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Non-State Armed Groups and their International Legal Responsibility

Master's Thesis

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Declaration of Authenticity

I, Jorida Vela declare that this thesis and the work included in it are my own and have been generated by me as a result of my original research. I confirm that I have always clearly attributed whenever I have consulted and quoted from the published work of others. I have acknowledged all the relevant sources included in the bibliography.

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List of Abbreviations

- *NSAGs – Non-State Armed Groups*
- *IHL – International Humanitarian Law*
- *IHRL – International Human Rights Law*
- *ICL – International Criminal Law*
- *ICJ- International Court of Justice*
- *CIHL – Customary International Humanitarian Law*
- *GC – Geneva Convention*
- *CA 3 – Common Article 3*
- *AP 1 – Additional Protocol 1*
- *AP 2 – Additional Protocol 2*
- *ICT – International Criminal Tribunals*
- *ICC – International Criminal Court*
- *ICTY – International Criminal Tribunal for the former Yugoslavia*
- *IAC – International Armed Conflict*
- *NIAC – Non-International Armed Conflict*
- *CIHL- Customary International Humanitarian Law*
- *UN- United Nations*
- UNGA -United Nations General Assembly
- *SC – Security Council*
- *HCP – High Contracting Parties*
- *ICRC – The International Committee of the Red Cross*
- *ILC – International Law Commission*
- *OCHA - The United Nations Office for the Coordination of Humanitarian Affairs*
- *ARSIWA - Articles on the Responsibility of States for Internationally Wrongful Acts*
- *UNCRC - United Nations Convention on the Rights of the Child*
- *ICPPED - International Convention for the Protection of All Persons from Enforced Disappearance*
- *LTTE - Liberation Tigers of Tamil Eelam*
- *ICCPR - International Covenant on Civil and Political Rights*

- *HRFO - Human Rights Field Officer*
- *PIRA - Provisional Irish Republican Army*

1. Introduction

In the last few years, Non- State Armed Groups (NSAGs), have become a significant topic of discussion and of a detailed legal analysis, to better understand the normative framework of the international law dynamics. Eventually, a special attention has been paid to their responsibility under international law, and to whether they are subject of the legal rights and obligations in the national and international level. When it comes to their international responsibility, there is no doubt that they are bound by the legal provisions of the relevant international treaties and also by the customary humanitarian legal norms. Although, according to many opinio juris, the international law provisions are oriented only towards the States, it cannot be denied that in the last decades, the role and significance of NSAGs within the international realm has been increased.[1]

While their increasing importance is undeniable, their specific role and regulation in several branches of international law, such as in International Humanitarian Law (IHL), International Human Rights Law (IHRL) and International Criminal Law (ICL) remains unclear and not sufficiently explored.

1.1 Purpose

The main purpose of this thesis, is to determine the legal status of NSAGs and to analyze the international responsibility of NSAGs for the breach of the legal norms of IHL, IHRL and ICL. Indeed, the three abovementioned branches of law are important, but they remain ambiguous regarding their binding nature towards the NSAGs and to what extend the treaty obligations applies to them in international law. In this paper is realized a detailed legal analysis, in order to better understand how the Customary International Humanitarian Law (CIHL) fills this legal vacuum.

1.2 Research Questions

In this thesis, there are raised four main research questions gradually analyzed under each part of the body of the thesis.

1. What is the Legal Definition of NSAGs under International Law?
2. What is the current legal status of NSAGs and do such entities possess an International Legal Personality?

[1] *Terry Gill, Yearbook of International Humanitarian Law (ed.)18 (2015), pg.181*

3. Are NSAGs held internationally responsible for the breach of norms forming part of IHL, IHRL, ICL and if so when and to what extend?
4. What are the main policy implications and the legal challenges of the attribution of International Responsibility towards NSAGs?

1.3 Methodology

The thesis presents a depth analysis of the topic while departing from the aim and the four research questions. Each of the research questions will be analyzed in a specific chapter. To carry out the analysis, the thesis will use mainly an analytical method focused on primary and secondary sources.

The primary sources have been obtained mainly by the relevant international law treaties, reports, other legal documents, case laws, customary humanitarian norms and fundamental universally accepted legal Principles. While the secondary sources have been obtained mainly by the journal articles, opinio juris, supra notes, and books. In the end of the legal analysis based in the abovementioned relevant sources, will be analyzed also the main legal challenges and the policy implications for the attribution of International Responsibility towards NSAGs. The thesis will be concluded with the possible recommendations which aim to find a solution for the existence of the legal vacuum in regard to the relevant international conventional norms and customary international norms when addressed to NSAGs.

2. The legal definition of Non-State Armed Groups

Non-State Armed Groups (NSAGs) play an important role in contemporary international and non-international armed conflicts, however at the existing international treaties there is not an agreed legal definition of NSAGs. Therefore, this term refers to a non-state party of an international or non-international armed conflict.[2] International law, does not provide a legal definition of NSAG, neither includes explicitly the notion of NSAGs as parties of an armed conflict. The main reason is the reluctance of the States to address the existence of such entities. Therefore, NSAGs have a hybrid status and they remain under the jurisdiction of the domestic law of the state against which they are fighting, which considers them as criminals and against which the States use all the necessary military and judicial means in order to fight them and to maintain public order. Eventually, there are some specific treaty provisions that refer to certain conditions that should be fulfilled by a NSAG to be considered as such. Common Article 3 of the Geneva Conventions (CA3) and the Additional Protocol 2 of Geneva Conventions (AP II) refer to non-state entities when defining their scope of application.

The CA3 of the Geneva Conventions, applies for each party of a NIAC. Therefore, CA3 states, "*in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the explicitly mentioned provisions in the article itself".*[3]

On the contrary, the AP 2 of the Geneva Conventions offers a more broader application in terms of its definition and scope related to NSAGs.

Article 1.1 of Additional Protocol 2 (AP2) to the 1949 Geneva Conventions states that, "it *shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".*[4]

[2] *Sandesh Sivakumaran, The Law of Non-International Armed Conflict (2012), pg.3*
[3] *Common Article 3 of the Geneva Conventions (1949)*
[4] *Additional Protocol 2 (1977) to Geneva Conventions (1949), Article 1.1*

While, still relatively narrow, this paves way for a much more specific and concrete definition to the primary question of "Who can be considered as a Non - State Armed Group".

Moreover, the non-governmental organization of Geneva call which engages with NSAGs in order to increase the appliance of IHL by such entities, uses the term "armed non-state actors" for these entities. It refers to organized armed entities that are primarily motivated by political goals, operate outside effective state control, and lack legal capacity to become party to relevant international treaties.[5] Furthermore, a detailed analysis regarding the dissident armed forces and other organized armed groups was provided by the International Committee of the Red Cross (ICRC), in its Interpretative Guidance on the notion of direct participation in hostilities under IHL.

In the abovementioned Guidance, the ICRC stated that NSAGs includes both, the dissident armed forces and the other organized armed groups. According to the ICRC, the dissident armed forces constitute part of a State's armed forces which have turned against their own government, while the other organized armed groups recruit their members from the civilian population and develop a significant degree of military organization to conduct the hostilities on behalf of a party to the armed conflict.[6]

A concrete example of dissident armed forces is the case of the Rapid Support Forces (RSF) which are paramilitary forces formerly operated by the Government of Sudan. The RSF was held responsible for crimes against civilians while fighting on behalf of the Government of Sudan during the war in Darfur. The abovementioned crimes were considered as crimes against humanity according to Human Rights Watch. [7] However, in 2019, while Sudan was experiencing a political crisis, the military junta took control of the country and employed the RSF to fight the demonstrators who were prodemocracy by also participating in the massacre of Khartoum on 3d of June 2019.[8] Moreover, on 15 April 2023, the fighting broke out between RSF and the Sudan Armed Forces (SAF), converting the RSF in dissident armed forces.

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[5] *P. Bongard & J. Somer, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms. A Look at International Mechanisms and the Geneva Call Deed of Commitment', International Review of the Red Cross (2011) pg. 883, 673, 674*

[6] *ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009), pg.31-32*

[7] *Loeb, Jonathan (9 September 2015). ""Men With No Mercy" – Rapid Support Forces Attacks against Civilians in Darfur, Sudan". Human Rights Watch. Archived from the original on 6 September 2019. Retrieved 13 September 2019*

[8] *"Sudan crisis: Death toll from crackdown rises to 60, opposition says". BBC News. 5 June 2019.* Archived *from the original on 14 June 2019*. Retrieved 5 June 2019

Meanwhile, a concrete example of the other organized armed groups which recruit their members from the civilian population and develop a significant degree of military organization to conduct the hostilities on behalf of a party to the armed conflict is the case of Wagner.

The Wagner group, known also as the Private Military Company (PMC) Wagner is a paramilitary organization funded by the Russian State. The Wagner group is a de facto private army of the Russian government, composed of mercenaries which uses the infrastructure of the Russian's armed forces and which operate beyond the national legislation of Russia where the private military companies are forbidden.[9] There is evidence that the Wagner group was used by the government of Russia to conduct military operations abroad and somehow to hide the Russian foreign intervention in the territory of another state. Therefore, the Wagner group played a significant role in the invasion of Ukraine by Russia for which it recruited civilians and prison inmates from Russia to combat in the frontline. In 2023, the Russian government granted the status of "combat veterans" to the members of the Wagner group who took part in the Ukrainian invasion.[10]

However, for a short period of time, the Wagner group has been transformed from an organized armed group with a responsible commander fighting on behalf of the Russian government, lately in the Ukrainian territory, into a dissident armed force fighting against the Russian government. The leader of Wagner, Prigozhin, started to openly criticize the Russian ministry of Defense for misleading the war in Ukraine. On 23d of June 2023 the Wagner leader, launched an armed rebellion against the Russian ministry of Defense for killing the Wagner soldiers. Therefore, the Wagner group took the de facto control of the Rostov on Don and of the Southern Military District and advanced toward Moscow. However, before reaching the Ministry of Defense, the president of Belarusian, Lukashenko, realized a settlement with the Wagner leader, Prigozhin, to end the rebellion and on 24th of June the Wagner forces began the withdrawal.[11]The case was definitely closed on 27th of June, where the criminal charges for armed rebellion in accordance with the article 279 of the Criminal Code against Wagner, dropped.

