

FILLING THE LACUNA: *DE FACTO* REGIMES AND
EFFECTIVE POWER IN INTERNATIONAL
HUMAN RIGHTS LAW

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International human rights law is taking a teleological trajectory. International organizations and scholars increasingly agree that a de facto regime exercising effective power over a territory can commit human rights violations. However, it is unclear when an armed group may be classified as a de facto regime. This article argues that armed groups should have human rights obligations because of the factual trigger of necessity created by a legal lacuna and the limited international legal personality of the de facto regime. A de facto regime gains a quasi-governmental complexion when it exercises effective power over territory, which enables its participation in the international community. By acting in the international forum, the regime is subjected to duties and obligations under international human rights law. To this end, the doctrine of effective power is the sine qua non that anchors the de facto regime to its human rights obligations.

This paper contributes to the ongoing discourse on armed groups and human rights law by examining similar concepts of authority and control in the contexts of extraterritorial human rights obligations, belligerent occupation, and the law on state responsibility. Synthesizing these bodies of law reveals three elements constitutive of effective power: (i) an armed group's ability to assert authority; (ii) its displacement of the original government; and (iii) the independence of its existence. If these three factors are satisfied, the de facto regime acquires functional international legal personality, and has obligations under human rights law. These obligations depend on the extent to which it exercises spatial control over the territory. Thus, effectiveness is a sliding scale tailored to how onerous the human rights obligations are. The extent of obligations the de facto regime owes is proportionate to its capacity to realize them.

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I. INTRODUCTION

Non-international armed conflicts (NIACs) occur with increasing frequency post-World War II, as international armed conflicts grow rarer.¹ In protracted NIACs, non-state armed actors actively engage with civilian populations through the exercise of public powers such as the establishment of courts and the collection of taxes.² Some of these armed actors operate as

1. HUMAN SEC. REPORT PROJECT, HUMAN SECURITY REPORT 2009/2010: THE CAUSES OF PEACE AND THE SHRINKING COSTS OF WAR 160 (2011).

2. For instance, many armed groups established courts and collected taxes in the territories they exercise control over, such as the Liberation Tigers of Tamil Eelam in Sri Lanka, the New People's Army in the Philippines, and Hezbollah in Lebanon, among others. See Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Promotion and Protection of all Human Rights, Civil, Political, Economic and Cultural Rights*,

de facto regimes (DFRs) in a legal vacuum where the *de jure* authorities cannot protect or fulfil human rights obligations.³

International human rights law (IHRL) can and should bind these armed groups. Traditionally, IHRL regulates vertical obligations between the State and individuals.⁴ When *de jure* governments lose effective control over a territory and lack the capacity to uphold human rights in that area of the State's territory,⁵ these armed groups assume responsibility for the human rights of the inhabitants in the territory. This prevents the inhabitants from being deprived "even of the minimum standard of rights to which they are entitled."⁶

The international community is increasingly willing to respond to practical realities to overcome this schism between "the actual and the normative,"⁷ instead of being bound by strict legality. In particular, international organizations and scholars recognize that when the primary duty-bearer, the *de jure* government, becomes ineffective, armed groups that exer-

Including the Right to Development: Mission to Philippines, ¶ 32, U.N. Doc. A/HRC/8/3/Add.2 (Apr. 16, 2008) (discussing the New People's Army); Michael T. Kindt, *Hezbollah: A State Within a State*, in *THE WORLD'S MOST THREATENING TERRORIST NETWORKS AND CRIMINAL GANGS* 123, 123 (Michael T. Kindt et al. eds., 2009) (Hezbollah); Kristian Stokke, *Building the Tamil Eelam State: Emerging State Institutions and Forms of Governance in LTTE-Controlled Areas in Sri Lanka*, 27 *THIRD WORLD Q.* 1021, 1022 (2006) (Liberation Tigers of Tamil Eelam).

3. The practical reality of this difficulty was illustrated by Philip Alston in 2006 where he observed: "When I asked police officers why a particular killing had not been resolved, I generally received the same answer: the suspect escaped into an LTTE-controlled area. . . . [I]t is true that the police are unable to enter these areas." Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings), *Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Mission to Sri Lanka (28 November to 6 December 2005)*, ¶ 34, U.N. Doc. E/CN.4/2006/53/Add.5 (Mar. 27, 2006).

4. The subject of international human rights law in multilateral treaties is the State. For instance, Article 2(1) of the International Covenant on Civil and Political Rights holds that "[e]ach State Party to the present covenant undertakes to respect and to ensure to all individuals within its territory." International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171.

5. Cedric Ryngaert, *Human Rights Obligations of Armed Groups*, 2 *REVUE BELGE DE DROIT INTERNATIONAL* 355, 368 (2008).

6. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, ¶ 96.

7. KATHARINE FORTIN, *THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW* 245 (2017).

cise “*de facto* control over a part of a State’s territory” gain human rights obligations in that territory.⁸

This paper addresses the issue of when an armed group exercises *de facto* or effective power. The doctrine of effective power serves as a necessary anchor and ensures that IHRL remains effective, meaningful, and grounded in concrete realities.⁹ It is a nexus between the non-state characteristic of DFRs exercising quasi-governmental functions and international human rights obligations. The effective power doctrine enables the continued efficacy and validity of the international legal order.¹⁰

Clarifying the substantive content of this doctrine is a necessary endeavour when assessing the accountability of DFRs for their human rights violations. Assertions that armed groups can be held accountable for human rights violations are not typically accompanied by a rigorous analysis of what exactly effective power means.¹¹ The insufficient examination of the content of this doctrine means that the doctrine resembles an *ex post facto* conclusory label, rather than a meaningful test for determining when armed groups become subject to human rights obligations. This paper contributes to the ongoing discourse by answering the overarching question of what effective

8. The Secretary-General’s Panel of Experts on Accountability in Sri Lanka used this language, which is reflective of an increased willingness of international organizations to recognize the human rights obligations of these groups. U.N. Secretary-General, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, ¶ 188 (2011) [hereinafter *Report on Accountability*].

9. Demopoulos v. Turkey, 2010–I Eur. Ct. H.R. 365, ¶ 85.

10. This is otherwise known as the principle of *ut res magis valeat quam pereat*. HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 121 (Routledge 2017) (1949).

11. For instance, in *Cyprus v. Turkey*, reference was made to how the armed group in the region was a “*de facto* authorit[y]” without deciding which factors would be dispositive. See *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, ¶ 96 (“To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context . . .”). Similarly, the U.N. Annual Report on the protection of civilians in Afghanistan makes a similar assertion when it suggests that “international human rights law increasingly recognizes that where non-State actors, such as the Taliban, exercise *de facto* control over territory, they are bound by international human rights obligations.” HUMAN RIGHTS UNIT, UNITED NATIONS ASSISTANCE MISSION IN AFG., *AFGHANISTAN ANNUAL REPORT 2011: PROTECTION OF CIVILIANS IN ARMED CONFLICT* iv (2012).

power is and determining when a DFR can have international human rights obligations.

This paper has three sections. These three sections advance the central thesis that DFRs possess effective power over territory when they have an independent existence and exercise exclusive authority over territory that displaces the original government. The quasi-governmental powers that they exercise elevate them to a limited form of international legal personality. They can effectively participate in the international forum and are accountable for human rights violations.

Section II defines the terms that are central to this debate. It clarifies what a DFR is and explains the basis of the term *de facto*, in contrast to *de jure*. It distinguishes between DFRs and other similar political entities such as *de facto* states, national liberation movements, and belligerent and insurgent groups. Furthermore, it clarifies whether effective power is distinct from other similar terms, such as effective authority and effective control, both of which appear in various contexts.

Section III contextualizes the significance of the effective power doctrine by elaborating on why DFRs should be bound by IHRL. This paper does not suggest that *all* armed groups should be held accountable for human rights obligations, including obligations to respect, protect, and fulfil human rights.¹² This paper is concerned only with armed groups that are DFRs.¹³ When a legal lacuna arises in the territory of DFRs, the void must be filled by DFRs. The underlying premise that

12. Under IHRL, duty holders must respect, protect, and fulfill human rights. "The obligation to respect means that [duty holders] must refrain from interfering with . . . the enjoyment of human rights. The obligation to protect requires [duty holders] to protect individuals . . . against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of human rights." *International Human Rights Law*, UNITED NATIONS OFFICE HIGH COMM'R HUMAN RIGHTS, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited Nov. 18, 2018).

13. The position that all armed groups should bear human rights obligations is still relatively controversial and is an idea that has not been embraced unanimously by the international community. However, most have accepted that DFRs, as a subset of armed groups, can have human rights obligations despite the lack of clarity of when this might be so. See, Jonte van Essen, *De Facto Regimes in International Law*, 28 *UTRECHT J. INT'L & EUR. L.* 31, 38 (2012) (discussing how the international community has responded to the need for DFRs to have human rights obligations).

only states are accountable for human rights violations is descriptively and prescriptively problematic, because multiple types of effective actors in the international forum have rights and obligations under international law. The effective power that DFRs exercise in international decision-making as a result of their quasi-governmental authority makes them international legal personalities with legal duties and obligations. This is logically distinct from recognizing DFRs as states, a distinction which reconciles the political concerns of legitimizing DFRs with the need to hold DFRs accountable for human rights violations.

Section IV substantiates the doctrine of effective power by identifying the factors relevant to a determination of when a DFR is exercising effective power, as well as what the necessary threshold is for this power to be effective. In so doing, this paper grounds the theoretical in the practical and provides a springboard for greater accountability for human rights violations by DFRs. This article draws from three areas of international law where scholars and practitioners already use similar concepts of control and power: the law of state responsibility, the extraterritorial human rights obligations of state actors, and the law of belligerent occupation.¹⁴ The article then distills three factors from the above concepts that identify whether the armed group exercises public powers in a legal lacuna: (i) the ability to assert authority; (ii) the displacement of the original government; and (iii) the independence of the armed group's existence. The greater the ability of the DFR to assert its authority, the more likely a DFR will effectively meet more onerous human rights obligations. To this extent, the threshold for effectiveness turns on the obligations cast on the DFRs, with the negative obligation to respect human rights attracting the lowest degree of effectiveness, and the positive obligation to fulfil human rights attracting the highest.

14. This extends beyond what the pre-existing academic literature has done. For instance, Katharine Fortin, who has written extensively on this topic, has only sustained an analysis of effectiveness on the law of State responsibility. FORTIN, *supra* note 7, at 251–53. However, this paper argues that this approach is insufficient, insofar as similar concepts of effective control exist in other areas of international law that are worth comparing and contrasting to reconcile any contradictions between these different legal regimes.

II. DEFINING EFFECTIVE POWER AND *DE FACTO* REGIMES

This article defines DFRs as entities that exercise effective authority over territory within a state.¹⁵ These regimes are *de facto*, as opposed to *de jure*, because an illegal use of force often accompanies their rise to power. This results in other governments refusing to recognize the legality of these regimes, such that the regime does not hold full international personality. These regimes possess authority and control as a matter of fact, rather than a matter of law, because they are not the legal or legitimate government of the territory despite possessing actual control and power over the territory.¹⁶

DFRs are distinguishable from *de facto* states, which seek “full constitutional independence and widespread international recognition as a sovereign state.”¹⁷ Two examples of *de facto* states are the Republic of Somaliland and the Republic of Kosovo. In contrast, DFRs desire to be “recognized by the international community as being the official government of an already existing state,” and intend to “leav[e] the parent state and its territories intact.”¹⁸ DFRs are also distinct from other armed groups, such as belligerent and insurgent groups. The difference lies in the extent to which the different groups exercise effective power—for the purposes of this paper, a belligerent group capable of exercising effective power is a DFR.

This paper uses the terms effective power, effective authority, and effective control interchangeably. As defined by Merriam-Webster, power is the possession of control and authority.¹⁹ The only difference among the three terms is the context in which they are typically used. While occupation law and extraterritorial human rights obligations usually refer to “effective control,”²⁰ the language used by international orga-

15. Michael Schoiswohl, *De Facto Regimes and Human Rights Obligations—The Twilight Zone of Public International Law?*, 6 AUSTRIAN REV. INT’L & EUR. L. 45, 50 (2001).

16. *Legal English: “De Facto/De Jure,”* WASH. UNIV. LAW (Dec. 28, 2012), <https://onlinelaw.wustl.edu/blog/legal-english-de-factode-jure/>.

17. SCOTT PEGG, INTERNATIONAL SOCIETY AND THE *De Facto* State 26 (1998).

18. Van Essen, *supra* note 1315, at 33.

19. *Power*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/power> (last visited Nov. 18, 2018).

