

The International Responsibility of non-State Armed Groups and Victims' Right to Reparations

La responsabilidad internacional de los grupos armados no estatales y el derecho de las víctimas a las reparaciones

La responsabilité internationale des groupes armés non étatiques et le droit des victimes aux réparations

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SUMMARY: I. *Summary*. II. *Non-State Armed Groups in International Law*. III. *Capacity of Non-State Armed Groups to Commit Serious Violations of International Law*. IV. *A Legal Vacuum in the Law of States' Responsibility*. V. *Victims' Right to Reparations*. VI. *Concluding Remarks*. VII. *References*.

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Artículo recibido el 19 de noviembre de 2021
Aprobado para publicación el 11 de agosto de 2022

Anuario Mexicano de Derecho Internacional, vol. XXIII, 2023, pp. 65-103
Ciudad de México, ISSN 1870-4654

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ABSTRACT: It is commonly accepted that quasi-state Non-State Armed Groups may violate international humanitarian law and that, under certain circumstances, their members may commit breaches of international criminal and human rights law. However, given the very nature of such groups —and their controversial role in the international legal system—, their victims' right to reparations is often questioned. This article outlines the legal questions surrounding serious violations of international law committed by Non-State Armed Groups and argues that their victims are entitled to reparations.

Key words: non-State armed groups, subjects of international law, international legal personality, reparations, humanitarian law, insurgencies.

RESUMEN: Es comúnmente aceptado que los grupos armados cuasiestatales pueden violar el derecho internacional humanitario y que, bajo ciertas circunstancias, sus miembros pueden cometer violaciones de derecho penal internacional y derechos humanos. Sin embargo, dada la propia naturaleza de estos grupos y el controvertido papel que juegan en el derecho internacional, el derecho de sus víctimas a obtener reparaciones es comúnmente cuestionado. Este artículo describe las cuestiones jurídicas que rodean a las violaciones graves al derecho internacional cometidas por estos grupos y argumenta que sus víctimas tienen derecho a obtener reparaciones.

Palabras clave: grupos armados no estatales, sujetos de derecho internacional, personalidad jurídica internacional, reparaciones, derecho humanitario, insurgencias.

RÉSUMÉ: Il est communément admis que les groupes armés quasi étatiques peuvent violer le droit international humanitaire et que, dans certaines circonstances, leurs membres peuvent commettre violations de droit pénal international et de droits de l'homme. Pourtant, à cause de la nature de ces groupes et le rôle controversé qu'ils jouent dans le droit international, le droit des leurs victimes à obtenir réparations est remis en question. Cet article décrit les questions juridiques autour de graves violations de droit international commises par ces groupes et argumente que leurs victimes ont le droit à obtenir réparations.

Mots Clés: groupes armés non étatiques, sujets de droit international, personnalité juridique internationale, réparations, droit humanitaire, insurrections.

I. SUMMARY

While States were traditionally considered as the sole subjects of international law, Non-State Actors have increasingly entered the international legal system, both as right holders and obligation bearers. Amongst these actors, Non-State Armed Groups (NSAG) capable of violating international law pose significant threats to international peace and security. Particularly, they often breach fundamental norms on the protection of individuals, who are regularly left in dire need of justice.

While NSAG have been held responsible for violating international law, remedies for their victims have seldom followed. Moreover, even though individual members of NSAG have faced national and international prosecutions, cases against these groups, as such, have rarely recognised their victims' international right to reparations. This stems from the idea that, lacking international legal personality, NSAG are unable to violate international law; or that, even if they do, their victims are not entitled to an international right to reparations. This article argues that, even if legal and practical obstacles may arise, victims of gross human rights and international humanitarian law (IHL) violations are entitled to reparations, even if they were committed by NSAG. This article is based on the first part of the author's dissertation: "*Can national civil jurisdictions provide redress for serious international law violations committed by Non-State Armed Groups?*"

II. NON-STATE ARMED GROUPS IN INTERNATIONAL LAW

International law was originally seen as exclusively applicable to States, which were naturally considered as the sole subjects of that law or 'the international legal system'.¹ The resulting position of those States justified the design of the current system and produced a symbiotic relationship between the State and international law in which the existence of the former facilitates that of the latter and vice versa.²

¹ Brownlie, Ian and Crawford, James, *Brownlie's Principles of Public International Law*, Oxford, Oxford University Press, 2012, p. 5.

² Klabbers, Jan, “(I Can't Get No) Recognition: Subjects Doctrine and the Emergence

This traditional approach has nonetheless been challenged and characterized as anachronistic,³ since, from a liberal perspective, any entity holding a right or bearing an obligation under international law could, in principle, be a subject of that system.⁴ In fact, since the twentieth century, international law has evolved to address non-State actors.⁵ The increased number and relevance of these actors produced a blatant need for their incorporation to the system, especially given their constant participation in international legal processes. For instance: international organizations now conclude treaties and adjudicate disputes under international law; some corporations have embraced international human rights obligations and may sue States before investment tribunals;⁶ individuals enjoy internationally recognised human rights and may be prosecuted for massively violating them;⁷ and NSAG, such as belligerents and insurgents, possess limited international rights and obligations.⁸

While it is widely accepted that international organizations and individuals possess international rights and obligations, the subjectivity of other non-State actors like corporations and NSAG is still disputed for the consequences this may entail. The question of whether NSAG are subjects of international law is particularly controversial: for the fear that they could gain legitimacy if awarded with subjectivity.

1. The Issues of Subjectivity and Legitimacy

Subjects of international law are those entities with international legal personality. While no instrument clarifies which of these entities constitute

of Non-State Actors", in Petman, Jarna and Klabbers, Jan, *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*, 2003, pp. 351, 356.

³ Brownlie, Ian and Crawford, James, *op. cit.*, p. 4.

⁴ Reinisch, August, "The Changing International Legal Framework for Dealing with Non-State Actors", *Non-State Actors and Human Rights*, Oxford University Press, 2005, p. 70.

⁵ Lauterpacht, Hersch, "The Subjects of International Law", *International Law. Being the Collected Papers of Hersch Lauterpacht*, Cambridge, Cambridge University Press, vol. I, 1970, p. 137.

⁶ Klabbers, Jan, *op. cit.*, p. 368.

⁷ Reinisch, August, *op. cit.*, p. 70.

⁸ Murray, Daragh, *Human Rights Obligations of NSAG*, Hart Publishing, 2016, p. 26.

international legal persons,⁹ jurisprudential developments and doctrinal writings have shed light on the requirements to gain personality. A starting point is the *Reparation for Injuries* Advisory Opinion of the International Court of Justice (ICJ), from which two requirements are commonly derived, namely, that the entity has the capacity to (i) possess international rights and duties; and (ii) bring international claims forward.¹⁰

To fulfil the first requirement, entities must be organized in a manner that allows them to avail themselves of the obligations incumbent on their members.¹¹ Certain NSAG seem to comply with this, for they function in a command and control structure whereby individuals are bound by the group to enforce some international obligations.¹² Concerning the capacity to bring international claims, Lauterpacht and others have classified this requirement as a possible consequence, rather than a prerequisite, of subjectivity.¹³ This is confirmed by the fact that individuals, who enjoy rights under international law, may not always have *procedural* rights to claim them at the international level. Thus, full and partial personality have been distinguished, the former pertaining solely to States —which possess all international rights and duties—, and the later to other subjects —with limited rights and duties—.¹⁴

Publicists have suggested the following as further requirements for subjectivity: the independence of the entity; its actual possession of international rights or obligations; and its capacity to breach international law. Firstly, it has been submitted that a direct attribution of international rights or obligations to entities that are completely independent is necessary for them to acquire subjectivity.¹⁵ This means that international legal persons should only be under the authority of, or *subjected* to, international law. Murray submits that NSAG would fulfil this requirement whenever they

⁹ Kyriakakis, Joanna, “International Legal Personality, Collective Entities, and International Crimes”, in Gal-Or, Noemi, Ryngaert, Cedric, and Noortmann, Math (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place*, Brill-Nijhoff, 2015, p. 89.

¹⁰ Brownlie, Ian and Crawford, James, *op. cit.*, p. 115.

¹¹ Murray, Daragh, *op. cit.*, p. 44.

¹² *Idem*.

