

# **Engaging With Armed Groups: A Human Rights Field Perspective From Nepal**

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## **1. Introduction**

### *1.1. The Issue and its Relevance to the Study of Global Administrative Law*

Global administrative law is concerned in part with the ways in which international law, rules and regulations – and the trans-national institutions and networks responsible for global rulemaking and enforcement - exert influence on the behaviours of individuals and practices of organizations at the national and international levels.<sup>1</sup> This paper will briefly explore how the theoretical uncertainty surrounding one aspect of the international law debate – whether and to what extent certain non-state actors are obligated to abide by international human rights and humanitarian norms – has impacted the policies and practices of human rights organizations – in particular, international human rights field presences. In doing so, it will draw upon the recent experience of Nepal, where international human rights organizations have been forced by circumstance to engage with a range of non-state armed groups, and have found the legal framework lacking.

Given the current ambiguities regarding the legal status of such groups, human rights monitors in many field missions have had to improvise with the shifting political contexts in which they work, filling in gaps in law with their own understandings of national and international best practices. In response, some international organizations have begun to develop institutional policies governing engagement with armed groups by their personnel in the field, based in part on a human rights assessment of the groups' actions. There is a growing body of evidence that as a result a new normative framework may be emerging within which armed group members have become common subjects of human rights discourse despite their status as non-state actors.

The failure of traditional law-making institutions to satisfactorily address the human rights consequences of armed group activity has opened the way for other entities – including international human rights organizations – to play a role in the development of pertinent 'soft law' and other normative structures. Global administrative law is particularly suited to analyzing the development of norms and rules outside of formal international law-making institutions.<sup>2</sup> The paper will therefore conclude with a reflection on how scholars of global administrative law and human rights practitioners in the field might collaborate to further develop this normative framework, as well as anticipate the unintended consequences of codifying rules governing the interaction between international organizations and armed groups.

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<sup>1</sup> For an overview, see B. Kingsbury, N. Krisch & R. Stewart, "The Emergence of Global Administrative Law", 68 *Law & Contemp. Probs.* 15 (Summer/Autumn 2005) p. 17.

<sup>2</sup> *Ibid.*, pp. 51-52.

## 1.2. *The View from Afar: Human Rights Law and Non-State Actors*

Since the adoption of the Universal Declaration of Human Rights, human rights has become an integral part of international legal and political discourse. States now take for granted that they have certain fundamental obligations under this international legal regime, some of which are derogable only under the most extreme circumstances. Though impunity for international crimes remains the norm, it is indisputable that the mainstreaming of human rights has had an impact on state practice. Recent controversies over the International Criminal Court's issuance of an arrest warrant for the sitting President of Sudan, and the government of Sri Lanka's resistance to international monitoring of its offensive against the Tamil Tigers, highlight the difficulties in enforcing international law. But the fact that the debate is occurring at all, and that it often invokes the rights of victims in addition to the obligations of states, is a sign that the tone of the conversation has changed. There is a growing consensus that individuals are bearers of rights and obligations, and not simply citizens of states that bear certain duties toward one another under international law.

Although the principle of individual criminal responsibility for violations of international criminal law is now widely accepted,<sup>3</sup> there is no consensus about the degree to which non-state entities have positive legal obligations under international human rights law. Although the well-developed framework of international humanitarian law does extend to the activities of certain types of insurgencies and national liberation movements, there is no clear and consistent framework applicable to the behaviour of armed groups that neither qualify as parties to a conflict under traditional international humanitarian law principles, nor trigger individual criminal liability under international criminal law.

Traditional views maintain that the rights and obligations of armed groups derive from their status as parties to a conflict (such as recognized insurgents, or militia acting on behalf of a state), or from their state-like behaviour (such as exercising quasi-governmental powers over a particular geographic area). Because the legal obligations of these groups have been so closely linked to their status as parties to a conflict, governments and international organizations alike have been cautious not to talk of armed groups as having human rights 'obligations' for fear that doing so will legitimize what might otherwise be viewed as criminal organizations outside of the jurisdiction of international law.

Despite these concerns, and although the law remains unsettled, there is a growing consensus that the view that only states and non-state actors which 'behave like states' are legally capable of bearing international legal duties is no longer adequate in a world populated with transnational corporations, private security companies, terrorist organizations and armed gangs operating across borders.

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<sup>3</sup> A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press, 2005) p. 26; see also, J. Cerone, "Much Ado About Non-state Actors: The Vanishing Relevance of State Affiliation in International Criminal Law" (2008), <[works.bepress.com/john\\_cerone/1](http://works.bepress.com/john_cerone/1)>, visited on 7 June 2009.

### 1.3. *The View from the Field: De Facto Recognition of Armed Groups*

As scholars debate the breadth of Common Article 3 of the Geneva Conventions and the nature of the subject in international law, human rights activists, investigators and lawyers on the ground are regularly coming into contact with armed groups. They often find themselves in uncharted territory, criticizing the actions of these groups but falling short of labeling their activities as ‘violations’ of international law, referring instead to ‘abuses’,<sup>4</sup> and calling on them to moderate their behaviour, without speaking of ‘duties’ or ‘obligations’. There is a growing feeling among those in the field that current international law does not supply the human rights practitioner with the conceptual tools needed to deal effectively with the growing threat of non-state human rights abuses.

Andrew Clapham, in the most comprehensive analysis of the issue published to date, argues that the tide may have already turned, and that many actors – including representatives of international organizations – have begun to treat the violent acts of certain non-state actors as violations of international human rights. He notes for instance that the language of Security Council resolutions presume that non-state actors’ use of child soldiers can constitute violations of international human rights obligations.<sup>5</sup> UN-supported human rights monitoring bodies, tribunals and UN Special Procedures mandate holders have found, without drawing ambitious conclusions about their legal status, that armed groups are bound by certain fundamental human rights principles.<sup>6</sup> International human rights monitoring organizations, such as Human Rights Watch and Amnesty International, have also turned their attention to armed groups, and now regularly call on them to abide by human rights principles – the scope of which are often left undefined but presumably include the rights to life, liberty and physical integrity.<sup>7</sup>

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<sup>4</sup> This paper adopts a convention often used by human rights organizations to differentiate breaches of human rights and humanitarian law by state actors from infringements by non-state groups, by referring to the former as “violations” and the latter as “abuses”. At the same time, the paper seeks to challenge that distinction – the reasons for which, in Clapham’s words, “are, seemingly, tactical and political rather than imbued with legal meaning.” Clapham, *supra* note 3, p. 49. Any confusion to which the use of these terms gives rise accurately reflects the shifting semantic ground which they occupy.

<sup>5</sup> Clapham, *supra* note 3, p. 283.

