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THE PROBLEM OF NON-STATE ACTORS STATUS UNDER INTERNATIONAL LAW

Master thesis

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Vilnius, 2020

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INTRODUCTION

For a long time, legal as well as political scholars considered states to be the main actors in the international arena as well as negated the important role of non-state actors (NSA) in international relations. However, the reality of international life has been different. Even in the post-16th century, NSAs have started to take part in international affairs. In the 17th century, the East India Companies, while perhaps not fully operating independently from the state, wielded enormous private economic power, having the monopoly on overseas trade with the colonies. Such phenomenas can be considered as precursors of modern-day multinational corporations. In the late 18th century, anti-slavery societies in the United Kingdom and the United States started to militate against the slave trade, eventually successfully. They can be considered as the first non-governmental organizations (NGOs). In the 19th and early 20th century, peace movements were instrumental in the establishment of arbitral tribunals and ultimately the League of Nations[1]. Undoubtedly, The Red Cross Movement's influence on humanitarian international law or the American Peace Movement's impact on the first drafts for the Covenant of the League of Nations are only two very famous historical examples of successful lobbying in international politics by Non-State Actors [2]. It is necessary to emphasize that the activity of NSAs has increased rapidly.

Nevertheless, despite an important role that NSAs play in international relations there are still some issues concerning NSAs, which are not regulated as well as have to be investigated.

Firstly, despite the impact of NSAs on other actors in international relations, there is still no universally accepted definition of NSAs. Secondly, the recognition of NSAs as subjects of international law is a very controversial issue. In fact, states are traditionally considered to be the sole subjects of international law as well as NSAs remain largely outside the field of international law. Thirdly, NSAs are increasingly participating, directly or indirectly, in international negotiations and the codification of international law, however, their role in the law-making process is not clear. Particularly, it is not understandable to what extent they can influence the norm-making process. Fourthly, as non-state actors are the most dominant party of the armed conflicts, the question of the applicability of IHL to NSAs remains vitally important. It can be concluded that due to the high level of uncertainty there is an urgent necessity in examining all the above-mentioned issues.

[1] Ibid
[2] Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Vienna: Holder, 1882), 160.

Researched Problems.

1. Whether there is an internationally legally recognized definition of a non-state actor?
2. Which actors in the international arena can be recognized by world community as non-state actors?
3. Can non-state actors be considered as subjects of international law?
4. Whether non-state actors are described as free-standing participants in the international law-making process?
5. Whether and to what extent international humanitarian law can be applied to armed non-state actors?

The relevance of the final thesis

It should be mentioned that the number of non-state actors has risen notably over the past decades. Moreover, it is a well-known fact that a huge amount of conflicts all over the world involve at least one armed non-state actor. The erosion of the state's monopoly on violence and the grave implications of the conflict for human rights and peace have increasingly made armed non-state actors a matter of international concern. However, this concern has not resulted in the development of a uniform approach concerning ANSAs treatment or status[3]. Moreover, a lot of scholars argue if NSAs can be treated as subjects of international law. Also, one more controversial issue is which norms can be applied to them in the case of different violations of law. Therefore, there is a specific need to explore NSA's status as well as the applicability of humanitarian law to them.

The novelty of the final thesis

It should be noted that despite the fact that NSAs play an important role in international relations there is still no accepted and legally binding definition of NSAs. Different scholars such as J. Rosenau[4], R. Osiba[5], R. Keohane[6], J. Nye[7], Andrew Clapham[8] as well as Antonio Cassese[9] have been trying to analyze the core characteristics and create a definition of a non-state actor. However, after analyzing the scientific works and proposed definitions of the above-mentioned

[3] Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law* (Farnham: Ashgate publishing, 2016), 133.
[4] J. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton: Princeton University Press, 1990), 88.
[5] Masashi Sekiguchi, *Government and Politics* (Oxford: Eolss Publishers Co. Ltd., 2010), 243-244.
[6] R. Keohane and J. Nye, *Transnational Relations and World Politics* (Cambridge: Harvard University Press, 1972), 111.
[7] Ibid.
[8] A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 31.
[9] Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005), 125.

authors it can be concluded that they consider some categories of non-state actors, but do not describe their core characteristics at whole. Therefore, having analyzed various approaches to the definition of a non-state actor and due to the absence of a legal definition of such a notion, it should be noted that there is a vital necessity of finding and creating an internationally recognized definition of a non-state actor. Moreover, for a better understanding of the legal nature of NSAs, their typology should be investigated due to the fact that there are a lot of interpretations of the typology of NSAs.

Also, scientists such as Fidler[10], Wolfrum[11], Delbrück[12], Hobe[13], Lukashuk[14], Zarei and Safari[15] in the last decades have made a lot of effort to develop an adequate reflection of the international legal status of NSAs. However, the legal personality of NSAs was the issue that led to the heated debates between scholars. Therefore, the features of the subjects of international law will be investigated in order to find out whether NSAs correspond to them.

In 2004, Appeals Chamber of the Sierra Leone Special Court confirmed the fact that IHL is binding to the NSAs, but the question of how it should be applied still remains open[16]. Different scholars represent the measures that can be applied to NSAs. However, deeper research should be done in order to find a unified approach to the applicability of humanitarian law to NSAs.

To sum up, it should be concluded that despite the fact that different scholars have investigated issues that were raised above, the problem of determining the status of NSAs as well as the applicability of IHL to them still remains open and leaves many questions behind it. Therefore, scientific novelty of such an analysis is quite logical and proceeds from the rather controversial nature of the chosen topic. Firstly, this Master Thesis proposes the definition of NSAs that can be further recognized by legal community. Secondly, this work analyzes the legal personality of non-state actors and proves that they are subjects of international law. Thirdly, it is determined what measures can be applied to NSAs.

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[10] David Fidler, "International Law," World Health Organization, Accessed 24 November 2019, https://www.who.int/trade/distance_learning/gpgh/gpgh7/en/index3.html .
[11] G. Dahm, J. Delbrück and R. Wolfrum, *Völkerrecht* (Berlin: De Gruyter Verlag, 2002), 45.
[12] Ibid.
[13] S.Hobe, "Der Rechtsstatus Der Nichtregierungsorganisationen Nach Gegenwärtigem Völkerrecht," *Archiv Des Völkerrechts* 37, 2 (1999): 172-176.
[14] I. Lukashuk, *Modern Law of International Treaties* (Moskow: Volters Kluver, 2004), 110–112.
[15] M. Zarei1 and A. Safari, "The Status of Non-State Actors under the International Rule of Law- A Search for Global Justice," Cultural Diplomacy, Accessed 24 November 2019, http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/2014-04-lhrs/Dr_Zarei_and_Azar_Safari_-_The_Status_of_Non-State_Actors_under_the_International_Rule_of_Law-_A_Search_for_Global_Justice.pdf.
[16] "Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72 (E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)," Refworld, Accessed 26 February 2020, https://www.refworld.org/cases,SCSL,49abc0a22.html.

Significance of the final thesis

The practical significance of the thesis is the following:

First of all, the study can be useful for those states on the territory of which non-international armed conflicts take place in order to determine the legal status of an NSA as a participant of such conflict.

Secondly, the legal definition of NSA presented in the thesis might be helpful for scholars in identifying NSAs as well as for the International Criminal Court deciding the cases related to violations of international law.

Thirdly, conclusions and recommendations could help to a legislator to improve existing regulation concerning the applicability of humanitarian law to NSAs.

Fourthly, this thesis might be useful for academics lecturing international humanitarian law, as well as be used as part of educative materials.

Fifthly, this study may be useful for NSAs due to the fact that it is determined in the thesis how they can influence the law-making process.

The Aim of research

The primary aim of this thesis is to determine the legal status of NSAs as subjects of international law through the creation of a legally recognized definition of such actors and clarification of the role of NSAs in the law-making process and possible applicability of international humanitarian law to non-state actors.

The objectives of research

1) To analyze historical development of non-state actors in international law and their activity in modern international law;
2) To analyze different approaches of various scholars to the definition of NSAs, to determine common as well as distinctive features of state and non-state actors in order to create an internationally recognized definition of a non-state actor;
3) To determine typology as well as some examples of NSAs;
4) To determine whether NSAs are subjects of international law;
5) To assess the impact of NSAs on decision-making as well as law-making processes;
6) To analyze whether IHL can be applied to armed NSA and in what extent;
7) To present practical recommendations to resolve the problems encountered connected with the applicability of IHL.

Research methodology

To achieve the aim of the thesis, the following methods were used:

1. The description method was used for providing a general overview of the legal status of non-state actors in international law. It was also employed for the determination of necessity to create the newest legally binding definition of non-state actors for further it implementation into international law.

2. A systematic method was used throughout the thesis to analyze the necessity to determine the status of the non-state actors in specific areas of international law namely: the role of the non-state actors in the law-making process and possible applicability of international humanitarian law to non-state actors.

3. The comparative method was used to determine the differences and similarities in the definitions of non-state actors, given by scholars, for further usage of such findings in order to create the legally binding definition.

4. The linguistic method and method of logic were used to interpret the provisions of Geneva Conventions, Additional protocols to them, the Rome statute. Also, it was used to interpret the case law.

5. The critical method was used to identify whether there exists a vital necessity to create the legally binding definition of non-state actors and determine the legal status of non-state actors in international law. Also, this method was used to clarify the recommendations on whether how to make possible in full extend to apply the international humanitarian law to non-state actors.

6. The analytical method was invoked in the analysis of the possibility to find the legal status of non-state actors as a subject of international law. Moreover, it was used in the analysis of the status of the non-state actors in specific areas of international law namely: the role of the non-state actors in the law-making process and possible applicability of international humanitarian law to non-state actors.

Structure of research

The thesis is divided into the following parts: introduction and three substantial parts, two of which are divided into the smaller sections. Then conclusions, recommendations, bibliography, and finally summary.

The general part of the thesis is included in Chapter 1. It covers the general overview of historical development of non-state actors in international law and their activity in modern

international law. In this chapter are analyzed examples of the influence of non-state actors on the international legal system since antiquity till nowadays.

The special part of the thesis is included in Chapter 2 and Chapter 3.

Chapter 2 is split into three subchapters which describe different approaches of various scholars to the definition of NSAs, determine common as well as distinctive features of state and non-state actors as well as propose an internationally recognized definition of a non-state actor, determine typology and examples of NSAs, analyze various opinions which were expressed by scientists on the legal status of the NSAs as a subjects of international law, provide the general overview of the rights and obligations of TNCs, as they are one of the most perfect examples of the non-state actors, under international law in order to prove that all NSAs are subjects of international law.

Chapter 3 is divided into two subchapters. It examines the impact of NSAs on the law-making, dispute-settlement as well as decision-making processes and the applicability of IHL to NSAs, proposes recommendations on how to apply to the full extent IHL to non-state actors.

Defense statements

1. NSAs are subjects of international law, but with the limited subjectivity.
2. NSAs cannot be regarded as free-standing participants in international law-making, however, their great impact on this process should not be underestimated.
3. International humanitarian law is applicable to non-state actors in a limited extent.

LIST OF ABBREVIATIONS

AFP - Agence France-Presse

AHC - ad-hoc committee

ANSA – armed non-state actor

AP – Additional Protocol

CHR - Commission on Human Rights

DRC - Danish Refugee Council

ECOSOC - Economic and Social Council

GA – General Assembly

GC - Geneva Conventions

GDP - Gross domestic product

ICJ – International Court of Justice

ICRC - International Committee of the Red Cross

IHL – international humanitarian law

ILO - International Labour Organization

INGO – international non-governmental organization

ISIL - Islamic State of Iraq and the Levant

MNC - multinational corporation

NATO - North Atlantic Treaty Organization

NGO – non-governmental organization

NSA – non-state actor

OECD - Organization for Economic Cooperation and Development

OPEC - Organization of the Petroleum Exporting Countries

OSCE – Organization for Security and Cooperation in Europe

TNC – transnational corporation

UK – United Kingdom

UN – United Nations

USA – United States of America

VCLT - 1969 Vienna Convention on the Law of Treaties

VNSA – violent non-state actor

WHO - World Health Organization

YWCA - Young Women's Christian Association

1. THE PHENOMENA OF NON-STATE ACTORS IN INTERNATIONAL LAW

1.1. Historical development of non-state actors in international law and their activity in modern international law

It should be noted that principal actors of the world politics are nation-states, but they are not the only actors. The international system consists of nation-states, international organizations, and private actors. Even though thousands of international organizations were established during the post-World War II era, they were underestimated by students of international relations. The increasing number of international organizations is parallel to the increasing levels of economic, political, social and cultural transactions between individuals, societies and states. The growth of so many kinds of non-state actors challenges and even weakens the "state-centric" concept of international politics and replaces it with a "transnational" system in which relationships are more complex. These organizations changed the international environment[17]. The proliferation of non-state actors has recently led some observers of international relations to conclude that states are declining in importance and that non-state actors are gaining status and influence[18]. Therefore, for the aim of this Master Thesis the history of development of non-state actors will be explored in this subchapter.

Examples of the influence of non-state actors on the international legal system have been known since antiquity. These are medieval political structures, religious institutions, commercial enterprises such as the East India Campaign and other entities involved in colonial enterprises. Significant social movements have been organized since the beginning of the 18th century around issues such as the elimination of the slave trade and slavery, women's voting rights, international peace and international workers' rights. However, as the world became increasingly interconnected, and the need for an international organization grew, states responded to this need, albeit often reluctantly, with the help of more complex, more institutionalized multilateral agreements, which eventually expanded to include even non-state subjects. These have altered the nature of state interactions, for better or for worse, though whether they are altering the actual structure of the international system remains a point of heated debate[19]. It should be concluded that the necessity of protection of human rights and need in cooperation between the states led to the evolution of the non-state actors in the international community.

[17] L. H. Miller, *Global Order: Values and Power in International Politics* (Boulder: Westview Press, 1994), 37-38.
[18] Muhittin Ataman, "The Impact of Non-State Actors on World Politics: A Challenge to Nation-States," *Alternatives: Turkish Journal of International Relations* 2, 1 (2003): 43-44.
[19] A. Bianchi, *Non-State Actors and International Law* (Farnham: Ashgate, 2009), 53-55.

The model that emerged in Europe after the Renaissance, whose main characteristics were established by the Treaty of Westphalia in 1648, was solely based on national interest. Any foray across national borders has always been driven by national interest: whether it is to conquer new territories, to defend existing borders or to acquire new territories to control their natural resources imperialistically. This means that in addition to the fact that states do not have a monopoly on international actions and the implementation of transnational regulations necessary for managing interdependencies, from the moment they participate in international regulation, they face a serious political and philosophical obstacle[20].

The genetic characteristics of the Westphalian state, although historically defined as serving more or less absolute monarchies, were strengthened, not weakened, by the quasi-generalized spread of democratic regimes: To the state's genetic nature we must add the nature of the governed: local and national interests are the matter of concern to citizens; in electing their leaders they find their interests go beyond national borders and where this is the case they prefer to act through non-state, not for profit organizations[21]. It should be emphasized that even during the Treaty of Westphalia in 1648 the world preferred doing not through the state's representatives, but more through the non-state actors.

The fundamental Nation-State model is based on international agreements with clearly defined objectives of common interest, and not on abandoning sovereignty for the benefit of entities, which transcend national interests[22]. In this respect, such model does not always comply with the common interests of the international society that in turn led to development of the non-state actors. Also, it should be noted that the efforts of some non-state actors have led to significant changes in international law.

In the century leading up to World War I, more than 450 private or non-governmental. international organizations were created[23]. "These NGOs" writes one scholar "began to organize for influence and travelled to international conferences to pursue their interests. NGOs discovered their ability to influence governments, while government officials recognized the benefits of securing inputs from NGOs, both for expertise and societal support. And when NGOs were not invited to international conferences, they invited themselves[24]." This trend had become undeniable

[20] Pierre Calame, "Non-state actors and world governance," World governance, Accessed 19 October 2019, http://www.essaydocs.org/non-state-actors-and-world-governance-pierre-calame-may-2008-s.html.
[21] R.A. Falk and C.E. Black, *The Future of the International Legal Order* (New Jersey: Princeton University Press, 1969), p. 32–70.
[22] Pierre Calame, "Non-state actors and world governance," World governance, Accessed 19 October 2019, http://www.essaydocs.org/non-state-actors-and-world-governance-pierre-calame-may-2008-s.html.
[23] F.S.L. Lyons, *Internationalism in Europe 1815 – 1914* (Leyden: A.W. Sythoff, 1963), 12.
[24] B. Reinalda and B.Verbeek, *Decision Making Within International Organizations* (London: Routledge, 2002), 55-56.

by the time of the Hague system, and one scholar notes that "the growing peace movement was partly responsible for the holding of the two conferences"[25]. In fact, "in the latter half of the nineteenth century, the rise of the private international associations mirrored that of the public international unions. National humanitarian, religious, economic, educational, scientific and political organizations arranged international meetings"[26] with the same highly organized structures of secretariats, boards and regular meetings found in the state-led initiatives[27]. These groups were often highly effective, influencing events not only at the local and national levels, as some focused on doing, but also in the global sphere.

The organization often regarded as the first to have a profound and undeniably transnational impact is the group Anti-Slavery International, established in 1839[28]. The evolution of this movement in fact illustrates the quality and power of the INGO. Locally based abolitionist groups began organizing trans-nationally as early as 1715 to pressure their governments into action. The British government was compelled by this pressure to bring the issue up at Vienna, albeit achieving no more than a declaration of condemnation. As the movement became more institutionalized, however, its successes grew, culminating of course in the eventual signing of treaties abolishing the slave trade[29]. To sum up, it should be noted that Anti-Slavery International is a great example that shows the growing influence of non-state actors during that period of time.

The peace societies, cited as having influenced the Hague conferences, had been organizing since Vienna, and they too were highly structured, holding their own International Peace Congress in 1849. Long before their participation at the Hague, where according to one commentator "they conducted themselves as though they were official members of the conference, and they sought to make their influence felt"[30] these groups were effective in influencing international affairs, negotiating, for example, the addition of a mediation clause in the peace treaty following the Crimean War[31], and working closely with NGOs working to strengthen international law. "By the turn of the century, transnational civil society had expanded… to include temperance (the International Order of Good Templars was founded in 1852), labor rights (the International

[25]David Mackenzie, *A World Beyond Borders* (Toronto: University of Toronto Press, 2010), 6.
[26] Clive Archer, *International Organizations* (New York: Taylor and Francis, 2014), 12.
[27] Leonard Woolf, *International Government* (New York: Brentano's, 1916), 165.
[28] Thomas Davies, "The Rise and Fall of Transnational Civil Society: The Evolution of International Non-Governmental Organizations Since 1839" (working paper, City University London, 2008), 13, https://openaccess.city.ac.uk/id/eprint/1287/.
[29] Steve Charnowitz, "Two Centuries of Participation: NGOs and International Governance," *Michigan Journal of International Law* 18, 2 (1997): 192.
[30] Ibid, 193.
[31] Ibid.

Working men's Association was established in 1864)…and women's suffrage (the International Alliance of Women was formed in 1902)[32]."

Private interest groups promoting free trade and commerce had also developed significant profiles by this time, with notable successes around such campaigns as the Corn Law lobby[33]. Other scholars point to groups like the Esperanto movement, the International Olympic Committee (despite the inherent nationalism and undertones of militarism), and the YWCA[34] along with a number of civil and human rights groups as contributing to "the building of transnational networks based on a global consciousness and shared interests and concerns[35]." It should be concluded that as a significant force, with highly organized transnational structures, demonstrated lobbying power, established links to governments and the international apparatus, and without the same set of limitations faced by nation-states, INGOs had found a substantial niche in the international environment[36].

Also, it should be taken into account the activities of the International Committee of the Red Cross that was established in 1863, which significant contribution to the formation and implementation of international humanitarian law is widely known in the whole world[37].

At the end of the 19th century, the recognition in international law of non-governmental movements as an influential force could be observed in the creation of a permanent institution for international arbitration at the Hague Peace Conferences of 1899 and 1907. At the Hague conferences, non-governmental groups petitioned delegates and organized informal meetings of state delegates, groups, and individuals[38].

Another example of the activities of non-state actors of that time is the Convention on the establishment of the International Institute of Agriculture of 1905, Article 9 of which provided for consultation with "international or other agricultural congresses or congresses of sciences applied to agriculture, agricultural societies, academies, learned bodies, etc."[39]. It should be concluded that the development of the non-state actors in XIX century manifested in various fields: protection of

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[32] Thomas Davies, "The Rise and Fall of Transnational Civil Society: The Evolution of International Non-Governmental Organizations Since 1839" (working paper, City University London, 2008), 16, https://openaccess.city.ac.uk/id/eprint/1287/.
[33] Steve Charnowitz, "Two Centuries of Participation: NGOs and International Governance," *Michigan Journal of International Law* 18, 2 (1997): 194.
[34] Akira Iriye, *Global Community* (Berkeley: University of California Press, 2004), 29-34.
[35] Ibid, 17.
[36] Ibid, 35.
[37] Yves Sandoz, "The International Committee of the Red Cross as guardian of international humanitarian law," ICRC, Accessed 13 November 2019, https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm.
[38] "Participants in International Law-Making," Law Explorer, Accessed 13 November 2019, https://lawexplores.com/participants-in-international-law-making/.
[39] Steve Charnovitz, "Non-Governmental Organizations and International Law," *American Journal of International Law 100*, 2 (2006): 348-357.

human rights, international humanitarian law, agriculture, economic activity, etc. However, it should be noted that this list is not exhaustive and could continue.

In fact, the growth of INGO "became so conspicuous that in 1910, some of their leaders came together in Brussels to found a center for international organizations: Office Central des Associations Internationales. It was intended as the headquarters for those organizations, a clear indication that they had become too numerous to be ignored[40]."

Although the period preceding World War I witnessed an unprecedented number of international gatherings — almost 3,000 between the years 1840 and 1914[41], traditional thinking defines these years as an era of preparation for an international organization, and the post-war period as the time when they began to be actually established[42]. Moreover, before and during World War I, many private groups had begun to plan for the creation of an intergovernmental institution to maintain peace. Among the various proposals were those developed by the League to Enforce Peace, the League of Nations Society of London, and the Union of International Associations[43].

With the creation of the League of Nations, civil society groups were actively involved in the activities of the organization, the main purpose of which was to find means of cooperation and the requirement to reform international law, taking into account problems, such as, the nationality of a married woman or human trafficking[44]. Also, thanks to the first American non-governmental organizations, articles on human rights were adopted within the framework of the UN Charter, which paved the way for the development of international human rights law[45]. It should be concluded that non-state actor's activities increased significantly.

In 1915, an International Congress of Women was held at the Hague. This Congress passed several resolutions regarding the war and sent delegations to meet with key governments in Europe and the United States. The organizers soon called themselves the Women's International League for Peace and Freedom (WILPF). This NGO pioneered many of the methods used by late-twentieth-century NGOs in international lobbying[46]. It should be taken into account that NGOs

[40] Akira Iriye, *Global Community* (Berkeley: University of California Press, 2004), 35.
[41] F.S.L. Lyons, *Internationalism in Europe 1815 – 1914* (Leyden: A.W. Sythoff, 1963), 12.
[42] Inis Claude, *Swords into Plowshares* (New York: Random House, 1956), 34.
[43] Henry R. Winkler, "The Development of the League of Nations Idea in Great Britain, 1914-1919," *The Journal of Modern History* 20, 2 (1948): 98.
[44] Peter Willetts, *The Conscience of the World: The Influence of Non-Governmental Organisations in the UN System* (Washington D.C.: Brookings Institution Press, 1996), 147.
[45] Canon John Nurser, "The Ecumenical Movement Churches, Global Order, and Human Rights: 1938-1948," *Human Rights Quarterly* 25, 4 (2003): 64-87.
[46] Calvin Dearmond Davis, "The United States and the Second Hague Peace Conference: American Diplomacy and International Organization 1899–1914*," The American Historical Review* 82, 2 (1977): 456.

were established not only for the purposes to prevent the war but for the purposes to protect human rights, rights of women, labor rights, to promote the trade and finance, to combat narcotics, terrorism, etc.

To confirm the above information, it should be mentioned some examples. In the absence of an international regime on criminal law, government officials and NGOs sometimes worked together to promote cooperation. In 1928, an International Bureau for the Unification of Criminal Law was established by governments[47]. Several private institutions played a role in the Bureau, including the Howard League for Penal Reform and the International Association of Criminal Law. In 1933, the Association held a congress that included official government delegates and NGOs (e.g., the International Association for the Protection of Child Welfare)[48].

NGOs had a faint presence with respect to military issues. In 1929, the Geneva Convention on Prisoners of War created a role for private relief societies[49]. Furthermore, the Convention called for the establishment of a central information agency regarding prisoners, but declared that these provisions "must not be interpreted as restricting the humanitarian activity of the International Committee of the Red Cross[50]. Peace groups seized opportunities when they arose. In 1921-22, the Women's Peace Union sought to influence the Washington Naval conference[51]. In 1930, a delegation of women's peace groups presented memorials to Ramsay MacDonald, President of the London Naval Conference, and to other government delegates. The memorials urged a substantial reduction in armaments[52]. Despite this faint presence NGOs took some actions with regard to military issues.

Also, it should be remembered that two wartime episodes demonstrate NGO involvement. In 1943, the newly created United Nations Relief and Rehabilitation Administration 616 established a policy of enlisting the participation of voluntary relief agencies[53]. Over 125 agencies from about twenty countries participated in relief operations. Some of these NGOs included the American Friends Service Committee and the Save the Children Fund[54]. It should be concluded that NGOs' activity between World Wars increased significantly in the various areas.

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[47] Irvin Stewart, "The International Telegraph Conference of Brussels and the Problem of Code Language," *The American Journal of International Law* 23, 2 (1929): 292, 299.
[48] Ibid, 297.
[49] "Convention Relative to the Treatment of Prisoners of War, 1929," ICRC, Accessed 13 November 2019, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/305.
[50] Ibid, art. 79.
[51] Alonso Harriet Hyman, "The Women's Peace Union and the Outlawry of War, 1921–1942," *The American Historical Review* 96, 2 (1991): 630–631.
[52] Merle Curti, *Peace or War: The American Struggle 1636-1936* (New York: Angell Press, 1936), 292.
[53] George Woodbridge, *The History of the United Nations Relief and Rehabilitation Administration* (New York: Columbia University Press, 1950), 67.
[54] Ibid.

