

# COMPLIANCE OF TERRITORIALLY FRAGILE STATES WITH INTERNATIONAL HUMAN RIGHTS LAW

*Antal Berkes*\*

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## Abstract:

Fragile States are understood as States that are unable or unwilling to exercise effective control over part of their national territory. The fragile State's compliance with its international law obligations is therefore reduced due to objective factors and this has major impact on international human rights law (IHRL) as well. Nonetheless, scholarship has overlooked that fragile States may and sometimes do comply with their positive obligations in areas beyond their effective control under the evolving, effectiveness-based interpretation of IHRL. The paper argues that each of the dominant compliance theories only partially explains the factors influencing fragile States' compliance with IHRL: instead of limiting compliance to a monocausal model, both rational choices and internal socialisation processes should be taken into account to enhance the fragile States' compliance. The two main schools of thoughts, rational and constructivist schools of compliance do provide complementary explanations to the questions why and how fragile States can comply with their positive obligations under IHRL.

Rational theories explain that compliance by fragile States with their positive obligations in IHRL entails direct benefits, especially in terms of monitoring of the human rights situation, well-being of the people in the area and international cooperation. Rational interests do not explain however why public bodies act in a way favouring human rights protection in the area beyond the State's control, especially if their domestic conducts are not reported in international human rights mechanisms. In those cases, constructivism may provide complementary explanation: repeated patterns of norm-compliance play a critical role in creating a common identity, especially domestic actors' belief in an ideal, active State.

Fragile States are understood as States that are unable or unwilling to exercise effective control over part of their national territory. State practice in international

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\* Lecturer in Public/International law, Brunel University London (antal.berkes@brunel.ac.uk). Between 2016 and 2018, Antal was postdoctoral research fellow at the University of Manchester, Manchester International Law Centre. In 2019, he was postdoctoral research fellow at the University of Pretoria, SARChI Professorship on International Constitutional Law (Prof Erika de Wet), where he was writing his book entitled *International Human Rights Law Beyond State Territorial Control* (CUP, forthcoming).

human rights law (IHRL) has used the notion of “effective control” over territory as a synonym of “actual authority”,<sup>1</sup> the main requirement of belligerent occupation within the meaning of the *1907 Hague Regulations*.<sup>2</sup> “Actual authority” has two factual criteria: the occupying State has to take physical possession of a land area, making the territorial State incapable of exerting its powers,<sup>3</sup> and be in a position to exercise its authority.<sup>4</sup> Due to the State’s lacking enforcement power in the area escaping its territorial control, its ability to fulfil its international law obligations is reduced. While this reduced ability to comply has major impact on the respect of IHRL as well, the evolving interpretation of international human rights treaties requires the State to take all available measures within its power to protect human rights in the area.<sup>5</sup>

Some fragile States have accepted this evolving interpretation of IHRL and taken specific measures within their power to implement their international human rights obligations in the area outside their effective control that human rights monitoring bodies have sometimes found satisfying the required threshold of positive obligations. Far from making any generalisation about a trend of compliance by fragile States, the present paper is limited to noting that certain fragile States have taken available measures to protect human rights in areas outside their effective control despite their reduced effectiveness. Yet, no study has ever interrogated the theoretical underpinnings of such compliance.

While numerous studies have addressed why Western, mainly powerful States comply or do not comply with IHRL, few authors have applied compliance theories to weak, mainly non-Western States. Fragile States face their inability to perform acts in a part of their territory, on the one hand, and the non-compliance by other international law subjects *de facto* controlling the area (another State, multiple States, armed opposition groups or an international organisation<sup>6</sup>), on the other.

The paper analyses State practice through international human rights

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<sup>1</sup> *Chiragov and Others v Armenia (merits)* [GC] (dec), Appl. no. 13216/0516 [2015] III ECtHR 135, para 96; Human Rights Council, *Situation of human rights in Crimea Sevastopol*, Doc off HRC UN, 36th session, UN Doc A/HRC/36/CRP.3 (25 September 2017), para 38, note 30; *Jose Isabel Salas Galindo and others v United States* (2018), Inter-Am Ct HR report n° 121/18 Case 10.573, Merits, OEA/Ser.L/V/II.169, para 318-319; Yoram Dinstein, *The International Law of Belligerent Occupation*, 1st ed, Cambridge, Cambridge University Press, 2009, at 40, 42.

<sup>2</sup> *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, UNTC, The Hague, Art 42.

<sup>3</sup> United States Military Tribunal, *The Hostages Trial – Trial of Wilhelm List and Others*, *Law Reports of Trials of War Criminals*, 1949, vol. 8, at 55; ICRC, *2016 Commentary of Geneva Convention I, Article 2*, para 304, online: </bit.ly/3aLx5tJ>; *Chiragov and Others v Armenia*, *supra* note 1, para 96; *Sargsyan v Azerbaijan (merits)* [GC], Appl. no. 40167/06 [2015] IV ECtHR 1, para 94, 144.

<sup>4</sup> *Wilhelm List and Others*, *supra* note 3, at 56; 2016 Commentary of GCI, *supra* note 3, para 304; *The Prosecutor v Mladen Naletilić*, IT-98-34, Judgement, Trial Chamber (31 March 2003) para 217 (ICTY).

<sup>5</sup> *Velásquez-Rodríguez v Honduras*, (1988), Inter-Am Ct HR report n°22/86 Case 7920, Merits, para 175; *Ilaşcu and Others v Moldova and Russia* [GC] (dec), Appl. no. 48787/99 [2004] VII ECtHR 1, para 333; *infra*, Section III.

<sup>6</sup> For the classification of all past and contemporary scenarios, see Antal Berkes, *International Human Rights Law Beyond State Territorial Control*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press (forthcoming) c 1.

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monitoring mechanisms, including regional human rights courts,<sup>7</sup> universal periodic treaty monitoring mechanisms<sup>8</sup> and UN Charter-based mechanisms<sup>9</sup> on compliance by States that are expressly recognised as lacking territorial control over part of their territory. International monitoring bodies have recognised this factual circumstance<sup>10</sup> in only certain fragile States (especially: Azerbaijan, Colombia, Democratic Republic of the Congo, Georgia, Iraq, Republic of Cyprus, Republic of Moldova, Syrian Arab Republic, Ukraine) that encountered territorial fragility for a longer period due to an enduring armed conflict.

To explain the reasons of compliance and non-compliance by fragile States, the paper applies the two main schools of thoughts, rational and constructivist schools of compliance.<sup>11</sup> First, the so-called rational or reputational theories focus on the State's self-interests and rationality, coercion, cost-benefit calculations and material incentives in choosing compliance.<sup>12</sup> As the fragile State encounters a situation of conflict and lack of effectiveness, any cooperation with the international community including international human rights mechanisms might enhance its likelihood to normalise the territorial situation. Second, the so-called constructivist school, however, emphasises social learning and socialisation in the State's choice of compliance.<sup>13</sup>

According to constructivists, State authorities might decide to act against the State's interests, as defined in rational models because their norm internalisation, culture or belief system dictates it.<sup>14</sup> This might apply especially to certain fragile States that have adopted and effectively internalised regional human rights treaty obligations.

Few academic works, mainly in political science, have drawn attention to the importance of capacities and the State's inability to comply with its human rights

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<sup>7</sup> Especially the ECtHR and the IACtHR. The African Court of Human and Peoples' Rights have provided relatively scarce case law on the subject matter.

<sup>8</sup> The periodic reports by the fragile States and the concluding observations by the ten UN treaty-based bodies ([www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx](http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx)) have been analysed.

<sup>9</sup> Especially reports of special rapporteurs and the Universal Periodic Review (UPR).

<sup>10</sup> By using various terms such as "territory beyond the effective control of the government", "military occupation", "difficulties that the State party has in exercising government powers and control over the territory", "areas under the control of non-State armed groups", etc.

<sup>11</sup> See this typology of only two models in: Jeffrey T Checkel, "Why Comply? Social Learning and European Identity Change" (2001) 55:3 *Int Organ* 553 at 553–588; Ryan Goodman & Derek Jinks, "How to Influence States: Socialization and International Human Rights Law" (2004) 54:3 *Duke Law J* 621 at 630–631.

<sup>12</sup> Jack L Goldsmith & Eric A Posner, *The limits of international law*, Oxford, New York, Oxford University Press, 2005 at 3–10; Markus Burgstaller, *Theories of compliance with international law*, Leiden, Boston, M. Nijhoff, 2005, at 96–97.

<sup>13</sup> Goodman & Jinks, *supra* note 11, at 635; Jutta Brunnée & Stephen J Toope, *Legitimacy and legality in international law: an interactional account*, Cambridge studies in international and comparative law 67, Cambridge, Cambridge University Press 2010 at 12–13.

<sup>14</sup> Harold Hongju Koh, "Jefferson Memorial Lecture - Transnational Legal Process after September 11th Lecture" (2004) 22:3 *Berkeley J Int Law* 337 at 339.

obligations,<sup>15</sup> as opposed to the dominant scholarship's focus on unwillingness.<sup>16</sup> Those authors have, however, ignored that States may and sometimes do comply with their positive obligations in areas beyond their effective control under the evolving, effectiveness-based interpretation of their positive obligations. The present paper fills the scholar gap and argues that each of the dominant compliance theories only partially explains the factors influencing fragile States' compliance with IHRL: instead of limiting compliance to a monocausal model, both rational choices and internal socialisation processes should be taken into account to enhance the fragile States' compliance. While the analysis of the applicability of all possible theories of compliance to the context of fragile States exceeds the limits of the present paper, the two main schools of thoughts, rational and constructivist schools of compliance do provide complementary explanations to the questions why and how fragile States can comply with their positive obligations under IHRL.

The paper proceeds as follows. Section II claims that the fragile States' lacking territorial control affects their ability to comply with IHRL. Section III explains that despite the factual limitation of fragile States to fully comply with IHRL, since the mid-2000s, human rights treaty bodies have increasingly required from fragile States a proactive conduct consisting of various positive obligations. This evolving interpretation relies on the international law standard of due diligence that imposes a realistic conduct, in accordance with the State's capacity. Section IV explains that several fragile States have voluntarily accepted the dynamic interpretation of treaty monitoring bodies and accepted the positive obligations towards individuals in the area beyond their territorial control. To address the reasons and nature of this compliant conduct by fragile States, dominant compliance theories provide partial and complementary explanations: first, the rational theories (Section V) and second, constructivism (Section VI). The analysis of the theoretical and practical impact of those schools of thought leads to some concluding recommendations as to the best practices to enhance the human rights compliance of territorially fragile States.