20. For instance, in *Cyprus v. Turkey*, 2001-IV Eur Ct. H.R. 1, ¶¶ 75–77, Turkey was deemed to have “effective control” over northern Cyprus. In de-

nizations in calling for DFRs to respect human rights obligations is usually centred around effective power and “*de facto* authority.”²¹

III. WHY *DE FACTO* REGIMES SHOULD HAVE INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS

Ostensibly, matters of practicality take center stage: NIACs these days are notably protracted and inconclusive,²² such that ordinary life continues. Many aspects of people’s lives are not directly connected to the armed conflict²³ and fall outside the ambit of the protections offered by international humanitarian law.

This debate is framed by the principle of *ex factis jus oritur*—“the law arises from the facts”²⁴—because of the inexorable connection of the “world of law to its ability to display effects in the world of fact and vice versa.”²⁵ The so-called world of fact arises when legitimate governments lose effective control over territory. They can no longer protect and fulfil human rights obligations in that territory, including protecting individuals against harms done by armed groups. If DFRs that displace the government’s effective control have no human rights obligations in that territory, a substantive gap exists in protecting individuals during protracted NIACs. In

termining whether Gaza is occupied, Elizabeth Samson has analyzed the issue through the lens of whether Israel’s actions “rise to the level of occupation under international law with respect to the legal requirements for ‘effective control.’” Elizabeth Samson, *Israel, Gaza, and the End of “Effective Control,”* OPINIO JURIS (Apr. 26, 2012), <http://opiniojuris.org/2012/04/26/israel-gaza-and-the-end-of-effective-control/>.

21. For instance, in *Cyprus v. Turkey*, reference was made to how the armed group in the region was a “*de facto* authority.” *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, ¶ 86. Separately, the United Nations’ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stated that the Declaration was meant to be a guideline for states and “other entities exercising effective power.” G.A. Res. 3452 (XXX) (Dec. 9, 1975).

22. As the ICRC noted in 2009, they have been present in conflicts for two, three, or even four decades. INT’L COMM. OF THE RED CROSS, ANNUAL REPORT 2009, at 88 (2010).

23. FORTIN, *supra* note 7, at 58.

24. *Id.* at 242.

25. Salvatore Zappalà, *Can Legality Trump Effectiveness in Today’s International Law?*, in REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 105, 105 (Antonio Cassese ed., 2012).

particular, there is a gap in norms governing the enforcement of positive obligations, such as the affirmative obligation to protect the right to life and the core subsistence rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁶

Additionally, international humanitarian law is insufficient to plug this gap, as it is mainly concerned with prohibitions of conduct, rather than the enforcement of positive obligations to protect individuals.

However, while the practical reality of the factual situations of NIACs is *a* factor that may justify departing from strict legal rules, necessity alone cannot serve as *the* factor for doing so. This avoids committing a logical fallacy: the necessity for *someone* to realize human rights in a territory does not mean that DFRs *must* fill that lacuna. Accordingly, tethering DFRs to their duties under IHRL requires a stronger normative base.

This paper proposes two models for establishing IHRL obligations for DFRs. The first model recognizes DFRs as *de facto* states, such that the doctrine of effective power provides a relevant criterion for elevating DFRs to state status. This model, however, falls prey to concerns of illegality under international law and the refusal of other states to recognize DFRs. The second, and preferable, model is more conservative. It views DFRs as a limited form of international legal personality, with rights and obligations flowing from authority and participation in international relations, regardless of statehood. In this second model, the doctrine of effective power is the *sine qua non* of establishing the legal personality of the regime.²⁷

In sum, because DFRs exercise effective power in a legal lacuna, they obtain international legal personality and accompanying obligations and duties under IHRL.

26. See Amrei Müller, *Limitations to and Derogations from Economic, Social and Cultural Rights*, 9 HUM. RTS. L. REV. 557, 601 (2009) (discussing the core subsistence rights in the ICESCR, namely, “the right to be free from hunger, to basic health care, clothing and shelter.”)

27. This is similar to Liesbeth Zegveld’s argument that effective authority is “a precondition for accountability under human rights law.” LIESBETH ZEGVELD, *THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 149 (2002).

A. *Practical Reality: The Normative Lacuna*

Scholars and practitioners have taken an increasingly functional approach to international law. In the *Reparations* Advisory Opinion, the International Court of Justice (ICJ) stated, “the development of international law has been influenced by the requirements of international life.”²⁸ In the *Namibia* Advisory Opinion, when deciding the mandate system established by Article 22 of the Covenant of the League of Nations, the ICJ applied an evolutionary reading to treaty interpretation. It held that:

[T]he Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—‘the strenuous conditions of the modern world’ and ‘the well-being and development’ of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the ‘sacred trust.’²⁹

This opinion paved the way for a teleological development of international law, where practical realities such as a legal vacuum cannot be ignored. In *Cyprus v. Turkey*, the European Court of Human Rights (ECtHR) explained how a vacuum in the protection of human rights manifests:³⁰

Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts To hold otherwise would amount to *stripping the inhabitants of the territory of all their rights* whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.³¹

While the ECtHR fell short of imputing the violations of the European Convention of Human Rights (ECHR) directly

28. *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 178 (Apr. 11).

29. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 53 (June 21).

30. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, ¶ 91.

31. *Id.* ¶ 96 (emphasis added).

to the Turkish Republic of Northern Cyprus (TRNC) as a non-state actor,³² the ECtHR's judgment reflected the practical reality of a legal vacuum existing in territory effectively controlled by non-state actors. In this vacuum, the State cannot protect and fulfil human rights in the territory where it no longer holds effective control. Specifically, the State can no longer protect individuals from the conduct of an armed group. Under the traditional international law framework, such armed groups need not respect human rights. International law must address *de facto* regimes as a matter of practicality, because "they will usually have ousted the parent sovereign from its sphere of effective governance and thus represent the sole, albeit illegitimate, authority for a given region."³³

Ilascu v. Moldova and Russia exemplifies this point.³⁴ In that case, the ECtHR held that a state's human rights obligations may be tailored to its capacity, depending on whether it exercises effective control over certain parts of its territory. In recognizing that ECHR obligations can be "divided and tailored"³⁵ between duty-bearers, the ECtHR tempered the positive obligation under Article 1 of the ECHR, due to the factual and effective exclusion of Moldova from Transdniestria. Due to the armed occupation by the Russian Federation, Moldova did not "exercise authority over part of its territory"³⁶ and could not "re-establish its authority over Transdniestrian territory."³⁷ The reality of these circumstances reduced Moldova's obligations. Moldova, at the minimum, had to "take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention."³⁸ The ECtHR found that the alleged acts fell within Russia's jurisdiction and responsibility.³⁹

32. Rather, the ECtHR found that Turkey was in breach of its extraterritorial obligations under the Convention. *Id.* ¶ 102.

33. MICHAEL SCHOISWOHL, STATUS AND (HUMAN RIGHTS) OBLIGATIONS OF NON-RECOGNIZED *De Facto* Regimes in International Law: The Case of 'Somaliland' 209 (2004).

34. *Ilascu v. Moldova*, 2004-VII Eur. Ct. H.R. 1, ¶ 330.

35. *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99, ¶ 137.

36. *Ilascu*, 2004-VII Eur. Ct. H.R. ¶ 330.

37. *Id.* ¶ 341.

38. *Id.* ¶ 331.

39. *Id.* ¶ 394.

Ilascu is valuable in two respects. *First*, the crucial takeaway from *Ilascu* is the Court's flexibility in reducing the human rights obligations of states when they lose effective control over their territory. The loss of control produces a legal vacuum in the region where the obligations to respect, protect, and fulfil a minimum baseline of rights have no clear duty-bearer.

The vacuum that arises, however, is not a *complete* one. Thomas Grant argues that in *Ilascu*, Moldova still has some human rights obligations in the territory even though another state displaced effective government control. This is due to the fact that Moldova did not "cease to have jurisdiction within the meaning of Article 1 of the Convention."⁴⁰ According to Grant, Moldova's continuing positive obligations to take diplomatic and legal efforts vis-à-vis other states and international organizations indicate some degree of continuing obligation for rights protection by that State in the territory.⁴¹ He argues that this mirrors the approach taken by other human rights institutions.⁴² For instance, he raises the example of the Committee on Economic, Social and Cultural Rights (CESCR) asking Ukraine, in light of the "recent events in Crimea and its annexation by the Russian Federation," what measures it would take "to ensure that the cultural and linguistic rights of the Crimean Tatars were upheld."⁴³ Tacit in this question is the notion that Ukraine still retains a degree of human rights obligations in the territory and should, at least, take steps to realize human rights based on what is reasonable in the factual circumstances.⁴⁴

Nonetheless, Grant's argument is not inconsistent with the notion that there is a lacuna with regard to *certain* obligations under the Convention, even if it is not a complete void. While Moldova retained positive obligations under Article 1 of the ECHR, this level of protection is, in Grant's own words,

40. *Id.* ¶ 333.

41. Thomas D. Grant, *Ukraine v. Russian Federation in Light of Ilascu: Two Short Points*, EJIL: Talk! (May 22, 2014), <https://www.ejiltalk.org/ukraine-v-russian-federation-in-light-of-ilascu-two-short-points/>.

42. *Id.*

43. Comm. on Econ., Soc. & Cultural Rights, Fifty-Second Session: Summary Record of the 4th Meeting, ¶ 41, U.N. Doc. E/C.12/2014/SR.4 (Apr. 29, 2014).

44. Grant, *supra* note 41.

tempered. If a state only retains a minimal degree of jurisdiction over territory it does not factually control, the protection and fulfilment of rights in that territory hollows and results in a lacuna. In such situations, the state does not have a direct obligation to protect individuals against the acts of armed groups and no longer holds responsibility for the acts of armed groups under the laws of state responsibility.

Second, this lacuna, in and of itself, does not *automatically* create legal obligations for DFR assumption of these obligations in the territory. In *Ilascu*, Russia was within the jurisdiction of Article 1 of the ECHR because of its “effective authority” or “decisive influence” over the Moldova Republic of Transdnistria (MRT), which exercised control in the region.⁴⁵ Russia violated Articles 3 and 5 of the Convention as a result of the ill-treatment inflicted on the applicants, the conditions of the applicant’s detention while threatened with execution, and the death sentence imposed by the Supreme Court of the MRT.⁴⁶ The ECtHR filled the legal void with the extraterritorial obligations of Russia.⁴⁷ Similarly, in *Cyprus v. Turkey*, the Court found that Turkey breached its extraterritorial obligations as a result of the “effective control” it exerted in Cyprus.⁴⁸ These examples demonstrate how the DFRs do not necessarily need to fill the void⁴⁹ and point toward the need for a stronger foundation for extending human rights obligations to DFRs. Reasoning *only* from necessity does not provide a strong enough link between the DFR’s authority and obligations under international law. This undermines the logic of Murray’s argument, insofar as this argument relies solely on necessity in grounding the human rights obligations of DFRs:

That states will not, and cannot, be held responsible for the actions of de facto entities existing beyond

45. *Ilascu v. Moldova*, 2004-VII Eur. Ct. H.R. 1, ¶ 392.

46. *Id.* ¶¶ 442, 464.

47. *Id.*

48. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, ¶ 77.

49. It is worth noting that not all NIACs take the form of the conflict in Moldova. For instance, where a NIAC does not have external state influences, it would be difficult to find extraterritorial obligations on the part of another state if there is no other state involvement in the NIAC. In that situation, the necessity for the lacuna to be filled by the DFR is stronger than in the fact pattern of *Ilascu*. Nonetheless, it is still important to furnish a conceptual basis for DFRs to have human rights obligations.

their control *confirms the necessity of directly subjecting the armed groups themselves to the rule of international law, so that they may be held to account and a legal vacuum avoided.*⁵⁰

In this line of logic, Liesbeth Zegveld suggests that the gap in substantive law protecting individuals during NIACs is not as large as some suggest, as international humanitarian law provides the most essential protections for individuals through Common Article 3⁵¹ and Protocol II.⁵² In other words, international humanitarian law fills this normative gap during NIACs. According to Zegveld:

*The specific contribution of human rights standards to the content of these instruments is not significant, because the non-derogable norms are in essence reflected in international humanitarian law. Related to this point is that the problems characteristic of internal conflict differ so markedly from the human rights context that the application of the same human rights principles will yield different rules, adjusted to the specific circumstances prevailing in conflict situations. This means that when applied in time of armed conflict, human rights norms will lose their specificity and come very close to or will even be identical to norms of international humanitarian law.*⁵³

50. DARAGH MURRAY, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ARMED GROUPS 132 (2016) (emphasis added).

51. Common Article 3 is common to the four Geneva Conventions, and applies both to international armed conflicts and IACs. As such, when looking at the application of humanitarian law to armed groups that have a non-state character, Common Article 3 is of particular importance. See Lindsey Cameron et al., *Article 3: Conflicts Not of an International Character*, in COMMENTARY ON THE FIRST GENEVA CONVENTION 126, ¶ 388 (Knut Dörmann et al. eds., 2016) (“[H]umanitarian law binds all Parties to the conflict, State and non-State alike.”).

