¹, the rights to a fair trial¹², the prohibition of torture¹³ and the freedom from slavery and from racial discrimination.¹⁴

⁵ (United Nations) According to the United Nations High Commission for Human Rights, the UDHR has inspired the adoption of more than seventy human rights treaties. Among these international instruments, the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) and the International Covenant on Civil and Political Rights of 1966 (ICCPR), both legally binding treaties, as well as conventions that address specific rights and freedoms, such as the Convention against Torture of 1984 and the Convention on the Rights of the Child of 1989. In more detail, on the history of International Human Rights Law, *cf.* (Shelton D. L., 2007)

⁶ The European Convention on Human Rights and Fundamental Freedoms of 1950 (ECHR); the Inter-American Convention on Human Rights (IACHR) of 1969; and the African Charter on Human and Peoples’ Rights (ACPHR) of 1981.

⁷ (Willmott-Harrop, 2001)

⁸ *Ibidem.*

⁹ (Botelho, *Aspirações Constitucionais e força normativa da Constituição - Requiem pelo «conceito ocidental de Constituição»?*, 2017, p. 25) See also (Albert, *Opening Lecture - The Illusion of a Written Constitution*, Universidade Católica Portuguesa, 2021)

¹⁰ The Human Rights Committee, in its General Comment No. 14: Article 6 (Right to Life), Nuclear Weapons and the Right to Life, adopted at the Twenty-third Session of the Human Rights Committee, on 9 November 1984, has stated that “is the supreme right from which no derogation is permitted even in time of public emergency” (paragraph 1). This statement was reinforced in the General remarks of the General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, that replaced the former (CCPR/C/GC/36, paragraph 2).

¹¹ ICJ, Case concerning United States Diplomatic and Consular Staff in Tehran (*United States of America v Iran*), Judgment of 24 May 1980, paragraph 91. See also 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, paragraph 37).

¹² Human Rights Committee, General Comment No. 29, Article 4: Derogations During State of Emergency, 31 August 2001 (CCPR/C/21/ Rev.1/Add.11, paragraph 11). Also, Human Rights Committee, General Comment No. 32, Article 14, Right to Equality Before Courts and Tribunals and to Fair Trial, 23 August 2007 (CCPR/C/GC/32).

¹³ In the case concerning Questions Relating to the Obligations to Prosecute or Extradite (*Belgium v Senegal*), the ICJ stated: “In the Court’s opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)” (Judgment, Merits, paragraph 99, 20 July 2012).

¹⁴ In more detail, *cf.* (Eatwell, 2018, p. 12)

Regarding the nature of human rights obligations, the State holds primarily responsibility to respect and ensure human rights of persons within its jurisdiction¹⁵, *i.e.*, “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”.¹⁶

In the words of Gilles Giacca, “the need to regulate the relationship between those who govern and those who are governed [...] “characterizes the *raison d’être* of human rights law.”¹⁷ But he also make a caveat, citing Rodley, who emphasises that “human rights are those rules that mediate the relationship between, on the one hand, governments or other entities exercising effective power analogous to that of governments and, on the other, those who are subject to that power”.¹⁸

In fact, as accurately observed by Ssenyonjo, “since the end of the cold war, there has been a trend in all regions of the world to reduce the role of the state through privatisation of functions previously performed by governments and to rely on private actors to resolve problems of human welfare”.¹⁹ Yet, and as Yaël Ronen argues, “since international human rights obligations have been formulated with states in mind as duty holders, the obligations are tailor-made for states”.²⁰

Nonetheless, jurisprudence by judicial organs, but also by treaty bodies, is a significant source of interpretation and is fundamental for the development of the system. As we will demonstrate, it appears to be accompanying the evolutionary process of human rights law, although not yet in a way that allows to comprehend the today’s reality, which comprises various categories of NSAs. Some NSAs share some characteristics with States, and, in that sense, have to be covered by this field of law, otherwise it would lose its capacity to create a normative framework that ultimately aims to protect its subjects.

Notwithstanding that International Human Rights Law (IHRL) imposes obligations on States, in conceptual terms, human rights obligations are unlimited in their recipients, since they are based on human dignity, which is inherent in all individuals, regardless of who is in a position to affect these obligations, and this realisation is even enshrined in

¹⁵ (Eatwell, 2018, p. 13) Exceptionally, the African Commission on Human and People’s Rights has applied state’s obligations extra-territorially (*Democratic Republic of Congo v Burundi, Rwanda and Uganda*).

¹⁶ 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, 7 January 2013, p. 2 (A/HRC/22/17/Add.3).

¹⁷ (Giacca, 2014, p. 40)

¹⁸ (Rodley, 1993, p. 300) *apud* (Giacca, 2014, p. 40)

¹⁹ (Ssenyonjo, 2008, p. 726)

²⁰ (Ronen, 2013, p. 25)

the UDHR.²¹ However, the UDHR is a non-binding instrument, although many of its provisions are considered customary international law and are therefore universally binding.

Indeed, the understanding that States are “the exclusive holders of human rights obligations may lead to an inadequate guarantee of these rights”.²² We fully agree with Yael Ronen’s proposition that “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”.²³ Nevertheless, the possibility of NSAs being bound by international human rights law does not depend on their subjective position, but on the law, and that is why the present analysis is fundamental.²⁴

ii. The emergence of Global Constitutional Law as a response to globalisation

“The problem of development in a globalised world has become the most significant challenge of the new century” [...] “in this framework an essential role is played both by the law as an instrument for the implementation of justice in social relations and by human rights as a form of protection for the individual.”²⁵

In the twentieth century we witnessed the decline of the figure of the State, in virtue of the assumption of a plurality of NSAs in world affairs.

As Ssenyonjo points out, “the shift in state sovereignty accompanying globalisation” led to a world where NSAs are “increasingly getting more involved in activities that impact (directly and/or indirectly) on human rights, and have gained more power to

²¹ (Ronen, 2013, pp. 1, 10) See also (Ssenyonjo, 2008, p. 736): “Article 29 of the UDHR provides that everyone has ‘duties to the community’. In its preamble, it states: ‘every individual and every organ of society ...shall strive ... to promote respect for these rights and ... to secure their universal and effective recognition and observance’. This statement recognises that human rights obligations apply not only to states but also to NSAs, in particular to ‘every individual’ and ‘every organ of society’”.

²² (Ronen, 2013, p. 23)

²³ (Ronen, 2013, p. 30)

²⁴ (Ronen, 2013, p. 36)

²⁵ (Vitale, 2018, p. 7)

violate human rights”.²⁶ To this extent, the issue has to be address in a “realistic but principled manner.”²⁷

In that sense, “in the era of globalisation, it is not enough to look only to the State as the primary actor to respect, protect and fulfil human rights”.²⁸

Indeed, this phenomenon derives from a series of factors, such as,

“(i) the privatisation of functions previously performed by states; (ii) the ever increasing mobility of capital and the increased importance of foreign investment flows, facilitated by market deregulation and trade liberalisation; (iii) the expanding impact and responsibilities of multilateral organisations such as the WTO affecting broader society; (iv) the enormous growth in the role played by transnational civil society organisations, many of which now have multimillion dollar budgets, employ very large staffs, and perform public-type functions in a large number of states; (v) a rise in the impact of organised armed groups violating human rights or controlling territory and population and aspiring to gain international legitimacy; and (vi) the growth of international terrorist networks [...] and international criminal networks, such as drug cartels, which are not confined to any one state and some of whose activities have become global in scope”.²⁹

However, for instance, the UN Charter, “widely considered as the centre of an international ‘constitutional order’”, only imposes obligations on member states.³⁰

In an astute way, Nicolas Carrillo Santarelli uses sarcasm to suggest that, since the object of the IHRL is human dignity, this will not be protected if we leave out those who have not been “‘lucky’ enough to have had their rights violated by a State.”³¹ Undeniably, “the decline of the nation-state and the international opening of national legal systems have encouraged the development of the ‘transnational law of liberties’.”³² In other words, the outcrop of a legal subject: Global Constitutional Law.

²⁶ (Ssenyonjo, 2008, p. 739)

²⁷ Economic and Social Council, Civil and Political Rights, including the Questions of Disappearances and Summary Executions, Extrajudicial, summary or arbitrary executions, Report of the Special Rapporteur, Philip Alston, 22 December 2004, paragraph 76 (E/CN.4/2005/7).

²⁸ (Ssenyonjo, 2008, p. 747) See also (Isa & Feyter, 2009)

²⁹ (Ssenyonjo, 2008, pp. 747-748)

³⁰ (Ssenyonjo, 2008, p. 726)

³¹ (Santarelli, 2008, p. 2)

³² (Botelho, 2019)

Dinah Shelton examines the two opposing views on the relationship between globalization and human rights: one that sees “the two topics as mutually reinforcing and positive in improving human well-being” and, in contrast, one that views “globalization as posing new threats not adequately governed by existing international human rights law”.³³ Assertively pointing out that “the fundamental question is whether a human rights system premised on state responsibility [...] can be effective in a globalised world”, the author explores the extent to which globalisation benefits human rights and *vice versa*, and concludes that “responses to globalization are significantly changing international law and institutions to protect individuals from human rights violations committed by non-state actors”.³⁴

iii. Universalism or Relativism of Human Rights?

A preliminary clarification of the applicability of the IHRL to NSAs is the very interpretation given to the human rights that must be protected by the international legal system. This is a very complex and controverse topic.

Which Human Rights should NSAs have obligations related to? In this chapter, we summarise the main insights to be drawn from a more detailed analysis of whether human rights are universal or relative, which ultimately dictates how human rights will be protected.