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[10] Meduza, "State Duma passes law giving Wagner mercenaries 'combat veteran' status" 20 April 2023
[11] "Band of Brothers: The Wagner Group and the Russian State". Center for Strategic and International Studies 21 September 2020

CA3 of the Geneva Conventions, implies the participation of at least one NSAG in NIAC, however the conditions set forth in the abovementioned article require a further analysis.[12]

In NIAC, NSAGs have to fulfil some relevant criteria in order to be considered as parties to the armed conflict and to be bound by IHL legal provisions. Firstly, they have to exercise their activities under a responsible command; secondly they have to exercise a de facto control over a part of their territory; and thirdly they have to be able to carry out sustained military operations in accordance with the AP 2 to the 1949 Geneva Conventions.[13] The main purpose of this criteria is to emphasis that NSAGs, by carrying out the well- structured and organized military operations, have the legal obligations of an organization, which includes also their obligation to respect the international legal provisions.

The legal personality of NSAGs has been addressed also by the United Nations Office for the Coordination for Humanitarian Affairs (OCHA). According to the OCHA, the NSAGs that bear political agendas that are contrary to the ones of the state within which they operate, shall not be considered as entities that act under the control of the state itself, hence they bear their own identity. This is indeed a valid point as there is a more obvious tendency of these armed groups in using force to achieve their objectives which in fact cannot be curtailed by the existing law enforcement mechanism of the state, therefore, making it much more sensible to consider it as a separate legal personality.[14] One of the good examples for the characterization of NSAG can be identified from its level of organization. Therefore, there is the case of the militant organization of Liberation Tigers of Tamil Eelam (LTTE) based in Sri Lanka, which has not been funded by the government of the state such as in the case of Wagner.

The main aim of the LTTE was to fight against the continuous discrimination and violent prosecution exercised by the Sinhalese dominated Sri Lankan government. The LTTE was involved firstly in attacks on government targets such as local politicians and police and then gradually moved on to armed conflicts against the official armed forces of the State.[15] Initially starting out as a guerrilla force, the LTTE increasingly came to have the status of a conventional fighting force characterized by a well-organized military structure comprised of a navy, an intelligence wing, an airborne unit, and a specialized suicide attack unit.

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[12] The ICTY has affirmed in this sense that there is a NIAC in the sense of CA3 "whenever there is a protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". Prosecutor v. Dusko Tadić;"Dule", Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, IT-94-1-T, T.Ch. II, 10 August 1995, para. 70. 21 Ibid.

[13] Additional Protocol 2 (1977) to the Geneva Conventions of (1949)

[14] OCHA, "Humanitarian Negotiations with Armed groups" (2006), pg.5

[15] T. Sabaratnam, Pirapaharan, Volume 1, Introduction (2003) pg 1

The LTTE popularized and perfected the use of a suicide vest as a weapon, a tactic which actually is being used by many current militant organizations.[16] Moreover, during the conflict, the LTTE exchanged several times the territorial control in the north east, with the Sri Lankan military, and later on, in 2000, the LTTE exercised its territorial control over 76% of the landmass in the northern and eastern provinces of Sri Lanka, fulfilling one of the main criteria and exercising a de facto control of the territory.[17]

In NIAC, the AP2 requires all the parties to the conflict, whether State or Non-State parties to comply with the legal provisions of the IHL. However, it is important to emphasis the fact that, States and NSAGs do not have the same degree of responsibilities under IHL. In order to be held criminally responsible under IHL, the NSAGs should have a certain level of organization, which means that the criminal responsibility of the commanders will be evaluated with respect to their level of organization and their territorial control capacities. Therefore, to better understand the concept of NSAGs, the International Criminal Tribunals (ICT) for the former Yugoslavia and Rwanda provided a legal definition of the above-mentioned entities in their respective case laws, within which, the level of organization and access to military assets, were highlighted as the key pointers in determining the legal personality of an NSAG.[18] The way the ICT had interpreted the level organization was the existence of a proper hierarchical military structure, that is similar to a conventional armed force, which in fact is a clear definition of proper organization as the modern military hierarchy is a fine tuned organizational structure that is based on the concept of checks and balances as well as accountability for actions.[19]

On 3 April 2008, in the Haradinaj et al. case law the ICTY Trial chamber stated that: "*an organized armed group should be characterized by the existence of a command structure, the existence of the headquarters, the de facto control of a certain territory, and the ability to carry out military operations and the capacity to conclude agreements such as cease-fire and peace accord".*[20]

This is indeed a valid argument in presenting the case of legal personality of a certain armed group as it undoubtedly helps in ascertaining the norms of accountability and responsibility.

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[16] *Grimland, Meytal; Apter, Alan; Kerkhof, Ad (1 May 2006). "The Phenomenon of Suicide Bombing". Crisis. 27 pg. 107–118.*

[17] *"Humanitarian Operation Timeline, 1981–2009". Ministry of Defence (Sri Lanka).* Archived from *the original* on 27 August 2011. *Retrieved 2 August 2011*

[18] *Limaj et al. case law, ICTY, IT-03-66-T, November 30 2005, para.89*

[19] *The Prosecutor v. Alfred Musema case law, ICTR-96-13-T, January 27 2000, para.257*

[20] *Rowman and Littlefield, "The Practical Guide to Humanitarian Law", 22 February 2016*

Having headquarters ensures the passing down of orders from a centralized authority to subordinate bodies without the individual bodies having to decide on the course of action based on individual assessments, which in turn could contravene the common objective of the NSAG in certain cases. Furthermore, the de facto control over the territory is also a vital part in establishing the fact that the said NSAG is beyond the punitive control of the state, thereby could not be considered as ordinary criminal offenders and be dealt with under local laws. Hence, the ability to conclude agreements such as cease fires etc. can be held.

These conditions were also confirmed later in the cases of *Tarculovski* and *Boskoski*, case laws which were mainly linked with the determination of the individual criminal responsibility of the members of NSAGs towards war crimes. And, they lean more towards ICL than IHL.[21]

Meanwhile, within the realm of International Armed Conflicts (IAC), the situation concerning NSAGs takes on a different complexion. As stipulated by the Additional Protocol 1 of 1977, an extension to the 1949 Geneva Conventions (AP1), NSAGs are not afforded the status of civilians. Instead, they are attributed the standing of combatants, subject to the condition that they openly bear arms while engaged in combat against foreign occupation and discriminatory regimes. Therefore, Art.48 of the AP1 states: "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".[22]

Eventually, the lack of a unified terminology has led to the use of many different terms to refer to non-state entities involved in NIACs such as "armed groups", "non-state organized armed groups", "armed non-state actors" etcc. All of the abovementioned terms are characterized by the following criteria:

- these entities are illegal under municipal law;
- these entities are not part of the official governmental State's armed forces;
- these entities are characterized by the use of violence;
- in difference from the State's official armed forces, these entities will most likely cease to exist after the end of an armed conflict, due to the fact that they already triumph in the conflict or also because they are defeated. [23]

[21] *Ibid*
[22] *Article 48 of AP1(1977) of Geneva Conventions (1949)*
[23] *E. Heffes, 'The Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law. Challenging the State-Centric System of International Law', 4 Journal*

One of the most well-known legal scholars, Murray, however, presents as a decisive factor the presence of a responsible command on determining the legal status of NSAGs. According to Murray's opinion, such entities must have an organizational structure capable to ensure the development of an internal discipline and the fulfillment of all the relevant legal obligations arising under international law.[24]

3. The determination of the Legal Status of NSAGs

(*International Legal Personality****)***

In the previous chapter, has been analyzed the definition of NSAGs and the required criteria to be considered as such, in IAC and NIAC, depending also in the respective jurisprudence of the ICT. However, the determination of the Legal Status of NSAGs represents a legal challenge. Indeed, the legal articles and publications regarding the status of NSAGs are limited.

The aim of this chapter is to determine whether NSAGs enjoy an international legal personality, to what extend their personality can be derived directly from the legal provisions of international law and whether their legal personality depends on the recognition by the international community. It is really important to make a distinction between the international legal personality and the competence or entitlement to act in the international relations. Eventually, to be entitled to have an international legal personality, each subject of international law must possess four main features:

- must have the competence to sign and to ratify the relevant treaties, also known as jus tractatuum;
- must have the right to send and receive diplomatic envoys, also known as jus legationis;
- must be entitled to present legal claims based on their international responsibility;
- must be entitled to use armed force in specific situations.[25]

The abovementioned competences should have as a legal basis a specific statute or founding treaty and in the case of NSAGs should have as a legal basis the relevant instrument defining or confirming their legal status. The mere fact of having rights and obligations in accordance

of International Humanitarian Legal Studies (2013), pg.1, 81, 91
[24] Murray, supra note 4, 75

with international law is not sufficient to entitle such entities to claim their international legal personality without a priori signing the relevant legal agreements which are binding among its parties. To determine the legal situation of non-state actors, it is important to define whether they are entitled to the right of self-determination. The recognition of the right of self-determination is crucial to establish their position in the international area and to grant such non-state actors the relevant rights and obligations. [26]

A concrete example are the civil wars that happened in Syria and in Libya. The oppositional movements were recognized as legitimate representatives of the people by the international community.

Why is so important the recognition of such entities as legitimate representatives of people?

Firstly, the recognition of such entities which are entitled to the right of self-determination, is considered an important measure that aims to protect democracy, the notion of self-determination and the rights of the citizens;

Secondly, such recognition guarantees certain level of protection under international law, since it allows the purchase of the military equipment or of specific weapons, in some cases, also gives access to financial resources.

Thirdly, it strengthens the entitlement of these entities to claim the reparation of the damages caused during the war. [27]

As abovementioned the recognition is one of the main sources of the international legal personality of NSAGs. However, it is important to emphasis that the recognition of NSAGs represents a legal challenge considering their unlawful activities. The unlawful activities of NSAGs should be denied a priori. This is important especially in the case when such entities claim the recognition of their right of self-determination, threating the territorial integrity and the political independence of the relevant State.

