NON-STATE ACTORS AND THEIR OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHT TREATIES

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INTRODUCTION

Under International human rights law, the States are placed with onerous duties on protection of human rights. The Preamble to the Universal Declaration of Human Rights (UDHR) notes that all person and entity in society must contribute to a legal system that promotes full enjoyment of human rights. This duty, according to many authors, is universal and extends to all entities, even if they are non-state actors[i] or state actors. This is because the only entities able to violate human dignity are hardly States.

Under conventional human rights methods, Non-State Actors (NSAs) fall beyond international human rights law's limits[ii]. They are not parties to the related treaties and are thus only bound to the degree that governments may extend the obligations agreed by States. The State continues to have primary duties and obligations in the area of human rights enjoyment. According to Clapham, the State cannot exempt itself of the responsibilities of protecting human rights under international law, even where they delegate the responsibilities to non-state actors[iii]. The consequence is that these NSAs are usually found not to be directly governed by the international treaties on human rights. This situation portends to make a mockery of most of the accountability mechanism for international human rights abuses. Besides, the threat to human rights posed by NSAs has been of rising concern in recent years, such as the treatment of young women by peacekeepers in conflict zones, the infringement of the human rights of indigenous peoples by multinational organizations, etc. Nevertheless, even though States have the primary responsibility, there has been an argument that NSAs also must uphold human rights as well as refrain from violating an individual's human rights.

In this paper, we would be considering the role of NSAs under the International Human Rights Lawas well as the inherent obligations contained under the various human rights instruments.

The protection of human rights should also be optimally applied whenever those rights are violated and regardless of who places them at risk. Generally speaking, considering the ever-growing presence and actions of the NSAs, it is high time for the international community to strongly consider placing the NSAs under the purview of the various human rights conventions and hold them accountable for the infringement of these rights under international law.

NATURE OF NON-STATE ACTORS UNDER INTERNATIONAL LAW

According to Andrew Clapham, non-State actors (NSAs) are bodies or organizations which do not have the characteristics of a State (i.e., a country) but have some sort of authority and powers that a State does[iv]. To him, NSAs are often used to refer to:

> "International organizations, 'peoples' (for purposes of self-determination), National Liberation Movements (NLMs), indigenous peoples, insurgents, belligerents, combatants, private corporations, non-governmental organizations (NGOs), religious organizations, and individuals".

NSAs do not have formal or governmental powers and authorities as well as no administrative or fiscal arrangement with the state. As such, they often were not regarded as conventional objects of international law, but rather as theoretically non-conventional subjects. This was pointed out by Nijman that:

> "NSAs are subject or persons of international law. The conception of NSAs as an object of international law does, however, not sufficiently explain its present-day position in the international law… In the other words, power and influence of NSAs in many cases goes far beyond that of entities to which international law has traditionally accorded to object states."[v]

Based on the aforementioned premises, the NSAs should not have an international legal personality because, to have legal personality, an entity must have responsibilities and duties within the legal framework[vi].Nowadays, however, international law extends beyond countries, with many acts, such as some illegal acts, commerce, banking, commercial affairs, environmental concerns, human rights, and more, influencing many people. Moreover,

international law indicates that individuals and entities other than countries are often subject to international obligations and responsibilities, and that such changes are consistent with the framework of international law[vii].This has prompted some scholars in International Law to postulate that international law is recognizing the relevance of NSAs and this might create a path for formal recognition of their legal personalities[viii].

A key reason for that public international law not granting the NSA legal personality is that most countries are hesitant to share their international roles with the NSAs. Furthermore, acknowledging the legal personality of NSAs may exacerbate the risk of legitimizing the criminal acts of these NSAs. This could contribute to the legitimization of their use of aggression[ix].

The main purpose of international human rights treaties is to defend persons and groups against states. Currently, there are a significant amount of NSAs such as NGOs and multinational corporations (MNCs) with financial, economic, and organizational capacities that can impact the structural actions of political actors, both locally and internationally. These limitless and unregulated powers are liable to be misused by persons and organisations and must thus be kept accountable in compliance with international human rights treaties.

