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Armed non-State Actors and their Impact on International Lawmaking. From State-centrism to Self-regulation

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Armed non-State Actors and their Impact on International Lawmaking. From State-centrism to Self-regulation

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Introduction

1. The emergence of ANSAs

Armed non-state actors (ANSAs) have become powerful and widespread actors. The emergence of ANSAs is strictly linked to the development of warfare and is part of a wider evolution of the role of actors and the relations between them within the international community. Traditionally, armed conflicts have been conducted by a state against (at least) another state, thus being international armed conflicts (IACs). Consequently, the legal framework governing the conduct of hostilities has been produced by, and addressed to, states. Since the end of World War II, however, non-international armed conflicts (NIACs) have become more common, while IACs have become rarer. Thus, armed conflicts have recently undergone profound changes in virtually every aspect,[1] including the entities involved. As NIACs are conducted by the forces of a state against at least an ANSA, or among two or more ANSAs,[2] the latter are today widespread. Moreover, ANSAs have gained power and control over certain areas, even outside armed conflicts.

Despite this development, the regulation of ANSAs provided by the traditional system of international law appears to have shortcomings. Indeed, the emergence of ANSAs shows the limitations of the traditional system of sources of international law to effectively regulate the current international scenario.

2. The international legal context

International law has been considered the law regulating the relations between sovereign states for a long time. In Vattel's words, it is "the science which teaches the rights subsisting between nations or States, and the obligations corresponding to those rights".[3] Consequently, in the Westphalian

[1] See, e.g., Emily Crawford, 'From Inter-State and Symmetric to Intra-State and Asymmetric: Changing Methods of Warfare and the Law of Armed Conflict in the 100 Years Since World War One' (2014) 17 Yearbook of International Humanitarian Law 95.
[2] See, e.g., Annyssa Bellal and others, 'The War Report: Armed Conflicts in 2018' (Geneva Academy of International Humanitarian Law and Human Rights 2019).
[3] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Joseph Chitty ed, 6th edn, T & JW Johnson 1844).

international order, states play a central and dual role. On the one hand, they are the makers of rules of international law;[4] on the other, they are the recipients of these rules.

However, today, the role of states within the international community does not appear as central as it used to be. This development has had impacts on the international legal system. Indeed, a thorough examination of the present international context has led many scholars to critique the traditional "State-centric" definition of public international law. The latter is no longer considered only as the discipline governing the relations between sovereign States, but rather as the regulation of the relations between the members of the international community.

This applies to the topic at issue as well. It appears that, despite the importance and power acquired by ANSAs in the international context, their position is not adequately regulated under the traditional sources of international law. Part of the lack of adequate regulation is due to the difficulties in identifying ANSAs, taking into consideration their structure, capability of enforcing rules and claims in an appropriate manner. In some circumstances, this may lead to a general unwillingness to engage with them at all; at best, it leads to inadequate rules. Moreover, as they are non-state actors (NSAs), they are not taken into consideration in traditional processes of law-making; this may ultimately compromise the willingness of ANSAs to respect such rules, as they have not contributed to the creation of provisions they are obliged to respect. The ineffectiveness of the rules of classic international law regarding ANSAs has grave effects, especially from a humanitarian point of view, as ANSAs are involved in almost all ongoing conflicts. The uncertainty regarding the rules applicable to them and the frequent reluctance of ANSAs to comply with rules they have not consented to compromise the effective protection of persons affected by the conflict, both civilians and members of the armed forces.

To overcome these issues, new strategies, which also involve the direct engagement of ANSAs in the adoption of regulatory instruments, have been elaborated. While it is unrealistic to expect a formal adherence of ANSAs to treaties,[5] in recent years several ANSAs have demonstrated their willingness to recognise and comply with rules of international law. These positions of openness of ANSAs

[4] Regarding the central role of states in the production of international customary law, it is enough to recall that the two elements necessary for a customary law to be created (*opinion juris* and *diuturnitas*) refer to the opinion and practice of States. See *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (1996) I.C.J. Reports 1996 226 (International Court of Justice) para. 64; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* (1985) I.C.J. Reports 1985 13 (International Court of Justice) para. 27.