¹³ Lauterpacht, Hersch, *op. cit.*, p. 14; Walter, Christian, “Subjects of International Law”, *Max Planck Encyclopedias of International Law*, 2007, paragraph 47.

¹⁴ Walter, Christian, *op. cit.*, paragraph 23.

¹⁵ Murray, Daragh, *op. cit.*, p. 42.

are not subjected to the authority of the State. For him, a direct attribution of international rights or obligations to NSAG is justified when no entity is capable of acting as a medium between these groups and the rule of international law.¹⁶ Secondly, the *actual* possession of international rights or obligations as a fundamental requirement for subjectivity derives from analysing the application of specific international rules to the entity. This analysis, vis-à-vis NSAG, will be carried out below. Finally, entities capable of having breached international law, and therefore subjected to international claims, may only enjoy a restricted kind of personality.¹⁷ In this sense, certain NSAG have adopted particular measures for recognizing their responsibility under international law and have acted accordingly. Thus, NSAG, which in certain circumstances comply with these requirements, may be considered as having a certain degree of subjectivity in international law.

Moreover, even if NSAG have been recognized limited international rights and obligations —and thus personality—, their entrance to the system has constantly been frowned upon for legitimacy implications. This stems from the idea that subjectivity, in addition of bestowing NSAG with some legitimacy, is not only a result of rights and obligations, but also constitutive of them.¹⁸ Thus, it is feared that recognizing NSAG's personality could entitle them to use force, eroding the legitimacy and authority of the State by challenging its capacity to suppress insurrections.¹⁹ Additionally, the fact that certain actors engage with NSAG for ensuring their compliance with international law has also been criticized for considering this may equate them to State-like entities²⁰ and thus legitimize their goals.²¹ Clapham notes that a possible way to eschew this obstacle is by drafting treaty provisions that preclude the legitimacy that may be derived from

¹⁶ *Ibidem*, p. 43.

¹⁷ Brownlie, Ian and Crawford, James, *op. cit.*, p. 115.

¹⁸ Klabbers, Jan, *op. cit.* p. 368.

¹⁹ Murray, Daragh, *op. cit.*, p. 35.

²⁰ Clapham, Andrew, "The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement", *Social Science Research Network Electronic Journal*, 2010, available at: <http://www.ssrn.com/abstract=1569636>.

²¹ Heffes, Ezequiel and Frenkel, Brian, "The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules", *Social Science Research Network Electronic Journal*, 2017, available at: <https://papers.ssrn.com/abstract=3130148>, p. 42.

imposing rights or obligations to NSAG.²² Moreover, one must distinguish between the subjectivity of a group and the legitimacy of its conducts and goals.²³ For Murray, “the fact that an armed group possesses international legal personality does not imply that all its actions must be considered legal, that the activities of its members cannot be criminalized, or that States are no longer entitled to suppress the group’s insurrection”.²⁴

Notwithstanding this theoretical debate, the complex reality of international affairs justifies the recognition of a limited type of personality for NSAG. In other words, international law’s traditional approach falls short in acknowledging that NSAG now directly participate in the system. In any case, this article argues that not every NSAG qualifies, nor should qualify, as an international legal person.

2. Contemporary Armed Conflicts and Types of Non-State Armed Groups

No clear or uniform definition of NSAG is provided by international law.²⁵ However, considering NSAG through the concept of armed conflict, which is crucial for the application of IHL, is a useful point of departure.

The Geneva Conventions of 1949,²⁶ which codify rules of IHL, distinguish between international and non-international armed conflicts (NIAC). Common Article 2 of the four Geneva Conventions establishes they apply to cases of: (i) declared war; (ii) armed conflicts between two States; and (iii) partial or total occupation of a State’s territory. When any of these occur, an armed conflict of an international character exists, and such Conventions and customary IHL is triggered. Additionally, internal armed con-

²² See Clapham, Andrew, “The Rights and Responsibilities...”, *cit.*, p. 26 on the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa whose article 7(1) establishes ‘this Article shall not, in any way whatsoever, be construed as affording legal status or legitimizing or recognizing armed groups and are without prejudice to the individual criminal responsibility of the members of such groups under domestic or international criminal law’.

²³ Heffes, Ezequiel and Frenkel, Brian, *op. cit.*, p. 42.

²⁴ Murray, Daragh, *op. cit.*, p. 36.

²⁵ Heffes, Ezequiel and Frenkel, Brian, *op. cit.*, p. 43.

²⁶ See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, (in force since 21 October 1950).

flicts may become ‘internationalized’ provided that a State intervenes to support a NSAG, which must be sufficiently controlled by the former in the fight against another State.²⁷ Moreover, Common Article 3 binds parties to NIACs to comply with certain rules contained therein and under customary IHL. Lacking an international element or the intervention of a State against another, these conflicts involve, perforce, the participation of a NSAG. Summarizing both scenarios, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) famously established in the *Tadić* case that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.²⁸ By adopting this definition, the ICTY distinguished both types of armed conflicts and acknowledged that IHL may apply to any of these conflicts, including those involving NSAG.²⁹

In addition to conflicts between States and those fought by them through proxies, the laws applicable to *international* armed conflicts extend to certain cases where NSAG intervene, namely, belligerencies or recognized insurgencies and wars of national liberation.³⁰ Traditionally, the belligerent or insurgent status—which gives subjectivity in international law—has been limited to State-like entities recognized as such by the relevant State.³¹ To become belligerents, entities have to represent a group of people, control significant portions of a State’s territory and have the semblance of a government with an organized military force capable of carrying out sustained hostilities.³² This status was used to describe NSAG aiming at secession, as was the case of the Confederate States of America during the US’ civil

²⁷ See, Clapham, Andrew, “The Concept of International Armed Conflict”, in Clapham, Andrew et al.ij, *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, p. 17.

²⁸ IT-94-1, *Prosecutor v Tadić (Appeals Chamber Decision on Jurisdiction)*, International Criminal Tribunal for the Former Yugoslavia (ICTY), 1995, paragraph. 70.

²⁹ Crowe, Jonathan and Weston-Scheuber, Kylie, *Principles of International Humanitarian Law*, Edward Elgar, 2013, p. 11.

³⁰ Clapham, Andrew, “Human Rights Obligations of Non-State Actors in Conflict Situations”, *International Review of the Red Cross*, vol. 88, num. 863, 2006, pp. 491 y 492, 495.

³¹ Brownlie, Ian and Crawford, James, *op. cit.*, p. 118.

³² Paust, Jordan J., “Armed Opposition Groups”, in Noortmann, Math, Reinisch, August, and Ryngaert, Cedric (eds.), *Non-state actors in international law*, Hart Publishing, 2015, p. 279.

war.³³ However, while it is theoretically possible to be recognized as insurgent or belligerent, this status has now been replaced by the rules of IHL relating to armed conflict, and which apply when a certain level of fighting is reached.³⁴ Concerning national liberation movements, NSAG waging these types of wars enjoy a special status; for Additional Protocol I to the Geneva Conventions³⁵ equates the rights and obligations of these armed groups to those applicable to States in international armed conflicts. Thus, its article 1.4 establishes the applicability of the Protocol in situations of “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”. This right is recognized both by the UN Charter³⁶ and the UN General Assembly Declaration on Principles of International Law.³⁷

Moreover, the threshold for applying IHL to NIACs is strictly intertwined with the nature and activities of NSAG involved, some of which are often called rebels, unrecognized insurgents, or armed opposition groups. For Clapham, “where there is no recognition of insurgency or belligerency, and the group in question is not a national liberation movement that has successfully triggered the application of the rules of international armed conflict, one is left with an internal armed conflict involving rebels”.³⁸ As noted, these NIACs involve ‘protracted armed violence’ between States and NSAG or between these groups within a State. This element, commonly referred to as the ‘intensity criterion’, has been assessed by the ICTY on the basis of the following indicative factors:

³³ Foster Halabi, Samm, “Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context”, *American University International Law Review*, vol. 27, Issue 2, 2012, pp. 321, 353.

³⁴ Clapham, Andrew, “Human Rights Obligations...”, *cit.* p. 492.

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, (in force since 23 March 1976).

³⁶ Charter of the United Nations and Statute of the International Court of Justice, 26 June 1945 (829 UNTS 119), (in force since 24 October 1945).

³⁷ UNGA, “Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations”, A/RES/2625 (XXV) (1970).