<sup>6</sup> For instance, the Guatemalan Historical Clarification Commission concluded that “armed insurgent groups... had an obligation to respect... the general principles common to international human rights law...” UN Doc. A/53/928 Annex, 27 (April 1999) paras. 127-128, cited in Clapham, *supra* note 3, p. 37. A Sri Lanka country report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions reads: “the LTTE... remains subject to the demands of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.” UN Doc. E/CN.4/2006/53/Add.5 (27 March 2006) para. 25. In a particularly honest assessment of the confused state of law in this area, the Special Court for Sierra Leone found that Common Article 3 applied to armed groups notwithstanding a lack of consensus on the reasons why, stating that although there is “no unanimity among international lawyers as to the basis of the obligation of insurgents to observe the provisions of Common Article 3... there is now no doubt that this article is binding on States and insurgents alike and that insurgents are subject to international humanitarian law.” *Prosecutor v. Kallon & Kamara*, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, 13 March 2004, Special Court for Sierra Leone, Appeals Chamber, para. 45.

<sup>7</sup> See examples at Z. Salzman, “Armed Groups in Peace Processes: Who Gets a Seat at the Negotiating Table?” *ILJ Emerging Scholars Paper* 10 (2008) p. 45, and R. Nair, “Confronting the Violence Committed by Armed Opposition Groups”, 1 *Yale Human Rights and Development Law Journal* 1 (1998).

This disparity between law and practice has forced field presences to work with the conceptual tools at their disposal, invoking international humanitarian and human rights law where it supports their advocacy, and where it does not, making do with a patchwork of non-binding international standards, national laws and regulations, and generally accepted ethical principles. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, recognizing that legal recognition of armed groups remains problematic, concluded pragmatically that the Human Rights Commission and its special procedures “had a right to hold armed groups to account, a *droit de regard*, whatever the international legal status of a particular group might be.”<sup>8</sup> In fact, human rights field presences throughout the world have been exercising this *droit de regard* for some time.

The next section of this paper briefly examines the ways in which the uncertainty surrounding the human rights obligations of non-state actors has impacted the work of human rights organizations, including the UN, working in Nepal during and after the ten-year-long insurgency. The paper will argue that there is a need to develop a more coherent framework to guide engagement with armed groups by human rights workers. It will then make some preliminary observations about the implications of the question for the study of global administrative law.

## **2. Engaging with Insurgents and Armed Groups in Nepal**

The case of Nepal is informative because the country has had both an unusually active human rights monitoring presence (in the form of civil society organizations, a National Human Rights Commission and a large United Nations human rights field presence), as well as a wide range of armed non-state actors.<sup>9</sup> The most well known of these non-state groups is the Maoist insurgency, which was relatively easy for the international community to integrate into existing legal architecture by virtue of the Maoist’s establishment of parallel governance institutions in parts of the country, and their formal recognition as a party to the conflict. The later stages of the conflict and the post-conflict period saw the emergence of militant organizations, some associated with the insurgency (such as the Young Communist League (YCL)), and others with ties to the military (such as community defence groups known as *Pratihar Samiti*). Although a more difficult argument to make, human rights organizations could still justify their reporting and advocacy on the basis of these groups’ alleged links to state or insurgent institutions. More problematic has been post-conflict violence by armed groups in Nepal’s southern plains, and militant ethnic autonomy movements in the hills. This section of the paper sketches the contours of these movements, and the ways in which human rights monitors, in particular the United Nations, have treated violations and abuses attributed to them.

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<sup>8</sup> UN Doc. A/62/265 (16 August 2007) para. 42.

<sup>9</sup> Clapham cites the early reporting of the Office of the United Nations High Commissioner for Human Rights in Nepal, which documented ‘abuses’ by Maoist insurgents, armed militia and community defence groups, as evidence of a growing focus by human rights bodies on non-state actors. A. Clapham, “Human rights obligations of non-state actors in conflict situations”, *International Review of the Red Cross* 88: 863 (Sept. 2008) pp. 507-508.

### 2.1. *The Maoist Insurgency – Voluntary Commitments and Behaving Like a State*

By the time the ten-year-long (1996-2006) Maoist insurgency was underway in Nepal, the era of international humanitarian intervention was in full swing (with precedents having been or being set in Somalia, Haiti, East Timor, the Balkans and elsewhere). It is perhaps not surprising then that during that period the Governments of Nepal, including both civilian-led governments and the royal government of king Gyanendra (which dissolved the Parliament in a coup in February 2005), obsessively characterized the Maoist rebels as criminals in an attempt to remove the Government's conduct of the war from the ambit of international scrutiny.

Although the Maoist insurgency was slow to develop, by the late 1990s, the movement had succeeded in building a strong base among the poorest and most marginalized communities in Nepal, and had developed a sophisticated political and military structure.<sup>10</sup> The Maoists began to set up parallel government institutions, including rural development bodies and revolutionary tribunals. It became increasingly difficult for the government to maintain that the insurgency, rumoured to have connections with both China and the Naxalite movement in northern India, was nothing more than a localized crime problem. As the Maoists gained ground militarily in the western parts of the country, the conflict drew more international attention, and soon both the activities of the Maoists and the Nepal Army became the subject of monitoring and criticism by human rights organizations, such as Human Rights Watch and Amnesty International.

Although in most places, the Maoist's hold remained tentative, especially near urban areas, it had become relatively clear that the insurgency had achieved 'effective control' over a substantial amount of territory – enough so that international organizations including the ICRC were willing to conclude that the Maoists had obligations under international humanitarian law in the areas which they had occupied. Until the extent of Maoist control was clearly established though, human rights reports tended to gloss over the subtleties of applying international law to the Maoists, occasionally resorting to the questionable theory that armed grouped members are bound to comply with treaties to which the states of which they are citizen are a party, and often referring to adhering to principles rather than honouring obligations.<sup>11</sup>

In addition to their growing control over territory, beginning in early 2004, the Maoist clandestine and military leadership began to make public commitments that Maoist combatants would abide by international law during combat operations.<sup>12</sup> In 2005, the Maoists and the government entered into a ceasefire code of conduct, which made

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<sup>10</sup> For details, see "Nepal's Maoists: Their Aims, Structure and Strategy", International Crisis Group Report 104 (27 October 2005), <[www.crisisgroup.org/home/index.cfm?id=1265&l=1](http://www.crisisgroup.org/home/index.cfm?id=1265&l=1)>, visited on 7 June 2009.

<sup>11</sup> "By virtue of Nepal's ratification of the four Geneva Conventions, both the Nepalese security forces and the CPN-M are bound by common Article 3 of the Geneva Conventions." *Investigations into violations of international humanitarian law in the context of attacks and clashes between the Communist Party of Nepal (Maoist) and Government Security Forces*, Office of the High Commissioner for Human Rights, Nepal (Jan – March 2006), <[nepal.ohchr.org/en/index.html](http://nepal.ohchr.org/en/index.html)>, visited on 7 June 2009.