In the 19th century, the United Nations General Assembly (UNGA) confirmed the obligation not to recognize the unlawful activities, via several specific resolutions which were adopted via consensus. Principle 1 of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Chapter of the United

[26] *Ibid*
[27] *Wladyslaw Czaplinski - Recognition and International Legal Personality of Non-State Actors, (2016), pg.11*

Nations (1970) states: "*No territorial acquisition resulting from the threat or use of force shall be recognized as legal*". [28]

Furthermore, Art. 5(3) of the United Nations General Assembly (UNGA) Resolution 3314 (XXIX) states: "*No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful*".[29] The abovementioned principles have been confirmed also by the respective jurisprudence later on. The ICJ, confirmed in its advisory opinion on the wall in the Palestinian territory that the acquisition of the territory by force is illegal and as such cannot be recognized.[30] Moreover, Art.41 of the Responsibility of States for Internationally Wrongful Acts (2001) states: "*No State shall recognize as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law*".[31]

How is determined whether a situation is unlawful?

The ICJ, in its East Timor Case stated that it should be a legal basis for such decision in the form of a resolution approved from the political organs of the UN.[32] Indeed, this is not the best approach considering the political nature of the resolutions of the General Assembly or the Security Council. Moreover, the relevant articles, more precisely article 42 (b) and article 48 (1/b) on State Responsibility leaves in the States competence the decision to claim the international responsibility for the violations of the erga-omnes obligations. There is a general agreement regarding the obligation of NSAGs to comply with IHL and there is no significant distinction between their international obligations under the legal provisions of IHL and those of States.[33]

It is really important to determine why NSAGs are bound by the legal provisions of IHL. Therefore, the main reason why NSAGs are bound by IHL, doesn't lie mere in the fact of accepting the existence of such legal provisions. There are two traditional approaches according to which NSAGs are bound by IHL despite their consent. The first approach, is related with the territorial link of a State Party to the GC according to which, when the States

[28] *Principle 1 of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Chapter of the United Nations (1970).*
[29] *Definition of Aggression, UNGA Resolution 3314 (XXIX), Art 5 (3)*
[30] *Advisory Opinion on Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory, ICJ Rep. 2004, pg.136*
[31] *Responsibility of States for Internationally Wrongful Acts (2001), Art.41*
[32] *East Timor (Portugal v. Australia) Case Law of ICJ-Judgement of 30 June 1995*
[33] *La Rosa & Wuerzner, supra note 7, pg.327-329*

ratify the relevant treaties or practice custom, they implicitly confer the necessary legal capacity to incur legal obligations under IHL, on the NSAGs.[34]

The second approach, is related with the fact that such obligations will also be founded on domestic law through the implementation of the international law and it is based in the capacity of the State to legislate in the national level.[35] The both abovementioned approaches, raise a priori some challenges that are difficult to address. Indeed, regarding the first approach, it may happen that a NSAG comes into existence after the ratification of a specific treaty creating international law obligations on NSAGs by the concerned State. A concrete example is the case of the infamous Revolutionary United Front which came into existence in 1991, while Sierra Leone ratified AP II to the GCs on 21st of October 1986.[36] Regarding the second approach, it is true that the implementation of international law creates legal obligations in the domestic law which derives from the international law itself, however such legal obligations exist within the domestic legislation of a relevant State and therefore they cannot be used to explain the legal obligations that NSAGs may possess in the international area.

Sassoli, provides a list of arguments why and how NSAGs are bound by the international legal obligations. The main argument is that IHL implicitly confers in NSAGs a limited international legal personality.[37] The States themselves, recognize a limited legal personality of NSAGs while they negotiate a relevant treaty or while they practice customary law. A distinction should be made between the recognition of a limited international personality and the recognition of their unlawful activities as such. The fact that NSAGs recognizes the legal obligations under IHL incur an important step in ensuring their compliance, however, in practice, such compliance by NSAGs has proven almost impossible to date. The principle of equality of belligerents is crucial for the enforcement of IHL. The equality of belligerents means that the legal rules of IHL applies equally to all both parties of the conflict, despite who is the aggressor.[38] It is quite clear that IHL regulates conflicts where some parties are states and others are non-state entities. For IHL to apply equally to both these types of entity, it is absolutely necessary that both types of entity must incur equal obligations. Moreover, NSAGs are also bound by the International Customary Law and they already participate in the

[34] *Sassoli- How does law protect in war (1999) pg. 214-217*
[35] *Ibid*
[36] *Waschefort 'Justice for child soldiers? The RUF Trial of the Special Court for Sierra Leone' (2010) - Journal of International Humanitarian Legal Studies pg. 189-204*
[37] *Draper - The Red Cross conventions (1958) pg. 17*
[38] *M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law', 1 Journal of International Humanitarian Legal Studies (2010) 5, 21-22*

formation of customary rules, through their unilateral declarations, codes of conduct and special agreements, affirming once again their commitment to apply a set of international rules and obligations.[39]

The principle of equality of belligerents, states that all the parties of an armed conflict have the same rights and obligations, regardless of their cause. The abovementioned principle is implied also in CA3 of the Geneva Conventions and in Art.1 (1) of the AP2, which explicitly addresses each party of an armed conflict. Based on the equality of belligerents, all parties of an armed conflict shall be bound by IHL for the same legal reasons and to the same extend, guaranteeing a specific level of ownership of the parties over the rules of the IHL and raising in this way the possibility of IHL to be respected as an effective body of law by all the parties. However, the equality of belligerents, principle if often challenged by the States which deny to recognize such NSAGs and ignore their participation in the international area by affecting also in a negative manner the body of IHL.[40] Indeed, the NIAC law does not recognize the status of combatant for the NSAGs. This results in an unfavorable legal unbalance regarding the implementation of IHL legal provisions, however, these entities should still be bound by the legal provisions of the IHL as parties of the armed conflict.

The legal status of NSAGs has been addressed also by the ICRC, in its Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, published in 2009. Therefore, the 2nd recommendation of the abovementioned Guidance states: *"For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non- state party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities".*[41] Furthermore, the 7th recommendation of the Guidance specifies: " *civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non- state party to an*

[39] *Zhuo Liang- The Practice of Non-State Armed Groups and the Formation of Customary International Humanitarian Law (5 May 2022), pg 1*
[40] *Somer, supra note 7, 663-664*
[41] *Nils Melzer, Legal adviser, ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009), 2nd recommendation*

armed conflict cease to be civilians and lose protection against direct attack, for as long as they assume their continuous combat function".[42]

The fact that NSAGs participate in the establishment of the relevant legal provisions that are obligatory to be applied by them, is an important step in this direction, especially considering the public expression of willingness as a tool to affirm their consent to be bound by such legal provisions. [43] Indeed, the States, the International Committee of the Red Cross (ICRC) and other international organizations encouraged the participation of the NSAGs in the formation of the relevant legal rules that apply upon them through the use of the unilateral declarations, special agreements or codes of conduct.[44]

As it will be analyzed also in the following chapter, the same situation applies when dealing with their possible international responsibility. NSAGs play a significant role in the further development of the legal rules that apply when a breach is attributed by publicly recognizing the international law violations.[45] Eventually, NSAGs must fulfill their legal obligations, however, they are also protected by several provisions specified in AP 2 concerning the people that do not or cannot longer take part in the hostilities such as the civilians or the persons hors de combat. The members of NSAGs are granted with the same legal protection as the abovementioned categories of protected persons, with the condition that they must respect the same rules towards civilians or combatants who fall under their control. The content of the obligations that is imposed on the members of NSAGs depends on the gravity of the conflict, on their organizational structure and on their capacity to exercise a de facto or de jure control of the territory. Therefore, NSAGs must fulfill the rights and obligations provided by CA 3 of Geneva Conventions and if they enjoy a high level of organization and do possess a territorial control, then these entities must fulfill also the relevant legal norms of IHL and the rules provided by AP 2. The key point to be considered in this regard is that the application of these provisions does not only apply to the NSAG as a group based on its legal personality, but also to individual members of the organization as well. This is based on the individual responsibility of each member of the body to be bound by international humanitarian and criminal laws, despite having operated under a specific organization. This clearly shows that in the case of such violation of legal obligations, whilst the organization itself could be held responsible if

[42] *Ibid, 7th recommendation*
[43] *Heffes, Kotlik & Frenkel, 2015, supra note 30, 59.*
[44] *Sassòli, Taking Armed Groups Seriously, supra note 43, 30.*
[45] *Ibid. supra note, 13-26. 70*

the common agenda of itself is in breach of such obligations, the members themselves could be held accountable in case of contravening the organization's goals by their individual actions.

Moreover, in the Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman* case, it was affirmed that customary international humanitarian law requires that all the parties that are involved in an armed conflict, whether their members act on behalf of a State or a non-State actor must comply with humanitarian law rules, despite their consent to be bound by such rules.[46]

Eventually, the AP 2 and the Rules of Customary International Humanitarian law have extended the fundamental guarantees provided by CA 3 in favor of: "*the wounded and sick persons; persons considered as "hors de combat"; persons deprived of their liberty; persons prosecuted and accused of criminal offences related to the armed conflict; the civilian population*".[47]

Therefore, article 4 (1) of AP 2 states: "*All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honor and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors*". Moreover, Article 4 (2) states: "*the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place, whatsoever:*

(a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Slavery and the slave trade in all their forms; (g) Pillage; (h) Threats to commit any of the foregoing acts."[48]

Furthermore, the abovementioned fundamental guarantees are complemented by the customary IHL norms.

[46] *Special Court for Sierra* Leone, *Prosecutor v. Sam Hinga Norman*, 31 *May 2004, para.22*
[47] *Rowman and Littlefield, "The Practical Guide to Humanitarian Law", 22 February 2016*
[48] *Art.4 of AP2 to Geneva Conventions (1977)*

Individuals who are incarcerated or held in custody due to reasons linked to a conflict fall into a specific category. This applies whether they are placed in internment camps or detained, as outlined in Article 5 of Additional Protocol 2 (AP 2). This pertains particularly to members of NSAGs who, upon being captured and confined by another faction or by government armed forces, come under this classification.