³⁸ Clapham, Andrew, “Human Rights Obligations...”, *cit.* p. 495.

[T]he number, duration, and intensity of individual confrontations; the type of weapons and other military equipment used; the number of caliber of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.³⁹

Additionally, an ‘organizational criterion’ must be fulfilled by the non-State armed group for it to be subjected to the laws applicable in NIACs. Thus, Additional Protocol II to the Geneva Conventions⁴⁰ covers armed conflicts between armed forces of a State 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”. It must be noted that the Protocol clarifies that it “shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”. In any case, the conceptions of NIACs outlined in Additional Protocol II seem narrower than those enshrined in Common Article 3 of the Geneva Conventions and, presumably, in customary IHL.⁴¹ Not only do they limit NIACs to those in which a State’s armed forces participate, but they introduce a requirement of territorial control exercised by the NSAG.⁴² The limited nature of this approach was confirmed by the ICTY in *Limaj*, where the Trial Chamber qualified the Kosovo Liberation Army as an organized armed group after considering that “some degree of organization by the parties will suffice to establish the existence of an

³⁹ IT-04-84-T, *Prosecutor v Haradinaj et al (Trial Judgement)*, International Criminal Tribunal for the Former Yugoslavia (ICTY), 2008, paragraph 49.

⁴⁰ 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, (in force since 27 January 1980).

⁴¹ Clapham, Andrew, “Defining Armed Conflicts under the Additional Protocols: Is There a Need for Further Clarification?”, in Pocar, F., *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, 2017, p. 39.

⁴² International Committee of the Red Cross, “How Is the Term “Armed Conflict” Defined in International Humanitarian Law?”, 2008, available at: <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>, p. 4.

armed conflict".⁴³ Additionally, the ICTY has also relied on indicative factors to establish whether NSAG fulfil the organizational criterion, namely: (i) the presence of a command structure in the group and the existence of internal regulations; (ii) the groups' capacity to carry out organized operations and control territory; (iii) the level of logistics carried out; (iv) the level of discipline that the group imposes and its ability to implement IHL; and (v) the group's capacity to speak with one voice.⁴⁴

While these rules are useful to understand the type of NSAG traditionally considered by international law, they fall short to portray the reality of contemporary armed conflicts and NSAG. In fact, most armed conflicts occurring today are non-international.⁴⁵ In its 2019 'War Report', the Geneva Academy concluded that, of the 69 armed conflicts identified, 51 had a non-international character and only 7 constituted State-to-State confrontations and 10 belligerent occupations.⁴⁶ Additionally, NSAG have diversified, with paramilitary, terrorist, self-defence groups and gangs entering the scene. The universe of NSAG and their different ideologies and objectives represent a major challenge for their fitting in the international legal system, whose application will very much depend on their nature and activities.

Given this scenario, this article's reach is confined to a particular type of NSAG, without prejudice to the possible application of the analysed rules to other non-State actors. It will only focus on NSAG complying with Additional Protocol II requirements, namely, that they: (i) constitute dissident armed forces or other organized armed groups within a State; (ii) act under responsible command; (iii) exercise control over a part of the territory of that State; and (iv) are able to carry out sustained and concerted military operations given their territorial control. This type of NSAG is chosen for, given their characteristics, they escape the authority of the State. Consequently, victims of international law violations who are subjected solely to

⁴³ IT-03-66-T, *Prosecutor v Fatmir Limaj et al (Trial Judgement)*, International Criminal Tribunal for the Former Yugoslavia (ICTY), 2005, paragraph 89.

⁴⁴ IT-04-82-T, *Prosecutor v Boškoski & Tarčulovski (Trial Judgement)*, International Criminal Tribunal for the Former Yugoslavia (ICTY), 2008, paragraphs 199-203.

⁴⁵ Murray, Daragh, *op. cit.*, p. 1.

⁴⁶ The Geneva Academy of International Humanitarian Law and Human Rights, 'The War Report: Armed Conflicts in 2018', Geneva Academy, 2019, available at: <https://www.geneva-academy.ch/research/our-project/detail/30-the-war-report>, p. 19.

their authority may face insurmountable obstacles when trying to obtain redress.

III. CAPACITY OF NON-STATE ARMED GROUPS TO COMMIT SERIOUS VIOLATIONS OF INTERNATIONAL LAW

1. Legal Basis for Binding Non-State Armed Groups

While it is widely accepted that certain IHL rules directly bind NSAG, uncertainty prevails as to the legal basis under which they do so. The following arguments have been advanced to explain such a legal basis and, as Murray submits, they can also be used to explain the application of other bodies of international law to NSAG.⁴⁷

The first argument consists in considering treaties as capable of binding NSAG. Accordingly, under Common Article 3 to the Geneva Conventions, “*each Party to the conflict* shall be bound to apply” certain rules of IHL.⁴⁸ Since at least one of the parties to NIACs as those covered by Common Article 3 will be a NSAG, such a provision would be directly applicable to them. Admittedly, under the 1969 Vienna Convention on the Law of Treaties (VCLT), the Geneva Conventions are international agreements concluded solely between States and thus exclusively binding upon them (*pacata tertius* principle).⁴⁹ Lacking the NSAG’ consent, it has been questioned whether treaties constitute reasonable bases to bind them.⁵⁰ However, the text and drafting history of the Geneva Conventions appear to confirm that the actual intention of the drafters was to bind third parties involved in NIACs *i.e.* NSAG.⁵¹ Clapham submits that, given the changing structure of the system, now States conclude treaties that create both rights and obliga-

⁴⁷ Murray, Daragh, *op. cit.*, p. 83.

⁴⁸ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (emphasis added).

⁴⁹ Articles 2(a), 26 and 34 Vienna Convention on the Law of Treaties, 23 May 1969 (1155 UNTS 331), (in force since 27 January 1980).; Brownlie, Ian and Crawford, James, *op. cit.*, p. 384.

⁵⁰ Clapham, Andrew, “The Rights and Responsibilities...”, *cit.*, p. 6.

⁵¹ Crowe, Jonathan and Weston-Scheuber, Kylie, *op. cit.*, p. 161.

tions for individuals without their consent.⁵² Ultimately, it is questionable whether the VCLT, whose scope is limited to treaties concluded between States, could be extrapolated to cover the attitude of non-State actors regarding particular treaties.⁵³

Additionally, the applicability of treaties through succession and the exercise of territorial control by NSAG have been argued as legal bases for subjecting them to international law. The former argument implies that NSAG successfully rebelling against the government or claiming to be their legitimate representatives will succeed to its previously ratified treaties.⁵⁴ The latter suggests that non-State actors with exclusive control over territories no longer ruled by a *de jure* authority, become directly bound to respect international law.⁵⁵ For Sivakumaran, this approach entails these NSAG are “bound by reason of their purported representation of the State or part thereof”.⁵⁶ Such arguments are nonetheless problematic, failing to answer how unsuccessful insurgencies would be bound under succession, and to encompass cases of NSAG not claiming representation of a State or a part thereof.⁵⁷

Secondly, customary law is commonly seen as a source of international law extending its application to NSAG.⁵⁸ In the *North Sea Continental Shelf Cases*, the ICJ held that “general or customary law rules and obligations... by their very nature, must have equal force for all members of the international community”.⁵⁹ These members would include NSAG with subjectivity.⁶⁰ Thus, in relation to the Revolutionary United Front, the Special Court

⁵² Clapham, Andrew, “The Rights and Responsibilities...”, *cit.*, p. 7.

⁵³ Sivakumaran, Sandesh, “Binding Armed Opposition Groups”, *International and Comparative Law Quarterly*, vol. 55, num. 369, 2006, p. 863.

⁵⁴ *Ibidem*, p. 379.

⁵⁵ Murray, Daragh, *op. cit.*, p. 121.

⁵⁶ Sivakumaran, Sandesh, *op. cit.*, p. 379.

⁵⁷ *Ibidem*, p. 380.

⁵⁸ Crowe, Jonathan and Weston-Scheuber, Kylie, *op. cit.*, p. 160.

⁵⁹ ICJ Reports 1969, *North Sea Continental Shelf Cases (Federal Republic of Germany / Denmark) (Federal Republic of Germany / Netherlands) (Judgment)*, p 3, International Court of Justice, 1969, p. 63.