52. Protocol II is of particular relevance because of how it applies to NIACs, in contrast to the other provisions in the Geneva Conventions, which are concerned with international armed conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

53. ZEGVELD, *supra* note 27, at 52–53 (emphasis added).

Zegveld asserts that instead of extending human rights obligations to armed groups, international humanitarian law is better suited to filling the lacuna during NIACs.⁵⁴

However, the present factual matrix of this paper is distinct from Zegveld's proposition for two reasons. First, human rights law offers greater protection than international humanitarian law in certain aspects. These aspects include the right to work, the right to freedom of expression, and the right to freedom of movement.⁵⁵ Second, and more importantly, Zegveld's argument primarily discusses the extension of human rights obligations to all armed groups generally, and not DFRs specifically.

Furthermore, Zegveld's conception of "problems characteristic of internal conflict" sits in the domain of negative obligations, to which international humanitarian law provides more circumscribed protections than IHRL.⁵⁶ One example of this is the protection of the lives of certain categories of persons and the personal safety of persons that armed groups hold captive.⁵⁷ International humanitarian law provides a more substantive protection in these situations as opposed to a general obligation to protect human rights. However, this article focuses on the obligations of DFRs in *protracted* NIACs where DFRs should have positive obligations in addition to the negative obligation to respect human rights. Positive obligations to protect and fulfil the right to health cannot be derived adequately from international humanitarian law.⁵⁸ In addi-

54. *Id.* at 53.

55. FORTIN, *supra* note 7, at 67.

56. ZEGVELD, *supra* note 27, at 52.

57. For instance, in a press release, the Inter-American Commission urged a Colombian armed group to respect the life and the personal safety of a person it was holding captive and whom it threatened to execute. Press Release, Inter-Am. Comm'n on Human Rights, No. 13/96 (June 3, 1996), <http://www.cidh.org/Comunicados/English/1996/Press%208-14.htm>.

58. International humanitarian law includes certain protections for health. For instance, it provides protections for medical personnel and the wounded and sick. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 79–86 (2005) (Rule 25. Medical Personnel); *id.* at 400–03 (Rule 110. Treatment and Care of the Wounded, Sick and Shipwrecked). International humanitarian law fails to fully address the necessity for the availability and accessibility of health services to the civilian population: for instance, in Iraq, the killing and kidnapping of doctors during armed conflict violated human-

tion, it is unclear if international humanitarian law provides guidance on whether DFRs should prevent armed attacks that violate the right to life, or secure the prosecution of persons violating the right to life.⁵⁹ The fact that occupation law, which creates certain positive obligations for occupiers to protect the inhabitants of the occupied territory against acts of human rights abuses,⁶⁰ does not apply to NIACs⁶¹ exacerbates the problematic lack of positive obligations.

To this end, international law must address the lacuna of obligations to respect, protect, and fulfil human rights. In protracted NIACs, DFRs can secure the realization of rights in territory they exercise effective control over, either by respecting human rights by refraining from interfering with the exercise of rights, or protecting and ensuring human rights through positive obligations.

B. *Model I: De Facto Regimes as Effective Governments and De Facto States*

Under IHRL, states must respect, protect, and fulfil human rights embedded in the multilateral treaties they have signed and ratified.⁶² Model I proposes a solution to the non-state complexion of DFRs by elevating them to statehood, resulting in imposition of human rights obligations. The localized nature of human rights treaties means that the obliga-

itarian law, but the resulting emigration of health professionals meant that health care services deteriorated. While this does not result in a humanitarian law violation, human rights law is violated because States must ensure that health services are available in sufficient quantities. *See* Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶ 12(a), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (requiring the ability of health services); Katherine H. A. Footer & Leonard S. Rubenstein, *A Human Rights Approach to Health Care in Conflict*, 95 INT'L REV. RED CROSS 167, 168–69 (2013) (discussing this requirement under international humanitarian law).

59. These are positive obligations under the right to life. *See, e.g.*, Human Rights Comm., Concluding Observations of the Human Rights Committee: Columbia, ¶¶ 18, 25, U.N. Doc. CCPR/COL/CO/6 (Aug. 4, 2010).

60. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 178 (Dec. 19).

61. *See* YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* ¶ 76 (2009) (discussing the non-application of occupation law to NIACs).

62. *International Human Rights Law*, *supra* note 12.

tions imposed by these treaties continue even when there is a “change in government of the State party, including dismemberment in more than one State or State succession,”⁶³ resulting in the continued protection of the people in the territory. Under Model I, the DFR is a succeeding state and inherits the human rights obligations consented to by the previous government.

The first step in determining how DFRs may be considered states is the Montevideo Convention, which codifies customary international law on the definition, rights, and duties of statehood.⁶⁴ According to Article 1 of the Montevideo Convention, a state should possess a permanent population, a defined territory, a government, and the capacity to enter in relations with other states.⁶⁵ These factors emerge, in principle, from “effectiveness,”⁶⁶ collectively evincing a state’s possession of rights and duties under international law.⁶⁷ It is a circumstantial trigger producing legal consequences. For instance, in the Åland Islands dispute, the League of Nations held that the Finnish Republic became a “definitely constituted sovereign State” when “a stable political organisation had been created, and . . . the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.”⁶⁸

Within this model, the doctrine of effective power indicates effective governance. In and of itself, effective power is insufficient as the condition for statehood. The Badinter Arbi-

63. Human Rights Comm., CCPR General Comment 26: Continuity of Obligations, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997).

64. Errol Mendes, *Statehood and Palestine for the Purposes of Article 12(3) of the ICC Statute: A Contrary Perspective* 10 (2010) (unpublished manuscript), available at <https://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281876/OTPErrolMendesNewSTATEHOODANDPALESTINEFORTHEPURPOS.pdf>.

65. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 45 (2d ed. 2006); see *Convention on Rights and Duties of States* art. 1, Dec. 26, 1933, 1936 U.N.T.S. 3802.

66. DAVID RAIC, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* 50 (2002).

67. *Id.* at 51.

68. *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, 3 LEAGUE NATIONS OFFICIAL J.: SPECIAL SUPP. NO. 3, at 9 (1920).

tration Committee observed how “the form of internal political organization and the constitutional provisions are *mere facts*, although it is necessary to take them into consideration in order to determine the Government’s way [sic] over the population and the territory.”⁶⁹ This presents a difficulty with adopting Model I: if one accepts the premise that effective power is one of the facts giving rise to statehood, then the corollary is that statehood is conditioned by other relevant principles.

One of these relevant principles is the legality of the State. The principle of *ex iniuria jus non oritur* triumphs over effectiveness, as law does not arise from injustice. A third State cannot recognize an insurgent movement as an independent State prematurely without its recognition becoming an act of intervention.⁷⁰ For instance, Talmon suggests that: “[a]ny recognition of the [Libyan National Transitional Council] as the *de jure* government of the State of Libya, while Qaddafi forces are still in control of the capital, seems premature and would *arguably constitute an illegal interference in the internal affairs of Libya*.”⁷¹

This difficulty is particularly relevant for DFRs. DFRs often establish control over a territory through an unlawful use of force. In *Cyprus v. Turkey*, Cyprus argued that the TRNC was not a valid state under international law because “it owed its existence to [Turkey’s] unlawful act of invasion of the northern part of Cyprus in 1974 and to its continuing unlawful

69. Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, EUR. J. INT’L L. 178, 182 (1992) (emphasis added); Conference on Yugoslavia Arbitration Comm’n, *Opinion on Questions Arising from the Dissolution of Yugoslavia*, 31 I.L.M. 1488, 1495 (1992).

70. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW § 26 (4th ed. 1895). This situation has arisen many times over history: for instance, the State of Manchukuo in China in 1931 was not recognized in any way that may impair the sovereignty, independence or territorial integrity of the Republic of China. Separately, the Turkish Republic in Northern Cyprus was also denied recognition in 1974 because its creation was the product of unlawful military intervention in breach of Article 2(4) of the UN Charter. See, Matthew Craven, *Statehood, Self-Determination, and Recognition*, in INTERNATIONAL LAW 201, 223 (Malcolm D Evans ed., 4th ed. 2014) (discussing the State of Manchukuo in China and the Turkish Republic in Northern Cyprus in more detail).

71. Stefan Talmon, *Recognition of the Libyan National Transitional Council*, 15 ASIL INSIGHTS, June 16, 2011 (emphasis added).

occupation of that part of Cyprus ever since.”⁷² This was despite the TRNC’s “effective overall control” over the occupied area.⁷³ Similarly, the ICJ in the *Namibia Advisory Opinion* declared that states had an obligation not to recognize the illegal continued presence of the South African authorities in Namibia.⁷⁴ To this end, James Crawford argues that DFRs, like the TRNC, Republika Srpska, and Southern Rhodesia are not independent states despite their effectiveness as political entities, because such recognition would violate other relevant norms of international law that have acquired the status of *jus cogens*.⁷⁵ The principle of effectiveness as a determinant of statehood:

[E]xposes the inevitable tension between a legal principle that seeks to allow the recognition of new aspirant entities once they have become legal ‘facts’ so to speak, and one that prohibits any such recognition as being a violation of the territorial sovereignty of the State from which that entity is to emerge.⁷⁶

Accordingly, the doctrine of effective power lacks bite. Even if, for instance, Republika Srpska exercises effective power in Bosnia and Herzegovina, it still is not a legal state if its exercise of authority contravenes international law. In this vein, the UN Security Council declared that Republika Srpska could not be recognized as a legitimate state because the “taking of territory by force or any practice of ‘ethnic cleansing’ is unlawful and unacceptable.”⁷⁷ The Security Council also condemned the purported secession of the TRNC, stating that the declaration was “legally invalid.”⁷⁸ If DFRs, such as Republika Srpska and the TRNC, cannot be considered states for the purposes of human rights treaties, IHRL cannot bind them under Model I.

72. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, ¶ 70.

73. *Id.*

74. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 54 (June 21).

75. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 56–61 (2d ed. 2006) (analyzing effectiveness as a criterion for statehood).

76. Craven, *supra* note 70, at 222.

77. S.C. Res. 787, ¶ 2 (Nov. 16, 1992).

78. S.C. Res. 541, ¶ 2 (Nov. 18, 1983).

The legal implications of the non-recognition⁷⁹ of a political entity exacerbate the complications discussed above. This is especially true under a constitutive theory of recognition, where “an entity’s very legal existence as part of the international system is ‘constituted’ by the recognition of the other entities making up that system.”⁸⁰ This understanding of statehood moves from being a factual concept determined by international sovereignty, to a legal condition dependent on recognition.⁸¹ DFRs are susceptible to this legal condition, as other governments often deliberately withhold recognition of these regimes and consequently deny them full international legal personality.⁸² Other governments take such actions “to express their disapproval of these regimes by not (fully) including them in international decision-making.”⁸³ Notwithstanding the conceptual disagreements between the constitutive and declaratory schools of recognition, even those who subscribe to a declaratory theory of recognition concede this point, because they acknowledge that entities are assured of rights under and participation in international law only after recognition.⁸⁴

79. It is worth noting that the recognition and non-recognition of a government can take two different forms: *de jure* and *de facto*. Recognition *de jure* is extended to an entity considered to represent the State, while recognition *de facto* is extended to an entity that, although exercising control over territory, cannot be considered a State on the international plane. In the present context, recognition refers to recognition *de jure*. JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 143–53 (8th ed. 2012).

80. BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 124 (2000). The constitutive theory can be understood in contradistinction to a declaratory theory, where the “political existence of the state is independent of recognition by other states” per Article 3 of the Montevideo Convention. Convention on Rights and Duties of States art. 3, Dec. 26, 1933, 1936 U.N.T.S. 3802.

81. Gerard Kreijen, *The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood*, in *STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE* 45, 92 (Gerard Kreijen ed., 2002).

82. For instance, the Soviet government took control of Russia in 1917 but was not recognized as the *de jure* government by the United Kingdom until 1924. See, Gill Bennett, *What’s the context? 22 January 1924: Britain’s first Labour government takes office*, GOV.UK Blog (Jan. 22, 2014), <https://history.blog.gov.uk/2014/01/22/whats-the-context-britains-first-labour-government-takes-office-22-january-1924/> (discussing the *de jure* recognition of the Soviet government by Britain’s Labour government in January 1924).

83. Van Essen, *supra* note 13, at 49.

84. HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 59 (1947).

Failure of recognition inhibits DFRs from attaining full international legal personality in the form of a state. Even if a DFR fulfils the legal criteria for a valid claim to statehood, “in the absence of recognition, either it has no legal existence or else its legal existence is inefficacious.”⁸⁵ Without recognition from other states, international law reduces the likelihood of success for a claim that DFRs may bear human rights duties and obligations.