<sup>12</sup> "Nepal: Dealing with a Human Rights Crisis", International Crisis Group Report 94 (24 March 2005) p. 17, <[www.crisisgroup.org/home/index.cfm?id=3337](http://www.crisisgroup.org/home/index.cfm?id=3337)>, visited 7 June 2009.

reference to the Universal Declaration.<sup>13</sup> This trend culminated in April 2006 at the height of the month-long People's Movement leading to the king's abdication, at which time the Maoists released a *Statement of Commitment to Human Rights and Humanitarian Principles*. By the time a field office of the United Nations High Commissioner for Human Rights (OHCHR) was established in Nepal in mid-2005, there was near universal recognition that the Maoists had international obligations by virtue of their effective control over territory and the leadership's voluntary commitments.<sup>14</sup>

The international framework for dealing with insurgents during an internal conflict was sufficient to justify the high-level of international monitoring, including calling on the Maoists to abide by international standards, and generally treating them as duty-bearers under international law. And it seemed effective. The Maoist leadership later acknowledged that it had believed that building legitimacy in the eyes of the international community would be to their benefit, and had moderated their behaviour accordingly. From mid-2005, when the UN established its human rights monitoring presence, there was a dramatic drop in civilian casualties, torture, illegal detention, and enforced disappearances. International scrutiny of the last stages of the conflict may also have been a contributing factor in the unexpectedly swift downfall of the monarchy in April 2006.<sup>15</sup>

As the legal status of the main human rights violators/abusers became more ambiguous, engagement diminished, and as a result the international community had a less substantial role to play in monitoring and reducing post-conflict violence.

## 2.2. Militia and State-sponsored Armed Groups – Finding Links to 'Legitimate' Actors

Even during the conflict, the picture on the ground was more complicated than a simple insurgent/ state dichotomy. The Maoist guerilla army was a patchwork of reasonably well-disciplined members of the People's Liberation Army (PLA) and poorly trained village-level militia. In addition, as the conflict developed, the Maoists incorporated pre-existing ethnic movements into the insurgency, including Tharu militia in the west of the country, and Kirati and Limbuwan groups in the east. For its part, the Nepal Army

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<sup>13</sup> For the text of the agreement, see

<[www.nepalnews.com/archive/2006/may/may31/code\\_of\\_conduct.php](http://www.nepalnews.com/archive/2006/may/may31/code_of_conduct.php)>, visited on 7 June 2009.

<sup>14</sup> From a statement of then High Commissioner Louise Arbour: "The leadership of the CPN(Maoist) has made general commitments to observe international humanitarian law and respect human rights: I call on them to declare publicly their acceptance of all that these principles require...", "High Commissioner for Human Rights Calls for State and Maoists to Respect International Humanitarian and Human Rights Law in Nepal's Armed Conflict", OHCHR Press release (5 January 2006),

<[nepal.ohchr.org/en/PressRelease.html](http://nepal.ohchr.org/en/PressRelease.html)>, visited on 7 June 2009; see also, Nepal: Maoist Rebel Abuses Continue, Joint letter to Prachanda, Head of the Communist Party of Nepal (Maoist) from Human Rights Watch, Amnesty International and the International Commission of Jurists (19 May 2005), <[www.hrw.org/en/news/2005/05/19/nepal-maoist-rebel-abuses-continue](http://www.hrw.org/en/news/2005/05/19/nepal-maoist-rebel-abuses-continue)>, visited on 7 June 2009.

<sup>15</sup> When Ian Martin (Representative of the High Commissioner for Human Rights in Nepal in 2005-2006, and subsequently the Special Representative of the Secretary General and Head of the UN Mission to Nepal (UNMIN)) left Nepal in February 2009, even those political and civil society leaders who objected to the UN's post-conflict monitoring of the Maoist and Nepal Armies, praised its human rights work during the conflict, citing the UN presence as a contributing factor to the success of the People's Movement.

"Civil society farewell moves Martin", *Ekantipur.com* (4 February 2009), <[www.kantipuronline.com/kolnews.php?&nid=178742](http://www.kantipuronline.com/kolnews.php?&nid=178742)>, visited on 7 June 2009.

supported pro-royalist gangs, some of which the government eventually legalized as community self-defence groups.

During the conflict, the UN and non-government human rights organizations began to report on the activities of these groups as well, linking them to one of the two parties. After the signing of the Comprehensive Peace Agreement in April 2006 and the formal end of the conflict, the picture became more complex. Over time, ethnic-based militant groups dissatisfied with the terms of the peace agreement or their implementation began to disassociate themselves from the Maoists, and pro-royalist and Hindu fundamentalist groups opposed to the new secular state became active. As for the Maoists themselves, they shifted much of their coercive activity from the PLA to the Young Communist League (YCL), which quickly became a major concern of human rights monitors.

### 2.2.1. The Example of the Young Communist League

In the immediate aftermath of the peace agreement, with the Nepal Army confined to its barracks and the PLA in cantonment, attention turned to youth groups associated with political parties, but especially the YCL. Ostensibly a youth front for the political wing of the Maoist movement, it had initially consisted of former Maoist militiamen, and often had the active support and involvement of former combatants. During the conflict, human rights organizations, including the UN, tended to treat the Maoist militia as an extension of the PLA (as they had treated various civilian defence groups and militant Hindu fundamentalist gangs as proxies of the Nepal Army).

In the immediate post-conflict period, the YCL engaged in activities such as abductions for ransom, killings, child recruitment, extortion, expropriation of land and the imprisonment of civilians sentenced by Maoist ‘people’s courts.’ UN human rights reports tended not to invoke obligations under international law, instead focusing on prior commitments by the Maoists, and the human rights provisions of the Comprehensive Peace Agreement. For instance, in its first post-conflict report on the activities of the YCL, OHCHR makes reference to Maoist commitments but otherwise refrains from engaging in an analysis of any legal obligations that the Communist Party of Nepal – Maoist (CPN-M) or YCL might have.<sup>16</sup> A follow-up report released nine months later again made reference to the terms of the peace agreement, adding that, as a partner in the interim coalition government which had since been established, “the CPN-M has a duty to ensure that the human rights provisions of the Interim Constitution as well as international human rights treaties... are respected.”<sup>17</sup> Other human rights organizations, including the National Human Rights Commission took a similar approach.

In general, human rights organizations maintained their engagement with groups such as the YCL by reference to the voluntary human rights commitments of the political entities with which they were affiliated. Reference to the problematic body of law regarding human rights and non-state actors was rarely made in the reporting of either national or international organizations. In turn, the CPN-M, as the Maoist army did during the conflict, clearly saw a benefit to being perceived as complying with its human rights

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<sup>16</sup> *Human rights abuses of the CPN-M*, OHCHR Summary of Concerns (September 2006), <[www.nepal.ohchr.org/en/resources/Documents/English/reports](http://www.nepal.ohchr.org/en/resources/Documents/English/reports)>, visited on 7 June 2009.