⁶⁰ See Murray, Daragh, *op. cit.*, p. 85 citing Interpretation of *Agreement of 25 March 1951 between WHO and Egypt (Advisory Opinion)* 20 December 1980, para. 37: “[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under [international law]”.

for Sierra Leone stated that “a convincing theory is that they are bound as a matter of international customary law to observe the obligations declared by Common Article 3”.⁶¹ More clearly, the International Commission of Inquiry on Darfur stated that “like all insurgents that have reached a certain threshold of organization, stability and effective control of territory, [the participating NSAG] possess international legal personality and are therefore bound by the relevant rules of customary international law”.⁶²

While the customary law argument seems convincing, many still wonder whether this source of law, traditionally defined as the general practice of States accepted *by them* as law,⁶³ may bind NSAG not involved in its formation.⁶⁴ Even if some argue that NSAG should solely be bound by custom established by other NSAG,⁶⁵ the International Law Commission (ILC) clarified that the general practice required refers primarily to the practice of States and, secondarily, to that of international organizations.⁶⁶ It also stressed that the “[c]onduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice” of States and international organizations.⁶⁷ In fact, the ILC explicitly included NSAG under the list of these ‘other actors’.⁶⁸ Murray has also argued that the fact that NSAG do not participate in its formation, does not mean they are not bound by customary law.⁶⁹

Thirdly, general principles of law have also been advanced as legal bases for binding NSAG. These principles, which may be derived from national legal systems or formed within the international one,⁷⁰ are abstractions ac-

⁶¹ SCSL-2004-16-AR72(E), SCSL-2004-16-AR72(E), *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber)*, Special Court for Sierra Leone, 2004 paragraph 47.

⁶² “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General”, 2005, paragraph 172.

⁶³ Charter of the United Nations and Statute of the International Court of Justice, 26 June 1945 (article 38.1[b] of the Statute).

⁶⁴ See, for instance Murray, Daragh, *op. cit.*, p. 13; Sivakumaran, Sandesh, *op. cit.*, p. 373.

⁶⁵ Murray, Daragh, *op. cit.*, p. 84.

⁶⁶ ILC, “Draft Conclusions on Identification of Customary International Law”, *Yearbook of the International Law Commission*, 2018.

⁶⁷ *Ibidem*, Draft Conclusion 4.

⁶⁸ *Ibidem*, Commentary to Draft Conclusion 4.

⁶⁹ Murray, Daragh, *op. cit.*, p. 87.

⁷⁰ As provided by Draft conclusion 3 in Chapter IX “General principles of law” in *Report of*

cepted for so long and in such a general manner that are not required to be directly based on State practice.⁷¹ Hence, an argument suggests, since rules governing NIACs derive from the humanitarian principles of distinction and proportionality, they are equally binding upon States and NSAG.⁷² Nevertheless, this explanation falls short to explain how NSAG become bound to the whole body of IHL, whose rules may derive from, but not necessarily constitute or reflect, general principles of law.⁷³

Lastly, the most convincing argument is given by the so-called prescriptive or legislative jurisdiction theory. In international law, 'jurisdiction' refers to the sovereign competence of States to regulate conducts of natural and legal persons.⁷⁴ Accordingly, when States become parties to treaties, international obligations following from them will not only bind such States, but also those within their territory.⁷⁵ In this sense, while acknowledging that treaties could not directly bind privates, the Permanent Court of International Justice (PCIJ) stated that "the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts".⁷⁶ Moreover, a recent view of international law is that its rights and obligations may be created, *directly* and without the interposition of national law, vis-à-vis non-State actors.⁷⁷ This was presumably the case of obligations contained in Common Article 3.

the International Law Commission: Seventy-First Session (29 April–7 June and 8 July–9 August 2019), International Law Commission, 2019.

⁷¹ Brownlie, Ian and Crawford, James, *op. cit.*, p. 37.

⁷² Sivakumaran, Sandesh, *op. cit.*, p. 373; Cassese, Antonio, *International Law*, 2nd ed., Oxford University Press, 2005, p. 64.

⁷³ Crowe, Jonathan and Weston-Scheuber, Kylie, *op. cit.*, p. 160; Sivakumaran, Sandesh, *op. cit.*, p. 863.

⁷⁴ Brownlie, Ian and Crawford, James, *op. cit.*, p. 456.

⁷⁵ Sivakumaran, Sandesh, *op. cit.*, p. 381.

⁷⁶ Series B - No 15, *Jurisdiction of the Courts of Danzing (Advisory Opinion)*, Permanent Court of International Justice, 1928, p. 18.

⁷⁷ ICJ Reports 1949, *Reparation for injuries (Advisory Opinion)*, International Court of Justice, 1949, paragraph 179; ILC, Principle 1 of the 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal Adopted by the International Law Commission at Its Second Session and Submitted to the United Nations General Assembly', 1950; ICJ Reports 2001, *LaGrand (Germany v United States of America)*

Considering these arguments' strengths and weaknesses, their coexistence leads to the conclusion that international law evolved to encompass the conducts of NSAG.

2. Branches of International Law that NSAG Might Violate

To outline the legal landscape concerning the international responsibility of NSAG, Clapham invites us to consider their role in international law from these group's rights and obligations' standpoint. For him, while it is uncontroversial that members of NSAG have international rights and duties as *individuals*, the question of whether they do so as *groups*, is still underdeveloped in law and practice. Clapham analyses how these groups, as such, might violate three branches of international law.⁷⁸

First, IHL binds NSAG when they become parties to NIACs. These groups may thus violate Common Article 3 to the Geneva Conventions, which prohibits them to carry out certain acts against persons taking no active part in hostilities.⁷⁹ Additionally, NSAG may violate customary law and general principles of IHL.⁸⁰

Second, while international human rights law has traditionally been concerned with restraining States' abuses,⁸¹ it has recently expanded to consider non-State actors' violations, as demonstrated by the adoption of certain treaties that have addressed these actors.⁸² In the past few decades, NSAG

(*Judgment*), International Court of Justice, 2001, p. 466, para. 77; ICJ Reports 2004, *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)*, International Court of Justice, 2004, p. 12, paragraph 40.

⁷⁸ Clapham, Andrew, "The Rights and Responsibilities...", *cit.*, pp. 4 y 5.

⁷⁹ Article 3(I) Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949.

⁸⁰ See a complete list, as cited by Clapham, in the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 2005.

⁸¹ Reinisch, August, *op. cit.*, p. 38.

⁸² See *ibidem* where Clapham notes developments in human rights treaties that address NSAG in one way or another: the 2000 Convention on the Rights of the Child, the 2006 Enforced Disappearances Convention and the 2009 African Union Convention for the Protection and Assistance of Internally displaced persons.

have gained power and relevance,⁸³ thereby increasing their capability to violate human rights. Reinisch explains that, over the last half-century, human rights lawyers have fought for the recognition of human rights as inherent and inalienable entitlements of every person and not merely as rights conferred by the goodwill of States.⁸⁴ Thus, given that human rights law recognizes each person's inherent dignity, every entity is bound to respect it.⁸⁵ This approach is reflected in the 1948 Universal Declaration of Human Rights,⁸⁶ which is not a treaty but a proclamation of every person's rights. This Declaration, which constitutes customary international law,⁸⁷ contains the proper standards to be applied by non-State actors, including NSAG.⁸⁸ Moreover, while accountability mechanisms have mainly focused on States' human rights violations, there is an increasing understanding that NSAG may also violate them".⁸⁹

Thirdly, it is also uncontroversial that members of NSAG may *individually* commit, and be prosecuted for, violations to international criminal law, *i.e.* international crimes.⁹⁰ While this branch of law was originally conceived for contexts involving large-scale State criminality,⁹¹ international criminal tribunals have mainly considered the conducts of NSAG's members.⁹² This occurs not only for the scope of their constitutive instruments, but also since States will not lightly surrender their agents for prosecution. More-

⁸³ Hessbruegge, Jan Arno, "Human Rights Violations Arising from Conduct of Non-State Actors", *Buffalo Human Rights Law Review*, vol. 11, article 3, 2006, p. 1.

⁸⁴ Reinisch, August, *op. cit.*, p. 38.

⁸⁵ Clapham, Andrew, "The Rights and Responsibilities...", *cit.*, p. 24.