As Catarina Santos Botelho points out the “philosophical debate on universalism versus relativism is striking and has been challenging legal minds for decades, particularly regarding human rights”.³⁵ The question appears to be whether the idea of universal human rights has some limits which is especially significant in regions such as Middle East, where “clashes of culture are imminent.”³⁶

While the Vienna Declaration sets a formal global consensus that all human rights, i.e., civil and political rights and economic, social and cultural rights, are universal, indivisible and interdependent and interrelated”, therefore are to be treated “in a fair and equal

³³ (Shelton D. , 2002, p. 1)

³⁴ (Shelton D. , 2002, pp. 1-2)

³⁵ (Botelho, Transnational Constitutional Law, 2020)

³⁶ (Gurbanli, 2018)

manner, on the same footing, and with the same emphasis”³⁷, “the ambivalence of many States in dealing with economic, social and cultural rights affects the state obligation to protect this category of rights.”³⁸ In fact, geopolitics play a significant role in this matter: while, on the one hand, the Western view prioritizes civil and political rights; on the other hand, Eastern countries often constitutionalize economic, social and cultural rights.³⁹

Some states are hesitant to adhere to international normative instruments due to concerns about ceding degrees of their national sovereignty to international human rights institutions, even in exchange for the presumed benefits of protecting rights.⁴⁰

The purpose of this chapter being solely to allude to this issue, we conclude with a thought. The debate between universalism and relativism appears to be found in a dilemma: “that to assert the cultural relativity of justice is to deny the legitimacy of international human rights law and that to defend international human rights law is to assert the universal and transcendent validity of its norms”.⁴¹ However, it is important to note that the universality of human rights, as proclaimed by international law, extends beyond geography to include all human beings.⁴²

III. The inherent difficulties in conceptualising the term Non-State Actors

First of all, it is important to note the challenges involved in defining the concept of Non-State Actors itself. Although there is no consensus in either legal practice or doctrine, it is crucial to address the problematic for the present analysis as it constitutes its object.

The term appears to be “virtually open-ended”.⁴³

³⁷ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993 (A/CONF.157/24).

³⁸ (Shaw, 2003, p. 287) *apud* (Ssenyonjo, 2008, p. 728)

³⁹ The name “Human Rights Committee” is used for the treaty monitoring body under the International Covenant on Civil and Political Rights (ICCPR), in contrast to the “Committee on Economic, Social and Cultural Rights” under the International Covenant on Economic, Social and Cultural (ICESCR). This demonstrates the idea that the former are prioritised over the latter.

⁴⁰ (Cassel, 2001, p. 121)

⁴¹ (Binder, 1999, p. 211)

⁴² (Santarelli, 2008, p. 2)

⁴³ (Alston, The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?, 2005, p. 5) *apud* (Ssenyonjo, 2008, p. 727)

On a doctrinal level, Josselin and Wallace propose a very broad concept that comprises three requirements that must be met in order to consider an organisation as an NSA: i) firstly, the organisation must emanate from civil society, market economy or political impulses beyond state control and direction, largely or totally autonomous from central government funding and control; ii) secondly, the organisation have to operate in networks that extend beyond the borders of two or more states, linking political systems, economies and societies; and thirdly, the organisation acts to affect political outcomes, either within one or more states or in international relations, either as their main objective or as an aspect of their activities.⁴⁴

Agata Kleczkowska proposes that while covering a “wide range of diversified entities”, they all share a common trait: independence from states.⁴⁵ Therefore, it includes, *inter alia*, individuals, corporations, non-governmental organizations (NGOs), international organisations⁴⁶, armed opposition or terrorist groups (armed non-State actors), de facto regimes and trade associations.⁴⁷

Rather than requirements, Andrew Clapham lists some entities that can be considered an NSA: large companies providing essential services, mercenaries, private security companies, peace-keepers, occupying forces, armed rebel groups, or even authorities representing a people with a recognized struggle for self-determination, large extraction companies and their attendant security contractors, enterprises in the garment industry, the pharmaceutical industry, and financial institutions, including entities such as the International Monetary Fund and the World Bank, non-governmental and civil society organizations, religious organizations and political parties.⁴⁸

Yaël Ronen provides a striking contrast to Clapham. He envisions a narrower understanding according to which we first need to identify the characteristics of an entity that would justify and enable the imposition of human rights on it. Restricting the analysis to territorial NSAs, he suggests three requirements: first, the exercise of effective territorial control; second, “an organizational apparatus exercising public functions and capable of securing human rights”, although it does not need to be sophisticated; and

⁴⁴ (Josselin & Wallace, 2001, pp. 3-4) *apud* (Ssenyonjo, 2008, p. 727)

⁴⁵ (Kleczkowska, 2020, p. 3)

⁴⁶ Such as the World Trade Organisation, the World Bank and the International Monetary Fund.

⁴⁷ (Ssenyonjo, 2008, p. 725); (Kleczkowska, 2020, p. 3)

⁴⁸ (Clapham, Human Rights Obligations for Non-State Actors: Where are We Now?, 2017, p. 2)

third, the territorial NSA must function independently.⁴⁹ Yaël Ronen was undoubtedly right when she wrote that “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”, because only in this case the NSA is in an identical factual position as a State, therefore requiring to be dealt with as such.⁵⁰

At the level of legal practice, the African Commission on Human and Peoples Rights has already stated that:

“The term 'non-state actors' has therefore been adopted by the international community to refer to individuals, organisations, institutions and other bodies acting outside the State and its organs. They are not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance [...].”⁵¹

In fact, “the long catalogue of obligations particularly addressed to armed groups in the African Union Convention represents a start” to the proposition that, in the future, “human rights treaties can afford to be more explicit on what exactly is required from non-state actors”.⁵²

IV. Human Rights Obligations of Non-State Actors

i. The relationship between IHRL and IHL

International Humanitarian Law (IHL), which has more ancient origins, was codified in the second half of the 19th century under the influence of Henry Dunant, the founding father of the International Committee of the Red Cross. Human rights law, on the other hand, is a more recent body of law that originated in certain national human rights declarations, such as the French Declaration of the Rights of Man and of the Citizen in

⁴⁹ (Ronen, 2013, pp. 25-27)

⁵⁰ (Ronen, 2013, p. 27)

⁵¹ African Commission on Human and Peoples’ Rights, Thirty-Ninth Ordinary Session 11-25 May 2006, Zimbabwe Human Rights NGO Forum v. Zimbabwe, Decision, Issues for Determination and Decision of the African Commission on the Merits, Issue One: What are Non-State Actors under International Law?, paragraph 136.

⁵² (Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement*, 2010, p. 43)

1789, only emerging as a branch of international law after the Second World War, under the auspices of the United Nations, as *supra* mentioned.

The realisation of the insufficiency of State responsibility has led to the development of new bodies of law that directly bind certain types of NSAs, and the individuals within them: International Humanitarian Law (IHL) and International Criminal Law (ICL). However, the current framework does not provide an adequate response to the full range of human rights that they can violate. On the one hand, IHL covers only a small number of rights – the minimum core – and is only applicable during armed conflicts. On the other hand, ICL imposes criminal liability on individuals for acts that violate human rights, but because it is the most severe type of sanction, it is limited to the most serious violations. In the end, “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”.⁵³

Regarding the relationship between IHL and IHRL, as Heintze assertively states, while the two bodies of law “vary in terms of origin and the situations in which they apply”, they “share the objective of protecting and safeguarding individuals in all circumstances”.⁵⁴ In fact, “Classic International Public Law recognised the separation between the two fields of law”, but after the Second World War, which changed the landscape of international relations, the adoption of the United Nations Charter in 1945 and the subsequent major documents on human rights changed this rhetoric.⁵⁵ As the author emphasises, the supporters of the so-called ‘separation theory’ denied the application of human rights norms during armed conflicts based on the argument that they were “two separate fields, which could not be applied at the same time”.⁵⁶ And while this theory seems to be supported in the Handbook of Humanitarian Law, that does not address the topic of human rights in armed conflicts, Common Article 3 to the Geneva Conventions goes in the opposite direction, containing a list of rights which are to be protected in all circumstances.⁵⁷

⁵³ (Ronen, 2013, p. 23)

⁵⁴ (Heintze, 2004, p. 789)

⁵⁵ (Heintze, 2004, p. 789)

⁵⁶ (Heintze, 2004, p. 789)

⁵⁷ (Heintze, 2004, pp. 790-791)

International and regional legal practice and jurisprudence do, however, provide some help in clarifying this issue. In addition, the rights protected by the two fields of law are, for the most part, non-derogable premises, *i.e.*, norms of *ius cogens*. And this was the motto for the drafting of the Turku Declaration – Declaration of Minimum Humanitarian Standards –, adopted in 1990, which “called for the legal grey zones – in the border areas of the law of peace and the law of war – to be filled by the cumulative application of human rights law and international humanitarian law”.⁵⁸

The International Court of Justice, in its Advisory Opinions on the Legality of the Threat or Use of Nuclear Weapons, and on Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, and in the decision of the case concerning Armed Activities on the Territory of the Congo clearly rejected the position that the IHRL can only be applied in peacetime.⁵⁹

At the regional level, article 15 of the European Convention on Human Rights and article 27 of the American Convention on Human Rights contain a derogation clause that establishes rights which cannot be abrogated even in times of war.