The NSAs have both positive and negative roles. The negative position of the NSAs can be examined from several perspectives. Firstly, repressive regimes, are conscious that the legal personality of the NSAs throughout international law is not well known, therefore cannot be considered legitimately accountable for their acts. Moreover, because countries do not want their authority to be put into doubt in the international arena. They may then aim to co-opt the NSAs for use against persons, opposition groups, and vulnerable or marginalized communities[x].These States use the NSAs as vehicles to escape international accountability. Often, by contracts and programs, the States specifically employ the NSAs as a tool to their ends. In any other way, the NSAs are used indirectly by States. NSA groups and personnel, such as local militia, are trained and funded and State governments. In other situations, regimes-actually refuse to sanction or punish abuses of human rights, such as arbitrary arrests, killings of activists or opposition parties and torture by the NSA, which follow the same State's ideology[xi].

On the flip side of things, NSAs, such as human rights advocacy groups, undertake essential constructive roles, ranging from human rights education to the compliance and oversight of

human rights norms. Often, specialist NSAs in the field of human rights may have an impact on international standards by engaging in consultations on specialist legal issues[xii].Even if NSAs are not specifically active in rules-building activities, they will also have an impact by disseminating information to the public that encourages transparency and public awareness.

The promotion of international law norms and principles is another positive practice of NSAs. In terms of international binding instruments, NSAs and NGOs have had a positive impact on international law implementation to national legal frameworks and have, in particular, been consulted or active in formulating the appropriate criteria[xiii].This will greatly lower the costs of compliance and regulation. In fact, by engaging in self-regulation of their operations, they can mitigate the costs of implementation.

Also, the NSA's' monitoring role cannot be neglected. In this respect, the NSAs have two facets to their function – the first is to supervise the enforcement of international norms and regulations within their States, and the second is to influence the actions of States concerning international conventions[xiv]. They may, for example, use the media to expose breaches of international legal norms by State agencies or government bodies, or could disclose abuses of powers to specific national supervisory institutions in the domestic framework or to appropriate international supervisory agencies, such as those in the United Nations Human Rights System.

Unfortunately, more frequently than not, there have been several cases in which the NSAs have separately manipulated their positions, structures, staff and resources against certain groups and individuals. In these situations, international law does not consider the direct responsibility of the NSAs, even though certain international human rights instruments impose responsibilities on the NSAs. In several cases, for instance, the *Social and Economic Rights Action Center (SERAC) v. Nigeria*[xv], States were held as the main responsible bodies for actions that were committed by NSAs. In the *SERAC* case, the Federal Government of Nigeria was held responsible for the actions of Shell Petroleum Development Corporation (SPDC) whose operations caused environmental degradation and health problems for the people of Ogoni land in Nigeria. A simple review of the majority of cases of common international law tends to be the only exception of international human rights law where the clear obligations of the insurgent, extremist and resistance groups are provided under of the Second Protocol to the Geneva Convention,[xvi].

Consequently, because the NSAs are not strictly regulated by international law norms, their activities may be a danger to national, regional and international security. Moreover, since they operate in a wide variety of ways, it is very problematic to assess the wide-ranging obligations of the NSAs; thus, it seems that States must assume primary responsibility for avoiding their detrimental acts, provided that they have the overriding powers and authorities to criminalize and penalize the practices of the NSA.