## I. Territorial Fragility as a Compliance Problem

Weak or failing States, or nowadays the more common term 'fragile States' are not legal terms to describe structural problems in the operation and capabilities of certain States. While difficult to define in legal terms, State fragility has been subject to extensive qualitative and quantitative scholarship. Indicators such as the Failed State Index, or its current version the Fragile State Index measure and classify States based

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<sup>15</sup> Neil A Englehart, "State Capacity, State Failure, and Human Rights" (2009) 46:2 J Peace Res 163–180; Thomas Risse & Tanja A Börzel, *Human Rights in Areas of Limited Statehood: The New Agenda*, in Thomas Risse-Kappen, Stephen C Ropp & Kathryn Sikkink (eds), *Persistent Power Hum Rights Commit Compliance* Cambridge studies in international relations 126, Cambridge, Cambridge University Press, 2013, at 63.

<sup>16</sup> E.g. Abram Chayes & Antonia Handler Chayes, *The new sovereignty: compliance with international regulatory agreements*, 1st Harvard University Press pbk. ed, Cambridge, Harvard University Press 1998 at 227, 230; Goldsmith & Posner, *supra* note 12 at 105.

on various key political, social and economic indicators and over 100 sub-indicators such as cohesion indicators, economic indicators, political indicators or social and cross-cutting indicators.<sup>17</sup> When defining a “failing State”, the UN Secretary General described a State without “cohesive national authority capable of guaranteeing the security of the State and its people in an accountable manner”, where “State authority is in the hands of local warlords” not under the unified command and control of the government.<sup>18</sup>

International law scholarship considers the loss of the State’s effective control over a part of its territory as one of the factors of the failure or the weakness of the State<sup>19</sup> which often exacerbates other geographical, socio-political phenomena such as armed conflicts, massive migrations or natural disasters. The State’s lacking effective control over part of the national territory entails inherent problems of compliance with IHRL. Without physical control over the territory, the State cannot fully protect and fulfil human rights of individuals situated in the area beyond its territorial control. For instance, State authorities have no access to evidence available in the area, cannot investigate and prosecute perpetrators of human rights violations and cannot fully offer certain remedies to victims without having the physical contact with them. Because of the significant limitation that the lacking territorial control imposes on the State, it is unsurprising that various commentators before the mid-2000s held that the State exercising no territorial control over part of its territory has no obligations under IHRL towards individuals in that region.<sup>20</sup> This dominant view has changed since the mid-2000s, when human rights treaty bodies started to increasingly conceptualise the question from a proactive standpoint, imposing positive obligations on fragile States.

## II. Interpretation by Treaty Bodies: Positive Obligations

In their ratification or periodic reporting dialogue, fragile States themselves tend to invoke their structured fragility, especially their inability to control their territory as a compliance problem. Fragile States expressed this inability in two forms: either at the time of the signature or the ratification of the human rights treaty, on the

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<sup>17</sup> The Fund for Peace “Fragile States Index” (10 April 2019) online: *The Fund for Peace* <[fundforpeace.org/2019/04/10/fragile-states-index-2019/#:~:text=The%20Fragile%20States%20Index%2C%20produced,towards%20the%20brink%20of%20failure](http://fundforpeace.org/2019/04/10/fragile-states-index-2019/#:~:text=The%20Fragile%20States%20Index%2C%20produced,towards%20the%20brink%20of%20failure)>, at 33.

<sup>18</sup> UN Security Council, *Letter dated 16 September 2013 from the Secretary-General addressed to the President of the Security Council*, UN Doc S/2013/557 16 September 2013, at 1-2.

<sup>19</sup> Gérard Cahin, “Le droit international face aux ‘États défaillants’” in *L’État dans la mondialisation, Colloque de Nancy de la société française pour le droit international*, acte du 46e colloque de la SFDI, Paris, Pedone, 2013, at 59; Neyire Akpinarli, *The Fragility of the “Failed State” Paradigm: a Different International Law Perception of the Absence of Effective Government*, Leiden, Martinus Nijhoff Publishers 2010 at 16–17.

<sup>20</sup> Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge studies in international and comparative law, Cambridge, Cambridge University Press 2002 at 210; Gérard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa*, Leyde, Martinus Nijhoff Publishers 2004 at 284; Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge, Cambridge University Press 2002 at 142.

one hand, or in the periodic reporting procedure, on the other.

First, States whose central government has lost effective control over a part of their territory often made unilateral declarations aimed at excluding the application of human rights treaties in their entirety in the given region. Among fragile States, Eurasian States of which territory is in part controlled by a *de facto* regime, and among them Azerbaijan, Georgia and the Republic of Moldova often had recourse to such unilateral declarations by which they intended to exclude the application of the treaty in its entirety to the region over which they lost control.<sup>21</sup> Ukraine, when it lost territorial control over Crimea and certain areas in Eastern Ukraine, made similar territorial declarations both to some of its already binding human rights treaties<sup>22</sup> and to those that it signed or ratified subsequently.<sup>23</sup> Treaty monitoring bodies, however, rejected the admissibility of those territorial declarations and held that the State cannot arbitrarily and unilaterally curtail its jurisdiction by excluding zones or areas from the State's territory.<sup>24</sup> Therefore, the territorial declarations of fragile States do not produce any legal effect, while the State's jurisdiction covers the entire national territory.<sup>25</sup>

Second, fragile States invoke in periodic reporting procedures and regional court procedures the fact that they are unable to control part of their territory.<sup>26</sup> In other words, even if territorial declarations made at the time of treaty ratification cannot exclude the applicability of the human rights treaty in respect of the area, fragile States argued that the factual loss of territorial control may nevertheless have such an effect.<sup>27</sup> If one accepts the jurisprudential principle according to which effective control of a territory entails jurisdiction,<sup>28</sup> one may suppose that reversely, the loss of effective

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<sup>21</sup> E.g. *Optional protocol No. 2 to the CAT* (Azerbaijan); CRPD (Azerbaijan); *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966 (Moldova); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 25 May 2000 (Moldova). See United Nations – Treaty Collection; Council of Europe Convention on Action against Trafficking in Human Beings (Georgia, Moldova). See Council of Europe (CoE) Treaty Office.

<sup>22</sup> *Treaty No.112 - Convention on the Transfer of Sentenced Persons*, CoE, 21 March 1983, ETS no. 112, Declaration of Ukraine, 12 October 2015, CoE Treaty Office.

<sup>23</sup> *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, New York, 19 December 2011 (Ukraine), UNTC A/RES/66/138 (14 October 2014), online: <[treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&clang=\\_en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en)>.

<sup>24</sup> *Ilaşcu and Others v Moldova and Russia* [GC], Appl. no. 48787/99 [4 July 2001] [decision on the admissibility], online: HUDOC <[hudoc.echr.coe.int/eng?i=001-5948](http://hudoc.echr.coe.int/eng?i=001-5948)>, at 20; *Assanidze v Georgia* [GC], Appl. no. 71503/01 [8 April 2004], online: HUDOC <[hudoc.echr.coe.int/eng?i=001-61875](http://hudoc.echr.coe.int/eng?i=001-61875)>, para 140; *Minas Sargsyan v Azerbaijan* [GC], Appl. no. 40167/06, [14 December 2011] [decision on the admissibility], online: HUDOC <[hudoc.echr.coe.int/eng?i=001-108386](http://hudoc.echr.coe.int/eng?i=001-108386)>, para 69; Committee on the Rights of the Child (CRC), *Concluding observations: Republic of Moldova*, UN Doc CRC/C/OPSC/MDA/CO/1, 29 October 2013, para 9.

<sup>25</sup> Further details on territorial declarations in: Berkes, *supra* note 6 c 2.

<sup>26</sup> E.g. Committee against Torture (CAT), UN Doc CAT/C/SR.1332 (4 August 2015), para 9-10 (Iraq); Human Rights Committee (HRC), *Fourth periodic reports of States parties due in August 2002, Cyprus*, UN Doc CCPR/C/CYP/4 (19 March 2013), para 5; The Republic of Moldova: *Ilaşcu*, *supra* note 5 para 300-304.

<sup>27</sup> The ECtHR also examines the two questions separately. *Ilaşcu*, *supra* note 5, para 324; *Sargsyan (admissibility)*, *supra* note 24, para 71-76.

<sup>28</sup> *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. Reports, at

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control over an area excludes jurisdiction over the same territory.

Face to the alleged inability to comply with treaty obligations by fragile States in their amputated region, universal treaty monitoring bodies drew diverse conclusions. Most reports concluded the State party's inability to apply the concerned human rights treaty (36 out of 108 concluding observations referring to the State's lacking territorial control until 31 May 2020, or 33.3 %).<sup>29</sup> Some reports held that the State encounters difficulties to implement the human rights treaty on account of the lacking territorial control (23 %). Even among the concluding observations talking about the State's incapacity to apply the treaty, only few affirmed expressly either the State's lack of jurisdiction,<sup>30</sup> or the difficulty<sup>31</sup> to exercise its jurisdiction in the area. As opposed to these conclusions, few reports (13.8 %) found that the State continues to have jurisdiction and obligations towards individuals situated in the area despite its lack of territorial control.<sup>32</sup>

This varying practice of concluding observations seemed to change, however, from the mid-2000s, as a consequence of the *Ilaşcu and Others v. Moldova and Russia* judgment of the European Court of Human Rights (ECtHR). In the *Ilaşcu* case, regarding applicants detained by separatist de facto authorities in the unrecognised Transnistrian region in the territory of the Republic of Moldova, the ECtHR recognised for the first time that a fragile State continues to have positive obligations and jurisdiction over human rights violations in an area outside its effective control but within its sovereign territory.<sup>33</sup> The Court concluded that the State has “a positive obligation under Article 1 of the Convention 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”.<sup>34</sup> This judgment largely reflects the decades-long practice of the Inter-American Court of Human Rights (IACtHR) and the African Commission on Human and Peoples' Rights, which presume the State's jurisdiction over its entire national territory and research how far the State complied with its obligation of due diligence to protect individuals

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54, para 118 (“Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.”).

<sup>29</sup> E.g. CRC, *Concluding observations: Cyprus*, UN Doc CRC/C/15/Add.205 (2 July 2003), para 5; Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations: Georgia*, UN Doc CERD/C/GEO/6-8 (22 June 2016), para 3; CERD, *Concluding observations: Republic of Moldova*, UN Doc CERD/C/MDA/CO/7 (16 May 2008), para 3.

<sup>30</sup> HRC, *Concluding observations: Cyprus*, UN Doc CCPR/C/79/Add.39 (3 August 1994), para 3; CERD, *Concluding observations: Republic of Moldova*, UN Doc CERD/C/60/CO/9 (21 May 2002), para 3; Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding comments: Cyprus*, supp no. 38, UN Doc A/51/38 (9 May 1996), 10, para 44.

<sup>31</sup> CRC, *Concluding observations: Georgia*, UN Doc CRC/C/15/Add.222 (27 October 2003), para 4; HRC, *Concluding observations: Georgia*, UN Doc CCPR/C/79/Add.75 (5 May 1997), para 3.