[5] See Geneva Academy of International Humanitarian Law and Human Rights, 'Armed Non-State Actors and International Norms: Towards a Better Protection of Civilians in Armed Conflicts: Summary of Initial Research and Discussions during an Expert Workshop in Geneva in March 2010' (2010).

towards the compliance with these rules have been variously manifested, e.g., through unilateral declarations, special agreements, and codes of conduct. In this sense, the work conducted by the non-governmental organisation (NGO) Geneva Call is particularly relevant. In fact, the latter has adopted different deeds of commitment, open for ANSAs for adoption. The majority of these instruments may be considered self-regulation tools. The latter may have very different characteristics, thus do not have "unique properties";[6] nonetheless, it can be affirmed that self-regulation tools entail the self-constraining of the conduct of non-state actors (NSAs). Indeed, the term "regulation" can be defined as an "authoritative rule",[7] or as "the act of regulating".[8] In turn, the verb "to regulate" means "to govern or direct according to a rule".[9] Therefore, the abovementioned instruments, i.e. unilateral declarations and codes of conduct, may be considered as self-regulation tools. The Geneva Call's Deeds of Commitment can be considered as an hybrid, as they are standardised instruments of self-regulation. Indeed, NSAs (ANSAs included) adopt these instruments to establish authoritative rules to govern their conduct. The adoption of these instruments demonstrates the willingness of ANSAs to commit themselves to the relevant provisions; from another point of view, this process demonstrates that rules of international law produced by States and for States are not suitable to deal with the problems raised by the emergence of ANSAs in an effective manner. Indeed, it has been affirmed that instruments of self-regulation may provide a solution to the lack of power and control of legitimate state authorities.[10] Consequently, the resort to self-regulation tools is thus not surprising, considering the powerful role recently gained by ANSAs.

Despite offering a solution to the problem of effectiveness of law, this recent practice raises theoretical issues related to the involvement of ANSAs in law-making processes. In addition, this practice shows the emergence of non-traditional modes of production of international law. Predictably, the involvement of a particular type of ANSAs and the resort to innovative methods of normative production has led to theoretical debates. Thus, it is appropriate to assess the main theoretical positions on the matter at issue.

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[6] Tony Porter and Karsten Ronit, 'Self-Regulation as Policy Process: The Multiple and Criss-Crossing Stages of Private Rule-Making' (2006) 39 Policy Sciences 41, 42.
[7] Merriam-Webster's Staff, 'Regulation'.
[8] Ibid.
[9] Merriam-Webster's Staff, 'Regulate'.
[10] Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 Current Legal Problems 103.

3. Research question

Taking into account the context outlined above, the present work aims at providing an answer to the following question:

What is the feasible role of ANSAs in processes of international law-making? What are the possible developments of their involvement?

To answer this question, it must first be taken into account that the perception and reception of ANSAs by the international community affects the feasibility of their involvement in law-making processes. Their identification is complicated because ANSAs are a wide category composed of several subcategories, with deeply different features. This situation is worsened by the frequent reluctance of states to engage with ANSAs as relevant actors within the international legal order. Also, the appraisal of ANSAs suffers from political considerations. For instance, while the perception of national liberation movements (NLMs) and terrorist groups is deeply different, it is also frequently affirmed that "one man's terrorist is another man's freedom fighter".[11]

Another issue to discuss in order to answer the question above regard the several theoretical issues submitted over time concerning the nature of the products of the law-making activity of ANSAs. On a more thorough analysis, it appears that such theoretical uncertainties are ultimately due to the unclear definitions and reception of other issues. In particular, the theoretical assessment of the involvement of ANSAs in law-making processes requires identifying what international law and international law-making are. Despite being fundamental elements, their definitions are contested, today possibly more than ever because of the emergence of soft law and informal law-making procedures. It appears, indeed, that the identification of all the abovementioned elements, and consequently the theoretical evaluation of the instruments adopted with the involvement of ANSAs, depends on the theoretical approach adopted.