C. *Model II: De Facto Regime as an International Legal Personality*

Model II takes a step back from the fundamental premise that IHRL solely focuses on vertical obligations between the State and the individual. Instead, it proposes that the DFR has limited international legal personality. The DFR’s status as a limited form of legal international personality assigns it rights and obligations under IHRL, including obligations to respect, protect, and fulfil human rights law.

The starting point of Model II is the deconstruction of the concept that the State is the sole subject of IHRL.⁸⁶ Frances Raday argues that states are the addressees of human rights obligations due to their absolute socio-economic and legal authority over individuals through their authority to make binding law.⁸⁷ However, Raday’s argument presents the discomfiting assumption that all authority rests within the purview of the State. This is obsolete in the present reality where NIACs often disperse the legal and socio-economic authority to non-state actors. The legal obligations of a state do not preclude other entities also having duties under IHRL. The assumption that the human rights obligations of states within their territories are exclusive, such that no other entities possess obligations under human rights law, is a *non sequitur*.

Decontextualizing human rights law from state obligations shows that the *raison d’être* of human rights law is the pro-

85. ROTH, *supra* note 80, at 129.

86. In other words, what is the normative basis for States having human rights obligations besides the fact that they are the explicit addressees in human rights treaties?

87. Frances Raday, *Privatising Human Rights and the Abuse of Power*, 13 CAN. J.L. & JURIS. 103, 108–10 (2000).

tection of human dignity⁸⁸ through regulation of the relationship between those who govern and those who are governed.⁸⁹ There is no specification that *those who govern* must necessarily be the State. Andrew Clapham, in a similar line of logic, argues that: “we can legitimately reverse the presumption that human rights are inevitably a contract between individuals and the state; we can presume that human rights are entitlements enjoyed by everyone to be respected by everyone.”⁹⁰

According to Clapham, the presumption that human rights are only between the State and individuals is conceptually erroneous. Human rights have to be respected and secured beyond the dichotomy between state and individual. However, Clapham’s central concern is the necessity of human rights being “respected by everyone.”⁹¹ His argument emphasizes the negative obligation to refrain from interfering with human rights. However, securing human rights goes beyond negative obligations and includes positive obligations of protecting and fulfilling human rights. This paper proposes that positive duties fall on “those who govern,” including non-state actors such as DFRs.

1. *Irrelevance of Non-Recognition*

A DFR holds duties under human rights law even if other governments refuse to recognize the regime controlling the territory based on reluctance to legitimize the illegal foundations of authority.⁹² The formal recognition of a government is

88. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 183 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

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

90. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 58 (2006). It is worth noting that Clapham argues for the extension of human rights duties to all individuals, and all armed groups. This paper, however, takes a more conservative stance by arguing that effective authority is still a necessary nexus between human rights obligations—to protect and fulfill human rights—and individuals such that only some individuals, such as those exercising effective authority, have obligations under human rights law.

91. *Id.*

92. It should be noted that it is not in all situations that no recognition is given whatsoever to a DFR. For instance, during the Spanish Civil War, the United Kingdom recognized the Republicans as the *de jure* government,

independent of whether a DFR has rights and duties flowing from effective control over territory.⁹³ Recognition is relevant only to the extent that one adopts a constitutive theory of recognition for statehood.

In this analysis, the status of the statehood of a DFR is irrelevant. A DFR is still an effective actor with conduct accompanied by international legal consequences. The DFR's conduct has legal consequences even in the absence of consent of the non-state actor to multilateral treaties because the *pacta tertiis* rule does not apply to non-state armed groups.⁹⁴ This delineates the *nature of the authority* exercised by the DFR on the one hand from the *conduct* of the DFR on the other. This echoes what the Canadian Supreme Court notes in *Re Manitoba Language Rights*, where it states that, “[t]he application of the *de facto* doctrine is, however, limited to *validating acts* which are taken under invalid authority: *it does not validate the authority* under which the acts took place.”⁹⁵ In other words, a *de facto* regime that is not *de jure* may still have obligations under international law.

Case law support this proposition. Courts recognize that a DFR may still exercise effective control even in the absence of international recognition of its legitimacy. For instance, in *Banque de France v. Equitable Trust Co.*, the District Court held that “the principle that the refusal of the political department to recognize a government should not be allowed to affect private rights which may depend upon proving the existing conditions in such state.”⁹⁶ Similarly, in *Kadic v. Karadzic*, the Second Circuit of the United States asserted that “an unrecog-

while also extending *de facto* recognition to the Nationalist forces of General Franco. *Banco de Bilbao v. Sancha* [1938] KB 176, 181 (Eng.).

93. Van Essen notes that *de facto* regimes “have the capacity to possess international rights and obligations” including “norms of international responsibility and ‘domestic’ protection of human rights.” Van Essen, *supra* note 13, at 39.

94. MURRAY, *supra* note 50, at 136; *see also* Christian Tomuschat, *The Applicability of Human Rights Law to Insurgent Movements*, in *KRISENSICHERUNG UND HUMANITÄRE SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION* 573, 586 (Horst Fischer et al. eds., 2004) (discussing how the *pacta tertiis* rule does not apply to non-state armed groups).

95. *Re Manitoba Language Rights*, [1985] S.C.R. 721, 756–57 (Can.).

96. *Banque de France v. Equitable Trust Co.*, 33 F.2d 202, 206 (S.D.N.Y. 1929) (citing *Sokoloff v. Nat'l City Bank of N.Y.*, 145 N.E. 917, 919 (N.Y. 1924)).

nized state is not a judicial nullity,” and “[a]ny government, however violent and wrongful in its origin, must be considered a *de facto* government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation.”⁹⁷ The Court of Appeal in the United Kingdom also stated that the English courts could “recognise the laws or acts of a body which [was] in effective control of a territory” independent of any *de facto* or *de jure* recognition by the government.⁹⁸

The consequences of recognizing the effective authority of a DFR, and not an independent state, cannot be overstated—as recognition of authority falls short of legitimizing the illegality of the entity under international law. As the ECtHR in *Cyprus v. Turkey* highlights: “recognising the effectiveness of [*de facto* regimes] for the limited purpose of protecting the rights of the territory’s inhabitants does not, in the Court’s view and following the Advisory Opinion [on Namibia] of the International Court of Justice, legitimise the ‘TRNC’ in any way.”⁹⁹

To this end, DFRs occupy a middle ground between states and private individuals, such that they may have international law obligations without assuming the status of a legally constituted state. This middle ground establishes obligations above private individuals, but below states. As such, the human rights obligations proposed here as owed to individuals by DFRs are still vertical. These vertical obligations align with the *raison d’être* of human rights being a relationship between those who govern, such as a DFR, and the governed.

2. *Acquiring International Legal Personality*

Under Model II, the DFR is subject to the essential obligations that every state must shoulder as an actor in the international community. Every international actor intending to legitimize themselves as an actor at the inter-state level must respect the general framework of rights and duties established

97. *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995) (quoting *Ford v. Surget*, 97 U.S. 594, 620 (1878) (Clifford, J., concurring)).

98. *Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd.* [1978] QB 205, 218 (Eng.).

99. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, ¶ 92.

by the international community.¹⁰⁰ Under a functional approach to international law, DFRs have a limited status of international legal personality as a result of their conduct and obligations.¹⁰¹

An international legal personality has rights and obligations under international law.¹⁰² The extent of the rights and obligations may differ from actor to actor. The ICJ pointed out in the *Reparations* case how “[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights.”¹⁰³ This statement highlights how the concept of international legal personality is not a binary but a spectrum, such that different personalities may have different extents of rights and obligations. DFRs sit within this spectrum, with states on one end, and private individuals on the other. The extent to which DFRs have rights and obligations under international law determine the location that DFRs occupy along this spectrum.

At face value, this may read as a circular proposition. It appears contradictory for the DFR’s rights and obligations to determine whether it is an international legal personality, when it should be the status of international legal personality that determines the rights and obligations of the DFR. The solution to this lies in a contemporary rejection of a *formal* conception of international legal personality, and an adoption of an *actor* conception instead.

The fact that DFRs have international obligations indicates that they have limited international legal personality when examined through an actor conception of international legal personalities. For instance, no one disputes that the rules in Common Article 3 of the Geneva Convention apply to armed groups in NIACs. Accordingly, their legal personality is

100. Tomuschat, *supra* note 94, at 586.

101. William Thomas Worster, *Relative International Legal Personality of Non-State Actors*, 42 *BROOK. J. INT’L L.* 207, 211 (2016).

102. JOHN O’BRIEN, *INTERNATIONAL LAW* 138 (2001). A positivist view of international law posits that only States are exclusive legitimate legal persons. However, this paper proposes that international legal personality is not a binary and that DFRs can have a limited form of international legal personality under international law.

103. *Reparations for Injuries Suffered in Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 178 (Apr. 11).

objective and emanates from the Geneva Conventions.¹⁰⁴ An actor conception of international legal personality, in contradistinction to a formal conception, deconstructs the idea of international legal personality as an “*a priori* title that provides its subject with international rights and duties.”¹⁰⁵ Otherwise, the application of international law to DFRs would be inconsistent with denying them a degree of international legal personality,¹⁰⁶ and treating them as partial subjects of international law.¹⁰⁷ Full international legal personality is not necessary for an entity to have rights and obligations under international law, or for DFR to have international human rights obligations. This sits within a modern conception of international law as a *ius inter potestates* encompassing every political organization that acts as an effective factor in international relations.¹⁰⁸

Roland Portmann classifies “all entities exercising ‘effective power’ in the international ‘decision-making process’” as being “‘participants’ or . . . ‘actor[s]’” in the international community.¹⁰⁹ The operative phrase here is *effective powers*, which situates his argument in the language of effectiveness this article centers on. According to Portmann, the factual circumstance of DFR exercising “effective power” in international law accords it international legal personality, rather than vice-versa.¹¹⁰

104. ZEGVELD, *supra* note 27, at 150.

105. Van Essen, *supra* note 13, at 39.

106. It is worth noting that certain international human rights treaties, including the Optional Protocol to the Convention on the Rights of the Child and the Kampala Convention directly address armed groups. See SCHOISWOHL, *supra* note 33, at 83 (discussing non-recognition and secession); Andrew Clapham, *Focusing on Armed Non-State Actors*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 767, 790–92 (Andrew Clapham & Paola Gaeta eds., 2014) (discussing human rights treaties that address armed non-state actors).

107. Jochen A. Frowein, *De Facto Regime*, OXFORD PUB. INT’L LAW, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1395> (last updated Mar. 2013).

108. Pieter Hendrik Kooijmans, *The Security Council and Non-State Entities Party to a Conflict*, in INTERNATIONAL LAW: THEORY AND PRACTICE 333, 339 (Karel Wellens ed., 1998).

109. ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW 208 (2010).

110. Van Essen, *supra* note 13, at 39.

The question remains as to whether effective powers in international decision-making are identical to effective powers over territory. When armed groups exercise effective power over territory, their assumption of quasi-governmental powers enables their engagement with the international community, such as entering into agreements with states¹¹¹ and the United Nations,¹¹² or issuing binding unilateral statements to comply with international law.¹¹³ In other words, effective power over territory gives the DFR *de facto* governmental authority, which then gives the DFR effective powers on the international plane. This provides a pragmatic appreciation of the limited, functional legal personality of DFRs.

In summary, DFRs should be subject to international human rights obligations for two reasons. First, a legal lacuna exists in territories where a DFR displaces a *de jure* government's authority, creating a gap in the legal protection of human rights. Second, there is a causal connection between this lacuna and the role of DFRs. The lacuna *must* be filled by DFRs. This causal connection relies on the quasi-governmental authority of the DFR as the result of its effective power over territory, and the powers it exercises on the international plane by corollary of this authority.

111. *See, e.g.*, Agreement on the Civilian Protection Component of the International Monitoring Team (IMT), Moro Islamic Liberation Front-Phil., Oct. 27, 2009, <http://peacemaker.un.org/philippines-agreemen-cpc2009> (treaty between the central government and a militant group); Agreement on a Permanent Ceasefire, Lord's Resistance Army/Movement-Uganda, Feb. 23, 2008, <http://www.peaceau.org/uploads/lra-gu-ceasefire.pdf> (same).

112. *See, e.g.*, Memorandum of Understanding Between the Gov't of Sudan, SPLM and the UN Regarding UN Mine Action to Support Sudan, Sep. 19, 2002, <http://reliefweb.int/report/sudan/memorandum-understanding-between-govt-sudan-splm-and-un-regarding-un-mine-action> (treaty between the central government, a militant group, and the United Nations).

113. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 91 (July 9) (citing the Palestinian Liberation Organization's declaration); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 627 (Int'l Crim. Trib. for Rwanda Sep. 2, 1998) (citing the Rwandese Patriotic Front's declaration to the International Committee of the Red Cross).