<sup>17</sup> *Allegations of Human Rights Abuses by the Young Communist League*, OHCHR Summary of Concerns (June 2007), <[www.nepal.ohchr.org/en/resources/Documents/English/reports](http://www.nepal.ohchr.org/en/resources/Documents/English/reports)>, visited on 7 June 2009.



commitments. The legitimacy that it accrued from interacting with the UN and the diplomatic community was an essential part of its political strategy, which culminated with the April 2007 election, in which the CPN-M gained a near parliamentary majority and the prerogative to form the first post-conflict government.<sup>18</sup>

Although the YCL was not technically a state actor even after the Maoists entered government, the party's public commitments and swift entry into government smoothed the problem of finding a basis for monitoring the human rights abuses of CPN-M-related organizations. From 2007 onwards, abuses by these organizations were often dealt with in a similar manner as ongoing human rights violations by state actors (for instance, illegal detention and torture by the police). It was not so easy, however, to gloss over the legal basis for scrutinizing the activities of other non-state actors not associated with the Maoists or the military. About the same time as the Maoists were becoming part of the state apparatus, an array of armed groups emerged – soon to constitute the most serious threat to the peace process – a threat that posed (and continues to pose) more complicated conceptual problems for human rights monitors.

### *2.3. Ethnic Autonomy Movements or Criminal Gangs? Post-Conflict Complications*

The parameters of traditional international human rights law could accommodate the insurgency, militia with tenuous links to the rebels or the Nepal Army, as well as militant youth wings. When the conflict ended in April 2006, human rights monitors found themselves in a new and more complicated set of circumstances. Though many of the human rights obligations of the parties to the conflict had by then been memorialized in the Comprehensive Peace Agreement, human rights organizations were not quite prepared to address new threats to the peace process taking the form of armed gangs in the southern plains, and militant ethnic autonomy movements in the hills.

The Maoist/state conflict had masked other areas of tension in Nepali society, in particular tensions between caste and ethnic groups. After the peace agreement was signed, ethnicity became increasingly politicized and claims to indigeneity became more frequently deployed for political ends.<sup>19</sup> Armed groups increased their activities throughout the country, many demanding a decentralization of power as part of an ill-defined federal state structure based on ethnic, linguistic and cultural identities.<sup>20</sup> The most militant of the groups – some of which had been associated with the Maoists during the conflict but had recently severed these links (such as Tharu groups in the far western region of the country and the Kirant Janabadi Workers Party in the east) – began to attack

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<sup>18</sup> The Maoist leadership also hoped that the enhanced legitimacy that came from behaving well might help to achieve other important political objectives – among them, the CPN-M's (still unfulfilled) quest to get itself removed from the US State Department's terrorist watch list. An improved human rights record, in particular the curtailment of YCL activities, has been cited by the Americans as a pre-requisite to removal. "Maoist Rule in Nepal Marks Potential Turning Point for Group", remarks of Ambassador Nancy Powell (27 May 2008), <[www.america.gov/st/democracy-english/2008/May/20080527173119esnamfuak0.6162378.html](http://www.america.gov/st/democracy-english/2008/May/20080527173119esnamfuak0.6162378.html)>, visited on 7 June 2009.

<sup>19</sup> For a comparative perspective, see F. Rawski and J. Macdougall, "Regional Autonomy and Indigenous Exclusivism in Bali", *International Journal on Minority and Group Rights* 11 (2004) pp. 143-157.

<sup>20</sup> Among the most active of these organizations were the Tharu Welfare Society, Kirant Workers Party and the Federal Limbuwan State Council. Most maintained youth wings similar to the YCL (such as the Limbuwan Volunteers), which engaged in acts of extortion and intimidation.



government buildings and police posts.<sup>21</sup> Although in a few isolated cases such groups may have exercised effective control over aspects of local economies (such as Limbuwan control of cardamom and tea crops in certain far eastern districts), for the most part, they did not reach the threshold to qualify as insurgencies or liberation movements under international humanitarian law.

This presented a problem for human rights organizations, which were being pressed by victims to intervene to prevent intimidation and violence. In part because of the lack of a coherent conceptual framework with which to deal with these groups, the human rights community tended to avoid directly addressing their activities, instead focusing, without much effect, on the state's inability to fulfill its obligation to provide public security.

### 2.3.1. The Example of Armed Groups in Nepal's Southern Plains

With the withdrawal of the Nepal Army to its barracks and the cantonment of the Maoist Army in 2006, a rule of law vacuum developed. Armed gangs began to assert control over local communities and commerce, engaging in widespread extortion and abductions for ransom. The most powerful of these gangs associated themselves with a political movement to free Nepal's southern plains, the Madhes<sup>22</sup>, from the grip of Kathmandu-based elites and migrants from the hills. As it did with the Maoists during the early stages of the insurgency, the government initially maintained that these groups were organized crime groups based in the Indian state of Bihar, and that it had no intention of granting them any level of political legitimacy by negotiating with them.

Despite government insistence that these groups were purely criminal in nature, several of them had well-defined political agendas ranging from full independence to some form of autonomy. The most developed ideologically and organizationally were factions of the Janatantrik Tarai Mukti Morcha (JTMM), founded by former Maoist Jay Krishna Goit in 2004.<sup>23</sup> Goit, while acknowledging that the group engaged in what some would describe as criminal activity (for instance, extortion and abductions for ransom), has been quick to

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<sup>21</sup> "UN alarmed as Nepal quota violence kills 3", *Times of India*, 6 March 2009, <[timesofindia.indiatimes.com/World/UN-alarmed-Nepal-violence-kills-3/articleshow/4236600.cms](http://timesofindia.indiatimes.com/World/UN-alarmed-Nepal-violence-kills-3/articleshow/4236600.cms)>, visited on 7 June 2009, and "Police arrest 'leader' of gang that attacked Khotang post", *Nepalnews.com*, 7 February 2008, <[nepalnewsmobile.com.np/2008/feb/feb07/news11.php](http://nepalnewsmobile.com.np/2008/feb/feb07/news11.php)>, visited on 7 June 2009.

<sup>22</sup> Madhes (from Sanskrit, *madhyadesh* or "middle country") refers geographically to the Gangetic plain stretching from the foothills of the Himalaya to the mountains in central India. It is used almost interchangeably with the more neutral term 'Tarai'. In Nepal, Madhes has developed a political connotation, as it has been adopted by groups – including armed groups - advocating for federal autonomy, and redress for past discrimination against its largely Hindi-speaking population (*Madhesis*).