Despite the theoretical uncertainties, international practice shows an emerging trend of taking into consideration the role and aims of ANSAs in the production of international rules relevant for them. Indeed, international law has increasingly taken ANSAs into account, first introducing rules addressed to them, e.g. Common Article 3 to the Four Geneva Conventions (CA3), then expanding the rules addressed to them beyond the branch of IHL, and finally involving ANSAs directly in law-making processes, also resorting to the promotion of the adoption of instruments of self-regulation.

[11] See, e.g., Boaz Ganor, 'Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?' (2002) 3 Police Practice and Research 287.

In this regard, it has been noted that the latter practice "has accommodated the desire of non-state actors to bind themselves".[12]

In conclusion, it appears that the practice of involvement of ANSAs in law-making processes exists and has accommodated non-state entities with power and authority; theoretical issues on the topic persist and must be assessed.

4. Methodology

As the topic discussed regards the development of international law-making because of a misalignment between traditional law and the current international community, the rules and doctrines are appraised adopting an evolutionary approach.

The research is divided into two main lines, the first regarding the identification of ANSAs and the second regarding the rules applicable to them.

The first line, namely the identification of ANSAs, starts from the assessment of the meaning of the terms "non-state", "armed" and "actor" under a semantic approach. This inquiry is then widened considering the pertinent international practice. In particular, relevant international conventions and instruments adopted by the UN organs are appraised.

The possibility for ANSAs to adopt international legal instruments is then examined both under a theoretical and practical perspective. In fact, it is examined in light of the existing rules on the topic, as well as relevant international practice. Given the theoretical issues on the topic, however, the main theoretical justifications and counterarguments emerged are assessed.

The research question arises from the observation of the legal issues regarding the production and application of international law relevant for ANSAs in the concrete international scenario. Therefore, a comprehensive approach is adopted, thus including the positions and claims expressed by ANSAs, their connection with local communities, legitimate authorities and other States.

[12] Noelle Higgins, 'The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements' (2009) 17 Human Rights Brief 12, 15.

5. Research outline

The research begins with a description of ANSAs. To do so, a general framework of NSAs is provided. In fact, the term "non-state actors" refers to a wider group of entities, among which it is possible to distinguish the subcategory of "armed non-State actors". As the latter is part of the whole group of "non-State actors", it logically possesses the common characteristics of the wider category. Significant types of ANSAs are then presented, focusing on their most peculiar features. Doing so, one aspect emerges: the absence of a commonly accepted definition. This is particularly significant, as the absence of a commonly shared definition of ANSA is reflected in the various positions adopted regarding their legitimacy, rights and obligations. Moreover, from a practical point of view, it appears that taking into account the characteristics of a specific ANSA can be useful to better engage with it. For this reason, many recommend a classification of ANSAs. This classification, however, can only be *ideal*, as the analysis of ANSAs shows that, in practice, they evolve over time, and normally present characteristics typical of different ideal subcategories of ANSAs.

The following Chapter presents the main theories intended to explain the process of production of international law. This assessment shows that a theoretically undisputed common ground does not exist. While some theories are based on a clear division between law and non-law (theories belonging to the so-called bright line school), others (belonging to the so-called grey zone school) submit that law exists along a spectrum, and it is thus more or less binding. Given this theoretical variety, it is difficult to reach an undisputed conclusion regarding the legal value of the instruments produced with the engagement of ANSAs. However, focusing on the aims pursued by the different theories, it appears that a common theoretical ground may be reached. As ANSAs are gaining more and more international relevance, it appears useful for the general aims pursued by the international community to bind them to the respect of international law that they have consented to. Their consent, in fact, may provide an effective solution to the lack of compliance due to the lack of ownership felt by ANSAs when asked to abide by rules established by others.

Finally, these theoretical evaluations concerning the necessity of involving ANSAs to ensure compliance and, ultimately, the effectiveness of the law are assessed considering the international practice, sketching their evolutionary path. Indeed, it appears that the role of ANSAs in international law-making is evolving, from mere addressees of IHL rules to active parts of these processes. The several theories proposed to provide a legal justification of the application of these rules, as well as their criticisms, are discussed as well.