IV. WHEN *DE FACTO* REGIMES CAN HAVE INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS

Section III argues prescriptively that the notion of *de facto* power, or effective power, is the *sine qua non* for extending the human rights obligations to DFRs. Descriptively, various documents from the UN reflect this idea. For instance, the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provided a guideline “for all States and other entities exercising effective power.”¹¹⁴ Similarly, the Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka stated with regards to the Liberation Tigers of Tamil Eelam (LTTE):

[A]lthough non-state actors cannot formally become party to a human rights treaty, it is now increasingly accepted that non-state groups exercising *de facto* control over a part of a State’s territory must respect fundamental human rights of persons in that territory. Various organs of the United Nations, including the Security Council, have repeatedly demanded that such actors respect human rights law.¹¹⁵

To apply the doctrine of effective power, one must closely examine the factors that determine when control, power, or authority is effective. Herein lies a conceptual gap in the existing academic literature—assertions of extending human rights obligations to armed groups are not accompanied by a sustained undertaking on delineating the contours of this doctrine. This may result from the fact that the term effective power or effective control is not from treaty law, but reflects a notion developed over time in the legal discourse to describe factual circumstances.¹¹⁶

This article argues that the test for effective power is a three-step inquiry identifying whether the armed group has *power* and whether its power is *effective*. First, the armed group must have the factual ability to assert authority. Second, the asserted authority must be exclusive, with the potential to over-

114. G.A. Res. 3452, *supra* note 21.

115. *Report on Accountability*, *supra* note 8, ¶ 188.

116. Tristan Ferraro, *Determining the Beginning and End of an Occupation Under International Humanitarian Law*, 94 INT’L REV. RED CROSS 133, 139 (2012).

come resistance on the ground. Third, the armed group must have an independent existence, such that it is not subject to the authority of a state.

These elements emerge from legal precedents or rules where there are similar concepts of effective control over territory: *first*, the extraterritorial application of human rights law; *second*, occupation law and the assessment of belligerency occupation; and *third*, state responsibility as set out in the Draft Articles on State Responsibility (ARSIWA).¹¹⁷ The threshold for effective control in these sources should be the same. This is because effective control implies the power of the State not only to respect and secure the human rights of the population, but also to fulfil its subsequent obligation and secure and ensure human rights.¹¹⁸ To this end, this article surfaces the similarities and differences among interpretations of this doctrine by different legal regimes and synthesizes the three bodies of law to extend human rights obligations to certain armed groups.

Determining effective power is a factual assessment. Whether effective power is exercised over territory is a question of fact, and what matters is whether the regime exercises *de facto* power over the territory, even if its control is not *de jure*. This mitigates concerns of unlawfulness that usually surround the armed group's assertion of control over territory: in the context of extraterritoriality, "any attempt to demand that the state's control over territory be lawful or anything other than *purely factual* should be resisted."¹¹⁹ This finds support in occupation law, where the existence of occupation is determined objectively as a matter of fact, and the subjective perception of the situation by the parties to the armed conflict is irrelevant.¹²⁰ For instance, the International Military Tribunal at Nuremberg in the *Hostages* trial held that whether "an invasion has developed into an occupation is a question of fact," which

117. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles on Responsibility].

118. MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 147 (2011).

119. *Id.* at 136 (emphasis added).

120. Ferraro, *supra* note 116, at 135.

places the inquiry of whether power is effective in the domain of objective assessments.¹²¹

The question of when a DFR is exercising effective power turns as much on the constitutive factors that are relevant to the inquiry, as it does on the necessary threshold for this power to be *effective*. The question of power is one of degree¹²² that depends on circumstances such as the terrain, density of the population, and other considerations.¹²³ This threshold is not static, but is a sliding scale dependent on the type of human rights obligations at stake. The negative obligation to “respect” human rights in a territory is subject to a minimal threshold,¹²⁴ while the positive obligations to protect and fulfil human rights requires a higher threshold of effectiveness. Within these positive obligations, some procedural due diligence obligations are more onerous than other substantive obligations—the latter of which have a higher threshold for effectiveness. Adopting a sliding scale addresses the countervailing concern of artificially imposing a threshold for effective power by applying the substance of these obligations to factual circumstances with more flexibility.¹²⁵

A. *Elements Constituting Effective Power*

There are three constitutive factors that determine whether a DFR exercises effective power: (i) ability to assert authority; (ii) displacement of authority; and (iii) independent existence. These go toward establishing the *effectiveness* of the *power* that the DFR exercises over territory. For power to be effective, all three factors must be present and fulfilled.

1. *Ability to Assert Authority*

The ability of an armed group to assert authority depends on both its institutional capacity to exercise authority, and the

121. U.S. Military Tribunal, Nuremberg, *The Hostages Trial: Trial of Wilhelm List and Others*, in 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 55 (United Nations War Crimes Comm’n ed., 1949).

122. Ferraro, *supra* note 116, at 139.

123. DINSTEIN, *supra* note 61, ¶ 98.

124. Marko Milanovic makes a similar argument with regard to negative obligations for extraterritoriality insofar as states always have control over its agents. MILANOVIC, *supra* note 118, at 210.

125. *Id.*

factual exercise of this power. In *R v. Zardad*, the Central Criminal Court of England and Wales faced the question of whether Faryadi Sarwar Zardad, a chief commander of the Afghan Hezb-I-Islami faction—a non-state armed group in Afghanistan—could be charged with torture and hostage-taking. In examining whether Zardad was a public official or a person acting in an official capacity under Section 134 of the Criminal Justice Act 1988, the Court held in an interim judgment that:

[W]hat needs to be looked at is the reality of any particular situation. Is there sufficient evidence that Hezb-I-Islami *had a sufficient degree of organisation, a sufficient degree of actual control of an area and that it exercised the type of functions which a government or governmental organisation would exercise?*¹²⁶

This holding is particularly helpful as a starting point for analysis. An armed group could be considered a vertical authority if it possessed the *capability*, through having a “sufficient degree of organisation,” to *actually assert authority* by exercising “actual control” and the “type of functions which a government or governmental organisation would exercise.”¹²⁷

Borrowing from this logic, this article distinguishes between factors that relate to the armed group’s *institutional capacity*, and those that relate to the *factual exercise of public powers* below. Both the capacity and the factual exercise of public powers are necessary when establishing that the armed group has the ability to assert authority.

a. Capability of Asserting Authority

From a macro perspective, Fortin suggests that one must ask, “is this armed group organized enough to be able to implement the human rights framework?”¹²⁸ Alternatively framed, one can ask whether the armed group has the means to assert authority, such that it should have human rights obligations.

126. *R v. Zardad*, [2004] EWHC (Crim), No. T2203 7676, [33] ILDC 95 (Eng.) (emphasis added).

127. *Id.*

128. FORTIN, *supra* note 7, at 159.

This inquiry is similar to the organization requirement under international humanitarian law.¹²⁹ An armed group must be sufficiently organized to be bound by Common Article 3.¹³⁰ The existence of an armed group's internal structure¹³¹ and its capability of exerting authority over its members¹³² determine its capacity to fulfil international humanitarian obligations. In *Boskoski*, the Court held that "[t]he leadership of the group must, as a minimum, have the ability to exercise some control over its members so that the basic obligations of Common Article 3 of the Geneva Conventions may be implemented."¹³³ Five factors are relevant: (i) command structure; (ii) ability to carry out operations in an organized manner; (iii) logistics; (iv) discipline and ability to implement international humanitarian law provisions; and (v) ability of the armed group to "speak with one voice."¹³⁴

This paper argues that the organization requirement in the context of armed groups and human rights obligations is fundamentally different from obligations under humanitarian law obligations. Human rights obligations are theoretically discrete from humanitarian law obligations. The *raison d'être* of human rights obligations is the regulation of the vertical relationship between those who govern and those who are governed. Following this analysis, whether an armed group is organized enough to assume human rights obligations turns on whether they have the means to exercise quasi-governmental functions. Therefore, the armed group's institutional capacity to exercise public powers is vital in determining obligations.

129. If international humanitarian law has an organization requirement that mirrors what is determinative of a non-state actor's capacity to exercise effective power, then the factors constitutive of the organization requirement should be similar to avoid a fragmentation of international law.

130. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶ 148 (Oct. 16) ("Some criterion has, however, to be employed to determine in any particular case whether what confronts the law is or is not legally an 'entity'").

131. ABRAHAM GUILLÉN, *PHILOSOPHY OF THE URBAN GUERRILLA: THE REVOLUTIONARY WRITINGS OF ABRAHAM GUILLÉN* 268 (Donald C. Hodges ed. & trans., 1973).

132. INT'L COMM. OF THE RED CROSS, *INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS* 19 (2003).

133. *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 196 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

134. FORTIN, *supra* note 7, at 128–32.

The internal coherence of the armed group, which is the focus of international humanitarian law, is merely the means to the end of establishing institutions that facilitate the exercise of public powers.

The *de facto* nature of the DFR's administration is inextricably linked to its exercise of public powers in lieu of a displaced sovereign. As Lord Atkin indicates in the *Arantzazu Mendi* case heard before the House of Lords, having *de facto* control means the "exercising [of] all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government."¹³⁵ There are two operative elements in Lord Atkin's analysis: first, the armed group's institutional capacity to exercise public powers; and second, the actual exercise of these powers. These two elements are logically distinct from the actual assumption of duties during conflict that comprises the core of international humanitarian law.

The focus on an armed group's institutional capacity to exercise authority emerges in *Kadic v. Karadzic*. The Court of Appeals for the Second Circuit addressed the question of whether jurisdiction existed over Karadzic—the President of a three-man presidency of the self-proclaimed Republika Srpska exercising control over large parts of the territory of Bosnia-Herzegovina—for a civil action based on violations of international law.¹³⁶ The Second Circuit found that Karadzic exercised effective control over the territory of Srpska during the time of the alleged acts, and clarified: "Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. *It has a president, a legislature, and its own currency.* These circumstances readily appear to satisfy the criteria for a state in all aspects of international law."¹³⁷

Putting aside the issue of whether Srpska is a state under international legal norms,¹³⁸ the Second Circuit's reasoning

135. *Spain v. Arantzazu Mendi* [1939] AC 256 (HL) 264–65 (appeal taken from Eng.).

136. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

137. *Id.* at 244 (emphasis added).

138. See earlier discussion *supra* Section II.B.

centers on the fact that Srpska's organization mirrors a functioning state, with both a President and a legislature. Its organizational structure enabled the exercise of quasi-governmental functions, such that the Second Circuit considered Srpska a DFR with human rights obligations.

Elmi v. Australia took a similar approach in defining an armed group's exercise of effective control based on its institutional capacity to exercise public powers, instead of emphasizing the group's internal coherence. The Committee Against Torture held that one of the warring factions in Somalia—a non-state actor—was a vertical authority because of its establishment of quasi-governmental institutions.¹³⁹ As the Committee noted, “some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration.”¹⁴⁰ As such, “the members of those factions can fall, for the purposes of the application of the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment], within the phrase ‘public officials or other persons acting in an official capacity’ contained in article 1.”¹⁴¹

b. Factual Assertion of Authority

The actual assertion of authority must accompany the institutional capacity to exercise authority. The existence of certain factual circumstances is indicative of actual control. Drawing from the context of state responsibility is particularly useful for guidance here, as Article 9 of the ARSIWA defines what conduct constitutes an exercise of governmental authority.

For the conduct of a person or group of individuals to constitute state action under international law, Article 9 of the ARSIWA provides that the relevant “conduct must effectively relate to the exercise of elements of the governmental authority.”¹⁴² The International Law Commission (ILC) interpreted this conduct as including: “the exercise of policing roles, the

139. U.N. Comm. Against Torture, *Sadiq Shek Elmi v. Australia*, ¶ 7, U.N. Doc. CAT/C/22/D/120/1998 (May 14, 1999).

140. *Id.* at ¶ 6.5.

141. *Id.*

142. Draft Articles on Responsibility, *supra* note 117, art. 9 cmt. 3. Article 9 of the ARSIWA states that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental author-

issuance of judgments and ordinances, the performance of legal acts, the taking charge of administration, the provision of health services, or the administration of property.”¹⁴³

The list of activities provided by the ILC can be broadly categorized into three categories of public powers that are normally exercised by a government:¹⁴⁴ *socioeconomic* power, including provision of health services and administration of property; *legal* power, such as policing roles, issuance of judgments, and performance of legal acts; and *military* power, like issuance of ordinances. These categories are not bright-line. For instance, the administration of property can be a manifestation of legal authority as much as it is an exercise of socioeconomic power. However, these broad categories allow for a clearer understanding of the extent to which authority has been asserted in a territory.

