

Human Rights Responsibility in Non-State Territory: The Case of the Palestinian Authority



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1	Abbreviations	3
2	Introduction.....	5
2.1	Purpose	5
2.2	A theoretical background.....	6
2.3	Method and scope	7
2.4	The status of the oPt in international law	8
2.4.1	International Humanitarian Law.....	9
2.4.2	International Criminal Law	10
2.5	A Historical Snapshot: Israel, PA and the Oslo Process	11
2.6	Human Rights in oPt.....	13
3	Why PA is not a sovereign state	14
3.1	Ungar v. PLO.....	15
3.2	If not a state, then what is PA?.....	16
4	A state-centred approach.....	17
4.1	Is PA conduct attributable to Israel?.....	17
4.1.1	Legal base	18
4.1.2	PA as a “state organ”	20
4.1.3	PA as an “entity exercising elements of governmental authority”	27
4.1.4	PA as a “group of persons under the direct control” of Israel	30
4.2	Israeli diagonal responsibility	30
4.2.1	Legal base	30
4.2.2	Applicability on our present case	31
5	PA as a <i>de facto</i> regime with human rights responsibilities	35
5.1	Legal base.....	35
5.2	A non-state with state-like responsibilities	39
5.2.1	A Test for Effective Control.....	39
5.3	Limitations to PA control	41
5.3.1	Israeli detentions of, and travel restrictions on, PLC members and civil servants.....	41
5.3.2	Israeli Travel restrictions	43

5.3.3	Control over water facilities	43
5.3.4	Tax Collection	43
5.3.5	Indirect effects of Israeli policy.....	44
5.3.6	A shared responsibility?	44
5.3.7	Which human rights?.....	47
5.4	Unilateral Undertakings.....	48
5.4.1	The Barcelona Declaration	49
5.4.2	Public Announcements.....	50
5.4.3	The Palestinian Basic Law	50
5.4.4	Interim Agreement and Wye Memorandum River clause on respect for human rights	51
5.4.5	Code of Conduct?	52
5.5	Accountability for non-state actors	53
5.5.1	“Soft accountability”	53
6	Summary	54
7	Protecting human rights in oPt	55
7.1	Treaty Bodies	55
7.2	Special Rapporteur.....	55
7.3	Office of the High Commissioner for Human Rights (OHCHR).....	56
7.4	Israel.....	57
7.5	Domestic NGOs	58
7.6	Conclusions	60
8	A pragmatic approach: Who <i>should</i> be held responsible for human rights?.....	61
9	Conclusions.....	65
10	Bibliography.....	66

1 Abbreviations

AI – Amnesty International

CAT = Convention Against Torture

CmAT – Committee against Torture

CESCR – Committee on Economic, Social and Cultural Rights

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women

CERD – International Convention on the Elimination of All Forms of Racial Discrimination

CIL – Customary International Law

CRC – Convention on the Rights of the Child

DoP – Declaration of Principles on Interim Self-Government Arrangements

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR – European Court on Human Rights

EJIL – European Journal of International Law

ESC – Economic and Social Council

EU – European Union

FARC – Fuerzas Armadas Revolucionarias de Colombia

FMLN – Frente Farabundo Martí para la Liberación Nacional

GA Res – (UN) General Assembly Resolution

GC IV – Fourth Geneva Convention

OPI – First Optional Protocol to the Geneva Conventions

OPII – Second Optional Protocol to the Geneva Conventions

HRC – Human Rights Committee

HRW – Human Rights Watch

IA – The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip

IACHR – Inter-American Commission on Human Rights

ICC – International Criminal Court

ICCPR =International Convention on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICHR – Independent Commission for Human Rights

ICJ – International Court of Justice

ICL – International Criminal Law

ICRC – International Committee of the Red Cross

ICTY – International Criminal Tribunal for the Former Yugoslavia

IDF – Israeli Defence Forces

IHL – International Humanitarian Law

IHRL – International Human Rights Law

ILC – International Law Commission

IO – International Organization

NGO – Non-Governmental Organization

OCHA – (UN) Office for the Coordination of Humanitarian Affairs

OHCHR – Office of the High Commissioner for Human Rights

PA – Palestinian Authority (Palestinian National Authority)

PCHR – Palestinian Center for Human Rights

PHRMG – Palestinian Human Rights Monitoring Group

PLC – Palestinian Legislative Council

PLO – Palestine Liberation Organization

PSF – Palestinian Security Forces

oPt – occupied Palestinian territory

RCHRS – Ramallah Center for Human Rights Studies

SC – Security Council

TNC – Trans-National Corporation

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNGA – United Nations General Assembly

2 Introduction

From a traditional state-centred perspective, the state, and only the state, is the ultimate bearer of human rights obligations. The human rights of individuals are protected from breaches by non-state actors through state responsibility, either by *attribution* to the state, or through the state's duty to act in *due diligence* to *protect* from horizontal abuses of human rights¹ There is an emerging view, one that advocates direct responsibilities of certain non-state actors.²

The Palestinian Authority³, a local autonomous regime bearing many traits of a government, but lacking statehood, falls outside of the traditional category of human rights obligations bearers. As an actor whose behaviour amounts to breaches of human rights, its international responsibility for these breaches are of importance, and should be of the human rights movement's interest. It's the ambition of this essay to shed some light on the question.

2.1 Purpose

The aim of this essay is to examine the responsibility for PA acts against the Palestinian population that amount to violations of human rights. This will involve an assessment whether Israel can be held responsible, either through *attribution* to the state, or because of its *due diligence* responsibility. It will likewise entail the question if PA has a direct human rights responsibility of its own, and, if so, whether it is bound by its unilateral undertakings to respect human rights. It is further my ambition to briefly describe the existing human rights monitoring and enforcement system in the occupied Palestinian territory⁴. What elements constitute it, and how does it deal with the question of responsibility?

¹ Hessbruegge (2006) p27

² Clapham (2006) Ch1

³ Also called Palestinian National Institution (PNA), hereinafter PA

⁴ Hereinafter oPt

2.2 A theoretical background

Andrew Clapham detects three main approaches to the issue of non-state actors' responsibilities under International Human Rights Law⁵; 1) The state is the only subject under international human rights law, and the only entity that should be a subject. The individual is protected from abuses by non-state actors through the states' *due diligence* obligations, as well as by the rules of *attribution*. 2) States are still the only subjects of international human rights law, while important non-state actors have gained considerable power and capacity to breach human rights, and *should* be made subjects to IHRL. 3) Clapham's own view: Non-state actors *are* presently bound by human rights law. This can be proven by evidence in present practice.⁶

Paying special respect to "Non-State Actors in Times of Armed Conflict" (the closest we get to PA), Clapham argues that such movements do have human rights obligations deriving from customary norms.⁷

Reinisch is less inclined to admit that a legal human rights obligation presently is binding non-state actors. He starts off from the view that the whole human rights framework has expanded from being merely a legal one binding states, to incorporating other elements, such as moral standards binding on a broader array of actors than traditional states.(however, Reinisch focuses on TNC, NGOs and IOs, rather than armed groups or *de facto* regimes). He detects two main developments; 1) Unilateral non-legal undertakings such as *codes of custom*. 2) With a special focus on TNCs, an increased practice of extraterritorial *due diligence* state responsibility is a second development enhancing non-state actors' human rights responsibility and – compliance. This has led to new means of accountability; holding accomplices responsible in case the main perpetrator can't, extra-legal means as boycotts etc, enforcing human rights of non-states regardless of whether they are strictly speaking legally bound by IHRL. In summary Reinisch could be said to belong to the second category of scholars according to Clapham's framework, admitting the prospects and

⁵ Hereinafter IHRL

⁶ Clapham (2006) Ch1

⁷ Ibid. Ch7

desirability of a human rights framework extending to non-state actors, but holding that in its present state, the international human rights framework is not capable of holding non-state actors directly responsible under international law.⁸

Zegveld is likewise cautious to hold that human rights obligations for *de facto* regimes exist, referring mainly to ambiguous and lacking international practice, but giving some authority to the argument that “human rights instruments could govern armed opposition groups exercising governmental functions.” The main issue is however that “armed opposition groups apparently lacking any effectiveness accountable for human rights violations.”⁹

Hessbruegge seems to be of the same opinion. Individuals are protected from human rights abuses committed by non state actors, *de facto* regimes included, through rules of state attribution as well as the due diligence responsibility of states. There are “emerging” responsibilities for *de facto* regimes, It is not yet, however, possible to conclude that these actors are directly bound by human rights law, other than by “soft law”.¹⁰

It is within the above discussion that the author wants to place this essay and hopefully make a contribution.

2.3 Method and scope

I have combined doctrinal legal method based on the examination of treaties, case law, scholarly literature and “soft” legal sources, with empirical method involving qualitative analysis of material such as personal interviews with relevant actors in the field of human rights in oPt, and written material such as reports, academic writings from disciplines of the social sciences.

For reasons of spatial and temporal limitations of this paper I have chosen not to extend the scope to the Hamas administration in the Gaza Strip, but will only focus

⁸ *Non-State Actors and Human Rights* (2005) pp37-89

⁹ Zegveld (2002) p151

¹⁰ Hessbruegge (2005) p35

on the Ramallah-based PA caretaking government. Neither will it explore Israel's responsibility for its own acts in oPt. This paper further focuses on human rights, and not on International Humanitarian Law¹¹ or International Criminal Law¹², even though these bodies of law will be briefly covered in the beginning.

2.4 The status of the oPt in international law

All of oPt is considered occupied by Israel among the international community. This was clearly spelled out in the *Wall* advisory opinion in 2004, and is confirmed by the Goldstone Report.¹³ This includes all of the parts of the West Bank transferred to PA and all of the Gaza Strip, even after Israel's "Disengagement" after 2005.

This fact triggers the international law of belligerent occupation, and more precisely the 4th Geneva Convention and Hague Regulations. Israel has not ratified OPI or OPII to the Geneva Conventions, but parts of these treaties have reached the status of CIL, and thus bind Israel.¹⁴

The Palestinians is recognized as a people with a right to self-determination.¹⁵

As to the international status of PA, a clear and authoritative definition is nowhere to be found. First of all, the Oslo Accords agreements are "remarkably unforthcoming on issues of status, no doubt because of fundamental disagreements between the parties"¹⁶, to borrow the words from James Crawford. The status of PA during the interim period is not defined

¹¹ Hereinafter IHL

¹² Hereinafter ICL

¹³ Goldstone Report para. 76-79 pp85-86

¹⁴ Goldstone Report para 272 p 84

¹⁵ Goldstone Report para. 269 p82, *Wall* advisory Opinion paras. 149, 155, 159

¹⁶ *The Reality of International Law: Essays in honour of Ian Brownlie* (2003) p 119

Subsequent authoritative legal assessments of issues relating to oPt are likewise silent on the issue. The ICJ 2004 *Wall* advisory opinion provides no further explanation. Neither does the 2009 *Goldstone Report*.

2.4.1 International Humanitarian Law

Israel has continuously held that IHRL doesn't apply to oPt¹⁷ and that the legal regime to refer to is IHL. As noted by, for example, the authors of *Occupation, Colonialism, Apartheid?*¹⁸, this represents a traditional view that IHL and IHRL are mutually exclusive.

It is today however accepted that IHRL applies in situations of armed conflict. The point of breakthrough came in 1996 with an ICJ Advisory Opinion where it was spelled out that IHL has the role of *Lex Specialis* in relation to IHRL. Only human rights treaty articles derogated from seize to apply in times of armed conflict.¹⁹

With a special reference to oPt, ICJ in 2004 confirmed this view, and held that Israel is bound by human rights instruments in oPt.²⁰ The Human Rights Committee has likewise held that:

“in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.”²¹

It has further been spelled out that the Fourth Geneva Convention is applicable to the oPt in its entirety, and further, applying art 7 and art 47 of the Convention to the case,

17 *Wall* Advisory Opinion para. 102

18 *Occupation, Colonialism, Apartheid?* (2009) p33 ff

19 Legality of the threat or use of nuclear weapons advisory opinion, ICJ Rep, 1996

20 *Wall* Advisory Opinion (2004), P178 para106

21 UN Human Rights Committee: Concluding Observations: Israel (2003) Para. 11

considering the Oslo accords a “special agreement”, the Palestinians to be “protected persons” within the scope of the convention, even after the transfer of power to PA. Israel then retains an IHL responsibility in relation to Palestinians residing in PA-controlled areas even in the post-Oslo context.²²

For the present purpose I will then consider Israel to be bound by IHRL in oPt. Israel’s responsibility for its own acts in areas of the West Bank under its control should then be of less interest, as it has been confirmed that the state has a responsibility under IHRL.