<sup>23</sup> By 2008, the JTMM-Goit had split into numerous factions each with a slightly different articulation of the JTMM platform, including the JTMM-Jwala Singh, JTMM-Prithivi, JTMM-Bisfot, and JTMM-Rajan Mukti. The 'JTMMs' are only one small part of the mosaic of armed groups in southern Nepal. Others include the Madheshi Mukti Tigers, the Tarai Cobras, the Liberation Tigers of Tarai Eelam, Terai Army, Terai Tigers, Madheshi Tiger Network, Terai Rebels, and Terai Peace Liberation Front Nepal.

point out that these are exactly the tactics that the now 'legitimate' Maoists used to support the insurgency.<sup>24</sup>

Initially, human rights organizations adopted the government position that these groups' political claims were mostly a front for criminal activities. Such a line became increasingly difficult to maintain after the *Madhesi Aandolan* of 2007, when massive street protests resulted in the granting of a number of concessions to political organizations with links to the armed groups, including pledges for increased representation in government institutions and some level of regional autonomy. After those events, the violent activities of the groups became more overtly political, with a string of bombings of government buildings and threats targeting government employees and people of hill origin. The demands of the armed groups became difficult to distinguish from the platforms of the political parties that emerged in the wake of the *Madhesi Aandolan*, such as the Madhesi Peoples' Rights Forum.

By mid-2007, human rights organizations began to pay closer attention to armed group activity. In the southern plains, public insecurity became the primary threat to the peace process. International human rights organizations and UN rights monitors, without drawing conclusions on the legal status of the groups, began to devote a substantial amount of their reporting to armed group activity. They chose to approach the issue primarily by raising the police's failure to provide public security and responsibility to conduct investigations, and expressing concern about the negative impact of general lawlessness on the "human rights situation".<sup>25</sup> Direct engagement between the groups and UN staff was rare, with the exception of visits to armed group members in detention.

National human rights organizations, at more of a distance from international law, were less circumspect. Indeed, prominent national human rights groups issued reports focusing almost exclusively on armed group abuses.<sup>26</sup> Some national human rights activists even began to act as mediators between the groups and victims of extortion, and were sometimes accused of complicity in armed group abductions.<sup>27</sup> The National Human Rights Commission made public appeals aimed directly at the armed groups to refrain

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<sup>24</sup> Goit's JTMM has developed a sophisticated, though flawed, legal basis for its claims - arguing that because a treaty signed by India and Nepal in 1950 resulted in the abrogation of previous treaties including those establishing the southern plains as part of Nepal, the people of the Madhes have a right to form an independent nation. Goit has written to the Secretary General calling for UN intervention. The argument is based on a deliberate mis-construal of the right to self-determination as including a right to secede, an interpretation widely adopted by indigenous movements throughout Nepal.

<sup>25</sup> "These criminal acts of violence are continuing to have a serious impact on the security and human rights situation... and must be fully investigated." "OHCHR-Nepal seriously concerned at killing of VDC Secretary", OHCHR press release (19 July 2007); "The killings... highlight the need to take measures to prevent acts of violence, which are having a serious impact on the security and human rights situation... State authorities have an obligation to protect the population." "OHCHR concerned about killing of CPN-M cadres and other violence in the Terai", OHCHR press release (2 July 2007), <[nepal.ohchr.org/en/index.html](http://nepal.ohchr.org/en/index.html)>, visited on 7 June 2009.

<sup>26</sup> For instance, the 2008 annual report issued by the Nepali human rights organization, the Informal Sector Service Centre (INSEC), <[www.inseconline.org/book/Executive%20Summary\\_2009\\_English.pdf](http://www.inseconline.org/book/Executive%20Summary_2009_English.pdf)>, visited on 7 June 2009.

<sup>27</sup> Recently highlighted by the controversial arrest of a senior Nepali journalist for alleged links with armed groups. "Dhamala to be tried over three separate cases", *Myrepublica.com*, 23 February 2009, <[www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=2188](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=2188)>, visited on 7 June 2009.

from activity “against the established norms and values of human rights”,<sup>28</sup> and engaged with some armed grouped members on an *ad hoc* basis, although it did not develop a formal policy. Field officers justified their interventions on humanitarian grounds without reference to international law or human rights.

The cautious approach of UN human rights monitors was not without basis. While the agreement between the Government of Nepal and the Office of the High Commissioner for Human Rights permitted OHCHR to engage with non-state actors as part of its monitoring mandate, that monitoring was explicitly tied to “ensuring the observance of relevant international human rights and humanitarian law”.<sup>29</sup> Government representatives had already voiced concern that international scrutiny of armed group activity could complicate domestic and regional politics. Until 2008, the government had not engaged the groups in political negotiations, and made it clear that it would not seek the aid of the UN in doing so.<sup>30</sup> Direct engagement with non-state armed groups during the post-conflict period was perceived by critics as an unwanted instance of ‘mission creep’.<sup>31</sup>

The Indian government was particularly sensitive to UN involvement, which would have cross-border implications as many of these groups maintain a base of operations in Indian Bihar. Mere speculation about the role of India in influencing armed groups in Nepal by the then UN Resident Coordinator was enough to cause a modest diplomatic firestorm.<sup>32</sup> Similarly, when a representative of the UN Office for Coordination of Humanitarian Affairs met with armed group leaders over the border to elicit guarantees that they would not target humanitarian workers, Indian diplomats cried foul, suggesting that the UN was interfering in India’s internal matters.<sup>33</sup> All of this controversy reinforced the tendency to focus almost exclusively on the state’s obligation to provide security to its citizens through police and other government institutions. The lack of direct advocacy with the armed groups was often justified by reference to the limited scope of international law.

By late 2008, the main armed groups had been approached by the government to engage in formal peace talks, and several rounds of talks (mostly unsuccessful) had taken place

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<sup>28</sup> *Human rights monitoring of Bara, Parsa, Rautahat, Sarlahi, Mahottari, Dhanusha, Saptari, Siraha, Morang, Sunsari and Banke districts of Tarai*, National Human Rights Commission (22 February 2008), unofficial translation on file with author.

<sup>29</sup> Article V. reads “1. The Office shall... (b) Engage all relevant actors, including non-state actors, for the purpose of ensuring the observance of relevant international human rights and humanitarian law...”, Agreement Between the United Nations High Commissioner for Human Rights and the Government of the Kingdom of Nepal Concerning the Establishment of an Office in Nepal (April 2005), <nepal.ohchr.org>, visited on 7 June 2009.

<sup>30</sup> This despite public calls by some armed groups leaders for UN mediation. One prominent armed group leader gave an interview calling on the Security Council-mandated UN Mission in Nepal [UNMIN] to mediate between armed groups and the Government. “No role for Indian in Terai: We have faith in UN, says chief of Nepal insurgent outfit”, *Hindustan Times*, 9 January 2008.

<sup>31</sup> A phenomenon of which the UN has been recently and frequently accused. For examples, see “In Peacekeeping, a Muddling of the Mission”, *New York Times*, 11 February 2009, <[www.nytimes.com/2009/02/11/world/11peacekeeping.html](http://www.nytimes.com/2009/02/11/world/11peacekeeping.html)>, visited on 7 June 2009.