Along with “good” non-state actors such as community-based organizations, women's groups, human rights associations, non-governmental organizations, religious organizations, trade unions, the media, the private sector, etc, it is necessary to consider violent NSAs which emerged as part of the decolonization process in the early and mid 20th century[55]. It is necessary to underline that violent/armed-NSAs posed threat to state, human and global security. They not only triggered conflicts, but also posed immense resistance to conflict resolution. In short, violent NSAs (VNSAs) are groups that are armed and use violence to achieve their objectives. They are usually not under any state control, but may be supported by state actors in a formal or informal manner. Such support by states is extended for their asymmetrical warfare strategy in return for recognition, support and other benefits rendered to VNSAs. VNSAs range from rebel groups, irregular armed groups, insurgents, dissident armed forces, guerillas, liberation movements, terrorist organizations, bandits, criminal gangs to de facto territorial governing bodies[56].

During the Cold War, both Super Powers supported VNSAs as tools of 'proxy war' by dubbing them as “freedom fighters” principally in the Third World (Africa, Asia and Latin America)[57]. The end of bipolarity in 1990 witnessed a proliferation of VNSAs mainly because of the birth of several new but weak sovereign states. VNSAs, in fact, became prominent in the social science literature especially since the end of the Cold War. The absence of Super Power rivalries made the VNSAs to look elsewhere for support. The end of the Cold War also facilitated the massive proliferation of small arms boosting the violence making capacity of VNSAs[58].

The influence of civil society on international relations was further developed thanks to populist movements that intensified in Eastern Europe after the signing in 1975 of the Helsinki Final Act, which formed a political space favorable for the overthrow of communist regimes. Popular movements overthrew governments in countries such as Iran, Nicaragua, the Philippines, South Africa, and others. The end of the Cold War, the abolition of despotic regimes in Central and South America, Asia and Africa and the demand for a form of responsibility for the violation of human rights by these regimes - all this contributed to the democratization of international legal relations[59].

Of all non-state actors, Aid NGOs have arguably made the most progress toward enhanced international status. A variety of treaties include provisions that accord special status to certain

[55] Mohammed Ayoob, *Conflict and Intervention in the Third World* (London: Croom Helm, 1980), 23.
[56] Major General PJS Sandhu, *Strategies for countering non-state actors in South Asia* (Mumbai: Vij Books India, 2011), 31-32.
[57] Ibid, 33.
[58] Francis Fukuyama, *State-Building: Governance and World Order in the 21 Century* (Ithaca: Cornell University Press, 2004), 92.
[59] Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton: Princeton University Press, 2001), 159-160.

NGOs[60]. The Geneva Conventions, for example, refer to "impartial humanitarian organizations", which shall be allowed to supply foodstuffs, medical supplies, and clothing[61]. States may not object to the presence of such groups if the civilian population in a zone of occupation is in need. This suggests that organizations meeting the criteria of "impartial" and "humanitarian" have certain rights granted to them directly under international law. Failing to allow NGO access in such circumstances is a breach of the Geneva Conventions[62].

Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 requires that states allow the free access of all relief consignments, equipment, and personnel, even if such assistance is destined for the civilian population of the adverse party[63]. Considering this particular provision, the ICJ stated in the 1986 Nicaragua case that "there can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law[64]."

Although states recognized the importance of non-state actors in promoting and implementing international political decisions as early as the 1970s, their first attempts to be included in the international negotiation process came across resistance from states. The contribution of non-state actors to the international negotiation process was recognized only in the early 1990s[65].

In recognition of the diversity of non-state actors in the late 1990s, the UN General Assembly differentiated between them, which contributed to the emergence of terms such as "stakeholder", "civil society" and "private sector"[66].

Despite doctrinal difficulties, states began to demonstrate their desire to open the interstate process for greater participation of non-state actors. So, in preparation for the United Nations Conference on Environment and Development, UNCED in Rio de Janeiro in 1992, the UN Secretary-General invited states to involve non-governmental organizations from among those

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[60] Mary Ellen O'Connell, "Enhancing the Status of Non-State Actors Through a Global War on Terror?," *Columbia Journal of Transnational Law* 43, 2 (2005): 440.
[61] "Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949," UN, Accessed 25 November 2019, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf.
[62] Mary Ellen O'Connell, "Enhancing the Status of Non-State Actors Through a Global War on Terror?," *Columbia Journal of Transnational Law* 43, 2 (2005): 440.
[63] "Protocol Additional to the Geneva Conventions on 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977," ICRC, Accessed 25 November 2019, https://ihl-databases.icrc.org/ihl/INTRO/470.
[64] "Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), I.C.J. Reports 1986, 14," ICJ, Accessed 26 November 2019, https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf.
[65] Stephen Tully, *Corporations and international lawmaking* (Boston: Martinus Nijhoff, 2007), 196.
[66] Ibid, p. 197.

enjoying a consultative status in the UN ECOSOC. This contributed to the effective participation of non-state actors in the framework of the Preparatory Committee and the Conference itself with the purpose of improving negotiations, their results, as well as mobilizing public support[67]. It should be summarized that despite some disagreements between states with regard to recognition of the non-state actors as an international actor, the non-state actors became important players in the international arena.

During the Conference, several forums were proposed to ensure productive interaction between states and non-state actors, including national and international briefings and pre-session conferences with the participation of non-state actors. Non-state actors could provide information, hold meetings on the most important issues as a part of an informal dialogue, as well as through reports and presentations. The Preparatory Committee decided that its policy should be to promote the equal representation of non-governmental organizations from developed and developing countries in all regions and to ensure a fair balance between non-governmental organizations that focus on environmental issues, as well as those that focus on sustainable development. The appointment of non-state actors to national delegations has also been encouraged[68].

More than 1,000 individual corporations (especially Transnational or Multinational corporations) took part in the Second World Industry Conference on Environmental Management, 1991, approximately 40 of which were widely involved in the work of the Conference. Created during the World Conference Entrepreneurship World Business Council noted that the business sector is clearly proved to be an effective acting force that undergoes changes, which must be perceived as an assistant to sustainable development, and not as the main source of environmental pollution[69].

At the International Conference on Population and Development in 1994, the UN ECOSOC proposed accepting the conditions for ensuring the effective participation of non-state actors "taking into account the procedures developed at the UN Conference on Ecology and Development and the relevant experience gained during previous UN conferences on population"[70].

It should be noted that the emergence of a kind of "private sector" as a part of the wider movement of "civil society" in the 1990s manifested itself not only in the field of development.

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[67] "U.N. Secretary-General Report, U.N. Doc. A/CONF 151, no. PC (1990)," UN, Accessed 26 November 2019, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Rev.1_Vol.%20I_Agenda.pdf.

[68] "The Role of NGOs in the Preparatory Process for the UN Conference on Environment and Development, 1st Organizational Sess., no. A/45/46 (1990)," UN, Accessed 26 November 2019, https://digitallibrary.un.org/record/107614.

[69] Stephen Tully, *Corporations and international lawmaking* (Boston: Martinus Nijhoff, 2007), 197.

[70] "G.A. Res. 47/176, U.N. Doc. A/Res/47/176, 1992," UN, Accessed 26 November 2019, https://www.un.org/Depts/dhl/res/resa47.htm.

States often engage non-state actors in negotiations to protect and promote international human rights. For instance, all non-state actors were invited to submit recommendations for participation in the Preparatory Committee for the 1993 World Conference on Human Rights and take an active part in this conference[71]. The Preparatory Committee extended participation to include those non-state actors enjoying ECOSOC consultative status and active in the development field[72].

At the Fourth Conference on Women 1995, the Commission on the Status of Women (CSW) demanded consultative status for non-state actors working for the advancement of women and recommended that UN ECOSOC Resolution 1296 (1968) be reviewed so that consultative status became more accessible[73]. The Commission on the Status of Women invited states to "include, whenever possible, non-governmental organizations in their delegations" and noted that "the proper activities of the Conference and the effective participation of non-governmental organizations" require that their number not be excessive[74]. As a result, the Beijing Conference on the Status of Women has become the largest assembly of non-state actors, with 51 statements made by them during plenary meetings[75].

Non-state actors, especially developing countries, were invited to attend the 1996 UN Conference on Human Settlements (Habitat II) in terms of participation similar to those applied during the UN Conference on Ecology and Development. The General Assembly called on all states to stimulate the wide participation in the event of local authorities and all interested parties, including academia, industry, trade unions, non-governmental organizations and the private sector at the national, regional and international levels and to encourage a wide exchange of information and experience in this regard. In addition, it was noted that "all efforts should be made to attract the greatest representation of interest groups", including the private sector in developing robust action plans[76].

The participation of non-state actors in summits usually takes place in the same conditions as at international conferences. For example, non-state actors in consultative status with ECOSOC

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[71] "G.A. Res. 45/155, U.N. Doc. A/RES/45/155, 1990," UN, Accessed 27 November 2019, https://undocs.org/en/A/RES/45/155.

[72] "G.A. Res. 47/122, U.N. Doc. A/RES/47/122, 1992," UN, Accessed 27 November 2019, https://undocs.org/en/A/RES/47/122.

[73] "Reference document on the participation of civil society in United Nations conferences and special sessions of the General Assembly during the 1990s," World summit on the information society, Accessed 28 November 2019, http://www.itu.int/net/wsis/docs/background/general/reports/civilsociety1.htm#women.

[74] "Commission on the Status of Women, Report on its 37th Session, U.N. Doc. E/CN.6/1993/18, 1993," Unispal, Accessed 28 November 2019, https://unispal.un.org/DPA/DPR/unispal.nsf/0/3D7CC1B06DB707C08525607500703C02.

[75] Stephen Tully, *Corporations and international lawmaking* (Boston: Martinus Nijhoff, 2007), 200.

[76] "Report to the 1st Organizational Session of the Oratory Committee to the U.N. Conference on Human Settlements, U.N. Secretary-General, U.N. Doc. A/C0NF.165/PC72," Undocs, Accessed 28 November 2019, https://undocs.org/A/CONF.165/14.

were invited to the World Summit for Social Development to "contribute in accordance with established practice" in the process of its preparation[77]. The General Assembly called on non-state actors "to fully contribute to the work of the Preparatory Committee and the Summit itself"[78].

The Secretary-General of the Third UN Conference on the Least Developed Countries, held in 2001, was instructed by states to "take measures, in consultation with Member States, to facilitate the participation of civil society, including non-governmental organizations and the private sector, in the process of preparing and holding the conference." Accreditation of "interested civil society actors, in particular non-governmental organizations and the business community" was entrusted to the Preparatory Committee[79].

Thus, it can be noted that states are making significant efforts to involve the private sector in the international negotiation process in order to increase the fruitfulness of conference results. The preparation for the 2002 International Conference on the Financing for Development deserves special attention in this regard[80]. The ad hoc working group noted that the preparatory process and the event itself should include interactive and innovative mechanisms to stimulate the participation of all stakeholders[81]. The Preparatory Committee was invited to consider "possible suggestions and recommendations regarding additional modalities for private sector participation". Several options for participation were envisioned: written statements, presence at meetings of the Preparatory Committee and at the event itself, participation in hearings and meetings of expert groups on specific topics, "web consultations" with specific proposals. Non-state actors, including business, could also organize information sessions in which members of the Preparatory Committee could participate[82].

The best form of interaction with the business community was found in the form of interactive round tables and seminars at which non-governmental organizations could express their proposals. The results were presented in the form of reports and distributed to national delegations for the use in the discussions. Hearings were also organized for civil society representatives.

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[77] "G.A. Res. 47/92, U.N. Doc. A/RES/47/92, 1992," UNDOCS, Accessed 29 November 2019, https://undocs.org/en/A/RES/47/92.
[78] "G.A. Res. 48/100, U.N. Doc. A/RES/48/100, 1993," UNDOCS, Accessed 29 November 2019, https://undocs.org/en/A/RES/48/100.
[79] "G.A. Res. 53/182, U.N. Doc. A/Res/53/182, 1998," UNDOCS, Accessed 29 November 2019, https://undocs.org/en/A/RES/53/182.
[80] "G.A., Report of the 2d Committee at the resumed 52d Sess., U.N. Doc. A/52/840, 1998," UN, Accessed 29 November 2019, https://www.un.org/ga/search/view_doc.asp?symbol=A/52/840&Lang=E.
[81] "Report of the Ad Hoc Open-ended Working Group, U.N. Doc. A/54/28, 1999," UN, Accessed 29 November 2019, https://www.un.org/en/development/desa/policy/publications/general_assembly/a_54_28.pdf.
[82] "G.A., Preparatory Committee for the International Conference on the Financing for Development, Modalities of the participation of all relevant stakeholders in the substantive preparatory process and the high-level intergovernmental event on financing for development, U.N. Doc. A/AC.257/6, 2000," UNDOCS, Accessed 29 November 2019, https://undocs.org/en/A/AC.257/6.

Following the hearing, the Preparatory Committee was instructed to "explore ways and means to enhance the efforts of all stakeholders", including the business community. Subsequently, the General Assembly endorsed informal discussions with the business community, authorizing other forms of reporting and calling for further business engagement initiatives at the national and regional levels[83]. It is necessary to conclude that the preparation process for the International Conference on Financing for Development deserves attention because of the degree of its complexity and the use of various practices of participation of non-state actors in the international negotiation process.

To sum up, it should be taken into account that non-state actors played an active role in different summits, meetings and were involved in decisions taken by ECOSOC and other UN institutions, as well as by EU structures and other international organizations which gave them a possibility to increase their role in international relations as well as their influence on world political processes.

Also, it should be noted a significant development of the most prominent example of non-state actors. It is Transnational or Multinational corporations.

The earliest historical origins of transnational corporations can be traced to the major colonizing and imperialist ventures from Western Europe, notably England and Holland, which began in the 16th century and proceeded for the next several hundred years. During this period, firms such as the British East India Trading Company were formed to promote the trading activities or territorial acquisitions of their home countries in the Far East, Africa, and the Americas. The transnational corporation as it is known today, however, did not really appear until the 19th century, with the advent of industrial capitalism and its consequences: the development of the factory system; larger, more capital-intensive manufacturing processes; better storage techniques; and faster means of transportation[84].

During the 19th and early 20th centuries, the search for resources including minerals, petroleum, and foodstuffs as well as pressure to protect or increase markets drove transnational expansion by companies almost exclusively from the United States and a handful of Western European nations. Sixty per cent of these corporations' investments went to Latin America, Asia, Africa, and the Middle East. Fueled by numerous mergers and acquisitions, monopolistic and oligopolistic concentration of large transnationals in major sectors such as petrochemicals and food also had its roots in these years. The US agribusiness giant United Fruit Company, for example,

[83] "G.A. Res. 56/445, U.N. Doc. A/Res/56/445, 2001," UNDOCS, Accessed 29 November 2019, https://undocs.org/en/A/56/445.
[84] John Dunning, *Multinational Enterprises and the Global Economy* (Massachusetts: Addison-Wesley Publishing Company, 1993), 112-114.

controlled 90 percent of US banana imports by 1899, while at the start of the First World War, Royal Dutch/Shell accounted for 20 percent of Russia's total oil production[85]. It should be concluded that TNCs as it is known today were focused mainly on the search for a market for their products, for doing business, etc. However, TNCs in the 21th century are rather variable in their activity.

US TNCs heavily dominated foreign investment activity in the two decades after the Second World War, when European and Japanese corporations began to play ever greater roles. In the 1950s, banks in the US, Europe, and Japan started to invest vast sums of money in industrial stocks, encouraging corporate mergers and furthering capital concentration. Major technological advances in shipping, transport (especially by air), computerization, and communications accelerated TNCs' increasing internationalization of investment and trade, while new advertising capabilities helped TNCs expand market shares. All these trends meant that by the 1970s oligopolistic consolidation and TNCs' role in global commerce was of a far different scale than earlier in the century[86].

Over the past quarter-century, there has been a virtual proliferation of transnationals. In 1970, there were some 7,000 parent TNCs, while today that number has jumped to 38,000. 90 percent of them are based in the industrialized world, which controls over 207,000 foreign subsidiaries. Since the early 1990s, these subsidiaries' global sales have surpassed worldwide trade exports as the principal vehicle to deliver goods and services to foreign markets[87].

Also, it should be emphasized that there has been a great increase in TNC investment in the less-industrialized world since the mid-1980s; such investment, along with private bank loans, has grown far more dramatically than national development aid or multilateral bank lending. Burdened by debt, low commodity prices, structural adjustment, and unemployment, governments throughout the less-industrialized world today view TNCs, in the words of the British magazine The Economist, as “the embodiment of modernity and the prospect of wealth: full of technology, rich in capital, replete with skilled jobs”[88]. As a result, The Economist notes further, these governments have been “queuing up to attract multinationals” and liberalizing investment restrictions as well as privatizing public sector industries[89]. It should be taken into account that the increase of TNC's activity in different directions (especially investment) led to the engagement of such non-state actors into international politics, the law-making process, etc.

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[85] Ibid.
[86] Frederick Clairmonte and John Cavanagh, *The Dynamics of Textile Multinationals* (London: Zed Press, 1981), 5-6.
[87] Ibid.
[88] Dalip S. Swamy, *Multinational Corporations and the World Economy* (New Delhi: Alps Publishers, 1980), 118-119.
[89] Ibid.

It should be noted that in the context of environment, the roles NSAs play, and the influence they exert, depend upon political, economic, and social context of the countries/environment they operate. By taking development as a yardstick, all States fall in any of the three broad categories: under-developed, developing and developed. While "bad" NSAs dominate under-developed states, "good" NSAs are abundant in developed countries; developing states have a mix of both. The violent NSAs are especially sophisticated in their exploitation of "grey areas" where states are weak, corruption is rampant, and the rule of law is nonexistent[90]. Weak states provide VNSAs safe havens, conflict experience, settings for training and indoctrination, access to weapons and equipment, financial resources, staging grounds and transit zones, targets for operations, and pools of recruits[91].

The political, economic, social and technical trends of the early twenty-first century not only encouraged the growth of armed groups but vastly increased their number, variety, power and impact in the international arena[92]. Post 9/11, the US-led "Global War on Terror" cracked on all VNSAs by terming them as "terrorists". International norms that shielded VNSAs enjoying sanctuary in other countries took a beating. As a result, post-9/11 cross-border attacks targeting VNSAs increased as in US in Af-Pak region, Israel in Lebanon and Gaza, Ethiopia in Somalia, Turkey in Iraq etc. Despite this, the overall intensity of violence caused by VNSAs world over has increased[93].

Also, nowadays the influence of non-state actors on most important scope of international relation, such as global politics has increased.

The functions of non-state actors in world politics are directly related to the role that they are assigned in this sphere by the traditional actors of international organizations - nation-states. However, the functionality of "actors outside sovereignty" is not limited only to this: the phenomenon of mass "intrusion" of NGOs into world politics leads to the fact that "actors outside sovereignty" have their own, in some way, exclusive functions in the political sphere[94].

It is hardly possible to dispute the thesis that the NGOs, having joined the regulation of political relations and processes, should perform in the political sphere the same functions like any other (traditional) political actors. However, this sphere is already occupied by nations by states that are in no hurry to concede to its new non-state participants. In Westphalia, the ability to carry

[90] David Sogge, "Repairing the Weakest Links: A New Agenda for Fragile States," TNI, Accessed 1 December 2019, https://www.tni.org/en/publication/repairing-the-weakest-links-a-new-agenda-for-fragile-states.
[91] Sebastian Mallaby, "The Reluctant Imperialist: Terrorism, Failed States and the Case for American Empire," *Foreign Affairs* 81, 2 (2002): 9.
[92] Francis Fukuyama, *State-Building: Governance and World Order in the 21 Century* (Ithaca: Cornell University Press, 2004), 92.
[93] Ian Bryan, "Sovereignty and Foreign Fighter Problem," *Orbis* 54, 1 (2010): 125.
[94] Peter Willetts, *The Role of NGOs in Global Governance* (Abingdon: Routledge, 2011), 26-27.

out external relations entirely depends on the sovereignty that states have and which the NSA does not have. In this regard the political rights, opportunities and competencies of the NSAs entirely depend on whether they are delegated time or on an ongoing basis, national states have a certain amount of international legal personality. There is a situation in which NGOs operating in the field and in accordance with the laws of the Westphalian system are forced to receive a certain kind of "mandate" each time. This fully applies to multinational corporations seeking to establish themselves in the sphere of world politics and to commit legally significant actions in it[95].

On the other hand, the penetration of NGOs into world politics is associated with a compensatory effect: NGOs are involved by national governments to solve the problems that the national states themselves, due to a number of their specific features (the presence of territory clearly delineated by national borders, indivisible sovereignty and a special situation in the Westphalia system), are unable to overcome. For example, NSAs are often used for mediation purposes; at the same time, NSAs can play a role as an active negotiator, an agent nation-state (a party representing its interests and empowered with appropriate authority), an international mediator or even an arbitrator, and a platform for negotiations[96].

In this sense, for conflicting states, the use of NSAs as an intermediary or a negotiating platform is in many cases very convenient, since engaging in a similar situation another national state may lead to the inclusion of a new participant in the conflict that is able to use its preferential position for its own mercenary purposes or to use its political status and weight in order to ensure an advantage in the negotiations of one of the parties to the conflict, which has in full or partly coinciding national interests. However, the NSAs, being by their nature "actors outside sovereignty," neither possess their own state territory, nor state sovereignty and, therefore, do not feel like taking away one or the other from one of the conflicting parties. When choosing a venue for negotiations, NSAs are usually perceived by the conflicting states as a "neutral territory", the choice of which does not provide any additional advantages for either side - which helps to bring together and negotiate constructively[97].

It should be added that becoming a political actor, NSAs (and TNCs, first of all) begin to stand out with the following distinctive qualities: the presence of political will for international cooperation, recorded in constituent or internal regulatory documents; the presence of a permanent apparatus ensuring the fulfillment by a non-state actor of special political functions (in the sphere

[95] Ibid
[96] Joan Mencher, "NGOs: Are They a Force for Change?," *Economic and Political Weekly* 34, 30 (1999): 2081-2086.
[97] Cedric Ryngaert, *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (London: Routledge, 2010), 63.

of world politics) and political continuity at all stages of evolution of the form of existence of non-governmental organizations; autonomy of competence and decisions[98].

In reality, NSAs have positive as well as negative functions. For the aim of this Master Thesis they will be outlined further.

The negative role of NSAs can be analyzed from different points of view. First, governments, in particular, authoritarian regimes, are aware that the legal status of NSAs in international law is not well established and because of that NSAs cannot bear legal responsibility for their actions. Furthermore, since states are unwilling their legitimacy to be questioned in the international community. Therefore, they may seek to co-opt NSAs for use against individuals, opposition groups and minorities[99].

Such states use NSAs as fig leaves to evade international responsibility. These negative relationships between NSAs and violating states take different forms. Sometimes, states directly use NSAs as a means to their ends through contract and agency. In some other forms, NSAs are used by states indirectly through the guidance and management of their operations. NSAs' forces and personnel, for example, informal militias, have been financed, trained, procured and equipped with weapons by governments. In other circumstances, governments may simply fail to act against human rights violations such as torture, arbitrary arrests and killings of opposition groups and civil movement activists by NSAs which share the same ideology of states[100]. In international law, the presumption of innocence of states in such circumstances can hardly be accepted. In fact, the contrary is more accurate, particularly where the government is undemocratic and there has been a previous and constant violation of human rights[101].

Second, in some cases, states may not be at fault or manipulate NSAs in wrongful acts but NSAs independently may abuse their positions, institutions, personnel, and powers against certain groups and individuals. In these circumstances, to prove that states have any direct responsibility for such actions may be difficult. International law in these circumstances may not recognize the direct responsibility of NSAs, notwithstanding that in several international human rights documents, the obligations of NSAs have been set down. Based on most cases, the states have been addressed as the main responsible bodies. It seems that the only exception is in international

[98] Ch. Zorgbibe, *Les Organisations Internationals* (Paris: P.U.F,1991), 91-118.
[99] James Crawford, *Human Rights and State Responsibility* (Cambridge: Cambridge University Press, 2013), 4-5.
[100] N. Santarelli, "Non-State Actors Human Rights Obligations and Responsibilities under International Law," *Revista Electronica De Estudios Internacionales* 15, 1 (2008): 1-2.
[101] C. Hoppe, "Passing the Buck: State Responsibility for Private Military Companies," *The European Journal of International Law* 19, 5 (2008): 990.

humanitarian law, where, for example, under the Second Protocol of the Geneva Convention, the direct responsibility of rebels, terrorist and armed opposition groups have been admitted[102].

To sum up, since NSAs are not covered completely by international law norms, their acts can become a real threat to national and international security. In addition, because they exist in a wide range of forms and establishments, it is very difficult to determine NSAs' general responsibilities; it seems that States, therefore, must bear principal responsibility for preventing their adverse actions considering that they possess overarching powers and authorities to criminalize and penalize NSA activities[103].

It should be noted, that non-state actors play also a positive role in modern international relations. In contemporary international relations, NSAs such as human rights advocacy organizations perform important positive functions ranging from human rights education to the enforcement and monitoring of human rights standards. Perhaps the most significant role of such NSAs is that they have played an effective role in the international norm making process like their participation in the preparation of the Draft on the UN Convention on the Rights of Persons with Disabilities[104]. Sometimes, specialized NSAs in the human rights arena may influence international norm making by participating in consultations on specialist legal matters. They may also act as lobbyists. Another particularly important area of activity is that of international norm making in the international environmental area[105].

Even if not directly participating in processes of norm formation, NSAs may still have an impact through the dissemination of information to the public which promotes public awareness and transparency. NSAs also have a significant role in peacebuilding processes, such as the role of the Center on Housing Rights and Evictions for the International Protection of Individuals and People of Kosovo[106].

Another positive activity of NSAs concerns the enforcement of international law norms and standards. With regard to binding international laws, NSAs and NGOs have had a positive

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[102] "Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949," ICRC, Accessed 2 December 2019, https://ihl-databases.icrc.org/ihl/full/GCII-commentary.

[103] Charles Sampford and Spencer Zifcak, *Rethinking International Law and Justice* (Farnham: Ashgate Publishing Limited, 2016), 152.

[104] V. Bernstorff, "On the Legality and Legitimacy of NGO Participation in International Law," KAS.DE, Accessed 2 December 2019, https://www.kas.de/c/document_library/get_file?uuid=4e2e1560-2408-8bfd-9f85-5dea3e38c200&groupId=252038.