The applicability of IHL to non-state actors such as PA and Palestinian armed groups is likewise straightforward. It’s generally recognized that IHL (common art 3 as well as OPII) applies to non-state actors in armed conflict. With the words in the Goldstone Report:

“It should be noted that the same issue [as with human right responsibility of non-state actors] does not arise with regard to IHL obligations, the question being settled some time ago[...] it is well settled that *all* parties to an armed conflict, whether States or non-State actors, are bound by international humanitarian law”²³

Israel has not ratified OPII, but is however bound by common article 3 of the four Geneva Conventions relating to “armed conflict not of an international character”. This is also considered CIL, effectively binding PA.²⁴ Many rights of fundamental importance provided by IHRL are covered by common article 3 and are thus binding on PA.

2.4.2 International Criminal Law

The 1998 Rome Conference provides for international obligations that directly bind individuals, whether acting on behalf of a state or as a non-state actor.²⁵ The crimes covered by the statute include particularly severe breaches of human rights, namely

²² *Occupation, Colonialism, Apartheid?* (2009) pp79-81

²³ *Goldstone Report*, para. 304

²⁴ *List of state signatories to OPII*

²⁵ Clapham (2006) p14-15

*genocide, crimes against humanity, war crimes and the crime of aggression.*²⁶ The rules are also generally accepted as customary international law.²⁷

The Rome Statute then establishes obligations as well as provides (potential) mechanisms for accountability for individuals PA officials committing severe international crimes, of which are contained in human rights instruments.

An important observation to make at this stage is that the individual international obligations stemming from ICL apply whether we confer the general human rights responsibility to Israel, or directly to PA.

2.5 A Historical Snapshot: Israel, PA and the Oslo Process

This is not the place for a detailed historiography of a topic that has been covered in meters of academic and journalistic literature, and is subject to one of the biggest controversies of our time. In order to provide the necessary background for this paper I will attempt to trace the broad lines.

The Gaza Strip and West Bank, administered by Egypt since 1949 and annexed by Jordan in 1950 respectively, were occupied by Israel during the June War in 1967. The Palestine Liberation Organization (PLO) was set up in 1964 with the aim of abolishing the State of Israel which was established in 1948, based on its claim of representing the right of the Palestinian people to national self-determination.²⁸ It was awarded observer status in the UNGA in 1974.

Following the Palestinian uprising that started in 1987 (the first *intifada*) and the Palestinian Declaration of Independence (the Aligiers Declaration) in 1988 which included a *de facto* recognition of the State of Israel within its pre-1967 borders, several peace initiatives were initiated. The so-called Oslo process succeeded and

²⁶ Rome Statute art. 5(1)

²⁷ Clapham (2006) p15

²⁸ See for example: Original Palestine National Charter (1964) art. 17 "The Partitioning of Palestine in 1947 and the establishment of Israel are illegal and false regardless of the loss of time, because they were contrary to the wish of the Palestine people and its natural right to its homeland, and in violation of the basic principles embodied in the charter of the United Nations, foremost among which is the right to self-determination."

resulted in the first Israeli-Palestinian peace accord (the Declaration of Principles) in September 1993 with the aim of concluding a full-fledged peace agreement within five years. In a separate exchange of letters, the PLO was recognized by Israel as the legitimate representative of the Palestinian people and PLO recognized explicitly the State of Israel within its pre-1967 borders.

Through various bilateral agreements between PLO and Israel, within the framework of the Oslo Process, the Palestinian Authority was established, to serve as an interim self-government body, while awaiting final status negotiations. Such final status has yet not been agreed upon, and after the failed “Camp David” Summit negotiations in 2000 and the eruption of the second *intifada*“, peace efforts such as the Roadmap to Peace and the Arab Peace Initiative have failed to settle a final solution.

In the meantime PA was established as a non-sovereign interim self-government body with unclear status. The “state formation” process involved the establishment of a governance structure consisting of a parliament (the Palestinian Legislative Council), a judiciary and an executive administration, where among a large police- and security sector took part.

The coming of the second *intifada* in 2000, resulted in Israel in 2002 reoccupying most areas under PA’s command with the destruction of major elements of its infrastructure, as well as the marginalization of then president Yasser Arafat and organizational change with, for example, the creation of a prime minister post²⁹

In 2005 Israel, “disengaged” from the Gaza Strip, removed the Israeli settlers until then residing in the area, and claimed the territory no longer occupied. This argument has however been rejected by the international community, and the Gaza Strip has been held to be an integral part of the occupied Palestinian territory (oPt).³⁰

Following the election victory of the opposition party the Islamic Resistance Movement (Hamas) in January 2006, and prolonged strife with the former ruling party, Fatah, oPt was split between the Fatah, and Hamas, the former seizing control

²⁹ See for example Robinson (1997), Parsons (2005), *State Formation in Palestine* (2004), Brown (2003)

³⁰ Diakonia (2009)

over the West Bank, forming a PA “caretaking government” under Prime Minister Salam Fayyad, while Hamas set up its own *de facto* administration in the Gaza Strip.

It is this Ramallah-based “caretaking government” which will presently be referred to when dealing with PA.

As of April 2010 new PA presidential elections have not been held but are planned to be held in July the same year.³¹

2.6 Human Rights in oPt

The human rights situation under the rule of PA leaves a lot to wish. The situation has been deteriorating, particularly in the aftermath of the 2007 West Bank-Gaza Strip split with heightened internal political tensions, exposing members of Hamas and other political opposition groups to grave breaches of human rights.³²

One aspect of this is the prevalence of arbitrary detention on political grounds giving rise to breaches of the right to Due Process.³³

ICHR further reports on violations of the right to life, stemming from serious flaws in PA prosecution routines following “honour killings” directed at women³⁴, cases of death in detention centres³⁵ etc.

The right to physical safety is likewise severely breached. Torture and ill-treatment by police and security forces, and in detention, occurs frequently, occasionally resulting in deaths. Instances of alleged enforced disappearance are likewise observed.³⁶ ICHR further notes flawed procedures of effective remedies for these abuses.³⁷

³¹ *Palestinian Authority approves July elections in West Bank*

³² *Internal Fight* (2008) p9ff

³³ *14th Annual Report ICHR* p71ff

³⁴ *14th Annual Report ICHR* p54ff

³⁵ *Ibid* p56

³⁶ *Ibid* 59 ff

³⁷ *Ibid* p65

Political rights like the Right to Freedom of Opinion and expression and Freedom of Assembly are likewise reported to be breached on a systematic basis.³⁸

3 Why PA is not a sovereign state

A precondition for this paper is that PA is a non-state actor. Had the entity been a state it had unquestionably been bound by customary principles of human rights, and it should be allowed to enter into human rights treaties.

The view among, for example human rights treaty monitoring bodies, is that PA is not a state, which is why the organization has not been allowed to sign any treaties. The (national) courts that have addressed the issue are likewise agreeing on the standpoint; PA is not a state. Most scholars having looked at the issue seem to be of the same view. A few, however a minority, are of the opinion that PA constitutes a Palestinian state. Although not a major element of this paper, I will outline the discussion below.

There are two conflicting legal theories relating to the issue of statehood. The prevailing one, the *declaratory* theory holds that in determining an entity's statehood an objective test must be applied. This is largely accepted as CIL and is codified into the regional binding treaty, the *Montevideo Convention on the Rights and Duties of States* (1933). The test for statehood consists of four elements: That the entity has (1) a defined territory, (2) a permanent population, (3) is under the control of its own government, and that it (4) engages in, or has the capacity to engage in, formal relations with other such entities.³⁹

The rivalling theory, the *constitutive* theory, applies the subjective test of an entity's status of recognition (or non-recognition) among other states. It is then up to the discretion of other states to determine the existence of statehood by recognizing or not recognizing an entity as a state. If an entity is recognized as a state, then it is a state. This theory has been criticized for being subjective and politicizing the question

³⁸ Ibid p130 ff

³⁹ Crawford (2006) p142 ff

of statehood. It represents a minority view, is seen as archaic and is presently generally not accepted as CIL.⁴⁰

The conflict, broadly speaking, is then one of granting the judiciary or the executive the power to determine status of statehood.⁴¹

3.1 Ungar v. PLO

In a ruling from the American Court of Appeal, concerning the question of whether PA is to be granted state immunity, it was held:

“This standard deems a state to be ‘an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.’ Restatement (Third) of Foreign Relations § 201 (1987)”⁴²,

and that:

“political recognition [...] is not a prerequisite to a finding of statehood.”

Thus US domestic law provides for an objective test for statehood (declaratory), applying the same fourfold test as the one provided by the Montevideo Convention 1933.

In the aforementioned case the US Court of Appeals, argues that the statehood of PA is supported by tests 1,2 and 4, but not by the 3rd, and therefore does not have the status of a state.

The court argues that: 1) under the initial period, prior to 1967, Mandate Palestine was first under Ottoman, then under British and finally under Egyptian/ Jordanian/ Israeli rule. There existed no sovereign Palestinian state. GA Res 181, calling for an independent Arab state, is normative and does not in effect create a Palestinian state. 2) This remains unchanged from the June War (Six Days War) in 1967 to the

⁴⁰ Crawford (2006) p142 ff

⁴¹ Harpaz 2007, p204-5

⁴² Ungar v. Palestine Liberation Organization, para. 34

Interim Agreement (1994). Res 242, calling for Israeli withdrawal from areas occupied during the war no more than Res 181 creates a state. 3) Also during this final period a Palestinian state fails to come into being due to the limited character of PA's control of territories under its command.⁴³

Two recent Israeli court decisions have come to the same conclusion.⁴⁴

While a minority of scholars, such as Curtis Doebbler, have argued that the Montevideo test, applied on the Palestinian case, reveals the existence of Palestinian statehood,⁴⁵ scholars like Dajani⁴⁶, James Crawford⁴⁷ and Eyal Benvenisti⁴⁸ denounce this argument and come to the same conclusion as the courts above.

Although an interesting question, this is not the place for a thorough analysis of the statehood of PA. I will let this serve as a sufficient demonstration that for the purpose of the current paper, PA does not qualify as a state, and should for the present purpose be treated like a non-state actor.

3.2 If not a state, then what is PA?

If we accept that PA is not a state with full legal personality, our next task is to try to define what it is. The *Interim Agreement* explicitly declares one of the aims to be the creation of a "Palestinian Interim Self-Government Authority".⁴⁹

⁴³ See minority opinion of Judge Drori in *Irena Litvack Norwich v. the Palestinian Authority 2003* for a similar analysis. Whereas the majority, on the question of PA's right to court immunity, apply a constitutive test of (Israeli) recognition, Drori applies the Montevideo Convention declarative test upon which PA fails all four criteria for statehood.

⁴⁴ Harpaz (2007) pp198-211

⁴⁵ Doebbler (2009)

⁴⁶ Dajani (1996), pp82-89

⁴⁷ Crawford (2006)

⁴⁸ *The Arab-Israeli Accords* (1996) p58-59

⁴⁹ DoP art. 1

The authors of the 2009 report *Occupation, Colonialism, Apartheid?* suggest Benvenisti's "autonomous regime" as an appropriate denominator. They explicitly leave the question of the legal implication of such an entity unanswered.⁵⁰

Dajani takes a similar hold. After having denounced Palestinian statehood he describes PA as an 'interim local government body'.⁵¹

The terms "Quasi-state" and "Client-state" are used by Khan, in order to visualize PA's continued economical and political dependence on Israel.⁵²

Others have named it a "*de facto* regime".⁵³

4 A state-centred approach

Having concluded that PA does not qualify as a sovereign state, the next task will be to assess the responsibility for abuses of human rights committed by the authority.