In accordance with Article 5 (1) of AP 2, several provisions come into effect for such individuals deprived of their liberty:

a) *the wounded and sick shall be respected, protected, treated humanely and receive the medical care and attention required by their condition.*
b) *the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigorous of the climate and the dangers of the armed conflict;*
c) *they shall be allowed to receive individual or collective relief;*
d) *they shall be allowed to practice their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;*
e) *they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.*[49]

Furthermore, Rule 99 within the realm of Customary International Humanitarian Law (CIHL) expressly prohibits the arbitrary deprivation of liberty".[50]
The focus shifts to individuals facing prosecution and allegations of criminal offenses linked to the armed conflict, a theme articulated in Article 6 of Additional Protocol 2 (AP 2). These provisions bear particular significance for members of non-state armed groups (NSAGs) who, by the mere act of taking up arms against the state, become subject to criminalization under domestic law.

Article 6 of AP 2, coupled with Rule 100 within customary International Humanitarian Law (IHL), outlines the crucial safeguards that must be upheld when it comes to judicial processes. These safeguards hold precedence over any conflicting stipulations found in municipal law. To

[49] *Art.5(1)of AP2 to Geneva Conventions (1977)*
[50] *Customary Rules of International Humanitarian Law (March 2005), Rule 99*

this end, Article 6(5) of AP 2 stipulates, "*At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.*"[51]

Meanwhile Rule 100 of customary IHL states, "*No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees".* [52] It is important to emphasis that these legal norms refer to the act of participation in hostilities. However, these norms do not cover specific instances such as war crimes committed by NSAGs during a conflict as they are covered under international criminal law, which could even extend to levels such as universal jurisdictions in cases such as ethnic cleansing or genocide.

Unlike the provisions set forth in Common Article 3 (CA3), Additional Protocol 2 (AP 2) brings about alterations to the legal safeguards that work in favor of NSAGs. This modification ensures that the procedures of apprehension and subsequent sentencing are not deemed arbitrary under IHL, even if they might be perceived as such according to local domestic legislation. The primary objective behind these adjusted judicial assurances is to establish a framework compelling NSAGs to uphold these guarantees within the realm of their own detention practices. When engaging in hostilities, NSAGs are obliged to curtail harm inflicted upon the civilian population and adhere to regulations governing the utilization of warfare tactics. Furthermore, it is incumbent upon them to facilitate the entry of humanitarian relief organizations, in accordance with the stipulations laid out in Additional Protocol 2 and the established norms of CIHL.[53]

NSAGs are not bound only by the norms of IHL, they are also bound by certain obligations under the norms of International Human Rights Law (IHRL), in armed conflicts, considering the fact that NSAGs are subject of the municipal legislation of the State in which they operate.[54] The laws of the relevant state come into effect within the territory and among the populace subject to the control of non-state armed groups (NSAGs). These NSAGs, in practice, adopt the same responsibilities as the local population. A tangible illustration of this is found in Article 4(1) of the Optional Protocol to the Convention on the Rights of the Child (CRC) concerning the engagement of children in armed conflict. This article explicitly asserts that "

[51] *Article 6 (5) of AP 2 (1977) of GCs (1949)*
[52] *Rule 100 of Customary IHL*
[53] *Rowman and Littlefield, "The Practical Guide to Humanitarian Law", 22 February 2016*
[54] *Art.77 (2) of AP I of Geneva Conventions (1977)*

armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years".[55]

Nonetheless, the employment of the word "should" instead of "must" underscores that this regulation, beyond being a binding requirement, is fundamentally a suggestion. This notion was subsequently reinforced within the African Union's Charter on the Rights and Welfare of the Child in 1999. Article 22 of this Charter stipulates that " *States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts*." Furthermore, the article delineates that these regulations extend to children within contexts encompassing internal armed conflicts, periods of tension, and instances of turmoil.[56]

The African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa, which entered into force on 6th December 2012 also addresses the members of armed groups in internal armed conflicts. Therefore, Art.7 (5) explicitly states that:

"*The Members of armed groups shall be prohibited from:*

a) *Carrying out arbitrary displacement;*
b) *Hampering the provision of protection and assistance to internally displaced persons under any circumstances;*
c) *Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family;*
d) *Restricting the freedom of movement of internally displaced persons within and outside their areas of residence;*
e) *Recruiting children or requiring or permitting them to take part in hostilities under any circumstances;*
f) *Forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons especially women and children;*
g) *Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons;*

[55] *Art. 4(1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (25 May 2000)*
[56] *African Charter on the Rights and Welfare of the Child (29 Nov1999), Art.22.*

h) Attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials; and

i) *Violating the civilian and humanitarian character of the places where internally displaced persons are sheltered and shall not infiltrate such places*."[57]

The CRC is a human rights law instrument, whereas AP1 is an IHL instrument, however, both instruments contain the same legal provisions regarding the use and recruitment of child soldiers. Art.38 (2) of CRC states: "*States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.*" Moreover, Art.38 (3) of CRC states: "*States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest*."[58]

Meanwhile, Art.77 (2) of the AP I states*: "The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavor to give priority to those who are the oldest".*[59]

The abovementioned legal provisions are the most closely substantive rules that exists in IHL and IHRL. The only difference between the two legal instruments is the word "State Parties" used in CRC instead of the word "The Parties to the Conflict" used in AP 1. The difference exists because only state parties incur obligations under IHRL, while non-state parties, who can participate in an armed conflict, incur obligations under IHL and of course under ICL. It is important to emphasis that IHL does not confer rights on individuals but it regulates the conduct of hostilities by obliging the parties of an armed conflict to comply with its legal provisions. In conventional law, the IHL makes a distinction between IACs and NIACs, Therefore, IACs are regulated by the Four Geneva Conventions of 1949 and the AP 1, while the NIACs are

[57] *Article 7 (5), The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (6 December 2012)*
[58] *Art.38 of Convention on the Rights of the Child (1990)*
[59] *Article 77 (2) of AP 1 (1977) of GCs (1949)*

regulated by CA 3 to the Four Geneva Conventions of 1949 and AP 2. In terms of conventional law, there are many more legal provisions that regulate IACs than NIACs, which are also more precise and protective.[60] Customary international law does not maintain such a strict distinction between the rules of international and non-international armed conflict. Indeed, of the 161 substantive rules identified by the ICRC study on customary international humanitarian law, only twelve were deemed inapplicable to non-international armed conflict, and these related mostly to combatant and prisoner of war status, which applies only to international armed conflicts.[61]

The rules of IHL create obligations on NSAGs in the context of both international and non-international armed conflict. As parties of the armed conflict, whether national or international one, the NSAGs must respect the relevant obligations of international law. According to IHL, the status of the Parties to the Conflict applies not Only to States but also to NSAGs, which means that they are both bounded by IHL legal norms.[62]

It is relevant to emphasis that NSAGs are not opposed to IHL as long as it does not constitute a legal obstacle for them in order to continue carrying out their military operations. Actually, taking into account the fact that especially in NIAC, they are vulnerable because the domestic laws "criminalize" them, they need to obtain some international guarantees by the IHL and the ICL. Therefore, the IHL and the ICL aim to find a legal balance between the States and NSAGs. According to ICL, the war crimes and the crimes against humanity are considered to be the most serious violations of IHL not only in NIACs but also in IACs.

From the analysis of the 2nd chapter, we conclude that NSAGs do possess a limited and defective international legal personality, are entitled of international conventional and customary rights and obligations and must be held responsible for the breach of any of the abovementioned legal provisions.

[60] *For example, the prohibition of the use and recruitment of child soldiers contained in art 77(2) of Protocol I Additional to the Geneva Conventions, and relating to international armed conflicts, is less precise and much less protective than art 4(3)(c) of Protocol II Additional to the Geneva Conventions, and relating to non-international armed conflicts.*
[61] *Henckaerts and Doswald-Beck Customary international humanitarian law vol I: Rules (2005)*
[62] *Common Article 3 of the Geneva Conventions (1949), Additional Protocol 2 (1977) Article 1 (1)*

4. The International Responsibility of NSAGs

4.1) The International responsibility of NSAGs for the breach of the norms forming part of IHL

4.2) The International responsibility of NSAGs for the breach of the norms forming part of IHRL

4.3) The International responsibility of NSAGs for the breach of the norms forming part of ICL

The International Responsibility of NSAGs

(Why is it so crucial in regard to NSAGs?)

According to many opinio juris, as parties of the armed conflicts, whether national or international conflicts, NSAGs should be held internationally responsible for their acts. Therefore, according to Bellal, the International Responsibility (IR) of NSAGs, would constitute a better implementation of the international law norms, by calling on the group to change their practice rather than simply punish the individuals.[63]

Moreover, Zegveld states that in order to efficiently enforce the application of international law to NSAGs, we should be able to involve the group itself as a collectivity, considering also the fact that the acts that are labelled as international crimes find their basis in the collectivity. Therefore, the most challenging level of accountability is the one of armed opposition groups as such.[64]

Furthermore, when dealing with this topic, Sassoli, proposed to enforce IHL directly against the whole group.[65] Eventually, States and individuals must be held responsible for violating an international obligation.[66] The individual criminal responsibility is applied to NSAGs, for the commitment of international crimes such as war crimes or crimes against humanity.[67] However, we should emphasis that, the States should not be held responsible for the actions of

[63] *Annyssa Bellal, supranote 12, 305*
[64] *L. Zegveld, The Accountability of Armed Opposition Groups in International Law (2002), pg.133*
[65] *Sassòli, Taking Armed Groups Seriously, supra note 43, pg. 9*
[66] *M. Dixon, Textbook on International Law, 7th ed. (2007), pg. 252-253 and 284*
[67] *Zegveld, supra note 73, pg. 106*

NSAGs acting beyond their control. As Murray states, this "*confirms the necessity of directly subjecting the NSAGs to the legal provisions of international law, in order to be held internationally responsible and also to avoid a legal vacuum*".[68]