Christina M. Cerna went further on suggesting that international public law had already been “transformed into a branch of human rights law and termed human rights in armed conflicts”.⁶⁰ The Convention on the Rights of the Child corroborates this understanding to the extent that although it is a human rights treaty, its article 38(1) enshrines the obligation of states to respect and ensure respect for rules of IHL.⁶¹

Therefore, it is necessary to clarify the interaction between the two fields of law. The convergence theory, aiming to provide the “greatest effective protection of the human being” suggests that this objective is only achievable through the cumulative application, and recent State practice demonstrates that this is not just a theoretical concept: the cumulative application during the armed conflict in Kuwait in 1991 was both “feasible and meaningful”, and also the Security Council Resolution 1483 (2003) regarding the situation in Iraq in 2003-2004, required all involved to fulfil their obligations under

⁵⁸ (Heintze, 2004, p. 791)

⁵⁹ ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, paragraph 25; ICJ, Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, paragraph 106; ICJ, Case Concerning Armed Activities on the Territory of the Congo (*DRC v Uganda*), Judgment, 19 December 2005. See also (Rights, 2011, p. 93)

⁶⁰ (Cerna, 1989, p. 39) *apud* (Heintze, 2004, p. 791)

⁶¹ (Heintze, 2004, p. 792)

international law, also requesting the Secretary-General's Special Representative for Iraq to work for the promotion of human rights protection.⁶²

Others counter that merging the two bodies is erroneous, thus the more appropriate relationship is one of complementarity: the two bodies complement each other while remaining distinct.⁶³

In the two mentioned Advisory Opinions, the ICJ also established the primacy of IHL over human rights law in armed conflicts, *i.e.*, affirmed the applicability of the *lex specialis derogat legis generalis* principle.⁶⁴ Borrowing Heintze's words, the evaluation given by the ICJ “has been welcomed by academics, mainly for its clarification that the norms developed for peacetime, *i.e.* human rights law, cannot be applied ‘in an unqualified manner’ to armed conflicts”, therefore supporting the understanding of a “single unit” of protection.⁶⁵

Moreover, the Martens Clause, understood today as of general applicability, underlines that *ius in bello* provisions “cannot be regarded as the final regulation of the protection of human beings, but can be supplemented with human rights law protection, a view that is compatible with the idea of a single unit”.⁶⁶

However, while some concepts can be “mutually recognised”, the sharing of concepts becomes a “very difficult undertaking”, and even more so there will be situations in which “dialogue between IHL and human rights is simply not possible, for example the concept of military target, which can only be understood within the framework of the law of armed conflict” and “the more worrying one, in which the similarity of references hides or conceals very different meanings”.⁶⁷

By way of conclusion, Raphaël Van Steenberghe recently proposed a coherency-based approach: “a promising candidate for providing a suitable legal framework for the interplay between IHL and IHRL in relation to both the interpretation and application processes”.⁶⁸ In practice, while some mechanisms, such as the *lex specialis* principle or

⁶² (Heintze, 2004, pp. 794-795)

⁶³ (Heintze, 2004, p. 794)

⁶⁴ (Heintze, 2004, pp. 796-797)

⁶⁵ (Heintze, 2004, p. 797)

⁶⁶ (Heintze, 2004, p. 797)

⁶⁷ (Azeredo Lopes J. A., 2011, p. 57) *apud* (Azeredo Lopes J. A., 2020, p. 226) Translation by the author.

⁶⁸ (Steenberghe, 2022, pp. 1366, 1395) The author explains that “the interplay resulting from both the interpretation of IHL in light of IHRL (the interpretation process) and the application of IHRL in armed conflicts alongside IHL (the application process)” are “the two main ways through which IHRL currently

the principle of systemic integration⁶⁹, have been suggested, they may not always be satisfactory as they are often formal in nature, and dealing with these interactions requires value judgements.⁷⁰ Therefore, the author's proposition is the following:

“the full incorporation of IHRL into IHL (as a result of the interpretation process) or the cumulative application of IHL and IHRL in armed conflicts (as a result of the application process) can only be limited if, or to the extent that, it is justified by the particular circumstances ruling at the time (*in concreto* considerations) or general features specific to armed conflicts (*in abstracto* considerations). Those limitations may result either in modulations or displacements of the inappropriate regime”.⁷¹

ii. Arguments against the imposition of Human Rights Obligations on NSAs

The main argument against the direct application of human rights obligations to NSAs is that attributing obligations to NSAs would give them some form of legitimacy or status under international law. And perhaps more importantly, it would entail the risk of States transferring their responsibility to these actors, which could not only jeopardise their sovereignty, but also diminish State obligations and responsibility, ultimately seen as a “cunning plan to let states off the hook”.⁷² Nonetheless, Andrew Clapham suggests what he calls the “ultimate contemporary opposition”: that, on the one hand, there is a “fear that human rights law will lose its specificity and heritage if it is extended to the acts of rebels/ terrorists/ criminals”; and that, on the other hand, there is a “concern that legal developments could lead to new forms of liability for corporations which would leave them vulnerable to lawsuits beyond the control of their home states”.⁷³

impacts the regulation of armed conflict since the 1960s and, in particular, since the 1968 Tehran Conference”.

⁶⁹ (Steenberghe, 2022, p. 1357) The author states: “IHRL may be used to interpret the Geneva Conventions on the basis of the principle of systemic integration, as enshrined in Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties. That article provides that a treaty shall be interpreted in light of “any relevant rules of international law applicable in the relations between the parties”.

⁷⁰ (Steenberghe, 2022, pp. 1348-1349)

⁷¹ (Steenberghe, 2022, p. 1396)

⁷² (Clapham, Human Rights Obligations for Non-State Actors: Where are We Now?, 2017, p. 3) Cf. (Ssenyonjo, 2008, p. 726); (Giaccia, 2014, p. 243); (Ronen, 2013, p. 29)

⁷³ (Clapham, Human Rights Obligations for Non-State Actors: Where are We Now?, 2017, p. 2)

The second argument is that of lack of capacity, in the sense that NSAs are unlikely to have, for instance, their own legal system, and therefore, the functioning as *de facto* governments lack any effectiveness for protecting human rights.⁷⁴

A final argument raised by some authors, which is more of a difficulty than a contribution to denying the applicability of IHRL to NSAs, is that human rights are normally internal affairs, whose guardian is the Constitution, with international law remaining the exception to the primacy of regulation by domestic law. But then again the truth is that it ceases to be when domestic law is insufficient to provide such protection.⁷⁵

iii. Arguments in favour of the imposition of Human Rights Obligations on NSAs

While some academics still argue that human rights, as a body of law, can only bind States, “a central tenet of international human rights law is that it must keep pace with a changing world”.⁷⁶ A reasoning that, in practical terms has become that of some NGOs and, while regarding only ANSAs in this aspect, is that adopted by some UN bodies that have started engaging with them “in order to alleviate the suffering of those affected by their activities”.⁷⁷

Starting with the United Nations Security Council, that presumes that NSAs have international obligations under IHL and IHRL. Referring to an extensive work by Christian Tomuschat – who reviewed the practice of the Security Council with regard to the former Yugoslavia, Afghanistan, Sudan, Sierra Leone, Ivory Coast, the Democratic Republic of the Congo, Angola, Liberia and Somalia –, Andrew Clapham states that rather than creating new obligations, the UNSC “just draws the attention of the addressees to the obligations incumbent upon them under international human rights law, as interpreted by it”.⁷⁸ Nonetheless, there is one caveat: the logic behind this premise is

⁷⁴ (Moir, 2002, p. 194) *apud* (Clapham, Human Rights Obligations of Non-State Actors in Conflict Situations, 2006, p. 502); (Giacca, 2014, p. 231)

⁷⁵ *Cf.* (Ronen, 2013, p. 24)

⁷⁶ (Clapham, Human Rights Obligations for Non-State Actors: Where are We Now?, 2017, p. 6). *Cf.* Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, 16 June 2015, paragraph 30 (A/HRC/29/51).

⁷⁷ (Clapham, Human Rights Obligations for Non-State Actors: Where are We Now?, 2017, p. 3)

⁷⁸ (Clapham, Human Rights Obligations of Non-State Actors in Conflict Situations, 2006, p. 501)

based on the recognition that “elements of government authority have fallen into the hands of a rebel movement.”⁷⁹

iv. International Legal Practice

In 2008, Ssenyonjo defended that NSAs were, at the time, “only bound to the extent that obligations accepted by states can be applied to them by states”.⁸⁰ In fact, it is up to States to determine when and under what circumstances an NSA may be subject to international law, “depending on their interests and the potential benefits”.⁸¹ Therefore, NSAs are “placed at the margins” of the existing legal regime.⁸²

In 1993, the UN Truth Commission on El Salvador, referring to the Farabundo Marti National Liberation Front, affirmed that:

“when insurgents assume government powers in territories under their control, they too can be required to observe certain human rights obligations that are binding on the State under international law. This would make them responsible for breaches of those obligations.”⁸³

Nevertheless, some authors suggest that the question of NSAs’ human rights obligations “arose starkly” in the context of the Guatemalan Historical Clarification Commission, established in June 1994, as a part of a peace agreement between the Guatemalan government and the Guatemalan National Revolutionary Unity, created to clarify human rights violations related to the thirty-six-year internal conflict from 1960 to the United Nation’s brokered peace agreement of 1996, in which the NSA in question was also an insurgent group.⁸⁴

In 2000, the Report of the Truth and Reconciliation Commission of Sierra Leone referred to the activity of various NSAs. In the same direction, UN’s Special Rapporteur, Philip Alston, suggested that, although the Liberation Tigers of Tamil Eelam (LTTE), in Sri Lanka does not have legal obligations under the ICCPR, it remains subject to the

⁷⁹ (Tomuschat, 2004, p. 586) *apud* (Clapham, Human Rights Obligations of Non-State Actors in Conflict Situations, 2006, p. 502)

⁸⁰ (Ssenyonjo, 2008, p. 726)

⁸¹ (Kleczkowska, 2020, p. 3)

⁸² (Ssenyonjo, 2008, p. 726)

⁸³ Letter from the Secretary-General addressed to the President of the Security Council, 1 April 1993, Applicable Law, page 20 (S/25500).