In the following paragraphs I will consider Israel's possible responsibility for human rights breaches committed by PA. First, whether PA acts could be *attributed* to the state of Israel, and secondly, whether Israel could have a *due diligence* responsibility to *protect* Palestinians in oPt from acts committed by PA, amounting to violations of human rights.

4.1 Is PA conduct attributable to Israel?

It has for long been acknowledged as general rules of PIL that states may be responsible for wrongful acts of individuals or bodies that are not directly a part of the state *per se*.⁵⁴ The rules of state attribution have been codified by ILC in the Draft

⁵⁰ *Occupation, Colonialism, Apartheid?* (2009) pp73-75

⁵¹ Dajani (1996)

⁵² *State Formation in Palestine* (2004) pp13-60

⁵³ *Not only the state* (2006) p65

⁵⁴ Hessbruegge (2006) p48

Articles on Responsibility of States for Internationally Wrongful Acts (hereafter “Draft Articles”) and adopted by UNGA in 2001, are generally accepted as CIL⁵⁵, and are thus binding upon Israel.

4.1.1 Legal base

As to the interpretation of human rights treaties, the Vienna Convention provides:

“There shall be taken into account, together with the context: [...] any relevant rules of international law applicable in the relations between the parties”⁵⁶

The *Commentaries to the Draft Articles on State Responsibility for Internationally Wrongful Acts*⁵⁷ are further

“concerned with the whole field of State responsibility”.⁵⁸

Human Rights treaties should be included therein.

It appears justifiable then to interpret the relevant human rights treaties in the light of these general international rules of state attribution.

The Inter-American Court on Human Rights has further held in a judgement that the international rules of attribution are applicable in the human rights field.

“Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the [Inter-American] Convention [on Human Rights].”⁵⁹

⁵⁵ Hessbruegge (2005) p48

⁵⁶ Vienna Convention art. 31(3)

⁵⁷ Hereafter *Commentaries*

⁵⁸ *Commentaries to the Draft Articles* (2001) para. 0(5)

⁵⁹ *Velasquez Rodriguez Case* para. 164

ECtHR in the *Ilaşcu* case took a similar view.⁶⁰ The articles have also been applied to *de facto regimes* with a special reference to breaches of human rights (and humanitarian law) by the UN Commission on Human Rights, which held that the acts of Hezbollah and other *de facto regimes*

“are classified, under the law on State responsibility, as acts of the State to the extent that such authorities are in fact exercising elements of governmental authority in the absence or default of the official authorities, and in circumstances which call for the exercise of such authority”⁶¹

It is further confirmed by a HRC General Comment⁶² that states are responsible for human right breaches of their agents outside of their territory. From this follows that the question whether PA-land is regarded as occupied by Israel, or not, should be of less importance. If acts or omissions committed by PA are attributable to Israel, the state is responsible for the authority’s human rights breaches no matter if those are committed inside or outside of Israel’s jurisdiction.

The interpretation of human rights law in relation to non-state actors through the lens of the Draft Articles has been advocated by such writers as Hessbruegge.⁶³

Klint A. Cowan, for example, using ILC’s scheme in order to determine a state’s human rights responsibility for the conduct of autonomous entities to which it *de jure* has mandated power but in practice has very little control over. He explores the United States’ human rights responsibility for the conduct of American Indian Tribes.⁶⁴

Meanwhile, reading human rights responsibility through the lens of the aforementioned articles has been criticised by proponents of a less state-centred view. Clapham argues that the human rights treaties contain *lex specialis* rules for

⁶⁰ *Ilaşcu and others v. Moldova and Russia* para 321-2

⁶¹ *Implementation of General Assembly Resolution 60/251 of 15 March 2006* para. 19 at p28

⁶² *HRC General Comment 31* para. 10

⁶³ Hessbruegge (2005) p48

⁶⁴ Cowan (2006) pp41-43

state *attribution* and the Draft Articles therefore don't apply.⁶⁵ Others have criticized the articles for being "inadequate" and even "flawed", not taking "sufficient account of the consequences of the breakdown of the traditional state system of the nineteenth century"⁶⁶

Benvenisti denounces Israeli human rights responsibility for PA acts by claiming that what matters is the *de facto* situation, and not the *de jure* one. He does not provide any ground for this argument. If we look at the matter from the perspective of the ICJ articles, it appears clear that either a *de facto*, or a *de jure*, control, in itself, by a state over an entity such as the PA would make the acts of the latter attributable to the former. Benvenisti could then be placed in the category of scholars denouncing the full applicability of the rules of attribution to IHRL. Crawford seems to take a similar stand⁶⁷

The task ahead of us will then be to analyze the Israel-PA nexus according to articles 4, 5 and 8 (whether PA is an Israeli "state organ", "an entity empowered by the law of [Israel] to exercise elements of the governmental authority" or as a "group of persons in fact acting on the instructions of, or under the direction or control of, [Israel] in carrying out the conduct."). Article 7 will not need any specific consideration, but is merely clarifying the threshold of state responsibility under articles 4 and 5.

4.1.2 PA as a "state organ"

Art. 4 clearly spells out that the act of any state organ is attributable to the state and further specifies that an entity is a state organ if it is given that status in the domestic law of the state.

It is questionable whether the referral uniquely to the "internal law" of a state is imperative. The *Commentaries* gives the reason for this wording, namely that the relation between a state and a sub-state body rarely is specified in international law. In that respect PA is an exception. The *de jure* nexus between PA and Israel is

⁶⁵ Clapham (2006) p317

⁶⁶ Rosenne (1997-8) p165-6

⁶⁷ Crawford (2006)

regulated in the agreements of the Oslo Accords. Since Israel is a monistic legal system⁶⁸, these instruments, can't be regarded as Israeli domestic law *per se*. Reading this article in the light of the *Commentaries* it seems as in our case the agreements between PLO and Israel are a relevant legal source in this respect. It would also seem unreasonable to refer to domestic law only, when the relation is strictly regulated in international agreements.

Moreover, the Oslo Accords, however ignored and circumvented by both parties, is the valid legal source for the interim framework, until new agreements have been signed.⁶⁹

The Interim agreement has likewise in part been implemented into domestic Israeli law.⁷⁰

In the Preamble to the Interim Agreement, as well as in DoP art. 1, the “aim” of the negotiations is articulated as the establishment of a “Palestinian Interim Self-Government Authority”.

There is however nothing in the Oslo accords, that clearly defines the status of PA. There is with other words nothing in this text that supports an unambiguous definition of PA as a “state organ”.

The question that arises is if, for the purpose of state attribution, an “Interim Self-Government Authority” can be read as a “state organ”, taking into account that its power and responsibilities are exclusively transferred from the state to which its internationally wrongful acts may be attributed.

It is acknowledged that due to differences between states in language use, as well societal structure, a body may not be defined as a “state organ”, or not be subject to any legal definition at all, even though it in practice holds that function. So in cases

⁶⁸ HRC, CCPR/C/ISR/3, *3rd periodic report of States parties* (2007) art. 2 at 6

⁶⁹ Parsons (2005) pp 83-84

⁷⁰ Harpaz (2007) p198

where an entity is not legally presented as a state organ one must determine whether the role of the entity in question can be characterized as one of a “state organ”.⁷¹

“The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own”⁷²

We will then turn our focus to the *de jure* role of PA, and determine whether the relationship between Israel and PA is of a kind that would characterize PA a “state organ”.

The *Commentaries* outlines a broad and inclusive definition of a state organ:

“the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.”⁷³

The *Commentaries* further specify the territorial scope of art 4 by holding that:

“It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State’s international obligations.”⁷⁴

The *Heirs of the Duc de Guise* case is an often referred-to confirmation of this principle where it was held that the state of Italy was responsible for the actions of Sicily, even though the island constituted an autonomous regime.⁷⁵

⁷¹ *Commentaries to the Draft Articles* (2001) para. 4(11)

⁷² *Ibid.* para. 4(10)

⁷³ *Ibid.* para. 4(6)

⁷⁴ *Ibid.* (2001) para. 4(9)

⁷⁵ *Ibid.* (2001) para. 4(8)

In our case this implies that PA's autonomy and Israel's degree of direct control over the entity is of less importance. There is little reason to regard PA as any different from for example the autonomous area of Sicily, treated like a state organ in the Heirs of the Duc de la Guise case, and whose acts and omissions were held attributable to the state of Italy.

To the facts

The limitations of this essay do not permit an exhaustive analysis of the Israel-PA nexus. I will let a few major examples illustrate my argument.

PA is in many respects the outcome of a compromise between the two diametrically opposed interests of PLO and Israel. The character of the entity will accordingly be ambiguous. The incentives of both sides have been thoroughly analysed. For the PLO an "institutional solution" to the struggle for Palestinian self-determination, eventually a sovereign state, alongside the absentee PLO leadership's own power interest has been observed as leading interests.⁷⁶

For Israel, security considerations and the unwillingness to remain responsible for the non-Israeli population in oPt have been put forth as important factors.⁷⁷

The terms of transition mandated PA to guarantee Israel's security. As an illustration of this, Rabin's statement prior to the signing of DoP, may serve:

"I prefer the Palestinians to cope with the problem of enforcing order in the Gaza strip. The Palestinians will be better at it than we were because they will allow no appeals to the Supreme Court and will prevent the Israeli Association of Civil Rights from criticizing the conditions there by denying it access to the area. They will rule by their own methods, freeing, and this is most important, the Israeli army soldiers from having to do what they will do."⁷⁸

Considering the inherent conflict between freedoms enlisted in human rights treaties and national security, it should come as no surprise to anyone that certain of Israel's

⁷⁶ Parsons (2005) ch. 4

⁷⁷ Ibid.

⁷⁸ Ibid. p161

human rights issues in oPt were to be transferred to PA as the institution overtook aspects of Israel's security enforcement in oPt. Rabin's statement above effectively illustrates this.

Palestinian political factions, opposing the Oslo framework, have often publicly described PA as a tool for indirect Israeli rule.⁷⁹ This is obviously a question of rhetoric and partly a means of de-legitimization, and in the words of an ICHR employee, "a very political issue"⁸⁰. The PA political elite has meanwhile supported the image of PA as an independent state. We should bear in mind that, when assessing PA's relation to Israel, we are entering very contested ground within the Palestinian discourse.

It seems PA shares the role of undertaking elements of Israeli authority, serving Israeli interests in the occupied West Bank, as well as pursuing its own goals, related, among others, to the goal of an independent Palestinian state.

The powers of PA are specified in the instruments of the Oslo Accords. These powers are strictly limited territorially and functionally.

Territorially, the West Bank and Gaza Strip were divided into three different areas "Area A", "Area B" and "Area C". In the first, made up of core urban areas of the West Bank, power over internal security as well as civil matters are under complete control of PA. Area B, constituting hamlets and villages surrounding these areas, is under shared responsibility, where PA takes care of civil matters and security is shared by Israel and PA. Israel has an "overriding responsibility" for public order. Area C, the rest of the West Bank, is still under complete Israeli control.⁸¹ The city of Hebron follows a specific pattern, being divided into "H1" (= Area A) and "H2" (= Area C).⁸²

The unique source of PA's authority is clearly specified as being Israel, and not the Palestinian population in oPt;

⁷⁹ Jamal (2005) p142

⁸⁰ Omran (2010)

⁸¹ IA ch. 2, art. 13

⁸² Protocol Concerning Redeployment in Hebron art. 2

“Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred.”⁸³

This has also been observed by others.⁸⁴ As Raja Shehadeh notes, this was a transfer of powers and responsibilities held exclusively by the Israeli government, from 1967 by the military, and from 1981 onwards partly by an Israeli civil administration.⁸⁵

The article continues

“Israel shall continue to exercise powers and responsibilities not so transferred”

This further highlights that Israel retains all authorities not transferred. The authorities of PA are strictly limited and thoroughly précised through the various instruments of the Oslo Accords.