This framework can be imported into an analysis of the types of quasi-governmental powers exercised by DFRs that are constitutive of effective power. A DFR may manifest its *socioeconomic power* through establishing its own currency, as indicated by the Second Circuit in *Kadic*.¹⁴⁵ Other examples of the exercise of governmental acts that regulate the socioeconomic lives of people living in the controlled territory include the registration of births, deaths, and marriages;¹⁴⁶ the provision of education;¹⁴⁷ the provision of telecommunication services in the territory;¹⁴⁸ the provision of housing and shelter to civilians

ity in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.” *Id.* art. 9.

143. FORTIN, *supra* note 7, at 251.

144. This is the language of the ECtHR, in *Bankovic v. Belgium*, where effective control was premised on the exercise of “all or some of the public powers normally to be exercised by that government.” *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 71.

145. *Kadic v. Karad_ic*, 70 F.3d 232, 245 (2d Cir. 1995).

146. FORTIN, *supra* note 7, at 269. The provision of these registration schemes undoubtedly relates to the legal power of the DFR, but constitutes regulating the social lives of the people in the territory. As noted, these categories of powers are not intended to be watertight distinctions.

147. *Id.*

148. *Id.*

and internally displaced persons;¹⁴⁹ and the establishment of systems for food production and distribution.¹⁵⁰

A DFR may manifest its *legal power* through the enforcement of directions and orders. The International Criminal Tribunal for the former Yugoslavia (ICTY) in *Naletilic* pointed to how the determination of occupation under Article 42 of the Hague Regulations depends partially upon whether “the occupying power has issued and enforced directions to the civilian population”¹⁵¹—a reference to whether the occupying power manifested *legal power*, such that it exercised effective control over the territory. This matches observations from political science research: armed groups often feel compelled to perform government activities, such as making and enforcing laws.¹⁵² In Afghanistan, the Taliban established a mobile court system to resolve people’s disputes that strengthened its legal authority.¹⁵³ Separately, the LTTE in Sri Lanka considered it necessary to establish law enforcement infrastructure. The LTTE’s chief negotiator suggested:

There are huge populations [in Sri Lanka] and we have to administer them and for the purpose of maintaining law and order, or rather social order and cohesion we need to have certain institutions. . . . [T]hese Police stations are necessary instruments to maintain law and order because we cannot allow anarchy and social disorder in areas controlled by us.¹⁵⁴

Military power is the most common manifestation of control over territory, especially considering that DFRs typically emerge during NIACs. Military power manifests through the presence of troops on the ground¹⁵⁵ or the maintenance of

149. ZACHARIAH CHERIAN MAMPILLY, *REBEL RULERS: INSURGENT GOVERNANCE AND CIVILIAN LIFE DURING WAR 4* (2011).

150. *Id.*

151. Prosecutor v. Naletilic, Case No. IT-98-34-T, Judgment, ¶ 217 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003).

152. FORTIN, *supra* note 7, at 43.

153. *Id.* at 46.

154. *LTTE Police Stations ‘Not a New Phenomena’—Balasingham*, TAMILNET (Dec. 3, 2002), <http://www.tamilnet.com/art.html?catid=13&artid=7932>.

155. It is worth noting that the non-consensual stationing of troops, in and of itself, does not satisfy the requirements of effective control. This was noted by the ICJ in the *Armed Activities* case where the Court stated that “the Court will need to satisfy itself that the Ugandan armed forces in the DRC

weapon stocks.¹⁵⁶ In the context of occupation law, the ICJ in *DRC v. Uganda* inquired as to whether “the Ugandan armed forces in the DRC were . . . stationed in particular locations” when determining if Uganda was exercising effective control in the DRC.¹⁵⁷ In the context of extraterritorial human rights obligations, in *Loizidou v. Turkey*¹⁵⁸ and *Cyprus v. Turkey*,¹⁵⁹ Turkey positioned thousands of troops on the ground, and the TRNC administration was at least initially little more than its puppet. In *Ilascu*, the ECtHR pointed to the expression of military power through the maintenance of weapon stocks:

The Russian army is still stationed in Moldovan territory in breach of the undertakings to withdraw them completely given by the Russian Federation at the OSCE summits in Istanbul (1999) and Porto (2001). Although the number of Russian troops stationed in Transdnistria has in fact fallen significantly since 1992 . . . the Court notes that the ROG’s weapons stocks are still there.¹⁶⁰

c. Maintaining Effective Power

While the ability to *establish* effective power depends on both the *capacity* to assert authority and the *factual* assertion of legal, military, and/or socioeconomic authority,¹⁶¹ the ability

were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government.” Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 173 (Dec. 19). The use of the words “not only . . . but also” indicates that both requirements must be met. This mirrors the approach taken by this paper that a manifestation of military power, alone, is insufficient for there to be effective control.

156. *Ilascu v. Moldova*, 2004-VII Eur. Ct. H.R. 1, ¶ 387.

157. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 173 (Dec. 19).

158. *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 1.

159. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1.

160. *Ilascu v. Moldova*, 2004-VII Eur. Ct. H.R. 1, ¶ 387.

161. In the context of occupation law, the potential to assert authority is insufficient as a means of establishing effective control. As noted by Arai-Takahashi, the rules embodied in Section III of the Hague Regulations only apply once the territory is “actually placed under the authority of the hostile army.” YUTAKA ARAI-TAKAHASHI, *THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW* 16 (2009). The word “actually” suggests that this authority must be factual and physical in nature.

to *maintain* effective power over territory is based on the potential to assert authority, rather than the exercise of actual authority. A textual reading of the notion of effective control gives no indication as to whether the maintenance of control requires continual physical presence. This presents a significant concern where pockets of resistance liberate territory from time to time in protracted NIACs. An examination of the positive law from extraterritoriality and belligerent occupation indicates that the potential to assert authority may sufficiently qualify as maintaining an effective form of control.

In the context of extraterritoriality, the ECtHR held in *Ilascu* that the applicants came within the jurisdiction of Russia because the MRT “remains under the *effective authority, or at the very least under the decisive influence*, of the Russia Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.”¹⁶² By reading the operative word—or—conjunctively, Russia’s “decisive influence” can be interpreted as the lowest possible threshold for effective authority. In other words, “decisive influence” is a form of “effective authority.” The Court further justified this analysis by reference to Russia’s “creation of the MRT, the far more extensive military control that it had in the past, and perhaps most importantly, the *potential* for such control that has remained.”¹⁶³

This paper contends that *Ilascu* does not relax the standard required for finding whether effective control *has been asserted* over a territory and disagrees with Marko Milanovic’s argument that *Ilascu* “redefine[s]” the test for “effective control.”¹⁶⁴ Rather, if Russia maintains “decisive control” over the MRT, such that it could “easily make its power felt more overtly” if it wanted to, the territory *remains* under Russia’s effective control.¹⁶⁵ This differs from a situation where Russia asserts effective control for the first time. In other words, the standard required for the initial *establishment* of effective control is higher than the standard for *maintaining* effective con-

162. *Ilascu*, 2004-VII Eur. Ct. H.R. ¶ 392 (emphasis added).

163. MILANOVIC, *supra* note 118, at 140.

164. Milanovic argues that “*Ilascu* perhaps goes so far as to redefine” the test for effective control because of the “decisive influence” standard it introduced. *Id.* at 138, 140–141.

165. *Id.* at 140.

trol. The latter standard is the potential to assert authority, rather than the factual assertion of actual authority.

The interpretation presented above is consistent with occupation law. Article 42 of the Hague Regulations states that “[t]he occupation extends only to the territory where such authority has been established and *can be exercised*.”¹⁶⁶ As long as the potential authority “*can be exercised*,” as opposed to actually being exercised, *after* “such authority has been established,” a state of occupation remains.¹⁶⁷ The potential for asserting control subsequent to the establishment of effective authority determines whether the territory is in a state of occupation.

In this vein, a state of belligerent occupation does not require “fixed garrisons” if “the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district.”¹⁶⁸ This prevents a “bad-faith interpretation of this criterion,” where occupying powers may evade their governance obligations in the occupied territory by avoiding “law and order or from meeting the basic needs of the local population.”¹⁶⁹ This reading of the Hague Regulations parallels the approach of post-war tribunals. The fighting against the Nazis in Yugoslavia during World War II from time to time temporarily liberated territory from the Nazis, but this did not translate to the conclusion of Nazi occupation due to the fact that “the Germans could at any time they desired assume physical control of any part” of Yugoslavia.¹⁷⁰ Similarly, the ICTY held that occupation exists so long as the occupying army has the “capacity to send troops within a reasonable time to make the authority of the occupying power felt.”¹⁷¹

166. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2295 (emphasis added).

167. *Id.* (emphasis added).

168. U.S. DEP’T OF THE ARMY, FM 27-10, DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE ¶ 356 (1956).

169. Ferraro, *supra* note 116, at 150–51.

170. U.S. Military Tribunal, Nuremberg, *supra* note 121121, at 56.

171. Prosecutor v. Naletilic, Case No. IT-98-34-T, Judgment, ¶ 217 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003).

2. *Displacement of Authority*

The authority that the armed group exercises over territory also must be exclusive for its power to be effective. In other words, the armed group must displace the original government that was in charge of the territory, such that a lacuna arises. Notably, the displacement of authority features more strongly in the assessment of effective control under international humanitarian law, as compared to extraterritorial human rights obligations. In the context of extraterritorial human rights obligations, Milanovic argues that “while jurisdiction over territory is normally exclusive, it need not necessarily be so,” especially in complex factual situations.¹⁷²

In contrast, when an armed group establishes control over territory through the use of force, effective control in the context of state jurisdiction and occupation law presumes that “the hostile army has established its own authority over the territory and substituted it for that of the displaced sovereign, and has . . . suppress[ed] the resistance of the enemy, except perhaps in isolated pockets.”¹⁷³ For instance, in the context of occupation law, the ICTY in *Naletilic* held that the occupying power must “be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly.”¹⁷⁴ The ICJ in *DRC v. Uganda* also held that: “[i]n the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government.”¹⁷⁵

In the context of state jurisdiction, the Commentary to Article 9 of the ARSIWA states that the Article¹⁷⁶ was intended

172. MILANOVIC, *supra* note 118, at 151.

173. *Id.* at 147.

174. *Naletilic*, Case No. IT-98-34-T, Judgment, ¶ 217. Similarly, Article 41 of the 1880 Oxford Manual on the Laws of War on Land states: “Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there.” INST. OF INT’L LAW, OXFORD MANUAL ON THE LAWS OF WAR ON LAND art. 41 (1880).

175. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 173 (Dec. 19).

176. Draft Articles on Responsibility, *supra* note 117, art. 9.

to cover situations where there is a “total collapse of the State apparatus,” and situations where “the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality.”¹⁷⁷ In other words, Article 9 covers situations where a general *de facto* government, such as a DFR,¹⁷⁸ controls territory in the absence of the previous government.¹⁷⁹

Arguably, the standard under occupation law and state jurisdiction—where power must be exclusive to be effective—is preferable to the standard for extraterritorial human rights obligations in deciding when human rights obligations can be extended to DFRs. Having exclusive authority is intimately connected to the requirement of the existence of an actual legal lacuna. If the occupied authority still exercises governmental functions, then its capacity to protect and fulfil human rights is not suspended. In that circumstance, the justification for DFRs to assume positive human rights obligations fails, as there is no pressing necessity for DFRs to enforce those obligations.

a. Resistance on the Ground

The degree of resistance on the ground to the DFR also plays into the assessment of the exclusiveness of the authority exercised by the regime. For instance, in the armed conflicts in Afghanistan and Nepal, the governments and armed groups were “locked in a struggle for legitimacy in a particular area of the country,” with neither exerting “exclusive [and effective] control of the territory.”¹⁸⁰ The material presence of resistance forces or counter-offensives from the original government over time indicates the actual division of authority. As Yoram Dinstein notes:

177. *Id.* art. 9 cmt. 5.

178. This can be understood as a government that replaced the previous government as a result of a *coup d'état*, military defeat, or total state failure. FORTIN, *supra* note 7, at 252.

179. *Id.*

180. *Id.* at 270; *see also* UNITED NATIONS OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, NEPAL CONFLICT REPORT 2012, at 39–44 (2012) (detailing the history of the armed conflict in Nepal).

Should the occupying power *be expelled from—or lose its grip over*—an occupied territory, in whole or in part, the occupation in the area concerned is terminated. . . . Over time, the territory subject to the effective control of an Occupying Power is likely to grow or shrink in size, and the fluctuations may be egregious. . . . The ebb and flow in the extent of the territory subject to belligerent occupation may be the direct outcome of battlefield victories or defeats.¹⁸¹

According to Dinstein, for the termination of a state of belligerent occupation, the DFR or occupying power, must be “expelled from,” or must have “los[t] its grip over” the territory.¹⁸² At face value, this is a tautological argument: a lack of effective control would, ostensibly, result in the occupier losing control over the territory. Dinstein further states that if the belligerent occupier “manage[s] to display resistance in the face of temporary adversity,” it maintains effective control.¹⁸³ Dinstein highlights this by discussing Israel’s occupation of the West Bank as surviving “two tidal waves of uprisings.”¹⁸⁴ However, Dinstein’s analysis raises more question than it answers. It is unclear what degree of resistance the belligerent occupier must display, and also whether resistance is a quantifiable measure at all. To this end, Dinstein’s formulation provides an insufficient basis for assessing what degree of resistance undermines the exclusive authority of the belligerent occupier.