⁸⁴ (Clapham, Human Rights Obligations of Non-State Actors in Conflict Situations, 2006, p. 503)

international community's requirement that all non-State actors respect the UDHR.⁸⁵ Also, in the Joint Report on Lebanon and Israel, it reads:

“Although Hezbollah, a non-State actor, cannot become a party to these human rights treaties, it 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”.⁸⁶

In 2008, the Periodic Review of the High Commissioner reads “both Israel and the Palestinian Authority, as well as Hamas in Gaza, carry obligations under international humanitarian law and international human rights law *vis-à-vis* the civilian populations in both Israel and the OPT [Occupied Palestinian Territory]”.⁸⁷

In this respect, since 2015, the report of the Commission of Inquiry in Gaza specifically addressed recommendations to the NSAs operating in Gaza, duly tailored to its obligations, suggesting that IHRL applies due to the failure of the authorities in Gaza to protect the population from a violation of both IHL and IHRL.⁸⁸ In May 2021, the Human Rights Council held a special session on “the Grave Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem” and adopted the resolution “Ensuring respect for international human rights law and international humanitarian law in the Occupied Palestinian Territory, including East Jerusalem, and in Israel”⁸⁹. Through its resolution, the Council decided to “urgently establish an ongoing, independent, international commission of inquiry to investigate, in the Occupied Palestinian Territory, including East Jerusalem, and in Israel, all alleged violations of IHL and abuses of IHRL leading up since 13 April 2021. One note is worth making, in the sense that the wording suggests something different than what Clapham noted few years before: the use of the

⁸⁵ (Clapham, Human Rights Obligations of Non-State Actors in Conflict Situations, 2006, pp. 505-506) Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, Philip Alston, 14 May 2008, page 28 (A/HRC/8/3/Add.3).

⁸⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kalin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, 2 October 2006, paragraph 19 (A/HRC/2/7).

⁸⁷ Report of the High Commissioner for Human Rights on the implementation of Human Rights Council resolution 7/1, Human rights violations emanating from Israeli military attacks and incursions in the Occupied Palestinian Territory, particularly the recent ones in the occupied Gaza Strip, 6 June 2008, paragraph 4 (A/HRC/8/17).

⁸⁸ Report of the detailed findings of the independent Commission of Inquiry established pursuant to Human Rights Council resolution S-21/1, 24 June 2015 (Palestine) (A/HRC/29/CRP.4).

⁸⁹ Resolution adopted by the Human Rights Council on 27 May 2021 (A/HRC/RES/S-30/1).

word “abuse” when it comes to IHRL, rather than when it comes to NSAs.⁹⁰ Does this imply a reduction of IHRL to the moral level?

In fact, reports with express references to the behaviours of NSAs led to discussions of whether “human rights law should apply to the state, while the armed groups should be judged according to international humanitarian law”.⁹¹ Nonetheless, three objections to this understanding, which also serve as reasons why exploring this topic is, in our opinion, extremely fruitful: first, in many cases, the threshold for the application of IHL has not been met (or in situations when, for political reasons, the existence of an armed conflict is denied); second, even if the law of armed conflict applies, it does not cover a number of serious issues; third, human rights bodies and organisations may have mandates limited to human rights law.⁹² Andrew Clapham refers to legally binding international human rights obligations, and relying on the reasoning of Dieter Fleck, who believes that “if non-state actors have human rights, it appears logical that they also must have responsibilities” suggests that from there, it only takes a “small step to suggest that such international human rights obligations apply at all times to all armed opposition groups”.⁹³

At a regional level, it is worthy to highlight three important rulings, one of each regional human rights court, in which the conducts of NSAs have been addressed.

In 1988, in the judgement of the *Velásquez Rodríguez v Honduras* case, the Inter-American Court of Human Rights considered that:

“176. The State is, moreover, obliged to investigate any situation in which human rights protected by the Convention have been violated. If the State apparatus acts in such a way that such a violation goes unpunished and the victim is not restored, as soon as possible, to the full enjoyment of his rights, it can be said to have failed in its duty to guarantee the free and full exercise of those rights to the persons subject to its jurisdiction. The same is true when individuals or groups of individuals are tolerated to act freely or with impunity to the detriment of the human rights recognised in the Convention.”⁹⁴

⁹⁰ (Clapham, *Human Rights Obligations for Non-State Actors: Where are We Now?*, 2017, p. 5)

⁹¹ (Clapham, *Human Rights Obligations for Non-State Actors: Where are We Now?*, 2017, p. 4)

⁹² (Clapham, *Human Rights Obligations for Non-State Actors: Where are We Now?*, 2017, pp. 4-5)

⁹³ (Fleck, 2003, p. 79) *apud* (Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 2006, pp. 504-505)

⁹⁴ Corte Interamericana de Derechos Humanos, *Caso Velásquez Rodríguez Vs. Honduras*, Sentencia de 29 de julio de 1988, page 37. Translation by the author.

In 2005, the European Court of Human Rights issued its judgement on *Siliadin v. France*, “the first recognition by the Court that Article 4 of the European Convention on Human Rights [...] imposes obligations on states to protect individuals from being subjected to forced labour by NSAs”.⁹⁵

In 2006, in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, “perhaps one of the most recent controversial cases on state responsibility for human rights violations by NSAs”, Zimbabwe was absolved of any responsibility regarding human rights violations committed by the Zimbabwe African National Union Patriotic Front, and its associated militia, on the ground that they were non-state actors with “an independent identity from the government with its own structures and administrative machinery”.⁹⁶ In practice, such understanding conducted to a situation of impunity.

Despite all significant efforts by international bodies responsible to monitor compliance with human rights standards, it is too soon to affirm that there is already a consensus on how to hold NSAs accountable for human rights violations. The key point here, nonetheless, is to underscore that the international bodies are on the right path. For instance, Security Council practice “demonstrates that the applicability of IHRL to non-state actors is “particularly strong” if they exercise “significant control over the population”.⁹⁷

However, as will be discussed in the next chapter, it is still questionable how this protection can be ensured and, even if NSAs are held accountable, how effectiveness can be guaranteed.

v. Responsibility, Accountability and Enforcement

Some authors still “raise an eyebrow” at the understanding that NSAs can have international human rights obligations, while supporting that they can legally have international rights.⁹⁸ This apparent contradiction leads us to the analysis of the question of the international legal personality, before focusing on their responsibility for the violation of human rights. In fact, international legal personality is seen by some authors

⁹⁵ (Ssenyonjo, 2008, p. 730)

⁹⁶ (Ssenyonjo, 2008, pp. 730-731)

⁹⁷ (Jerusalem Institute of Justice & Regent Law Center for Global Justice, 2015, p. 7)

⁹⁸ (Santarelli, 2008, p. 3)

“as the ‘bridge’ by which non-state actors cross from the sphere of international relations into the sphere of international law”.⁹⁹ Nicolas Carrillo Santarelli points out that the NSA must have an “active legal entitlement” – to claim its rights at the international level, or the “passive entitlement” – to be tried and held accountable before an international body.¹⁰⁰ However, the author raises two objections: the possibility of having rights without remedies, and obligations without accountability, “especially in international law”, where there is a “huge gap between the normative level and implementation”; and the fact that the concept of legal subjectivity itself is useless.¹⁰¹

As so often in law, the first step is a political decision, i.e., lawmakers “may determine that a non-state actor’s deeds impact the international community to an extent that makes it necessary or advisable to have its actions regulated by international norms”.¹⁰²

Therefore, the author suggests that it is appropriate to replace the concept of international subjectivity with the theory of capacities, according to which there are two categories of negative capacities of NSAs under IHRL: primary-substantive capacities (the expected behaviour of NSAs towards human rights) and secondary-procedural capacities (the way a claim can be raised against the NSA at the international level in order to make it comply with the primary capacities).¹⁰³

As early as 2005, Louise Arbour, UN High Commissioner for Human Rights, focusing on accountability, pointed out that “means of holding States and non-State actors accountable for their actions in relation to human rights are still wanting”.¹⁰⁴ Today, the answer is still unclear.

Back in 1989, Theodor Meron has signaled that “the relationship of state responsibility to human rights is even more important for the law of human rights”, however remaining “terra incognita”.¹⁰⁵ The law of state responsibility has made significant progress since then, culminating in the drafting of the Articles on State Responsibility of States for Internationally Wrongful Acts (Draft Articles).¹⁰⁶

⁹⁹ (Green, 2008, p. 4)

¹⁰⁰ (Santarelli, 2008, p. 3)

¹⁰¹ (Cassese, 2004, p. 17) *apud* (Santarelli, 2008, pp. 3-4)

¹⁰² (Santarelli, 2008, p. 4)

¹⁰³ (Santarelli, 2008, pp. 4-7)

¹⁰⁴ Keynote address by Louise Arbour, United Nations High Commissioner for Human Rights to the International Conference Organized by the World Organisation against Torture, 4 October 2005.

¹⁰⁵ (Meron, 1989, p. 372)

¹⁰⁶ Draft Articles on State Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its fifty-third session, in 2001.