<sup>32</sup> E.g. HRC, *Concluding observations: Georgia*, UN Doc CCPR/C/GEO/CO/3 (15 novembre 2007), para 6; CERD, *Concluding observations: Iraq*, UN Doc CERD/C/IRQ/CO/22-25 (11 January 2019), para 4; etc.

<sup>33</sup> *Ilaşcu*, *supra* note 5, para 331-335.

<sup>34</sup> *Ibid.*, para 331.

against third-party violations in areas where the State is absent.<sup>35</sup> Beyond regional treaty monitoring bodies, universal human rights monitoring bodies also adhered to the State's continued positive obligations regarding an area outside its territorial control. Charter-based human rights bodies<sup>36</sup> and universal treaty monitoring bodies<sup>37</sup> reiterated the same standard as *Ilaşcu* and addressed to the fragile State various positive obligations with regard to individuals in the area outside governmental control.<sup>38</sup>

The State's positive obligations in an area beyond its territorial control rely on both its residual effectiveness and awareness of the risk of the wrongful act, the two instigating the standard of due diligence to protect, prevent and repress wrongful acts by third parties.<sup>39</sup> Due diligence requires the State to prevent and repress human rights violations within its territory.<sup>40</sup> Despite the lack of its territorial control, the State can take a broad range of political, diplomatic, economic, legislative, judicial, administrative or other measures within its power to protect human rights against third parties (States or non-state actors). This capacity, also called the 'capacity to influence' effectively the action of third parties,<sup>41</sup> one of the preconditions of the standard of due diligence, assesses the actual means in the State's power to take proactive measures to protect human rights. In other words, despite the loss of territorial control, the State disposes of both the sovereign title over its territory and certain residual effectiveness

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<sup>35</sup> E.g. *Velásquez-Rodríguez*, *supra* note 5, para 172; *Commission nationale des droits de l'Homme et des libertés v Chad*, Communication no. 74/92, ACommHPR, 18th ordinary session, 11 October 1995, para 22.

<sup>36</sup> E.g. Human Rights Council, *Situation of human rights in Yemen, including violations and abuses since September 2014. Report of the UNHCHR*, UN Doc A/HRC/39/43 (17 August 2018), para 13; Human Rights Council, *Situation of human rights in Crimea Sevastopol*, UN Doc A/HRC/36/CRP.3 (25 September 2017), para 41; HRC, *Report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine 13 September 2017 to 30 June 2018*, UN Doc A/HRC/39/CRP.4 (21 September 2018), para 84, note 98; *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Mission to the Republic of Moldova, UN Doc A/HRC/10/44/Add.3 (12 February 2009), para 6.

<sup>37</sup> HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc CCPR/C/GC/36 (30 October 2018), para 22; CEDAW, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010), para 5.

<sup>38</sup> E.g. HCR, *Concluding observations : Republic of Moldova*, UN Doc CCPR/C/MDA/CO/2 (4 November 2009), para 5; CRC, *Concluding observations: Syrian Arab Republic*, UN Doc CRC/C/SYR/CO/5 (1 February 2019), para 21(f)-(i); Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations : Iraq*, UN Doc E/C.12/IRQ/CO/4 (27 October 2015), para 5; CEDAW, *Concluding observations : Syria*, UN Doc CEDAW/C/SYR/CO/2 (18 July 2014), para 40(g); Committee on Enforced Disappearances, *Concluding observations : Iraq*, UN Doc CED/IRQ/CO/1 (13 October 2015), para 23.

<sup>39</sup> On due diligence see in detail in: Riccardo Pisillo-Mazzei, "The Due Diligence Rule and the Nature of the International Responsibility of States" (1992) 35 *Ger Yearb Int Law* 9–51; Berkes, *supra* note 6 c 3.

<sup>40</sup> See the general international law formulation of the standard, requiring the protection of the rights of other States within the territory of the State: *Trail Smelter Case (United States, Canada)* (1938, 1941) III UNRIIA 1905, at 1965; in the same sense, see *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, at 22.

<sup>41</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, at 221, para 430.



in the government-controlled area. As Kelsen duly observed, effectiveness in this context, “means only that the principle of effectiveness does not refer to the control of the territory but to the efforts to regain such control”.<sup>42</sup> *Mutatis-mutandis*, in IHRL effectiveness refers to the capacity to take measures to protect individuals, prevent and repress human rights violations, and not to the State’s actual territorial control in the region.

Certain authors in political sciences noted that overall human rights compliance of certain fragile States has improved, without the change in the State’s effectiveness in the area outside their effective control, by the enhancement of capacities in the government-controlled area.<sup>43</sup> However, they failed to remark the close link between the two: the efforts to regain territorial control and protect human rights in the area beyond governmental control suppose measures of legal, political, administrative and cultural nature<sup>44</sup> taken by the State in the government-controlled area. In other words, better human rights compliance supposes enhancement of effectiveness by the fragile State.

At first sight, requiring fragile States to take positive measures regarding individuals in an area beyond their effective control might seem contradictory: despite the State’s ineffectiveness, it is expected to improve the human rights situation of the area. However, the idea that the threshold of positive obligations depends on the capacities of the fragile State creates a realistic expectation, in line with the standard of due diligence. States are expected to invest in strengthening their effectiveness towards individuals in the area beyond their territorial control as far as possible in the given circumstances. Consequently, IHRL contributes to the effectiveness of territorial States and to the reconstitution of an ideal State, namely, an active State that protects individuals in its sovereign territory.

### III. Acceptance of Positive Obligations by Fragile States

The dynamic interpretation of treaty monitoring bodies found positive echo in the compliance practice of the concerned States. As a sign of the increasing authority of the international case law, several fragile States have accepted their positive obligations towards individuals in the area beyond their territorial control.<sup>45</sup> They have

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<sup>42</sup> Hans Kelsen, *Principles of international law*, New York, Rinehart & Co. 1952 at 289.

<sup>43</sup> Risse & Börzel, *supra* note 15 at 80.

<sup>44</sup> Velásquez-Rodríguez, *supra* note 5, para 175; *Ilaşcu*, *supra* note 5, para 331.

<sup>45</sup> E.g. Georgia : CEDAW, *Combined 4th and 5th periodic reports of Georgia*, UN Doc CEDAW/C/GEO/4-5 (30 October 2012), para 11; CAT, *Third periodic report of Georgia*, UN Doc CAT/C/73/Add.1 (4 July 2005), para 35; Ukraine : HRC, *Eighth periodic report of Ukraine*, UN Doc CCPR/C/UKR/8 (30 January 2019), para 61; Republic of Moldova : HRC, *Third periodic report of the Republic of Moldova*, UN Doc CCPR/C/MDA/3 (17 March 2016), para 77; Republic of Cyprus : Meeting of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, *Submission by Cyprus*, UN Doc APLC/MSP.12/2012/WP.5 (4 October 2012), paras 9-10; Democratic Republic of the Congo : HRC, *Reply of the Democratic Republic of the Congo to the List of Issues*, UN Doc CCPR/C/COD/Q/4/Add.1 (9 October 2017), para 54.

adopted a series of positive measures to protect human rights in the area outside their effective control,<sup>46</sup> which can be considered as the adequate implementation of IHRL. Nonetheless, the fact that in some periodic reports the same States also denied their positive obligations<sup>47</sup> shows that the evolving interpretation has not yet soundly stabilised.

Certain quantitative and qualitative data suggest that the international community increasingly accepts and monitors the positive obligations of fragile States regarding the area beyond their control. Limited international case law of regional human rights courts has brought the compliance of fragile States with their positive obligations in the frontline of discussions. For instance, until the end of 2019, the ECtHR found the Republic of Moldova to have violated the *European Convention on Human Rights* (ECHR) regarding Transnistria only in three out of 33 judgments on the merits,<sup>48</sup> presenting a non-compliance rate of 9 %. The same non-compliance rate with regard to the entire territory was 87 % in average since Moldova's ratification of the ECHR in 1997<sup>49</sup> and 72 % in 2019.<sup>50</sup> Until the end of 2019, the ECtHR found Ukraine to have violated the ECHR regarding its areas beyond its effective control (Eastern Ukraine, Crimea) in none of the two judgments decided on the merits (out of five finalised cases).<sup>51</sup> While Ukraine's data should be considered carefully due to the low number of finalised cases from the regions outside governmental control, Moldova's record suggests a deliberate policy of compliance. The limited case law, however, does not allow evaluating the compliance record of fragile States: thousands of applications submitted against Georgia (Abkhazia and South Ossetia) and Ukraine (Crimea and Eastern Ukraine) are pending before the ECtHR for long years,<sup>52</sup> as the Court has adjourned individual applications while they

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<sup>46</sup> E.g. Georgia : CERD, *Sixth to eighth periodic reports of Georgia*, UN Doc CERD/C/GEO/6-8 (31 October 2014), para 74-90; Republic of Moldova : HRC, *Third periodic report of the Republic of Moldova*, *supra* note 45, at 14-17; Iraq : CERD, *Combined twenty-second to twenty-fifth periodic reports submitted by Iraq*, UN Doc CERD/C/IRQ/22-25 (22 November 2017), paras 25-29; Ukraine : CAT, *Seventh periodic report of Ukraine*, UN Doc CAT/C/UKR/7 (11 February 2019), paras 45-71.

<sup>47</sup> HRC, *Fourth periodic reports of States parties: Cyprus*, *supra* note 26, para 5; HRC, *Report of the Working Group on the Universal Periodic Review (RWGUPR) : Cyprus*, UN Doc A/HRC/41/15 (5 April 2019), para 24; HRC, *Replies of Georgia to the list of issues*, UN Doc CCPR/C/GEO/Q/4/Add.1 (28 April 2014), para 5.

<sup>48</sup> *Ilaşcu*, *supra* note 5; *Braga v the Republic of Moldova and Russia (judgment)*, Appl. no. 76957/01, [17 October 2017] online: HUDOC <<http://hudoc.echr.coe.int/eng?i=001-177650>>; *Negruşa v Russia and the Republic of Moldova (judgment)*, Appl. No. 3445/13, [17 September 2019] online: HUDOC <[hudoc.echr.coe.int/eng?i=001-195847](http://hudoc.echr.coe.int/eng?i=001-195847)>.

<sup>49</sup> ECtH, "ECHR Overview 1959-201", February 2020, 9, online (pdf): <[www.echr.coe.int/Documents/Overview\\_19592019\\_ENG.pdf](http://www.echr.coe.int/Documents/Overview_19592019_ENG.pdf)> (5 March 2020).

<sup>50</sup> ECtHR, "Violations by Article and by State", 2019, 2, online (pdf): <[www.echr.coe.int/Documents/Stats\\_violation\\_2019\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_violation_2019_ENG.pdf)> (5 March 2020).