HUMAN RIGHTS OBLIGATIONS ON NON-STATE ACTORS

Traditionally, the State is seen as the body solely responsible for the protection of human rights at both the international and national levels. With the advent of a whole range of NSAs on the global stage, the primacy of the state's role in international affairs is being debated, as is its ability to monitor and govern these new actors[xvii].As the traditionalist opinion would say, international law is mainly concerned with the norms of State compliance and those principles, including human rights, can be breached only by state authorities – meaning that abuses by private individuals or NSAs come under ordinary national legislation[xviii].The notion of human rights obligations to States is based on two related ideals, according to Steven Ratner[xix]. The first is that local law can efficiently control actions under the jurisdiction of a State. Customarily, the State itself will be desirous in resolving abuses of human rights under its territorial jurisdiction, rendering it inappropriate for external international law bodies to interfere. The other notion is that the States won't approved the international regulation of private bodies. However, with the advent of the prevailing international system, and the rising relevance of NSAs that are gradually exercising powers similar to those of States. Insofar as NSAs are permitted by or ultimately substituted by the State, acting in compliance with its orders, directives or controls, the State shall be legally responsible for those actions. The State shall correspondingly be liable if it validates the actions of the NSA.[xx]

Many of the United Nations Conventions include specific requirements for ratifying Member Parties to take appropriate steps to deter all forms of infringements of human rights. For instance, the Covenant on Civil and Political Rights[xxi], in its article2(3a), imposes a duty on each ratifying Member State to ensure an effective remedy whenever the rights or freedoms of any right holder have been violated. The Covenant on Economic, Social and Cultural Rights

also requires Member parties to achieve the implementation of the economic, social and cultural rights, thus providing for local and international affirmative obligations upon States.[xxii]

Furthermore, Article 2 of the UN Convention on the Elimination of All Forms of Racial Discrimination[xxiii]requires that the State end all forms of racial discrimination against any persons, group or organization. Also, in the Convention on the Elimination of All Forms of Discrimination against Women[xxiv], Article 2(e) requires that all measures must be taken by States to eliminate discrimination against women by any person or body.

Various the United Nations Supervisory Committees have expressed their opinions on the role of States in promoting human rights between private actors. The Committee on the Elimination of Racial Discrimination, for instance, noted that State Parties must ensure that private institutions do not influence the exercise and enjoyment of civil, political, economic, social, and cultural rights within the State's jurisdiction (Office of the High Commissioner for Human Rights, 1999: 113.). The Committee on the Elimination of Discrimination against Women has emphasized that discrimination under the Convention is not limited to measures under Article 2(e) or on behalf of Governments; for example, it calls on States Parties to take all necessary steps to eradicate discrimination against women by any person, organization or entity[xxv].

These remarks indicate that there has been a seismic shift from the idea of "protection against the State" to "protection by the State which includes all kinds of human rights violations, be they governmental or non-governmental"[xxvi]. The very nature of human rights, too, is that people have inalienable rights, and that the protection of fundamental rights is not only a product of limitations on State's authority but the main, essential and basic substance of human rights[xxvii].

These findings also suggest that, according to its international human rights commitments, the State is liable for abuses of human rights perpetrated by NSAs because it neglects to monitor, deter as well as prosecute such acts. Moreover, even though human rights instruments are binding on Governments, the prospect of extending them to acts by non-State actors has been noted.

The NSAs also can operate outside the jurisdiction of states. This is often the case that where States have neither the resources nor the interests to keep the NSAs responsible under national

law. Consequently, retaining States as being exclusively responsible for human rights commitments can lead to an insufficient guarantee of these rights.

The above situation has led to the creation of new instruments that determine NSAs' responsibility for actions that constitute human rights abuses in principle. Thus, some categories of NSAs are also explicitly bound by certain international legal principles which, although under a distinct legal definition and in strictly limited contexts, basically protect human rights. These rules include international criminal law and international human rights law. Interestingly, the existing oversight mechanism applied to NSAs would not include an appropriate solution to the full spectrum of human rights which they may infringe. International human rights law relating to rebel groups or insurgents encompasses only a limited range of protections, known as the essential foundation, which must be complied with in all circumstances. International human rights law is, of course, valid only during conflicts. Various instruments on international criminal law maintains criminal liability against persons over actions that breach human rights, such as terrorism, crimes against humanity, and some breaches of armed conflict rules, but international criminal law is restricted to the more extreme abuses of human rights, and it represents the most stringent form of sanctions[xxviii].As a result, NSAs exercising powers analogous to those of State governments frequently remain non-liable for their misuse of the authority since the actions are not treated as international crimes and are not tied to conventional war.