The International Law Commission (ILC), decided to regulate the conduct of NSAGs through the Articles on the Responsibility of States for International Wrongful Acts (ARSIWA).[69] According to Article 10, the conduct of "a *movement, insurrectional or other*" which establishes a new State "*in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law*".[70] To better understand the phrase "*movement, insurrectional or other*", the ARSIWA commentaries state that the AP2 (1977) to the Geneva Conventions (1949), must be analyzed in details.[71] As mentioned also in the previous chapter, this treaty refers to "*dissident armed forces or other organized armed groups*". So, the ARSIWA affirms that these dissident armed forces represent the essential components of an insurrectional movement.[72] Therefore, we can conclude that Article 10 applies in the case of the responsibility for the conduct of insurrectional movements in NIAC in accordance with AP 2 and with CA3 of the Geneva Conventions (1949). Moreover, the ILC states that NSAGs must be held responsible for their conduct under international law. Article 10 of ARSIWA, states that the responsibility of NSAGs is recognized only when the group has the power to replace the government of its State's territory, becoming responsible for the wrongful unlawful acts committed when it was NSAG.[73] The abovementioned position was reaffirmed also by the ICRC in its Commentary regarding CA3 according to which, the responsibility of armed groups for violations of CA 3 can also be envisaged if the armed group becomes the new government of a State or the government of a new State. In these circumstances, the conduct of the armed group will be considered as an act of that State under international law.[74] Despite the fact that previously the abovementioned article has been

[68] *Murray, supra note 4, pg. 132*
[69] *Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission [ARISWA], 2001, Vol. II 2, pg.26*
[70] *A. Clapham, Brierly's Law of Nations, 7th ed. (2012), pg. 396*
J. Crawford, State Responsibility: The General Part (2013), pg. 170 and J. Crawford, Brownlie's Principles of Public International Law, 8th ed. (2012), pg. 554
[71] *3 Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission, 2001, Vol. II pg. 2, 31, 51 Art. 10, para 9*
[72] *Ibid*
[73] *M. Spinedi & B. Simma (edition), United Nations Codification of State Responsibility (1987), pg. 35, 38 and pg. 51–52*
[74] *ICRC 'Commentary on Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' (2016), para. 890*

applied in certain arbitral decisions, currently practices of States and NSAGs confirming this Article are quite rare. [75]

4.1) The International Responsibility of NSAGs for the breach of the norms forming part of IHL

There is no doubt that NSAGs as States are bound by the legal provisions of IHL and as a result they are held internationally responsible for their illegal acts during armed conflicts.[76]

CA3 of the Geneva Conventions of 1949, which applies to NIACs, is addressed to "each Party to the conflict". The main legal issue, is whether the treaties themselves are binding upon the non-contracting parties considering the fact that the Geneva Conventions and the other related humanitarian law treaties are not normally open for signature by NSAGs. It is important to emphasis, that exists an exception in accordance with Article 34 of the Vienna Convention on the Law of Treaties, which states that a third state may give its consent to be bound by the treaty legal rights and obligations.[77]

Furthermore, Article 96(3) of the AP 1 to the Geneva Conventions of 1949, sets another legal exception in the situations of IACs, by allowing NSAGs to apply the Geneva Conventions and this Protocol during the armed conflict.

Currently, there are several international legal humanitarian treaties which refer to NSAGs legal obligations during armed conflicts. Therefore, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) like the CA3 to the Geneva Conventions of 1949, sets several legal obligations for NSAGs by addressing them as "parties to the armed conflict". Furthermore, Article 4(3) (c) of AP2 (1977) states "*children who have not attained the age of fifteen years, should not be recruited in regular armed forces or other armed groups to take part in hostilities*. "This Article, creates a set of legal obligations for any "group", which means that also NSAGs are bound by it.[78] Another relevant humanitarian law treaty engaged with the NSAGs legal obligations, is the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. It states that in case a NIAC, occurs

[75] *d'Aspremont, Rebellion, supra note 85, pg. 431–432*
[76] *La Rosa & Wuerzner, supra note 7, pg. 327-329*
[77] *Article 34 of the Vienna Convention on the Law of Treaties (1969)*
[78] *Additional Protocol 2 (1977) to GCs of 1949, Article 4 (3) (c)*

in the territory of one of the HCP, each party to the conflict must be bound to apply the legal provisions of this Convention and of its additional Protocols.[79] Eventually, even in the Commentary to Geneva Convention 2 was further explained that in most of the domestic legislations, the provisions of IHL become legally binding upon all the individuals of the country after its ratification.[80] Moreover, in accordance with the CA3 of the four Geneva Conventions and with Article 1 (1) of the AP2, in NIAC, NSAGs are obliged to comply with the provisions of IHL despite the fact that the national domestic legislation criminalizes them for using their force against the State.[81] Also, in accordance with the legal principle of equality of belligerents, NSAGs and States not only will be bound by IHL, but they also will be both bound for the same legal reason, therefore, the IHL will have greater possibilities to be respected by each of the parties. Certainly, within NIAC, NSAGs find themselves shielded by numerous pertinent legal clauses outlined in AP 2, which pertain to both civilians and individuals who are "hors de combat" – essentially, those who are out of combat due to injury, illness, detention, or any other reason. Consequently, NSAGs are obligated to adhere to identical regulations when dealing with both civilians and combatants who come under their authority throughout the course of an armed conflict.

This responsibility extends not only to the rank and file of NSAGs but also encompasses their leadership, in alignment with the precepts of humanitarian law and international criminal law. As noted previously, due to the absence of combatant recognition for NSAG members according to Additional Protocol 2 (AP 2), they lack a legal incentive to differentiate themselves from the civilian population or to openly carry arms in the course of armed conflict. Consequently, they fall within the scope of individuals categorized as civilians engaging directly in hostilities, as articulated in Article 13(3) of AP 2. Indeed, Article 13(3) of AP 2 stipulates, "*civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities*".[82]

However, it's crucial to underline that while engaged in hostilities, this designation of civilians participating directly in hostilities divests them of the safeguards usually accorded to civilians.

[79] *Article 1(3)*
[80] *J. Pictet, Commentary on the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1960), pg. 34*
[81] *M. Schmitt & J. Pejić, International law and Armed Conflict: Exploring the Faultlines (2007), pg. 241, 256*
[82] *Additional Protocol 2 (1977) to GCs of 1949, Article 13 (3)*

Consequently, during this period, they become susceptible to attack and capture. Furthermore, they can be subject to detention and prosecution within national judicial systems due to their involvement in hostilities.

Moreover, both the AP 2 and the established norms of CIHL have expanded the foundational assurances originally laid out in CA 3 of Geneva Conventions, to encompass specific groups. Within these mentioned categories fall individuals who are wounded or sick, those categorized as "hors de combat" (outside of combat due to factors like injury, illness, or detention), individuals held in custody due to conflict-related reasons—be it detention or internment—and those facing allegations and legal proceedings for criminal offenses linked to the armed conflict. Notably distinct from CA 3, AP 2 introduces modifications to the judicial safeguards, ensuring that the verdicts and detention operations conducted by NSAGs align with the tenets of IHL, even if they are carried out in accordance with domestic legal systems.[83]

Indeed, the legal provisions of IHL are important, but they remain ambiguous regarding their binding nature towards the NSAGs. Therefore, it often remains unclear to what extend the treaty obligations applies to them in international law. In this case, it would be crucial to analyze how the CIHL will fill this legal vacuum.

Recently, CIHL plays a crucial role in verifying that some legal obligations are customary, so they can form the legal basis for prosecution for a serious international crime before the ICT. Indeed, the ICT decided to examine whether the international crimes are covered by CIHL, before determining whether CIHL itself recognizes the individual criminal responsibility.[84]

In contrast to several legal provisions of IHL treaties, CIHL will usually be binding also among NSAGs.[85] According to many opinio juris, NSAGs are legally bound by CIHL, because the States want so. Eventually, States accepted CIHL as a legal binding system for themselves and also for other groups. According to them, CIHL rules are aimed to protect fundamental values and principles and should be binding for all the parties. Nevertheless, there are some other legal theories which recognize the direct link of NSAGs with the IHL and their willingness to respect the IHL provisions.[86]

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[83] *Rowman and Littlefield, "The Practical Guide to Humanitarian Law", 22 February 2016*

[84] *Tadić (Appeal) (Decision on the defence motion for Interlocutory Appeal on Jurisdiction) ICTY, Appeals Chamber, Decision of 2 October 1995 (case no. IT-94-1-AR72) pg. 94-127*

[85] *E. Wilmshurst and S. Breua, Perspectives on the ICRC Study on Customary International Humanitarian Law, (Cambridge: Cambridge University Press, 2007) pg. 3-14*

[86] *International Review of the Red Cross (2011) 881, pg. 47, 53-56*

In the Tadic case law, the ICTY has supported the idea that NSAGs participate also in the formation of customary IHL.[87] Taking into account their unilateral declarations, special agreements and codes of conduct, NSAGs, as the States should be held internationally responsible under customary IHL.[88] It is important to mention that these agreements will not apply when they are in dis-accordance with the peremptory norms of international law, which according to the ICTY includes 'most customary rules of international humanitarian law.[89] The ICTY in its decision stated that the violation of the abovementioned legal agreements can serve as a legal basis for international prosecution, where these agreements goes beyond the CIHL provisions.[90] CA3 to the Geneva Conventions of 1949 states that such special agreements should be adopted by the parties to the conflict. Moreover, the Darfur commission of Inquiry considered such agreements as international agreements which gave rise to international rights and obligations of NSAGs.[91] NSAGs by adopting such special agreements, codes of conduct and unilateral declarations, bind themselves to respect humanitarian law on the international level.[92] The ICRC states that when a NSAG makes a unilateral declaration in order to adopt these special agreements, the next step should be to develop the codes of conduct in order to include its legal obligations in a workable list.[93] A report from one detailed study of eleven codes of conduct of NSAGs revealed that, their special agreements referred to CIHL.[94] The legal rights mentioned in all their agreements consisted in the right to live in dignity, the right to receive humanitarian assistance and to be involved in relevant humanitarian activities, to human rights legal protection and the right to basic needs.[95]