<sup>51</sup> ECtHR, *Khlebik v Ukraine (judgment)*, Appl. no. 2945/16, [25 July 2017]; *Tsezar and Others v Ukraine*, Appl. nos. 73590/14 et al., [13 February 2018].

<sup>52</sup> On 31 August 2018, 1,723 individual applications against Georgia were pending, lodged by persons affected by the hostilities in South Ossetia at the beginning of August 2008 : ECtHR, "New inter-State application brought by Georgia against Russia", Press release, ECHR 287 (2018), 31 August 2018; On 11 September 2019, more than 5,000 individual applications concerning events in Crimea, Eastern Ukraine and the Donbass region submitted against Ukraine, Russia or Ukraine and Russia were pending :

are legally and factually inked to highly politicized interstate applications.<sup>53</sup> Moreover, individuals from regions outside governmental control encounter systemic difficulties in having access to international courts.<sup>54</sup> What the limited case law nonetheless indicates is an increased acceptance of their positive obligations by certain fragile States.

Some qualitative examples from the practice of human rights periodic monitoring mechanisms corroborate the claim that certain fragile States take their positive obligations regarding the area outside their control seriously. For instance, human rights monitoring bodies welcomed the efforts of Georgia in the domain of the protection of IDPs potentially or actually escaping the area beyond its control,<sup>55</sup> in the restitution of property and compensation for those who had left the government-controlled area and moved to the area beyond government control and in facilitating the visit of international monitoring bodies,<sup>56</sup> or its support of health and education services in the regions beyond its control.<sup>57</sup> Regarding the policies of the Moldovan government on Transnistria, the Human Rights Committee welcomed “the commitment expressed by the State party’s delegation during the dialogue to take all appropriate measures to ensure the effective protection of human rights in that region”.<sup>58</sup> Treaty monitoring bodies welcomed the implementation of a Colombian legislative act that ensures full reparation for the victims of the internal armed conflict<sup>59</sup> or the introduction of the Early Warning System of the Colombian Ombudsman, designed to prevent displacement and other serious human rights violations.<sup>60</sup> Despite the instances of recognised compliance, most concluding observations of universal treaty bodies stress the domains of non- or partial compliance with the expected positive obligations.<sup>61</sup>

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ECtHR, "Grand Chamber hearing on inter-State case Ukraine v. Russia (re Crimea)", Press release, ECHR 309 (2019), 11 September 2019.

<sup>53</sup> ECtHR, "ECHR to adjourn some individual applications on Eastern Ukraine pending Grand Chamber judgment in related inter-State case", Press release, ECHR 432 (2018), 17 December 2018; the pending cases include: *Georgia v Russia (II)*, Appl. no. 38263/08; *Georgia v Russia (IV)*, Appl. no. 39611/18; *Ukraine v Russia (re Crimea)*, Appl. no. 20958/14; *Ukraine v Russia (II)*, Appl. no. 43800/14; *Ukraine v Russia (V)* (re Eastern Ukraine), Appl. no. 8019/16; *Ukraine v Russia (VII)*, Appl. no. 38334/18; *Ukraine v Russia (VIII)*, Appl. no. 55855/18.

<sup>54</sup> Antal Berkes, "Concurrent Applications Before the European Court of Human Rights: Coordinated Settlement of Massive Litigation from Separatist Areas" (2018) 34:1 *Am Univ Int Law Rev* 1–88 at 3-4.

<sup>55</sup> E.g. Walter Kälin, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Mission to Georgia (21 to 24 December 2005)*, UN Doc E/CN.4/2006/71/Add.7 (24 March 2006), para 53.

<sup>56</sup> HRC, *Consideration of reports submitted by States Parties under article 40 of the Covenant: Third periodic report of Georgia*, UN Doc CCPR/C/SR.2483 (19 October 2007), paras 37-38 (Mr Kälin).

<sup>57</sup> CRC, *Concluding observations: Georgia*, UN Doc CRC/C/GEO/CO/4 (9 March 2017), para 4.

<sup>58</sup> HRC, *Concluding observations on the third periodic report of the Republic of Moldova*, UN Doc CCPR/C/MDA/CO/3 (18 November 2016), para 5.

<sup>59</sup> Committee on Enforced Disappearances, *Concluding observations on the report submitted by Colombia under article 29 (1) of the Convention*, UN Doc CED/C/COL/CO/1 (27 October 2016), para 35.

<sup>60</sup> HRC, *Concluding observations of the Human Rights Committee: Colombia*, UN Doc CCPR/C/COL/CO/6 (4 August 2010), para 13.

<sup>61</sup> *Ibid* para 5-6, 18; CRC, *Concluding observations: Georgia*, *supra* note 57, para 4; HRC, *Concluding observations: Iraq*, UN Doc CCPR/C/IRQ/CO/5 (3 December 2015), para 20; CAT, *Concluding observations: Syrian Arab Republic*, UN Doc CAT/C/SYR/CO/1/Add.2 (29 June 2012), paras 21, 23(d); CEDAW, *Concluding observations: Democratic Republic of the Congo*, UN Doc

These quantitative and qualitative examples, far from proving any general trend among all fragile States, demonstrate that certain fragile States have been able to adopt a series of positive measures to comply with their obligation to protect human rights in the area outside their effective control. While examples of non-compliance or partial compliance are still preponderant in the periodic concluding observations, it is sound to say that fragile States contest the required threshold of proactive conduct rather than the validity of the norm. The next two sections provide for the theoretical underpinning of this evolving State practice.

#### IV. Rational Theories

The so-called rational theories such as rational choice or reputational theories focus on the State's self-interests and rational costs-benefits in choosing compliance: the State chooses compliance with international rules because it advances its national interests but it does not need to claim that the national interest itself serves its compliance.<sup>62</sup> This school of thought assumes that States are rational, self-interested actors who seek to maximize their own gains or payoffs, while they have no innate preference for complying with international law.<sup>63</sup> According to rational scholars who focus on reputation, defined as judgments about an actor's past behavior used to predict future behavior,<sup>64</sup> the reputation of the State's conduct influences its choices: a decision to violate international law will increase today's payoff but reduce tomorrow's benefits.<sup>65</sup> The rational theory comprehensibly explains States' compliance in areas such as international financial and economic law where cooperation and coordination entails direct costs and benefits,<sup>66</sup> but are hardly obvious in other fields not characterised by reciprocity. Especially in IHRL, reciprocity or traditional rational choice mechanisms can hardly explain States' compliance.<sup>67</sup> As rational choice theories exclude that altruistic considerations such as an internalized desire to follow the law justify compliance,<sup>68</sup> rational interests and external reputation of the State's conduct are the only decisive factors. In the case of the fragile State's choice to comply with positive obligations, such rational considerations are far from obvious. Moreover, certain rational choice theorists are sceptical towards IHRL as universal human rights treaties

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CEDAW/C/COD/CO/8 (6 August 2019), para 10, 11(a); CESCR, *Concluding observations: Ukraine*, UN Doc E/C.12/UKR/CO/7 (2 April 2020), para 29-32, 44-45.

<sup>62</sup> Burgstaller, *supra* note 12 at 97.

<sup>63</sup> Andrew Guzman, *How International Law Works: A Rational Choice Theory*, Oxford University Press 2008, at 17; Goldsmith & Posner, *supra* note 12 at 13 ("International law is [...] endogenous to state interests").

<sup>64</sup> Guzman, *supra* note 63 at 33.

<sup>65</sup> Markus Burgstaller, "Amenities and Pitfalls of a Reputational Theory of Compliance with International Law" (2007) 76:1 Nord J Int Law 39–71 at 61.

<sup>66</sup> *Ibid* at 71.

<sup>67</sup> Harold Koh, "Internalization Through Socialization" (2005) 54:4 Duke Law J 975–982 at 979; Alex Geisinger & Michael Stein, "Rational Choice, Reputation, and Human Rights Treaties" (2008) 106:6 Mich Law Rev 1129–1142 at 1134.

<sup>68</sup> Geisinger & Stein, *supra* note 67 at 1131–1134; Guzman, *supra* note 63 at 17.

lack effective or reliable coercive enforcement mechanism<sup>69</sup> such as an international human rights court. Their overall conclusion is that the foreseeable benefits do not change States' compliance with IHRL, as human rights-abusing States can ratify the treaties with little fear of adverse consequences, while States with a higher culture of human rights do not have to change their behaviour only because of their party status to human rights treaties.<sup>70</sup> Despite the scepticism of authors representing rational compliance school on the importance of costs and benefits of States' compliance with UN treaty mechanisms, this section argues that the treaty compliance by fragile States is both costly and entails direct benefits in terms of international monitoring (A), the well-being of the people (B), and international cooperation (C).

### A. Monitoring as a Benefit

Analysts of rational theories consider universal treaty monitoring mechanisms generally weak, as their public information on the States parties' human rights practices does not specifically evaluate compliance with the treaty obligations nor is it well publicized.<sup>71</sup> Empirical studies demonstrate that publicity of human rights violations by domestic authorities increases human rights compliance of the State, but it does not necessarily depend on the given State's party status to IHRL treaties.<sup>72</sup> Neither human rights NGOs and journalists reporting on human rights abuses nor other governments distinguished between signatories and non-signatories when they monitor human rights abuses.<sup>73</sup> Therefore, adepts of rational theories may legitimately ask whether fragile States have any interest in participating in universal treaty mechanisms.

Despite the scepticism of rational scholars about the effectiveness of universal human rights treaty monitoring procedures, fragile States' practice shows that compliance with the positive obligations to report on, monitor and investigate human rights violations entails direct benefits. In an area where agents of the fragile State have no physical access, the State party is not in a position to provide first-hand information on the situation of human rights.<sup>74</sup> Nonetheless, as a compliance measure to strengthen their jurisdiction in the area outside their control, some fragile States set up a governmental body charged with the monitoring and reintegration of the area.<sup>75</sup> As

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<sup>69</sup> Goldsmith & Posner, *supra* note 12 at 119–120.

<sup>70</sup> *Ibid* at 120.

<sup>71</sup> Oona Hathaway, "Do Human Rights Treaties Make a Difference?" (2002) 111:8 Yale Law J 1935–2042 at 2022–2023; Goldsmith & Posner, *supra* note 12 at 120.

<sup>72</sup> Ellen L Lutz & Kathryn Sikkink, "International Human Rights Law and Practice in Latin America" (2000) 54:3 Int Organ 633–659 at 645–647.

<sup>73</sup> Goldsmith & Posner, *supra* note 12 at 122, 125–126.

<sup>74</sup> E.g. HRC, *Fourth periodic report of Cyprus*, UN Doc CCPR/C/SR.3143 (24 March 2015), para 33 (Republic of Cyprus).