[105] Asher Alkoby, "State and Non-state Actors in the Climate Change Regime: The Power of Legitimacy among Actors in International Environmental Institutions" (master thesis, University of Toronto, 2010), 46, https://tspace.library.utoronto.ca/bitstream/1807/15528/1/MQ63073.pdf.

[106] Charles Sampford and Spencer Zifcak, *Rethinking International Law and Justice* (Farnham: Ashgate Publishing Limited, 2016), 238.

influence on the application of international laws to national legal systems, in particular, where they have already been consulted or taken part in formulating the applied norms and standards. In this way, they may reduce the costs of application and enforcement. More significantly, they can minimize the costs of enforcement by engaging in self-regulation of their activities. Furthermore, the supervisory function of NSAs cannot be overlooked[107].

This role of NSAs has two aspects: one is their role in supervising the implementation of international norms and standards within their own area, and the other is their role in monitoring states' conduct in the light of international conventions. They may, for example, use the media to reveal the state violation of international legal norms, or they may report the abuse of powers to relevant monitoring bodies in the domestic system or to relevant international supervisory bodies such as those in the UN human rights arena[108].

The invasion of non-state actors in world politics is an indisputable, universally recognized fact that is taken into account today by all states in the formation of their international policies and having an impact on the global agenda. This phenomenon is based on such interrelated reasons as the unprecedented achievements of scientific and technological progress in the field of electronics, communications, transport, mass communications; globalization of production goods, services, and ideas; globalization of the economy, global market formation, and trade liberalization; intensification of all types of international exchanges. At the same time, the sources of obtaining mass character and political activity of the NGA are related to the interests of the most developed states, which consistently eliminate obstacles to international exchanges, control over capital flows and financial markets and information flows[109].

To sum up, it should be concluded that at the beginning of the XXI century, the state remains the main form of the political organization of society, the main actor on the world stage. But at the same time, it changes and develops, adapts to new conditions and adapts them to itself. It does not disappear but only changes. These processes are difficult. In modern conditions, the functions of the state are changing, and it is forced to interact in the international arena with other transnational actors, including non-state ones. The political system of the world, based on the principles of Westphalia, where a state was the only actor, is changing. At the end of the twentieth century non-state transnational actors - NGOs, TNCs, etc. are actively entering the world stage[110].

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[107] Anne Peters, Till Foster and Gretta Fenner, *Non-State Actors as Standard Setters* (Cambridge: Cambridge University Press, 2009), 33.
[108] Charles Sampford and Spencer Zifcak, *Rethinking International Law and Justice* (Farnham: Ashgate Publishing Limited, 2016), 239.
[109] Muhittin Ataman, "The Impact of Non-State Actors on World Politics: A Challenge to Nation-States," *Alternatives: Turkish Journal of International Relations* 2, 1 (2003): 44-45.
[110] Ibid

Despite the fact that NSAs play an important role in international relations and have a major impact on world politics, there are issues of great significance which should be investigated, such as a unified definition of NSAs, their typology, whether they are subjects of international law, and most importantly, applicability of the rules of law in practice to them. All these above - mentioned matters will be analyzed in the following chapters.

2. THE STATUS OF NON-STATE ACTORS UNDER INTERNATIONAL LAW

2.1. Definition of non-state actors

Most of today's armed conflicts take place within states and are waged by at least one NSA fighting state forces and/or other NSAs. In these conflicts, frequent violations of humanitarian norms and human rights are committed by both state and non-state parties. NSAs also frequently control or heavily influence areas, where civilians live. Consequently, efforts to protect civilian populations should address not only the behavior of states, but also that of NSAs. However, despite the role they play in international relations as well as their impact on other actors in those relations, there is still no universally accepted definition of NSAs[111]. Therefore, this part of the Master Thesis will explore the concept of NSAs, particularly it will discuss the definition and characteristics of international actors, then the comparative analysis of the categories such as state and non-state actors will be done for finding their core characteristics in order to create a definition of a non-state actor.

Scientific analysis of an international legal phenomenon or institute, or in this case the subject, should begin with a detailed study of the categorical apparatus that will serve as the basis for the study[112]. Before proceeding to the analysis of the essence of the concept of non-state actors, it is necessary to define the concept of an international actor. In this respect, the next paragraphs will describe the core characteristics of the international actor that further will lead to a systematic and widespread analysis of the non-state actor's concept.

Famous French sociologist A. Touraine distinguishes between "actor", "subject" and "agent". He emphasizes that "... being a subject means wanting to become an actor, that is, to change your environment, not to remain completely dependent on it". The theory of international relations is also often used by the term "player", borrowed from interactionist sociology, whose adherents often prefer it to other terms to denote actors involved in broad networks of world interdependence. That is why quite often such terms as "play" ("play space") and "bets" ("bet" are commonly referred to in the literature as the consent of the "player" to the terms and rules of the game, and most importantly, the willingness to take risks in a situation uncertainty for the sake of achieving their goals). "Play space," writes well-known French sociologists, "is an aggregate of opportunities within which different actors, according to how they position themselves at the moment, produce strategies based on objectively available options that prompt them to discover

[111] "Armed non-state actors: current trends and future challenges" (working paper no.5, DCAF Horizon, 2015), 6-7, https://www.dcaf.ch/sites/default/files/publications/documents/ANSA_Final.pdf.
[112] D. Koval, "International Legal Analysis of the Definition of 'Cultural Values," *Law of Ukraine* 5,3 (2016): 21.

bids"[113]. As for the most common term in the theory of international relations, the term "international actor", it means any actor who is actively involved in international processes. However, as A. Touraine points out, if the main feature of the subject is the desire to "not be a pawn in the system", then the feature of the actor is the ability to act and make changes in the environment with his activity[114].

The theory of international relations often uses the concept of "actor" (from Latin - the one who acts). D. Dougherty by the term "actor" means a social unit that is characterized by a sufficient level of organization and independence of its activity. For J. Rosenau, the "actor" is the integrity that influences world processes. F. Briar, M.-P. Jalili treats an actor as any person who plays an important role in the sphere of international relations, takes an active part in its functioning. Often, an actor is understood to be any authority (organization, group or individual) capable of playing a role, influencing international relations[115].

In this respect, the main features of the term "actor" that are necessary to underline, are:

1) it has a sufficient level of organization;

2) it plays an important role in international relations;

3) it may carry out its activity independently.

To sum up, taking into consideration all the above mentioned it can be concluded that an actor is considered to be any authority (organization, group or individual) who has a sufficient level of organization, may carry out its activity independently as well as plays an important role in the sphere of international relations.

After analyzing the essence of the concept of an actor, it should proceed to a comparative analysis of the categories such as state and non-state actors.

In international law two kinds of actors are widely recognized, particularly state and non-state actors.

In the work "Turbulence in World Politics", J. Rosenau identifies two major "worlds" in international relations: the "state" that the researcher considers to be dominant, and the "actors beyond sovereignty" to which non-sovereign international actors are referred to - international organizations, transnational corporations, national movements, ethnic groups, territorial

[113] P. Tsygankov, "Actors and Factors in International Relations and World Politics," TWIRPX, Accessed 26 November 2019, http://www.twirpx.com/file/281413/.
[114] A. Touraine, "Sociology without a Society," IS.MUNI, Accessed 26 November 2019, https://is.muni.cz/el/1423/podzim2016/SOC603/um/Touraine_Sociology_Without_Societies.pdf.
[115] R. Keohane and J. Nye, *Transnational Relations and World Politics* (Cambridge: Harvard University Press, 1972), 111.

communities, bureaucratic structures, individuals[116]. The relations between these actors are contradictory: they operate under the jurisdiction of a state, but not in its interests, while the activities of such actors simultaneously stabilize the international system and destabilize international relations[117]. R. Keohane and J. Nye to conclude that the state is not always the only important actor in world politics, and even more – "it is not always mediating outbound and inbound social action flows"[118].

For the aim of this Master Thesis, it is necessary to determine common features of state and non-state actors. Actors in world politics, especially states and non-state actors, per Professor Ryo Osiba of Hitotsubashi University, can be defined as entities, which have the following three features:

(a) They should have overall capacity to decide on their purposes and interests.

(b) They should also have the capability to mobilize necessary resources to achieve these purposes and interests and be passionate about appealing for global cooperation.

(c) Their actions should be significant enough to influence the state-to-state relations or the behavior of other non-state actors in the global system[119].

To sum up, it should be noted that common features of state and non-state actors are acting as players in the international arena and exerting influence on world politics.

Also, it should be mentioned that international relations deal in studying the manner how the actors in the international arena, state actors and non-state actors, interact with each other. Globalization and the development of technologies have transformed the international order; today, not only state actors have become major players in the international arena, but non-state actors as well. As a result, most of the actions of state actors are influenced and challenged by these growing demands of non-state actors. The difference between state actors and non-state actors as per definition is, state actors are the ruling governments of the states while non-state actors are the influential bodies not allied to states. The interest of these actors differs accordingly[120].

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[116] J. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton: Princeton University Press, 1990), 88.
[117] Ibid.
[118] R. Keohane and J. Nye, *Transnational Relations and World Politics* (Cambridge: Harvard University Press, 1972), 111.
[119] Masashi Sekiguchi, *Government and Politics* (Oxford: Eolss Publishers Co. Ltd., 2010), 243-244.
[120] Jahangir Arasli, "States vs. Non-State Actors: Asymmetric Conflict and Challenges To Military Transformation," Eurasia Review, Accessed 4 December 2019, https://www.eurasiareview.com/13032011-states-vs-non-state-actors-asymmetric-conflict-and-challenges-to-military-transformation/.

For the more practical applicability, the difference between the state and non-state actors should be presented in the form of a table.

The core differences between state and non-state actors

State actors	Non-state actors
endowed with state sovereignty	these actors beyond sovereignty
have full legal capacity in the international arena	recognition of the legal capacity of non-state actors depends on the states
these actors have state-related interests as exemplified by their domestic and foreign policies.	these actors have varied self-motivated interests.

It should be taken into account that the key differences between state actors and non-state actors are, the state actors are the ruling governments of a state or a country whereas non-state actors are the influential organizations or even individuals having the potential to influence the actions of state actors, but not allied to a state[121]. In this regard, non-state actors have a potential influence into the international relations at whole, but are limited due to the scope of its legal personality.

Having established the characteristics of non-state actors and their difference from state actors, it should proceed with the question of the definition of the concept of non-state actors.

Due to the absence of the legally recognized definition of non-state actors, it should be found various views of such notion in order to create the newest one for the purposes of this thesis.

As it was mentioned above, international legal instruments do not define the term "non-state actor", although the term is quite commonly used. Most often, the non-state actor is an individual or organization that has significant political influence but is not affiliated with any particular country or state. Undoubtedly, there is a fairly large list of subjects in this category[122].

However, among the authors who have attempted to provide a definition of non-state actors, it should be discussed the authoritative opinion of Andrew Clapham. Clapham likens non-state actors to rebel groups, insurgent groups, and belligerents who are sometimes considered by

[121] Ibid.
[122] "Armed non-state actors: current trends and future challenges" (working paper no.5, DCAF Horizon, 2015), 7, https://www.dcaf.ch/sites/default/files/publications/documents/ANSA_Final.pdf.

international lawyers in accordance with a graded scale of importance and power, proportional to their capacity to organize and control the territory, taking into account the ability of territorial control, which would ensure their recognition proportionally[123]. The larger the territory "controlled" by these groups, the greater will be the recognition by the states. Undoubtedly, the world of non-state armed groups is vast and includes militias, terrorist organizations and insurgents, but it can be conceptually broadened to encompass international and domestic criminal groups, armed gangs or vigilantes.[124]

Furthermore, Antonio Cassese recognizes non-state actors as subjects of international humanitarian law according to the level of organization and intensity of the conflict[125]. In fact, A. Clapham stressed that in recent years, there has been a tendency to submit these actors as no longer under traditional international law, but rather simply calling them belligerent, with all the rights and obligations that will follow, hence they are governed by international law of armed conflict[126].

After analyzing the scientific works of the above-mentioned authors, it can be concluded that they consider some categories of non-state actors, but do not describe their core characteristics. Therefore, for defining the term "non-state actor" the deeper research was done.

A broader definition of this term is contained in the Cotonou Agreement.[127] Article 6 of this agreement provides that two types of actors will cooperate: the state (at local, national and regional levels) and non-state actors (economic and social partners, including trade union organizations, and civil society bodies in all their forms, in accordance with national features). Therefore, it is entirely justified that non-state actors take different forms: non-governmental organizations, both national and international; indigenous peoples and national minorities; a variety of autonomous groups; human rights defenders; terrorists; paramilitary groups; autonomous districts; internationalized territories; multinational enterprises (transnational corporations); and, finally, individuals.[128] It should be finalized that the notion of a non-state actor

[123] A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 31.
[124] D. Rodgers and R. Muggah, "Gangs as Non-State Armed Groups: The Central American Case," *Contemporary Security Policy* 30, 2 (2009): 305.
[125] Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005), 125.
[126] L. Esposito, "Non-State Actors in Law of Armed Conflict," Iusondemand, Accessed 4 December 2019, https://dl-iusondemand.s3.amazonaws.com/civileitnews/2017Non-state-actors-in-law-of-armed-conflicts-1.pdf.
[127] "Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of The One Part, and the European Community and its Member States, of the Other Part, signed in Cotonou on 23 June 2000, 2000/483/EC," EUR-LEX, Accessed 4 December 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:22000A1215(01).
[128] "The Role of Non-State Entities," Icelandic Human Rights Centre, Accessed 6 December 2019, http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-actors/the-role-of-non-state-entities.

is extremely broad. In this respect, it should be found a new definition of the non-state actors for the purposes of this thesis.

Creating a generic notion of non-state actors is a rather complex research task from several perspectives. First, the terms already used (in particular, non-state actors, transnational actors) interfere with this are not optimal. They are, despite their different meanings, used in the law as synonyms, although, from the point of view of legal technology, any legal categories must be precise and specific. Secondly, the created category should cover the various manifestations of non-state entities - from organizationally complex international organizations to illegal formations such as the group of collectors of folk crafts[129].

In conclusion, having analyzed various approaches to the definition of a non-state actor and also due to the absence of a legal definition of such a notion, it should be noted that there is a vital necessity of finding and creating an internationally recognized definition of a non-state actor. A new definition should not be restricted by elements of definitions given by the various scholars. Moreover, it should contain the other characteristics that are similar to state actors and may be fulfilled by non-state actors. A model formulation of the definition according to the above – mentioned guidelines could potentially be: non-state actor is an active participant (collective or individual) in international relations, which not belongs to state authority, having a certain legal personality, possessing the ability, at the expense of relevant and potential resources at his disposal, to make decisions in the international arena which have the impact on the international system as well as other participants of international relations.

Proposed definition will help to determine the nature of non-state actors as well as to differentiate them from other subjects of international law. It should be emphasized that this thesis presents a definition that should be used as a basis for defining the unified term of the non-state actor on the international level.

2.2. Typology of non-state actors

It should be noted that for a better understanding of the legal nature of non-state actors their typology should be considered.

The consequence of an ambiguous understanding of the concept of “non-state actors” is the controversy of the issue of the typology of non-state actors in international relations and world politics. Some internationalists even believe that no typology as applied to them can claim to be convincing since their combination forms a kind of nebula in which only a few common features

[129] Ibid.

vaguely appear[130]. The complexity of the issue, of course, does not mean abandoning ongoing attempts to resolve it. At the same time, the degree of persuasiveness of attempts at the typology of non-state actors is determined by their compliance with research or practical tasks, depending on which appropriate criteria are selected. Such criteria may be the field of activity of the non-state actors (humanitarian, medical, religious, etc.), the goals pursued by them (environmental, human rights, protest, etc.), the formality or informality of the composition and membership (for example, the ICRC and anti-globalist movements), etc[131].

In accordance with commercial criteria, TNCs and multinational firms and enterprises are distinguished from humanitarian, human rights, environmental, charity, etc. As one of the most important typological criteria for NSAs resources are allocated for their influence on political decision-making by states and intergovernmental organizations[132].

Finally, the distinction between NGOs in terms of the degree of influence on public opinion has become widespread, therefore they are often called international pressure groups. Most often, complex criteria are used that combine a number of important features, which allows one to enlarge the object of analysis. Already from the 70s, publications appear in which the legal or non-legal nature of their activities is one of the criteria for classifying NSAs. In the future, distinctions are also made according to the principles of "legal" and "illegal" (option: "formal" / "informal")[133]. In 2000, works appeared on "violent" non-state actors (VNSA), which include national liberation, separatist and irredentist movements, terrorist networks, military mercenaries, private military units, rebel guerrilla groups, etc.[134]

Given the above definition and the existing classifications of NSAs, one can distinguish such broad groups as legitimate and illegitimate. Legitimate NSAs, in turn, can be divided into:

- business structures as well as Corporations, which include multinational corporations (MNCs) and transnational corporations (TNCs): MNC has facilities and other assets in at least one country other than its home country.[135]

[130] D. Ethier and M. Zahar, *Introduction Aux Relations Internationales* (Montreal: Les Presses de l'Universite de Montreal, 2003), 125, 130.
[131] Ibid.
[132] M. Lebedeva, *Non-State Participants in World Politics* (Moskow: Publishing house of MGIMO, 2013), 23.
[133] D. Josselin and W. Wallace, *Non-State Actors in World Politics* (London: Palgrave Macmillan, 2001), 54.
[134] K. Mulaj, *Violent Non-State Actors in World Politics* (Columbia: Hurst, 2010), 22.
[135]"Multinational corporation," Investopedia, Accessed 7 December 2019, https://www.investopedia.com/terms/m/multinationalcorporation.asp.

- officially recognized NGOs and social movements: NGO is a non-profit, citizen-based group that functions independently of government.[136] It should be noted that the examples of NGOs could be Red Cross as well as Amnesty International.
- global private media. International media agencies have a great influence being NSAs, as they spread information about the social and political situation in different countries throughout the world. A great example of such NSA can be Agence France-Presse. AFP is a global news agency delivering fast, accurate, in-depth coverage of the events shaping our world from conflicts to politics, economics, sports, entertainment and the latest breakthroughs in health, science and technology. AFP's 201 bureaus cover 151 countries across the world, with 80 nationalities represented among its 2,400 collaborators. The Agency operates regional hubs in five geographical zones.[137]

After analyzing the legitimate group of NSAs, it should be concluded that all non-state actors, which were mentioned above fall under the definition of NSA, which was created for the purposes of this thesis in the previous part.

Now, it should be underlined the illegitimate group of non-state actors. As for illegitimate non-governmental organizations, these include drug dealers, mafia structures, terrorist organizations, separatist and irredentist movements, partisan and pirate formations, private armies, etc. The prime example of the terrorist militant group would be the Islamic State of Iraq and the Levant, also known as "ISIL". The United Nations has recognized "ISIL" as a terrorist organization, which pose a threat to international peace and security.[138] The United Nations states that ISIL is responsible for committing human rights abuses, crimes against peace, genocide, war crimes, and crimes against humanity. ISIL also committed ethnic cleansing on a historic and unprecedented scale in northern Iraq.[139] In this perspective, ISIL is a quite practical example of illegitimate group of non-state actors that possesses all necessary features of such notion.

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[136] "What is an NGO," Investopedia, Accessed 7 December 2019, https://www.investopedia.com/ask/answers/13/what-is-non-government-organization.asp.

[137] "AFP in the world," Agence France-Presse, Accessed 7 December 2019, https://www.afp.com/en/agency/about/afp-world.

[138] "Eighth report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat, S/2019/103," Security Council of United Nations, Accessed 8 December 2019, https://www.un.org/sc/ctc/wp-content/uploads/2019/02/N1901937_EN.pdf.

[139] "Ethnic cleansing on a historic scale: The Islamic State's systematic targeting of minorities in northern Iraq, 2014," Amnesty International, Accessed 7 December 2019, https://www.es.amnesty.org/uploads/media/Iraq_ethnic_cleansing_final_formatted.pdf.

Now, it should be taken into account non-state actors that have international legal capacity in international law, are legitimate and endowed with a group of rights and obligations with respect to other subjects of international law.

It should be noted that the above-mentioned group of non-state actors in international relations consists of non-governmental organizations (NGOs), transnational corporations (TNCs) and other public forces on the world stage. The next paragraphs will analyze each of the above-mentioned types of organizations for the aim of this thesis.

Firstly, non-governmental organizations will be analyzed with respect to the aim of this thesis. It should be mentioned that NGOs are not territorial entities, because their members are not sovereign states. There are many kinds of NGOs such as transnational, government-organized, government-regulated and initiated, business and industry, donor-organized, donor-dominated, people's organizations, operational, advocacy, transnational social movements, quasi, and anti-governmental NGOs. Their number increased (more than 23,000 in the early 1990s) and their effectiveness for transnational politics became more relevant in recent decades. They have become "crucial participants in the international policy process"[140].

The main core of NGOs is the mobilization of international public opinion and pressure on intergovernmental organizations. These include Greenpeace, the International Federation for Human Rights, etc. For instance, in 2006 anti-nuclear activists were filing official complaints under international humanitarian law to bring governments before the court because of their role in NATO's illegal nuclear weapons strategy. Greenpeace initiative the groups called for the removal and dismantlement of the illegal US nuclear weapons deployed in Europe. Greenpeace was encouraging people to file their own legal complaints and have placed information needed to make a complaint on the Internet[141].

In this respect, it can be concluded that NGOs have influence in the field of humanitarian law. For example, as it was analyzed before Greenpeace and its activists all over Europe made their contribution in order to remove illegal nuclear weapons.

Also, one more great example of NGO is the International Committee of the Red Cross (ICRC). The International Committee of the Red Cross (ICRC) has a specific mandate from the States to monitor the implementation of humanitarian law. The ICRC deals directly with governments and armed opposition groups to obtain greater compliance and appeals to the

[140] S. Brown, *New Forces, Old Forces, and the Future of World Politics* (New York: Harper Collins College Publishers, 1995), 268.
[141] "Joint Bombspotting and Greenpeace press release," Greenpeace International, Accessed 8 December 2019, https://www.greenpeace.org/archive-international/en/press/releases/2006/report-illegal-nuclear-weapons/.

international community only as a last resort in the face of massive violations. The ICRC also has the task of paving the way for the development of humanitarian law, to ensure international rules keep pace with changes in warfare itself. The organization is uniquely placed for such a mission. The ICRC as the traditional guardian of international humanitarian law is specifically entitled by the law to visit prisoners of war and to monitor the circumstances of civilians protected by the Fourth Geneva Convention. The community of States has also conferred on it the right to offer its humanitarian services to those party to an armed conflict, including internal conflicts[142].

The role of the ICRC in disseminating the content of international humanitarian law is also impressive. Its target groups have been primarily armed forces and combatants, national Red Cross and Red Crescent personnel, civil servants in government ministries, the academic community, primary and secondary school systems, medical professionals, journalists, and the media, and the public[143].

As for the term "NGOs", there are at least three interpretations of its content:

- narrow, based on legal criteria;

- extended, connecting to them economic features;

- and the broadest sociological one, from the perspective of which international non-governmental organizations include virtually any collective actors capable of influencing the international political system[144].

Supporters of the first interpretation, as a rule, refer to non-profit organizations that have consultative status with the UN and its institutions and promote international cooperation[145].

The largest association of NGOs is the International Council of Voluntary Agencies (ICVA). The set of NGOs in consultative status with ECOSOC is represented by the Conference of NGO (CONGO). In resolution of the UN General Assembly No. 1296 (XIV) of May 23, 1968, INGOs are defined as "any international organization established not on the basis of an intergovernmental agreement. In this interpretation, the main features of MHPO include: a) lack of goals for profit; b) recognition by at least one state or presence of consultative status with international intergovernmental organizations; c) receipt of funds from more than one country; d)

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[142] "How can NGOs help promote international humanitarian law," Humanitarian Practice Network, Accessed 7 December 2019, https://odihpn.org/magazine/how-can-ngos-help-promote-international-humanitarian-law/.
[143] Louise Doswald-Beck, "International Humanitarian Law and Human Rights Law, International Review of the Red Cross, No. 293, 1993," ICRC, Accessed 9 December 2019, http://www.icrc.org/en/doc/resources/documents/article/other/57jmrt.htm.
[144] Kerstin Martens, "Mission Impossible? Defining Nongovernmental Organizations," *International Journal of Voluntary and Nonprofit Organizations* 13, 3 (2002): 273.
[145] Ibid.

carrying out activities in at least two states; e) creation on the basis of a constituent act ". In general, in 1999, according to UN documents, there were almost 44 thousand INGOs in the world (and in this sense were considered officially recognized)[146]. Moreover, 2379 of them had a consultative status for 2004. The European Convention on the Recognition of the Legal Entity of INGOs, which was adopted on May 24, 1986, identifies such features as mandatory non-commercial activity in at least two states, as well as the fact that they should be established in accordance with the domestic law of a state[147].

Even narrower understanding of NGOs, in addition to the above signs, implies the promotion of international cooperation, compliance with the spirit and principles of the UN Charter, democratic principles of construction and clearly defined action programs that are remote from politics, as well as activities in more than two states. From this point of view, MNPOs do not include multinational firms (MNFs) and transnational corporations (TNCs), socio-political movements and political parties, and even more transnational criminal groups and terrorist networks.

Another interpretation expands the concept of NGOs, including three categories:

- environmental protection INGOs;

- associations of private law firms;

- human rights organizations, transnational corporations[148].

Taking into account the economic criterion, some authors attribute even interstate production associations to NGOs. From this point of view, there are three types of NGOs: groups consisting of individuals who voluntarily join together to achieve common tasks of a non-commercial nature (NPO), organizations aimed at achieving profit, including through political pressure (TNCs), and associations of states manufacturers (such as, for example, OPEC)[149]. In the Anglo-Saxon literature, the term "non-governmental business organizations" (BINGO - business non-governmental organizations) is used to refer to TNCs[150].