The temporal element of the requirement further complicates the analysis, as it is only where the DFR has been expelled from the territory for a certain period of time¹⁸⁵ that the authority is no longer exclusive.¹⁸⁶ The general rule under

181. DINSTEIN, *supra* note 61, ¶¶ 102–03.

182. *Id.*

183. *Id.*

184. *Id.* ¶ 101.

185. Arai-Takahashi suggests that where “resistance to occupation and outbreak of hostilities [have] become so widespread and persistent,” effective control is undermined. ARAI-TAKAHASHI, *supra* note 161, at 7.

186. In the context of Israel-Palestine, Arai-Takahashi has stated that the “fact that the Israeli forces and Palestinian terrorist groups have often been engaged in violent clashes and intense fighting . . . does not undermine the legal status of the occupied territory” because “the fact that the occupying power encounters guerrilla operations able to exercise a *brief control* over certain sections of the territory does not alter the legal status of occupation.” *Id.* at 6–7 (emphasis added).

international humanitarian law is that military occupation continues even when resistance forces temporarily control some part of the territory. In the *Hostages* trial, the Tribunal stated that:

While it is true that the partisans were able to control sections of these countries at various times, it is established that *the Germans could at any time they desired assume physical control of any part of the country*. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant.¹⁸⁷

Further, the 2004 UK Manual of the Law of Armed Conflict states that:

The fact that some of the inhabitants are in state of rebellion, or that guerrillas or resistance fighters have occasional successes, does not render the occupation at an end. Even a *temporarily successful rebellion . . .* does not necessarily [interrupt or] terminate the occupation *so long as the occupying power takes steps to deal with the rebellion and re-establish its authority . . .*¹⁸⁸

Prima facie, the *Hostages* trial and the UK Manual of the Law of Armed Conflict suggest different tests for assessing whether resistance groups have dispersed the exclusive authority of the belligerent occupier. While the *Hostages* trial focuses on the potential ability of the belligerent occupier to re-establish its authority—“the Germans could at any time they desired assume physical control of any part of the country”¹⁸⁹—the UK Manual of the Law of Armed Conflict focuses on the dexterity in which resistance is actually, in fact, suppressed—“the occupying power takes steps to deal with the rebellion and re-establish its authority.”¹⁹⁰ Between the two, the standard under the *Hostages* trial prescribes a lower burden of proof, since it depends on the *potential* of re-asserting authority, rather than the actual re-assertion of authority.

187. U.S. Military Tribunal, Nuremberg, *supra* note 121, at 56 (emphasis added).

188. U.K. MINISTRY OF DEFENCE JOINT DOCTRINE & CONCEPTS CTR., JSP 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 11.7.1 (2004) [hereinafter U.K. MANUAL] (emphasis added).

189. U.S. Military Tribunal, Nuremberg, *supra* note 121, at 56.

190. U.K. MANUAL, *supra* note 188, ¶ 11.7.1.

This paper proposes that the standard provided by the *Hostages* trial is more appropriate¹⁹¹ when creating consistency between the different constitutive elements of effective power—the ability to assert authority and the exclusiveness of the authority. The *Hostages* trial standard is, furthermore, useful for resolving Dinstein’s dilemma concerning the determination of the end of effective control. As discussed above,¹⁹² the potential to assert authority provides a key basis for maintaining effective control. Accordingly, exclusivity of control must also depend on the regime’s ability to reassert authority and suppress resistance on the ground, as opposed to the actual suppression of resistance. Creation of two different standards for determining when power is effective would be counterproductive.

b. Vertical Sharing of Obligations

The vertical sharing of authority does *not* undermine the exclusivity a group’s authority over certain territory. The vertical sharing of authority occurs when there is a hierarchy between the armed group and other subordinate organs, with “the former maintaining a form of control over the latter through a top-down approach to the allocation of responsibilities.”¹⁹³ The vertical sharing of obligations is distinct from the horizontal sharing of obligations, where there is competition over whose authority prevails.¹⁹⁴ Where regimes share authority horizontally, it is unclear whether the control of any regime is exclusive and effective.

In the context of extraterritorial obligations, the ECtHR in *Loizidou v. Turkey* held that the State is obliged to secure human rights when it exercises effective control over an area, “whether it be exercised directly, through its armed forces, or

191. This does not, in any way, preclude the standard that the U.K. Manual prescribes, because the higher standard would fall within the scope of the lower standard of proof. When the occupying power does suppress rebellion at once, it demonstrates how it does have the capacity to re-assert its authority and falls within the standard of proof prescribed in the *Hostages* Trial.

192. For a discussion of the ability to assert authority as an element of effective power, see *supra* Section III.A.i.

193. Ferraro, *supra* note 116, at 149.

194. *Id.*

through a subordinate local administration."¹⁹⁵ Occupation law similarly reflects this. Articles 47,¹⁹⁶ 50,¹⁹⁷ and 56¹⁹⁸ of the Fourth Geneva Convention require cooperation between the occupying power and local authorities, and such sharing of power does not affect the overall effective power that the belligerent occupier exercises over the territory.¹⁹⁹ The High Court of Justice of Israel held that the belligerent occupier may:

[D]etermine to what degree it exercises its powers of civil administration through its direct delegates and which areas it leaves in the hand [sic] of the former government, whether local or central government officials. Permitting the activities of such governmental authorities does not, per se, detract from the factual existence of effective military control over the area and the consequences that ensue therefrom under the laws of war.²⁰⁰

Ferraro suggests that the notion of "subordination" is crucial for permissible sharing of authority, stating that "the continued operation of the local government must therefore de-

195. *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 1, ¶ 62 (emphasis added).

196. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 47, Aug. 12, 1948, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.") (emphasis added).

197. *See id.* art. 50 ("*The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.*") (emphasis added).

198. *See id.* art. 56 ("To the fullest extent of the means available to it, *the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.*") (emphasis added).

199. Ferraro, *supra* note 116, at 149.

200. *See id.* at 149–50 (quoting HCJ 102/82 Tsemel v. Minister of Defence 37(3) PD 365, 373–74 (1983)).

pend on the occupier's willingness to let it function and exert responsibilities to a certain extent."²⁰¹ As such, while the vertical sharing of authority does not undermine the exclusiveness of authority, the horizontal sharing of authority subverts the effectiveness of the control exerted by an armed group.

3. *Independent Existence*

Finally, it is crucial that the armed group exists independently. The justification for this factor corresponds with the required exclusivity of the authority exerted by the armed group: if the armed group is independent and its authority is exclusive, a legal vacuum arises.

According to the law on state responsibility, Article 10 of the ARSIWA provides that states are not responsible for the acts of armed groups. Instead, they are only responsible for the actions of its own organs of government, or for individuals who act under the direction, instigation, or control of those organs.²⁰² If international law imputes the human rights abuses of an armed group to a State, which is the traditional recipient of human rights duties, then no legal vacuum would arise in the territory. States would then be fully responsible for the human rights violations, instead of the armed group. However, legal voids arise because of the absence of such accountability for armed groups' actions under international law, and the reality of their existence as separate and independent from the influence of a State.

Below, this paper discusses two common factual situations where states effectively undermine the independence of armed groups. The first situation arises when the armed group is subject to the authority of the original State in control of the territory. The second situation arises when the armed group is subject to the authority of a third State, for instance, because of the financial or military support that the third State provides in support of the resistance of the armed group against

201. *Id.* at 149.

202. The Commentary to Article 10 states: "The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law." Draft Articles on Responsibility, *supra* note 117, art. 10 cmt. 2; *see also id.* art. 10 cmt. 2 (placing such movements "on the same footing as that of [private] persons or groups.").

the original State. In these two situations, the armed group does not exist independently, and thus does not exercise effective power.

a. Subject to Authority of the Original State

The first situation occurs “if an entity is subject to the exclusive authority of another legal person,” such that “it is the personality of the superior authority which is more appropriately relevant to the international legal order.”²⁰³ If so:

[T]he ‘classic’ definition of independence in the context of statehood—‘the state has over it no other authority than that of international law’—may be applied to non-state actors in general, and armed opposition groups in particular.²⁰⁴

The armed group is then subject to the authority of the original State—“another legal person.”²⁰⁵ The Central African Republic (CAR) exemplifies a consensual delegation of authority. There, the government authorized Union of Democratic Forces for Unity (UDFR), a non-state armed group, to maintain security over certain territories.²⁰⁶ Properly understood, the CAR government delegated the authority that the UDFR exercised. Accordingly, the UDFR did not exist independently. In this situation, *no* lacuna arises because the state itself is responsible for the conduct of the armed group under its authority. Following this line of logic, the armed group exists independently only if the state cannot subject it to its “normal internal rule of law mechanisms, such as legislation, the police force, the judiciary, and so on.”²⁰⁷

More commonly, the State loses control over the armed group and accordingly gives the armed group independent ex-

203. MURRAY, *supra* note 50, at 133.

204. *Id.* at 133–34

205. *Id.* at 133.

206. In a briefing paper, the International Crisis Group noted with regard to the Central African Republic that “[s]ince the 13 April 2007 peace agreement, the government, aware of its army’s weakness, has authorised the rebel group to maintain security in both Vakaga and Haute-Kotto prefectures.” Int’l Crisis Grp., *Central African Republic: Keeping the Dialogue Alive*, Africa Briefing No. 69, at 13 (Jan. 12, 2010).

207. MURRAY, *supra* note 50, at 138.

istence without its consent.²⁰⁸ This occurs when the non-state entity becomes party to a NIAC, creating an insurgency. A state of insurgency is distinct from a rebellion. A rebellion is:

[A] situation of internal violence involving either a sporadic challenge to state authority, or a short-lived insurrection which could be suppressed ‘by normal procedures of internal security.’ The defining marker of rebellion was thus that the normal mechanisms of the state—notably the police force—could be utilised in order to induce the relevant entity to respect the domestic legal order.²⁰⁹

On the other hand, an insurgency arises when state mechanisms are insufficient and resolution of the situation necessitates international regulation:

[W]hen the insurrection became so widespread that *it could not be contained by the state’s civil administration*, then it was customary . . . for the government and foreign states ‘to make an admission of insurgency’. This ‘was an acknowledgment of the fact that an organized uprising for political ends involving the use

208. This includes situations where the State tries to subject a group to its authority but cannot do so reasonably. As noted by Murray, “in Mexico the state attempted to bring areas subject to the control of a number of different drug gangs back under its control and deployed significant military resources to achieve this aim. Despite these efforts, however, the state was unable to effectively impose its authority on a number of these groups.” *Id.* at 141–42; see also Nick Miroff & William Booth, *Mexico’s Drug War Is at a Stalemate As Calderon’s Presidency Ends*, WASH. POST (Nov. 27, 2012), https://www.washingtonpost.com/world/the_americas/calderon-finishes-his-six-year-drug-war-at-stalemate/2012/11/26/82c90a94-31eb-11e2-92f0-496af208bf23_story.html (describing the increase in violent crime despite years of military crackdown).

209. MURRAY, *supra* note 50, at 139; see also Richard A. Falk, *Janus Tormented: The International Law of Internal War*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE 197 (James N. Rosenau ed., 1964) (analyzing the links between internal war and international law); SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 323–429 (2012) (discussing the law of conduct of hostilities and the implementation of non-judicial enforcement); HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 22–29 (1988) (discussing legitimate authority in non-international armed conflict); Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts*, 91 INT’L REV. RED CROSS 35, 48–9 (2009) (defining “rebellion”).

of armed force and *temporarily beyond the control of the civil authorities*' was taking place.²¹⁰

Armed groups only have independent existences where there is an insurgency—not just a rebellion. Situations of internal disturbance and tension where police or armed forces may control the situation and restore law and order do not qualify as NIACs, as the Common Article 3 threshold “did not include ‘a mere riot or disturbances caused by bandits’, situations of ‘disorder, anarchy or brigandage’, an ‘uprising’, or ‘mere strife’.”²¹¹ As such, if the armed group is a party to a NIAC, the armed group has acquired an independent existence.

b. Subject to Authority of a Third State

The second situation occurs when a third state has authority over an armed group. The ICJ suggests that this occurs when the armed group has “complete dependence” on the third state,²¹² such that it is considered a *de facto* organ of the state. However, the law of extraterritorial human rights obligations imposes an even lower threshold for holding a state responsible. In other words, where the third state exercises decisive influence over the armed group, as seen as *Ilascu* with regard to the MRT and Russia, the third state maintains the effective control over a territory.²¹³ In this situation, no lacuna arises because the third state is responsible for any violations of human rights by the armed group, either indirectly through the law of state responsibility, or directly as an extraterritorial human rights obligation.

210. HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL ORGANIZATIONS AND CIVIL WARS* 6 (1995) (quoting NORMAN J. PADEFORD, *INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE* 196 (1939)) (emphasis added).

211. MURRAY, *supra* note 50, at 140. This was noted during the drafting process of Article 3. See generally David A. Elder, *The Historical Background of Common Article 3 of the Geneva Conventions of 1949*, 11 *CASE W. RES. J. INT'L L.* 37, 52 (1979) (discussing the negotiating history).

212. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 109–10 (June 27); *Application of Convention on Prevention and Punishment of Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 1996 I.C.J. Rep. 595, ¶ 393 (July 11).

213. For a discussion of *Ilascu*, see *supra* Section II.A.

B. *Threshold for Effective Power*

In the context of occupation law, Graber laments that defining the amount of control deemed objectively effective is an imponderable problem.²¹⁴ This raises the question of what the threshold should be for deciding when the power that an armed group exercises over a territory is effective.

In short, the answer to this question depends on the factual circumstances. The degree of effectiveness required depends on the consequences attached to effective control.²¹⁵ In this vein, an armed group's capacity to exercise control over its territory determines the human rights obligations owed by the group.²¹⁶ The threshold for effectiveness is thus a sliding scale dependent upon factual circumstances. This is mirrored by state obligations, where states may have reduced human rights obligations if they lose control over territory.²¹⁷

Notably, two of the proposed factors are binaries: power is either exclusive or not exclusive, and the armed group is either independent or not independent. Accordingly, the proposed sliding scale of effectiveness turns on the DFR's ability to exert authority over the territory it controls. This may be assessed in terms of the type of power that the DFR exerts, the duration of its exertion of authority,²¹⁸ and the comprehensiveness of its power.

There are two ways in which the obligations of DFRs vary based on this sliding scale: first, in terms of the types of rights

214. DORIS APPEL GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914: A HISTORICAL SURVEY* 69 (1949).

215. Milanovic states that “the test of effective overall control of an area is also a functional one” such that the “stringency in the degree of effectiveness required depends foremost on the consequences that attach to the fact of such effective control.” MILANOVIC, *supra* note 118, at 141.

216. Similarly, Fortin has argued that there are “important advantages to an approach which matches an armed group's obligations to its capacity.” FORTIN, *supra* note 7, at 169.

217. See discussion *supra* Section II.A.

218. In the context of occupation law, the Israeli Supreme Court has suggested that the application of the law of occupation in that area does not necessarily require the existence of a durable belligerent occupation. HCJ 593/82, Tzemel v. Minister of Defence 37(3) PD 365 (1983), *translated in* 13 ISR. Y.B. HUM. RTS. 360, 363 (1983). However, this proposition can be distinguished from the present context insofar as we are concerned with the extent of obligations that DFRs should have instead of whether DFRs have any obligations at all.

that DFRs must secure; and second, in terms of the range of obligations within the rights that DFRs must secure.

1. *Types of Rights*

Certain human rights are intrinsically tied to the presence of specific public institutions and the exercise of public powers. For instance, Lindsay Moir notes that non-governmental parties likely cannot uphold certain rights, including the right to due process, if they do not have their own legal system or courts.²¹⁹

However, if the DFR operates a court system, then they have an obligation to ensure that their courts are “competent, independent and impartial” under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).²²⁰ Expecting this right where the DFR has legal power is justified, as the group exerts greater control over the territory by virtue of exercising legal power.

2. *Range of Obligations*

Within each human right is a range of obligations, which depend on the entity’s capacity to secure them. For instance, in the context of socioeconomic rights, the ICESCR recognizes that while ratifying states must realize the minimum core obligations, these rights can be realized progressively depending on the availability of the state’s resources, so long as they take steps to do so.²²¹ There are different obligations within, for instance, the right to health, with the obligations depending on the maximum of the state’s available resources.²²² Under human rights law, duty-bearers may have positive or negative obligations, and procedural or substantive obligations.

219. LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 194 (2002).

220. Human Rights Comm., General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, ¶¶ 18–21, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

221. Article 2 of the ICESCR requires that each State party “undertakes to take steps, individually and through international assistance and co-operation . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.” GA Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1996).

222. *Id.*

On the furthest end of the spectrum, DFRs will always have the negative obligation to respect human rights, as long as they meet a minimal threshold of effective control over the territory. Despite arguments by Milanovic in the context of extraterritorial human rights obligations, human rights obligations still depend on the existence of effective power. According to Milanovic, states must always respect human rights—whether territorially or extraterritorially—because the negative obligation “does not depend on its control over territory,” but on “control over its own agents.”²²³ While this approach is normatively desirable because it widens the net cast by human rights law, the framework is not immediately transferable into the present context of DFRs respecting human rights. As discussed above, a lacuna must exist as a factual trigger for the human rights obligations of DFRs.²²⁴ Thus, at the very least, the DFR must displace the authority of the original government such that the government cannot protect or fulfil its obligations. This displacement of authority depends on, if only to a minimal degree, exclusive control over territory. Holding an armed group accountable for a failure to respect human rights if it exercises no territorial control ignores the fact there is no vacuum in such a situation, as the original state retains the obligation to protect individuals against human rights abuses of third parties, including armed groups, or else be held accountable under the law of state responsibility.

223. MILANOVIC, *supra* note 118, at 141.

224. See discussion *supra* Section II. However, one situation where the armed group must respect human rights law regardless of control over territory is where the norm has attained *jus cogens* status such that it is an *erga omnes* obligation. This can include the range of crimes that are protected under international criminal law, such as genocide, which all individuals have the responsibility to respect. See generally Dire Tladi (Special Rapporteur), *Second Report on Jus Cogens*, U.N. Doc. A/CN.4/706 (Mar. 16, 2017), <http://legal.un.org/docs/?symbol=A/CN.4/706>. This is also reflected in the Syrian Commission of Inquiry’s report in February 2012, where they note that “at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) binds States, individuals and non-State collective entities, including armed groups.” This is so even if there is no NIAC and even if the armed groups did not exercise effective control over territory. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 106, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012).

On the other end of the spectrum are DFRs' positive obligations to ensure the protection and fulfilment of human rights. However, positive obligations are heterogeneous, ranging from the procedural or prophylactic²²⁵ to the substantive. Procedural or prophylactic positive obligations, in the context of the right to life under Article 2 of the ECHR, include the obligation to conduct an independent and effective investigation into a possible taking of life by the state or organization's own agents, or prosecution of perpetrators of takings of life.²²⁶ In addition, where an authority deprives persons of liberty, it must at least provide those persons with food, clothing, or health care.²²⁷ These positive obligations are not onerous because they are mere duties of due diligence.²²⁸ These are realistic commitments for DFRs, thus requiring a lower degree of effectiveness than substantive positive obligations. The commitment that numerous non-state actors made to the Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination exemplifies the reasonableness of these obligations. The Deed of Commitment, signed by the Chin National Front, the Karen National Liberation Army, and several other non-state armed groups in India, contained the commitment to:

[T]ake all feasible measures towards effectively preventing and responding to acts of sexual violence committed by any person, in areas where we exercise authority [and] . . . endeavour to provide victims of sexual violence with

225. These are tied to the State's negative obligations to respect human rights. For instance, in *R v. Foreign Secretary*, Lord Bingham pointed to how certain "procedural dut[ies do] not derive from the express terms of article 2, but was no doubt implied in order to make sure that the substantive right was effective in practice." *R. Foreign Secretary*, [2008] UKHL 20, [5] (appeal taken from Eng.); MILANOVIC, *supra* note 118, at 216.

226. *R v. West Somerset Coroner* [2004] 2 AC 182 (HL) ¶ 3 (appeal taken from Eng.).

227. The State has positive obligations towards an individual if it acts beforehand so as to restrict or affect the rights or liberty of the individual concerned, e.g. by incarcerating them. In *Estelle v. Gamble*, 429 U.S. 97, 102–04 (1976), the U.S. Supreme Court stated that "elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration" even if they do not owe these positive obligations to the population at large.

228. MILANOVIC, *supra* note 118, at 141.

the assistance and support they require in order to address the impact of such violence.²²⁹

Procedural obligations toward purely private conduct have more far-reaching scope and flexibility in determining conduct. However, the procedural nature of these obligations implies a less onerous burden than substantive obligations.²³⁰ The ECtHR in *Osman v. United Kingdom* was concerned that these positive obligations may “impose an impossible or disproportionate burden on the authorities.”²³¹ For example, borrowing facts from *Al-Skeini v. United Kingdom*,²³² British troops on patrol killed the five applicants. If the United Kingdom did not exercise effective overall control over Basra, and third parties, not British troops, carried out the killings, the United Kingdom would likely not have the procedural obligation to “conduct an effective investigation without actually having control over the territory,” because of the disproportionate burden it would place on the United Kingdom.²³³

Arguably, most onerous of all would be the imposition of positive *substantive* obligations. This is especially true for socio-economic rights, which include “taking an active role in food distribution if there is a situation of humanitarian disaster or food shortage,” and “the active provision of healthcare and education, within the boundaries of the armed group’s capability.”²³⁴

The imposition of positive substantive obligations is implicitly tied to the types of power that the DFR exercises over the territory. For instance, if a DFR asserts its authority through the provision of health care or housing, then it exercises greater effective control and has a greater range of obligations under the socioeconomic right to health care or housing. *Prima facie*, it is unlikely that DFRs who have just asserted

229. GENEVA CALL, DEED OF COMMITMENT FOR THE PROHIBITION OF SEXUAL VIOLENCE IN SITUATIONS OF ARMED CONFLICT AND TOWARDS THE ELIMINATION OF GENDER DISCRIMINATION ¶¶ 2–4, http://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Prohibiting-sexual-violence-and-gender-discrimination.pdf (last visited Nov. 20, 2018).

230. MILANOVIC, *supra* note 118, at 217.

231. *Osman v. United Kingdom*, App. No. 23452/94, 29 Eur. H.R. Rep. 245, ¶ 116 (1998).

232. *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99.

233. MILANOVIC, *supra* note 118, at 217.

234. FORTIN, *supra* note 7, at 166.

their control would immediately have the obligation to fulfil socioeconomic rights if they lack the capacity to do so. However, as noted above, the effectiveness of the power exerted by the DFR can increase over time. If the effectiveness of the DFR's power increases, then the DFR will eventually have positive obligations to fulfil substantive rights.

Represented graphically, the sliding scale of effectiveness corresponds with the obligations owed by the DFR, with negative obligations to *respect* human rights on the one end, positive procedural obligations to *protect* human rights in the middle, and positive obligations to *fulfil* substantive rights on the other.²³⁵

V. CONCLUSION

The doctrine of effective power, within the context of human rights obligations and armed groups, constitutes three conjunctive factors that must all be met for the armed group to gain a quasi-governmental complexion. First, the ability to assert authority; second, the exclusiveness of the authority asserted; and third, the independence of the group's existence. When these conditions are met, the armed group constitutes a DFR and an effective actor in the international decision-making plane, such that they are bound by human rights obligations. The law is only as useful as it can be meaningfully applied, and filling the conceptual lacuna of what effective power—a concept that which caustically evolved from factual situations—means will hopefully act as a springboard for greater accountability from DFRs.

The principle of *ex factis jus oritur* is important for the continued evolution of international law in the face of new practical realities that challenge the legal status quo. When confronted with the factual inevitability of a legal vacuum, scholars and judicial actors should interpret IHRL progressively, but also consistently with the norms of international law. Attaching human rights obligations to armed groups can only happen when there is the circumstantial trigger of the displacement of state authority in a territory, *and* the armed group exercises effective power over a territory such that it is a

235. A graphical version of this sliding scale appears in Appendix I of this article.

limited international legal personality with duties under international law. This simultaneously allows for an expansion of international law, while staying within its doctrinal parameters, insofar as factual necessity alone cannot and should not be the sole reason for extending human rights obligations to non-state actors.

This paper confronts two related lacunas existing in IHRL: first, the *legal* lacuna arising from state loss of effective control over territory; and second, the *conceptual* lacuna that exists as a result of the lack of clarity of the substantive content of the doctrine of effective power. This paper fills these lacunas by elucidating the content of the doctrine of effective power, such that the doctrine can operate as a compass for determining when DFRs should be held accountable for their human rights violations.

APPENDIX I

DEGREE OF EFFECTIVENESS	OBLIGATIONS OWED
No territorial control	<i>Erga omnes</i> obligations
Minimal effective power	Negative obligations
	Positive procedural obligations from its own conduct OR positive obligations flowing from deprivation of liberty
	Prophylactic obligations to prevent purely private conduct
Maximum effective power	Substantive positive obligations