Yueyao Zhang affirms that “the ILC Draft Articles are intended to apply to international human rights conventions”.¹⁰⁷ However, she notes that while both the European and American regional systems have developed rules concerning state responsibility, the same cannot be said for universal human rights treaties, in relation to which the UN has developed “less coherent and clear patterns”.¹⁰⁸

Considered “the third structuring pillar of the international legal order set up after the Second World War”, together with the UN Charter and the Vienna Convention on the Law of Treaties, Maurizio Arcari analyses the future of the Draft Articles, that “still retain the character of a non-binding instrument”, although a significant number of international judicial decisions have expressly mentioned its provisions.¹⁰⁹ The author notes a sharp division between “those who prefer to keep the text [...] in its current format and those who consider its transposition into an international convention as unescapable”, but ultimately points out a compelling argument for retaining the articles as they are: “its status as a non-binding instrument, has proved to have an impact on practice and, in particular, has been widely used in international case-law”.¹¹⁰ Furthermore, and especially relevant here, Arcari mentions that, in matters of implementation of international responsibility, Article 54 of the Draft Articles has served as an answer to the serious violations of human rights and international humanitarian law committed in the context of the conflict in Syria and in Myanmar.¹¹¹

In response to increasing accountability for human rights violations by NSAs, we agree with the proposition that “even though states will retain the primary responsibility for ensuring the promotion and protection of human rights, non-state actors will be held accountable when they undermine state efforts to do so or are complicit in violations undertaken by the state”.¹¹² However, there are various ways to address this issue: one approach is to strengthen the role of the state in preventing such violations, but this may not be effective in cases involving, for instance, terrorism¹¹³; another is to enhance the

¹⁰⁷ (Zhang, s.d.)

¹⁰⁸ (Zhang, s.d.)

¹⁰⁹ (Arcari, 2022)

¹¹⁰ (Arcari, 2022) See also (Teles, 2021)

¹¹¹ (Arcari, 2022)

¹¹² (Shelton D. , 2002, p. 322)

¹¹³ Although there is a growing trend among states to classify any act of violence carried out by a non-state armed group in armed conflict as terrorism, after 9/11, the main discussion in the international community was whether the traditional classification contained in IHL was adequate to classify conflicts involving autonomous terrorist groups. There has been a shift in perspective regarding terrorism. Historically, it was treated primarily as a crime rather than an act of war. The use of the term ‘terrorism’ in political discourse has increased significantly in recent years and is now a top priority on the global public policy agenda for

role of states and impose greater international obligations on NSAs through multilateral mechanisms.¹¹⁴

a. The “protection gap” regarding Armed Non-State Actors

The approach to ANSAs is very complex, since as a category of NSA, it covers, for instance, terrorist organizations. The debate about whether ANSAs possess an international legal personality has been occupying scholars, but yet a legal definition is lacking and there is no consensus on the scope and source of this personality, ultimately leading to the lack of regulation of their status under public international law.¹¹⁵

The point under discussion in this chapter goes beyond the regulation of IHL, which explicitly addresses ANSAs in some instruments and is therefore largely uncontested as imposing obligations on them, which is not the case with IHRL, where “conceptual and practical difficulties arise”.¹¹⁶

Bearing this in mind, Gilles Giacca observes an increasing tendency in the contemporary practice of international institutions, and a political will to hold those entities accountable under IHRL, despite legal uncertainties.¹¹⁷ The practice of the United Nations, as well as of other international and regional organisations has been proving efforts to apply human rights law to ANSAs, in particular, but not exclusively, when they perform elements of governmental functions and have *de facto* authority over a population.¹¹⁸ Nonetheless, the central question remains how to identify the positive obligations imposed on them in terms of the socio-economic rights of the population under their territorial control.¹¹⁹ As it is indeed a global challenge that has to be faced in the 21st century, as he notes, although the legal answers to the resulting difficulties have yet to be worked out, holding ANSAs directly accountable under the IHRL is, *volens*

security and peace. It has indeed become a global priority, although the absence of an indisputable and legally binding definition of terrorism leaves significant room for interpretation by policymakers. See also (Breedon, 2015)

¹¹⁴ (Shelton D. , 2002, pp. 321-322)

¹¹⁵ (Kleczkowska, 2020, pp. 5-6) To clarify the issue, the author refers: “For instance, if a state agreed to render an international legal personality to ANSAs and allowed them to become full-fledged parties to a treaty, it might mean that an ANSA could subsequently oversee the implementation of a treaty by a state and, on these grounds, make claims against a state.”

¹¹⁶ (Giacca, 2014, p. 243)

¹¹⁷ (Giacca, 2014, p. 271)

¹¹⁸ (Bellal & Casey-Maslen, 2011, p. 187); (Giacca, 2014, pp. 271-272)

¹¹⁹ (Giacca, 2014, p. 269)

volens, “the direction in which the international community is heading” and, we agree with him, rightly so.¹²⁰

Andrew Clapham draws attention to the fact that while, on the one hand, there is some consensus among those debating the adequacy of the application of human rights law to armed groups that human rights reports can address the behaviour of armed groups, on the other hand, there is a belief that they can only refer to human rights “abuses” committed by these groups and that the term “violations” of human rights should be reserved for States.¹²¹ But, after all, what distinguishes “abuse” from “violation”? The author astutely observes that if they are not violations of the law, they are merely transgressions of some moral code, which in practice would result in Israel violating international law and Hamas behaving immorally in terms of human rights.¹²² A result that, in our opinion, fails to understand and adapt to the new challenges of an evolving science as Law.

Rather disconcertingly, the loss of control over parts of its territory by a State, due to activities of an ANSA, “can result in a protection gap that in practice leaves victims of human rights violations without recourse to remedy”.¹²³

In exceptional circumstances, the actions of an ANSA may trigger State's responsibility: i) when an ANSA is authorised to exercise elements of governmental authority; ii) where an ANSA acts on the instructions of, or under the direction or effective control of a State; iii) where an ANSA is in fact exercising elements of the governmental authority in the absence or default of the official authorities; iv) when violations are committed by an insurrectional movement which succeeds in establishing a new government or State; v) where a State acknowledges and adopts the acts of an ANSA as its own.¹²⁴

¹²⁰ (Giacca, 2014, p. 272)

¹²¹ (Clapham, *Human Rights Obligations for Non-State Actors: Where are We Now?*, 2017, p. 5) To say that IHRL applies to a group means that they are held accountable under customary international law, *ius cogens* rules, unilateral commitments, or any other human rights obligation filtered through national law. See also (Ronen, 2013, p. 37): “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 and are therefore binding on all international legal actors (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.”

¹²² (Clapham, *Human Rights Obligations for Non-State Actors: Where are We Now?*, 2017, p. 5)

¹²³ (Eatwell, 2018, p. 6)

¹²⁴ Respectively, Articles 5, 8, 9, 10 and 11 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Cf. (Eatwell, 2018, pp. 26-33)

At a more fundamental level, the difficulties arise where an ANSA operates independently of any state and controls territory, culminating in the *supra* mentioned ‘protection gap’, that results from the lack of control by any State or the ANSA itself over a certain territory. This leads to a situation in which no state will exercise jurisdiction, therefore making it impossible to hold any state directly responsible for human rights violations committed by the ANSA: proven that the territorial State has fulfilled its due diligence obligations to prevent such violations, “the victims will be left without recourse to remedy”.¹²⁵

When these actors establish institutions and infrastructure to provide services typically associated with governments, their acts may impact a wider range of human rights and freedoms beyond those affected by armed violence, for instance, an ANSA that prohibits a social group from attending school violates their right to education.¹²⁶

Although the UN Human Rights Committee and human rights courts adopt an approach to questions of jurisdiction that, in such situations, the territorial state's jurisdiction will be limited to its positive obligation to ensure the rights and freedoms of all individuals within its jurisdiction, in practice, measures taken by the state to protect human rights are unlikely to be effective, since the ANSA is unlikely to comply with such political and legal measures.¹²⁷

Some of the protections are common to both IHRL and IHL, and therefore, will be interpreted according to the principles of IHL, as we have seen above. However, it is important to note that IHL does not protect the extensive range of neither economic, social and cultural rights, nor political and civil rights, that may be violated by an ANSA with territorial control.¹²⁸

Tatyana Eatwell proposes two ways that, in theory, address the protection gap: first, “by upholding the presumption that a state exercises jurisdiction throughout its own territory, even if that territory is controlled by an ANSA”; and second, “by invoking the responsibility of the ANSA itself”; the latter being the most promising.¹²⁹ While there is no general agreement on whether and to what extent ANSAs are bound by IHRL, the

¹²⁵ Paper 36, page 7. The author provides some examples of ANSAs that have controlled territory, including, *inter alia*, the Taliban in Afghanistan, the Naxalites in Chhattisgarh, India, the self-proclaimed Moldavian Republic of Transnistria in Moldova, the LTTE in Sri Lanka and the Sudan People’s Liberation Army in Sudan.

¹²⁶ (Eatwell, 2018, pp. 8-9)

¹²⁷ (Eatwell, 2018, p. 34)

¹²⁸ (Eatwell, 2018, p. 35)

¹²⁹ (Eatwell, 2018, pp. 35-36)

international contemporary practice has attempted to close this gap by focusing on the accountability of ANSAs themselves.¹³⁰ A clear example of this understanding is expressed in the Report on Human Rights in Armed Conflict of 2011, in which is pointed out that:

“concerning 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.”¹³¹

However, the question of 'how?' remains unanswered. Only the development of a clear and consensual understanding can provide an assertive solution to this gap.

Additionally, it is important to note that 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 may not be under any international obligation to provide a remedy”.¹³²

vi. Interim conclusions

The first, most emphasised through the analysis, and most obvious conclusion is that a state-centred approach, without holding NSAs directly accountable for human rights violations, is indeed not sufficient to protect against human rights violations by NSAs. Yet, “States are often reluctant to take (costly) measures necessary to ensure human rights compliance by NSAs in order to attract investment from NSAs”.¹³³

Agata Kleczkowska highlights that, in the current security environment, where hybrid threats are prevalent, “states may (ab)use the undetermined legal status of NSAs to challenge their adversaries, while NSAs themselves may seek to influence a state’s policies”, and it is in the state’s interest to maintain the current status, as regulation could enhance NSAs’ role in international relations, weakening their position.¹³⁴ Yet, the

¹³⁰ (Eatwell, 2018, pp. 36-37)

¹³¹ OHCHR, The International Legal Protection of Human Rights in Armed Conflict, 2011, page 24.