Finally, another political and sociological interpretation of the concept of NGOs proceeds from the place that non-governmental associations occupy in the social structure of the modern

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[146] "Resolution of the UN General Assembly (No. 1296 (XIV) of May 23, 1968," Global Policy Forum, Accessed 9 December 2019, https://www.globalpolicy.org/component/content/article/177/31832.html.
[147] "European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, 1986," OSCE, Accessed 9 December 2019, https://www.osce.org/odihr/37848?download=true.
[148] Kerstin Martens, "Mission Impossible? Defining Nongovernmental Organizations," *International Journal of Voluntary and Nonprofit Organizations* 13, 3 (2002): 275-276.
[149] P. Tsygankov, *Theory of International Relations* (Moskow: Gardariki, 2002), 65-66.
[150] Ibid.

world, and from the role they play in ongoing political changes. Understood in this sense, the term NGOs includes organizations officially recognized by the international community in this capacity, business structures and international criminal groups and terrorist networks.[151]

In other words, only a politico-sociological interpretation of the concept of NGOs actually coincides with the content of the term "non-state actors" (NSA). Non-state actors from this point of view are different, different from the state world, whose subjects seek to preserve and expand their autonomy, agreeing or refusing to cooperate with states and avoiding traditional forms of diplomacy. The famous American researcher J. Nye uses the metaphor of the "third dimension" of the world "chessboard" - the sphere of world politics that exists relatively independently of the two other spheres representing military-political and economic relations between states. Transnational relations and non-state actors, in this interpretation, have their own widely dispersed power, which allows them to avoid control by states[152]. This world of "actors outside sovereignty" (J. Rosenau) includes both structured organizations and informal groups whose members have unity or at least a similarity of behavior, on the basis of which they can be considered as a single type of actor[153].

Having analyzed the most important characteristics of NGOs, it should be drawn a general conclusion with regard to their status in international law.

The main attributes of international organizations continue to be in the first line for facilitating negotiations and implementing agreements, dispute resolution, offering technical assistance and developing rules. But the most important thing remains their neutrality, impartiality, and independence. Neutrality enables organizations to act as mediators between states and to implement their decisions. Impartiality resides on the fact that neither part is favored whatever the subject is. And independence resides on the fact that international organizations can take decisions for themselves[154]. NGOs are vested with contractual legal capacity, that is, they have the right to conclude various agreements within their competence.

NGOs have the ability to participate in diplomatic relations. Representatives of states are accredited with them, they themselves have representations in states (for example, UN information centers) and exchange representatives among themselves. Also, NGOs are liable for offenses and damage by their activities and may make claims for liability. It should be noted that each NGO

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[151] G. Geeraerts, "Analyzing Non-State Actors in World Politics," Pole Papers Series, Accessed 10 December 2019, http://poli.vub.ac.be/publi/pole-papers/pole0104.htm.
[152] R. Keohane and J. Nye, *Transnational Relations and World Politics* (Cambridge: Harvard University Press, 1972), 113-114.
[153] Ibid.
[154] M. Berg, "The Role of Inter- and Non-Governmental Organizations," *Conventions, treaties and other responses to global issues* 2 (2018): 5.

has at its disposal financial resources, which, although they mostly consist of contributions from states and members, are spent exclusively in the general interests of the organization[155].

As it was mentioned above, except from NGOs legitimate group of NSAs consists of TNCs which will be discussed further for the aim of this thesis.

In recent decades, the most controversial issue has been the status of transnational corporations (TNCs) as subjects of international law, which is explained by their significant influence on the spheres of the economy, labor and, as a result, the emergence of new legal mechanisms in these areas. Transnational corporations also have a great influence on the direction of changes in the nature of international interactions. Such corporations strengthen the sovereignty of the state in the economic sphere. TNCs - enterprises, institutions, and organizations whose purpose is to make a profit. They operate through their branches simultaneously in several states, while the control center of a particular multinational corporation is located in one of them. In this respect, it should be found a legal definition of such actor in the field of international law[156].

The definition of a transnational corporation, according to the official definition of the United Nations, is an international operating company in two or more countries and managing these units from one or more centers. Experts to such firms include any manufacturing, commercial, leasing, other corporations whose activities are carried out in two or more countries[157]. Moreover, it should be noted that TNCs are the most prominent contemporary examples of the NGOs.

For the purpose of this thesis it should be taken into account that Multinational corporation (MNC), also called transnational corporation, any corporation that is registered and operates in more than one country at a time. Generally, the corporation has its headquarters in one country and operates wholly or partially owned subsidiaries in other countries[158]. Thus, it should be concluded that Multinational corporation is similar to a transnational corporation and for the purposes of this thesis, these notions mean the same.

MNCs are huge firms that own and control plants and offices in at least more than one country and sell their goods and services around the world. They are large corporations having branches and subsidiaries operating on a worldwide basis in many countries simultaneously.

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[155] Ibid.
[156] "Strengthening the Role of Business and Industry," UN, Accessed 10 December 2019, https://sustainabledevelopment.un.org/content/dsd/agenda21/res_agenda21_30.shtml.
[157] Ibid.
[158] "Multinational corporation," Encyclopedia Brittanica, Accessed 10 December 2019, https://www.britannica.com/topic/multinational-corporation.

MNCs are "major driver of global economic integration" and "establish unprecedented linkages among economies worldwide"[159].

The biggest and the most effective industrial corporations are based in the United States, Europe and Japan. In 1992, of the 20 largest MNCs, excluding trading companies, in terms of sales all were based in G-7 states –eight were in the United States, four were in Japan, three were in Germany, and five were in Britain, two of which were jointly based in the Netherlands[160].

MNCs can be classified according to the kinds of business activities they pursue such as extractive resources, agriculture, industrial products, transportation, banking, and tourism. The most notable MNCs are industrial and financial corporations (the most important being banks). Naturally the primary objective of MNCs is profit maximization[161]. They are very effective in directing foreign policy of states, including that of the most powerful ones, and they set agenda for international politics. They have become a major factor in national economic decision-making process[162]. It should be concluded that MNCs have an influence, due to their role in the world, to the sovereign State.

One of the measures of the influence of MNCs is the extent of the resources they control. They have enormous "flexibility in moving goods, money, personnel, and technology across national boundaries, and this flexibility increases their bargaining power with governments"[163]. Dozens of MNCs have annual sales of tens of billions of dollars each. Many of them have more economic activity than the GDPs of the majority of the states in the world. For instance, MNCs such as General Motors, Exxon, Royal Dutch Shell, General Electric and Hitachi outranked the GDP of nation-states like Taiwan, Norway, Turkey, Argentina, Pakistan, Malaysia and Nigeria in the early 1990s[164]. As compared "to total world export in 1992 of about $4.0 trillion," "sales by MNCs outside their countries of origin were $5.5 trillion for the same year"[165].

Different economic schools of thought treat MNCs differently. According to liberalism, MNCs are the vanguard of the new world order since they possess the most efficient means of production[166]. Liberal economists argue that "the global efficiency and the increased generation of

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[159] E. R. Peterson, *Looming Collision of Capitalisms?* (New York: McGraw- Hill, 1995), 260.
[160] J.S. Goldstein, *International Relations* (New York: Longman, 1999), 27.
[161] M. Miyoshi, "A Borderless World? From Colonialism to Transnationalism and the Decline of the Nation State," *Critical Theory* 19, 4 (1993): 726.
[162] E. R. Peterson, *Looming Collision of Capitalisms?* (New York: McGraw- Hill, 1995), 261.
[163] A. L. Bennett and J. K. Oliver, *International Organizations: Principles and Issues* (Prentice Hall, 2002), https://www.worldcat.org/title/international-organizations-principles-and-issues/oclc/682032219.
[164] S. Brown, *New Forces, Old Forces, and the Future of World Politics* (New York: Harper Collins College Publishers, 1995), 25.
[165] E. R. Peterson, *Looming Collision of Capitalisms?* (New York: McGraw- Hill, 1995), 262.
[166] K. Mingst, *Essentials of International Relations* (New York: W. W. Norton & Company, Inc., 2016), 102.

the wealth result from the ability of MNCs to invest freely across international borders"[167]. Some economists even welcome the replacement of the nation-state by MNCs as the main economic unit[168]. Mercantilist and nationalist perspective argue that MNCs are instruments of home states. For them, MNCs either serve national interests of the state or become a threat to the state. The Marxist tradition considers MNCs as the instrument of exploitation and as an extension of the imperialism of strong capitalist states[169]. Their monopolistic power causes uneven development and inequality in the international division of labor. They bring mal-development into host countries[170]. Moreover, the MNCs should be interpreted not only from the economic, but also from the international and international humanitarian law's perspectives.

It should be concluded that TNCs, as well as MNCs, as a great example of non-state actors, due to their influence during armed conflict and peacetime to the state, should fulfill a set of obligations listed in the Geneva Conventions, Protocols, European Convention of Human rights, etc.

After analyzing the typology of various non-state actors, their characteristics as well as activities, there is a possibility to determine if non-state actors are subjects of international law, which will be done in the next paragraphs of this master thesis.

2.3. Non-state actor as a subject of international law

States are traditionally considered to be the sole subjects of international law. In the real world, however, non-state actors, such as transnational corporations, insurgent or terrorist groups, or leading charitable or issue-oriented organizations (NGOs), have sometimes become more influential and powerful than States. In spite of this evolution, these actors remain largely outside the field of international law. They have no, or very few, formal rights of participation, and they are generally not considered to be internationally responsible for their actions[171].

In the last decades witnessing the constant strengthening of the normative ties of various non-state actors with international law[172]. As examples in this context it should be mentioned transnational corporations, international non-governmental organizations and international

[167] J.S. Goldstein, *International Relations* (New York: Longman, 1999), 30.
[168] R. J. Barnet and J. Cavanagh, *Global Dreams: Imperial Corporations and the New World Order* (New York: Simon and Schuster, 1994), 43.
[169] K. Mingst, *Essentials of International Relations* (New York: W. W. Norton & Company, Inc., 2016), 105.
[170] S. Brown, *New Forces, Old Forces, and the Future of World Politics* (New York: Harper Collins College Publishers, 1995), 28.
[171] "International legal personality of non-state actors (rights and duties of non-state actors under international law)," NWO, Accessed 11 December 2019, https://www.nwo.nl/en/research-and-results/research-projects/i/23/5223.html.
[172] M. Noortmann, A. Reinisch and C. Ryngaert, *Non-State Actors in International Law* (Portland: Hart Publishing, 2015), 78.

terrorist groups. Due to the traditional state-centrism of the doctrine of international legal personality, in process of positioning these entities in the international legal system, there are frequent recourses in the contemporary international legal theory to terms such as "participants" in international law, "users" of international law, "non-state actors" in international law, as well as focusing, instead of on designation, on the research of specific rights and obligations of a particular entity in international law. These approaches to the theoretical inclusion of non-state entities in the international legal system have indeed offered some new viewpoints on the discussions traditionally conducted within the doctrine of international legal personality[173]. In this respect, it should be found an international legal personality of the non-state actors. Moreover, such legal personality is a perfect direction in the case of proving a fact that non-state actors should be determined as a subject of international law.

Firstly, it should be mentioned the concept of international legal personality as an important feature of the subjects of international law. Before presenting the concept of international legal personality it is necessary to point out once again that the concept of legal personality is common to all legal systems[174]. To put it simply, legal personality or legal subjectivity is the capacity of a person to be a holder of rights and obligations under a given legal system. However, except for the mere granting of rights and obligations to persons in a particular legal system, social relations require that persons can in principle also produce legal effects with their own actions. That is why legal personality has its passive or static dimension (capacity to be a holder of legal rights and obligations) and its active or dynamic dimension (capacity to produce legal effects with its own actions)[175]. The most important features of the latter dimension are the capacity of the person to conclude contracts, to undertake legal actions to protect their own rights and to bear legal responsibility for illegal acts[176].

The above described general concept of legal personality is in principle accepted also in international law. However, in international law, this concept has some special features, which are the consequences of the different nature of that legal system in relation to internal legal systems. While in internal legal systems the subjects of these systems (legal persons in a broader sense) are natural and non-natural (legal persons in a narrower sense) persons within a particular State, the most typical and the least disputed subjects of international law are States themselves. Unlike in internal legal systems, in international law, there is no organized central authority, set above the

[173] A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 59.
[174] D. Vrban, *Država i pravo* (Zagreb: Golden marketing, 2003), 258.
[175] Ibid, 259.
[176] Ibid, 268.

subjects of this legal system, which would grant them this status[177]. Moreover, there is no relevant legal norm of international law, which would define its subjects or regulate the means for acquiring this status. The defining of a subject of international law is therefore largely left to legal doctrine.

There is no generally accepted definition of an international legal person or a subject of international law in the legal doctrine. Authors generally agree on the capacity to be a holder of international legal rights and obligations as a necessary precondition for the status of a subject of international law, but they disagree with regard to the necessity of possessing capacity to produce legal effects with their own actions. Thus, some authors define a subject of international law merely as a holder of rights and obligations under the rules of international law[178]. On the other hand, the other group of authors deems this passive dimension of legal capacity insufficient and requires some degree of active legal capacity. Yet these latter authors again differ with regard to the necessary content and scope of this active legal capacity necessary to consider an entity a subject of international law[179]. In simple worlds, international legal personality is a mere possession of international legal rights and obligations by an entity is sufficient to consider it a subject of international law.

It should be concluded that in international legal literature, various opinions were expressed on the legal status of the NSAs as a subjects of international law.

David Fidler thinks, that historically only states were subjects of international law, but the list of subjects now includes non-state actors, such as individuals, non-governmental organizations (NGOs), and multinational corporations (MNCs). This expansion reflects the extent to which states have, in the development of international society, created new tools (e.g., IGOs) and crafted new public-private partnerships with NGOs and MNCs as part of international cooperation[180]. It should be concluded that the state's activity led to the development of the non-state actors in the international area.

Delbruck and Wolfrum assume with regard to NGOs' participation rights within the framework of the UN that, although they are no subjects of international law, an "indirect" inclusion in the international legal system can still be proved: „This status could be paraphrased

[177] B. Cheng, *Introduction to Subjects of International Law* (Paris: Martinus Nijhoff Publishers, 1991), 33.
[178] Davor Muhvic, "Legal Personality as a Theoretical Approach to Non- State Entities in International Law: The Example of Transnational Corporations," *Pecs Journal of International and European Law* 1 (2017): 9.
[179] J.H.W. Verzijl, "International Law in Historical Perspective," *American Journal of International Law 2, 1* (1969): 450.
[180]David Fidler, "International Law," World Health Organization, Accessed 24 November 2019, https://www.who.int/trade/distance_learning/gpgh/gpgh7/en/index3.html .

with the term of a confined, secondary and indirect subjectivity in international law"[181]. In this respect, it seems clear that NGOs as well as non-state actors have a limited legal personality.

S. Hobe speaks of a limited subjectivity within international law, in so far as it depends upon whether and to what extent a respective NGO or non-state actor itself, in an individual case, are assigned rights and duties by international law[182].

However, the assessments of the NSA expressed at the indicated time "do not correspond to the realities of today, because in the UN system, NSAs act as subjects of international law with a limited legal capacity. Their legal status includes quite a variety of rights and obligations enshrined in the norms of international law"[183].

Given the above, in accordance with the widespread international practice of the work of the NSA, constantly getting rid of the political cliches and ideological phobias of the recent past, scientists in the last decades have made a lot of efforts to develop an adequate reflection of the international legal status, role and place of the NSA in the system of modern international relations[184].

To date, the most influential intergovernmental organizations in the world - the UN, the Council of Europe, the OSCE, etc. - have completely decided on their relations, raising their status to the extent necessary for fruitful cooperation with them on an equal footing and urging all other interstate organizations to follow suit.[185] In 1986, the Committee of Ministers of the Council of Europe adopted the Convention "On the recognition of the legal personality of international non-governmental organizations", [186]which marked the beginning of the transfer of the question of the place of INGOs in the system of modern international relations from a theoretical plane to a practical one[187].

The international treaty practice of the NGO provides all grounds for recognizing the organizations in question as subjects of international treaty law. As I.I. notes Lukashuk,

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[181] G. Dahm, J. Delbrück and R. Wolfrum, *Völkerrecht* (Berlin: De Gruyter Verlag, 2002), 45.
[182] S.Hobe, "Der Rechtsstatus Der Nichtregierungsorganisationen Nach Gegenwärtigem Völkerrecht," *Archiv Des Völkerrechts* 37, 2 (1999): 172-174.
[183] Ibid., p. 157.
[184] Cedric Ryngaert, "Non-State Actors: Carving out a Space in a State-Centered International Legal System," *Netherlands International Law Review* 63, 2 (2016): 184.
[185] K. Annan, "Intervention Problem: Statement by the UN Secretary General," UN, Accessed 12 December 2019, https://www.un.org/press/en/1998/19980416.SC6502.html.
[186] "European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, 1986," OSCE, Accessed 9 December 2019, https://www.osce.org/odihr/37848?download=true.
[187] K. Annan, "Intervention Problem: Statement by the UN Secretary General," UN, Accessed 12 December 2019, https://www.un.org/press/en/1998/19980416.SC6502.html.

"agreements of this kind were also found in the practice of our country, especially in the first period of the existence of Soviet power"[188].

"There are frequent cases," said Professor I.I. Lukashuk, when agreements between non-governmental organizations regulate relations of national importance[189]. As the authors of the ICRC's publication note: "Such agreements, of course, relate to international public law. The signatory states thereby acknowledge that the ICRC is a subject of international law and provide it with the benefits and privileges that are usually used by intergovernmental organizations". On this basis it is difficult to agree that the NGAs are subjects of private international law, and their agreements are contracts under private international law[190].

From the point of view Mohammad H. Zarei and Azar Safari, NSAs do not possess official or government authorities and powers and do not have institutional and financial relationships with states[191]. Despite that NSAs widely cooperate with states in different directions such as humanitarian aid, the law-making process, etc.

It should be mentioned that NSAs are widely recognized subjects of international law. The conception of NSAs as an object of international law does, however, not sufficiently explain its present-day position in international law. In other words, power and influence of NSAs in many cases goes far beyond that of entities to which international law has traditionally accorded to object states[192]. It should be concluded that international community recognizes the non-state actors as a subject of international law, but there are some doubts.

Of all the examples cited, the Agreement of March 19, 1993 between the ICRC and the Government of Switzerland on the status and activities of the ICRC in its territory, which recognizes that the ICRC is a subject of international law and confirms its independence from the authorities of this country, deserves special consideration[193]. It was a great example of recognition ICRC as a subject of international law.

Due to the fact that TNCs are one of the most perfect examples of the non-state actors, it should be taken into account the general overview of the rights and obligations of TNCs under

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[188] I. Lukashuk, *Modern Law of International Treaties* (Moskow: Volters Kluver, 2004), 110–112.
[189] Ibid., p. 110–111
[190] Ibid., p. 113
[191] M. Zarei and A. Safari, "The Status of Non-State Actors under the International Rule of Law: A Search for Global Justice," Cultural Diplomacy, Accessed 24 November 2019, http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/2014-04-lhrs/Dr_Zarei_and_Azar_Safari_-_The_Status_of_Non-State_Actors_under_the_International_Rule_of_Law-_A_Search_for_Global_Justice.pdf.
[192] J. Nijman, *Non-State Actors and the International Rule of Law: Revisiting the Realist Theory of International Legal Personality* (Farnham: Ashgate 2010), 93.
[193] "Agreement between the International Committee of the Red Cross and the Swiss Federal Council, No. 293, 1993," ICRC, Accessed 13 December 2019, https://casebook.icrc.org/case-study/agreement-between-icrc-and-switzerland.

international law. Due to the limited scope of this Master Thesis in order to discover if non-state actors are subjects of international law the legal personality of TNCs will be examined as all non-state actors have almost similar features.

An important feature of the ties of prominent non-state entities with international law is that they are limited only to certain fields of international law. As an example of that it will be shown that the strongest normative ties of transnational (multinational) corporations as prominent non-state entities with international law manifest themselves in several areas: international investment law, international human rights law, international criminal law and international humanitarian law[194].

First of all, it should be described the rights related to protection of foreign investment. The contemporary regime of the international protection of foreign investment is for the most part based on international treaty law. It is a series of mostly bilateral investment treaties (BITs), very similar in structure and content, which in general offer mutual guarantees of one State Party's foreign investors' protection in other State Party[195]. These treaties can be characterized as treaties in favor of a third party (*pacta in favorem tertii)* where the third parties who on the basis of these provisions acquire rights are foreign investors, in practice most often transnational corporations. The content of such agreements includes a series of foreign investors' rights, inter alia: the right to compensation in case of expropriation, the right to a fair and equitable process and rights based on the standards of fair and equitable treatment, full protection and security, national treatment and most-favored-nation treatment[196].

This international legal regime does not only directly address transnational corporations as foreign investors, guaranteeing them aforementioned rights on the international stage, but also generally provides them with the capacity of direct access to international fora for the purpose of protecting their own rights[197]. Most of these treaties contain previously given consent of States Parties to dispute settlement with foreign investors from other States Parties by arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) or via some other form of arbitration[198].

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[194] Davor Muhvic, "Legal Personality as a Theoretical Approach to Non- State Entities in International Law: The Example of Transnational Corporations," *Pecs Journal of International and European Law* 1 (2017): 15.
[195] Ibid.
[196] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012), 13.
[197] P. Dumberry, "L'entreprise, sujet de droit international? Retour sur la question à la lumière des développements récents du droit international des investissements," *Revue générale de droit international public* 108, 1 (2004): 10.
[198] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012), 13.

In addition to possessing rights under the provisions of investment treaties, it could reasonably be argued that transnational corporations possess some of those rights, such as the right to compensation in case of expropriation[199] or the right to access to courts and fair and equitable procedure[200], also under general international customary law. But, since the only way of legal protection of this kind of rights is to seek diplomatic protection of their own State, by which the dispute becomes an inter-State one, in practice rights guaranteed by a treaty to transnational corporations, which are accompanied by the possibility to initiate direct arbitration proceedings against the host State are much more important[201].

As another argument for the possible recognition of the international legal personality of transnational corporations which was considered already as early as 1960s was the existence of contracts which corporations conclude directly with host States[202]. There is some force in the argument that transnational corporations have some kind of *ius contrahendi* in international law, assuming that these contracts are of a public law character, that they determine sources of public international law as applicable law and that they provide for international arbitration as a means for the settlement of eventual disputes between their parties. International legal practice and theory have still not given a definite answer to the question of the legal nature of these kinds of agreements[203]. In this respect, TNC as a non-state actor possesses a set of the rights related to protection of foreign investment.

Secondly, it should be described the rights related to protection of human rights. One of the curiosities of the Council of Europe's system of human rights protection in relation to other international systems for human rights protection is that it guarantees the protection of human rights not only to natural persons, but to some legal persons as well. According to the Article 34 of the European Convention on Human Rights[204], the European Court of Human Rights "may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto." Although the term 'non-governmental organization' is commonly associated with non-profit entities, in the context of the European Convention on Human Rights it evidently encompasses companies as well[205].

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[199] R. Jennings and A. Watts, *Oppenheim's International Law* (Oxford: Oxford University Press, 2008), 919-921.
[200] Ibid., 543-544.
[201] Ibid., 545
[202] W. Friedmann, *The Changing Structure of International Law.* (London: Stevens & Sons, 1964), 221-231.
[203] I. Marboe and A. Reinisch, *Contracts between States and Foreign Private Law Persons* (Oxford: Oxford University Press, 2012), 44.
[204] "The European Convention on Human Rights, 1950," ECHR, Accessed 14 December 2019, https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[205] Ibid.

The practice of the European Court of Human Rights shows that since 1979[206] companies have successfully made claims according to Article 34 of the Convention in a series of cases. The Convention protects the rights of all companies, regardless of their size, or their transnational or national character[207]. In the majority of cases the claimants have been small or middle-sized companies registered in a State Party to the Convention claiming that the state in question had violated their rights guaranteed under the Convention or its Protocols[208], but there are also cases where the claimants have been transnational corporations[209].

It is apparent that corporations cannot enjoy all human rights. As pointed out in the literature, "the artificial and essentially inhuman nature of corporations impedes their inclusion within the protective confines of these provisions which seek to protect individuals of flesh and blood"[210]. Examples of these kinds of human rights are: the right to life, the prohibition of torture, the right to liberty and security or the right to marry[211]. On the other hand, the European Court of Human Rights has declared that it has jurisdiction in cases where corporations had claimed that they suffered a violation of the rights such as the right to a fair trial, the prohibition of punishment without law, the right to an effective remedy, the prohibition of discrimination and the protection of property[212]. In some cases, the Court has gone so far that it extended the Convention's protection of corporations to some rights which at first glance do not seem to be generally applicable to non-natural persons, such as the freedom of expression[213] or the right to respect for private life[214].

Thus, on the basis of the aforementioned, TNC as a non-state actor possesses a set of the rights related of human rights. Moreover, all above – mentioned cases of the human rights violations by TNCs were committed during the peacetime. Nevertheless, it should be assuming that such violations can be committed during the armed conflict by TNCs, rebels group, insurgents

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[206] "Sunday Times v. United Kingdom (App. no. 6538/74) ECHR, 1979," ECHR, Accessed 14 December 2019, https://hudoc.echr.coe.int/rus#{"itemid":["001-57584"]}.
[207] M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006), 4, 35.
[208] Ibid.
[209] "British-American Tobacco Company Ltd v. Netherlands (App. no. 19589/92) ECHR, 1995," EUR-LEX, Accessed 15 December 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61984CJ0142.
[210] W.H.A.M. Muijsenbergh and S. Rezai, "Corporations and the European Convention on Human Rights," *Pacific McGeorge Global Business & Development Law Journal* 25, 1 (2012): 50.
[211] M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006), 35.
[212] Davor Muhvic, "Legal Personality as a Theoretical Approach to Non- State Entities in International Law: The Example of Transnational Corporations," *Pecs Journal of International and European Law* 1 (2017): 9.
[213] "Autronic AG v. Switzerland (App. no. 12726/87) ECHR, 1990," ECHR, Accessed 16 December 2019, https://hudoc.echr.coe.int/rus#{"itemid":["001-57630"]}.
[214] "Société Colas Est and Others v. France (App. no. 37971/97) ECHR, 2002," Legal Tools Database, Accessed 17 December 2019, https://www.legal-tools.org/doc/5aefe0/.

that take a part on hostilities. Despite that fact not only TNCs, but also others non-state actors cannot violate basic human rights.

Thirdly, it should be taken into consideration that TNCs have not only rights related to a protection of human rights, but also obligations.