Eventually, from the NSAGs perspective, their willingness to implement and respect IHL and to participate in law – making processes can serve as a strong initiative to change their behavior. Nevertheless, it's worth highlighting that the engagement NSAGs in shaping IHL, especially the customs that have emerged as a result, presents a noteworthy legal dilemma. Armed groups,

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[87] *Prosecutor v. Dusko Tadić a/k/a "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, 51, at para 107-108*

[88] *M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law', 1 Journal of International Humanitarian Legal Studies (2010) pg.5, 21-22*

[89] *Tadić (Appeal) (Decision on the defence motion for Interlocutory Appeal on Jurisdiction) ICTY, Appeals Chamber, Decision of 2 October 1995 (case no. IT-94-1-AR72) at para. 143*

[90] *Tadić (supra) at para. 143-144*

[91] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005 at para. 76*

[92] *Case concerning the Frontier Dispute (Burkina Faso/ Republic of Mali), ICJ Reports (1986) pg. 554*

[93] *ICRC, Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts, (Geneva: ICRC, 2008) pg. 22*

[94] *Ends and Means: Human Rights Approaches to Armed Groups, International Council on Human Rights Policy (ICHRP), Versoix, 2000, pg. 52*

[95] *Ibid*

due to their historical disposition, aren't typically associated with a strong adherence to IHL principles. Additionally, international legal precedents have acknowledged that customary IHL dictates the international responsibility of all individuals participating in either international or non-international armed conflicts, regardless of whether they represent a sovereign state or a non-state entity. This accountability remains in force regardless of the individual's consent or affiliation.[96]

4.2) The Responsibility of NSAGs for the breach of the norms forming part of IHRL

From the abovementioned legal analysis, we can clearly see that NSAGs are bound by the IHL. However, it is not the same situation in case of the applicability of International Human Rights Law (IHRL). In contrast to IHL, in the current legal doctrine, IHRL is seen as applicable only to States. Furthermore, human rights treaties provisions rarely address NSAGs.[97] Moreover, according to human rights law, engaging with NSAGs in human rights issues entails such groups with a certain legitimacy. The determination of the fact, whether NSAGs are subject of IHRL, represents a legal challenge itself. According to the legal doctrine, at least the "de jure" application of human rights treaties has been recognized. Greenwood stated that: "*The legal obligations of IHL apply not only to the States but also to NSAGs*." Meanwhile, the application and implementation to NSAGs, of human rights law treaties, despite the fact that at least "de jure" is considered as applicable, represent a legal challenge, especially considering the fact that the relevant enforcement mechanism created by human rights treaties, usually can be invoked only in the legislative proceedings against a State.[98]

The doctrinal debate regarding the status of NSAGs under IHRL continues, but with some changes, in part due to the United Nations (UN) practice regarding the human rights reports on NSAGs and the demand by the Security Council (SC) for them to respect human rights law.[99]

Regarding the human rights treaties addressed to NSAG, we should analyze three relevant legal documents. When considering human rights agreements that pertain to non-state armed groups

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[96] *Special Court for Sierra Leone, Prosecutor v. Sam Hinga Norman, 31 May 2004, at para.22*

[97] *Optional Protocol to the Convention on the Rights of the Child, section 7 (12 February 2002)*

[98] *'Scope of Application of Humanitarian Law' in D. Fleck, The Handbook of Humanitarian Law in Armed Conflict, 2nd edition, (Oxford: Oxford University Press, 2007) pg. 45-78*

[99] *Resolutions 1193, 1213, 1214, 1216, 1471, 1479, 1509, and 1528 discussed in 'Human rights obligations of armed non-state actors in conflict situations (supra) at 499-504*

(NSAGs), it becomes essential to examine three pertinent legal documents. The initial document of significance is the United Nations Convention on the Rights of the Child (UNCRC). Article 4 within the Optional Protocol of the UNCRC states: "*Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.*" This article further stipulates that member states are obligated to enact all requisite legal measures to forestall such recruitment. It is crucial to emphasize that the implementation of this article should not alter the legal standing of any of the parties engaged in the armed conflict.[100]

The second legal document is the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), which states that: "*Each State Party shall take appropriate measures to investigate acts committed by persons or groups of persons acting without the authorization of the State and to bring those responsible persons or group of persons to justice.*"

Despite the fact that during the negotiations were moments where it seemed that the legal definition of enforced disappearances would include acts committed by NSAGs, this did not happen and the legal obligations were addressed only towards the states.

In the abovementioned treaties, we cannot see an explicit legal mentioning of NSAGs obligations under human rights law, however this is not the case with the third legal document. Eventually, The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) explicitly refers to NSAGs. Within the scope of this treaty, are included two different types of actors. Therefore, according to Article 1 (d) of this treaty, the "armed groups" are defined as dissident armed forces or other organized armed groups, which are different from the regular armed forces of a State. Furthermore, according to Article 1 (n), "non-state actors" are defined as private actors, which are not public officials of the state, and whose actions cannot be de jure neither de facto attributed to the states. The treaty itself states that: "*the members of the armed groups should be prohibited from carrying out arbitrary displacement, undermining the legal provisions regarding the protection of internally displaced persons and their fundamental guarantees, recruiting*

[100] *UNICEF and Coalition to Stop the Use of Child Soldiers, Guide to the Optional Protocol on the Involvement of Children in Armed Conflict, (New York: UNICEF, 2003), pg. 17*

children to participate in hostilities, hostage taking, trafficking persons and violating humanitarian character of the places where the displaced persons are sheltered." [101]

Meanwhile, the States Parties under this treaty should also ensure the accountability of the non-states actors for the commitment of arbitrary displacement acts or their complicity in such acts and also their accountability for the commitment of acts related with the exploitation of natural and economic resources which lead to displacement.

From the legal analysis of the three abovementioned treaties, we can clearly see that the used legal terminology for NSAGs does not depend in the criteria used in IHL in order to define them as NSAGs. There is not a legal provision which requires from them to have a well-structured organization or a de facto territorial control in order to be considered as parties to the armed conflict. Nevertheless, the treaties regarding human rights law do not explicitly address NSAGs directly as IHL treaties do. Eventually, in times of armed conflicts, international or non-international ones, the UN and its special mechanisms are reporting not only in humanitarian law but also in human rights law violations. A special attention should be paid to the context in which these mechanisms are used to address human rights violations committed by NSAGs. Despite the absence of explicit legal obligations mentioned in the human rights treaties, the UN mechanisms addressed the human rights obligations of NSAGs. Therefore, the report of the International Commission of Inquiry on Darfur to the UN Secretary General, does not only concentrate on legal issues regarding IHL and ICL, but also on human rights obligations. According to the Report, the abduction of persons by the NSAGs constitute serious violations of human rights law.[102]

Another relevant legal report regarding the legal obligations of NSAGs under international human rights law is the Report on Extrajudicial, Summary or Arbitrary Executions. Eventually, the UN's Special Rapporteur Philip Alston, in his report on Sri Lanka stated that the Government and the NSAGs, such as the Liberation Tigers of Tamil Eelam (LTTE) must respect the human rights of every person in Sri Lanka which are also recognized in the International Covenant on Civil and Political Rights (ICCPR). Indeed, as non-state actor, the LTTE is not legally obliged by the ICCPR, but it remains subject of the legal obligations set in the Universal Declaration of Human Rights. An armed group which exercise a de facto control over the population and the territory, and which has a well-organized political structure, must respect the human rights legal rules. The SC, contrary to most of the states has recognized

[101] *Article 7 (5) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (6 December 2012)*

[102] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary – General (2005)*

NSAGs with the legal capacity to assume international obligations to respect human rights norms.[103]

The distinction between humanitarian law and human rights law is quite narrow. The main difference consists in the fact that the humanitarian law addresses armed groups with a certain degree of control and organization, while the human rights law addresses state-like entities. Furthermore, according to many opinio juris, humanitarian law norms are more universally accepted than human right law norms.

As we have seen from the abovementioned analysis the UN special mechanisms, consider that it is appropriate for the international community to apply human rights norms when the armed group has exercised a de facto control over the population and the territory itself and has its own political structure. The Human Rights Council is the competent authority to monitor the behavior of States and NSAGs during the armed conflicts, through its special legislative procedures and ad hoc missions. It should be emphasized that the Human Rights Council is empowered not to report the violations of IHL, but the violations of IHRL, committed by NSAGs and to attempt to made these non-state actors to change their illegal behavior. Moreover, the publication of "The Guiding Principles for Human Rights Field Officers" has addressed further the issue of engaging with NSAGs. In the accordance with the abovementioned principles, the IHL constitutes the legal basis for the work of human rights field officers (HRFOs) and guarantees the recognition of human rights for all the persons without distinction.[104]

Eventually, international humanitarian law applies during armed conflict, international or non-international one in different degrees, and includes protection of all persons not taking an active part in hostilities. It applies jointly with IHRL and imposes obligations on all parties to the conflict, including NSAGs. These guidelines represent an important development due to the fact that the human rights responsibilities of NSAGs are recognized and because they are entitled with the legal right to cooperate with other regular armed forces in the human rights field. Later on, The UN's work on children in armed conflict has led to an innovative approach which details violations by NSAGs. The recent reports by the UN Secretary-General to the SC on certain situations list the non-state actors concerned and whether or not they are involved in any of the categories of serious violations which include the assassination of children, the recruitment of children on hostilities, the armed attacks in public places, the kidnapping and