It has been argued, which we agree, that it is therefore necessary, by expanding the framework of international human rights obligations, to bridge between extensive powers of NSAs and their restricted forms of accountability under international law[xxix]. However, States are often reluctant, in international law or, in that regard, domestic law to attribute to human rights obligations of NSAs. Sometimes, States are usually unlikely to apply any international law to such entities, as such an expansion in some cases may add to the international legal personality of such entities[xxx].

In recent times attempts have been made to improve NSAs' human rights responsibility, and it can be seen that certain countries are keen, if not able, to accept the applications of human rights responsibilities to NSAs. Nonetheless, national governments could be prepared to do so if this applicability exempts States from liability themselves. Accordingly, some states see this as a way of escaping accountability, and which is becoming increasingly appealing as a

counterbalance to the emergent practice of keeping States accountable for the human rights abuses by the NSAs under their territorial control.

CONCLUSION

International human rights laws have defined obligations by which States shall protect the human rights of people from the acts of other State entities and must deter, prosecute and handle any infringement of human rights adequately and reasonably, particularly those perpetrated by NSAs. Over the years, we have seen that NSAs have no doubt been able to commit actions which may be considered as abuses of human rights enshrined in international conventions if carried out by States. Naturally, maintaining NSAs bound under international human rights legislation would help citizens under the direct supervision of these non-state actors, especially where the responsibility can be successfully implemented. Currently, however, international human rights law does not seem to expand outside the Member States as well as the general treaty law. Yet preliminary measures are discernible to include the NSAs in the States in which they function as responsible for protecting individuals' human rights.

Lastly, it would not exempt the State from its responsibilities under human rights law to protect, uphold and enforce human rights by NSAs under a State's jurisdiction. Protection of citizens' rights are mainly the responsibility of States. In cases of abuses of human rights by parties other than the State, first, the duty to defend ensures that persons or persons are not subject to non-State actors' abuses of their rights. In certain cases, failure to protect might entail the duty of the state. Secondly, States should have an effective remedy for citizens or individuals who are victims of abuses of human rights. To this end, any breaches of citizens ' rights should be urgently and impartially reviewed and offenders prosecuted.

REFERENCES

Clapham A, "The 'Drittwirkung' of the Convention" in Ronald St J Macdonald, Herbert Petzold and Franz Matscher (eds), *The European System for the Protection of Human Rights* (Kluwer Academic Publishers 1993)

Clapham A, *Human Rights Obligations for Non-State Actors* (Oxford University Press 2006)

Clapham A, "Non-State Actors" in Daniel Moeckli and others (eds), *International Human Rights* (Oxford University Press 2016) <>

Dodd T, "Distinguished Lecture Series Human Rights and State Responsibility," *12th Raymond & Beverly Sackler Distinguished Lecture Serie* (Thomas Jodd Research Center University of Connecticut) <https://thedoddcenter.uconn.edu/wp-content/uploads/sites/319/2013/10/10.25.2006-Sackler-Lecture-James-Crawford-Transcript.pdf> accessed June 2, 2021

Forde M, "Non-Governmental Interferences with Human Rights" (1986) 56 British Yearbook of International Law 253 <https://academic.oup.com/bybil/article/56/1/253/276802> accessed June 2, 2021

Klabbers J, "(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors" in Jan Klabbers and Jarna Petman (eds), *Nordic Cosmopolitanism: Essays in International Law For Martti Koskenniemi* (Leiden Nijhoff 2003)

Lauterpacht H, "The Subjects of the Law of Nations" in Hersch Lauterpacht and Elihu Lauterpacht (eds), *International Law: the Collected Papers of Hersch Lauterpacht. Volume 1, the General Works* (Cambridge University Press 2009)