Due to the very common cases of non-compliance with the international legal obligation of the protection of human rights by developing States that occur in the context of the activities of transnational corporations under their jurisdiction, strong tendencies of imposing adequate direct international legal obligations to such non-state entities have emerged. Some authors have gone as far as to claim that existing international law already imposes such of obligations on these corporations[215]. Such interpretations which were predominantly based on the preamble of the 1948 Universal Declaration of Human Rights[216] have proven to be exaggerated[217]. Positive international law not only addresses States which have an obligation to refrain from violations of human rights of individuals under their jurisdiction, but also entails an obligation to protect those individuals when their human rights are endangered by a third party, including transnational corporations[218].

The contemporary tendencies of "disciplining" transnational corporations on the international level with regard to the protection of human rights manifest in the development of relevant international soft law instruments, specific case-law in the United States developed by the implementation of the so-called Alien Tort Statute[219] and also in theoretical contributions of various scholars[220]. Here only the most significant international soft law instruments focusing on the behavior of transnational corporations with regard to human rights shall be mentioned: the 1976 OECD Guidelines for Multinational Enterprises,[221] the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[222] and Ten Principles of the

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[215] L. Henkin, "The Universal Declaration at 50 and the Challenge of Global Markets," *Brooklyn Journal of International Law* 25, 1 (1999): 24-25.
[216] "GA Res. 217 A (III), A/RES/3/217 A, 1948," OSCE, Accessed 17 December 2019, https://www.osce.org/odihr/elections/19132?download=true.
[217] C.M. Vazquez, "Direct vs. Indirect Obligations of Corporations under International Law," *Columbia Journal of Transnational Law* 43, 3 (2005): 942.
[218] "Human Rights Committee, General Comment no 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004," Refworld, Accessed 19 December 2019, https://www.refworld.org/docid/478b26ae2.html.
[219] B. Stephens, *International Human Rights Litigation in U.S. Courts* (Leiden: Martinus Nijhoff Publishers, 2008), 309.
[220] S.R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility," *Yale Law Journal* 111, 3 (2001): 443.
[221] "OECD Guidelines for Multinational Enterprises, 2011," OECD, Accessed 19 December 2019, http://mneguidelines.oecd.org/guidelines/.
[222] "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, International Labour Office, 2017," International Labour Organization, Accessed 19 December 2019, https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

2000 United Nation's Global Compact[223]. Moreover, there are other obligations of the TNCs with regard to obligations to protect the human rights during the armed conflict.

Fourthly, it should be noted obligations related to international crimes that are listed in the article 5[1] of the Rome Statute.

From World War II until today it has been demonstrated that transnational corporations can be involved in committing international crimes such as genocide, crimes against humanity or war crimes. Accordingly, it is quite reasonable to consider the question of their responsibility for involvement in committing those crimes under international law. The Charter of the International Military Tribunal in Nuremberg[224] had already contained the first attempt of providing a concept of criminal responsibility of groups in international law (Art. 9). However, the issue of the responsibility of the business sector for participating in the commission of international crimes came to the forefront only in a few cases that took place before the tribunals of the Allied occupation powers in Germany on the basis of the so-called Control Council Law No. 10 for Germany of 20 December 1945[225]. Especially worth mentioning is the judgement in the case of I.G. Farben[226]. From the text of this judgement it can be inferred that the court *de facto* held responsible a corporation as such for involvement in committing international crimes, despite formally being authorized only for trying individuals from the management structure of the corporation in question[227].

At the 1998 Rome diplomatic conference on the establishment of the International Criminal Court there was a very serious discussion about the competence of the future court over legal persons, including transnational corporations. The draft provision on the relevant competence of the future court had undergone several revisions during the conference[228]. The proposal was eventually abandoned, but not because the government delegates had a problem with the conceptual assumption according to which legal persons could have obligations under

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[223] "The Ten Principles of the UN Global Compact," UN Global Compact, Accessed 19 December 2019, *https://www.unglobalcompact.org/what-is-gc/mission/principles*.

[224] "Charter of the International Military Tribunal, Annex to the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279," UN, Accessed 19 December 2019, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf.

[225] T. Taylor, "Final Report to the Secretary of Army on the Nuernberg War Crimes Trials under control Council Law No 10, Washington, D.C., 15 August 1949," Military Legal Resourses, Accessed 19 December 2019, https://www.loc.gov/rr/frd/Military_Law/NT_final-report.html.

[226] "The I.G. Farben Trial, Case No. 57, US Military Tribunal, Nuremberg, 14 August – 29 July 1948," *Law Reports of Trials of War Criminals* X (1948): 1.

[227] A. Clapham, *The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court* (Hague: Martinus Nijhoff Publishers, 2000), 170-171.

[228] "Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 1998," UN, Accessed 20 December 2019, https://legal.un.org/diplomaticconferences/1998_icc/docs/english/vol_3/a_conf183_2.pdf.

international law[229], but simply because there was not enough available time for the delegations to agree on the specific content of the relevant provision[230]. Moreover, the personal jurisdiction of the International Criminal Court spreads only to natural persons. In this respect, TNCs cannot be liable under the scope of jurisdiction of the International Criminal Court. Nevertheless, there are trends in the modern word in international criminal systems that prescribes another opinion.

The main argument in favor of the view according to which there is a development in progress concerning the international legal obligations of transnational corporations with regard to international crimes can be found in the combination of two strong trends in internal criminal law systems. The first one is the trend of an increasing introduction of criminal responsibility of legal persons[231], while the other one is a trend of implementation of three international crimes from the Rome Statute of the International Criminal Court in national criminal laws of the states[232]. In that way, "the emerging corporate responsibility for international crimes is grounded in growing national acceptance of international standards for individual responsibility" – "just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today"[233]. In this respect, the TNCs responsibility is a part of the international legal personality.

When authors provide a definition of the subjects of international law, they often in addition state some kinds of indicators of this status. Such indicators very often reflect the content the kind of legal capacity which is enjoyed by States as traditional subjects of international law. Cheng, for example, as indicators of international legal personality lists the right to send and receive diplomatic missions, the right to conclude agreements, the right to engage in legitimate armed conflicts, the right to a maritime flag, the right of diplomatic protection of its nationals, the right to bring an international claim, to sue and be sued on the international plane, the enjoyment of sovereign immunity within the jurisdiction of other States, the right to be directly responsible for any breach of one's own legal obligations and the right to acknowledged territorial sovereignty over a portion of the surface of earth[234].

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[229] A. Clapham, *The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court* (Hague: Martinus Nijhoff Publishers, 2000), 170-171.
[230] Ibid., 191.
[231] A. Ramasastry and R.C. Thompson, "Commerce, Crime and Conflict – Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries – Executive Summary," Fafo, Accessed 20 December 2019, https://www.fafo.no/index.php/en/publications/fafo-reports/item/commerce-crime-and-conflict.
[232] Ibid., 15-17.
[233] "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 19 February 2007, UN Doc. A/HRC/4/35," UN, Accessed 20 December 2019, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/108/88/PDF/G0710888.pdf?OpenElement.
[234] B. Cheng, *Introduction to Subjects of International Law* (Paris: Martinus Nijhoff Publishers, 1991), 33.

It is evident that some of these elements of legal capacity cannot be enjoyed by non-state entities such as transnational corporations or international non-governmental organizations. Thus, the main question here is: does the entity have to meet all or most of the abovementioned characteristics in order to be considered a subject of international law? The International Court of Justice has, way back in 1949, in its advisory opinion regarding the Reparation for Injuries Suffered in the Service of the United Nations pointed out the following: "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States[235]". In this respect, TNCs, as well as non-state actors, should not have identical features with the state.

Moreover, judging by the advisory opinion in the Reparations for Injuries case, which is still the most authoritative text in respect of international legal personality, the absence of certain elements of legal capacity as those enjoyed by the State as a typical subject of international law does not prevent the extension of this legal status to non-state entities[236].

The distinction between the State and other eventual subjects of international law prompted some authors to distinguish between full and limited international legal personality. According to this discourse, full international legal personality is enjoyed by States only, while the international legal personality of other entities would be limited to certain rights and obligations, or certain fields of international law, according to their function in the international community[237]. However, this distinction does not correspond to the reality of contemporary international law. Instead of full and limited subjects of international law it is more correct to speak about the interest of a certain subject or the international community for appropriate rights or obligations of a subject in a particular wider or narrower field of international law[238]. States today clearly do not possess all rights and obligations provided by contemporary international law. As an example of international legal rights which are not enjoyed by the State certain rights which are enjoyed by individuals on

[235] "Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949," ICJ, Accessed 20 December 2019, https://www.icj-cij.org/en/case/4.
[236] Davor Muhvic, "Legal Personality as a Theoretical Approach to Non- State Entities in International Law: The Example of Transnational Corporations," *Pecs Journal of International and European Law* 1 (2017): 10.
[237] C. Walter, *Subjects of International Law* (Oxford: Oxford University Press, 2012), 28.
[238] R. Higgins, *Problems & Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), 47.

the basis of international human rights law, such as the right to life or the right to be free from torture could be mentioned[239].

Contemporary international law has therefore developed from a legal system that regulates exclusively relations between States to a legal system which still largely regulates relations between States, but also takes into account the relevant needs of other entities as well as the international community as a whole by prescribing certain rights and obligations to various entities. As emphasized by O'Connell already in 1970: "[…] entity A may have capacity to perform acts X and Y, but not act Z, entity B to perform acts Y and Z but not act X, and entity C to perform all three. "Personality" is not, therefore, a synonym for capacity to perform acts X, Y and Z; it is an index, not of capacity per se, but of specific and different capacities"[240].

After analyzing the various approaches regarding the definition of non-state actors as subjects of international law, it is worthwhile to conclude that non-state actors are subjects of international law with a limited normative function. The thesis that non-state actors in international relations do not have sufficient international legal personality in order to be full-fledged subjects of international law is refuted by the generally accepted international point of view, according to which international legal personality does not depend on "volume", but on "the ability of individuals to participate in interstate relations regulated by international law".

Finally, it should be concluded that the limitation of a non-state actor only to some international rights and obligations, does not constitute a theoretical obstacle to its characterization as a subject of international law.

Due to the limited scope of this Master Thesis the chapter 3 will analyze the applicability of humanitarian law on the basis of such non-state actors as non-governmental organizations as well as terrorist networks, rebels groups.

[239] A. Clapham, *The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court* (Hague: Martinus Nijhoff Publishers, 2000), 68-69.
[240] D.P. O'Connell, *International Law* (London: Stevens & Sons, 1970), 81-82.

3. NON-STATE ACTORS IN A SPECIFIC FIELD OF INTERNATIONAL LAW

3.1. Non - state actors in the international law-making process

It should be noted that the participation of non-State actors is no longer confined to a relatively minor role or the status of an observer; rather, non-State actors are increasingly participating, directly or indirectly, in international negotiations and the codification of international law[241]. What is more problematic is to determine the precise role of such bodies in international law-making: do they act as little more than a catalyst to traditional forms of state law-making or can they be accurately described as free-standing participants in international law-making? Are their activities primarily lobbying and campaigning or can they be appropriately termed law-making[242]? Therefore, for the aim of this Master Thesis these questions will be considered in this subchapter.

Most international lawyers with a positivist bent would not deny the important role played by NSAs in the functioning of the current international legal system, but they consider their impact on law-making, compliance-monitoring, and dispute-settlement largely as the outcome of a two-level game[243]. Public international lawyers, especially in the United States, have recently relied on game theory to explain the workings of international law[244]. This means that NSAs do not have a direct impact on international law-creation but they are free to influence the actual law-making agencies: states. Law-applying agencies will normally not take issue with how state or organizational authoritative decision-making has come into being. A rare counter-example is ICJ Judges Guillaume and Oda's criticism of the UN General Assembly resolution requesting the ICJ to give an advisory opinion on the use of nuclear weapons in 1996, on the ground that NGOs were behind this resolution[245]. However, by and large international law and its appliers black-box the preference formation within states or international organizations[246].

Examples of how NSAs have influenced state preferences are not hard to come by: just think of the outlawing of the slave trade in the 19th century as well as the creation of the International Criminal Court. Article 71 of the UN Charter has even been explicitly adopted to enable NGOs to impact the policy-setting and norm-setting process within the UN. Notably

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[241] Markus Wagner, *Non-State Actors* (Oxford: Oxford University Press, 2009), 25.
[242]"Participants in International Law-Making," Law Explorer, Accessed 23 December 2019, https://lawexplores.com/participants-in-international-law-making/.
[243] K. Raustiala, *NGOs in international treaty-making* (Oxford: Oxford University Press, 2012), 153.
[244] E. Posner and Alan O. Sykes, "Economic Foundations of International Law," *The American Journal of International Law* 108 (2014): 365.
[245] "Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996," ICJ, Accessed 25 December 2019, https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.
[246]M. Finnemore and K. Sikkink, "International norm dynamics and political change," *International Organization* 52, 4 (1998): 888.

international relations scholars adhering to the constructivist school have well theorized such norm cascades, consisting of local NGOs teaming up with international NGOs so as to convince states or organizations to espouse civil society values and/or bring pressure to bear on recalcitrant states[247].

Whether NSAs can also play one-level games in international law-making and policy-making is a different matter. Still, as a matter of positive law, it is hard to deny the role played by employers' and workers' associations in the International Labour Organization[248], the treaty-making practice of the Holy See[249], or the legal value of International Committee of the Red Cross (ICRC) agreements concluded with states[250]. It is a more controversial proposition, however, that agreements concluded by armed opposition groups and states are governed by international law, that the practice of NSAs counts towards the formation of customary international law[251], or that transnational private regulation[252], or multi-stakeholder initiatives[253] can give rise to international obligations properly speaking. It is doubtful whether we should allow NSAs to play even more one-level games, e.g., whether one should invite NGOs to the international negotiation table. It can be concluded that practical problems and concerns over legitimacy militate against enhancing the law-making capacities of NSAs[254].

While non-State actors were sometimes able to influence governments through States sympathetic to their cause, for instance Helsinki Watch in the meetings of the Organization for Security and Cooperation in Europe, they depended on the will of States. This moment changed with the Rio process, during which non-state actors were no longer confined to the sidelines, but were active participants, taking part in the agenda-setting process as well as in the official negotiations, aggressively promoting their own goals, with NGOs sometimes acting as consultants to governments. Moreover, NGOs were increasingly organizing as a network, making them a crucial component towards the success of the Earth Summit, great examples are Stockholm Declaration 1972 and Rio Declaration 1992. This success for NGOs provoked concerns about their

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[247] Ibid.
[248] "Note on the role of employers' and workers' organizations in the implementation of ILO Conventions and Recommendations, 1987," ILO, Accessed 25 December 2019, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_124975.pdf.
[249] C. Ryngaert, "The legal status of the Holy See," *Goettingen Journal of International Law* 3, 3 (2011): 829-859.
[250] E. Debuf, "Tools to do the job: the ICRC's legal status, privileges and immunities," *International Review of the Red Cross* 97, 897 (2016): 319–344.
[251] J. Henckaerts, L. Doswald-Beck, C. Alvermann, *Customary international humanitarian law* (Cambridge: Cambridge University Press, 2005), 53.
[252] F. Cafaggi, "A comparative analysis of transnational private regulation: legitimacy, quality, effectiveness and enforcement," EESSC, Accessed 25 December 2019, https://www.eesc.europa.eu/resources/docs/a-comparative-analysis-of-transnational-private-regulation-fcafaggi_12062014.pdf.
[253] "KP Basics," Kimberley Process, Accessed 25 December 2019, https://www.kimberleyprocess.com/en/about.
[254] Cedric Ryngaert, "Non-State Actors: Carving out a Space in a State-Centered International Legal System," *Netherlands International Law Review* 63, 2 (2016): 185.

role in international negotiations and would only be duplicated in a similar fashion during the negotiations leading up to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction concluded 18 September 1997,entered into force 1 March 1999 and the Rome Statute of the International Criminal Court adopted 17 July 1998, entered into force 1 July 2002. Another form of contribution in the law-creation process is the participation in or the development of standards by non-State actors, mainly through international organizations or private actors, some of which are subsequently adopted as binding reference documents in international treaties, for example sanitary and phytosanitary measures and technical barriers to trade. Moreover, examples include International Organization for Standardization (ISO), which crafted management standards in the environmental field as well as auditing, labelling and life-cycle assessment standards. Similarly, NGOs are promoting their ideas through labelling and certification schemes in order to induce compliance with, for example, human rights, environmental or food safety standards[255]. It can be concluded that all the above-mentioned facts are great examples that NGOs did not only considerably contribute to the start of negotiations, but also influenced the concrete shaping of foreknown international law treaties.

Perhaps the most significant role of such NSAs is that they have played an effective role in the international norm making process like their participation in the preparation of the Draft on the UN Convention on the Rights of Persons with Disabilities[256]. This UN Convention on human rights does not only go back to an international political mobilization campaign from national and international non-governmental organizations but from the very beginning, one of the remarkable features of the UN negotiation process was the intensive participation of groups representing persons affected. The responsible negotiation panel experimented with innovative forms of NGO participation, which are to be examined closer and evaluated below[257].

Through a resolution submitted by Mexico to the UN General Assembly, in 2001, an open ad-hoc committee (AHC) in the format of the General Assembly was established as a negotiation panel for all member states and observers of the UN with the purpose to discuss proposals for an international convention. Altogether eight sessions were held in New York, for 2-3 weeks respectively. Already the drafting of the first official treaty blueprint clearly showed the AHC' preparedness to allow new forms of the civil society's involvement. A working group, installed by the AHC and consisting of 40 people, that was in charge of drafting the first blueprint, comprised 27 government representatives, 12 representatives from associations for disabled people, and other

[255] Markus Wagner, *Non-State Actors* (Oxford: Oxford University Press, 2009), 27.
[256] V. Bernstorff, "On the Legality and Legitimacy of NGO Participation in International Law," KAS.DE, Accessed 26 December 2019, https://www.kas.de/c/document_library/get_file?uuid=4e2e1560-2408-8bfd-9f85-5dea3e38c200&groupId=252038.
[257] Ibid.

NGOs from the field of disability policy, as well as a representative from an independent national human rights organisation. The NGOs, after an internal voting, could appoint respective representatives for the 12 seats allocated to them themselves. The civil society's representatives participating, most of them living themselves with a handicap, had the same speaking and voting rights as the government representatives. Furthermore, some states gave mandates to other representatives of the concerned civil society for the 27 government seats. It should be noted that this, to a large extent, formal equalization of civil society representatives in working out the first official draft treaty had a considerable impact on its contents[258].

Also in the plenum of the AHC, NGOs' representatives during the whole course of negotiations retained an above-average high influence on the negotiations. Already at its first session, the AHC determined the general modalities concerning NGOs participating in its sessions at the General Assembly. According to them, the NGOs accredited for negotiations were hereby enabled to participate in all public sessions of the AHC and to submit statements. In addition, the provision stipulated that in cases of lack of time appointed speakers from civil society could make statements. In practice, during the AHC sessions, the finally more than 600 accredited NGOs often availed themselves of the opportunity. Almost always they also spoke with one voice concerning the contents. Mostly, the NGOs' statement was made by a representative who, due to a specific handicap had himself or herself in the past become a victim of violations. It should be mentioned that these recurrent voices of people affected or their representatives significantly marked the discourse climate within the AHC[259].

Concerning the summarised common position of the NGOs on individual articles, prevailing was the voice and final decision of those special associations, to whom the respective regulation was most pertinent. The interest of a specific group of disabled people (e.g. group of blind people, mentally handicapped people living in a disabled people's home) hereby became the common cause of all non-governmental organisations[260]. It should be concluded that this fact significantly increased their influence on individual regulations in the treaty text.

The chair, furthermore, summarised the respective negotiation results on individual articles in the plenum only after not only the states had given their statements, but also, following them, the NGOs. The interim result stated thereafter by the chair, was, as a rule, a synthesis of the majority opinion of government delegations on the one hand, and NGOs on the other. The chair,

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[258] "History of United Nations and Persons with Disabilities – The first millennium decade," United Nations, Accessed 18 January 2020, https://www.un.org/development/desa/disabilities/about-us/history-of-united-nations-and-persons-with-disabilities-the-first-millennium-decade.html.

[259] Ibid.

[260] V. Bernstorff, "On the Legality and Legitimacy of NGO Participation in International Law," KAS.DE, Accessed 18 January 2020, https://www.kas.de/c/document_library/get_file?uuid=4e2e1560-2408-8bfd-9f85-5dea3e38c200&groupId=252038.

mostly overnight, on the basis of the interim result, set up a new draft version of the negotiated article. This practice significantly differed from other UN bodies, where NGOs could raise their voice only after the operative conclusion of a respective round of negotiation, i.e. at a time when the respective negotiation result had already been decided upon. The dialectically structured negotiation process and the cooperation on equal terms in working out the first overall draft enabled the chair to represent the view of the concerned much more in the treaty text than it would have been possible otherwise. The negotiating diplomat is constantly coerced to take the view of the concerned into account. This view is then, although not fully, but to a greater extent than normally would be the case, included in national positions[261]. To sum up, the participation of NSAs in the preparation of the Draft on the UN Convention on the Rights of Persons with Disabilities is a great example of intensive involvement and initiative of non-state actors in the international law-making process.

Sometimes, specialized NSAs in the human rights arena may influence international norm making by participating in consultations on specialist legal matters. They may also act as lobbyists[262]. Another particularly important area of activity is that of international norm making in the international environmental area[263].

In environmental law, a progressive step has been made by the UN Economic Commission for Europe 2005 concerning the NGO participation. The Commission, in its "Almaty-Guidelines", has agreed to apply them with regard to NGO participation by promoting the principles of the Aarhus Convention. This Convention, that was developed under the aegis of the UN Economic Commission for Europe too, provides for extensive participation rights for NGOs in the field of protection of the environment, or for other in environmental issues interested persons from the public[264]. This encompasses a full and active provision of public information on the objects of negotiation via modern means of media to all interested NGOs and individuals[265]. Furthermore, NGOs due to the Almaty-Guidelines now always have free access to sessions and documents during all phases of the decision-making process in international forums on issues of

[261] Ibid.
[262] C. Ryngaert, "Imposing International Duties on Non-State Actors and the Legitimacy of International Law," paper presented at the Seminar on the FWO Research Community on Non- State Actors in International Law, Leuven, March 2009, https://ghum.kuleuven.be/ggs/research/non_state_actors/publications/ryngaert.pdf.
[263] K. Raustiala, "States, NGOs, and international environmental institutions," *International Studies Quarterly* 41 (1997): 720.
[264] Ibid., 721.
[265] 17. The UN Economic Commission for Europe ,"Almaty Guidelines (IV), U.N. Doc. ECE/MP.PP/2005/2/Add.5, 2005" UNECE, Accessed 20 January 2020, https://www.unece.org/fileadmin/DAM/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.5.e.pdf.

environmental protection. States, in addition, agree to take into consideration the result of the - according to the guidelines as diversely as possible developed - NGO participation[266].

A particular category of non-state actors has had some considerable success in institutional development but less in successful law-making in the sense of adoption by states of the international legal standards they have worked towards. Indigenous peoples across many states hold a unique position in the world and have sought to have their status and rights given effect under international law. There has long been engagement between international institutions and indigenous peoples. The ILO began working on issues pertinent to indigenous peoples as early as 1921, especially in connection with what they termed the "native workers" of Latin America. In the UN era, the ILO adopted Convention No. 107 on Indigenous and Tribal Populations in 1957. This Convention identified members of indigenous peoples as requiring special protection of their human rights but this was within a framework of assimilation that does not "envisage a place . . . for robust, politically significant cultural and associational patterns of indigenous groups". The Convention was revised in 1989 by ILO Convention No. 169. In the meantime, there had been a significant change. Indigenous peoples had ceased to be sole "objects" of international law but had become active participants "in an extensive multilateral dialogue that has engaged states, non-governmental organizations, and independent experts, a dialogue facilitated by human rights organs of international institutions". There was some participation by representatives of indigenous peoples in negotiating the 1989 Convention. The assimilationist perspective had largely given way to one that recognizes the importance of maintaining and developing the identities, languages, and religions of indigenous peoples within their own states of residence[267].

Nevertheless, another instrument negotiated through the wide participation of indigenous representatives was still needed. The mechanism through which this has been sought was the Commission on Human Rights (CHR) Sub-Commission on Prevention of Discrimination and Protection of Minorities. In 1971 ECOSOC authorized the Sub-Commission to work on the subject and in 1982 the Sub-Commission established a Working Group on Indigenous Populations to work on a draft instrument. The Working Group began work in 1985, thus pre-dating ILO Convention No. 169. Indeed, the latter became an "effective extension" of the Working Group, although with less active participation by indigenous persons than in the Working Group. The latter pioneered innovative working methods within the UN, most importantly according to speaking rights to indigenous representatives without requiring them to have an affiliation to any NGO with ECOSOC consultative status. Alongside states, such representatives were able to comment on

[266] Ibid.
[267] "Participants in International Law-Making," Law Explorer, Accessed 28 January 2020, https://lawexplores.com/participants-in-international-law-making/.

proposals and to make their own suggestions. In 1994, the Sub-Commission adopted the Working Group's Draft Declaration on the Rights of Indigenous Peoples[268].

It was hoped that the Draft Declaration would be discussed and adopted in turn by the CHR, ECOSOC and finally the GA[269]. However, the process was long stalled in the CHR. In 1995 the CHR established an open-ended inter-sessional working group to elaborate a draft declaration on the rights of indigenous peoples, considering the Sub-Commission's draft. Unlike the Sub-Commission (and its Working Group) this body comprised state representatives, although it followed the practice of the Sub-Commission Working Group by authorizing as observer's participation by organizations of indigenous people not in consultative status with ECOSOC. Controversial issues included the right to self-determination and land rights. At the first session of the Human Rights Council in 2006, nearly 25 years after the establishment of the Sub-Commission Working Group and after eleven sessions of the Working Group, the non-binding declaration was adopted, although of course this is still a long way from the adoption of a binding convention[270]. It should be emphasized that change in 2006 rested upon the apparent willingness of some states to offer support to the Declaration, illustrating that the political will of states remains crucial to the law-making activities of non-state actors. Moreover, other factors were the support for the declaration in the World Summit Outcome Document and perhaps too the desire for the newly established Human Rights Council to be seen to take a significant law-making step at its first meeting[271]. It should be concluded that the facts which were shown above demonstrate that NSAs still act as little more than a catalyst to traditional forms of state law-making as well as that states remain the actual law-making agencies.