<sup>75</sup> E.g. in Georgia, the actual Office of the State Minister for Reconciliation and civic equality : CERD, *Fourth and fifth periodic report due in 2008, Georgia*, UN Doc CERD/C/GEO/4-5 (25 February 2011), para 6; in the Republic of Moldova, the Reintegration Office : HRC, *Third periodic report of the Republic of Moldova*, UN Doc CCPR/C/SR.3309 (21 October 2016), para 42-43; in Serbia, the Coordination Center for Kosovo and Metohija, transformed into the Ministry for Kosovo and Metohija, and then into the actual Office for Kosovo and Metohija; In Ukraine, the Ministry of Temporarily

those government bodies can only provide remote monitoring of human rights in the area, based on indirect sources, the State has a primary interest in inviting and promoting international monitoring.<sup>76</sup>

A further, less costly measure of compliance in terms of human and financial resources is the mere invocation of and protestation against the unlawful territorial situation in human rights mechanisms. For instance, without truly detailing the positive measures taken to protect human rights in the area, Azerbaijan regularly uses periodic reporting mechanisms as a forum for its territorial claim against Armenia whom it considers as an occupying power in Nagorno-Karabakh.<sup>77</sup> Other fragile States such as Ukraine or Georgia have decided to exhaust all available international judicial and non-judicial mechanisms to challenge human rights violations and, indirectly, the alleged occupation of their territory by Russia.<sup>78</sup> Those examples indicate that the mere publicity of the human rights treaty mechanisms, even without the latter's competence to issue binding decisions, constitutes an argumentative benefit for the fragile State.

## **B. Well-being of the People in the Area**

Rational choice advocates accept that certain national interests can justify compliance even in the field of IHRL. The State's interest in the well-being of persons under its control is one of such rationales.<sup>79</sup> However, this does not necessarily apply to individuals living outside the State's territorial control but still within its territory, in a region beyond its territorial control. However, even authors representing the rational choice theory admit that the State can have a lower interest in protecting foreign citizens, especially coreligionists, co-ethnics, and co-nationals living in other States, or of States with whom they have colonial, historic or sentimental ties, or trade relations.<sup>80</sup> Between the two groups of persons, individuals under the government's control and foreign citizens, one can perfectly recognize that a State does have rational interests in protecting the human rights of its nationals in an area outside its effective control as their sort might be of major concern for the domestic electorate.

Nonetheless, protection of nationals only partly explains compliance, especially regarding situations where the population of the area beyond the State's

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Occupied Territories and IDPs, see Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Ukraine*, UN Doc A/HRC/WG.6/28/UKR/1 (31 August 2017), para 6.

<sup>76</sup> E.g. CEDAW, *Combined 4th and 5th periodic reports of States parties due in 2011, Georgia*, UN Doc CEDAW/C/GEO/4-5 (30 October 2012), para 9; HRC, *Report of the Working Group on the Universal Periodic Review, Georgia*, UN Doc A/HRC/31/15 (13 January 2015), para 29 (Georgian government).

<sup>77</sup> E.g. HRC, *Third periodic report of States parties: Azerbaijan*, UN Doc CCPR/C/AZE/3 (10 December 2007), para 10-15; HRC, *Fourth periodic reports of States parties due in 2013: Azerbaijan*, UN Doc CCPR/C/AZE/4 (17 March 2015), paras 4-5, 192, 347.

<sup>78</sup> HRC, *Fifth periodic report submitted by Georgia under article 40 of the Covenant, due in 2019*, UN Doc CCPR/C/GEO/5 (28 April 2020), paras 108-110 (detailing the interstate applications initiated by Georgia against Russia before the ECtHR), 184-193 (reporting on the human rights situation in the areas outside the government's control); on the interstate applications: ECtHR, ECHR, *supra* note 53.

<sup>79</sup> Goldsmith & Posner, *supra* note 12 at 109.

<sup>80</sup> *Ibid* at 109-110.

territorial control has been subject to forced population changes. Examples include Northern Cyprus or Nagorno-Karabakh, both populated by settlers who are non-nationals of the fragile State, Cyprus and Azerbaijan, respectively. Even in other regions, citizens of neighbouring countries, foreign fighters or other immigrants have diversified the ethnic and national landscape of the area.<sup>81</sup> As a consequence, beyond nationals of the fragile State, residents holding other nationalities have settled in the area. What is appealing from some fragile States' declarations is their readiness to fulfil their positive obligations with regard to all individuals rather than only their citizens residing in the area.<sup>82</sup> The Iraqi government also expressed this policy to protect individuals irrespective of their nationality when it declared that "Iraq is making every endeavour to fulfil its moral and legal obligation under the provisions of international treaties to protect the lives and future of children by shielding them to the greatest possible extent from armed conflict and all acts of violence".<sup>83</sup>

This policy to protect non-nationals in the area is all the more justified that nationals of the State and their descendants might have lost their identity documents while they forcefully obtained a new nationality due to the massive distribution of passports by an occupying or outside State.<sup>84</sup> The policy of extraterritorial 'passportization', for example that of Russia executed in Transnistria, South-Ossetia, Abkhazia or Crimea, is presumed as unlawful in international law,<sup>85</sup> as it is likely to violate the prohibition of discrimination based on racial or ethnic origin and to lead to the loss of the nationality of the territorial State.<sup>86</sup> On the one hand, protecting foreign citizens in the area beyond the fragile State's control may not, however, a priori serve any direct interest of the State. On the other hand, it must also be admitted that certain fragile States distinguish between the protection of their citizens and settlers whom they consider illegal.<sup>87</sup> In such scenarios, the fragile State has to accommodate its positive obligations under IHRL, on the one hand, and the general international law obligation not to recognise as lawful a situation created by serious breaches of peremptory norms,

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<sup>81</sup> E.g. HRC, *Fifth periodic report submitted by Georgia under article 40 of the Covenant*, UN Doc CCPR/C/GEO/5 (28 April 2020), para 187.

<sup>82</sup> E.g. HRC, *Third periodic report of the Republic of Moldova*, UN Doc CCPR/C/SR.3309 (21 October 2016), para 58 (Republic of Moldova); CESCR, *Replies by the Government of Cyprus to the list of issues (E/C.12/CYP/Q/5)*, UN Doc E/C.12/CYP/Q/5/Add.1 (24 March 2009), para 59; Fourth report submitted by Cyprus, Framework Convention for the protection of National Minorities, Doc. ACFC/SR/IV(2014)007 (29 April 2014), para 98 (freedom of movement of foreign citizens).

<sup>83</sup> HRC, *Replies of Iraq to the list of issues*, UN Doc CCPR/C/IRQ/Q/5/Add.1 (27 August 2015), para 78.

<sup>84</sup> Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Georgia, July 2010, online: [www.refworld.org/docid/4c4d2bfa2.html](http://www.refworld.org/docid/4c4d2bfa2.html) (30 June 2020), at 5.

<sup>85</sup> Anne Peters, "Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction" (2010) 53 *Ger Yearb Int Law* 623–725 at 693, 718.

<sup>86</sup> *Ibid* at 671, 702.

<sup>87</sup> E.g. Nils Muiznieks (Commissioner for Human Rights of the CoE), *following his mission in Kyiv, Moscow and Crimea, from 7 to 12 September 2014*, CommDH(2014)19 (27 October 2014), para 54 (Ukraine restricting foreign citizens' freedom of movement from and to Crimea); Thomas Hammarberg (Commissioner for Human Rights of the CoE), *Special follow-up mission to the areas affected by the South Ossetia Conflict*, Doc. CommDH (2008) 33 (21 October 2008), para 80 (*idem* by Georgia).

on the other.<sup>88</sup> As the accommodation between the two rules in tension is unclear, rational theories recognise that the cost of the failure to take positive measures of protection vis-à-vis settlers may be relatively low provided that the State is able to persuade others that its conduct was actually in compliance with a reasonable interpretation of the law.<sup>89</sup> The ambiguity of the norm will incite the fragile State to provide an explanation in the human rights mechanism for why its behaviour is in compliance with the given treaty; therefore, cost-benefit calculations will still matter.

### C. International Cooperation

Another interest that rational choice theorists apply to IHRL is that human rights compliance acts as a signal to other States which are likely to seek cooperation with compliant partners.<sup>90</sup> The so-called signalling theory assumes that persons undertake the costs of compliance in exchange of future benefits in terms of trust and cooperation from the part of other persons.<sup>91</sup> Applying this theory to IHRL, the cost would be the fragile State's efforts to take measures to protect individuals in the area beyond its territorial control, while the benefit is its future cooperation with other States.<sup>92</sup>

To a certain extent, fragile States may expect foreseeable gains in terms of international cooperation: they may expect development aid, humanitarian or economic assistance and even military cooperation with other States and international organisations. An increasing number of international organisations and States require human rights compliance as a prerequisite of their development aid programmes. However, those conditional benefits require proven engagement in improving human rights records by the fragile State, not only in the government-controlled area but also regarding the area beyond its control.<sup>93</sup> Therefore, such conditional benefits might be costly in terms of capacities that the fragile State should invest in its human rights system.

In case of the most serious massive human rights violations, the international community is obliged to cooperate with and assist the fragile State that is unable to control an area within its territory. This follows first from the concept of 'Responsibility

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<sup>88</sup> Articles on Responsibility of states for Internationally Wrongful Acts, with commentaries, (2001) YbILC vol II, Part Two, Article 41(2), at 39, para 4; the underlying peremptory norm is the absolute prohibition on the transfer into the occupied territory of the occupier's nationals. See Geneva Convention IV, Articles 27, 49; Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, Comité international de la Croix-Rouge, ed., Cambridge, Cambridge University Press 2005, at 462-463 (Rule 130).

<sup>89</sup> Guzman, *supra* note 63 at 96.

<sup>90</sup> David Moore, "A Signaling Theory of Human Rights Compliance" (2003) 97:2 Northwest Univ Law Rev 879-910 at 882-888.

<sup>91</sup> Eric A Posner, "The Signaling Model of Social Norms: Further Thoughts Response" (2002) 36:2 Univ Richmond Law Rev 465-480 at 476.

<sup>92</sup> Moore, *supra* note 90 at 879-880.

<sup>93</sup> E.g. EC, *Definitive adoption of the European Union's general budget for the financial year 2013* (2013/102/EU, Euratom), [8 March 2013] OJ L 66, at II/840.



to protect', a theory according to which it is the territorial State's primary responsibility to guarantee human rights in its territory.<sup>94</sup> Under the concept, the international community is obliged to assist the unable State to protect the population from the commission of the gravest human rights violations (genocide, war crimes, ethnic cleansing and crimes against humanity).<sup>95</sup> In case of those gravest human rights violations, fragile States have often expressed request for international assistance in the protection of human rights in the area.<sup>96</sup> Especially the hope to invite peacekeeping forces under the control of an international organisation as a real alternative to territorial control by other actors constitutes an incentive for which fragile States expressed their willingness to comply with IHRL.<sup>97</sup> As seeking the assistance of other States and international organisations is one of the available measures through which the State can fulfil its positive obligations,<sup>98</sup> its reiteration in periodic reporting mechanisms is both a relatively costless expression of compliance and an expected benefit.