¹³² Article 1, International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, Yearbook of the International Law Commission, 2001, vol 2, part 1, p 32 *apud* (Eatwell, 2018, p. 10)

¹³³ (Ssenyonjo, 2008, p. 731)

¹³⁴ (Eatwell, 2018, p. 3)

prevalent form of responsibility held by ANSAs is still indirect responsibility, have not been yet established a “model of direct responsibility borne by ANSAs, which would take into account their activities as collective entities”.¹³⁵

Should NSAs be directly liable under IHRL or should they continue to be indirectly liable through states? Echoing Andrew Clapham’s pragmatic and optimistic words, “once we rid ourselves of the assumption that human rights only cover the relationship between individuals and governments there is no danger that accusing an armed group of human rights violations lends it automatic legitimacy or quasigovernmental status. If we fail to address our human rights concerns to these non-state actors we fail the victims of the abuses. It is time to feel comfortable talking about the human rights obligations of non-state actors.”¹³⁶

Having made this statement, we must now consider some theoretical proposals that, while not entirely resolving the issue, may improve the current international legal system of human rights protection.

V. New proposals

The actions of NSAs are committed to challenging the long-standing rules of the international system. In fact, as Ssenyonjo notes, “what is presently required is to secure broad agreement among NSAs as to their human rights responsibility and the effective implementation of norms applicable to NSAs.”¹³⁷

Now returning to a broader concept of NSAs and to Dinah Shelton’s idea of the necessity to impose greater international obligations on NSAs through multilateral mechanisms, and having concluded that it is still lacking in our system an appropriate manner to deal with accountability of NSAs and even more to ensure effectiveness of human rights instruments, we turn to an analysis of what can be expected, in the future, that could serve as an answer to this issue.

Although, as Fergus Green suggests, “the arbitrary and incoherent approaches taken by the Court when confronted with legal issues which bear upon the rights and obligations

¹³⁵ (Eatwell, 2018, p. 5)

¹³⁶ (Clapham, Human Rights Obligations of Non-State Actors in Conflict Situations, 2006, p. 523)

¹³⁷ (Ssenyonjo, 2008, p. 735)

of various non-state actors” show the “ICJ’s flawed approach to non-state actors”, the first proposal is one that deals with an adaptation of its jurisdiction.¹³⁸

From a more feasible perspective, but at the same time more modest, Paula Wojcikiewicz Almeida and Giulia Tavares Romay consider the possibility of opening the existent World Court – the ICJ – to certain NSAs, NGOs and individuals, as *amicus curiae*, in contentious cases, despite the fact that the possibility is not enshrined in the Statute or the Rules of Court.¹³⁹ Observing that participation of both State and NSAs in law-making has recently become a basic feature of international law, and considering that “international litigation has rarely been a matter of private concern affecting exclusively the parties in dispute”, the authors’ proposal is that of recognising the plurilateral nature of international disputes, aiming at “protecting the international community’s fundamental values and, ultimately, strengthening the democratic legitimation of judicial decisions”.¹⁴⁰ By applying an empirical research methodology, they conclude that “ICJ procedural law remains outdated and disconnected from the contemporary developments characterizing the international community nowadays”.¹⁴¹

However, this solution only enables greater participation by NSAs, but does not address the main issue at hand: the lack of accountability and enforcement when violations of human rights by NSAs occur. Therefore, it appears that new legal instruments to regulate the status, role, and responsibilities of NSAs at the international level are necessary.¹⁴²

To increase accountability for human rights violations by NSAs, it may be beneficial to consider the adoption of a Statute of a “World Court of Human Rights” to which NSAs – and not only States – could also become parties. Such a Court would complement existing regional courts, rather than duplicate them.

Although in the near future it may seem utopian, the proposal to establish a World Court of Human Rights (WCHR) is a response to significant contemporary challenges faced in the globalized world of the 21st century. The use of the term “World Court” instead of “International Court” is intentional: it suggests that the establishment of this Court would not follow the same model as the International Criminal Court, *i.e.*, the Statute would not only come into effect for those states that voluntarily submit to

¹³⁸ (Green, 2008, p. 1)

¹³⁹ (Almeida & Romay, 2023, p. 1)

¹⁴⁰ (Almeida & Romay, 2023, pp. 1-2)

¹⁴¹ (Almeida & Romay, 2023, p. 21)

¹⁴² (Kleczkowska, 2020, p. 3)

international jurisdiction in the field of human rights, reflecting the “consent-based and inter-state oriented nature of human rights law”.¹⁴³

Just two years after the UN Charter was adopted, Australia proposed the establishment of an International Court of Human Rights. However, almost eighty years later, this idea remains unrealized. Recently, the idea was revived on the occasion of the Swiss initiative aimed at preparing a new Agenda for Human Rights on the 60th anniversary of the UDHR. Acknowledging that the UN has thus far only entrusted quasi-judicial treaty monitoring bodies with the examination of individual complaints, whose decisions are, however, non-binding, Julia Kozma, Manfred Nowak, and Martin Scheinin proposed a solution that “goes beyond the model of regional human rights courts and also provides for an optional competence to hold international organizations, transnational corporations, and other non-State actors accountable for human rights violations”.¹⁴⁴

Even before this proposal, in 2004, Stefan Trechsel has signalled the problematic. Analysing whether the creation of a WCHR would be desirable, needed and had a reasonable chance to happen, the author concluded, respectively, that the today’s world reality is not of a kind that could be solved by judicial proceedings; that none of the existing bodies can be regarded as a substitute for a WCHR; and, finally, that the process of being publicly accused of having violated human rights would make States reluctant to agree to submit to such a system of control.¹⁴⁵ Proposing three models of status of the Court – a sibling to the ICJ, a Court in its own right like the ICC, or a Court as the top of a world-wide judicial pyramid – he chooses the first one to examine its competence, its proceedings and its relationship with the ICJ, the ICC and Regional Courts. The author recognises the difficulties – to not say impossibility – of this model in itself, which would require an amendment to the UN Charter, ultimately justifying such choice on the fact that it would provide the “highest authority for a human rights court”.¹⁴⁶

The author raised, already at the time, the possibility to grant active competence to a limited number of NGOs, recognising that “the problem of who should have the right to apply to the WCHR might be one of the most difficult problems to be solved”, and passive competence to international organisations and “in a more visionary perspective”, to the

¹⁴³ (Trechsel, 2004, p. 8); (Scheinin, 2009, pp. 5, 8)

¹⁴⁴ (Nowak, 2018)

¹⁴⁵ (Trechsel, 2004, pp. 1-5)

¹⁴⁶ (Trechsel, 2004, pp. 7-8)

World Bank, the International Monetary Fund and the world's largest corporations.¹⁴⁷ Regarding the competence *rationae materiae*, the author raised a question that has been previously treated in this work: the meaning of "human rights". To answer that question, we would suggest to, at a minimum, include the human rights that have achieved consensus on their customary nature, as previously mentioned. But this solution would be unsatisfactory, being needed to "identify the rights whose violation could be alleged in judicial proceedings", and, moreover, to "envisage a proper codification of universally recognized human rights".¹⁴⁸

Finally, the author highlights the main issue that would persist: enforcement, specifically the execution of judgments on a universal level, in relation to which the possibilities reach a "dead end". For that reason, he defended the non-creation of the Court, at least before a certain level of common regional development has been achieved.¹⁴⁹

Considering that "Non-enforcement is a major failure of the United Nations human rights treaty system"¹⁵⁰, Kozma, Nowak, and Scheinin advanced a proposal, that culminated in the drafting of a Statute.¹⁵¹ In a summarising exercise, we will extract the points that deserve highlighting. Retrieving Trechsel's question on the *rationae materiae* jurisdiction, the authors suggest an understanding "based on the existing normative catalogue of human rights treaties, interpreted on the basis of the principle of interdependence and indivisibility of all human rights and drawing inspiration from customary international law and general principles of law".¹⁵²

In general terms, the Court would have legally binding jurisdiction over states that have ratified its Statute. This includes orders on interim measures, permissibility of reservations to human rights treaties, and orders on the remedies to be provided to a victim.¹⁵³ Furthermore, the Human Rights Council, being the primary intergovernmental UN body responsible for human rights issues, would be tasked with supervising the successful execution of its rulings.¹⁵⁴ More importantly, the Court's potential status as a

¹⁴⁷ (Trechsel, 2004, pp. 8-11)

¹⁴⁸ (Trechsel, 2004, pp. 11-12)

¹⁴⁹ (Trechsel, 2004, pp. 18-19)

¹⁵⁰ (Scheinin, 2009, p. 8)

¹⁵¹ "A World Court of Human Rights – Consolidated Draft Statute and Commentary", May 2010.