Institutionally there was faster progress. In 1993 the Vienna World Conference on Human Rights recommended consideration of the establishment of a permanent forum for indigenous people within the framework of an international decade of the world's indigenous people. Workshops were held to explore the feasibility of this recommendation and a CHR ad hoc Working Group established. Indigenous representatives participated throughout these processes. The recommendation of the ad hoc Working Group to the CHR was accepted by ECOSOC, which adopted by consensus a resolution establishing the Permanent Forum on Indigenous Issues. The Forum is a subsidiary organ of ECOSOC with advisory status on issues within its mandate. Eight

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[268] John P. Humphrey, "The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities," *The American Journal of International Law* 62, 4 (1968): 875.
[269] Ibid.
[270] "Working Group on the draft declaration on the rights of indigenous peoples," United Nations Human Rights Office of The High Commissioner, Accessed 5 February 2020, https://www.ohchr.org/EN/Issues/IPeoples/Pages/WGDraftDeclaration.aspx.
[271] "Participants in International Law-Making," Law Explorer, Accessed 6 February 2020, https://lawexplores.com/participants-in-international-law-making/.

members are nominated by governments and elected by ECOSOC, and eight members are nominated by the ECOSOC president "on the basis of broad consultations with indigenous organizations". All members serve in their personal capacity "as independent experts on indigenous issues". This composition makes the Forum a unique global body in which indigenous representatives access a UN body on an equal footing with states' representatives. Further, ECOSOC has provided that "organizations of indigenous people may equally participate as observers in accordance with the procedures which have been applied in the Working Group on Indigenous Populations of the Sub-Commission on the Promotion and Protection of Human Rights"[272]. Nevertheless, the long delay in the adoption of the draft Declaration demonstrates that where states deem their interests to be threatened, even extensive participation by non-state actors does not lead to timely international law-making. To sum up, it should be pointed out that through the processes evolved for the drafting and adoption of the draft Declaration by the Sub-Commission and the creation of the Permanent Forum there is now a principle, backed by supporting state practice, that rights of indigenous peoples cannot be determined without their participation and consent[273].

Moreover, there is one more prominent example of NSA which made its contribution to the law-creation process. It should be noted that the International Committee of the Red Cross (ICRC) is known first and foremost for its field operations in aid of victims of armed conflict and internal violence all over the world. Less well-known is the scope of its role as "guardian" of international humanitarian law, the law applicable in situations of armed conflict. It should be mentioned that the role of the ICRC in the formation, application, and monitoring of international humanitarian law is indisputable[274]. Therefore, it is necessary to consider the contribution of ICRC from the date of its creation to the law-making process for the aim of this subchapter.

What was to become the International Committee of the Red Cross met for the first time in February 1863 in Geneva, Switzerland. Among its five members was a local man named Henry Dunant who, the year before, had published a book (A Souvenir of Solferino) calling for improved care for wounded soldiers in wartime. By the end of the year, the committee had brought together government representatives to agree on Dunant's proposal for national relief societies, to help military medical services. And in August 1864 it persuaded governments to adopt the first Geneva

[272] "Establishment of a UN Permanent Forum on Indigenous Issues," United Nations, Accessed 6 February 2020, https://www.un.org/development/desa/indigenouspeoples/about-us/resolution-e200022.html.
[273] "Participants in International Law-Making," Law Explorer, Accessed 6 February 2020, https://lawexplores.com/participants-in-international-law-making/.
[274] Yves Sandoz, "The International Committee of the Red Cross as guardian of international humanitarian law," International Committee of the Red Cross, Accessed 7 February 2020, https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm.

Convention. This treaty obliged armies to care for wounded soldiers, whatever side they were on and introduced a unified emblem for the medical services: a red cross on a white background[275].

Over the following 50 years, the ICRC expanded its work while national societies were established (the first in the German State of Württemberg in November 1863) and the Geneva Convention was adapted to include warfare at sea. The ICRC persuaded governments to adopt a new Geneva Convention in 1929 to provide greater protection for prisoners of war. But despite the obvious broader threats posed by modern warfare, it was unable to have them agree on new laws to protect civilians in time to prevent the atrocities of World War II. Since 1945 the ICRC has continued to urge governments to strengthen international humanitarian law – and to respect it. It has sought to deal with the humanitarian consequences of the conflicts that have marked the second half of the 20th century – starting with Israel and Palestine in 1948. In 1949, at the ICRC's initiative, states agreed on the revision of the existing three Geneva Conventions (covering wounded and sick on the battlefield, victims of war at sea, prisoners of war) and the addition of a fourth: to protect civilians living under enemy control[276]. For instance, in 1965, the ICRC undertook to study the possible revisions to the 1949 Conventions at the 20th International Conference of the Red Cross, held in Vienna in 1965[277]. The Conference adopted a resolution enumerating the following principles:

• That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited.

• That it is prohibited to launch attacks against the civilian populations as such.

• That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population, to the effect that the latter be spared as much as possible.

• That the general principles of the law of war apply to nuclear and similar weapons[278].

It is also important to note that on 19 December 1968 the UN General Assembly adopted a resolution inviting the Secretary General to carry out studies for the revision of earlier conventions on international humanitarian law "in consultation with the International Committee of the Red Cross [279]." And in 1977, two Protocols to the Conventions were adopted, the first

[275] "History of the ICRC, 2016," International Committee of the Red Cross, Accessed 7 February 2020, https://www.icrc.org/en/document/history-icrc.
[276] Ibid.
[277] "International Review of the Red Cross no. 56, 1965," ICRC, Accessed 9 February 2020, https://www.loc.gov/rr/frd/Military_Law/pdf/RC_Nov-1965.pdf.
[278] Ibid., 573.
[279] Frits Kalshoven, *Constraints on the Waging of War* (Geneva: International Committee of the Red Cross, 1987), 21.

applicable to international armed conflicts, the second to internal ones – a major breakthrough. The Protocols also laid down rules concerning the conduct of hostilities[280].

To sum up, it should be pointed out that the ICRC has always had a close and special relationship with international humanitarian law. It has worked on battlefields and has always sought to adapt its action to the latest developments in warfare. It has then reported on the problems encountered, and on that basis has made practical proposals for the improvement of international humanitarian law. In short, it has made a very direct contribution to the process of codification, during which its proposals were examined, and which has led to regular revision and extension of international humanitarian law, notably in 1906, 1929, 1949 and 1977[281].

However, as the Red Cross issued from a private initiative, one might see "Red Cross law" - meaning all the rules drawn up by the International Red Cross and Red Crescent Movement - as an autonomous legal system having no relevance to international law. But this would be quite wrong[282].

Indeed, despite the essentially private origins of the Movement's constituent parts - the National Societies, the ICRC and the Federation - there can be no denying that the deliberations and actions of the International Red Cross are of concern to public international law. Firstly, the States party to the Geneva Conventions take part in the Movement's International Conferences. They are represented by delegates with sufficient powers for them to participate in the debates and to vote in accordance with the instructions of their governments. These delegates therefore legitimately represent the States whose official position they put forward. It should be noted that the participation of government delegates gives the International Conferences an element of public authority which cannot be disregarded by international law. Secondly, the Red Cross and Red Crescent institutions themselves contribute to the formation of international humanitarian law, both by their activities and by the drafting of legal instruments which are then submitted to diplomatic conferences[283].

It can, therefore, be concluded that, although the Red Cross and Red Crescent institutions are governed essentially by private law, by virtue of their composition and their statutes, their

[280] "History of the ICRC, 2016," International Committee of the Red Cross, Accessed 9 February 2020, https://www.icrc.org/en/document/history-icrc.
[281] Yves Sandoz, "The International Committee of the Red Cross as guardian of international humanitarian law," International Committee of the Red Cross, Accessed 11 February 2020, https://www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm.
[282] François Bugnion, "International Review of the Red Cross no. 308, 1995," ICRC, Accessed 12 February 2020, https://www.icrc.org/en/doc/resources/documents/article/other/57jmr8.htm.
[283] Ibid.

actions, and in particular the proceedings of the International Conferences, have a certain relevance to public international law[284].

One more controversial issue which should be highlighted for the purposes of this subchapter is that it has been convincingly argued that international law-making through the negotiation of treaties or other instruments rests upon a unitary model of the state that speaks through the mouth of the head of government (or another relevant ministry)[285].

Anne-Marie Slaughter has criticized this model for discounting the way government networks disaggregate the state and carry out law-making functions. People working in sub-state sectors such as courts, administrative agencies, legislatures, and parliamentarians share professional and technical expertise with those in similar positions in other states. Through their working relationships, they develop networks across state borders in a horizontal system of what Slaughter terms "transnational regulatory cooperation". Such networks may work in conjunction with, or be initiated by, those in expert positions in IGOs, for example, financial networks including World Bank and International Monetary Fund personnel. Experts from civil society groups also assist within public sector transnational networking[286].

Membership of networks is flexible without the formal criteria for participation that are required for non-state actor access to IGOs. Networks facilitate devising solutions to common problems that are formulated through rules and principles in soft law forms such as codes of conduct, guidelines, and best practices. Guiding rules and principles may also be more formally agreed through Memoranda of Understanding. They are implemented by the network participants within their own states. These flexible and informal agreements on common approaches and regulatory mechanisms create the expectation of compliance, in effect international standard-setting. Slaughter gives as examples the Basle Committee on Banking Supervision, the International Organization of Securities Commissioners and the International Association of Insurance Supervisors. The soft character of their agreements avoids the formality of treaty negotiation and the need for incorporation into national law. Transnational networks are facilitated by electronic communications that avoid the expense and time of meetings, or in the case of government networks, the formality of diplomatic meetings. These networks emphasize technical expertise, practice and functional efficiency, although at the expense of openness and transparency[287].

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[284] Ibid.
[285] "Participants in International Law-Making," Law Explorer, Accessed 11 February 2020, https://lawexplores.com/participants-in-international-law-making/.
[286] Ibid.
[287] Ibid.

Similar forms of transnational networking take place through expert groups within the private sector, for example, professional associations and similar epistemic communities. Such networking has had a long history. Writing in 1907 Baldwin listed some 600 meetings of what he termed 'leading congresses, associations and societies of an unofficial description'. He noted that international regulation of matters of the public moment often resulted from private congress inspired by commercial, scientific, philosophic or altruistic motives. A contemporary example is what has been called the "globalization of accounting standards"[288]. The standard setting for accounting has traditionally been carried out by national authorities but this has shifted to the International Accounting Standards Board, a London-based organization whose parent body is a US private corporation and which is largely financed by the 'big four' accountancy firms. Since 2005 the International Financial Reporting Standards (IFRS) prepared by this body have been adopted by all publicly listed companies in the EU and by some 70 other states. As a result, the IFRS have, in effect, become international accounting standards and provide an example of international regulation of technical matters by an epistemic professional community[289].

It should be noted that the various ways in which non-state entities are brought into the law-making processes and the activities of sub-state and professional networks illustrate different forms of participation and their diverse outcomes. Moreover, innovative solutions are possible to allow participation where the political will (or economic reality) requires measures to redress the anomaly of an entity's exclusion from UN institutional law-making, or of a long-marginalized group (as in the case of indigenous peoples). In conclusion, expert networks are a pragmatic (albeit bureaucratic) response in the public or private sector to complex specialist demands which can best be met through transnational cooperation. Treaty-making may be too cumbersome a process to address effectively these demands[290].

Also, even if not directly participating in processes of norm formation, NSAs may still have an impact through the dissemination of information to the public which promote public awareness and transparency[291].

NSAs have not only participated in international law-making games but have also contributed or, more accurately, been allowed to contribute to monitoring compliance with international law. NSA compliance-monitoring can be formal—e.g. when it is provided for in a

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[288] Ibid.

[289] "The International Accounting Standards Board," Deloitte, Accessed 15 February 2020, https://www.iasplus.com/en/resources/ifrsf/iasb-ifrs-ic/iasb.

[290] "Participants in International Law-Making," Law Explorer, Accessed 15 February 2020, https://lawexplores.com/participants-in-international-law-making/.

[291] V. Bernstorff, "On the Legality and Legitimacy of NGO Participation in International Law," KAS.DE, Accessed 16 February 2020, https://www.kas.de/c/document_library/get_file?uuid=4e2e1560-2408-8bfd-9f85-5dea3e38c200&groupId=252038.

treaty or when NGO representatives form part of a compliance or inspection committee—or informal when NGOs simply name and shame governments, armed groups, or corporations. It has a vertical dimension where NGOs monitor state compliance and a horizontal one where NSAs monitor other NSAs' compliance without state mediation. The latter dimension is surely innovative. The efforts of the Geneva Call can be mentioned in this respect[292], as can the role of NGOs in auditing corporations' human rights records. Consumer and investor pressure, e.g., the divestment regarding the fossil fuel industry[293], shows how market forces can also enforce compliance with public values[294]. The operation of the market diminishes the role of the state in compliance-monitoring, as individuals no longer need to cast a ballot when they want politics to change; they can simply vote with their shopping trolley or through their shareholder activism[295].

As far as NSA participation in dispute-settlement mechanisms is concerned, the picture somewhat resembles the games played in law-making. Without the pressure of discrete NSAs, some state-to-state contentious proceedings would not have been brought, e.g., the Whaling case before the ICJ,[296] or, in the case of the World Trade Organization (WTO) Dispute Settlement Mechanism[297], the majority of cases would not have taken place[298]. This is a two-level game, with states running errands for influential NSAs[299].

In contrast, opportunities for direct intervention by NSAs in pending international law disputes are somewhat more circumscribed. The ICJ does not allow such intervention, although, in advisory proceedings, states can refer to written documents and statements submitted by NSAs to the Court[300]. Trade and investment tribunals, as well as domestic courts in some jurisdictions, may for their part allow NGOs to file amicus curiae briefs in limited circumstances[301]. A major breakthrough in international law is obviously the creation of direct access rights for NSA in some areas of international law—notably human rights and investment law—which makes them no

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[292] Cedric Ryngaert, *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (London: Routledge, 2010), 67.
[293] "Fossil Free: Divestment," Gofossilfree, Accessed 18 February 2020, https://gofossilfree.org/divestment/what-is-fossil-fuel-divestment/.
[294] C. Ryngaert and M. Noortmann, *Responsibilities of the non-state actor in armed conflict and the market place: theoretical considerations and empirical findings* (Leiden: Brill Nijhoff, 2015), 24.
[295] Cedric Ryngaert, "Non-State Actors: Carving out a Space in a State-Centered International Legal System," *Netherlands International Law Review* 63, 2 (2016): 184.
[296] "Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment of 31 March 2014," ICJ, Accessed 27 February 2020, https://www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf.
[297] S.A. Aaronson, *Trade and the American dream: a social history of postwar trade* policy (Lexington: University Press of Kentucky, 1996), 64.
[298] Helene Ruiz Fabri, "Is there a case—legally and politically—for direct effect of WTO obligations?," *The European Journal of International Law* 25, 1 (2014): 151-173.
[299] Cedric Ryngaert, "Non-State Actors: Carving out a Space in a State-Centered International Legal System," *Netherlands International Law Review* 63, 2 (2016): 186-187.
[300] E. Levine, "Amicus curiae in international investment arbitration: the implications of an increase in third-party participation," *Berkeley Journal of International Law* 29 (2011): 201.
[301] Ibid., 202.

longer dependent on the mechanism of diplomatic protection. Sometimes, states are also willing to conclude an arbitration agreement with NSAs[302]. Furthermore, as these days international law issues are being litigated much more frequently in domestic courts, it is worth mentioning that NSAs concerned about international issues may in some national jurisdictions have the standing to initiate proceedings single-handedly. For instance, in 2015, Dutch NGO Urgenda successfully brought a case before a Dutch court against the Dutch Government for failing to meet its international obligations to sufficiently reduce greenhouse gas emissions[303]. Also, in 2015, the Polisario Front, a national liberation movement fighting for the self-determination of the Sahrawi people in Western Sahara, was granted standing before the Court of Justice of the European Union (EU) and successfully argued that an EU-Morocco free trade agreement violated the right to self-determination of the Sahrawi people[304]. To sum up, it should be noted that NSAs actively participate in dispute-settlement mechanisms and made a great contribution to settlement of various issues. It should be mentioned that some single-handedly proceedings can be initiated by NSAs concerned about international issues. However, it is done much more frequently only in some national jurisdictions.

Moreover, two great examples of the extent of NGO influence in international decision making should be concerned: the World Court Project as well as the NGO Coalition for an International Criminal Court. The World Court Project was an international citizens' initiative to obtain an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons. Officially launched in 1992 by three international nongovernmental organizations, the initiative was aimed at influencing decision-makers at the World Health Organization (WHO) and the United Nations General Assembly to make the necessary request of the Court, since citizens groups are not allowed by the rules of the Court to seek such an opinion[305]. The Project succeeded; both the WHO and the General Assembly made requests. The second example, the NGO Coalition for an International Criminal Court, has successfully coalesced the efforts of a number of grassroots organizations and "likeminded" governments all over the world

[302] "Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area," Permanent Court of Arbitration, Accessed 27 February 2020, https://pca-cpa.org/wp-content/uploads/sites/6/2016/02/Arbitration-Agreement-between-The-Government-of-Sudan-and-The-Sudan-People's-Liberation-Movement_Army-on-Delimiting-Abyei-Area-July-7-2008.pdf.

[303] Hoge Raad, "Dutch State to reduce greenhouse gas emissions by 25% by the end of 2020," Organisatie Rechtspraak, Accessed 3 March 2020, https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Nieuws/Paginas/Dutch-State-to-reduce-greenhouse-gas-emissions-by-25-by-the-end-of-2020.aspx.

[304] Jed Odermatt, "Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario)," *American Journal of International Law* 111, 3 (2017): 731-738.

[305] Ved P. Nanda and David Krieger, *Nuclear Weapons and the World Court* (Denver: Transnational Pub Inc, 1998), 211.

toward the establishment of an international criminal court[306]. It should be concluded that NSAs have a great influence on the decision-making in various fields.

In conclusion, it should be emphasized that while the state, with its ambitions, has gradually entrenched its power and captured legal and political scholars' imagination, the reality of international life has actually been different[307].

Nowadays, NSAs continue to play a huge role in the functioning of the international legal system. Considering the questions which were raised in the first paragraph it is hard to conclude that NSAs can be regarded as free-standing participants in international law-making. Despite the fact that NSAs do not have a direct impact on the international law-making process they found out another possible option - to influence states as it was shown in the paragraphs above. Examples of how NSAs influence the law-making process were discussed in this subchapter: the important role played by employers' and workers' associations in the International Labor Organization, or the legal value of International Committee of the Red Cross (ICRC) agreements concluded with states as well as its practical proposals for the improvement of international humanitarian law, the great impact of NGOs in international negotiations leading up to the adoption of Conventions on landmines and cluster munitions, development of management standards in the environmental field as well as auditing, labeling and life-cycle assessment standards by International Organization for Standardization, the participation of NSAs in the preparation of the Draft on the UN Convention on the Rights of Persons with Disabilities, where the civil society's representatives participating had the same speaking and voting rights as the government representatives, etc. Moreover, article 71 of the UN Charter enables NGOs to impact the policy-setting and norm-setting process within the UN. As a result, people almost cannot imagine multilateral practice in the field of human rights, humanitarian, and environmental law without them anymore.

To sum up, it should be mentioned that NSAs have already made a great contribution to the law-making, dispute-settlement as well as decision-making processes and probably will make much more in the future.

3.2. Applicability of international humanitarian law to non-state actors

Since its inception, there has been a clear separation in international law between the law of war and the law of peace. The divide has been supported by a belief that war was the sole purview of the state. However, following the end of the Cold War, the nature of conflict changed.

[306] Ved P. Nanda, "Nongovernmental Organizations and International Humanitarian Law," *International Law Studies* 71, 13 (1998): 339, http://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1614&context=ils.
[307] Alexander Orakhelashvili, "The idea of European international law," European Journal of International Law 17, 2 (2006): 318.

The move to a unipolar world, coupled with a new wave of democratization and the increasing globalization of information and economic power, is credited with triggering a surge in micro-nationalism and sometimes violent claims of self-determination. This has resulted in a shift in the balance of conflict from conventional, interstate wars, predominantly driven by political factors, to low-intensity, intrastate wars, predominantly driven by human factors[308].

Over the past 60 years, the number of intrastate wars has doubled, meaning approximately 80 percent of all conflict now involves a non-state actor. As the trend in conflict continues to be dominated by intrastate wars, or more frequently termed "non-international armed conflict", it is useful to understand the relationship that non-state actors have with international law[309]. It should be mentioned that non-state actors are the most dominant party of the armed conflicts.

Moreover, use of force in this era – be it in the international war on terror or in the domestic use of force in internal conflicts during civil wars – is used by and against NSAs[310]. In these conflicts, it is often civilians that face the horrors of war[311]. The concept of IHL exists primarily to decrease human suffering during war and to protect precious human lives. It is considered a set of state-centric rules that bind only governments to abide by the laws of human protection[312]. These state-centric rules are usually inapplicable against NSAs resulting in the world realizing that the applicability of IHL to NSAs is vitally important[313]. These NSAs include anarchists and unlawful terrorists, rebels and warlords who bow to no rules and exercise illegitimate violence[314]. Since the methods used by NSAs severely affect civilians during armed conflicts, legal theorists are trying to bind NSAs with IHL rules and principles to protect civilians by coming up with and applying alternative laws (laws exclusively binding NSAs) or customary international laws (that are universally applicable) to reduce human suffering[315].

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[308] P.C. Stern and D. Druckman, *International Conflict Resolution after the Cold War* (Washington DC: National Academy Press, 2000), 1-2.
[309] D. Kilcullen, "The Future of War? Expect to See Urban, Connected, Irregular, Zombie Conflicts," Foreign Policy, Accessed 5 March 2020, https://foreignpolicy.com/2014/02/05/the-future-of-war-expect-to-see-urban-connected-irregular-zombie-conflicts/.
[310] Belinda Helmke, *Under Attack: Challenges to the Rules Governing the International Use of Force* (New York: Routledge, 2016), 57.
[311] Daniel Rothbart, Karina V. Korostelina and Mohammed Cherkaoui, *Civilians and Modern War: Armed Conflict and the Ideology of Violence (War, Conflict and Ethics)* (London: Routledge, 2012), 127.
[312] Ida Gjerdrum Haugen, "Armed Groups and International Humanitarian Law: A Study on Parallel Legal Agreements, Armed Groups and Compliance with International Humanitarian Law" (master thesis, University of Oslo, 2011), 18, https://www.duo.uio.no/bitstream/handle/10852/13207/MasterThesisIdaGHaugen2011.pdf?sequence=1&isAllowed=y.
[313] Dayana Jadarian, "International Humanitarian Law's Applicability to Armed Non-State Actors" (graduate paper, University of Stockholm, 2007), 37, http://www.juridicum.su.se/juruppsatser/2008/ht_2008_Dayana_Jadarian.pdf.
[314]Caroline Varin and Dauda Abubakar, *Violent Non-State Actors in Africa: Terrorists, Rebels and Warlords* (London: Palgrave Macmillan, 2017), 47.
[315] Andrew Clapham, "The Right and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement," *SSRN Electronic Journal* (2010): 32, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636.

There have been a number of legitimate concerns about applying alternative IHL to NSAs through the use of agreements, such as the concern of providing NSAs with the legitimacy to use force, because without such agreements all use of force by NSAs is considered illegitimate. However, making agreements with NSAs requires admitting NSAs' legitimate authority and thus their authority to use force. As a result, theorists are stuck with the dilemma of balancing the reduction of human suffering and the legitimization of NSAs' authority and their use of force[316].

It should be emphasized that this Master thesis will examine the applicability of IHL to NSAs by finding and explaining the applicable provisions of IHL and discussing the related aspects of such an application.

Only a state can use legitimate force in its territory[317]. NSAs therefore use unlawful force within a sovereign state's territory without authorization in order to meet private ends, such as to assume power, acquire property, collect money, and also for covert civic, political and economic reasons[318]. Usually NSAs are wanted outlaws, such as rebel groups, terrorist groups, mercenaries, and drug/warlords, who fight against their own state[319]. As a result, the state fights back and uses legitimate force against NSAs. However, for political reasons, these NSAs are also used by other states and paid as mercenaries, receiving aid in terms of modern war weaponry, funds and training[320]. They are also backed by these states to fight proxy wars on their behalf. However, it is pertinent to mention here that, in accordance with the ICJ in the Nicaragua case, arming and abetting NSAs in another territorial state violates the international law of using force, with such arming and abetting is even considered an act of aggression[321].

Moreover, NSAs use all sorts of unorthodox weapons and techniques in armed combat, because they are outlaws and do not bow to any rules or regulations. For example, terrorists use suicide vests to blow themselves up as a means of using force and causing terror and fear. Similarly, rebels in Syria have used chemical weapons against civilians, which is outlawed[322]. The UN defines an NSA as a group of people that has "the potential to employ arms in the use of force to achieve political, ideological or economic objectives; but are not within the military structures of states, state-alliances or intergovernmental organizations; and are not under the control of the

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[316] Caroline Varin and Dauda Abubakar, *Violent Non-State Actors in Africa: Terrorists, Rebels and Warlords* (London: Palgrave Macmillan, 2017), 48.
[317] Jean Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* 306 (London: Eerdmans, 2010), 303.
[318] Natasha Ezrow, *Global Politics and Violent Non-state Actors* (London: SAGE Publications Ltd, 2017), 30.
[319] Ibid, p. 31.
[320] Luiz Alberto Moniz Bandeira, *The Second Cold War: Geopolitics and the Strategic Dimensions of the USA* (New York: Springer, 2017), 246.
[321] Max Hilaire, *International Law and the United States Military Intervention in the Western Hemisphere* (Hemisphere: Martinus Nijhoff Pub., 1997), 101.
[322] "UN's Del Ponte says evidence Syria rebels used sarin," BBC NEWS, Accessed 7 March 2020, https://www.bbc.com/news/world-middle-east-22424188.

state(s) in which they operate"[323]. In this respect, the topicality of the IHL's application to NSAs is quite important and needed a deeper analysis.

As was previously mentioned in the Chapter 2, there is no universally accepted definition of NSAs. For the purpose of this subchapter, an NSA is defined as any organized group with a basic structure of command operating outside state control that uses force to achieve its political or allegedly political objectives[324]. Such actors include "rebel groups" and governments of entities which are not (or not widely) recognized as states. This definition excludes paramilitaries that are under the "effective control" of a state, but it does not exclude when an NSA is fighting another NSA. The criterion of a basic command structure is especially important for humanitarian practitioners, since in the absence of a chain of command the NSA is more a loose grouping of armed individuals than a defined actor[325]. This definition is closely related to the general definition that was given in Chapter 2 but with some additional remarks with regard to NSAs in the war period.