[103] *SC Res. 1265 (1999), preamble; SC Res. 1193 (1998), para. 12, 14; SC Res. 814 (1993), para. 13*
[104] *The Guiding Principles for Human Rights Field Officers (2008), pg. 5-6*

the denial of humanitarian access for them. Moreover, subsequent reports on various country situations have detailed the serious violations of children's rights committed by the NSAGs.
The SC also adopted specific relevant resolutions and legal measures, which consisted in the prohibition of the export and supply of arms, weapons and other military equipment.
Furthermore, it adopted legal measures regarding the prohibition of military assistance towards the parties to armed conflicts which are on the SC's agenda and whose acts are in violation of international law in regard to the protection of children during armed conflict.[105]
The reports of the Special Representative covered groups which were not addressed as parties to a conflict by the states concerned.[106] Furthermore, the Special Representative established a methodology based on commitments by the NSAGs, rather than only a strict application of IHL by them.[107]
For this reason, it seems more appropriate to consider this question as a matter of international human rights standards rather than international humanitarian law and the obligations exist whether or not there is an armed conflict. This technique of applying universal standards to NSAGs and then engaging with them to monitor and encourage consent has been developed by various non-governmental organizations including, in particular, Geneva Call.
It is important to emphasis the fact that the engagement with NSAGs is not limited only to UN mechanisms. Eventually, Human Rights Watch, as an intergovernmental organization reports on the human rights violations committed by NSAGs.[108]
Indeed, the legal doctrinal issue regarding the application of human rights law in regard to NSAGs, over time, has been overcome through the invocation of universal fundamental values such as the fairness, the presumption of innocence, impartiality and independence.
The reports of the UN Human Rights Council and the resolutions of SC, play an important role in the legal analysis of the status of NSAG and their obligations under the international rule of law. However, as previously mentioned, a third organization which deserves a special attention regarding the analysis of NSAGs, is the Geneva Call.[109] The Geneva call has engaged armed forces in the "Deeds of Commitment", which consists in a cooperation in mine action and in a total ban on anti-personnel mines. It does not only monitor the compliance with the "Deeds of

[105] *Security Council Resolution 1612, para. 9*
[106] *'Human rights obligations of non-state actors in conflict situations' supra at 512-3*
[107] *Human Rights Obligations of Non-State Actors (supra) at 289-291*
[108] *Human Rights Watch: "You'll Learn not to Cry": Child Combatants in Colombia (2003); Human Rights Abuses Inside the MKO Camps (2005); A Face and a Name: Civilian Victims of Insurgent Groups in Iraq (2005); A Question of Security: Violence against Palestinian Women and Girls, (2006); Renewed Crisis in North Kivu (2007); "All the Men Have Gone": War Crimes in Kenya's Mt. Elgon Conflict (2008)*
[109] *Margaret Busé, 'Non-State Actors and their Significance' 5.3 Journal of Mine Action (2001)*

Commitment", but also receives the reports by NSAGs. The reason why the NSAGs are willing to be bound by this legal document in particular is because they realize that being bound by the international norms, would make it easier for them to criticize the governments and their armed forces for violating the international norms of humanitarian law.

The Geneva Call Statute aims to further engage with NSAGs to guarantee the respect of humanitarian and human rights legal rules. Furthermore, through the "Deeds of Commitment" it also aims to fully ban the use of anti-personnel mines, the recruitment of the children of soldiers in hostilities, and other inhuman and cruel treatment.[110]

4.3) The International Responsibility of NSAGs for the breach of the norms forming part of ICL

In the abovementioned chapters, we analyzed the legal responsibility of NSAGs for the breach of the norms forming part of IHL and IHRL.

This chapter will be characterized by a detailed legal analysis regarding the international criminal responsibility of NSAGs. The development of the International Criminal Law (ICL) in regard to its application towards the individuals who form part of NSAGs, has been sophisticated. Therefore, the International Criminal Tribunals (ICTs) of Yugoslavia and Rwanda have further developed legal rules concerning the superior criminal responsibility and the joint criminal enterprise.

Individual criminal responsibility applies not only within the context of armed conflict, international or non-international one, but also against the genocide or crimes against humanity. Meanwhile, in other cases, ICL has been used to prosecute members of NSAGs for treaty crimes such as torture, hostage- taking, piracy or enforced disappearance.[111] However, as the focus turns to individuals detained and prosecuted for the most serious crimes, a prosecutorial selection will start among the members of NSAGs, in order to identify its leaders. The main issue will be to identify the leader to be held liable for prosecution for international crimes deriving from the rules concerning command responsibility. The application of the doctrine of

[110] *Geneva Call and the APCLS, Deed of Commitment on Health Care (August 2019)*
[111] *Zardad trial in 2004, discussed in Human Rights Obligations of Non-State Actors pg. 343-344*

international individual criminal superior responsibility for commanders to internal armed conflicts was explicitly challenged before the ICTY.[112]

The Chamber stated that: "*wherever the international law recognizes that a war crime can be committed by a member of an organized military force, it also recognizes that a commander can be penally sanctioned if he knew or had reason to know that his subordinate was about to commit a prohibited act or had done so and the commander failed to take the necessary and reasonable measures to prevent such an act or to punish the subordinate".* [113]

Hence, when NSAGs meet the prerequisites that warrant the application of humanitarian law, the presence of a commanding authority and responsible commanders becomes apparent. These commanders are bound by the obligation of criminal accountability for any war crimes perpetrated by their subordinates, following the conditions outlined earlier. Furthermore, under specific circumstances, these commanders could also be held liable for their failure to prevent the occurrence of such crimes.[114].

We should emphasis that, since NSAGs cannot be subject of the jurisdiction of the International Criminal Court (ICC), as a legal person, the national jurisdictions should consider the responsibility of the group under the international criminal norms. In this regard, it may be worth it to have a look in the US Alien Tort Statute which allows for tort cases to be brought before the US Federal Courts. This legal document, uses ICL as a normative framework, not only for substantive obligations but also for secondary liability, such as for the complicity in violations of the norms.

A concrete example of a third party being accused of complicity in an international crime committed by a NSAG is the suit brought by the victims of the bombings against Libya for complying with the Provisional Irish Republican Army (PIRA) in the commitment of international crimes.[115] The complaint consisted on the supply of arms and ammunition, on the training military assistance and on the fact that Libya knew that its provisions of arms would be used by the PIRA to commit crimes against humanity and more precisely against the civilian populations in Northern Ireland and Great Britain. [116] Eventually, PIRA committed international crimes, and therefore, assisting such a group is a violation of international law.

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[112] *Prosecutor v Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case IT-01-47-AR72, Decision of 16 July 2003*
[113] *Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, 15 July 1999*
[114] *A. Cassese, International Criminal Law, 2nd edition, Oxford: Oxford University Press (2008) pg. 243*
[115] *Class Action McDonald et al v The Socialist People's Libyan Arab Jamahiriya, US District Court for the District of Columbia, filed 21 April 2006*
[116] *Ibid, para. 322*

Furthermore, the recent decisions of the US courts, set down some relevant parameters for what kind of violations committed by NSAGs fall under the Alien Tort Statute, and under what conditions a specific organization should be held liable for complicity in the violation of international law.[117]

From the analysis of the abovementioned cases we can clearly see that the members of NSAGs are held criminally responsible for the breach of the international norms. However, it is really important to determine whether the NSAGs themselves are bound by the norms of ICL as a legal person, and if so which are their legal obligations. Based on a historical analysis of the ICL, the bodies of the international criminal justice, held liable for the committed crimes only the natural persons. However, this does not mean that the issue of the responsibility of the legal persons for the breach of norms of ICL has not been raised. Therefore, art. 6 of the Charter of International Military Tribunal in Nuremberg (the IMT Charter) states*: "The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:(a) Crimes against peace (b)War crimes (c)Crimes against humanity. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."*[118]

Moreover, the ICTY analyzed and defined the conditions of the actus reus for the joint criminal enterprise in the Tadić case law. [119] Indeed, based on the analysis of the abovementioned case laws, can be declared only the criminal liability of natural persons, in its individual or collective form.

It was the Special Tribunal for Lebanon that sentenced for the first time a legal person and then this decision was reflected also in the Draft Articles on Crimes against Humanity of the International Law Commission (ILC). According to ICL, it is up to states to establish the criminal liability of the legal persons for crimes against humanity.[120] The main reason why the states explicitly restricted the ICC's jurisdiction to natural persons is because they did not have

[117] *Ibid*
[118] *Charter of International Military Tribunal in Nuremberg, Article 6*
[119] *14 Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, 15 July 1999, 194.*
[120] *Lukáš Mareček Criminal Liability of Legal Persons under International Law-Retrospection and current status (2020), pg 413*

the notion of criminal liability of the legal persons in their national legislation, therefore it would be complicated to deal with such legal persons if they would need to punish them in their legal systems for the commitment of crimes. According to the complementary principle, the criminal proceedings should be taken firstly in the national level and only if the states are unwilling or unable to carry out the proceedings then the jurisdiction of the ICC should apply and actually the States are not so willing to modify or update their national legislation in accordance with the international law. Therefore, it can be concluded only the criminal liability of the natural persons, either in its individual or collective form for the breach of the international norms.

4.4) The attribution of International Responsibility for the breach of international legal norms to NSAGs

The NSAG is a legal person, organization, which acts through physical persons and must be identified through attribution. As mentioned in the previous chapters, there are many non-state armed actors operating in the international area, characterized by different features, therefore the attribution of the breach of an international obligation to such entities represents a legal challenge. According to many opinio juris, the main issue of the attribution of the responsibility for the NSAGs it is closely related with the lack of a specific legal definition. Therefore, Zegveld states that, NSAGs are abstractions which act only through human beings who should be held responsible for their unlawful activities of for the breach of the relevant legal provisions.[121]

Moreover, in its Customary Study, the ICRC stated that NSAGs are responsible for acts committed by its Members, however, in its Commentary to CA3, it stated that international law is ambiguous regarding the responsibility of NSAG as an entity for the acts committed by its members.[122]

The relevant principles of attribution presented by ILC are stated in Art.4-11 of ARSIWA. In accordance with the abovementioned legal provisions, *the conduct of any State organ shall be considered an act of that State under international law whatever position it holds in the organization of the State.*[123] As a result, to be able to determine the attribution of responsibility

[121] *Zegveld, supra note 73, 152*
[122] *J.–M. Henckaerts & L. Doswald–Beck, Customary International Humanitarian Law Volume I (2005), 530/ 98 ICRC, supra note 88, para. 892.*
[123] *ARSIWA, supra note 81, Art. 4*

to a NSAG it is important to analyze whether such a group is characterized by the presence of non-state organs than can be considered as such by the international law. To determine the organizational structure of NSAGs it is important to analyze them based on concrete examples.