¹⁵² (Scheinin, 2009, p. 5)

¹⁵³ (Scheinin, 2009, p. 5)

¹⁵⁴ (Scheinin, 2009, p. 5)

“world court” is demonstrated by its ability to exercise jurisdiction over “entities”, the chosen terminology to cover a broad range of NSAs – intergovernmental organizations, TNCs, international NGOs, organized opposition movements exercising a degree of factual control over a territory and autonomous communities within one or more states -, who may accept the Court’s legally binding jurisdiction.¹⁵⁵ Even if an entity does not accept the Court’s jurisdiction, a case may still be brought against them, and the same would be true regarding states that do not accept its legally binding jurisdiction.¹⁵⁶ On the other hand, regarding the active entitlement, state and non-state parties could submit a complain to the Court, however, in these situations, the Court could consider such complaints only upon a request by the UN High Commissioner for Human Rights, and would issue an Opinion on the interpretation of a human rights issue.¹⁵⁷ To emphasise the progress that enables achieving this objective, Martin Scheinin enumerates a series of “small steps”¹⁵⁸ that demonstrate a “trend ‘from consent to constitution’, from a state-centred world order to a new global order with focus on the individual endowed with rights”.¹⁵⁹

Manfred Nowak notes that although this initiative was well-received by civil society and the academic community, there is one exception: Philip Alston, indicated by the author as “one of the most prominent human rights scholars of our time”.¹⁶⁰

Philip Alston accuses the very idea of a World Court of being a “misguided distraction from deeper and much more important challenges”.¹⁶¹ Even before referring his own arguments against the creation of the WCHR, the author points out Antonio Cassese’s similar understanding, “even in the context of a self-described ‘utopian’ plea for a global community grounded in a core of human rights”.¹⁶² The author acknowledges that considering the reluctance in the Asian region and Arab countries to restrict their freedom

¹⁵⁵ (Scheinin, 2009, p. 5)

¹⁵⁶ (Scheinin, 2009, p. 6)

¹⁵⁷ (Scheinin, 2009, pp. 5-6)

¹⁵⁸ From that list, we selected the three that, in our view, had a significant impact on the subject. First, the General Comment No. 24 on reservations to the ICCPR and its two Optional Protocols, adopted in 1994, by the Human Rights Committee. Second, the General Comment No. 31 on the nature of obligations of states under the ICCPR, adopted in 2004, by the Human Rights Committee, which codifies the Committee’s earlier approach of addressing conduct by NSAs that affects the enjoyment the rights enshrined in the Covenant. Finally, the report on the situation of human rights in Kosovo since June 1999, submitted by the United Nations Interim Administration Mission in Kosovo and considered by the Committee in 2006, that created a precedent for holding intergovernmental organizations, and not only states, accountable.

¹⁵⁹ (Scheinin, 2009, pp. 9-15)

¹⁶⁰ (Nowak, 2018)

¹⁶¹ (Alston, Against a World Court for Human Rights, 2014, p. 198)

¹⁶² (Alston, Against a World Court for Human Rights, 2014, p. 200)

of manoeuvre in relation to human rights policies, “political feasibility is likely to be a major stumbling block”.¹⁶³ However, he concludes that the main problem is not “its pie-in-the-sky idealism”.¹⁶⁴

Regarding the criticisms presented by the author, the analysis here will focus on those understood, in our view, as most relevant. First, the Court’s inability to address the necessary level of heterogeneity.¹⁶⁵ Second, the unrestricted access to State documents “constitutes a huge leap in terms of powers that states would see as infringing on their sovereignty”.¹⁶⁶ Third, the intellectual breakthrough to “let alone a single World Court offer the best hope of resolving complex and contested problems”.¹⁶⁷ Furthermore, granting the Court the authority to issue definitive interpretations on a global basis could jeopardise the necessary systemic pluralism, diversity, and separation of powers.¹⁶⁸ In addition, organized crime groups are still left out of such a wide range of “entities”, and the statute appears to ignore that the existing legal framework on State responsibility by acts or omissions of NSAs is “notoriously incapable of dealing adequately with the differences in status and obligation among such entities”.¹⁶⁹ Finally, the author highlights the challenges that arise from the relationship with regional systems, assuming that it does not aim to serve only as a court for regions that lack one: “Asia and the Middle East, the two regions that have thus far proved resistant to substantive initiatives in this field”.¹⁷⁰

In conclusion, while recognizing the advantages of this proposal in identifying the main challenges for a future global order, and borrowing Alston’s words, it is important to note that “the history of state engagement with human rights regimes is one of determined incrementalism, not one of dramatic leaps forward”.¹⁷¹

Retrieving the idea of a trend ‘from consent to constitution’, we will now focus on a different proposal: that of creating an International Constitutional Court, to “internationalize constitutional law”, an idea launched by Marzouki, in 1999, and latter materialized.¹⁷² Observing a “long democratic recession” in recent years, accompanied

¹⁶³ (Alston, *Against a World Court for Human Rights*, 2014, p. 201)

¹⁶⁴ (Alston, *Against a World Court for Human Rights*, 2014, p. 211)

¹⁶⁵ (Alston, *Against a World Court for Human Rights*, 2014, p. 202)

¹⁶⁶ (Alston, *Against a World Court for Human Rights*, 2014, p. 203)

¹⁶⁷ (Alston, *Against a World Court for Human Rights*, 2014, p. 206)

¹⁶⁸ (Alston, *Against a World Court for Human Rights*, 2014, p. 206)

¹⁶⁹ (Alston, *Against a World Court for Human Rights*, 2014, p. 207)

¹⁷⁰ (Alston, *Against a World Court for Human Rights*, 2014, p. 209)

¹⁷¹ (Alston, *Against a World Court for Human Rights*, 2014, p. 210)

¹⁷² (Albert, *Does the World Need an International Constitutional Court?*, 2023, pp. 1-4, 13)

by “constitutional fraud and brainstorming ways to rescue democracy”, Richard Albert, who refers to it as a “Hail Mary Play” analyses the proposal.¹⁷³ The Court would aim, in the short-term, “to rule on the legality of elections around the world”, and, in the long-term, “to eradicate dictatorship and to guard democracy from defeat”.¹⁷⁴ Regarding its *rationae materiae* jurisdiction, the Court would be the “guardian” of the three main universal human rights treaties: the UDHR, the ICCPR and the ICESCR, the so-called Bill of Rights.¹⁷⁵

Undoubtedly sharing certain features with the WCHR, it is relevant to point out the main differences. First, the significant restriction of jurisdiction to the above mentioned treaties, which are to be interpreted in light of “the principles and rules relating to democracy and universal and regional civil liberties”.¹⁷⁶ Second, and as we could already infer from the Court’s designation, NSAs would not be given the possibility to be a party to the Statute, although it would accept the involvement of political parties, professional groups, non-governmental organizations, and multinational organizations at the international, regional, or sub-regional level, in both its advice-giving and dispute-resolution functions.¹⁷⁷ Finally, it would be an organ of the UN, rather than functioning as a new independent court.¹⁷⁸

If at first glance, the proposal may have seemed more feasible, this last aspect, well criticized by the author, given the world’s “portrait of tragedy” that “undermines the authority of the UN as a body that can help manage global governance” reveals its probable unfavourable outcome.¹⁷⁹ Moreover, it would not respond to the most pressing issue: enforcement.¹⁸⁰

In fact, Richard Albert affirms that neither solution is ideal: on the one hand, regional courts are perhaps a better solution to compliance and enforcement; on the other hand, allowing different interpretations of the same rights risks undermining the goal of having

¹⁷³ (Albert, Does the World Need an International Constitutional Court?, 2023, pp. 6-7)

¹⁷⁴ (Albert, Does the World Need an International Constitutional Court?, 2023, p. 5)

¹⁷⁵ (Albert, Does the World Need an International Constitutional Court?, 2023, pp. 5-6)

¹⁷⁶ (Albert, Does the World Need an International Constitutional Court?, 2023, p. 11)

¹⁷⁷ (Albert, Does the World Need an International Constitutional Court?, 2023, pp. 10-11)

¹⁷⁸ (Albert, Does the World Need an International Constitutional Court?, 2023, p. 10)

¹⁷⁹ (Albert, Does the World Need an International Constitutional Court?, 2023, p. 14)

¹⁸⁰ (Albert, Does the World Need an International Constitutional Court?, 2023, p. 15)

one World Constitution.¹⁸¹ In line with this position, Stefan Trechsel has stated, already in 2004, that a long-term development should aim to

“bring the regions of the world onto the same level as Europe, and to the extent that the parallel is justified, the Americas. Once a solid basis has been established, it will be at least desirable to establish a world court which would secure the uniform protection of human rights on the whole planet.”¹⁸²

Ultimately, the author adopts the understanding that “the Court, if ever it is created, should be limited to issuing only advisory rulings”.¹⁸³ The author’s conclusion does not attempt to hide the obvious problems of the proposal, but rather confronts them realistically in the current international relations scenario. In fact, it is challenging to find a solution for the issue of enforcement without risking further complications.

Indeed, none of the three proposals put forward appears to provide a single solution to the various challenges. States are unwilling to subjugate their sovereignty to a body with such broad jurisdiction, some NSAs, such as large corporations, are unwilling to prioritize the protection of human rights alongside economic growth, and there is no intermediate position between coordinating and uniformising regional and global jurisdictions. Furthermore, finding a solution to the issue of enforcement appears to be currently unattainable.

VI. Conclusion

With assertive words, Martin Scheinin affirmed that “Although the 20th century was a breakthrough for the novel idea of the international protection of human rights, the realization of that idea remains far from complete.”¹⁸⁴ The present century has radically changed the international relations, as globalization brought together many actors with an enormous influence that, in some cases, equalise or even surpasses that of the state.

In fact, it is evident that the current international legal system does not fully and unambiguously address the challenges posed by NSAs, as the system was established by

¹⁸¹ (Albert, Does the World Need an International Constitutional Court?, 2023, pp. 18-19)

¹⁸² (Trechsel, 2004, p. 19)

¹⁸³ (Trechsel, 2004, p. 1)

¹⁸⁴ (Scheinin, 2009, p. 7)

and for states. Despite the increasing concern surrounding this new reality, there is currently no clear international solution. And the “old” instruments no longer serve the ultimate purpose of ensuring human rights protection.

However, while some promising and innovative proposals have emerged, they are hindered by numerous obstacles. In an era where human rights are a constant theme of the international community due to their cross-cutting nature, there are few ways to protect them.

The first necessary step is to establish an internationally uniform legal definition of NSA. It may be reasonable to categorise the various actors based on their characteristics, as this affects how they should be treated.