<sup>32</sup> “UN plays down official comment on Nepal”, *Nepalnews.com*, 3 February 2008, <[www.nepalnews.com/archive/2008/feb/feb03/news09.phphttp://www.nepalnews.com/archive/2008/feb/feb03/news09.php](http://www.nepalnews.com/archive/2008/feb/feb03/news09.phphttp://www.nepalnews.com/archive/2008/feb/feb03/news09.php)>, visited on 7 June 2009.

<sup>33</sup> The incident endangered the renewal of UNMIN’s mandate. “Nepal: UN mandate under fire”, *International Relations and Security Network* (4 Dec 2007), available at <[www.reliefweb.int/rw/rwb.nsf/db900SID/PANA-79KK2D?OpenDocument](http://www.reliefweb.int/rw/rwb.nsf/db900SID/PANA-79KK2D?OpenDocument)>, visited on 7 June 2009.

by early 2009. Because of their largely self-imposed isolation, international human rights organizations had neither maintained contact with the most accessible armed group leaders, nor developed a clear human rights message to communicate to them, and so had very little influence on this process. As a result, few demands were made upon those groups to moderate their violent behaviour as a condition of entering into talks. Very much the opposite seems to have occurred. Following the example of the Maoists, armed groups increased their violent activities as a way to get the attention of mainstream political actors – and an invitation to talk. Once the invite was issued, armed group leaders set their own pre-conditions, including amnesties for the often purely criminal past actions of their cadres.<sup>34</sup> Had a human rights framework existed for such negotiations, it might have made a difference.

### **3. Global Administrative Law, Human Rights and International Engagement with Armed Groups: Some Concluding Observations**

This short review of recent human rights monitoring experiences in Nepal suggests that the lack of a clear framework addressing the human rights obligations of non-state actors can impact the effectiveness of field operations. As monitors see their focus shift from the activities of recognized insurgents to post-conflict militant youth wings to armed groups without a clear link to the state, the legal terrain upon which they base their analyses becomes increasingly shaky. Many of these armed groups do not have the capacity to trigger legal responsibility under international humanitarian law. At the same time, a narrow focus on the state's responsibility to protect its citizens from violence by non-state actors has proven unsatisfactory. As a consequence, human rights organizations struggle to justify their monitoring and interventions, host states become suspicious of international field presences, and policy makers at the headquarters of monitoring organizations become concerned about potential political fallout from human rights monitoring.<sup>35</sup>

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<sup>34</sup> “Nepal government to begin peace talks with Terai rebels”, *ThaiIndian News* (27 March 2008), <[www.thaindian.com/newsportal/south-asia/nepal-government-to-begin-peace-talks-with-terai-rebels\\_10031918.html](http://www.thaindian.com/newsportal/south-asia/nepal-government-to-begin-peace-talks-with-terai-rebels_10031918.html)>, visited on 7 June 2009 (noting amnesty demands by armed groups). This follows a pattern of post-peace agreement deals struck between the Government and non-armed Madhesi groups such as the Madhesi People's Rights Forum, 30 August 2007 (“annul all charges made against the leaders and workers of the Forum”), and United Democratic Madhesi Front, 23 February 2008 (“withdraw cases filed against Madhesi leaders and party cadres”), as well as indigenous groups such as the Federal Republic National Front, 2 March 2008 (“charges filed against leaders and cadres shall be repealed and those detained shall be immediately released”) and Federal Limbuwan State Council, 19 March 2008 (“withdraw charges filed against the agitators”), unofficial translations on file with author.

<sup>35</sup> One relevant aspect of the relationship between the UN and Nepal is the fact that Nepal is one of the top five troop contributors to UN peacekeeping operations – a status which neither the Department of Peacekeeping Operations nor the Nepal government wishes to see disturbed, and which adds an extra level of sensitivity to the UN's human rights monitoring role. See “Nepal's Participation in UN Peacekeeping for 50 Years is ‘Shining Example’, Says Secretary-General”, SG/SM/11638 (12 June 2008), <[www.un.org/News/Press/docs/2008/sgsm11638.doc.htm](http://www.un.org/News/Press/docs/2008/sgsm11638.doc.htm)>, visited on 7 June 2009; also, “NEPAL: Army accused of protecting rights abusers”, *Australian Broadcasting Corporation*, 19 February 2008 (discussing peacekeeping deployment of Nepal Army personnel involved in human rights violations), <[www.abc.net.au/ra/programguide/stories/200802/s2165395.htm](http://www.abc.net.au/ra/programguide/stories/200802/s2165395.htm)>, visited on 7 June 2009.

A growing body of research by global administrative law scholars suggests that, in cases such as this, where existing legal and theoretical paradigms fail to reflect the realities experienced by practitioners in the field, new norms and practices may develop – pushing the envelope of international law and calling into question the authority of traditional law-making institutions. The final section of this paper sets out to elucidate three simple propositions: (a) a greater engagement with non-state actors, including armed groups, by international field workers is inevitable, (b) normative frameworks need to be developed to address this inevitability, and (c) the global administrative law paradigm provides a useful set of conceptual tools for grappling with the consequences of that engagement.

### 3.1. *The Inevitability of Engagement: Bridging the Gap between Theory and Practice*

In her paper on the treatment of armed groups in the peace process in the Democratic Republic of Congo, Zoe Salzman concluded that the lack of a clear framework by which to include or exclude armed groups undermined peace negotiations and rendered the resulting agreements un-sustainable. She writes of the “divorce between the theory of inclusion and the reality of exclusion”, referring to the disconnect between mainstream conflict resolution theory (which calls for the inclusion of all parties to a conflict in negotiations), and the reality of exclusion on the ground.<sup>36</sup> Here, we have something of the opposite - the theory of “exclusion” of armed groups (incapable of being treated as duty bearers under international human rights law) disconnected from the reality on the ground – one of increased engagement and *de facto* recognition.

This gap is slowly being bridged as human rights theory shifts from a state-centred to a more individual-centred approach built around the concept of ‘human dignity’. That approach concerns itself less with the legitimacy that recognition may or may not bestow upon a group by addressing them as duty bearers (or ‘rights violators’), focusing instead on the victim as a ‘rights bearer’. Using this approach, the actions of armed groups and other non-state actors can more easily be scrutinized as infringements of the human rights of individuals.

For the moment, the basis in law for such an approach remains obscure. But as non-governmental organizations and international human rights presences engage non-state actors more frequently, calling upon them to abide by international human rights standards, a non-binding but still influential body of international practice is developing whereby the “legitimate expectations” of the international community can have substantial influence on their behaviour. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, writes that human rights operate on three levels:

as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community... It is increasingly understood... that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed.<sup>37</sup>

Even if the legal framework has not developed sufficiently to treat armed groups as bearers of obligations under international human rights law, there is some evidence that a

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<sup>36</sup> Salzman, *supra* note 7, p. 3.