The status of PA is further domestically regulated through an Israeli military order transferring power to the Palestinian Authority.⁸⁶ Accordingly the ultimate responsibility over PA is held by Israel who has the power to change the authority of PA as well as to dismantle it.

PA is strictly limited in its ability to enter into foreign relations:

the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions [...]⁸⁷

This emphasizes the local governance character of PA. It is further enhanced by the fact that PA is given jurisdiction over Palestinians and other non-Israelis in the

⁸³ IA art. 1

⁸⁴ Shehadeh (1997), *The Arab-Israeli Accords* (1996) pp50-53

⁸⁵ Ibid. p34

⁸⁶ Benvenisti (2010)

⁸⁷ IA art. 9(5)

territory under its authority, while Israel retains jurisdiction over Israelis, even when present in area A or B⁸⁸. Dajani interprets this as if “PA governs a population, rather than a territory”⁸⁹.

Tax issues are regulated in the Protocol on Economic Relations (Annex VI to the Gaza-Jericho Agreement). PA is being granted the authority to levy taxes from the population in oPt, while Israel remains in control of collecting VAT and customs, and transfers the collected money to PA⁹⁰. This fiscal relationship further supports the image of PA as a state organ, dependent on the central government for securing part of its financial base.

Israel, through the Oslo process agreements, transferred aspects of its civil administration over the Palestinians living in oPt, for example social welfare⁹¹ agriculture⁹², Forests⁹³, Education and culture⁹⁴, Health⁹⁵ etc. These, according to the agreement, are to be completely under the authority of PA.

The creation of a Palestinian security apparatus was another important aspect of the Oslo process, with the double role of providing for “internal” public order in oPt and safeguarding the security of Israel-proper.⁹⁶

Moreover, the A areas, over which the highest degree of authority has been transferred to PA, are completely separated from each other by area C, remaining

⁸⁸ IA art. 17(2)(c)

⁸⁹ Dajani (1997) p69

⁹⁰ Gaza-Jericho Agreement, Annex VI art. 15

⁹¹ IA Annex 3, app. 1, art 33, para. 3(b) at 619

⁹² IA Annex 3, app. 1 art. 1 at 604

⁹³ IA Annex 3 art. 14 at 609

⁹⁴ IA Annex 3 art. 8 at 606

⁹⁵ IA Annex 3 art. 17 at 611

⁹⁶ IA Annex II, art. II

under Israeli authority, creating “islands” of PA control in a “sea” of Israeli rule, which further enhances the local character of PA authority.⁹⁷

With the words of Dajani “The sphere of authority transferred to the PA, therefore, are primarily municipal functions”⁹⁸

It could further be argued that these civil functions are responsibilities that Israel have *qua* belligerent occupier of the whole of oPt, through the Oslo Accords “outsourced” to PA.

With this limited authority of PA in mind, Israel as the unique source of authority, and the fact that PA provide for security and civil matters under the responsibility of Israel, there is little room for considering PA anything beyond an autonomous region in the same way as for example Sicily, treated in the Duc de la Guise case. There are then good arguments, to regard PA as a “state organ” of Israel, within the meaning of the *Draft Articles*.

4.1.3 PA as an “entity exercising elements of governmental authority”

To determine whether PA is an “entity exercising elements of governmental authority” is a likewise delicate task and to some extent depending on the particular context, as expressed with the words of the *Commentaries*:

“Beyond a certain limit, what is regarded as ‘governmental’ depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise.”⁹⁹

However

⁹⁷ UNOCHA *West Bank & Gaza Strip Closure Map* (2008)

⁹⁸ Dajani (1997) p 67

⁹⁹ *Commentaries to the Draft Articles* (2001) art. 5(6)

“an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State.”¹⁰⁰

It is, nevertheless, closely related to the question of being a “state organ”. I will therefore mostly draw on the above discussion.

I have demonstrated that PA has been delegated powers by Israel partly to provide for Israeli security, as well as to undertake a broad array of municipal civil activities in areas of oPt, for a population under the overall responsibility of Israel.

The vision of an authority providing for Israeli security has partly been realized, with a Palestinian security apparatus effectively cracking down on elements in the oPt constituting a security threat against Israel.¹⁰¹

This fact further nourishes the view that PA (or at least its security apparatus) “is empowered by the law of [Israel] to exercise elements of the governmental authority”¹⁰²

The commentary stipulates further:

“If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage.”¹⁰³

The question then arises, should PA human rights abuses committed while serving the interests of Israel, be separated from those committed in the interests of their own? Should PA, for the purpose of determining human rights obligations, be treated as “empowered [...] to exercise elements of the governmental authority” in the instances that they actually pursue Israel’s interests, and as non-attributable to Israel

¹⁰⁰ Ibid. 5(7)

¹⁰¹ Parsons (2005) p161

¹⁰² ILC Draft Articles art. 5

¹⁰³ *Commentaries to the Draft Articles* (2001) art. 5(5)

when it, in fact, doesn't?" In practice interests are, of course, intermingled and such a separation would be impossible.

"The extent to which the entity is accountable to government for their exercise"¹⁰⁴ is mentioned as an important aspect to consider. There is no formal system of PA accountability before Israel on issues concerning human rights breaches of Palestinian citizens. PA, in Israeli domestic courts has been given sovereignty.¹⁰⁵ Israel has however made use of coercive means of policy enforcement on PA, such as detention of MPs, destruction of PA institutions during the al-Aqsa Intifada, withholding of tax revenues etc.¹⁰⁶ To the extent that these acts have been committed with the purpose of ensuring a certain PA policy, it has been for other reasons, such as relating to PA's failure, or unwillingness, to provide for Israel's security.¹⁰⁷

When looking specifically at the question of PA human rights compliance vis-à-vis Palestinian citizens, PA is hence not accountable to the government of Israel at all. However, Israel disposes of several coercive means to enforce specific PA policies, wherein human rights compliance could in theory take part.

In conclusion, then, if the arguments for considering PA a "state organ" were to be dismissed, it seems as there are good grounds to consider PA, in part, and in certain instances, to be "empowered by the law of [Israel] to exercise elements of the governmental authority". It is clear that not all PA activity would be covered under this article, but when, for example, acting in order to provide for Israeli security.

¹⁰⁴ *see supra*

¹⁰⁵ *Agudat Moreshet Elon Moreh v. the State of Israel*

¹⁰⁶ *See infra*

¹⁰⁷ *Parsons (2005) ch. 5*

4.1.4 PA as a “group of persons under the direct control” of Israel

The commentary to the ILC Draft Articles proposes the test provided by the *Nicaragua* and *Tadić* cases in order to determine whether a person is “under the direction or control” of a state, but conclude that “it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.”

The analysis of PA under this article is highly linked to the treatment of PA as a *de facto* regime, which is thoroughly dealt with *infra*. At this point it will be sufficient to conclude that it appears obvious that PA, in general, acts with a degree of independence, *vis-à-vis* the state of Israel, by far superseding any threshold of “direction or control”. As Benvenisti points out, Israel has little direct control over PA, even though this is stipulated in the Oslo agreements.¹⁰⁸ This question, furthermore, has to be treated on a case-to-case basis, which makes a general assessment difficult and even superfluous.

4.2 Israeli diagonal responsibility

A second way of addressing the human rights responsibility for PA conduct is by considering PA a private actor on territory over which Israel has jurisdiction. Israel has a *due diligence* responsibility to *protect* individuals subject to its jurisdiction from actions committed by third parties amounting to human rights violations.¹⁰⁹

4.2.1 Legal base

ICCPR 2(1) obliges state parties to “respect and to ensure” the rights included in the Covenant. The wording implies positive obligations to protect persons under its jurisdiction. General Comment 31 has further underlined the obligation to protect

¹⁰⁸ Benvenisti (1994) p313

¹⁰⁹ See for example Art. 2(1) of the ICCPR, clarified by General Comment No. 31 (*The Nature of the General Legal Obligation imposed on States Parties to the Covenant*) and Human Rights Committee, *General Comment 23*

“against acts committed by private persons or entities that would impair the enjoyment of Covenant rights”¹¹⁰

ICESCR has in the same manner been interpreted by the CESCR to imply diagonal obligations.¹¹¹

CEDAW and ICERD both contain *due diligence* obligations expressed in more specific language. CEDAW has it that the State Parties must:

“take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise”¹¹²

ICERD 1(d) imposes an obligation on states to:

“prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”.

CRC provides a duty to:

“respect and ensure the rights set forth in the present Convention”¹¹³

4.2.2 Applicability on our present case

Zegveld provides an analysis of several authoritative international judgements relating to whether states have a responsibility to act in *due diligence* to ensure the human rights compliance of armed opposition groups. She comes to the conclusion that:

“International practice demonstrates that the general obligation resting on the state under human rights treaties to ‘ensure’ or ‘secure’ the relevant rights and freedoms entails the obligation to protect individuals from armed opposition groups on its territory. [...] an internal conflict in itself [...] does not remove the state’s positive obligations

¹¹⁰ HRC *General Comment no 31* Para. 8

¹¹¹ See for example ESC General Comments 12, 15 and 16

¹¹² CEDAW art. 2(e)

¹¹³ CRC art. 2(1)

under human rights treaties to regulate and control the conduct of actors under its jurisdiction.”¹¹⁴

As displayed by for example the Namibia case, a state’s responsibility under international law concerns the territory under its *physical control*, which implies an Israeli responsibility for oPt, to the extent it exercises its effective control over the territory.¹¹⁵ In a case against Uganda, the ICJ held that its *due diligence* responsibilities extended to the parts of the Democratic Republic of Congo that it was at the time occupying.¹¹⁶

The question at this point is, then, if Israel’s lack of total control over the areas assigned to PA relieves it of the obligation to *protect* individuals from human rights abuses by the same PA.

ECtHR, in a case brought before it, held that generally, lack of control does not totally cancel a state’s obligations to *protect* individuals from breaches of human rights committed by non-state actors. Specifically, Moldova

“does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or another State.”¹¹⁷

And that the country further

“must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms guaranteed by the Convention.”¹¹⁸

¹¹⁴ Zegveld (2002) p173

¹¹⁵ Legal Consequences for States of the Continued Presence of South Africa in Namibia (ICJ Advisory Opinion) Zegveld (2002) p209-10

¹¹⁶ DRC v. Uganda, Case Concerning Armed Activities on the Territory of the Congo, para.179: “The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account” and para.211.

¹¹⁷ Ilașcu and Others v. Moldova and Russia para. 333

¹¹⁸ Ibid. para. 348

The signing of the San José Agreement between El Salvador and the armed opposition group FMLN in 1990, according to which the human rights responsibility for territory put under guerrilla control is to be divided between the two parties, provides case with strong parallels. In the view of the Inter-American Commission on Human Rights,¹¹⁹ the international responsibility for human rights violations, however, remained fully upon the state, El Salvador.

A similar situation, was the temporary transfer by Colombia of 44000 km² of territory to the armed opposition group FARC in 1998, with the purpose of facilitating peace negotiations. Colombia withdrew police, army and the judiciary, in order to grant FARC with effective control over the area. Zegveld argues, in the light of the above considerations of the Inter-American Commission on Human Rights, that this transfer did not in any way relieve Colombia of its obligations under human rights treaties. This conclusion stems from the fact that Colombia deliberately transferred powers to FARC, that it in fact is not materially *unable* to protect individuals in the mentioned area, but made the voluntary choice to turn the responsibility over to the armed opposition group.¹²⁰

As a general rule, Zegveld points out that:

“It would seem that the effect of the temporary impossibility of the operation of human rights treaties only occurs when the state’s further compliance is not possible, owing to forcible or involuntary loss of control of territory as a result of enemy action. When the state has contributed to the occurrence of loss of territorial control or otherwise to the ineffectiveness of the government, it would seem that its obligations under human rights treaties remain fully valid.”¹²¹

This being said, it is remarkable that no treaty bodies, ICJ in the *Wall* advisory opinion or the authors of the Goldstone Report have raised the questions as to

¹¹⁹ Inter-American Commission OEA/ser.L/V/II.85, Doc. 28, rev. at 7 /Report on the Situation of Human Rights in El Salvador, 11 Februari 1994)

¹²⁰ Zegveld (2002) p213

¹²¹ Ibid. (2002), p212-13

whether Israel might have a *due diligence* responsibility over Palestinians in the areas of oPt that have been transferred to PA. This fact could suggest a different stand on the question than the Inter-American Commission, or possibly a development of the law.