For example, the Liberation Movement of Congo in accordance with it Statute, is comprised of four main organs: The President, the Political–Military Liberation Council, the General Secretariat and a military Liberation Army of Congo.[124] According to the opinio juris based also in concrete examples such as the abovementioned example, there is no doubt that the responsibility for the acts committed by its Members is attributed also to the NSAG itself.

4.5) De lege ferenda and the Content of International Legal Responsibility of NSAGs.

(Reparation)

There is no doubt that NSAGs are held internationally responsible for the breach of the norms forming part of IHL, IHRL and ICL.

It important to emphasis that the concept of "reparation" forms the basis of the content of the international legal responsibility of such entities. Therefore, once the International Responsibility is established for the breach of the abovementioned norms, the NSAGs are obliged to provide full reparation. In the international area, the reparations can take the form of restitution, compensation, satisfaction and guarantees of non-repetition.[125]

The restitution consists in the reestablishment of the situation which existed before the commitment of the wrongful act.[126] The compensation consists in the financial compensation for the caused damage which cannot be reestablished in it's a priori condition.[127] The satisfaction which has a symbolic character, implies firstly the acknowledgement of the breach of a specific legal provision and then the expression of a regret or formal apology.[128]

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[124] Mouvement de Libération du Congo, 'Statuts du Mouvement de Libération du Congo' (Statute of the Liberation Movement of Congo) (1999), Art. 11
[125] C. Tams, 'Law-Making in Complex Process', in C. Chinkin & F. Baetens (eds), Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford (2015), pg. 287, 291;
[126] ARSIWA, supra note 81, Art. 35.
[127] ARSIWA, supra note 81, Art. 36.
[128] ARSIWA with Commentaries, supra note 83, 89. See also, La Grand (Germany v. United States of America), Judgement, ICJ Reports 2001, para. 123

Meanwhile, the guarantees of non-repetition aim to restore the confidence in the relationship between the parties with the aim to prevent future damages rather than to repair them.

5. Policy Implications, Possible Recommendations and Conclusion

- *Policy Implications and Possible Recommendations*
- *Conclusion*

5.1) Policy Implications and Possible Recommendations

NSAGs cause human security threats not only in the national level but also in the international level through the use of direct violence by breaching the relevant legal provisions of international law. As we have seen from the abovementioned legal analysis, the situation with the international law treaties is unsatisfactory, due to the fact that they leave ambiguous the nature of the international legal obligations addressed to NSAGs.

Eventually, not all humanitarian law treaties are sufficiently clear whether their legal provisions are binding towards NSAGs. Indeed, Second Hague Protocol for the Protection of Cultural Property (1999) is addressed to the State Parties to the treaty and not to the "parties to the conflict". [129]

Therefore, determining which legal Articles should apply to NSAGs represents a legal challenge itself. It seems that in the cases of crimes committed by NSAGs the judges prefer to rely more in CIHL than in international law treaties. To resolve this legal challenge has been suggested that the NSAGs representatives should be involved in the legislative process of adoption and ratification of international law treaties.[130]

The main issue in this case lays in the fact that the Governments of the States disagree to empower NSAGs with the legal right to be part of the law-making process.

Moreover, IHRL is also unsatisfactory when addressed to NSAGs. The use of "should" instead of "shall or must" when addressed these groups, seems to establish a less binding legal obligation. In regard to CIHL, there is not a specific list of customary rules applicable to NSAGs. It is generally accepted that NSAGs are bound by the principles of CIHL.

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[129] *Second Hague Protocol for the Protection of Cultural Property (1999)*
[130] *Sassòli 'The Implementation of Humanitarian Law' (supra) at 64*

Eventually, when addressing these entities, we have referred to the ICRC report, the report from the Darfur Commission and the Legal Statute of the ICC.[131]

The legal suggestions that CIHL should be determined by taking into account the previous practices of NSAGs deserves a proper discussion. Indeed, such practice, generates a sense of "ownership" for NSAGs, however it would transform the international legal framework in a simple normative framework based on universally accepted practices. The existence of the CIHL, should in no case undermine the existence and the primacy of the international legal norms.

It is important to emphasis, that is strongly suggested that the customary norms should apply to NSAGs, without a priori requiring the existence of an armed conflict and without recognizing them as "parties to the conflict". Several UN special mechanisms, report on NSAGs operating outside the scope of an armed conflict.[132]

The application of many customary norms by the NSAGs concerning crimes such as hostage-taking, slavery or the recruitment of children do not require the existence of an armed conflict.[133]

A key solution for the existence of the legal vacuum in regard to international humanitarian treaties and customary international norms when addressed to NSAGs, is the adoption and the ratification of a new legal treaty, which would include specific legal obligations for NSAGs.

The existence of such treaty, would set out explicit legal obligations for NSASGs within the international realm and could also avoid the long legislative process of the determination whether and in what specific cases the NSAGs are bound by the customary humanitarian legal norms.

Although many opinio juris, consider the existence of such treaty as risky due to the fact that it could undermine the existing customary legal obligations, and would not impose the same legal obligations as with the States, the adoption and ratification of such treaty would be crucial to ensure the fulfillment of the fundamental standards of humanity by NSAGs and the protection of the civilians.

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[131] *UN Doc. A/58/546-Corr.2S/2003/1053-Corr.2, 19 April 2004*

[132] *Statement by Professor Philip Alston, UN Special Rapporteur on extrajudicial executions Mission to Colombia 8-18 June 2009': 'FARC and ELN guerrillas continue to carry out significant numbers of unlawful killings, especially in order to control and instill fear in rural populations, to intimidate elected officials, to punish those alleged to be collaborating with the Government, or to promote criminal objectives. Their indiscriminate and inhumane use of landmines also kills and maims many.' Report forthcoming (May 2010).*

[133] *Ibid*

Moreover, such a treaty would avoid the necessity to force the governments of the states to determine the level of the organization and the de facto territorial and population control and to prove the level of intensity of the crimes committed by the NSAGs.

5.2) Conclusion

In the final analysis, four key conclusions have been reached. First, currently, there is not an explicit international legal definition for NSAGs. Therefore, such entities should comply with the relevant criteria set by the specific abovementioned norms of international law and by the customary international law to be considered as such.

Secondly, in order for an entity to be entitled to the legal rights and also to incur international legal obligations, that entity must possess legal personality. The mere fact of having rights and obligations in accordance with international law is not sufficient to entitle such entities to claim their international legal personality without a priori signing the relevant legal agreements which are binding among its parties.

To determine the legal situation of non-state actors, it is important to define whether they are entitled to the right of self-determination. The recognition of the right of self-determination is crucial to establish their position in the international area and to grant such non-state actors the relevant rights and obligations. It is important to emphasis that NSAGs have a limited and a defective form of legal personality attributed to them by States.

Thirdly, there is no doubt that NSAGs are held internationally responsible for the breach of the norms forming part of IHL, IHRL and ICL. The main legal challenge in this case is to determine whether the members of such entities are held responsible as natural persons or the NSAGs themselves are held responsible as a legal person. Legal practice shows that prevails the liability of natural persons, in its individual or collective form. The main reason is because the States did not have the notion of criminal liability of the legal persons in their national legislation, therefore it would be complicated to deal with such legal persons as NSAGs, if they would need to punish them in their legal systems for the commitment of crimes. Moreover, States are not so willing to modify or update their national legislation in accordance with the international law.

Once the international responsibility is established, the NSAGs will be obliged to provide full reparation, which may be in the form of restitution, compensation, satisfaction or guarantees of non-repetition.

Fourthly, from the abovementioned analysis it seems that the key solution for the existence of the legal vacuum in regard to the relevant international conventional norms and customary international norms when addressed to NSAGs, is the adoption and the ratification of a new legal treaty, which would include specific legal obligations for NSAGs.

Abstract

Non-State Armed Groups (NSAGs) play an important role in contemporary international and non-international armed conflicts, however at the existing international treaties there is not an agreed legal definition of NSAGs. Therefore, this term refers to a non-state party of an international or non-international armed conflict which should be characterized by the existence of a command structure, the existence of the headquarters, the de facto control of a certain territory, and the ability to carry out military operations and to gain access to military equipment. NSAG is a legal person which operates through physical persons, who may be identified through attribution.

NSAGs possess a limited and defected international legal personality and they are entitled to the relevant international conventional and customary rights and obligations and must be held responsible for the breach of any of the abovementioned legal provisions. Indeed, there is no doubt that NSAGs are held internationally responsible for the breach of the norms forming part of IHL, IHRL and ICL. Therefore, once the responsibility is established NSAGs would be obliged to provide full reparation which may be in the form of restitution, compensation, satisfaction or guarantees of non-repetition.

Abstract

Nestátní ozbrojené skupiny (NSAG) hrají důležitou roli v současných mezinárodních i nemezinárodních ozbrojených konfliktech, avšak v existujících mezinárodních smlouvách není dohodnuta právní definice NSAG. Proto se tímto pojmem označuje nestátní strana mezinárodního nebo nemezinárodního ozbrojeného konfliktu, který by měl být charakterizován existencí velitelské struktury, existencí velitelství, faktickou kontrolou určitého území a schonností provádět vojenské operace a získat přístup k vojenskému vybavení. NSAG je právnická osoba, která působí prostřednictvím fyzickýchosob, jež lze identifikovat prostřednictvím atributu.

NSAGmají omezenou a defektní mezinárodní právní subjektivitu a náleží jim příslušná mezinárodní konvenční a zvyková práva a povinnosti a musí nést odpovědnost za porušení kteréhokoli z výše uvedených právních ustanovení.
Není totiž pochyb o tom, že NSAG jsou mezinárodně odpovědné za porušení norem, které jsou součástí MHP, MZP a MZL.
Proto by po stanovení odpovědnosti byly NSAG povinny poskytnout plnou náhradu škody, která může mít podobu restituce, odškodnění, satisfakce nebo záruk neopakování.

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