<sup>37</sup> Special Rapporteur, *supra* note 6, paras. 25, 27.

field-driven understanding of human rights is beginning to operate “independently of the existence of binding obligations under international law”.<sup>38</sup>

For the time being, the JTMM and other groups operating in Nepal’s southern plains remain out of reach of international human rights law in the sense of their actions triggering legal responsibility under the ICCPR and other human rights instruments. But establishing legal responsibility is not necessarily the main function of human rights. It is its normative and standard setting function – and the prospect of legitimacy that comes from abiding by those standards – that gives human rights organizations much of their power. Arrest warrants and other legal sanctions by international institutions such as the ICC are few and far between. Armed groups can be said to be contravening human rights law, even if their actions do not trigger legal liability in the strict sense.

### *3.2. Finding a Framework: Moving Beyond the Droit de Regard*

The complexities of international law notwithstanding, there are compelling arguments for developing a more coherent soft law framework for dealing with armed groups, and for treating their activities as more than public security problems. The limited reach of international law should not be used as an excuse not to engage with armed groups when international monitoring and intervention have the potential to reduce violence.

When armed groups desire to be brought into a peace process, they may be willing to moderate their violent behaviour if their leaders believe that international recognition will increase their political standing. Human rights advocates in Nepal often viewed this potential legitimizing effect as a disincentive to engage. This overlooks the fact that the prospect of legitimacy may be the most powerful leverage that human rights advocates have. This is what made the UN’s human rights presence effective with the Maoists, and to a lesser extent with affiliated organizations such as the YCL. The possibility of influence is even more powerful with armed groups in view of their perceived need to gain political legitimacy, and the fact that many of them justify their own struggles in human rights terms (such as long-standing discrimination and marginalization, and appeals to indigenous peoples’ rights). By denying themselves contact, human rights organizations strip themselves of a crucial piece of leverage, one which they have been able to utilize effectively with the traditional state subjects of human rights scrutiny.

An increased focus by human rights organizations on the behaviour of such groups will inevitably be perceived as infringing on what has hitherto been viewed as the exclusive territory of national governments. But fears of legitimizing armed groups by merely calling on them to moderate their violent behaviour may be overblown. Linking political legitimacy to compliance with human rights does not place armed groups on par with states as bearers of legal duties – although it does suggest that we are moving, albeit slowly, toward the recognition of a set of basic human rights standards applicable to all actors, state or non-state.

There are a number of ways that one might operationalize a human-rights approach to armed groups, but the basic objective is simple: to reverse the existing incentive system

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<sup>38</sup> A. Bianchi, “Globalization of Human Rights: The Role of Non-state Actors”, in G. Teubner (ed.), *Global Law Without a State* (Aldershot, Dartmouth, 1997) p. 201, cited in Clapham, *supra* note 3, p. 26.



which encourages violence and replace it with a system within which armed groups are encouraged to moderate their behaviour in order to achieve some level of recognition by the international community.<sup>39</sup> This might be done by insisting upon progress toward compliance with a minimum standard as a pre-requisite to direct engagement by international actors such as the UN. Similar approaches to non-state actors such as corporations have shown some success.<sup>40</sup>

An international human rights ‘bottom-line’ would provide a set of standards against which the behaviour of both armed groups and state actors engaging with them (such as the police) could be measured. Under the right circumstances, it could have the effect of decreasing an armed group’s recourse to violence. It could also discourage the pattern which is emerging in Nepal – commit acts of violence to get attention, and then negotiate an amnesty for those acts as a pre-requisite for further negotiations.

In building such a minimum standard, one could start with some of the basic prohibitions under international humanitarian law found in Common Article 3 and Additional Protocol II to the Geneva Conventions (the unlawful killing of civilians, extra-judicial executions, torture and inhumane treatment), as well as what seems to be an emerging customary law prohibition on the use of child soldiers. Other prohibited activities might include those infringing upon freedom of expression and association, freedom of movement and the enjoyment of certain economic, social and cultural rights (in particular, actions resulting in the obstruction of the delivery of humanitarian aid).<sup>41</sup> This set of standards could draw upon already existing codes of conduct or declarations.<sup>42</sup> For Nepal, the relevant provisions of the Comprehensive Peace Agreement might be useful as a model, though those provisions may go well beyond a workable baseline.<sup>43</sup>

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<sup>39</sup> As Salzman puts it in the context of peace negotiations in the Congo, “peace process participation could be conditioned on respect for international law, modifying the parties’ cost-benefit analysis during the conflict in favor of a greater respect for their international obligations.” Salzman, *supra* note 7, p. 76.

<sup>40</sup> See, for instance, Steven R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, *The Yale Law Journal* 111: 443 (2001); A. Clapham, “Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups”, *Journal of International Criminal Justice* 6 (2008) pp. 899-926.

<sup>41</sup> This could enhance the ability of international aid organizations to engage with non-state actors to protect the sanctity of their ‘operational space’ (precisely what the UN had attempted to do so controversially in 2007, *supra* at fn. 33).

<sup>42</sup> Such as the Deed of Commitment to refrain from the use of anti-personnel land mines, <[www.genevacall.org/resources/testi-reference-materials/deed.htm](http://www.genevacall.org/resources/testi-reference-materials/deed.htm)>, visited on 7 June 2009, or the Turku Declaration of Minimum Humanitarian Standards <[hei.unige.ch/~clapham/hrdoc/docs/turkudecla.html](http://hei.unige.ch/~clapham/hrdoc/docs/turkudecla.html)>, visited on 7 June 2009.

<sup>43</sup> Civil and political rights commitments in the CPA include respecting the right to life (article 7.2.1), right to Individual Dignity, Freedom and Mobility (7.3), refraining from torture and inhuman and degrading punishment (7.3.1), arbitrary and illegal detention (7.3.2), respecting freedom of movement and right of return (7.3.3), freedom of expression and association (7.4.1; 7.7.1), right to take part in elections (7.4.2), and right to information (7.4.3), and a prohibition on use of children (7.5.6). The CPA does not stop there, however, and also includes economic, social and cultural rights commitments, such as respecting the right to employment (7.5.1), right to food (7.5.2), right to health - including a commitment not to block delivery of medical supplies (7.5.3), right to education - including a commitment not to occupy schools (a common Maoist practice during the conflict) (7.5.4), right to property (7.5.5), and right to work (7.5.6). The full text of the agreement is available at <<http://www.reliefweb.int/rw/rwb.nsf/db900sid/VBOL-6VSHK8?OpenDocument>>, visited on 7 June 2009.