As accounted for, Israel gave, through the Oslo process, willingly up parts of the territory occupied by it, to the newly created institution of PA, for this purpose comparable to an armed opposition group. No physical obstacles keep Israel from reoccupying these areas and re-establishing its direct and total authority here (which in fact occurred during the partial reoccupation in 2000 and the almost complete reoccupation in 2002)¹²². The clauses in IA and Wye River Memorandum¹²³ obliging the PLO to respect international standards of human rights, similarly to the one in the San José Agreement, would not relieve Israel of its human rights obligations for oPt.

The human rights protection provided by this approach is in some respects weaker than, the regime provided by the *attribution* approach. A state is only responsible for enforcing compliance of armed opposition groups, when concerned with grave breaches of human rights. The protection of life would be included in this category, while for example ill-treatment in detention falls outside of it.¹²⁴

This limited lack of State responsibility leads Zegveld to propose shared responsibility, in similar situations, between the state and the non-State actor.¹²⁵ Israel would then be responsible for “grave breaches” of human rights, while PA would remain responsible for less serious breaches. How such a division would look in practice, and how an enforcement mechanism would appear, remains however diffuse.

It seems in any case that there are strong arguments behind a claim that Israel has, at least a limited, responsibility to act in *due diligence*, to protect individuals from PA acts in oPt amounting to breaches of human rights.

¹²² Parsons (2005) pp305-310

¹²³ Wye River Memorandum art. 4, IA 7(h)

¹²⁴ Zegveld (2002) p224

¹²⁵ Ibid. (2002) ch6

5 PA as a *de facto* regime with human rights responsibilities

I have considered, above, the vertical and diagonal responsibility for PA acts and omissions. If we were to dismiss the arguments *supra* about Israeli responsibility for PA's acts and omissions, the arising question is: Does PA have a horizontal obligation under IHRL?

The question whether non-state actors in general, and *de facto* governments in particular, themselves have obligations under international human rights law, is a highly debated one. Two recent books¹²⁶ focusing solely on non-state actors and human rights have developed the theory.

5.1 Legal base

Human rights treaty law does not create binding rules applicable to non-state actors. The major human rights conventions refer explicitly and unambiguously to the “state parties”.

This has further been highlighted by, for example, HRC, in 2004, holding that:

“The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law.”¹²⁷

The Universal Declaration of Human Rights is more ambiguous. Two passages in the document allow for the argument that human rights could bind entities other than states:

“Every individual and every organ of society [...] shall strive by teaching and education to promote respect for these rights and freedoms and [...] to secure their universal and effective recognition and observance [...]”¹²⁸

¹²⁶ Clapham (2006), Alston (2005)

¹²⁷ ICCPR General Comment 31, Para. 8

¹²⁸ UDHR preamble para. 10

The declaration further spells out that the individual has

“duties to the community in which alone the free and full development of his personality is possible”¹²⁹

The fact that important parts of the UDHR have reached the status of customary international law¹³⁰ opens up for an application of these customary principles to *de facto* regimes.

During the war in former Yugoslavia, for example, one member of the Human Rights Committee, in 1992, took the stand that the Bosnian Serb authority, which exercised control over territory, was bound by IHRL, due to its territorial control.¹³¹

Security Council Resolutions

In 1998 the UN Security Council in a resolution requested

“the Afghan factions to put an end to the discrimination against girls and women and to other violations of human rights [...] and to adhere to the internationally accepted norms and standards in this sphere”¹³²

Human Rights Commission/Council Reports

Bodies, such as the Human Rights Council have expressed, in vague language, a desire that *de facto* regimes respect human rights. During the civil war in Somalia the Human Rights Commission encouraged “all parties” to “respect human rights”¹³³. This was followed up in 2006, following the war between Israel and the Lebanese armed group

¹²⁹ UDHR art. 29(1)

¹³⁰ Hessbruegge (2005) p34

¹³¹ *Decision on State Succession to the Obligations of the Former Yugoslavia under the International Covenant on Civil and Political Rights (Separate opinionMullerson)*

¹³² Security Council Resolution 1193 para. 14

¹³³ Human Rights Commission *Assistance to Somalia in the Field of Human Rights* (1997) para. 3

Hezbollah, when the Human Rights Commission issued a report where it is spelled out that:

“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. The Security Council has long called upon various groups which Member States do not recognize as having the capacity to do so to formally assume international obligations to respect human rights. It is especially appropriate and feasible to call for an armed group to respect human rights norms when it exercises significant control over territory and population and has an identifiable political structure”.¹³⁴

In the 2009 Goldstone Report it is spelled out that:

“In the context of the matter within the Mission’s mandate, it is clear that non-State actors that exercise government-like functions over a territory have a duty to respect human rights”¹³⁵

It is not, however, spelled out which specific rights constitute these “human rights”, neither are the legal sources for these duties. The report refers mainly to unilateral undertakings as well as domestic Palestinian law:

“The Mission notes that the Palestinian Authority, through its public undertakings as well as those of the Palestine Liberation Organization (PLO) and the Palestinian Legislative Council, has declared its commitment to respect international human rights law in several instances, including in the context of international agreements. This commitment is also contained in the Palestinian Basic Law.”¹³⁶

This passage refers only to “legal sources” of a non-binding character.¹³⁷ One may pose the question why there is no referral to principles of customary international law or to *jus cogens*, possibly binding non-state actors like PA as “hard law”. This

¹³⁴ Human Rights Council *Mission to Lebanon and Israel* (2006) para. 19

¹³⁵ Goldstone Report, para 305

¹³⁶ *Ibid.*, para 306

¹³⁷ See “unilateral Undertakings” *infra*

omission must be seen as an unwillingness to spell out that similar entities are really bound by IHRL, and an attempt to rather hold them morally responsible.

The referral to internal law as well as undertakings of a morally, rather than legally, binding nature suggests that these “duties” stem from “soft”, rather than “hard” law. There is little indicating that these entities *are* legally bound by IHRL.

Secondary Literature

Literature covering human rights compliance of Non-state actors have largely been focusing on TNCs, international peace-keeping operations, NGOs, International organizations and armed groups.¹³⁸ PA, approached as a non-state actor, falls somewhat outside of this framework. It is obviously not a TNC, IO, peacekeeping mission or NGO. A natural category to put it would be an armed group exercising effective power over a certain territory. PA disposes over an (armed) police- and security force and, as we have seen, exercises elements of effective control over some territory. But the PA is at one time more and less than an armed group in effective control. It is less, since the limits to its authority, or effective control, are defined by law and temporarily granted by Israel, the central government. The source of PA’s authority is not its physical control, but the wilful granting of authority by Israel. PA is more than most armed groups due to the sophistication of its power apparatus, in many respects closely resembling that of a state. It has a functioning legislature, judiciary and executive administration, its own police and security forces, prisons, mandate and capacity to issue official travel documents etc.

The question of whether an organization such as PA could have obligations under IHRL, then, remains unsettled to begin with. Second It seems to be a consensual understanding that if such obligations exist, they only do so to the extent the organization (armed group) has established authority over a territory. With the words of Zegveld

“A relevant criterion to determine whether armed opposition groups can incur accountability under human rights law may therefore be the existence of an authority

¹³⁸ For two recent contributions, see Clapham (2006), and *Non-state actors and human rights* (2005)

effectively controlling territory and persons [...] The threshold for the applicability of human rights standards should therefore be higher than the threshold for applicability of international humanitarian law”¹³⁹

In conclusion there seem to be “emerging”¹⁴⁰ human rights obligations for *de facto* regimes, however questioned. As seen, if such obligations exist, they seem to presuppose some level of territorial control.

5.2 A non-state with state-like responsibilities

A first question will then be to determine the test for *effective control*, and then analyze whether PA is in possession of such control.

5.2.1 A Test for Effective Control

Human rights apply to areas and persons under the “jurisdiction” of the contracting state: “to all individuals within its territory and subject to its jurisdiction”¹⁴¹, “in territories under their jurisdiction.”¹⁴², “in any territory under its jurisdiction.”¹⁴³, The meaning of “jurisdiction” for the purpose of these conventions has been subject to a major debate, but is generally understood, with the support of various court cases, as meaning effective territorial control. HRC for example has declared that

“[a] state party must respect and ensure the rights laid down in the covenant to anyone within the power or effective control of that state Party, even if not situated within the territory of the state party”¹⁴⁴

¹³⁹ Zegveld (2002) p149

¹⁴⁰ Hessbruegge (2005) p39

¹⁴¹ ICCPR art. 2(1)

¹⁴² CERD art. 3, CRC Art. 2(1)

¹⁴³ CAT art. 2(1)

¹⁴⁴ HRC General Comment 31 para. 10

ECtHR has set the bar high. In *Banković et al v. Belgium*, the court held that the threshold for “jurisdiction” is high and effective control can be defined as the capacity to ensure the entire scope of rights provided in the ECHR¹⁴⁵

This test seems however to have evolved with the *Ilașcu* case, where the threshold is set to “effective authority”.¹⁴⁶

Meanwhile the HRC seems to apply a much more inclusive test. In the *Lopez Burgos* case, relating to the treatment by Uruguay of one of its citizens abroad, it was held that

“The reference in article 1 of the Optional Protocol to ‘individuals subject to its jurisdiction’ [...] is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred”¹⁴⁷

This test is preferable for a number of reasons. First of all it is applied in relation to the international instrument of ICCPR, binding in the region, and develops the meaning of “jurisdiction” in the covenant. Second this test seems far more fit to apply to a *de facto regime*.

If we accept this test, it should already be clear that such a relationship exists between PA and its subjects. PA is, within certain functional limitations, and to a varying extent in different geographical areas, exercising authority establishing a state-like relationship to the Palestinians living therein.

PA’s disposes of a legislative body, a one-chamber parliament consisting of 132 members. There is further a judiciary and various executive branches consisting of 25 ministries.¹⁴⁸ It disposes of its own police, security force, secret service, prisons,

¹⁴⁵ *Banković et al v. Belgium* para. 62

¹⁴⁶ *Ilașcu et al v. Moldova and Russia* para. 335 at 78

¹⁴⁷ *Lopez Burgos v. Uruguay* para. 12.2-12.3

¹⁴⁸ Abdel Munem (2010)

education system, health service etc¹⁴⁹. It issues travel documents and employs approximately 150,000 civil servants.¹⁵⁰

As such PA resembles *prima facie* a state, at least what concerns its relationship to the population living under its jurisdiction.

With HRC's argumentation above, it is clear that whether PA human rights abuses occur in Area A, B, C, H1 or H2 is of less interest. To the extent PA is the direct perpetrator, it should be responsible. Even when they occur in areas where responsibility is shared with Israel, the relationship government-governed seems to be present. With the words of a Palestinian human rights officer "it is as if we have two governments".¹⁵¹

The functional limitations imposed on PA's authority, however, merit some further consideration.

5.3 Limitations to PA control

In the following chapter I will consider the limitations to PA's authority, to try to define PA effective control in the negative.