⁸⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

⁸⁷ As utilized by the International Court of Justice in ICJ Reports 1980, *Case concerning United States diplomatic and consular staff in Tehran (United States of America v Iran) Judgement*, International Court of Justice, 1980, p. 3, paragraph 42; see also Hannum, Hurst, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, vol. 25, 1996, p. 287. 0.

⁸⁸ Clapham, Andrew, "The Rights and Responsibilities...", *cit.*, p. 24.

⁸⁹ See Clapham, Andrew, "The Rights and Responsibilities...", *cit.*, p. 28 citing UNDoc A/HRC/2/7, 2 October 2006, at paragraph 19.

⁹⁰ *Ibidem*, p. 34.

⁹¹ Cassese, Antonio *et al.*, *Cassese's International Criminal Law*, 3rd ed., Oxford University Press, 2013, pp. 255 y 256.

⁹² Clapham, Andrew, "The Rights and Responsibilities...", *cit.*, p. 34.

over, responsibility for committing war crimes during NIACs may also be attached to superior members of NSAG for their subordinates' crimes and for failing to prevent or punish them.⁹³ Lastly, while international tribunals have not prosecuted these groups *as such*, national tribunals may have to consider these entities' international responsibility when dealing with civil reparation cases.⁹⁴

3. *Proposals for Changing the System*

Three options have been identified as alternatives that could either fortify or change the system for establishing the international legal responsibility of NSAG: (i) strengthening the rules under which States are responsible for failing to prevent these groups' human rights violations; (ii) making NSAG directly responsible at the national and international levels; and (iii) radically opening the system.

First, various international human rights treaties contemplate a form of 'indirect' or 'vicarious' responsibility of States for actions committed by non-State actors. This form of responsibility is derived from the obligations that States parties, together with their basic obligation to 'respect', have to 'ensure', 'protect' or 'secure' human rights.⁹⁵ In this sense, article 2(I) of the 1966 International Covenant on Civil and Political Rights⁹⁶ establishes that parties undertake "to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized" therein. This obligation entails that States shall take "legislative, judicial, administrative, educative and other appropriate measures"⁹⁷ to prevent human rights violations committed either by them or other actors, including NSAG.⁹⁸ Also known as *due diligence*, this obligation, which has been confirmed by different interna-

⁹³ *Ibidem*, p. 35.

⁹⁴ *Ibidem*, p. 34.

⁹⁵ Reinisch, August, *op. cit.*, p. 79.

⁹⁶ International Covenant on Civil and Political Rights, 16 December 1966 (999 UNTS 171), (in force since 23 March 1976).

⁹⁷ HRCttee, General Comment no 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, paragraph 7.

⁹⁸ Eatwell, Tatyana, 'State Responsibility for Human Rights Violations Committed in the

tional bodies,⁹⁹ entails that States may be responsible for private acts whenever they fail to prevent, investigate or punish human rights violations.¹⁰⁰ However, the fact that States have an obligation of due diligence does not mean they must accomplish disproportionate or impossible tasks; they are only expected to take all the *appropriate, reasonable* and *necessary* measures available in each case.¹⁰¹ While strengthening this ‘indirect responsibility’ system may incentivize States to prevent non-State human rights violations,¹⁰² its effectiveness seems less clear when dealing with NSAG. Especially, considering that one of the main policy rationales of this type of ‘vicarious’ responsibility is the establishment of State’s responsibility but for ‘out-sourced’, ‘delegated’ or ‘transferred’ authority by the State to the non-State actor.¹⁰³ In any case, this avenue remains available, and its use may continue to¹⁰⁴ establish States’ responsibility.

Second, a direct form of accountability of NSAG under international law remains underdeveloped.¹⁰⁵ In the human rights field, for instance, no enforcement machinery has been created whereby these groups can be held directly accountable. Moreover, even if their members may be individually prosecuted, the responsibility of the group, as such, is scarcely established. For Clapham, “one should not, however, draw the conclusion that the absence of international jurisdictions means that NSAG have no obligations under international law”.¹⁰⁶ Additionally, civil litigation before national courts has proved to be effective for holding non-State actors responsible. While this possibility has mainly focused on transnational corporations, national courts may also have to consider the conducts of NSAG for deter-

State’s Territory by Armed Non-State Actors’, *Geneva Academy: Academic Briefing*, num. 13, 2018, pp. 13-24.

⁹⁹ Reinisch, August, *op. cit.*, pp. 79-81.

¹⁰⁰ *Ibidem*, p. 80.

¹⁰¹ Eatwell, Tatyana, *op. cit.*, p. 22.

¹⁰² Reinisch, August, *op. cit.*, p. 82.

¹⁰³ *Idem*.

¹⁰⁴ Eatwell, Tatyana, *op. cit.*, p. 23 establishing that “the African Commission on Human and People’s Rights found Cameroon responsible for its failure to take the necessary measures to prevent post-election violence that, through its investigations, the state knew or should have known was being planned, and for its failure to respond promptly to that violence”.

¹⁰⁵ Reinisch, August, *op. cit.*, p. 82.

¹⁰⁶ Clapham, Andrew, “The Rights and Responsibilities...”, *cit.*, p. 5.

mining whether a State has assisted them (*f.i* by supplying arms) in violating international rules.¹⁰⁷ Strengthening this type of litigation could advance the making of NSAG directly responsible for international law violations at the national level.

A third avenue for making NSAG accountable for international law violations is radically modifying the system. Exploring this possibility, Heffes and Frenkel explain there is a gap created by the rules on international responsibility under which only States and individuals can separately be held responsible for international law violations, leaving aside NSAG's responsibility as a collective.¹⁰⁸ Building on the idea that such gap needs to be filled by directly subjecting NSAG to international law,¹⁰⁹ they submit that their international responsibility shall be undertaken on behalf of victims and the international community.¹¹⁰ While recognizing the difficulty of changing the system, they also identify rules on attribution and reparations that could, *mutatis mutandis*, conceive NSAG as capable of violating international law. Clarifying those rules, they argue, may have a positive impact on parties subjected to them, who would more highly and easily recognize and respect the law.¹¹¹

A good reason for endorsing this option is the belief that NSAG could become convinced of the appropriateness of international law and take ownership of its norms. This has materialized in the real world, where certain NSAG have embraced rules of international law and their responsibility for violating them.¹¹² It is also claimed that opening the system to allow the participation of NSAG in the formation of IHL could elicit the group's ownership of its rules, which would be consistent with the principle of equality of the parties in armed conflicts.¹¹³ In Heffes and Frenkel's words, "improving the clarity on the rules on a subject may entail higher levels of respect, since every involved party would be able to recognize its obliga-

¹⁰⁷ *Ibidem*, pp. 5, 36-38.

¹⁰⁸ Heffes, Ezequiel and Frenkel, Brian, *op. cit.*, p. 56.

¹⁰⁹ Murray, Daragh, *op. cit.*, p. 132.

¹¹⁰ Heffes, Ezequiel and Frenkel, Brian, *op. cit.*, p. 56.

¹¹¹ *Ibidem*, p. 72.

¹¹² *Ibidem*, p. 42.

¹¹³ *Ibidem*, p. 54, See also p. 60 in which the authors submit that 'there is good case to claim that armed groups already participate in the formation of customary rules, mainly with respect to IHL'.

tions and act accordingly".¹¹⁴ They conclude that the internalization of rules and their translation into a language that NSAG can understand would raise their level of compliance.¹¹⁵ In fact, non-governmental organizations like Geneva Call have engaged with these groups for monitoring and encouraging their consent to certain international obligations, particularly with respect to human rights and IHL.¹¹⁶

In my view, it is salutary to be sceptical towards radically opening the system. In addition to 'legitimacy implications', if the current system overly loosens to comprehend more States' violations of due diligence obligations regarding human rights, a risk of having developing States paying large amounts of compensations for non-State action emerges. Moreover, a very extreme version of the 'open system scenario' could be a private-to-private litigation model, in which non-State actors could settle with victims of serious human rights or IHL violations in disregard of basic moral values. I am certain that a middle ground that brings about both the responsibility of State and non-State actors is both possible and more desirable. In this sense, proposals entailing the recognition of certain international obligations for NSAG; mainly in the realms of international human rights, IHL and criminal law, seem more prudent. Clarifying these rules and empowering national and international mechanisms may thus have a positive impact on victims.