Other variations on the theme of a minimum standard include model codes of conduct for armed groups, or a multi-stage process of “ratcheting-up”<sup>44</sup> of obligations and linking them to participation in different stages of a peace process or different levels of recognition by the international community. Other scholars and institutions have offered a more considered analysis of how this standard setting might operate.<sup>45</sup>

The development of such a framework carries risks. There are legitimate concerns that over-extending the reach of human rights law will dilute the hold that it currently has over state actors.<sup>46</sup> At the same time, the credibility of UN and other human rights institutions are at stake. In places like Nepal, there is a perception that the international community is shutting its eyes to what many citizens view as the most crucial post-conflict human rights issue. Not surprisingly, local interlocutors do not find distinctions between abuses and violations especially compelling, or explanations that armed groups do not have human rights obligations and are therefore outside of the jurisdiction of human rights law especially satisfying. Whatever the complications, there is a clear need to build a more broadly acceptable language about which human rights advocates can talk – if not about the obligations of armed groups – then at least about the common expectations that international organizations such as the United Nations have of armed groups seeking some sort of political recognition.

### *3.3. Putting GAL to Work: Unanswered Questions and Unintended Consequences*

From the Congo to Nepal, international actors are coming into contact with armed groups. This contact is likely to increase with the growing reach of non-governmental human rights networks and the proliferation of human rights field missions.<sup>47</sup> Armed groups themselves are also developing transnational links.<sup>48</sup> International law has had to make *ad hoc* adjustments in the post-September 11<sup>th</sup> era to accommodate the threat of transnational terrorist networks, but a comprehensive approach to non-state armed groups has yet to materialize. Where international law has found it difficult to keep up, new practices, norms, methods and standards of engagement are developing fast. Global administrative law can help to identify and understand these emerging rules of conduct, as well as provide a set of tools for international organizations and other actors trying to shape them. The picture is complex, but there are many questions which might be elucidated through collaborative work between international lawyers and human rights field workers using global administrative law as a guiding paradigm. Among them:

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<sup>44</sup> Salzman, *supra* note 7, p. 98.

<sup>45</sup> For this preliminary discussion paper, the author relied most heavily on Ends & means: human rights approaches to armed groups, International Council on Human Rights Policy (2001), <[www.ichrp.org/files/reports/6/105\\_report\\_en.pdf#search=armed groups](http://www.ichrp.org/files/reports/6/105_report_en.pdf#search=armed%20groups)>, visited on 7 June 2009; Salzman, *supra* note 7; and Clapham, *supra* notes 3, 9 and 40. OHCHR has also recently embarked on an internal effort to develop a policy to guide its human rights field workers' interactions with armed groups.

<sup>46</sup> For a summary of these concerns, see Clapham, *supra* note 3, pp. 33-35.

<sup>47</sup> In addition to 11 OHCHR country offices, 17 UN peacekeeping mission have human rights components, <<http://www.ohchr.org/EN/Countries/Pages/WorkInField.aspx>>, visited on 14 August 2009.

<sup>48</sup> See, for instance, Marco Sassoli, “Transnational armed groups and international humanitarian law”, HPCR Occasional Paper Series (March 2006), <<http://www.hpcrresearch.org/pdfs/OccasionalPaper6.pdf>>, visited on 14 August.

- *To what extent is the practice of engaging with and calling upon armed groups to abide by international human rights standards really outpacing formal legal developments? Has the outline of a minimum standard already emerged?* More comprehensive evidence needs to be collected to understand whether and to what extent new practices in the field may have already effectively altered global understandings of the human rights obligations of non-state actors. Further study will help us to understand how emerging normative frameworks interact with recent innovations in international criminal and humanitarian law. Lessons can be learned from global administrative law studies in other areas where both non-binding norms and the law have developed in parallel, such as corporate responsibility.
- *What is the proper role of international organizations? Are such standards best developed by states, formal law-making institutions, expert bodies, non-government organizations, or some combination?* The notion that international organizations should not only be engaging with armed groups, but that they should be playing a role in defining standards against which their behaviour (and suitability for engagement) should be measured is controversial. Even non-binding ‘soft law’ approaches are likely to be regarded as interfering with ongoing peace processes. The experience of global administrative law suggests that some level of formalization is good to ensure a level of consistency, predictably and accountability. But how much? Too rigid a formulation is likely to be counter-productive. Further thinking needs to be done about the potential consequences that codifying the human rights obligations of non-state actors could have on peace negotiations and post-conflict peacebuilding. Given the sensitivities, it is possible that such rules might better be left to technocrats and policy-makers within expert bodies such as the OHCHR than political bodies.
- *When assessing the consequences of engagement, to whom and how should we hold non-state actors, including international organizations, accountable? Are new mechanisms necessary to monitor such a regime of ‘soft law’?* International human rights field presences often have an obligation to report to UN political bodies, such as the Security Council, the General Assembly or the Human Rights Council pursuant to a mandate, or an agreement with a host government. Armed groups often have no formal legal obligations beyond abiding by local criminal codes, if they exist. But when viewed from a ‘victim-centred’ perspective, there may be additional constituencies to which a human rights organizations have obligations – such as the victims of conflict themselves - obligations which may at times conflict with the letter of their mandates and agreements. As in Nepal, the demand for international attention to armed group activity may not come from the government or the international community, but from civil society and communities concerned with the state’s inability to safeguard public security. Global administrative law scholars, in conjunction with their counterparts in the field, are well-placed to explore the interaction between the formal mechanisms of accountability set out in mandates and agreements, internal institutional mechanisms and extra-legal normative obligations.

The prognosis for human rights monitoring may look grim at the moment. Recent developments such as the Human Rights Committee’s lauding of Sri Lanka’s military success, and the rejection of an international role during or after its most recent offensive suggest that there is a long way to go before governments and the international

institutions which they comprise will willingly consent to the extension of international law to non-state actors such as armed groups.<sup>49</sup> Indeed, the media and some political leaders in Nepal have already begun to cite the Sri Lankan example to justify an increasingly belligerent position toward international monitoring of the peace process.<sup>50</sup>

Nonetheless, in the long-run, fears of the gradual legitimization of non-state actors and the expansion of international monitoring mandates are still likely to give way to the emerging rights-based approach to conflict – an approach which is less likely to privilege the political imperatives of the state over the rights of its individual citizens. The international norm-making machinery about which global administrative law is largely concerned is hardly in retreat. But it is both more diffuse and diverse. By the day, global regulation is becoming more ubiquitous, and the relationships between international and national institutions more complex. The assumptions underlying current approaches to international law will continue to be questioned, and much of that questioning – and many of the answers – are likely to continue to emanate from the field.

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<sup>49</sup> “Sri Lanka: Human Rights Council Fails Victims”, Human Rights Watch (27 May 2009), < <http://www.hrw.org/en/news/2009/05/27/sri-lanka-un-rights-council-fails-victims>>, visited on 7 June 2009.

<sup>50</sup> H. Dulal, “Lessons for Nepal”, Republica (25 May 2009), < [http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=5450](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=5450)>, visited on 7 June 2009 (citing Sri Lanka as possible example for Nepal) ; B. Peterson, “Nepal: ‘Democrats’ and the struggle for democracy”, Green Left (23 May 2009), < <http://www.greenleft.org.au/2009/796/40977>>, visited on 7 June 2009 (claiming that defeat of Tamil Tigers has encouraged Nepalese elite).