5.3.1 Israeli detentions of, and travel restrictions on, PLC members and civil servants

One issue raising serious questions about the degree of *de facto* control of PA is the ongoing Israeli policy of detaining members of the Palestinian Legislative Council, Ministers and senior civil servants. This practice was, among other things, commented on in the Goldstone Report

¹⁴⁹ See *supra*

¹⁵⁰ Abu Toameh (2009)

¹⁵¹ Jabarin (2010)

“The detention of members of the Legislative Council has meant that it has been unable to function and exercise its legislative and oversight function over the Palestinian executive.”¹⁵²

“The arrest by Israel of members of the Palestinian Legislative Council and other Palestinian Authority officials has also resulted in the inability of many institutions to function properly and prevented Palestinians from the two areas to work together.”¹⁵³

The detention of the Council’s members has meant that it has been unable to function for three years and no laws have been passed. According to ICHR, it has not been able to exercise its oversight function over the Government’s administrative and financial performance

“In other words, the goal is the deconstruction of both the Palestinian political system and the Legislative Council as can be inferred from the detention of almost two thirds of the PLC deputies. The natural outcome is reflected in the ongoing obstruction of PLC functions and roles, both in terms of legislation and oversight of the executive, and inevitably, the indirect obstruction of the main legal instruments such as Palestinian Basic Law and the PLC bylaws.”¹⁵⁴

And further that

“Israel maintained control over the PNA by influencing the PNA’s ability to keep its official institutions ensuring human and citizens rights operational at a time when the PNA had no sovereign control over major natural and other sources such as land, water, regional continuity, and total jurisdiction for the legal and administrative systems of its people, free access to the external markets and freedom of movement.”¹⁵⁵

It is evident that this to a certain extent curtails PA’s ability to protect rights diagonally, as they lack the capacity to formally protect rights by legislation.

¹⁵² Goldstone Report para. 90

¹⁵³ Ibid. para. 205

¹⁵⁴ ICHR 14th Annual Report (2008) p 38

¹⁵⁵ Ibid. p34

5.3.2 Israeli Travel restrictions

Israeli has since 1996 imposed travel restrictions on the West Bank¹⁵⁶ affecting members of the Palestinian Legislative Council's (and other Palestinian's) ability to move freely has further negatively affected PA's ability to exercise authority over the area, and as a consequence to ensure human rights.

5.3.3 Control over water facilities

Another area of control, which only to a very limited extent has been transferred to PA, is the control over natural resources, there among water. According to a recent AI report:

“Under the Oslo Accords, the PA was given no authority to make decisions relating to drilling of new wells, or upgrading existing wells, or implementing other water-related projects, and Israel continues to control decision-making regarding the amount of water that may be extracted from existing wells and springs in the OPT virtually to the same extent as it did before the Oslo Accords. Thus, the Israeli authorities continue to monitor and control the amount of water extracted from Palestinian wells and springs in the West Bank, and Palestinians are not allowed to drill new wells or rehabilitate existing wells without first obtaining authorization from the Israeli authorities. Such authorization is rarely granted; even when it is, the process is an unduly lengthy and complicated one and the potential for delays and consequent cost increases is high.”¹⁵⁷

This is of course a limitation with negative implications for the capacity of PA to ensure human rights to individuals in the area of its control.

5.3.4 Tax Collection

The fiscal system, partly remaining in the control of Israel, has briefly been accounted for *supra*. VAT collection on imports to oPt are collected by Israel and the revenues

¹⁵⁶ Goldstone Report para. 204 at 63

¹⁵⁷ *Troubled Waters – Palestinians denied fair access to water* (2009)

transferred by Israel to PA. The same system applies to income tax on Palestinian workers employed inside Israel.¹⁵⁸

These tax revenue transfers to PA have been halted by Israel at numerous instances as a means of political pressure. One of the cut, after Hamas' election victory in 2006, lasted for more than a year¹⁵⁹ whereby Israel withheld US \$50-60 million of tax revenues per month.¹⁶⁰ In 2008 as a response to PA Prime Minister Salam Fayyad's political campaign, directed towards EU, criticizing settlement expansion, a similar move was made, withholding \$75.¹⁶¹

This, in theory and in practice, further limits PA's capacity to manage its civil administration, and in the extension, its ability to ensure human rights protection.

5.3.5 Indirect effects of Israeli policy

Israeli policy in relation to the oPt, further has indirect consequences on the human rights record in the oPt. One example often referred to is the high level of domestic violence against women, due to the frustration and disempowerment among men caused by travel restrictions and the high level of unemployment caused thereof.¹⁶² This further displays how intertwined the human rights record in oPt is with the occupation policy of the Israeli government, even in thematic and geographic areas seemingly outside the control of Israel.

5.3.6 A shared responsibility?

It should be clear, then, that PA does not in effect exercise unlimited "jurisdiction", even in Area A. The "coordination of policies"¹⁶³ provided for in the DoP might not

¹⁵⁸ *State Formation in Palestine* (2004) p122

¹⁵⁹ Macintyre (2008)

¹⁶⁰ *Internal fight* (2008) p9

¹⁶¹ Macintyre (2008)

¹⁶² Tomic (2010)

¹⁶³ DoP Par. 10

have been effectuated, but rather a coercive Israeli attitude on issues related to its own security and political gains. The question relevant for this task is whether these restrictions on PA control have adversely affected the authority's ability to ensure human rights.

The situation of almost total Israeli control in areas C, shared control with Israel in areas B and a varying degree of indirect Israeli control in all of these areas makes it very difficult to make a general assessment of PA's effective control and might have to be considered on a case-to-case basis.¹⁶⁴ For the many grave breaches, for example torture, arbitrary detention, extra-legal killings etc, committed by for example Palestinian security officers, there is a direct and uninterrupted link between the government and the governed, satisfying HRC's test, clearly triggering PA responsibility. The indirect Israeli control however, in some instances question the degree to which PA could be deemed responsible.

I will try to illustrate this with three hypothetical scenarios, all occurring in area A of the West Bank: (1) Palestinian Security Forces¹⁶⁵ detain and torture an individual due to his political opposition towards the PLO. (2) Discriminatory Palestinian laws against women. (3) IDF enters area A and raids a Palestinian urban area in the search for wanted people, while rounding them up, one of them is severely beaten.

They are all clear breaches of human rights: 1) Right to freedom from torture, right to freedom from arbitrary detention etc, 2) Right to freedom from discrimination 3) Right to freedom from inhuman treatment.

The question is who is responsible in each of these cases. In the first example, it should be obvious that PA is responsible. The Palestinian Security Forces are Palestinian "government" officials, act in their official capacity, and are under unlimited control of the PA. As already noted, the relationship government-governed exists. The third case should be equally clear. IDF represent the Israeli government and human rights treaties, as we have seen, apply extraterritorially. Israel is

¹⁶⁴ This consideration was also expressed by Tomic (2010)

¹⁶⁵ Hereinafter PSF

responsible. In the second case, the situation is more complicated. PA has failed to legislate in order to overcome discrimination against women. On the other hand, this thematic area (legislation) is a field where PA control has been severely restricted, due *inter alia* to Israeli policy of MP detention. In this case then, one could argue that PA does not in fact exercises effective control over the relevant thematic field. One could argue, then, that PA does not quite exercise unlimited authority in the relevant functional field.

Clapham notes that *de facto* regimes rarely dispose of a refined administration, capable of ensuring the full spectre of human rights. What Clapham proposes, as an analogy from the clause in ICESCR, is that the obligations should be considered “to the maximum of its [the PA’s] available resources”.¹⁶⁶ This seems highly relevant and applicable to the present case. The reporting of for example ICHR, where Israeli policy’s limiting effect on PA human rights performance is explicitly reported on¹⁶⁷ seems implicitly be based on such an approach.

To the extent that these limitations to PA authority do not create a corresponding effective control of Israel’s, for example limited PA control over its legislative and executive, the question arises if this would put the responsibility on Israel, due to its overall occupation, or it simply creates a human rights limbo, where nobody has the responsibility.

The ICJ, in its 2004 “Wall” Advisory Opinion, held that Israel is

“under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.”¹⁶⁸

This could in theory serve as guarantee that PA’s ability to ensure the human rights by which it is bound are not infringed.

There is thus a degree of human rights responsibility in the West Bank according to the nature of the right breached. It is clear that no ultimate rule for the division of

¹⁶⁶ Clapham (2006) Ch7

¹⁶⁷ See for example: 14th Annual Report ICHR p 33ff

¹⁶⁸ Wall Advisory Opinion, para. 112

human rights responsibility could be established. Israeli policy in relation to PA and oPt changes over time, PA changes, etc.

5.3.7 Which human rights?

While holding the view that PA is bound by customary norms of human rights, Benvenisti asks the question whether human rights conventions apply to an autonomous regime like PA, and, if so, which conventions do apply.

He proposes three ways in which human rights can be applied in PA-land: (1) By simply considering instruments ratified by Israel applying to PA, through the transfer of authority to the latter. (2) By considering instruments ratified by Israel during the occupation period as part of the law of the West Bank and the Gaza Strip. (3) By unilateral undertakings by PA to respect specific rights.¹⁶⁹

His first proposition is supported by HRC jurisprudence holding that Human rights treaties are “localized treaties”, that is to say, *territorial*, binding on a territory, and remaining in force in a territory whether coming under the jurisdiction of a power not itself having ratified human rights conventions.¹⁷⁰ For example were human rights instrument ratified by Portugal during the period of its sovereignty over Macau still seen as binding on the Island after its return to China.¹⁷¹ Israel has signed and ratified the six major UN human rights conventions, CERD in 1979, as well as ICCPR, ICESCR, CAT, CRC and CEDAW in 1991. As these conventions have generally been held to apply to oPt (even though Israel denies it), these would all, consequently, be valid instruments of international law in oPt.¹⁷²

Benvenisti’s second proposition refers to internal law, and is of less interest to us as we are dealing with PA’s international responsibility.

¹⁶⁹ This has been done through the introduction of the Basic Law

¹⁷⁰ HRC General Comment 26

¹⁷¹ Ben-Naftali & Shanny (2003) p98-99

¹⁷² *Ibid.* (2003) come to the same conclusion

The author's third proposition has, as we will see¹⁷³, largely been undertaken by PA in a number of ways, since the time of Benvenisti's writing. The remaining question is whether these undertakings are binding upon PA. This will be the focus of the next chapter.

It has further been proposed that *de facto* regimes are bound by CIL.¹⁷⁴ If we accept this, these rules would also apply to PA.

5.4 Unilateral Undertakings

An often repeated "source" of PA's human rights responsibilities is the unilateral undertakings to respect human rights and "endorsements" of human rights instruments.

PLO and PA representatives have at several instances undertaken to respect international human rights standards.

Two important general questions arise as we analyze these commitments: 1) What is meant by "human rights" when (as often is the case) the range of rights is not specified? 2) Do these commitments have any legally binding effect?

As an answer to the first question, we can refer to one study which has shown that declarations, agreements, codes of custom etc. that commit non-state actors (armed groups in conflict situations) to "human rights" refer to human rights provided by CIL.¹⁷⁵ There is no reason to believe that PA, notwithstanding its specific character in comparison to armed groups, would be any different in this respect. It is therefore reasonable to believe the meaning of "human rights", "internationally-accepted norms and principles of human rights" etc, have the connotation of customary international human rights law. Meanwhile, PA commitments have extended far beyond CIL by for example "endorsing" CEDAW. Our earlier conclusions on the *territoriality* of human

¹⁷³ See "Unilateral Undertakings" *infra*

¹⁷⁴ Clapham (2006) Ch7

¹⁷⁵ Vigny and Thompson (2002) p 193

rights conventions also open up for the argument that all human rights conventions ratified by Israel apply to the West Bank as a territory, and therefore bind PA.

As an answer to the second question I will analyze each undertaking separately.

5.4.1 The Barcelona Declaration

Yasir Arafat in 1995 signed the Barcelona Declaration, setting up principles for the Euro-Mediterranean cooperation going under the name “the Barcelona Process”. In doing so he undertook

“in the [...] declaration of principles to: act in accordance with the United Nations Charter and the Universal Declaration of Human Rights, as well as other obligations under international law, in particular those arising out of regional and international instruments to which they are party”¹⁷⁶

This signature has often been evoked by human rights defenders, local and international, to hold the PA responsible under IHRL.¹⁷⁷ The question we must answer to here, then, is to what extent the signing of this declaration can be said to have a legally binding effect on PA.