IV. A LEGAL VACUUM IN THE LAW OF STATES' RESPONSIBILITY

In 2001, the ILC adopted the 'Draft articles on Responsibility of States for Internationally Wrongful Acts' (ASR), which are now considered as largely reflecting customary law.¹¹⁷ The ASR contains the conditions under which States may be held responsible for violating international law and the ensuing consequences.¹¹⁸ Under article 2, internationally wrongful acts are

¹¹⁴ *Ibidem*, p. 72.

¹¹⁵ *Idem*.

¹¹⁶ Clapham, Andrew, "The Rights and Responsibilities...", *cit.*, p. 32.

¹¹⁷ Crawford, James, *State Responsibility: The General Part*, Cambridge University Press, 2014, p. 43.

¹¹⁸ ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries", *Yearbook of the International Law Commission*, 2001, p. 31.

those breaches of international obligations that are *attributable to States*. The general requirement of attribution is further construed in Articles 4 to 11, which define the particular scenarios where such an attachment of conducts to a State is justified. Particularly, article 10 refers to the situation where acts of insurgents give rise to States' responsibility:

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law...

This article is premised on the general rule that States are not responsible for privates' acts. In this sense, Roberto Ago, who was the Special Rapporteur of the ILC in charge of drafting Article 10, proposed to expressly include such general rule as follows: “[t]he conduct of a private individual or group of individuals, acting in that capacity, is not considered to be an act of the State in international law”.¹¹⁹ This general rule covers NSAG' conducts, which are not attributable to States unless one of the Article 10 situations occurs. In fact, Ago noted that the conducts of an insurrectional movement, which exists as a separate subject of international law in parallel with the State, are in principle attributable solely to that movement and not to the State. In his words, “[t]o the extent allowed by its limited international capacity, this subject is perfectly capable of committing internationally wrongful acts”.¹²⁰

Nonetheless, Article 10 of the ASR establishes an exception to this general rule, namely, where insurrectional movements succeed and therefore exceptionally engage the responsibility of the State for their conducts. In this sense, Article 10 covers three scenarios, two explicit and one implic-

¹¹⁹ ILC, 'Fourth Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur—The Internationally Wrongful Act of the State, Source of International Responsibility (Continued)', International Law Commission, 1972, Document A/CN.4/264 and Add.1, p. 126.

¹²⁰ *Ibidem*, p. 129.

it.¹²¹ The first explicit scenario occurs where the insurgency succeeds and becomes a State's new government. This exception, based on the idea of continuity between the insurgency and the organization of the new State, entails that the acts committed during the struggle by both the insurgency and the former government become attributable to the already existing State.¹²² The second explicit scenario occurs where an insurrectional 'or other' movement succeeds in establishing a completely new State. Here, the acts of the movement will be solely attributed to the new State and not to the predecessor;¹²³ for continuity exists between the movement and the new States' organization.¹²⁴ In both of scenarios, the actions of insurgents may be assessed under international law *through* the law of State responsibility, *i.e.* as acts of the State proper when insurgencies succeed. Nonetheless, a final implicit scenario is derived from Article 10: where the insurgency fails and its conducts cannot be attributed to any State.

In theory, where insurgencies fail and their conducts cannot be attributed to a State, they may *themselves* be held responsible for violating international law.¹²⁵ As specified in the ASR's Commentary, "the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces".¹²⁶ While these movements' international responsibility and its consequences escape from the ASR's scope, Ago's analysis during the drafting process sheds light on such responsibility's elements. In fact, he even proposed a Draft Article entitled 'conduct of other subjects of international law', under which: "the conduct of a person or group of persons acting in the territory of a State as organs of an insurrectional movement directed against that State and possessing separate international personality is not considered to be an act of that State in international law".¹²⁷ The proposed

¹²¹ Crawford, James, *op. cit.*, p. 174.

¹²² ILC, "Draft Articles on Responsibility of States...", Article 10 paragraph 5, p. 50.

¹²³ For a proposal that this principle should find application in all cases of succession and even where predecessor State continue to exists, see: Dumberry, P, 'New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement', *European Journal of International Law*, Volume 17, Issue 3, 2006, p. 605.

¹²⁴ ILC, "Draft Articles on Responsibility of States...", Article 10, paragraph 6, p. 51.

¹²⁵ Crawford, James, *op. cit.*, p. 180.

¹²⁶ ILC, "Draft Articles on Responsibility of States...", Article 10, paragraph 6, p. 52.

¹²⁷ ILC, "Fourth Report on State Responsibility...", p. 143.

Article included a ‘without prejudice’ clause, providing that those persons’ conducts might nonetheless be attributable to the insurrectional movement of which they were organs. The Draft Article was based on the idea that insurrectional movements, as such, are different from other NSAG and could therefore be held responsible.¹²⁸ For Ago:

[I]njurious actions committed by the organs of an insurrectional movement, in the sense in which this term is used in international law, are different from those committed by individuals or groups of individuals during a riot or demonstrations by a rebellious mob. In the first case, those who commit the acts are not private individuals, but *organs of a subject of international law other than the State*. It is this subject to which the acts of its own organs should normally be attributed, and which may be called upon to answer for them.¹²⁹

Notably, Ago went on to exemplify three cases where States have presented direct claims to insurrectional movements for the injuries caused to them or to their nationals. Firstly, in the context of the American Civil War (1861), Great Britain justified its relations with the Confederate insurgents by referring to the “undoubted principle of international law, that when the persons or the property of the subjects or citizens of a State are injured by a *de facto* government, the State so aggrieved has a right to claim from the *de facto* government redress and reparation”.¹³⁰ Second, during the Mexican Revolution (1914), the US claimed reparation for the unlawful arrest, by an armed group under General Huerta’s control, of crewmembers of the American vessel *Dolphin*. This was done with the understanding that, at the moment, Mexico had no government and General Huerta’s forces solely controlled part of Mexican territory.¹³¹ Thirdly, Great Britain formally claimed reparations on three occasions to the belligerent Nationalist Government during the Spanish Civil War.¹³² For instance, in response to a

¹²⁸ Clapham, Andrew, “Human Rights Obligations...”, *cit.* p. 509.

¹²⁹ ILC, “Fourth Report on State Responsibility...”, *op. cit.* p. 139 (emphasis added).

¹³⁰ *Idem*.

¹³¹ ‘Address of the President Woodrow Wilson to Congress on “The Situation in Our Dealings with General Victoriano Huerta at Mexico City”, *Office of the historian - US Department of State*, 20 April 1914, available at: <https://history.state.gov/historicaldocuments/frus1914/d705>.

¹³² ILC, “Fourth Report on State Responsibility...”, *op. cit.*, p. 139.

particular claim on the bombing of the British steamer *Jean Weems*, the Nationalist forces provided assurances of non-repetition, and agreed to submit the case to arbitration if the parties so considered.¹³³

These examples rest on the premise that States may bring claims against insurrectional movements, engaging their international responsibility when they have not succeeded in establishing a new government or State.¹³⁴ While this possibility remains underexplored, international bodies such as the UN Security Council have called unsuccessful insurgencies to respect international law and abide by the consequences of their violations.¹³⁵ In Resolution 1214 (1998) it demanded Afghan factions to halt human rights and IHL violations and to adhere to international law.¹³⁶ Additionally, in Resolution 1417 (2002) it held rebel groups in the Democratic Republic of Congo "responsible to bring to an end all extrajudicial executions, human rights violations and arbitrary harassment of civilians" in territories they controlled.¹³⁷

Truth and reconciliation commissions have also considered international law violations committed by unsuccessful insurgencies and requested them compliance. This is reflected in the Guatemalan Commission for Historical Clarification's Report, issued in the aftermath of that State's civil war:

[I]nsurgent groups that participated in the internal armed confrontation had an obligation to respect the minimum standards of international humanitarian law that apply to armed conflicts, as well as the general principles common to international human rights... superior levels of the organic structure of the guerrillas hold undeniable responsibility for offences against the lives of individuals and other violations of international humanitarian law.¹³⁸

¹³³ Fortin, Katharine, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, 2017, paragraph 4.3.

¹³⁴ Crawford, James, *op. cit.*, p. 180.

¹³⁵ For a more comprehensive discussion of these Resolutions see Clapham, Andrew, "Human Rights Obligations...", *op. cit.* pp. 449-503.