Borrowing Agata Kleczkowska’s words, “even though the contemporary international stage is awash with different actors”, states are “not only the most important actors but also gatekeepers, in the sense that they determine the scope of the rights and obligations of all other entities that interact with them”.¹⁸⁵

Nevertheless, we do believe that the question is essential to ensure the future and credibility of international law, and even being *lege ferenda*, the proposals that have been suggested must be the target of particular attention, notwithstanding the simultaneous improvement of the *lege lata* solutions. Looking at the past, important landmarks have shown that there is always a possibility of a paradigm shift. It is desirable to have developed a solid framework that demonstrates its added value and benefits if and when that happens. It seems unlikely that there will be a shift in the current international political climate in the near future, and the UN is showing certain signs of decadence, which further complicates the situation. However, unpredictability can inspire the development of new solutions to respond to the challenges of a new global order.

¹⁸⁵ (Kleczkowska, 2020, p. 6)

Bibliography

- Albert, R. (2023). Does the World Need an International Constitutional Court? *Rutgers International Law and Human Rights Journal*, Vol. 3, 1-25.
- Almeida, P. W., & Romay, G. T. (2023). Opening the World Court to State and Non-State Actors in Contentious Cases: Reality or Utopia? *Revista Direito GV*, Vol. 19, 1-31.
- Alston, P. (2005, July). The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors? In P. Alston, *Non-State Actors and Human Rights* (pp. 3-36). Oxford University Press.
- Alston, P. (2014). Against a World Court for Human Rights. *Ethics & International Affairs*, 28 (2), 197-212.
- Azeredo Lopes, J. A. (2011). Enfim reunidos? Direito dos conflitos armados e direito internacional dos direitos humanos. In J. A. Wladimir Augusto Correia Brito (dir.), *Conflitos armados, gestão pós-conflitual e reconstrução* (pp. 39-65). Santiago de Compostela: Andavira.
- Azeredo Lopes, J. A. et. al (2020). *Regimes Jurídicos Internacionais, Volume I*. Porto: Universidade Católica Editora.
- Bellal, A., & Casey-Maslen, S. (2011). Enhancing Compliance with International Law by Armed Non-State Actors. *Goettingen Journal of International Law* 3, 175-197.
- Binder, G. (1999). Cultural Relativism and Cultural Imperialism in Human Rights Law. *Buffalo Human Rights Law Review*, Vol. 5, 211-221.
- Botelho, C. S. (2017, May). *Aspirações Constitucionais e força normativa da Constituição - Requiem pelo «conceito ocidental de Constituição»?*, pp. 19-52.
- Botelho, C. S. (2019). Int'l J. Const. L. Blog. *Book Review: A World Government? by Sabino Cassese (Global Law Press/Editorial Derecho Global, Sevilla)*.
- Botelho, C. S. (2020). Transnational Constitutional Law. In F. L. eds. Rainer Grote, *Max Planck Encyclopedia of Comparative Constitutional Law* (pp. 1-22). Oxford University Press.
- Breedon, J. (2015). Redefining Terrorism: the danger of misunderstanding the modern world's gravest threat. *Revista de Direito Internacional, Brasília*, v. 12, n.2, 463-483.
- Cassel, D. (2001). Does International Human Rights Law Make a Difference. *Chicago Journal of International Law*, 121-135.
- Cassese, A. (2004). *International Law*. s.l.: Oxford University Press.

- Cerna, C. M. (1989). *Implementation of International Humanitarian Law*, ICRC, Geneva.
Human rights in armed conflict: Implementation of international humanitarian law.
- Clapham, A. (2006). Human Rights Obligations of Non-State Actors in Conflict Situations. *International Review of the Red Cross*, 491-523.
- Clapham, A. (2010, February 10). *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement*, pp. 1-45.
- Clapham, A. (2017, August 14). *Human Rights Obligations for Non-State Actors: Where are We Now?*, pp. 1-18.
- Eatwell, T. (2018, December). Academic Briefing N°13. *State Responsibility for Human Rights violations committed in the state's territory by armed non-state actors*, pp. 1-43.
- Fleck, D. (2003). Humanitarian Protection Against Non-State Actors. In *Verhandeln für den Frieden, Negotiating for Peace - Liber Amicorum Tono Eitel* (pp. 69-94). Berlin: Springer.
- Giacca, G. (2014). Economic, Social, and Cultural Rights in Armed Conflict, Oxford University Press. *Human Rights Obligations of Armed Non-State Actors*, pp. 230-272.
- Green, F. (2008). Fragmentation in two dimensions: The ICJ's flawed approach to Non-State Actors and International Legal Personality. *Melbourne Journal of International Law*, 1-31.
- Heintze, H.-J. (2004, December). *On the Relationship between human rights law protection and international humanitarian law*, pp. 789-814.
- Isa, F. G., & Feyter, K. d. (2009). *International Human Rights Law in a Global Context*. Bilbao: Universidad de Deusto.
- Jerusalem Institute of Justice & Regent Law Center for Global Justice, H. R. (2015, April). Hamas and the International Human Rights Law - What are the legal consequences of a designated terrorist organization becoming the governing entity of a recognized state? pp. 1-22.
- Josselin, D., & Wallace, W. (2001). Non-State Actors in World Politics. In D. Josselin, & W. Wallace, *Non-state Actors in World Politics: a Framework* (pp. 1-20). Houndsmills: Palgrave.
- Kleczkowska, A. (2020, January). Hybrid CoE Strategic Analysis 20. *States vs. non-state actors – a public international law perspective*, pp. 3-7.
- Liesa, C. R. (2020). Questions on the Theory of Law in International Human Rights Law. *The Age of Human Rights Journal*.

- Meron, T. (1989). State Responsibility for Violations of Human Rights. In *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 83 (pp. 372–385). Cambridge University Press.
- Moir, L. (2002). *The Law of Internal Armed Conflict*. Cambridge University Press.
- Rights, U. N. (2011). *International Legal Protection of Human Rights in Armed Conflict*, pp. 1-120.
- Rodley, N. S. (1993). Can Armed Opposition Groups Violate Human Rights? In M. Nijhoff, *Human Rights in the 21st Century: a Global Challenge* (pp. 297–318). K. E. Mahoney and P. Mahoney (eds).
- Ronen, Y. (2013). Human Rights Obligations of Territorial Non-State Actors. *Cornell International Law Journal*, Vol. 46, 21-50.
- Santarelli, N. C. (2008). Revista Electrónica de Estudios Internacionales. *Non-State Actors' Human Rights Obligations and Responsibility under International Law*, pp. 1-10.
- Scheinin, M. (2009). Research report within the framework of the Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights. *Towards a World Court of Human Rights*, pp. 1-53.
- Shaw, M. N. (2003). *International Law (5th edition)*. Cambridge University Press.
- Shelton, D. (2002). Boston College International & Comparative Law Review. *Protecting Human Rights in a Globalized World*, pp. 273-322.
- Shelton, D. L. (2007). GW Law Faculty Publications & Other Works. *An Introduction to the History of International Human Rights Law*, pp. 1-30.
- Ssenyonjo, M. (2008). The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights? *The International Journal of Human Rights*, 725–760.
- Steenberghe, R. V. (2022). The impacts of human rights law on the regulation of armed conflict: A coherency-based approach to dealing with both the "interpretation" and "application" processes. *International Review of the Red Cross*, 104 (919), 1345–1396.
- Tomuschat, C. (2004). The Applicability of Human Rights Law to Insurgent Movements. In U. F. Horst Fischer, *Crisis Management and Humanitarian Protection* (pp. 573-591). Berlin.
- Trechsel, S. (2004). A World Court for Human Rights? *Northwestern University Journal of International Human Rights*, Volume 1 Fall, 1-19.
- Vitale, M. Q. (2018). *Modernization, Development and Law - Gino Germani's contribution to a Sociology of Justice in a Global World*. MIM Edizioni Srl.

Other sources

- Albert, R. (2021, February 17). *Opening Lecture - The Illusion of a Written Constitution*, Universidade Católica Portuguesa. Retrieved from <https://www.youtube.com/watch?v=mRLRAVoOYB4>
- Arcari, M. (2022, June 30). *The future of the Articles on State Responsibility: A matter of form or of substance?* Retrieved from Questions of International Law: <http://www.qil-qdi.org/the-future-of-the-articles-on-state-responsibility-a-matter-of-form-or-of-substance/>
- Gurbanli, Z. (2018, August 12). *The Universalism of Human Rights or Cultural Relativism?* Retrieved from Baku Research Institute: <https://bakuresearchinstitute.org/en/the-universalism-of-human-rights-or-cultural-relativism/>
- Nowak, M. (2018, September 26). *A World Court of Human Rights*. Retrieved from Springer: https://link.springer.com/referenceworkentry/10.1007/978-981-10-5206-4_10
- Teles, P. G. (2021, August 3). *The impact and influence of the Articles on State Responsibility on the work of the International Law Commission and beyond*. Retrieved from EJIL Talk: <https://www.ejiltalk.org/the-impact-and-influence-of-the-articles-on-state-responsibility-on-the-work-of-the-international-law-commission-and-beyond/>
- United Nations*. (n.d.). Retrieved from Universal Declaration of Human Rights: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>
- Willmott-Harrop, E. (2001, January). *Human rights mechanisms and international law*. Retrieved from Liberty & Humanity: <https://libertyandhumanity.com/themes/international-human-rights-law/human-rights-mechanisms-and-international-law/>
- Zhang, Y. (n.d.). *State Responsibility in the Realm of Human Rights Conventions*. Retrieved from Max Planck Institute for Comparative Public Law and International Law: <https://www.mpil.de/en/pub/research/areas/human-rights/state-responsibility-realm.cfm#project>