Declarations of this kind belong to what is commonly named “soft law”, setting standards that in the long run may achieve the status of customary international law. In itself, however, the signing of such a declaration does not legally bind the signatories.¹⁷⁸

So, the Barcelona Declaration is of a non-legally binding character¹⁷⁹, a “politically enforceable instrument [...] but [...] not binding in law.”¹⁸⁰ The signing of such a declaration may arguably impose a moral obligation on a signatory, and constitute a promise to

¹⁷⁶ Barcelona Declaration art. 2

¹⁷⁷ Goldstone Report para. 306, *Internal Fight* (2008) p48

¹⁷⁸ Cassese (2005) p196

¹⁷⁹ Del Sarto (2006) p20

¹⁸⁰ Pardo & Zemer (2005) p7

its citizens against which its actions can be judged, but does not give rise to obligations under international treaty law.

5.4.2 Public Announcements

Another unilateral undertaking that has been suggested as putting a human rights responsibility on the shoulders of PA is Arafat's and later Mahmud Abbas' public announcements to unilaterally undertake to respect human rights principles.¹⁸¹

For example former PA president Yasser Arafat on several occasions declared that PA was committed to respecting "all human rights standards"¹⁸²

A more recent and specific example is Women's day (8th March) 2009, when Mahmoud Abbas issued Presidential Decree number 19 unilaterally "ratifying" CEDAW and thus considers itself bound by it.¹⁸³

This is another example of an act arguably establishing a moral responsibility to respect human rights standards, but does, needless to say, in no way have a legally binding effect.¹⁸⁴

5.4.3 The Palestinian Basic Law

The Basic Law, functioning as a proto-constitution of PA contains several substantial human rights clauses, which are also frequently referred to as a base for holding PA responsible¹⁸⁵. On top of this, art 10 stipulates that:

¹⁸¹ Ibid. para. 306, *Internal Fight* (2008) p49

¹⁸² Goldstone Report footnote 7, p 5

¹⁸³ Al-Haq (2010), Tomic (2010)

¹⁸⁴ This is confirmed by Eva Tomic, private interview

¹⁸⁵ *Internal Flights* (2009) p48, Goldstone Report art. 306

“1 Basic human rights and liberties shall be protected and respected. 2 The Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights.”¹⁸⁶

The Palestinian Basic Law is a domestic instrument that doesn't give rise to any international obligations. It does, however, bind PA under domestic law to respect human rights standards, which may have a positive effect on PA's human rights compliance and create a domestic system of accountability.

5.4.4 Interim Agreement and Wye Memorandum River clause on respect for human rights

A more delicate issue is the question of the legal implications of PLO's signing of the IA, and thereby committing itself to art XIX of the agreement to respecting “internationally-accepted norms and principles of human rights”.

This is often mentioned by human rights promoters as creating human rights obligations for PA.¹⁸⁷ Israel has likewise held that this clause ensures the applicability of human rights norms for the population in the PA-controlled parts of oPt (in relation to PA), while relieving Israel of its responsibility in these areas. Israel has further held that for practical reasons, it would be impossible to report on the human rights situation in these areas, as the government lacks the data.¹⁸⁸

Apart from these referrals, the *Wall* Advisory Opinion and Goldstone Report are silent on this matter.

As mentioned, when signing the San José Agreement with the armed opposition group FMLN, El Salvador was held by the Inter-American Commission to not be

¹⁸⁶ Palestinian Basic Law art. 10

¹⁸⁷ *Internal Fight* (2008) p48

¹⁸⁸ Ben Naftali and Shany (2003) p97

relieved of its international human rights obligations, but the Commission took the stand that the country remained bound by applicable human rights provisions in all of its territory, the responsibility thus remaining on EL-Salvador.¹⁸⁹

From this analogy, it seems then, as if these articles of the Oslo instruments would not relieve Israel of its international responsibility for human rights violations arising from acts committed by PA.

5.4.5 Code of Conduct?

In the literature covering human rights and non-state actors *code of conduct* is commonly referred to. Corporations, International Organizations, NGOs as well as armed groups¹⁹⁰ are among those entities that have unilaterally undertaken to follow a set of norms, derived from international standards of human rights. These codes of conduct are, strictly speaking, not legally binding upon the actors but serve as moral frameworks against which the actions of the actors can be judged and could have the effect of increasing the human rights compliance of the entities endorsing them.¹⁹¹ In fact, empirical studies on similar undertakings by armed groups suggest that commitment to codes of conduct encourages these actors to respect human rights.¹⁹²

As a non-state actor incapable of entering into human rights treaties, the legal implication of PA making similar moves should be no different than that of other non-state actors. This has no binding effect upon PA. Codes of conduct have, not surprisingly, been criticized for their weakness, lacking formal monitoring and/or enforcement procedures. However, they have created ethical frameworks giving rise to informal surveillance and enforcement mechanisms, or 'extra-legal enforcers' to use Reinisch's words, such as consumers, donors, member states etc, exercising their economical power over the actors in order to "enforce" a higher level of human

¹⁸⁹ Inter-American Commission *Report on the Situation of Human Rights in El Salvador* 11 February 1994 p7

¹⁹⁰ Clapham (2006) pp286-289

¹⁹¹ *Non-state actors and human rights* (2005) pp 42-53

¹⁹² Clapham (2002) p289

rights compliance.¹⁹³ These undertakings might furthermore be regarded as a confirmation of already existing obligations under customary international human rights law.

5.5 Accountability for non-state actors

Mainly, three potential ways for the accountability of non-state actors under international law exist; 1) International state responsibility for non-state acts, 2) Direct non-state responsibility under international law before international tribunals, 3) Direct human rights accountability before national courts.¹⁹⁴

The first and the third options have been dealt with *supra* (1) holding Israel accountable for PA acts, for example in their periodic reports to CAT and CCPR and 3) holding PA officials accountable in Israeli (military) courts). What remains is the option of holding PA, as a non-state actor in effective control, accountable before an international tribunal, or other body.

But international treaty-based bodies have been reluctant to directly address non-states, without capacity to ratify conventions, and at its present state the international human rights system provides no possibilities for holding entities such as the PA responsible under IHRL.

There is thus a discrepancy between an emerging recognition of non-state actors as bearers of obligations under human rights law and a lack of extension of the institutional and procedural framework to monitor and enforce such obligations.

5.5.1 “Soft accountability”

In the lack of mechanisms for legal accountability for human rights violations committed by non-state actors, extra-legal means have been presented as ways to ensure human rights compliance. This relates mainly to actors such as Transnational

¹⁹³ *Non-state actors and human rights* (2005) pp 42-53

¹⁹⁴ *Ibid.* pp78-89

Corporations (TNC), International Organizations (IO) and NGOs. Consumers' boycotts, Withholding of government funding, withdrawal of membership etc are examples of "soft accountability" pressing for higher levels of human rights compliance.¹⁹⁵

As a general feature of the recent development of human rights in relation to non-state actors, Reinich points to a diminished focus on whether human rights law is actually legally binding on the entity, when being enforced.¹⁹⁶

6 Summary

In conclusion, there are broadly speaking three ways of arguing about the responsibility for human rights compliance in oPt today. The first two have been dealt with *supra*; According to the first, Israel still holds the full responsibility. The second line argues that PA as a *de facto* regime is responsible. Thirdly, one could argue that nobody is responsible. If we were to accept Israel's arguments of the lack of effective control over PA-controlled areas, and meanwhile reject the view that *de facto* regimes have responsibilities under IHRL, oPt becomes a limbo, where human rights are breached without responsibility.

From the third line it could, of course, further be argued that whether or not PA strictly speaking is bound by IHRL it has a moral obligation to respect human rights standards, reinforced by its own unilateral undertakings.

As demonstrated, there are strong arguments to for holding Israel responsible for the human rights compliance of PA. It is then remarkable that this does not seem to have been considered by ICJ in the *Wall* case, in the Goldstone Report or by none of the treaty monitoring bodies, concentrating solely on Israeli direct human rights breaches. This might suggest a legal evolvement away from the strict state-centered approach.

¹⁹⁵ Ibid. (2005) pp37-74

¹⁹⁶ Reinich (2005) p69

Accept for the vague and ambiguous reference in the Goldstone Report, these sources are however likewise unclear whether PA in fact has legally binding obligations under IHRL. In fact, it seems uncertain whether IHRL as it stands today is capable of binding PA directly.

If it does, the enforcement mechanism available are limited to “extra-legal” and “quasi-legal” means.

This framework leads us to the next task that I have undertaken to deal with, the existing system for human rights protection in oPt, and how it deals with the question of responsibility.

7 Protecting human rights in oPt

I will now turn my attention to the system for human rights protection available in PA-controlled areas of oPt.

The system available for human rights “protection” can broadly be divided into the categories of 1) National institution for Human Rights (ICHR), 2) NGOs, 3) IOs (UN).

7.1 Treaty Bodies

The PA or PLO have not been accepted to sign any human rights treaties and are therefore presently not being monitored by any human rights treaty body.

Since PA’s ‘endorsement’ of CEDAW they have requested to be allowed to submit periodic reports, but have not been accepted by the committee. However OHCHR have accepted these reports, as part of their monitoring activity.¹⁹⁷

7.2 Special Rapporteur

The post of *Special Rapporteur to the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied since 1967* (Hereafter *Special*

¹⁹⁷ Tomic (2010)

Rapporteur) was established in 1993 as a special country-specific procedure under the Commission on Human Rights and later inherited by the Human Rights Council . The position is currently held by US professor emeritus Richard Falk. The mandate, however, is limited to covering “human rights violations committed by the occupying Power and not by the occupied people.” It therefore does “not consider the human rights record of the Palestinian Authority in the West Bank”¹⁹⁸

This limitation of the mandate has been criticized. For example AI in 2008 urged HRC to review the mandate and extend its scope to PA and other Palestinian actors as, in its present state, it “undercuts both the effectiveness and the credibility of the mandate.”¹⁹⁹ However, as it stands today, the special procedure does not cover human rights breaches of the PA.

7.3 Office of the High Commissioner for Human Rights (OHCHR)

Originally set up 1996 as a consultancy body to the new PA, advising on human rights standards. However, reporting was not part of its mandate.²⁰⁰

The mandate of OHCHR (oPt) was amended by a Human Rights Council Declaration in 2009. The mandate has now been extended to include reporting on the human rights compliance of the state of Israel, the Hamas *de facto* regime in the Gaza Strip as well as the Palestinian Authority. OHCHR (oPt) reports directly to the Human Rights Council.

The agency considers PA to be bound by human rights within the domestic legal framework as well as morally through the authority’s unilateral undertakings. In the recently initiated reporting on PA, the High Commissioner reports on breaches of conventions unilaterally “endorsed” by PA, as if they were internationally binding the

¹⁹⁸ UN Human Rights Council, *Human rights situation in Palestine and other occupied Arab territories : report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967* (2008) p6

¹⁹⁹ Amnesty International (2008)

²⁰⁰ Tomic (2010)

authority. This is however done while admitting that strictly legally speaking, these endorsements do not bind the PA.²⁰¹

Two aspects of the work, and development of, OHCHR in oPt must be commented on. First, the inclusion of PA into the mandate of OHCHR can be understood within the framework of an increased coverage of non-State actors depicted by Reinisch, and Clapham. The Palestinian Authority is presently covered within the UN Charter-based system for human rights monitoring, in a way comparable to a sovereign state. Two, the treatment by as authoritative a body as the OHCHR of PA's "endorsements" of human rights treaties as binding, while admitting that strictly speaking it's not, must be seen as an example of what Reinisch describes as an increased blurring of the line between law and moral standards and as an aspect of the trend towards quasi-legal accountability mechanisms for ensuring human rights compliance of non-state actors. This quasi-legal mechanism is approaching a proper legal mechanism. The step to opening up for holding PA legally bound by human rights, then, is being bridged.

7.4 Israel

In the periodic report to HRC 2001 Israel notes that

"the overwhelming majority of powers and responsibilities in all civil spheres (including civil and political rights, as well as a variety of security issues, have been transferred to the Palestinian Council, [...] In light of this changing reality, and the jurisdiction of the Palestinian Council in these areas, Israel cannot be internationally responsible for ensuring the rights under the ICCPR in these areas."²⁰²

This serves as an illustration of Israel's attitude to its own responsibility for ensuring the human rights compliance of PA, needless to say Israel does not in any way function as a guarantor for human rights in oPt, neither does the country consider

²⁰¹ Ibid.