¹³⁶ UNSC, The situation in Afghanistan, Resolution 1214 (1998), 1998, paragraph 12.

¹³⁷ UNSC, The situation in the Democratic Republic of the Congo, Resolution 1417 (2002), 2002, paragraph 4.

¹³⁸ 'Guatemala Memory of Silence: Report of the Commission for Historical Clarification - Conclusions and Recommendations', UN Doc. A/53/928, 1999, Annex pp. 42-44.

As means of reparation, this Commission recommended Guatemala to create a National Reparation Program, which benefited victims of international law violations committed both by State actors and insurgent groups. The Commission also recommended insurgents to directly assume responsibility of those violations, ask forgiveness, and provide information on enforced disappearances.¹³⁹ Moreover, the Truth and Reconciliation Commission of Sierra Leone also found that non-State actors, including private security companies, rebels, peacekeepers and insurgents, had violated international law during the Sierra Leonean armed conflict (1991).¹⁴⁰ Amongst the participant insurgents, it found the Revolutionary United Front to be the most responsible for international human rights and humanitarian law violations.¹⁴¹ While non-State actors had committed most of the unlawful conducts, the Commission considered that the State was bound to provide reparations for all violations committed,¹⁴² as they were primarily the government's responsibility.¹⁴³

In any case, claiming the international responsibility of unsuccessful insurgencies and obtaining reparations for them faces several obstacles. Not only is this option problematic for the States' reluctance to recognize the insurgent's personality,¹⁴⁴ but it also faces practical obstacles given these entities' nature and the complexity of enforcing the law against them. For Ago:

[T]he extent and size of the insurrectional movement may vary with the vicissitudes of the civil war, and the territory over which it exercises authority may shrink or expand. All this creates uncertainty regarding the prospects of obtaining reparation from the movement, during the conflict, for an internationally wrongful act, especially as it may have no property which, when the need arises, could afford a means of compensation. We may add that... making responsibility effective

¹³⁹ *Ibidem*, pp. 49-52.

¹⁴⁰ Truth and Reconciliation Commission, "Witness to truth: final report of the truth and reconciliation commission - Sierra Leone", Graphic Packaging, 2004, available at: <http://www.aspresolver.com/aspresolver.asp>, pp. 23, Volume 1, Chapter one.

¹⁴¹ *Ibidem*, Volume 2, Chapter Two, pp. 29, 127, 154.

¹⁴² *Ibidem*, Volume 2, Chapter Four, p. 21.

¹⁴³ *Ibidem*, volume 2, Chapter Four, pp. 5, 82, 197.

¹⁴⁴ Crawford, James, *op. cit.*, p. 171.

could entail further difficulties, either in fact or in law, since there is a risk that the presentation of a claim could imply recognition.¹⁴⁵

For these reasons, reparations arising from international law violations committed by insurgencies have mostly been sought through the establishment of States' responsibility, relegating the insurgencies' responsibility as *independent entities* to second place. This is exemplified by how the Truth and Reconciliation Commission of Sierra Leone addressed the matter. Recognizing the complexity of the conflict, the impossibility to identify the perpetrators, and the absence of options to seek redress through civil courts,¹⁴⁶ the Commission decided that the State was responsible for failing to prevent violations committed by privates.¹⁴⁷ For Crawford, what really matters, in practice, is the responsibility of States for the insurgents' conducts.¹⁴⁸ Accordingly, the relevant responsibility for these cases would only be that of the State, arising either from the attribution of successful insurgencies' conducts or through the application of due diligence. Still, a strong version of this approach solely reinforces the traditional State-centred paradigm of international law, an exclude a necessary avenue to make non-State actors directly accountable.

In conclusion, the traditional approach fails to address violations committed by insurgencies *per se*, creating a legal vacuum for the victims who are entitled to reparations. This vacuum emerges when insurgencies have not yet succeeded in establishing a new government or a new State, when they fail in this endeavour, or when States cannot be held responsible for failing to comply with due diligence. From the victims' standpoint, it should not matter whether the insurgency succeeded or if a particular State could be held responsible for violating obligations of conduct or failing to comply with due diligence. What should matter is victims' exercise of their right to reparations. In other words, wrongful acts committed by unsuccessful insurgents, should also be redressed. Otherwise, victims of serious international law violations risk facing a legal loophole when trying to obtain redress arising from these NSAG' violations. In my view, a possible

¹⁴⁵ ILC, "Fourth Report on State Responsibility...", *cit.* p. 139.

¹⁴⁶ Truth and Reconciliation Commission, *cit.*, vol. 2, Chapter Four, paragraph 11.

¹⁴⁷ *Ibidem*, vol. 2, chapter Four, p. 21.

¹⁴⁸ Crawford, James, *op. cit.*, p. 171.

instrument to fill this gap could be the establishment, at the national level, of universal civil jurisdiction.

V. VICTIMS' RIGHT TO REPARATIONS

It is a general principle of international law that any violation of such law gives rise to an obligation of making full reparation for the injuries caused.¹⁴⁹ This obligation, in turn, produces a right to claim for the responsibility of the wrongdoer and to claim reparations.¹⁵⁰ The development of these rules followed a traditional approach, which considers States as the ultimate subjects in charge of making reparations. While the scope of these rules is mostly clear when dealing with inter-State relations, the extent to which they apply for situations where wrongdoers or their victims are non-State actors is uncertain. Unfortunately, this uncertainty persists with respect to individual victims of human rights and IHL violations,¹⁵¹ who are commonly considered as not being directly entitled to claim for reparations. One must then make the following assumption: even if international law recognizes certain *substantive* rights of individuals, this does not automatically entail that they enjoy *procedural* rights to enforce those rights or to internationally obtain reparations.¹⁵²

In this sense, reparations have mainly been considered from the standpoint of the State's *obligation* to make them, rather than from the injured subject's *right* to obtain them.¹⁵³ Thus, and in line with this article's pur-

¹⁴⁹ ILC, "Draft Articles on Responsibility of States...", article 31 ILC.

¹⁵⁰ *Ibidem*, p. 42.

¹⁵¹ Gillard, Emanuela-Chiara, "Reparation for Violations of International Humanitarian Law", *International Review of the Red Cross*, No. 851, 2003, pp. 25, 85, 530.

¹⁵² Gaeta, Paola, "Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?", in Ben-Naftali, Orna (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, 2011, p. 322.

¹⁵³ See, para. 152 of I.C.J. Reports 2004, *Wall (Advisory Opinion)*, p. 136: "given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons." See also, I.C.J. Reports 2010, *Diallo (Republic of Guinea v. DRC)*, Merits, Judgment, p. 639, paragraph 161.

pose, the following paragraphs will focus on the victims' rights to obtain reparations rather than on the States' obligations to ensure them. Moreover, while 'victims' comprise a limited type of subjects, without a precise definition in international law,¹⁵⁴ this article will focus on the concept of victims taken by the UN General Assembly's 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of IHL'.¹⁵⁵

Concerning IHL, Article 3 of the Hague Convention IV of 1907¹⁵⁶ and Article 91 of Additional Protocol I to the Geneva Conventions bind States to pay compensation for the wrongs they commit during international armed conflicts. However, these provisions do not expressly mention the subject to whom compensation is owed, which has traditionally been interpreted as entailing that such obligations are exclusively placed at an inter-State level.¹⁵⁷ In other words, States responsible of violating IHL are considered as solely bound to provide reparations to the State of nationality of injured victims, rather than to the victims as individuals.¹⁵⁸

This position has been criticized for ignoring the principle of evolutionary interpretation of treaties.¹⁵⁹ For Gaeta, such approach only made sense in the past, where individuals lacked subjectivity in international law.¹⁶⁰ The development of international human rights law, she argues, affected this

¹⁵⁴ Fernández de Casadevante Romani, Carlos, "International Law of Victims", *Max Planck Yearbook of United Nations Law*, Volume 14, 2010, pp. 219, 273.

¹⁵⁵ UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005 [Resolution 60/147] "[V]ictims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of [IHL]" "[a] person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim".

¹⁵⁶ Convention (IV) on the Laws and Customs of War on Land and annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, (in force since 26 January 1910).

¹⁵⁷ Bucher, Andreas, "La compétence universelle civile", *Recueil des cours de l'Académie de Droit International de La Haye*, vol. 327, Martinus Nijhoff Publishers, 2015, p. 45.