It follows that international cooperation, depending on the type of the human rights violations in the area, may require certain investments by the fragile State in its human rights system or relatively costless international claim for assistance. The benefit, international cooperation, enhances the fragile State's effectiveness in terms of financial, humanitarian, economic, military capabilities.

All the above-mentioned factors provide certain benefits for fragile States, and thus constitute interest-based explanations for compliance. They contribute either to the fragile State's claim for territorial sovereignty as a litigation strategy or enhance its effectiveness, as a material element.

## V. Constructivism

Rational theories do not entirely explain all conducts of fragile States, especially domestic conduct not reported in international human rights mechanisms that complies with IHRL. None of the above-mentioned rational interests fully explains why public bodies act or do not act proactively to prevent and mitigate human rights violations in the area beyond governmental control. Constructivists challenge rational

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<sup>94</sup> See the second pillar of the theory of 'Responsibility to protect' : *Resolution 60/1 : 2005 World Summit Outcome*, UN Doc A/RES/60/1 (24 October 2005), para 138; and the numerous resolutions of the Security Council : UN Doc S/RES/1653 (27 January 2006), para 10; UN Doc S/RES/1674 (28 April 2006), para 9 of the Preamble, etc.; For a complete list see the website of the International Coalition for the Responsibility to Protect, [www.responsibilitytoprotect.org/](http://www.responsibilitytoprotect.org/) (25 February 2014).

<sup>95</sup> General Assembly, *Implementing the responsibility to protect, Report of the Secretary-General*, UN Doc A/63/677 (12 January 2009), para 28-48 (Pillar two).

<sup>96</sup> E.g. HRC, *Replies of Iraq to the list of issues, supra* note 83, para 81; CEDAW, *Summary record of the 892nd meeting (Chamber B)*, UN Doc CEDAW/C/SR.892 (B) (14 August 2009), para 70 (Azerbaijan); HRC, *Third periodic report of the Central African Republic*, UN Doc CCPR/C/SR.3695 (11 March 2020), para 22 (Central-African Republic).

<sup>97</sup> E.g. HRC, *RWGUPR: Ukraine*, UN Doc A/HRC/37/16 (3 January 2018), para 8.

<sup>98</sup> *Ilaşcu, supra* note 5, para 346-347; *Ivanțoc and Others v Moldova and Russia (judgment)*, Appl. no. 23687/05, [15 November 2011] online: *HUDOC* <[hudoc.echr.coe.int/eng?i=001-107480](http://hudoc.echr.coe.int/eng?i=001-107480)>, para 109; CRC, *Concluding observations: Cyprus*, UN Doc CRC/C/CYP/CO/3-4 (24 September 2012), para 53.

theories and see social interaction as central to shaping human conduct. Instead of interests as the origin of legal obligations, constructivists claim that through interaction and communication based on norms, States generate their identities and interests.<sup>99</sup>

For constructivists, public authorities of fragile States may decide to act against the State's interests, as defined in rationalist models, because their norm-internalisation, culture or belief system dictate it.<sup>100</sup> Instead of an expected benefit in terms of the State's sovereignty or effectiveness, State authorities act, under the constructivist theory, out of the "internalization of the norms' generalized validity claim".<sup>101</sup> Constructivists call socialization processes the interactions through which pro-norm behaviour becomes internalized.<sup>102</sup> Socialization is the result of interactions of the main law-making subjects, States, intergovernmental organizations, and other non-state actors such as NGOs, citizens, and the media.<sup>103</sup> To scrutinize how far those actors have internalized the fragile States' positive obligations regarding areas outside their territorial control, the contribution of each of the major international actors will be questioned: State authorities (A), regional human rights monitoring bodies (B), the international community including intergovernmental organisations and third States (C), and the civil society understood as NGOs, citizens and the media (D).

## A. State Authorities

Constructivists examine how far State authorities interact with other international and domestic actors in internalizing a given norm. As explained above, fragile States have declared their commitment to positive obligations regarding the area beyond their control but have not necessarily fully complied with the expected threshold of diligence. Various domestic authorities have contributed to the compliance, at least partial, with those obligations: the executive including especially

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<sup>99</sup> Brunnée & Toope, *supra* note 13 at 13; Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106:8 Yale Law J 2599–2659 at 2633–2634; Sarah Elizabeth Kreps & Anthony Clark Arend, "Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Regimes" (2006) 16:2 Duke J Comp Int Law 331–414 at 344–345 (criticising that constructivists are not quite able to predict when this change in identity will take place).

<sup>100</sup> Koh, *supra* note 14 at 339.

<sup>101</sup> Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge Studies in International Relations, Cambridge, Cambridge University Press 1989, at 48.

<sup>102</sup> Alastair Iain Johnston, "Treating International Institutions as Social Environments" (2001) 45:4 Int Stud Q 487–515 at 492.

<sup>103</sup> Brunnée & Toope, *supra* note 13 at 75; Ryan Goodman & Derek Jinks, *Socializing States: Promoting Human Rights through International Law*, Oxford University Press 2013, at 12–13 (distinguishing between macro and micro level developments in State socialisation).

investigative and diplomatic authorities, courts,<sup>104</sup> legislation,<sup>105</sup> ombudsman office<sup>106</sup> may equally play a role in preventing, repressing and mitigating human rights violations in the area beyond governmental control. The principle of territorial integrity, which is in accordance with international law standards,<sup>107</sup> is without doubt one of the main constitutional law foundations underlining this domestic practice.

For constructivists, a norm only acquires legality if a “shared understanding” makes it intelligible, that is beyond the formal lawmaking and the rule’s validity, a community of practice builds up a practice of the norm’s legality in legal interactions.<sup>108</sup> As for constructivists it is practice rooted in the criteria of legality that grounds continuing obligation, interactionalism explains the formulation of customary law as arising from state practice plus *opinio juris*, that is the States’ belief in the binding character of the custom.<sup>109</sup> Whereas Georgia went as far as to speak about its positive obligations towards its separatist regions “imposed by the Convention and the customary international law”,<sup>110</sup> the above-mentioned inconsistencies in the views of States and the treaty bodies make it premature to speak about an established custom. Considering the evolving State practice and the gaps in the scope of positive obligations, one can nonetheless regard the territorial State’s positive obligations as a progressive development of international law.

### B. Regional Human Rights Monitoring Bodies

The case law of regional monitoring bodies has decisively influenced the domestic case law of certain fragile States. For example, in accordance with the case law of the ECtHR, domestic courts of the Republic of Cyprus engaged the responsibility of the Cypriote State for its failure to comply with the procedural limb of the right to life and awarded damages to the claimants, relatives of missing persons who disappeared during the Turkish invasion.<sup>111</sup> In Moldova, criminal courts quash the

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<sup>104</sup> E.g. by quashing decisions of the unrecognised authorities of the area: ECtHR, *Mozer v the Republic of Moldova and Russia (judgment)* [GC], Appl. no. 11138/10, [23 February 2016], para 153.

<sup>105</sup> E.g. Address of the Verkhovna Rada of Ukraine to the United Nations, other international organisations and national parliaments on condemnation of violation of the rights of indigenous peoples in the Russian Federation and territories of Ukraine temporarily occupied by Russia, in: Volodymyr Yelchenko, *Letter dated 25 June 2019 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General*, UN Doc A/73/915-S/2019/526 (27 June 2019), Annex.

<sup>106</sup> E.g. Public Defender (Ombudsman) of Georgia, 12 June 2014, Submission to the Fourth report of Georgia under the ICCPR.

<sup>107</sup> Venice Commission, *Opinion on ‘whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea’s 1992 Constitution is compatible with constitutional principles*, Opinion no. 762/2014, CDL-AD(2014)002 [21 March 2014], para 17.

<sup>108</sup> Brunnée & Toope, *supra* note 13 at 72.

<sup>109</sup> *Ibid* at 47.

<sup>110</sup> CRC, *Written replies by the government of Georgia to the list of issues (CRC/C/GEO/Q/3)*, UN Doc CRC/C/GEO/Q/3/Add.1 (20 May 2008), para 41.

<sup>111</sup> E.g. *Palma v Attorney General* (28 november 2012), Nicosia Court, Appeal Chamber, Case no. 6661/2001, (Cyprus) available in English at

judicial decisions of Transnistrian *de facto* authorities if their procedure was vitiated or contrary to article 6 of the ECHR, referring to the positive obligation under the *Ilaşcu* judgment,<sup>112</sup> and open criminal proceedings against the *de facto* judges who breached those human rights. The ECtHR considered those measures as satisfying Moldova's positive obligations<sup>113</sup>.

In Colombia, courts act in line with the Inter-American case law when deciding cases about guerrilla regions. The case law of the IACtHR has strongly influenced the State responsibility cases of the Colombian Council of State:<sup>114</sup> when the court has no evidence on the active participation (support, authorisation) of the State authorities in the human rights violations committed by non-state armed groups, it examines whether the violations are due to an omission of the authorities. If the latter were unable to foresee the risk of the violation, the responsibility of the State is not engaged.<sup>115</sup> However, when both the activity and the military objectives of the guerrillas in a given region were of public knowledge – this was the case in the 'demilitarised enclave'<sup>116</sup> –, the Council of State concluded that the argument of force majeure was not admissible and the predictability of the violations justified the engagement of the State's responsibility for its own omission.<sup>117</sup> Like the IACtHR, the Council of State stresses that through the non-respect of the obligations of due diligence, the territorial State itself created the situation of risk.<sup>118</sup>

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<[www.truthnowcyprus.org/index.php/en/announcements/item/21-recentcaselaw](http://www.truthnowcyprus.org/index.php/en/announcements/item/21-recentcaselaw)> (3 March 2019); While the example concerned missing Greek Cypriots who disappeared in the government-controlled area, domestic courts apply the same approach to missing Turkish Cypriots. HRC, *Information received from Cyprus on follow-up to the concluding observations*, UN Doc CCPR/C/CYP/CO/4/Add.1 (15 March 2015), para 5.

<sup>112</sup> E.g. Supreme Court of the Republic of Moldova : *Petiş Mihail et al.*, no. 1re-130/12, 10 July 2012; *Elişov Eduard Petru*, no. 1re-486/12, 18 December 2012; *Ursu Alexandru Timofei*, no. 1re-4/13, 22 January 2013.

<sup>113</sup> *Ilaşcu*, *supra* note 5, para 346; Ivançoc, *supra* note 98, para 110; *Mozer v the Republic of Moldova and Russia (judgment)* [GC], Appl. no. 11138/10, [23 February 2016], online: HUDOC <<http://hudoc.echr.coe.int/eng/?i=001-168541>> para 153.