McCorquodale R, "Overlegalizing Silences: Human Rights and Nonstate Actors" (2002) 96 Proceedings of the Annual Meeting (American Society of International Law) 384 <https://www.jstor.org/stable/25659810> accessed June 2, 2021

Nijman JE, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser 2004)

Nijman JE, "Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality" [2010] Amsterdam Center for International Law Research Paper Series 1 <https://ssrn.com/abstract=1522520>

Office of the High Commissioner for Human Rights, "CCPR General Comment No. 27: Article 12 (Freedom of Movement)" (OHCHR 1999) <https://www.refworld.org/pdfid/45139c394.pdf>

Peters A, Koechlin L and Fenner Zinkernagel G, "Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion" in Anne Peters and others (eds), *Non-State actors as Standard Setters* (Cambridge University Press 2009) <http://edoc.unibas.ch/dok/A5264926> accessed June 2, 2021

Portmann R, *Legal Personality in International Law* (Cambridge University Press 2013)

Ratner S, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 Yale Law Journal 443 <https://core.ac.uk/download/pdf/157778424.pdf>

Rudolf B, "Non-State Actors in Areas of Limited Statehood as Addressees of Public International Law Norms on Governance" (2010) 4 Human Rights & International Legal Discourse 128 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/hurandi4&div=13&id=&page=> accessed June 2, 2021

Ryngaert C, "Imposing International Duties on Non-State Actors and the Legitimacy of International Law," (2009) <https://ghum.kuleuven.be/ggs/research/non_state_actors/publications/ryngaert.pdf> accessed June 2, 2021

Santarelli NC, "Non-State Actors Human Rights Obligations and Responsibilities under International Law" (2008) 15 Revista Electronica De EstudiosInternacionales 1 <http://dialnet.unirioja.es/descarga/articulo/2800704.pdf> accessed June 2, 2021

Teson F, *A Philosophy of International Law: A Human Rights Approach.* (Westview 1998)

UN Committee on the Elimination of Discrimination Against Women (CEDAW), "CEDAW General Recommendation No. 19: Violence against Women" (*Office of the High Commissioner on Human Rights*1992) <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf> accessed June 2, 2021

United Nations General Assembly, "Report of the Special Rapporteur on the Situation of Human Rights Defenders A/65/223" (Office of the High Commissioner for Human Rights 2010) <https://www2.ohchr.org/english/issues/defenders/docs/A-65-223.pdf> accessed June 2, 2021

ENDNOTES

[i] Non-state actors (NSAs) take on various forms: NGOs, both national and international; indigenous and minority groups; (semi-) autonomous groups; human rights defenders; terrorists; paramilitary groups; autonomous areas; internationalized territories; multinational enterprises; and even individuals in some cases. (http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-actors/the-role-of-non-state-entities)

[ii] Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser 2004), p. 10

[iii] Andrew Clapham, *Human Rights Obligations for Non-State Actors* (Oxford University Press 2006), p. 28

[iv] Andrew Clapham, "Non-State Actors" in Daniel Moeckli and others (eds), *International Human Rights* (Oxford University Press 2016)

[v] Jane Elisabeth Nijman, "Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality" [2010] Amsterdam Center for International Law Research Paper Series 1 <https://ssrn.com/abstract=1522520>.

[vi] Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2013), pp. 42-79

[vii] Hersch Lauterpacht, "The Subjects of the Law of Nations" in Hersch Lauterpacht and Elihu Lauterpacht (eds), *International Law: the Collected Papers of Hersch Lauterpacht. Volume 1, the General Works* (Cambridge University Press 2009), p. 494

[viii] Jan Klabbers, "(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors" in Jan Klabbers and Jarna Petman (eds), *Nordic Cosmopolitanism: Essays in International Law For Martti Koskenniemi* (Leiden Nijhoff 2003), p. 369

[ix] Andrew Clapham, n. 3, p. 46

[x] Thomas Dodd, "Distinguished Lecture Series Human Rights and State Responsibility," *12th Raymond & Beverly Sackler Distinguished Lecture Serie* (Thomas Jodd Research Center University of Connecticut) pp. 4-5<https://thedoddcenter.uconn.edu/wp-content/uploads/sites/319/2013/10/10.25.2006-Sackler-Lecture-James-Crawford-Transcript.pdf> accessed June 2, 2021.