There are three prominent theories for how IHL is already applicable to NSAs. However, it is apparent that NSAs choose to ignore it. For instance, terrorist organizations break laws and rules during their acts of terrorism, such as bombing innocent children in schools[326]. The first argument is that, like all non-party states, NSAs are bound by customary international law, including the principles of distinction, proportionality, precaution and necessity and the prohibition on indiscriminate attacks[327]. By this argument, even if NSAs have not agreed to or have signed a treaty, they are still bound by IHL, since IHL also acts as customary international law[328]. This argument is backed by the inclusion of NSAs in common Article 3 of the Geneva Conventions (GC) and its self-explanatory declaration that customary international humanitarian law is applicable to NSAs. This group goes so far as to assert that, since IHL is universal in nature and seeks to ensure the protection of civilians in armed conflict, everyone – including NSAs – is bound by its rules[329].

The second argument is that, owing to the applicability of all domestic laws to NSAs, NSAs are bound by all of IHL through its inclusion in legislation/domestic law[330].

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[323] Luiz Alberto Moniz Bandeira, *The Second Cold War: Geopolitics and the Strategic Dimensions of the USA* (New York: Springer, 2017), 246, 291-295.
[324] Anki Sjöberg, "Armed Non-State Actors and Landmines," *Journal of Mine Action* 11, 1 (2007): 25.
[325] Ibid.
[326] Kevin D. Burton, *Managing Emerging Risk: The Capstone of Preparedness* (Boca Raton: CRC Press, 2016), 142.
[327] Tatiana Londono-Camargo, "The Scope of Application of International Humanitarian Law to Non-International Armed Conflicts," *Vniversitas* 130 (2015): 207, 223.
[328] Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, "International law and armed non-state actors in Afghanistan," *International Review of the Red Cross* 93, 881 (2011): 9.
[329] Chris De Cock, "Counter-Insurgency Operations in Afghanistan," *Yearbook of International Humanitarian Law* 13, 97 (2010): 109.
[330]Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, "International law and armed non-state actors in Afghanistan," *International Review of the Red Cross* 93, 881 (2011): 9-10.

The third argument is that IHL is applicable to NSAs since they are bound by all the legal responsibilities and obligations of the state where they are operating[331]. The argument continues that all the IHL obligations that bind a state also bind all NSAs and individuals within the territories of that state. This argument is known as the "principle of legislative jurisdiction", by which NSAs are automatically bound by all state obligations[332]. This claim is even substantiated by common Article 3, which makes NSAs also responsible for IHL rules and regulations. Noticeably, the United Nations Security Council is also of the view that NSAs are bound by IHL in internal armed conflicts[333]. While NSAs cannot legally become parties to treaties, and cannot contribute to creating customary international law, the prevailing view is that IHL is applicable to NSAs. For these reasons, it can be established that all kinds of NSAs are already bound by IHL[334]. Despite the fact that the applicability of the IHL to NSAs is quite problematic issue the abovementioned prominent theories for how IHL is already applicable to NSAs show such possibility but in a limited and controversial manner.

In 2004, the Appeals Chamber of the Sierra Leone Special Court simply held that "it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties"[335]. It has now become uncontroversial, even commonplace[336], to refer to non-state parties to an armed conflict being bound by international humanitarian law – the legal reasoning required to come to this "well-settled" conclusion remains, however, unclear[337]. Even the Appeals Chamber of the Sierra Leone Special Court confirmed the fact that IHL is binding to the NSAs, but again how it should be applied is quite an interesting issue.

In this respect, it should be analyzed the main provisions of the different sources of the IHL and their applicability to the NSAs. NSAs are explicitly mentioned under the IHL provisions of the Geneva Conventions, its additional protocols, customary international law and the Rome

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[331] Claudie Barrat, *Status of NGOs in International Humanitarian Law* (Leiden: Martinus Nijhoff, 2014), 232.
[332] M. Noortmann, A. Reinisch and C. Ryngaert, *Non-State Actors in International Law* (Portland: Hart Publishing, 2015), 87.
[333] Tatiana Londono-Camargo, "The Scope of Application of International Humanitarian Law to Non-International Armed Conflicts," *Vniversitas* 130 (2015): 222.
[334] Ibid, p. 223.
[335] "Prosecutor v. Sam Hinga Norman (Case No. SCSL-2004-14-AR72 (E)), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 2004," Sierra Leone, Accessed 17 March 2020, https://sierralii.org/sl/judgment/special-court/2004/18.
[336] "Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL) (2009/C 303/06),2009," EUR-LEX, Accessed 17 March 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009XG1215(01).
[337] M. Sassoli, "Transnational Armed Groups and International Humanitarian Law," *Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series* 4, 6 (2006): 14, https://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf.

Statute of the International Criminal Court. For the purposes of this Thesis, it should be analyzed all of them.

Common Article 3 to the Geneva Conventions of 1949 is addressed to "each Party to the conflict" and this Article applies to conflicts "not of an international character". The first requirement in this Article is that there must be a non-international armed conflict for the Article to apply, and one party to that conflict must be a state[338]. This means that this Article applies only to internal conflicts and not to international conflicts[339]. Scholars argue that the other party must be non-state, such as an NSA. Over the years, case law, customary law and state practices have established that common Article 3 does indeed apply to NSAs[340]. In accordance with the International Criminal Tribunal for the Former Yugoslavia, there must be two characteristics for the application of IHL to an NSA[341]. The first is that the duration of the armed conflict must be sufficiently long. The second is that the NSA must be organized[342]. For instance, the fight against Al-Qaeda in Afghanistan has been going on for a long time, and Al-Qaeda as a terrorist organization certainly shows the signs of an organized group. Therefore, Article 3 is applicable to the armed conflict between Afghanistan and Al-Qaeda[343]. However, Article 3 does not require any prerequisites for the application of IHL; it is simply applicable to all NSAs. Nevertheless, it is pertinent to note that this Article in no way decreases the state's right to put down these rebels or terrorists[344].

Moreover, the designation of a situation as "an armed conflict not of an international character", so as to trigger the application of Common Article 3 to the Geneva Conventions of 1949, is obviously an act of considerable political importance for all sides to the conflict. The rebels will often welcome the designation of their attacks as constituting armed conflict, since this confers a curious sort of international recognition on them, and the applicability of Common Article 3 reinforces the special role of the International Committee of the Red Cross (ICRC)[345].On the other hand, as already noted, the government may be less willing to acknowledge the situation

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[338] "Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949," UN, Accessed 15 March 2020, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf.
[339] Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), 35-36.
[340] "Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949," UN, Accessed 15 March 2020, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf.
[341] Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, "International law and armed non-state actors in Afghanistan," *International Review of the Red Cross* 93, 881 (2011): 10.
[342] Tamas Hoffman, "Trying Communism through International Criminal Law? The Experiences of the Hungarian Historical Justice Trials," in *The Hidden Histories of War Crimes Trials*, Kevin Heller, Gerry Simpson (Oxford: Oxford University Press, 2013), 234.
[343] Ibid., 235.
[344] "Article 3 : Conflicts not of an International Character," ICRC, Accessed 15 March 2020, https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3.
[345] Ibid.

as one of armed conflict, preferring instead to portray it as a fight against criminals and terrorists. To be clear, the application of the obligations does not depend on any acceptance by the government that the threshold for the applicability of humanitarian law has been reached. In some cases, the situation is put beyond doubt by UN resolutions stating that the humanitarian rules contained in Common Article 3 are to be respected by both sides in a particular conflict[346].

Most recently the US Supreme Court has pointed to the applicability of Common Article 3 with regard to the procedural guarantees offered by military commissions due to try individuals captured in Afghanistan during the conflict there between the United States and Al Qaeda. The Court held that Common Article 3 was applicable to that conflict[347]. Deputy Secretary of Defense Gordon England latest issued a memorandum which started "The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda." The memorandum then requested defense commands and departments to start a prompt review of policies and procedures ''to ensure that they comply with the Standards of Common Article 3"[348]. For our purposes it is worth simply recalling that if Common Article 3 is indeed applicable, then the terms of Common Article 3 refer to obligations for each "Party" to the conflict; in this case this means international obligations not only for the United States but also for Al Qaeda (and its members to the extent that their actions constitute war crimes)[349]. In this respect, it should be concluded that the court practice confirmed the fact that Common Article 3 is applicable to both parties of non-international armed conflict.

Also, the treaties then would seem to have a provision which directly binds the non-state armed group. The problem arises, however, in the following way: treaties are only binding on the contracting parties to them, and the Geneva Conventions and related humanitarian law treaties are not normally open for signature by armed non-state groups. The exception to this general rule is where a third state accepts to be bound by the treaty obligations in question[350]. And an exception in the particular field of international humanitarian law can be found in Article 96(3) of the 1977 Additional Protocol I to the Geneva Convention of 1949 allowing for a declaration by certain armed non- state actors (known as national liberation movements) that such an actor undertakes to

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[346] A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 15.
[347] Salim Ahmed Hamdan v. Donald H. Rumsfeld et al., 548 U.S. 557, 2006," ICRC, Accessed 17 March 2020, https://casebook.icrc.org/case-study/united-states-hamdan-v-rumsfeld.
[348] Roza Pati, *Due Process and International Terrorism* (Boston: Martinus Nijhoff Publishers, 2009), 426.
[349] "Human Rights Obligations of Non-State Actors in Conflict Situations, 2006," ICRC, Accessed 17 March 2020, https://international-review.icrc.org/articles/human-rights-obligations-non-state-actors-conflict-situations.
[350] "Vienna Convention on the Law of Treaties, 1969," UN, Accessed 17 March 2020, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

apply the Protocol and the Geneva Conventions to that particular conflict[351]. It should be mentioned that national liberation movements are a great example of the NSAs.

The principle that third states cannot be bound by a treaty to which they are not a party is so familiar, and so obviously derived from principles of contract law, that it is often associated with the Latin maxim: *pacta tertiis nec nocent nec prosunt*. In the face of this formidable Latin obstacle should we not simply conclude that in the face of a principle dating back to Roman Law there is nothing a treaty can do to bind an armed group? Perhaps not, perhaps we should look a little more closely at the changing structure of the international legal system. First, it is increasingly accepted that a treaty can create not only rights for individuals but also obligations. Dinstein puts it bluntly: "It is a commonplace today that treaties can directly impose obligations on – and accord rights to – individual human beings[352]".

Second, the UN Charter is a treaty, and, as such, one might assume that it is merely binding on the member states. And yet from early on in the UN's history there has been a sense that the purposes of the UN were so essential that non-member states could be bound by decisions of the member states. In the words of one authoritative treatise discussing the effect of the UN Charter on non-member states: "as international society becomes a more integrated community, a departure from the accepted principle becomes unavoidable, in particular in the sphere of international peace and security"[353]. It seems that with regard to certain principles in the UN Charter this treaty can be seen as creating binding obligations on non-parties, but that this *manoeuvre* is probably dependent on the fact that those same Charter principles are now seen as binding customary international law[354]. It this respect, it should be concluded that it seems likely applicable to the NSAs.

Applying this reasoning to Common Article 3 to the Geneva Conventions it should be assumed that the universal adherence to the Geneva Conventions together with the legal consensus that the Article applies as customary international law[355], allow us to conclude that this provision is indeed binding on armed groups[356]. It is worth noting that the UK Ministry of Defence relies on the treaty as such and with reference to Common Article 3 states: "These purports to bind all parties, both states and insurgents, whether or not the latter have made any declaration of intent to

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[351] Noelle Higgins, "The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements," Inter-American Court of Human Rights, Accessed 17 March 2020, http://www.corteidh.or.cr/tablas/r23526.pdf.
[352] Y. Dinstein, "The Interaction Between Customary International Law and Treaties," *RCADI* 322 (2006): 246.
[353] R. Jennings and A. Watts, *Oppenheim's International Law* (London: Longman, 1996), 1265.
[354] M. Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 929.
[355] "Nicaragua v United States of America, International Court of Justice, 1986," ICJ, Accessed 18 March 2020, https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf.
[356] Jelena Pejic, "The protective scope of Common Article 3: more than meets the eye," ICRC, Accessed 20 March 2020, https://www.icrc.org/es/doc/assets/files/review/2011/irrc-881-pejic.pdf.

apply the principles"[357]. Similarly, the language of the International Court of Justice suggests that the Contras in Nicaragua were bound by the terms of Common Article 3 rather than merely by the principles which it embodied: "The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions"[358]. It seems logical to use the same reasoning of applying Common Article 3 to the NSAs.

However, before simply applying this logic to all humanitarian law provisions applicable in internal armed conflict, it should be needed to admit that Common Article 3 was singled out by the International Court of Justice "as a minimum yardstick … rules which, in the Court's opinion, reflect … elementary considerations of humanity"[359]. Therefore, it should be concluded that international law accepts that Common Article 3 is binding on non-state parties to a conflict, due perhaps to a combination of the special nature of the norms and the universal acceptance of the treaties, the case may be less certain for other norms found in treaties applicable in non-international armed conflicts. These treaties may enjoy less than universal adherence and the norms they detail may not always be considered as representing customary international law[360]. In this respect, the applicability Common article 3 to the NSA's is less controversial.

Similar to common Article 3, Additional Protocol II also discusses the applicability of IHL to NSAs[361]. Article 1, paragraph 1, of Additional Protocol AP II reads:

To all armed conflicts … which takes places 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[362].

In comparison to common Article 3, Article 1 of AP II raises the threshold of applicability of IHL to NSAs. The NSA must reflect all four characteristics outlined under Article 1 of AP II. First, the NSA must have system of "responsible command" for allocating responsibility[363], such as the Taliban's "Code of Conduct"[364]. Second, the NSA must control a significant territory. Third,

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[357] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), 385.
[358] "Nicaragua v United States of America, International Court of Justice, 1986," ICJ, Accessed 18 March 2020, https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf.
[359] Ibid, para 218.
[360] Andrew Clapham, "The Right and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement," *SSRN Electronic Journal* (2010): 8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636.
[361] "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977," The Office of the High Commissioner for Human Rights, Accessed 20 March 2020, https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolII.aspx.
[362] Ibid.
[363] Ibid.
[364] Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, "International law and armed non-state actors in Afghanistan," *International Review of the Red Cross* 93, 881 (2011): 6.

the NSA must have sustained continuous armed attacks on the state. Fourth, the NSA must be able to implement the protocol[365]. Scholars have argued that such state-like characteristics, together with the requisite of implementing the protocol, makes it apparent that the protocol is only applicable to the parties already implementing it[366].

At the time of the drafting of Protocol II to the Geneva Conventions, several states explained their conviction that insurgents engaged in a civil war were simply criminals, and that the protocol conferred no international legal personality on them[367]. However, this treaty is today assumed to contain obligations for rebels who fulfil the criteria in the Protocol and where the fighting has passed the Protocol's threshold. Various theories have been suggested to explain how a treaty such as Protocol II entered into by states can create international duties for the rebel group as such[368]. Today, even in the absence of a consensus on a theoretical justification, it has become clear that, not only are rebels bound as parties to the conflict by Common Article 3 to the Geneva Convention, but they are also bound by the provisions of Protocol II. Indeed, from early on the ICRC Commentary to the Protocol simply asserted this to be the case: "The deletion from the text of all mention of 'parties to the conflict' only affects the drafting of the instrument, and does not change its structure from a legal point of view. All the rules are based on the existence of two or more parties confronting each other. These rules grant the same rights and impose the same duties on both the established government and the insurgent party, and all such rights and duties have a purely humanitarian character[369]."

The Commentary highlights the theories which allow for the imposition of international duties on individuals and groups and asserts that the fact of application is not challenged by states in practice. The question is often raised as to how the insurgent party can be bound by a treaty to which it is not a high contracting party. It may therefore be appropriate to recall here the explanation given in 1949: "The commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State. Although this

[365] "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977," The Office of the High Commissioner for Human Rights, Accessed 20 March 2020, https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolII.aspx.
[366] Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, "International law and armed non-state actors in Afghanistan," *International Review of the Red Cross* 93, 881 (2011): 7.
[367] Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts," *International and Comparative Law Quarterly* 30, 3 (1981): 418.
[368] Ibid, 419.
[369] The International Committee of the Red Cross, "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949," ICRC, Accessed 22 March 2020, https://ihl-databases.icrc.org/ihl/COM/470-750001?OpenDocument.

argument has occasionally been questioned in legal literature, the validity of the obligation imposed upon insurgents has never been contested[370]".

In this respect, it may be useful for the purposes of this Master thesis to consider the existing legal arguments for the application of these obligations to armed opposition groups under four headings. First, private individuals and groups are bound as nationals of the state that has made the international commitment. Second, where a group is exercising government-like functions it should be held accountable as far as it is exercising the de facto governmental functions of the state[371]. Third, the treaty itself directly grants rights and imposes obligations on individuals and groups. Fourth, obligations such as those in Common Article 3 are aimed at rebel groups, and it has been argued by Theodor Meron that the effective application of these rules should not depend on the incorporation of duties under national law. In Meron's words, "therefore, it is desirable that Article 3 should be construed as imposing direct obligations on the forces fighting the government[372]".

The theoretical basis for the application of the laws of internal armed conflict remains misty. Such theories have rarely been articulated by governments or international organizations in their application of international law to rebel groups. For example, in 1998 with regard to Afghanistan the UN Security Council simply reaffirmed that "all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular under the Geneva Conventions" of 1949[373]. Interestingly, the resolution goes on to state that "persons who commit or order the commission of breaches of the Conventions are individually responsible in respect of such breaches". This confirms at the highest level that individual responsibility attaches to violations of international humanitarian law in internal armed conflicts (even outside the contexts of Yugoslavia, Rwanda and the regime of the International Criminal Court)[374]. It should be found that the applicability of the IHL to the NSAs is confirmed also by the Resolutions of the Security Council.

Also, consider Article 4(3)(c) of 1977 Additional Protocol II which reads "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities". This would seem to create an immediate set of obligations for any "group" not to recruit such a child nor allow them to take part in hostilities. How can a treaty create such an obligation for an armed group? If the logic is similar to that for the application

[370] Ibid.
[371] Rudiger Wolfrum and Christiane E. Philipp, "The Status of the Taliban: Their Obligations and Rights under International Law," *Max Planck Yearbook of United Nations Law* 6 (2002): 559–601.
[372] Theodor Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge: Grotius, 1987), 39.
[373] Menno T. Kamminga, *Challenges in International Human Rights Law* (Abingdon: Routledge, 2014), 85.
[374] Ibid, 86.

of Common Article 3, the treaty on its face expressly binds a third party and in any event is universal and an elemental consideration of humanity[375]. But the treaty does not enjoy universal ratification, and in practical terms it is likely that lawyers will resort to customary international law or some accumulated set of obligations in order to prove the international individual criminal responsibility of the members of the group. This will particularly be the case where the armed conflict takes place in a state not a party to Protocol II or the tribunal has no particular jurisdiction over Protocol II. The tribunal may rely on a particular provision in its own statute or a generic category such as violations of the laws and customs of war[376].

Another set of treaties that it should be considered are those relating to weapons. As with Protocol I, national liberation movements as a great example of NSAs can make a declaration under the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW)[377]. Such a declaration can bring into force, not only the Weapons Convention and its Protocols, but also the Geneva Conventions, even where the state against which the liberation movement is fighting is not a party to 1977 Protocol I[378]. Nevertheless, no such Declaration has been successfully made either under this Convention or under 1977 Protocol I[379].

Since 2001 the Convention has been amended so that it now reads: "In case of armed conflicts 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 the prohibitions and restrictions of this Convention and its annexed Protocols"[380]. This applies only in situations where the relevant state has ratified the amendment, in other cases the relevant provisions will only apply to inter-state conflicts, with the exception of the provisions in Amended Protocol II (Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices) and Protocol V (Explosive Remnant of War)[381]. Other weapons treaties may or may not extend to situations of internal armed conflict but there are apparently no explicit provisions aimed at the non-state parties to the conflict[382]. Despite

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[375] Andrew Clapham, "The Right and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement," *SSRN Electronic Journal* (2010): 10, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636.
[376] Ibid.
[377] "Protocol Additional to the Geneva Conventions on 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977," ICRC, Accessed 27 March 2020, https://ihl-databases.icrc.org/ihl/INTRO/470.
[378] Menno T. Kamminga, *Challenges in International Human Rights Law* (Abingdon: Routledge, 2014), 156.
[379] Ibid, 157.
[380] "Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980," ICRC, Accessed 27 March 2020, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/385ec082b509e76c41256739003e636d/af62e5065f4e9646c1256bb3003bae4f?OpenDocument.
[381] Andrew Clapham, Paola Gaeta and Tom Haeck, *The Oxford Handbook of International Law in Armed Conflict* (Oxford, Oxford University Press, 2014), 775.
[382] W.H. Boothby, *Weapons and the Law of Armed Conflict* (Oxford: Oxford University Press, 2009), 18.

the express inclusion of a need to prevent the use of cluster munitions by armed groups the new Convention on Cluster Munitions confines itself to a preambular commitment that the states parties are: "Resolved also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention". Commentators have not seen this as creating any international obligations on the armed groups as such; nevertheless, it has been argued that as the treaty refers to a ban on assistance to "anyone" engaged in prohibited activities this must be read to include assistance to such armed groups[383]. It should be concluded that state parties are prohibited under the treaty from assisting NSAs to use cluster munitions, while the NSAs are not considered as subject to obligations under the same treaty. It simply means that NSAs are not obliged to don't use such prohibited kinds of weapons.

This duality is not confined to weapons treaties. Even where a humanitarian treaty on the methods of war applies to the state party in an internal armed conflict, there may be doubts as to the generation of obligations for the armed non-state actor. Like Common Article 3, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict seeks to single out a set of obligations for the non-state armed group. Article 19(1) states that "each Party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property." But the 1999 Protocol II to the Hague Convention of 1954, while it extends to internal armed conflicts, seems to specifically address its key obligations to a state "Party" (with a capital P) to the Protocol rather than the "parties" to the conflict (with a small "p"). This exclusive capitalization for state "Parties" is not present in the Geneva Conventions of 1949 nor in the Hague Convention of 1954. Article 1(a) to Protocol II, however, draws this distinction in unambiguous terms. "For the purposes of this Protocol: a. "Party" means a State Party to this Protocol'. Moreover, the Protocol, while it is extended to non-international armed conflicts on the territory of a 'State Party' to the Protocol[384], nowhere demands substantive obligations from the non-state party as the obligations are addressed to Parties or a Party. The Protocol seems on its face and at first glance to address non-state actor "parties" (with a small "p") mainly to remind that the application of the Protocol to an internal armed conflict "shall not affect the legal status of the parties to the conflict[385]". This state-centric reading is, however, contradicted by Henckaerts, who participated in the drafting, and who writes that such "a literal interpretation would lead to a manifestly absurd result of declaring a treaty applicable to

[383] B. Docherty, "Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law," *Human Rights Quarterly* 34 (2009): 934-935.
[384] "Human Rights Obligations of Non-State Actors in Conflict Situations, 2006," ICRC, Accessed 27 March 2020, https://international-review.icrc.org/articles/human-rights-obligations-non-state-actors-conflict-situations.
[385] Ibid.

non-international armed conflicts and at the same time eliminating most o of its practical relevance in such conflicts[386]". According to Henckaerts' appreciation at the time[387]:

"Although Article 22 of the Second Protocol does not spell it out as clearly as it could have, the Protocol applies to all parties to a non-international armed conflict, whether governmental or insurgent forces. This was clearly acknowledged at the final plenary session. A certain confusion arose because Article 1 of the Protocol defines the word "Party" as a State Party to the Second Protocol. However, the understanding was that throughout the text the word "Party" in the phrase "Party to the conflict" includes rebel groups of States party to the Second Protocol but not third States which have not ratified the Second Protocol[388]. The reasoning was that non-governmental forces involved in a non-international armed conflict within a State party to the Protocol are bound by the Protocol through the ratification of the State concerned[389]."

While treaty law remains important, it can be ambiguous as to whether it binds non-state actors. In any event it remains unclear how a treaty obligation applies in international law to the non-state armed group through ratification by the state it is fighting against[390]. In this respect, the question of customary international law has become crucial. It should be found for the purposes of this Master thesis how customary international law is applied to NSAs.

Inquiries into customary international humanitarian law have taken off in recent years[391], in part due to the perceived need to prove that certain obligations are customary so that they can form the basis for the prosecution of an individual for an international crime before an international criminal tribunal. Despite the articulation of certain crimes in the relevant Statutes the ad hoc International Criminal Tribunals have chosen to examine whether the events are covered by applicable customary international law, before going on to determine whether customary international law entails individual criminal responsibility[392].

But the turn to custom is also essential beyond the question of individual prosecution and has been central in the context of fact-finding missions and commissions of inquiry charged with determining violations of international law by armed non-state actors. In contrast to many

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[386] R. O'Keefe, "Protection of Cultural Property," in *The Handbook of Humanitarian Law in Armed Conflict*, D. Fleck (Oxford: Oxford University Press, 2007), 433.
[387] Jean-Marie Henckaerts, "New rules for the protection of cultural property in armed conflict,1999," ICRC, Accessed 27 March 2020, https://www.icrc.org/en/doc/resources/documents/article/other/57jq37.htm.
[388] Ibid.
[389] Ibid.
[390] Andrew Clapham, "The Right and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement," *SSRN Electronic Journal* (2010): 9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636.
[391] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), 35.
[392] "Prosecutor v. Dusko Tadic a/k/a "DULE" (Decision on the defence motion for Interlocutory Appeal on Jurisdiction)," Appeals Chamber, Decision of 2 October 1995 (Case no. IT-94-1-AR72), ICTY, Accessed 29 March 2020, https://www.icty.org/x/cases/tadic/acdec/en/51002.htm.

provisions of treaty law, customary international law will usually be binding on the non-state actor as such[393]. In this context the work of the Darfur Commission is instructive. Here the Commission set a threshold for the capacity of any rebel group to bear international obligations under customary international law. "The SLM/A and JEM, like all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts referred to above. The same is probably true also for NMRD"[394]. It seems positive with respect to whether customary international law is binding to NSAs.