<sup>114</sup> Lina Marcela Escobar Martínez, Vicente F Benítez-Rojas & Margarita Cárdenas Poveda, "La influencia de los estándares interamericanos de reparación en la jurisprudencia del Consejo de Estado Colombiano" 9:2 *Estud Const* 165–190.

<sup>115</sup> Consejo de Estado, *Luis Miguel Fernández Vega c. La Nación, Ministerio de Defensa, Ejército Nacional y Policía nacional*, no. 11837, Sala de lo Contencioso administrativo, Sección tercera, 8 May 1998, 18 (Colombia).

<sup>116</sup> The 'demilitarised enclave' of Colombia between 1998 and 2002 was an area of 42 000 square kilometres from where the Colombian armed forces withdrew and where the Revolutionary Armed Forces of Colombia (FARC) had become the *de facto* authority. Colombia, Resolución n° 85, 14 October 1998, Departamento Administrativo de la Presidencia de la República y los Ministerios del Interior, Justicia y Defensa; *Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Colombia*, UN Doc E/CN.4/2001/15 (8 February 2001), para 126-127.

<sup>117</sup> E.g. Consejo de Estado, *Martha Morales y Otros c. Nación, Ministerio de Defensa nacional y Policía nacional*, no. 5001-23-31-000-1994-4398-01(13553), Sala de lo Contencioso administrativo, Sección tercera, 20 September 2001, at 27-28; *Blanca Rosalba Prieto Rubio y otros c. Nación-Ministerio de Defensa y Otro*, no. 20001-23-31-000-1997-03529-01(18274), Sala de lo Contencioso administrativo, Sección tercera, 18 February 2010, at 30.

<sup>118</sup> E.g. *José Ignacio Ibañez Díaz y Otros*, no. 52001-23-31-000-1997-08789-01(15838, 18075, 25212 acumulados), Sala de lo Contencioso administrativo, Sección tercera, 25 May 2011, at 91, para 60; *Numael Barbosa Hernandez y Otra*, no. 50001-23-31-000-1999-00286-01(25949), Sala de lo

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In those cases, compliance by the domestic authorities does not necessarily serve the direct interests of the State. Paying compensation to victims or investigating about human rights violations occurring in the area beyond the State's control do not serve the budgetary or administrative interests of the fragile State. Such measures rely much more on an internalised pattern of belief in the positive obligations under the regional human rights treaty than on rational interests or coercion. In fact, each of the above-mentioned States presents a good example of norm internalization. In the Republic of Moldova, regional organisations such as the Council of Europe and the OSCE have provided since the time of the *Ilaşcu* judgment regular training and assistance for local judges and prosecutors.<sup>119</sup> In Colombia, judges of the supreme judiciary such as the Council of State or the Constitutional Court are “groups of progressive lawyers”, mainly trained in the United States and Europe, who have constructed the IACtHR's jurisprudence as a source of constraining authority.<sup>120</sup>

Constructivism, furthermore, explains what identity regional human rights bodies contribute to. One of the main rationales of the fragile States' positive obligation is the concept of an ideal State under the standard of due diligence. This foresees a proactive State that cares for individuals even in areas beyond its territorial reach, in accordance with its effective powers. As the Inter-American Court and the Commission formulated, the State has a role of ‘guarantor’, initially used to express the specific position of the State vis-à-vis persons deprived of their liberty by State authorities.<sup>121</sup> Later, the IACtHR slightly extended the notion to human rights obligations of the State vis-à-vis several categories of persons in a position of vulnerability,<sup>122</sup> whereas in its recent case law, it understands under this notion the position of the State towards any person coming within its jurisdiction.<sup>123</sup> The Colombian case law has internalised the same notion and invokes it whenever it applies the State's positive obligations towards victims of guerrilla regions.<sup>124</sup> Less expressly, the Moldovan case law regularly refers to the State's obligations under Article 1 of the ECHR to adopt all kinds of available measures - economic, diplomatic or legal or otherwise - in order to ensure that

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Contencioso administrativo, Sección tercera, 12 June 2013, at 47-49 (Colombia) (the creation of the ‘demilitarised enclave’ and the lack of measures of precaution).

<sup>119</sup> CoE, *Moldova: Stock-taking of co-operation with the Council of Europe*, Report prepared by the Secretariat subsequent to a visit to Chisinau on 27- 30 September 2005, SG/Inf(2005)20-rev, 21 December 2005, paras 20, 26.

<sup>120</sup> Alexandra Huneus, “Constitutional Lawyers and the Inter-American Court's Varies Authority The Variable Authority of International Courts” (2016) 79:1 Law Contemp Probl 179–208 at 187–192, esp. 189.

<sup>121</sup> *Case of Neira-Alegria et al. v Peru* (1995), Inter-Am Ct. H.R. (Ser. C) No. 21, *Annual Report of the Inter-American Court of Human Rights: 1995 OAS/Ser.L/V/III.33/doc.4* (1996), para 60.

<sup>122</sup> Such as human rights defenders working in NGOs: *Case The Inter-ecclesial Commission on Justice and Peace*, Order of 22 November 2010, Request for Provisional measures, para 23; or children: *Case of the Río Negro Massacres v Guatemala* (2012), Inter-Am Ct. H.R. (Ser. C) No. 250 (Preliminary objection, merits, reparations and costs), para 142.

<sup>123</sup> *Case of the 19 Merchants v Colombia* (2002), Inter-Am Ct. H.R. (Ser. C) No 93 (Preliminary Objection), para 183.

<sup>124</sup> E.g. *Blanca Rosalba Prieto Rubio*, *supra* note 117, para 2.3; *Gloria Amanda Orjuela Grimaldo y Otros*, no. 73001-23-31-000-1999-1250-01 (19.920), Consejo de Estado, Sala de lo Contencioso administrativo, Sección tercera, 28 January 2012, at 30-31 (Colombia).

individuals' Convention rights are respected in Transnistria.<sup>125</sup> The concept of an ideal, active State creates a common legal identity of individuals both in the area outside the fragile State's control and in the government-controlled area. The norm of obedience to regional human rights standards, if consistently followed as a pattern, might therefore create a common identity in those regions.<sup>126</sup> For instance, in Moldova, confidence-building measures construct that common identity in the two borders of the Dnistru River among judges, lawyers and prosecutors to improve their professional knowledge, skills and experience in implementing the ECHR at the national level.<sup>127</sup> Facilitating such patterns of compliance leads to a solidification of the norm-conformity, human rights culture and a regional identity of the addressees.

### C. The International Community

In line with the evolving interpretation of human rights monitoring bodies, certain international organisations such as the Council of Europe<sup>128</sup> and the United Nations, especially the UN Security Council<sup>129</sup> or the Human Rights Council<sup>130</sup> adopted recommendations reiterating the fragile States' positive obligations vis-à-vis individuals in areas beyond their territorial control. Especially the first pillar of the concept 'Responsibility to protect', the State's primary responsibility to guarantee human rights in its territory has broadened the international community's acceptance of those positive obligations.<sup>131</sup> The European Union, as a regional organisation of economic integration, also called upon the Republic of Moldova as an associated State "to take concrete steps to improve the livelihoods of the population" in the area beyond its territorial reach.<sup>132</sup> However, it has not systematically recommended the same obligation vis-à-vis its other associated States such as Georgia, Syria, or Ukraine that

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<sup>125</sup> *Petiș Mihail et al.*, *supra* note 112; *Ursu Alexandru Timofei*, *supra* note 112.

<sup>126</sup> Mike Burstein, "The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights" (2006) 24:2 *Berkeley J Int Law* 423–443 at 442.

<sup>127</sup> CoE, "Online courses on Human Rights for judges, prosecutors and lawyers from Moldova", press release, Chisinau, 11 December 2017, online: <[www.coe.int/en/web/chisinau/confidence-building-measures-across-the-river-nistru/dniester/-/asset\\_publisher/sCMGySdz2KII/content/online-courses-on-human-rights-for-judges-prosecutors-and-lawyers-from-moldova?inheritRedirect=false](http://www.coe.int/en/web/chisinau/confidence-building-measures-across-the-river-nistru/dniester/-/asset_publisher/sCMGySdz2KII/content/online-courses-on-human-rights-for-judges-prosecutors-and-lawyers-from-moldova?inheritRedirect=false)> (16 March 2020).

<sup>128</sup> CoE Parliamentary Assembly, Resolution 2028 (2015), *The humanitarian situation of Ukrainian refugees and displaced persons*, 27 January 2015, para 14; CoE Parliamentary Assembly, Resolution 2198 (2018), *Humanitarian consequences of the war in Ukraine*, 23 January 2018, paras 11.4, 11.15.

<sup>129</sup> SC, *Resolution 2259*, UN Doc S/RES/2259 (23 December 2015) on Libya, para 13 ("Calls upon the Government of National Accord to promote and protect human rights of all individuals within its territory and subject to its jurisdiction").

<sup>130</sup> Human Rights Council, *Res. 42/2. Human rights situation in Yemen*, UN Doc A/HRC/RES/42/2 (2 October 2019), para 7 (adopted by a vote of 22 to 12, with 11 abstentions); HRC, *Res. 30/18. Technical assistance and capacity-building for Yemen in the field of human rights*, UN Doc A/HRC/RES/30/18 (12 October 2015), para 7 (adopted without a vote).

<sup>131</sup> *Supra* note 94.

<sup>132</sup> EC, *Conclusion of an association agreement between the European Union and the Republic of Moldova*, *European Parliament non-legislative resolution of 13 November 2014*, OJ C 285/2, 5 August 2016, para 33.

have lost territorial control over part of their territory.

Some third States, not affected by the territorial conflict confirmed their shared understanding about the fragile State's positive obligations regarding individuals in the area beyond governmental control.<sup>133</sup> Nonetheless, the fact that various other third States<sup>134</sup> and the fragile State themselves<sup>135</sup> often presented views that ignored those positive obligations shows the somewhat limited consensus or awareness of the international community on the evolving interpretation.

#### D. Civil Society

For constructivists, the question of how far the norm internalisation has been effective is not limited to the conduct of State authorities. A new standard is internalized by a wide range of actors: the shared understanding of a norm is generated from epistemic communities, that is knowledge-based networks that enjoy authority due to their expertise and impartiality, and create policy-relevant knowledge.<sup>136</sup> Those epistemic communities might instigate the procedure of norm internalisation through promotion of interactions that ultimately occur amongst individuals or groups of people.<sup>137</sup> Especially NGOs influence State compliance by their reporting, monitoring and awareness-raising activities.<sup>138</sup>

Unlike rational theories, constructivism accepts that the interactions of non-state actors can lead to a new interpretation of an existing treaty norm through subsequent practice.<sup>139</sup> This fits to the commonly accepted view according to which the conduct of non-state actors may be relevant when assessing the subsequent practice of States parties to a treaty.<sup>140</sup> The more actors of the civil society invoke the fragile State's positive obligations in domestic and international interactions, the more they contribute to the internalisation of the evolving interpretation in IHRL.