²⁰² **List of issues to be taken up in connection with the consideration of the second periodic report of Israel** (2002) p 5

itself responsible to do so. It further seems to consider PA bound by human rights, as a non-state actor.

7.5 Domestic NGOs

A large number of NGOs monitoring the situation of human rights in oPt exist. Many of these focus solely on Israeli human rights breaches and are of less importance for the case before us.

In their submission to HRC for the 2009 report, the Israeli Association for Civil Rights regret Israel's view that the state is not bound by ICCPR in the oPt (for their own actions), but do not report on the human rights compliance of the PA, which must be taken as a sign that they do not view PA behaviour as attributable to Israel.²⁰³ The same approach is taken by the Palestinian human rights NGO Badil, in their 2009 report to HRC.²⁰⁴ The Palestinian Human Rights Monitoring Group, Palestinian Centre for Human Rights, as well as al Haq, hold the same view; Israel is not responsible for human rights abuses committed by PA.

A comprehensive analysis of the legal human rights responsibility of PA seems, however, to be lacking.

PA is described as having a moral responsibility due to its unilateral undertakings and 'endorsements' of human rights.²⁰⁵

Customary International Law binding PA in its capacity of a *de facto* regime is often referred to as a legal source.²⁰⁶

Domestic NGOs likewise see themselves as organizations monitoring PA compliance with its domestic laws, containing human rights provisions.²⁰⁷

²⁰³ NGO Information submitted by the Association for Civil Rights in Israel (ACRI) to the Human Rights Committee August (2009)

²⁰⁴ Badil's Written Report in Response to Israel's Third Periodic Report to the UN Human Rights Committee (2009)

²⁰⁵ Jabarin (2010), Abu Hasheesh (2010), Barghouti (2010), Eid (2010)

²⁰⁶ Jabarin (2010), Eid (2020)

Working methods consist largely in monitoring and reporting on PA's breaches of human rights.²⁰⁸ The Palestinian public and the 'international community' are the main targets of their reporting. Some NGOs are directly lobbying elements of the PA.²⁰⁹ The Israeli government, or society, is never an important target for publications on PA human rights compliance²¹⁰, other than as part of the "international community".²¹¹T

The referral to human rights as a moral responsibility, on many instances, points towards a non-legal understanding of "human rights".

In summary the NGO community, promoting human rights in relation to PA, seems to treat the authority like NGOs anywhere treat the sovereign state whose human rights compliance they want to affect.

Independent Commission for Human Rights (ICHR)

The PA equivalent of a national human rights institution. Receives individual complaints, is engaged in human rights advocacy directed towards the Palestinian public as well as in lobbying on all levels, from the president and prime minister to the security branches. They are likewise involved in advocacy directed towards the international community.²¹²

PA is seen to have responsibilities under CIL and is domestically bound by the human rights provisions in the Palestinian Basic Law.²¹³

²⁰⁷ Jabarin (2010), Abu Hasheesh (2010), Barghouti (2010), Eid (2010)

²⁰⁸ Jabarin (2010), Abu Hasheesh (2010), Barghouti (2010), Eid (2010)

²⁰⁹ Notably al-Haq, Jabarin (2010)

²¹⁰ Jabarin (2010), Abu Hasheesh (2010), Barghouti (2010)

²¹¹ Eid (2010)

²¹² Omran (2010)

²¹³ Ibid.

ICHR has no contact with the Israeli government and does not perceive any interest from their side on the PA human rights compliance. This further suggests, in theory and in practice, that Israel is in no way held responsible for PA abuses.

The organization refers to ICL as binding on PA, but admits reporting on human rights abuses falling outside of the scope of customary rights.²¹⁴ This suggests that whether PA strictly speaking is bound by international human rights law, or not, is of less importance.

In its latest legal report it is stated that

“given the fact that it has not yet become a state, the PA can not in any way join the existing international conventions of human rights. Therefore, the only legislative means by which the constitutional provisions could be implementable and apply the provisions of international conventions and covenants of human rights in its national legal system at this time, is through the integration of the provisions of those conventions and agreements, particularly the conventions relating to torture and illtreatment into the Palestinian national legislation.”²¹⁵

The starting point of ICHR then is to monitor PA behaviour from the perspective of PA’s own declared national commitments, rather than from its international obligations according to IHRL.

ICHR seems to function in many ways like a national human rights institution in any other country. It is since 2009 permitted as a member in the ICC, the International Coordinating Committee of National Human Rights Institutions.²¹⁶

7.6 Conclusions

A comprehensive analysis of PA’s responsibility under International Human Rights Law seems to be lacking among the human rights community in oPt.

There seems to be a consensus, however, among civil society organizations, international organizations, Israel, PA and the “national institution”, that PA is to be

²¹⁴ Ibid.

²¹⁵ ICHR, *A legal review of provision on torture in the Palestinian legal system* (2009) p13

²¹⁶ Omran 2010

held directly responsible for its own abuses of human rights, and that Israel is relieved from its responsibility, other than for their own abuses.

Human rights in relation to PA is today protected through a combination of “quasi-legal” and “extra-legal” procedures holding PA directly responsible for human rights abuses.

This must be interpreted as an increased willingness among the international community to hold *de facto* regimes accountable for abuses of human rights, even though the legal framework and accountability mechanisms are still partly missing.

It further displays a discrepancy between the legal framework, still largely state-focused, and practice among the UN charter-based system, NGOs, national institutions, in this particular case unambiguously holding the non-state actor responsible for its breaches of human rights. However, the somewhat stronger enforcement mechanisms in hands of the treaty bodies lacking.

8 A pragmatic approach: Who *should* be held responsible for human rights?

Having concluded that there are good doctrinal arguments supporting the view that Israel has the responsibility for the human rights compliance of PA, admitting that there likewise is some substance in the argument that PA itself could have binding obligations, while noticing that the international and domestic human rights community treats PA as the only body responsible for its own abuses, we must ask ourselves which approach best serves the aim of protecting the human rights of Palestinians living under PA rule. I will propose a pragmatic approach.

Human rights have been understood to operate on three levels: as the rights of individuals, as state obligations and as legitimate expectations of the international community.²¹⁷ Until now we have been dealing with obligations. If we shift our focus to the rights of individuals, it should be clear, from the above discussions, that the

²¹⁷ UN Commission on Human Rights, *Addendum to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Sri Lanka* (2005) para. 25

Palestinians living in PA-controlled land are entitled to almost the entire scope of human rights.

The authors of *Human Rights and the Non-State Universe*²¹⁸, who try to overcome the discrepancy between the state-centrism of the classical human-rights paradigm and the increasingly fragmented post-Westphalian world of today, propose a *functionalist* approach to human rights responsibility, which focuses on *governance*, rather than solely on the state, and

“implies a pragmatic approach to protection, promotion and enforcement. We should favour what works, looking for creative ways to secure human rights. The variance of systems of governance in our world warrants a corresponding variety of regulatory approaches”²¹⁹.

From this viewpoint the question we should ask ourselves is how best to deal with the fact that PA abuses human rights.

As noted by Benvenisti, and in the analogous case of American Indian tribes by Cowan²²⁰, holding Israel responsible for human rights breaches of PA would imply an obligation on the state to intervene in the internal affairs of PA in order to secure compliance with Israel’s duties under international human rights law. A closer reading of the Oslo accords, calling for coordination of the mutual policies, might further suggest such a policy.

This raises several questions. First, areas like the parts of oPt transferred to PA, have often been given its special status of autonomy as a solution to historic injustices and situations of armed conflict. For the international community to hold Israel responsible for breaches of its human rights commitments by PA would in practice effectively limit the autonomy conferred to such authorities. Holding Israel responsible implies a request on Israel to interfere with PA’s dealings with Palestinian citizens, something that most probably would lead to a higher degree of tensions and

²¹⁸ Goodhart 2006, in *Non-State Actors in the Human Rights Universe*

²¹⁹ *Non-State Actors in the Human Rights Universe* (2006) p38

²²⁰ Cowan (2006), p42-43

not necessarily to a better, maybe worse, PA compliance with human rights law. Benvenisti observes that

“Any Israeli attempt to intervene in the actual exercise of powers by the PA in the name of Israel’s responsibility for the protection of human rights of Palestinians would necessarily be viewed as a pretext for uncalled-for interference in domestic affairs. Such interference would not be welcomed and inevitably would lead to controversy.”²²¹

Secondly, if the granting of autonomy is a step towards enhanced enjoyment of the rights to self-determination²²², as given by common article 1 of the UN Charter as well as common article 1 of ICCPR and ICESCR, the international community would severely limit such enjoyment by motivating the central government to interfere in the name of human rights protection. The right to Self-determination has an *erga omnes* nature obliging all states to support its realization.²²³ It appears as, in this case, there is a conflict between the right to self-determination, and the rest of the human rights spectrum, if read through the lens of a traditional state-centred approach. The self-determination of Palestinians would, however, be further enhanced by treating PA as directly responsible.

Thirdly, in oPt, as well as in similar cases, the central state, Israel, would most probably have a very low credibility as a human rights guarantor in an autonomous region, given the ongoing conflict as well as past and present severe breaches of the human rights of Palestinians. It seems likewise unlikely that Israel, with its already burdened human rights record, would like to see itself held accountable for violations committed by PA.²²⁴

²²¹ Benvenisti 1994 p314

²²² The agreements, notably, contain no specific reference to the right to self-determination of the Palestinian people. However, it has been observed that “the Declaration has clearly been agreed upon in the perspective of selfdetermination, as can be easily inferred from both the text and the context” Cassese (1993) p5

²²³ Goldstone Report Para. 269 at 83

²²⁴ In fact, as we have seen, Israel claims not to be bound by its human right obligations at all in relation to the West Bank and Gaza Strip, even less so by actions committed by PA.

Fourthly, a common argument against the extension of IHRL to armed groups is that these, as opposed to states, have not accepted obligations by ratifying conventions.²²⁵ As we have seen, PA has repeatedly expressed their will to be bound by IHRL, giving yet another reason to hold PA responsible.

Lastly, and maybe most importantly, human rights were created to regulate the relationship between a government and the individual subject.²²⁶ This is further supported by the *Burgos* test for “jurisdiction”. Regardless of the limits to the powers of PA, its *functional* relationship to the Palestinians under its authority resembles, all in all, closely, if not completely, that of any government to its subjects. The human rights regime seems, in that situation, best fit to hold PA directly responsible.

With these arguments in mind it seems obvious, if our aim is to improve the enjoyment of human rights among the Palestinians residing in oPt, that we should favour a development towards enhanced obligations and accountability for PA and similar non-state actors. Eyal Benvenisti seems to take a similar stand arguing that PA should be held directly responsible, and that such a responsibility should be spelled out²²⁷

Approaching the question of responsibility of PA in the light of ILC’s articles on state responsibility or holding Israel responsible under *due diligence* obligations appears unfruitful if our aim is to protect human rights.

The human rights community in oPt seems to have adopted the same approach, suggesting a development towards holding PA responsible. Whether this is followed by a development of positive law in the same direction remains to be seen. Anyhow, the case of PA seems to give credit to Clapham’s view.

²²⁵ Zegveld (2002) P41

²²⁶ Ibid. p53

²²⁷ *The Arab-Israeli Accords* (1996) pp62-65

9 Conclusions

As a final step I will now try to wrap up the findings of this essay.

In the first section we saw that there is strong support within IHRL to hold Israel responsible for PA's abuses of human rights. The legal base for holding PA horizontally responsible under IHRL seems more questionable as the law stands today.

The practice among human rights promoters in oPt gives evidence of a willingness to hold PA directly responsible, with the "extra-legal" and "quasi-legal" means available.

From a pragmatic approach there are likewise strong arguments to hold PA directly responsible.

This points towards the desirability of a clear recognition of *horizontal* human rights obligations of *de facto* regimes. If our aim is to protect human rights, we should favour such an evolvement.

This should be coupled with corresponding mechanisms for accountability for such structures of governance as PA.

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