Turning to the question of prosecution of individuals we should note that, even where the Statute of an International Criminal Tribunal clearly spells out the obligations for an individual there may be questions as to whether the armed non-state actor can be considered to know of the applicability of such a norm. Although the first trial before the International Criminal Court was not asked to rule on whether the relevant crime was a violation of customary international law, the defence did ask the Court to rule on "whether Thomas Lubanga Dyilo was aware of the existence of the crime of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities and whether he could foresee that the conduct in question was criminal in nature and could therefore entail his criminal responsibility[395]". The Pre - Trial Chamber mentioned the finding by the Sierra Leone Special Court's Appeal Chamber that the prohibition on child recruitment had crystallized "as a customary law norm[396]". But the Chamber seems to place more emphasis on the fact that the communities of Ituri "were familiar with the Statute [even before its entry into force] and the type of conduct which gives rise to criminal responsibility under the Statute"[397], and that in fact "Kristine Peduto explained that on 30 May 2003 she discussed child protection issues and matters relating to the ratification of the Rome Statute by the DRC with Thomas Lubanga Dyilo"[398]. It is important to conclude that some provisions of the IHL are recognized as customary law.

Similar to common Article 3 of GC and Article 1 of AP II to the GC, Article 8 (e) and (f) of the Rome Statute of the International Criminal Court applies IHL to NSAs[399]. Article 8 (f) reads:

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[393] Wilmshurst and S. Breua, *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2007), 8.
[394] Ibid.
[395] "Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges (ICC-01/04-01/06-803-tEN), 2007," International Criminal Court, Accessed 30 March 2020, https://www.icc-cpi.int/pages/record.aspx?uri=266175.
[396] Ibid, para. 311.
[397] Ibid, para. 312.
[398] Ibid, para. 313.
[399] Kristen E. Boon, "The Application of Jus Post Bellum in Non-International Armed Conflicts," in *Jus Post Bellum: Mapping the Normative Foundations*, Carsten Stahn, Jennifer S. Easterday, Jens Iverson (Oxford: Oxford University Press, 2014), 263.

"Article 8 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between government authorities and organized armed groups or between such groups[400]".

In a similar way to common Article 3, Article 8 of the Rome Statute also applies to internal conflicts within a state[401]. The threshold of applying IHL to NSAs is higher than that of common Article 3 but lower than that of Article 1 of AP II. This Article sets out four main prerequisites for the application of IHL to NSAs. First, the armed conflict must be non-international. Second, the conflict must be protracted and not sporadic. Third, the NSA must be organized. Fourth, the conflict must be between a state and an NSA, or between one NSA and another (even without involving the state)[402]. Moreover, Article 8 (e) outlines IHL. It states that "civilians, transpiration vehicles, buildings, religious places, wounded people and property cannot be targeted in an armed conflict", while prohibiting the use of "slavery, forced prostitution, forced pregnancy, rape, sexual violence, displacement of civilians, poisoned weapons and underage combatants in the armed conflicts[403]". It should be concluded that Rome Statute also applies to NSAs.

It should be strongly finalized that the *rationale* for the pretended binding character of IHL at whole, and in particular Common Article 3 of the Geneva Conventions and its Additional Protocol II, for NSAs remains somewhat elusive. In previous paragraphs were mentioned the different explanations of whether such groups are bound by those conventions, in spite of their not having signed up to them, have been offered, none of them being fully satisfactory.

In what is seen as the majority view, non-State actors are bound by IHL by reason of their being active on the territory of a Contracting Party (a State Party to the Geneva Conventions and/or its Additional Protocols). This theory is also referred to as the "principle of legislative jurisdiction", pursuant to which the agreements which a State enters into are automatically binding on all (non-State) actors within its jurisdiction[404]. The advantage of this theory is that it may subject all armed groups active on a State territory to IHL, whether or not these groups have consented to be bound. The apparent redundancy of consent is the main flaw of this theory, however.

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[400] "Rome Statute of the International Criminal Court (A/CONF.183/9), 2002," ICC, Accessed 30 March 2020, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.

[401] Kristen E. Boon, "The Application of Jus Post Bellum in Non-International Armed Conflicts," in *Jus Post Bellum: Mapping the Normative Foundations*, Carsten Stahn, Jennifer S. Easterday, Jens Iverson (Oxford: Oxford University Press, 2014), 264.

[402] Dr. Waseem Ahmad Qureshi, "Applicability of International Humanitarian Law to Non-State Actors," *Santa Clara Journal of International Law* 1 (2019): 17, https://digitalcommons.law.scu.edu/scujil/vol17/iss1/2/.

[403] "Rome Statute of the International Criminal Court (A/CONF.183/9), 2002," ICC, Accessed 30 March 2020, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.

[404] Cf. S. Sivakumaran, "Binding Armed Opposition Groups," *International and Comparative Law Quarterly* 55 (2006): 393.

Deconstructing the State by submitting that State governments can bind the people because they represent the people only takes us so far. In reality, there are no groups that feel less represented by the State than armed opposition groups. The theory binds those groups by IHL without their consent, which in turn risks to adversely affect their compliance with IHL. Sivakumaran seems to believe that he can remedy this defect by highlighting to armed groups the inherent legitimacy of the rule (its substantive content: its importance for the well-functioning of the international community) over its procedural legitimacy (the fair and inclusive procedure of its adoption), where he states that "compliance in this regard is likely affected more by the degree of legitimacy the armed opposition group sees in the rules than the precise manner in which they are bound"[405]. However, he fails to explain this substantive legitimacy argument: what is it precisely that endows IHL rules with inherent legitimacy? In fact, his argument falls flat in his very next sentence, where he pleads for enhancing procedural legitimacy all the same: "In order to increase the degree of legitimacy of and foster a sense of respect for the laws governing internal armed conflict, participation of armed opposition groups in the formation of the rules is vital[406]". The concept of substantive legitimacy is nevertheless an interesting one, as it may indeed overcome procedural consent problems. Notably in the field of international criminal law has it been put to good use: for a limited number of international crimes, international criminal responsibility attaches irrespective of the capacity of the perpetrator and irrespective of his consent to the relevant rules. Given the heinous character of the crimes, the international community appears to assume that no reasonable person can withhold his consent to be bound by the rules allotting responsibility for the crimes[407].

It is precisely the argument that non-State actors are also bound by international criminal law that has been resorted to so as to support – in fact as an alternative argument – the binding character of IHL for armed groups[408]. Surely, members of armed groups can only incur international criminal responsibility if they are bound by the underlying norm of IHL? There is indeed no denying that some more serious violations of international humanitarian law qualify as grave breaches or international crimes to which international criminal responsibility attaches. This responsibility is individual and not collective, however. There are no indications that entities, such as armed opposition groups, incur, qua entities (i.e., separate from their constituent members)

[405] Ibid, 394.
[406] Ibid.
[407] Cedric Ryngaert, *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (London: Routledge, 2010), 57.
[408] Cf. S. Sivakumaran, "Binding Armed Opposition Groups," *International and Comparative Law Quarterly* 55 (2006): 385.

international criminal responsibility for violations of IHL[409]. On the contrary, the personal jurisdiction of such international criminal tribunals such as the Nuremberg Tribunal (International Military Tribunal) and the International Criminal Court was/is limited to natural persons, and the grave breaches provisions in the Geneva Conventions only refer to individual perpetrators[410]. Accordingly, the fact that there is individual responsibility under international criminal law cannot be used so as to support an argument that there is such a thing as "collective" criminal responsibility of the entity made up of the individuals. If the hypothesis that entities incur international criminal responsibility proves unsubstantiated, so does the hypothesis that those entities are necessarily bound by the substantive norms of international humanitarian law, which underlie any criminalization[411].

An alternative rationale has it that, because some armed groups exercise de facto control over territory, they behave like States, and thus, any international obligations – including obligations under IHL – incurred by States should also be incurred by those armed groups. This rationale can never fully explain the binding nature of IHL for all armed groups, as not all of them exercise territorial control[412]. Irrespective of its limited scope, however, it is worth looking at this explanation in respect of those groups that do exercise territorial control. It is noted in this respect that the de facto control argument has also been made so as to justify the binding character of human rights obligations for armed groups. The present author has cautiously supported it in a previous publication, although I preferred using the term "legitimate expectations" rather than "binding law" so as to denote the normative human rights expectations that one can have of armed groups[413].

However, the de facto control theory has limited explanatory power, another theory, which has notably been advocated by Cassese, may be put forward. This theory has it that armed groups can be bound by IHL conventions because treaties can create obligations for third parties, an argument that is based on Article 35 of the 1969 Vienna Convention on the Law of Treaties (VCLT)[414]. The theory can easily be dismissed on the ground that that the Convention only addresses the situation of treaties between States creating obligations for other (third) States. The major weakness of the theory, however, is that it only explains the binding character of IHL for

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[409] A. Clapham, "Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups," *Journal of International Criminal Justice* 6 (2008): 899.
[410] "Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949," ICRC, Accessed 30 March 2020, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365.
[411] Cedric Ryngaert, "Non-State Actors and International Humanitarian Law" (working paper, Katholieke Universiteit Leuven, 2008), 7, https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP146e.pdf.
[412] Ibid, 8.
[413] C. Ryngaert, "Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council," *Academy in Brief* 7 (2016): 34.
[414] Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts," *International and Comparative Law Quarterly* 30, 3 (1981): 420.

armed groups provided that these groups consent to be bound. In accordance with Article 35 VCLT, as well as common sense, treaties cannot create obligations for third parties without their consent. In the final analysis, the theory boils down to the basic idea that an armed group is only bound if it wants to be bound[415]. If armed groups refrain from giving their consent – and indeed, not all of them have given their consent – they are not bound by IHL[416]. It should be concluded that even this theory whether the IHL is binding for NSAs remains disputable.

Also, it should be briefly discussed another theory and its a disadvantage. The consent problem may finally be overcome by pointing out the binding character of IHL qua customary international law or general principles of law. However, although the ICRC has identified many rules of customary international humanitarian law[417], not all rules may have customary status or amount to general principles, so that this theory can impossibly ground the binding character of the entire corpus of IHL for non-State actors, as Sivakumaran rightly noted[418]. Moreover, it shifts the problem of non-State actor consent to another level, and elicits the question of whether it is fair to apply customary law to the acts of non-State actors if these actors have not participated in the formation of this law. Sassoli's retorical question "how could armed groups be expected to abide by a special set of laws designed to govern conflicts if they are not, however, involved in the law-making process[419]?", applies with equal force in both a treaty and a customary law context. So far, in any event, only State practice, as opposed to non-State actor practice, appears to be taken into account for the formation and identification of customary law[420]. This restriction does not particularly encourage compliance of non-State actors with IHL, and may thus reduce the overall effectiveness of IHL. Indeed, the fact that one is formally bound by the law does not mean that one will also comply with it. Willingness to comply on the part of an actor is crucially dependent on the perception of its having consented to, or at least of having participated in the formation of the law one is bound by[421].

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[415] Cf. S. Sivakumaran, "Binding Armed Opposition Groups," *International and Comparative Law Quarterly* 55 (2006): 387.
[416] "Landmines in Colombia: Cheap ant Lethal. The FARC flouts the Ottawa treaty," The Economist, Accessed 3 April 2020, https://www.economist.com/the-americas/2009/08/27/cheap-and-lethal.
[417] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), 67.
[418] Cf. S. Sivakumaran, "Binding Armed Opposition Groups," *International and Comparative Law Quarterly* 55 (2006): 376-377.
[419] M. Sassoli, "Transnational Armed Groups and International Humanitarian Law," *Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series* 4, 6 (2006): 40, https://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf.
[420] "Prosecutor v. Dusko Tadic a/k/a "DULE" (Decision on the defence motion for Interlocutory Appeal on Jurisdiction)," Appeals Chamber, Decision of 2 October 1995 (Case no. IT-94-1-AR72), ICTY, Accessed 29 March 2020, https://www.icty.org/x/cases/tadic/acdec/en/51002.htm.
[421] Cf. S. Sivakumaran, "Binding Armed Opposition Groups," *International and Comparative Law Quarterly* 55 (2006): 375.

Nevertheless, there is an argument in favor of taking non-State actor practice into account for purposes of customary IHL formation could thus be made[422]. If one accepts this argument, one should however also be willing to accept the consequence that the content of the customary rules thus formed may not as a matter of course be a humanitarian's dream. Armed opposition groups, and a fortiori transnational armed groups with a religious-ideological agenda such as Al Qaeda, are not known for their respect for IHL, quite on the contrary. Accordingly, including non-State actors in the process of customary law formation may possibly lead to regression (although the practice of humanitarian NGOs may of course contribute to more human rules)[423]. But if one is in favor of participatory governance, one should take this for granted. More "progressive", inclusive decision-making structures do not guarantee that the actual content of the norms produced by this structure is also progressive. If we aspire for democracy in global governance, we should accept that a limited- membership club can no longer steer the rules in a supposedly "humanitarian" direction. In this context, it is submitted that the "humanizing" modern custom theory, which the present author has endorsed in a previous publication, may in fact only deliver the good that it promises if the circle of its contributing agents is limited to NGOs, progressive inter-governmental institutions, and (smaller) States that are not, or barely involved in armed conflict[424]. It should be summarized that this theory whether the IHL is binding for NSAs remains also unclear.

As has been shown in the previous paragraphs, none of the discussed explanations to ground the binding character of IHL to NSAs are fully satisfactory: either these theories only partially explain such binding character, e.g., for some armed groups or in respect of some norms, or they gloss over the lack of NSAs formal consent to be bound.

Despite all the above-mentioned explanations to ground the binding character of IHL to NSAs and them no satisfactory character, for the purposes of this Master thesis, it is necessary to analyze and give some recommendations in order to not only clearly apply IHL to NSAs but also to make the possible imposition of international responsibility to NSAs for IHL violation.

Firstly, it should be taken into account the fact that IHL is not clear. Some lawyers and scholars find fault in the law itself, suggesting that it is unclear. The clarity of law should usually lead to better compliance if there is a common understanding among the people who exercise the law. But the clarity of international humanitarian law is such that it fails to operate as a useful guideline for actions. For example, the lack of a clear definition of civilians leads some armed

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[422] M. Sassoli, "Transnational Armed Groups and International Humanitarian Law," *Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series* 4, 6 (2006): 27, https://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf.

[423] Ibid, 28.

[424] M. Kamminga and M. Scheinin, *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009), 113-114.

groups to craft their own understanding of what constitutes non-combatants in civil conflicts[425]. Also, some armed groups might have an expansive definition of "direct participation in hostilities"—including those who provide logistics and food. Others might possess a narrow definition to privilege civilian protection. Finding fault in the law, however, does not appear to be a fruitful approach. It is doubtful that clarifying the law will enhance IHL compliance by armed groups[426].

It is necessary to agree that it is not possible for IHL to specify every contingency of conflict situation (each armed conflict has some unique characteristics, which should be specified in IHL), and it is not guaranteed that NSAs would know such rules. However, such changes in the IHL (especially in the Geneva Conventions, Additional Protocols) in order to clarify such provisions and make them clearer would likely sway NSAs behavior. These changes would not be so essential, however, they would have some sense.

Secondly, it should be taken into account the fact that IHL is not legitimate. Some NSAs would not accept IHL as legitimate. Some Islamic fundamentalist groups also deny western values and reject IHL wholesale. Historically, this rejection also stems from the fact that armed groups have not participated in the making of IHL, and the voices of non-state armed groups have been rendered mute. Their voice has not been heard, except as observers in the Additional Protocol negotiations, and this history of lawmaking might have influenced armed groups' rejection of IHL principles as outside norms[427].

It is necessary to emphasize that encouraging participation of the NSAs in IHL lawmaking may be one solution to the abovementioned issue. However, there are some political hurdles abound, especially, legitimacy concerns of national governments. In this respect, states, and other various bodies, which are engaged in the IHL making process, should agree on a process of encouraging participation of the NSAs in such action. Nevertheless, these changes would not be so crucial, however, they would have some sense.

These soft law instruments are quite reasonable measures in order to not only clearly apply IHL to NSAs but also to make the possible imposition of international responsibility to NSAs for IHL violation. Moreover, it should be taken into consideration some hard measures with the purposes of enhancing IHL compliance by NSAs and applying IHL to them.

It is necessary to discuss the first hard measure. Sanctions—financial restrictions or travel bans—are used with the aim of constraining the ability of non-state armed groups and coercing them to comply with IHL. Targeted sanctions by the United Nations Security Council are an

[425] E. Crawford and A. Pert, *International Humanitarian Law* (Cambridge: Cambridge University Press, 2015), 167.
[426] Ibid.
[427] Terry D. Gill et al., *Yearbook of International Humanitarian Law* (Hague: Asser Press, 2016), 71.

example of such measures to influence the behavior of armed groups. Specific examples of sanctions on rebel groups include the charcoal ban on Al-Shabaab in Somalia or the diamond ban on UNITA in Angola. Although these goals are not explicitly intended for civilian protection, this is increasingly the case[428]. The sanctions are usually imposed when other measures are infeasible, and their effectiveness is often questioned. Recent research finds that sanctions imposed on civil war actors are not effective in saving lives, except in the case of arms embargoes[429].

It should be concluded that sanctions, as a policy tool for enhancing compliance, appear to have great power, but not so much coercive power. Sanctions policies restrict some resources (such as weapons) flows to NSAs and might bind their hands to reduce IHL violations. In this respect, more strict sanctions (arms embargoes, suspension of membership in case of well - organized NSAs) would lead to enhancing compliance with IHL.

It is necessary to discuss the second hard measure. Prosecutions - trials at the ad hoc tribunals (for instance, Sierra Leone Special Court) or at the International Criminal Court - are another hard measure used to ensure IHL compliance by armed groups. This approach of emphasizing individual accountability is a relatively new strategy on the historical scale, with only a couple of decades of experience. The primary logic of employing prosecutions vis-à-vis non-state armed actors is deterrence: by punishing past wrong-doings, prosecutions are meant to deter future violations[430].

It should be found that prosecutions of the NSAs are the other hard measure, which would be a good tool of containment and at the same time would create an international judicial practice in order to provide a binding character of IHL to NSAs. Moreover, ad hoc tribunals or at the International Criminal Court make the possible imposition of international responsibility to NSAs for IHL violation.

In order to summarize the whole subchapter, it should be agreed that all the above-mentioned soft and hard measures in their joint application would lead to some positive implications in the field of IHL and human rights law. Moreover, these recommendations should also be taken into account, not only by the state authorities, International governmental organizations but also by the NSAs, especially armed NSAs.

[428] A.Charron and C. Portela, "The UN, regional sanctions and Africa," *International Affairs* 91, 6 (2015): 1369–1370.
[429] Lisa Hultman and Dursun Peksen, "Successful or Counterproductive Coercion? The Effect of International Sanctions on Conflict Intensity," *Journal of Conflict Resolution* 61, 6 (2017): 25.
[430] Terry D. Gill et al., *Yearbook of International Humanitarian Law* (Hague: Asser Press, 2016), 76.

CONCLUSIONS AND RECOMMENDATIONS

1. The results of the research allow to conclude that the aim of the thesis has been achieved, objectives fulfilled and the defense statements proven to be correct. This leads to the conclusions and following recommendations, which are set out below.

2. The number of non-state actors has increased significantly from the end of the Second World War to the XXI century. It witnessed the emergence of NSAs at the international level, another subject of international law on a par with states. Nevertheless, there is no legally recognized by the international community definition of such actors and there is a vital necessity to find it. A model definition according to the guidelines given in Master thesis could potentially be: non-state actor is an active (collective or individual) participant in international relations, which does not belong to state authority, having a certain legal personality, possessing the ability, at the expense of relevant and potential resources at his disposal, to make decisions in the international arena which have the impact on the international system as well as other participants of international relations. Moreover, the proposed definition will help to determine the legal nature of non-state actors as well as to differentiate them from other subjects of international law. Also, above-mentioned definition could be used as a basis for defining the unified term of the non-state actor on the international level.

3. Non-state actors are subjects of international law with a limited normative function. The thesis that non-state actors in international relations do not have sufficient international legal personality in order to be full-fledged subjects of international law is refuted by the generally accepted international point of view, according to which international legal personality does not depend on the scope of rights and obligations, but on “the ability of such actors to participate in interstate relations regulated by international law”. Moreover, it should be emphasized that this international legal personality is limited only to some international rights and obligations (for instance, right to life as a right, which by its nature can belong only to individuals) and does not cause a theoretical obstacle to characterize the non-state actors as a subject of international law.

4. It is hard to conclude that NSAs can be regarded as free-standing participants in international law-making. Despite the fact that NSAs do not have a direct impact on the international law-making process they found out another possible option - to influence states in various ways. For instance, the important role played by employers’ and workers’ associations in the International Labor Organization, or the legal value of International Committee of the Red Cross agreements concluded with states as well as its practical proposals for the improvement of international humanitarian law, especially the great impact of NGOs in international negotiations

leading up to the adoption of Conventions on landmines and cluster munitions. Moreover, it should be mentioned that NSAs have already made a great contribution to the law-making, dispute-settlement as well as decision-making processes and probably will make much more in the future.

5. It is necessary to emphasize that international humanitarian law in limited extent is applicable to armed non-state actors. Moreover, it should be concluded without any doubt that the binding character of IHL at the whole, and in particular, Common Article 3 of the Geneva Conventions and its Additional Protocol II, for NSAs remains somewhat unclear. None of the different explanations in order to prove a binding character of IHL to NSAs are fully satisfactory: either these theories only partially explain such binding character, e.g., for some armed groups or in respect of some norms, or they simply break down by reason of the lack of NSAs formal consent to be bound in armed conflict by international humanitarian law. In order to make clear an application of international humanitarian law to NSAs the following recommendations are set out below.

6. It is widely recognized practice that the clarity of law, especially in case of international humanitarian law, usually lead to better compliance if there is a common understanding among the international actors. However, it is not possible for IHL to specify every contingency of conflict situations (each armed conflict has some unique characteristics, which should be specified in IHL), and it is not guaranteed that NSAs would know such rules. In this respect, such changes in the IHL (especially in the Geneva Conventions, Additional Protocols) are needed in order to clarify such provisions and make them clearer would likely sway NSAs behavior.

7. It is agreed on the international level that some NSAs do not accept IHL as legitimate. Some Islamic fundamentalist groups also deny Western values and reject IHL wholesale. It is necessary to emphasize that encouraging participation of the NSAs in IHL lawmaking may be one solution to the abovementioned issue. In this respect, states, and other various international bodies, which are engaged in the IHL making process, should agree on a process of encouraging participation of the NSAs in such action.

8. Hard measures also might be helpful. The sanctions policies imposed by the international community restricting some resources in armed conflicts (such as weapons) flows to NSAs and might bind their hands to reduce IHL violations. In this respect, more strict sanctions (arms embargoes, suspension of membership in case of well - organized NSAs) that would lead to enhancing compliance with IHL by NSAs. Moreover, prosecutions of the NSAs are the other hard measure, which would be a good tool of containment and at the same time would create an international judicial practice in order to provide a binding character of IHL to NSAs. In this respect, ad hoc tribunals or at the International Criminal Court make the possible imposition of international responsibility to NSAs for IHL violation.

9. In addition to the above – mentioned conclusions, all measures in their joint application would lead to positive implications in the field of IHL. Moreover, these recommendations should be taken into account not only by the state authorities, International governmental organizations but also by the NSAs, especially armed NSAs.

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ABSTRACT

The amount of non-state actors and their influence at the end of the XX centuries increased rapidly in various international areas. Thereby, non-state actors became one of the most prominent international actors on a level with states but with limited legal subjectivity. Moreover, this limited legal subjectivity does not give a huge scope of rights and does not impose full obligations with regard to following all international rules in their practice. In this respect, the creation of the unified definition of non-state actors for further its implementation as a legally binding is vital for all international community. Moreover, it should be noted that there is a vital necessity to determine the status of the non-state actors in specific areas of international law namely: the role of the non-state actors in the law-making process and possible applicability of international humanitarian law to non-state actors.

From the results of research, it should be mentioned that the unified definition of non-state actors that was given in this Master thesis would be appropriate for recognition by the international community as legally binding. Moreover, despite the fact that non-state actors do not have a direct impact on the international law-making process they found out another possible option - to influence states and participate in the law-making process as an advisor in various fields. Also, it is necessary to emphasize that international humanitarian law in limited scope is applicable to non-state actors.

Keywords: Non-state actors, law-making process, non-state actors and international humanitarian law, non-state actors as a subject of international law, unified definition.

SUMMARY

The Master thesis “The problem of non-state actors status under international law” examines the general and legal status of non-state actors in relationship with state and their influence on international law. Moreover, it describes the theoretical and practical overview of the aspects regarding the creating of the unified definition of non-state actors that would be appropriate for recognition by the international community as legally binding. It should be added that the thesis shows the current pattern of recognition of non-state actors as a subject of international law.

Also, this Master thesis examines the status of the non-state actors in specific areas of international law namely: the role of the non-state actors in the law-making process and possible applicability of international humanitarian law to non-state actors. Moreover, the thesis presents some recommendations in order to solve core problems with regard to the applicability of international humanitarian law to non-state actors.

The thesis is divided into 3 Chapters. Chapter 1 covers the historical overview of the development of non-state actors in international law and their activity in the modern world. Chapter 2 describes the current status of non-state actors in international law. Moreover, this Chapter describes different approaches of various scholars to the definition of NSAs as well as propose an internationally recognized definition of a non-state actor, determine typology and examples of NSAs. Chapter 3 examines the role of non-state actors in law-making process and to what extent international humanitarian law fully covers the activity of non-state actors in armed conflicts.

From the results of research, it should be concluded that the unified definition of non-state actors that was given in this Master thesis would be appropriate for recognition by the international community as legally binding. Moreover, despite the fact that non-state actors do not have a direct impact on the international law-making process they found out another possible option - to influence states and participate in the law-making process as an advisor in various fields. Also, it is necessary to emphasize that international humanitarian law in limited scope is applicable to non-state actors.

HONESTY DECLARATION

28/04/2020

Vilnius

I, _____Viktoriia Yushchyshyna_____, student of
(name, surname)

Mykolas Romeris University (hereinafter referred to University),

Faculty of Law, International and European Union Law Institute, International Law
(Faculty /Institute, Programme title)

confirm that the Master thesis titled

"The Problem of Non-State Actors Status Under International Law":

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

Viktoriia Yushchyshyna

_ -

(signature) *(name, surname)*