¹⁵⁸ Gaeta, Paola, *op. cit.*, p. 308.

¹⁵⁹ Bucher, Andreas, *op. cit.*, p. 45.

¹⁶⁰ Gaeta, Paola, *op. cit.*, p. 308.

construct by introducing the idea of individuals as direct holders of international rights opposable to States, including that to obtain reparations.¹⁶¹ Thus, individuals whose rights under IHL have been breached would also have a *substantive* right to reparations; a different question being whether they have a *procedural* right to internationally enforce those substantive rights. Acknowledging several obstacles, Gaeta notes that, in any case, individuals' right to reparations could be fulfilled through other means, such as their State's exercise of diplomatic protection; the actions of other States when dealing with *erga omnes* obligations; or the recourse to national tribunals.¹⁶²

Moreover, these IHL rules are, in principle, solely applicable to international armed conflicts, in which States would be those responsible of violations and the ones bound to make reparations. However, the fact that NSAG may also violate IHL when participating in NIACs, raises the question of whether their victims also possess a right to obtain from them reparations. Presumably, this right would not depend on the responsible entity, but on the right to reparations itself. For Gaeta:

[I]n contemporary armed conflicts is not unlikely that non-state armed groups commit serious violations of the rules of the international law of armed conflicts. Assuming that these groups are internationally bound by such rules, it is clear that if individuals possess an international right to compensation towards the responsible state, it would be easier to reach the same conclusion —*mutatis mutandis*— whenever the belligerent party responsible for the violation is a non-state armed group.¹⁶³

In fact, NSAG have occasionally acceded to make reparations for international law violations. In 1998, the Philippines and the National Democratic Front concluded a 'Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law', under which both parties agreed to make reparations.¹⁶⁴ The Agreement recognised the victims' right to seek justice and obtain reparations, and provided that those liable shall be

¹⁶¹ *Ibidem*, pp. 319, 326.

¹⁶² *Ibidem*, pp. 322 y 323.

¹⁶³ *Ibidem*, p. 307 Footnote 6.

¹⁶⁴ Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law.

prosecuted and their victims indemnified.¹⁶⁵ Admittedly, instances like this have rarely occurred, and today it is more common that *particular* members of NSAG, rather than the group *as such*, face a burden to make reparations via their individual civil or criminal responsibility. Moreover, neither the Geneva Conventions nor Additional Protocol II expressly bind NSAG to make reparations. However, it seems that NSAG' responsibility to make reparations is a natural consequence of their international law breaches.¹⁶⁶ This has also been the approach taken by the International Law Association when considering that “victims of armed conflict have a right to reparation from the responsible parties”, which “may also include non-State actors other than International Organizations”.¹⁶⁷

With respect to international human rights law, Article 8 of the Universal Declaration of Human Rights recognizes that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the[ir] fundamental rights.” Generally, under human rights law it is more common to witness cases where victims' right to reparations is fulfilled. Perhaps this is so because individuals are more frequently recognized with procedural rights to claim reparations arising from human rights violations before international tribunals.¹⁶⁸ However, most human rights treaties have been drafted from the point of view of the Sates' obligation to ensure reparations for individual victims within their *own* legal systems. Examples include the 1965 International Convention on the Elimination of All Forms of Racial Discrimination,¹⁶⁹ the 1984 Convention against Torture,¹⁷⁰ and the

tarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines (16 May 1998).

¹⁶⁵ See *ibidem*, Part IV, Article 6: “The persons liable for violations of the principles of international humanitarian law shall be subject to investigation and, if evidence warrants, to prosecution and trial. The victims or their survivors shall be indemnified...”.

¹⁶⁶ Gillard, Emanuela-Chiara, *op. cit.*, p. 535.

¹⁶⁷ International Law Association, “Resolution No 2/2010: Reparation for Victims of Armed Conflict”, *Report of the Seventy-Fourth Conference*, 2010, Articles 5.2 and 6.

¹⁶⁸ For instance, see Article 41 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 63 of the 1969 American Convention on Human Rights.

¹⁶⁹ International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966 (660 UNTS 195), (in force since 4 January 1969).

¹⁷⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (1465 UNTS 85), (in force since 26 June 1987). The text

2006 Convention on Enforced Disappearances.¹⁷¹ Admittedly, these provisions do not create individual rights to claim reparations at the international level, but only bind States to guarantee such reparations within their own legal systems.¹⁷²

The UN General Assembly took a more progressive approach in 2005, through the adoption of the above-mentioned Basic Principles, which reaffirm and develop victims' right to access justice and redress mechanisms. Particularly, they confirm that States have the obligation to ensure compliance with international law by: incorporating rules of human rights and IHL into their legal systems; adopting measures that provide fair, effective and prompt access to justice; making remedies available; and ensuring a minimum level of protection for victims (paragraph 2). Interestingly, the Principles clarify that the obligation to respect, ensure respect, and implement these branches of international law entails a duty to “[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice..., irrespective of who may ultimately be the bearer of responsibility for the violation” (paragraph 3). While this duty is State-oriented, its wording infers that victims' right to access justice should be fulfilled vis-à-vis *any* entity capable of committing those violations, including NSAG. Additionally, the Principles recognize and clarify the content of the victims' right to remedies in the form of access to justice, reparation, and access information (paragraph 11). In any case, the Principles end up subordinating these rights to States' domestic law. For Bucher:

[L]es Principes ne fournissent pas, et ne constatent pas non plus, la norme juridique internationale dont la victime peut se prévaloir pour réclamer réparation... Le droit des victimes “aux recours” n'est pas articulé, à part son principe,

of this instrument, which has been taken as a model for other UN human rights conventions, reads as follows: “Article 14. 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible... Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.”

¹⁷¹ International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006 (2716 UNTS 3), (in force since 23 December 2010).

¹⁷² Bucher, Andreas, *op. cit.*, p. 48.

en tant que droit individuel conféré par le droit international à la personne lésée. C'est un droit dont l'existence dépend de l'application et du respect, par les Etats, de leurs «obligations juridiques internationales» de rendre leur droit interne compatible avec le droit international.¹⁷³

In other words, while the Principles reaffirm victims' substantive rights to access justice and reparations, they do not attribute such rights to individuals in the form of directly applicable rules at the international level. In any case, these Principles are progressive and embrace a victim-oriented perspective; for, in addition to confirming States' obligation to repair their own international law violations, they specify that other liable entities *should* either directly provide reparations or compensate States that have already done so (paragraph 15). While it is not clear whether this has crystallized into an obligation for non-State entities, victims' right to obtain reparations remains intact. In this sense, such right is safeguarded vis-à-vis non-State actors in instruments of international law such as the Rome Statute, which empowers the International Criminal Court to make reparation orders against convicted persons.¹⁷⁴ Recently, the Human Rights Council's Guiding Principles on Business and Human Rights also declared that States must ensure that victims of business-related human rights abuses have access to effective remedies.¹⁷⁵

Finally, the Principles also recognize the States' obligation to “enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic [and international] law” (paragraph 17). This obligation could be the *raison d'être* of the exercise of national civil jurisdictions for the providing redress to victims of international law violations committed by non-State actors.

¹⁷³ *Ibidem*, p. 50.

¹⁷⁴ Article 75.2 Rome Statute of the International Criminal Court, 17 July 1998 (2187 UNTS 3), (in force since 1 July 2002).

¹⁷⁵ HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework 2011 paragraph 25.

VI. CONCLUDING REMARKS

The question of whether NSAG' breaches of international law give rise to victims' rights to reparations is plagued with uncertainties. As individuals, members of NSAG may be bound to repair international crimes and other serious violations of international law. However, as subjects of international law, these NSAG' obligations to make reparations for the international law violations of the group is less clear.

In this sense, the States' responsibility framework created a vacuum with respect to unsuccessful insurgencies' accountability. These NSAG, should respond to their international law violations regardless of their success.

The entrance of non-State actors in the international legal system calls for ensuring internationally recognized human rights, including the right of NSAG' victims to reparation, regardless of the perpetrator's nature. Similarly, to other non-State actors, NSAG are responsible to redress victims of their international law violations. Instrumentalizing this right of reparations through various mechanisms could be beneficial given the assets these groups possess, and their victims' need to access justice and obtain redress.

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