[xi] United Nations General Assembly, "Report of the Special Rapporteur on the Situation of Human Rights Defenders A/65/223" (Office of the High Commissioner for Human Rights 2010), p. 4 <https://www2.ohchr.org/english/issues/defenders/docs/A-65-223.pdf> accessed June 2, 2021.

[xii]Cedric Ryngaert, "Imposing International Duties on Non-State Actors and the Legitimacy of International Law," (2009), p. 11<https://ghum.kuleuven.be/ggs/research/non_state_actors/publications/ryngaert.pdf> accessed June 2, 2021.

[xiii]Anne Peters, Lucy Koechlin and Gretta Fenner Zinkernagel, "Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion" in Anne Peters and others (eds), *Non-State actors as Standard Setters* (Cambridge University Press 2009) p. 2

[xiv]Nicolas Carrillo Santarelli, "Non-State Actors Human Rights Obligations and Responsibilities under International Law" (2008) 15 *Revista Electronica De EstudiosInternacionales* 1, 3 <http://dialnet.unirioja.es/descarga/articulo/2800704.pdf> accessed June 2, 2021.

[xv] Communication No. 155/96, African Commission on Human and Peoples' Rights.

[xvi] Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva.

[xvii]Robert McCorquodale, "Overlegalizing Silences: Human Rights and Nonstate Actors" (2002) 96 *Proceedings of the Annual Meeting (American Society of International Law)* 384 <https://www.jstor.org/stable/25659810> accessed June 2, 2021.

[xviii]Fernando Teson, *A Philosophy of International Law: A Human Rights Approach.* (Westview 1998), p. 163

[xix]Steven Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 *Yale Law Journal* 443, 466<https://core.ac.uk/download/pdf/157778424.pdf>.

[xx] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 53d Sess., arts. 36, 42-44, U.N. Doc. A/56/10; 56 U.N. GAOR Supp. No. 10 (2001).

[xxi] International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), December 16, 1966.

[xxii] International Covenant on Economic, Social and Cultural Rights, G. A. Res. 2200A (XXI), December 16, 1966.

[xxiii] International Covenant on the Elimination of All Forms of Racial Discrimination, 60 U.N.T.S.195, entered into force January 4, 1969.

[xxiv] Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34 / 180, UN GAOR Supp. (No.46) at 193, UN Doc. A / 34 / 180, entered into force Sept. 3, 1981.

[xxv]UN Committee on the Elimination of Discrimination Against Women (CEDAW), "CEDAW General Recommendation No. 19: Violence against Women" (*Office of the High Commissioner on Human Rights*1992), p. 129<https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf> accessed June 2, 2021.

[xxvi]Andrew Clapham, "The 'Drittwirkung' of the Convention" in Ronald StJ Macdonald, Herbert Petzold and Franz Matscher (eds), *The European System for the Protection of Human Rights* (Kluwer Academic Publishers 1993), p. 190

[xxvii]Michael Forde, "Non-Governmental Interferences with Human Rights" (1986) 56 *British Yearbook of International Law* 253, 279<https://academic.oup.com/bybil/article/56/1/253/276802> accessed June 2, 2021.

[xxviii]Steven Ratner, n. 19, p. 466

[xxix] Ibid. p. 461

[xxx]Beate Rudolf, "Non-State Actors in Areas of Limited Statehood as Addressees of Public International Law Norms on Governance" (2010) 4 *Human Rights & International Legal Discourse* 128 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/hurandi4&div=13&id=&page=> accessed June 2, 2021.