In regions beyond State territorial control, the proactive litigation activity of

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<sup>133</sup> E.g. *RWGUPR: Republic of Moldova*, UN Doc A/HRC/34/12 (21 December 2016), paras 121.173-175 (Romania, Czechia, Georgia); *RWGUPR: Republic of Moldova*, UN Doc A/HRC/19/18 (14 December 2011), para 73.63 (Canada); *RWGUPR: Ukraine*, UN Doc A/HRC/37/16 (3 January 2018), paras 71 (Switzerland), 116.63 (Georgia), 116.109 (UK); *RWGUPR: Georgia*, UN Doc A/HRC/31/15 (13 January 2015), paras 71 (Poland), 116.20 (Lithuania); *RWGUPR: Syrian Arab Republic*, UN Doc A/HRC/34/5 (27 December 2016), paras 109.24-109.25 (Islamic Republic of Iran), 109.128 (Namibia).

<sup>134</sup> *RWGUPR: Georgia*, UN Doc A/HRC/17/11 (16 March 2011), para 50 (USA); *RWGUPR: Iraq*, UN Doc A/HRC/28/14 (12 December 2014), para 127.156 (Italy); *RWGUPR: Syrian Arab Republic*, *supra* note 133, para 109.141 (Hungary).

<sup>135</sup> *Supra* note 47.

<sup>136</sup> Brunnée & Toope, *supra* note 13 at 59; Harold Hongju Koh, *supra* note 99 at 2648.

<sup>137</sup> Brunnée & Toope, *supra* note 13 at 58–61; Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance*, Cambridge Studies in International and Comparative Law, Cambridge, Cambridge University Press 2014 at 37-38 (calling the procedure "socialisation" into the community's norms).

<sup>138</sup> Chayes & Chayes, *supra* note 16 at 269–270.

<sup>139</sup> Brunnée & Toope, *supra* note 13 at 50.

<sup>140</sup> ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, UN Doc A/73/10 (2018), at 36, Conclusion 5(2).

certain NGOs has largely contributed to the shared understanding on fragile States' obligations.<sup>141</sup> In periodic reporting mechanisms, civil society submissions on the fragile States' reports rarely address human rights problems specifically in the region beyond State territorial control.<sup>142</sup> Areas where egregious violations of international humanitarian law and IHRL took place such as the territory controlled by the so-called Islamic State, however, provoked various shadow reports addressing the State's positive obligations.<sup>143</sup>

In certain cases, the State intervened to protect human rights in the region beyond its effective control only under the pressure from the civil society.<sup>144</sup> For instance, after years of successive Transnistrian applications filed with the ECtHR against the Republic of Moldova, the Moldovan government accepted that the effective protection of human rights in the area outside its control can only be achieved hand in hand with a genuine civil society in the region, "international partners", especially those involved in the settlement process (including third States and international organisations),<sup>145</sup> NGOs and mass media.<sup>146</sup>

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<sup>141</sup> See e.g. the role of the Moldovan NGO Promo-LEX in the Transnistrian case law of the ECtHR: Promo-LEX, "Representatives of EIN member Promo-LEX visit Strasbourg to raise awareness of important cases" (19 March 2019), online: *Promo-LEX* <promolex.md/14794-representatives-of-ein-member-promo-lex-visit-strasbourg-to-raise-awareness-of-important-cases/?lang=en> (22 June 2020); successful applications include: ECtHR, *Negruța v Russia and the Republic of Moldova (judgment)*, Appl. no. 3445/13, [17 September 2019] online: *HUDOC* <hudoc.echr.coe.int/eng?i=001-195847> (violations by both Moldova and Russia); *Vardanean v the Republic of Moldova and Russia (judgment)*, Appl. no. 22200/10, [30 May 2017] online: *HUDOC* <hudoc.echr.coe.int/eng?i=001-173802> (violations by Russia); the Ukrainian Helsinki Human Rights Union in Eastern Ukrainian cases: Olena Protsenko (UHHRU), "No control should not amount to no responsibility: *Khlebiuk v Ukraine*", 16 February 2018, online: *Ukrainian Helsinki Human Rights Union* <helsinki.org.ua/en/articles/olena-protsenko-uhrru-no-control-should-not-amount-to-no-responsibility-khlebiuk-v-ukraine/> (2 June 2020); *Khlebiuk*, *supra* note 51 (no violation by Ukraine); the European Human Rights Advocacy Centre in Caucasian cases, e.g. in Nagorno-Karabakh: EHRAC, "EHRAC and Yale Law School submit third-party intervention in Nagorno-Karabakh right to life cases", 14 January 2020, online: *EHRAC* <ehrac.org.uk/news/ehrac-and-yale-law-school-submit-third-party-intervention-in-nagorno-karabakh-right-to-life-cases/> (20 June 2020).

<sup>142</sup> See however e.g. Joint submission of Georgian Centre for Psychosocial and Medical, Rehabilitation of Torture Victims (GCRT), Human Rights Center (HRC) et al., June 2014, Submission to the Fourth report of Georgia under the ICCPR, at 2-3.

<sup>143</sup> E.g. civil society submissions to the fifth report of Iraq under the ICCPR: Alkarama Foundation, *Iraq: Shadow report*, 25 September 2015, at 5, 8; MADRE, IWHR Clinic (CUNY), *Seeking accountability and demanding change: A report on women's rights violations in Iraq*, October 2015, at 33, 47; Alkarama Foundation, *Submission to the CAT on the initial report of Iraq*, 13 July 2015, at 6-7; Miriam Puttick/Minority Rights Group International & Ceasefire Centre for Human Rights, *No Place to Turn: Violence against women in the Iraq conflict*, February 2015, at 34.

<sup>144</sup> Promo-Lex/National Endowment for democracy, *Civil society report for the Review of the Third Periodic Report of Moldova (CAT/C/MDA/3) at the 62th session of the CAT*, November 6–December 6, 2017, para 16; another good example is the role of the civil society in the case law of the Colombian Council of State and Constitutional Court. Huneus, *supra* note 120 at 189.

<sup>145</sup> *RWGUPR: Republic of Moldova*, *supra* note 133, paras 16, 69-70.

<sup>146</sup> *Ibid* para 66; For instance, in 2006, the Moldovan government set up the National Referral System for Assistance and Protection of Victims and Potential Victims of Trafficking as a framework for co-operation between governmental and non-governmental bodies covering the entire national territory, including Transnistria. Report concerning the implementation of the Council of Europe Convention on



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In summary, constructivism explains how progressive development of international law such as the evolving interpretation of fragile States' positive obligations is created through a pattern of interactions by various actors. Constructivists encounter, however, difficulties to explain instances of non-compliance. For constructivists, non-compliance occurs not because of the calculated weighing of costs and benefits of compliance but instead because of insufficient information or capacity on the part of the State.<sup>147</sup> They admit that the State's deficit in domestic regulatory capacity, scientific and technical judgment, bureaucratic capacity, and fiscal resources do limit the compliance with positive obligations.<sup>148</sup> The constructivist model also fails to predict which norms will become internalized through socialisation,<sup>149</sup> and how far fragile States not parties to regional human rights treaties with a binding monitoring mechanism internalise the evolving interpretation of positive obligations. Despite those limits, constructivism provides a feasible explanation of existing patterns in domestic practices, such as those in certain State parties to regional human rights treaties with a solidifying international case law. Furthermore, the constructivist suggestion to provide facilitation and capacity building as the most effective response to capacity limitations<sup>150</sup> fully applies to fragile States. The more State authorities and the civil society benefit from the international community's technical assistance and capacity building on the State's positive obligations, the more the evolving interpretation is internalised.

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Fragile States are unable to fully satisfy their obligations under IHRL for objective reasons, especially due to their lacking territorial control over a part of their territory. Their positive obligations are therefore reduced and interpreted under the standard of due diligence, expecting a realistic conduct in the given circumstances. Despite their reduced capacity, certain fragile States have made significant efforts in areas outside their effective control to fulfil their international human rights obligations and have sometimes been found to satisfy the required threshold.

To address the reasons and nature of the conduct of fragile States, existing compliance theories can provide partial and complementary explanations. Going beyond the use of only rational or constructivists theories, various authors concluded that compliance is not mono-causal, but multi-causal that relies on both rational choices of States and internal socialisation processes.<sup>151</sup> The study of the positive obligations

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Action against Trafficking in Human Beings by the Republic of Moldova, First evaluation round, GRETA (2011) 25 (22 February 2012), para 31.

<sup>147</sup> Chayes & Chayes, *supra* note 16 at 9–17.

<sup>148</sup> *Ibid* at 14.

<sup>149</sup> Hathaway, *supra* note 71 at 1962.

<sup>150</sup> Brunnée & Toope, *supra* note 13 at 109.

<sup>151</sup> Harold Hongju Koh, "The 1998 Frankel Lecture: Bringing International Law Home" (1998) 35:3 *Houst Law Rev* 623–682 at 635–636; Thomas Risse & Stephen C Ropp, "Introduction and overview" in

of fragile States under IHRL in areas beyond their territorial control confirms those hybrid approaches.

Rational theories explain that compliance by fragile States with their positive obligations in IHRL is both costly and entails direct benefits, especially in terms of monitoring of the human rights situation, well-being of the people in the area and international cooperation. Those factors provide benefits and require certain investments by the fragile State in its human rights system or relatively costless international claims for assistance. From the point of view of rational theories, the international community and especially human rights monitoring bodies should stress those benefits while addressing realistic recommendations to fragile States.

None of the above-mentioned rational interests explains why public bodies act in a way favouring human rights protection in the area beyond the State's control, especially if their domestic conducts are not reported in international human rights mechanisms. In those repeated cases of compliance, constructivism may provide complementary explanation: repeated patterns of norm-compliance play a critical role in creating a common identity, especially domestic actors' belief in an ideal, active State. Constructivism explains why the facilitation of norm internalisation matters: by diffusing awareness of various domestic actors of the State's positive obligations, the international community contributes to compliance. Capacity building, technical assistance and training of legal practitioners might all enhance compliance by fragile States, without the need to search for benefits outside the State's legal system. Those measures of norm internalisation should expand to all stakeholders of the domestic legal system: the executive, legislative and judiciary branches of State authorities, and the civil society understood as NGOs, citizens, and the media.

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Thomas Risse, Stephen C Ropp & Kathryn Sikkink, eds, *The Persistent Power of Human Rights from Commitment to Compliance*, Cambridge University Press, 2013, 3 at 13; Goodman & Jinks, *supra* note 103 at 23.