Chapter I – Armed Non-State Actors. Definitions and classifications

1. Introduction

As a first step, it is important to define the main element of the present research: ANSAs. They are one of the many types of NSAs and, at the same time, they are composed of several subcategories. In addition, ANSAs tend to evolve over time. Also, ANSAs often simultaneously have characteristics typical of different subcategories. The vastity and variety of this group, combined with its ever-changing nature, have often led to abuses of this term and its subcategories, gathering entities that are, in reality, deeply different. Of course, this imprecise terminology can have an impact on international regulations as, for instance, it can affect the choice of the applicable legal regime. Therefore, it appears useful to identify the main subcategories of ANSAs, present an ideal taxonomy, and discuss the general features of this category.

The Chapter begins with the assessment of NSAs in general, describing the few common characteristics of such a heterogeneous group. Even though the vagueness of the term emerges, this first assessment helps identify of the macro-category that includes ANSAs. The main terms used to refer to subcategories of ANSAs are then presented, highlighting their distinguishing feature as a means of classification; in particular, their participation in an insurgency, their purpose, the means they resort to, and their relationship with authorities. These criteria are useful to distinguish each subcategory of ANSA from another.

This analysis highlights that some subcategories of ANSAs already have a recognised role in international law and some form of (more or less extended) international legal personality (ILP). On the other hand, it also underlines the presence of legal loopholes. The terms used to identify subcategories of ANSAs are often misused for political reasons. This incorrect terminology has legal effects, as different rules apply to different ANSAs. As an example, the differences in the applicable rules and potential overlaps between National Liberation Movements (NML) and terrorist groups may be presented. Indeed, the rules of Protocol Additional I to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (API) apply in armed conflicts in which one party is the authority representing a people exercising its right to self-determination, that is to say, the specific category of ANSAs labelled NML. Consequently, ANSAs pursuing this goal are disciplined by these rules and are involved in an IAC. However, the category of NLM may overlap

with terrorist groups, which constitute another category[13] of ANSAs and to which the rules of API do not apply. Consequently, using the correct terminology is crucial to frame ANSAs under the appropriate legal perspective.

2. NSAs and their "definition-non definition"

While today the relevant role of NSAs at the international level is commonly accepted, the exact meaning of the term "NSA" itself remains unclear. One cause is certainly the state-centric structure of the traditional international legal system, which leaves little room for other entities. As affirmed in the ILA report of 2016 on Non-State Actors,

> "[s]ince international law has been conceptualized as a system of rules regulating relationships between States, NSAs […] have for a long time had no formal place in it".[14]

Nonetheless, their role in international relations is becoming more and more relevant, eventually challenging the state-centric perspective of traditional international law. Therefore, identifying and limiting these entities appear useful from a legal perspective. To do so, it is useful to start with an etymological analysis of the term "Non-State Actors" itself. This expression can be divided into two components, separately analysed:

1. Non-State;
2. Actor.

"Non-State" means that these actors do not possess the necessary elements to be considered states. According to the 1933 Montevideo Convention on Rights and Duties of States, states should possess: "a) A permanent population; b) defined territory; c) Government; and d) capacity to enter into relations with the other states".[15] International recognition is not included in this provision; an approach pursuing effectiveness was adopted.[16] Thus, entities in possession of these requirements are states, formally equal and sovereign.

[13] Despite the lack of a commonly accepted definition of "terrorism", several international conventions regarding terrorism and terrorist acts have been adopted, which may be pertinent for identifying terrorist groups.
[14] International Law Association, 'Johannesburg Conference on Non State Actors' (2016) International Law Association Reports of Conferences 77 612–613.
[15] 'Montevideo Convention on the Rights and Duties of States' (26 December 1933) art. 1.
[16] On the topic of recognition of states see, e.g., Hersch Lauterpacht, 'Recognition of States in International Law' (1944) 53 The Yale Law Journal 385; James Crawford, 'The Criteria for Statehood in International Law' (1977) 48 British

In addition, doctrine and practice have affirmed that states have a series of exclusive characteristics. In this sense, Crawford mentions:

> "(1) In principle, States have plenary competence to perform acts, make treaties, and so on, in the international sphere […].
> 2) In principle States are exclusively competent with respect to their internal affairs, a principle reflected by Article 2(7) of the United Nations Charter […].
> (3) In principle States are not subject to compulsory international process, jurisdiction, or settlement without their consent, given either generally or in the specific case.
> (4) In international law States are regarded as 'equal', a principle recognized by the Charter (Article 2(1)) […].
> (5) Derogations from these principles will not be presumed: in case of doubt an international court or tribunal will tend to decide in favour of the freedom of action of States […]".[17]

The requirements above are considered exclusive characteristics of states, while they are completely absent from NSAs. Insofar as the same requirements are typical attributes and emanations of sovereignty, it can be inferred, *a fortiori*, that NSAs are not sovereign entities.

On the other hand, it is also true that NSAs have autonomy from the states, both regarding their financing and control. The term "NSA" has been used to refer to entities that are "largely or entirely autonomous from central government funding and control",[18] "entities that are not comprised nor governed or controlled by States nor groups of States",[19] and "an individual or entity, not acting under the lawful authority of any State".[20] In other words, it is unanimously accepted that formal groups of States, sub-national levels of administration (e.g., the States part of a Federation) and internationally administered territories do not fall under the definition of NSA. In addition, private contractors, such as Private Military and Security Companies (PMSCs), are not included as well, as they are governed and controlled by a State. In fact, they are private companies hired by States that outsource their coercive function, normally through contracts that also discipline their activities. In conclusion, it has been affirmed that "[n]ot being a State is the crucial unifying feature of the identity of all non-state

Yearbook of International Law 93; Ti-Chiang Chen, *The International Law of Recognition* (Stevens & Sons, Ltd 1951); James Crawford, *The Creation of States in International Law* (Oxford University Press 2006).
[17] Crawford, *The Creation of States in International Law* (n 16) 40–41.
[18] E Donald Elliott, 'The Evolutionary Tradition in Jurisprudence' (1985) 85 Columbia Law Review 38.
[19] International Law Association (n 14) 612.
[20] UN Security Council, 'Resolution 1540 (2004), S/RES/1540 (2004)' (28 April 2004).

entities, strong enough to prevail over any potential differences among them".[21] In fact, NSAs are unified by little more than their non-state quality.

2. *Actor*. The term "actor" can be better explained by referring to international relations, rather than to international law. In fact, the term refers to "any entity which plays an identifiable role in international relations",[22] influencing in a very concrete way the international context.[23] This definition is relevant for international law as well; in fact, NSAs "actually perform functions in the international arena that have real or potential effects on international law".[24] This impact is due to the fact that these entities act "in ways which affect political outcomes, either within one or more States or within international institutions – either purposefully or semi-purposefully, either as their primary objective or as one aspect of their activities".[25] Their activities, functions and effects are not more precisely clarified. An "actor" is simply a relevant entity, and the term can be used to refer to "the variety of personalities, organizations and institutions that play a role at present".[26]

In sum, the analysis of the terms "non-state" and "actor" helps clarify the features considered distinctive of NSAs; however, the category emerging is wide and varied. The term refers to a category of entities identified on the basis of only two elements, one of which is negative. The crucial element is what an entity is *not*; what it *is* appears less significant. An entity must have international relevance; the reason why it has such relevance appears less significant as well. NSAs remain a vast category of entities, ranging from Multi-National Enterprises (MNEs) to non-profit organizations, to ANSAs:[27] in other words, they represent a "disparate collection of actors".[28]

In this context, many studies have concluded that the best solution is not to define NSAs at all;[29] a "definition-non definition" is frequently preferred. Quite tautologically, NSAs have been defined as "all actors who are not State",[30] as "this category is defined by what it is not".[31] Indeed, since "international law does not establish any a priori limitation on what constitutes an NSA, as long as

[21] International Law Association (n 14) 615.
[22] Graham Evans and Jeffrey Newnham, *The Penguin Dictionary of International Relations* (Penguin Group USA 1998) 3.
[23] International Law Association (n 14) 615.
[24] ibid 612.
[25] Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non State Actors and Human Rights* (Oxford University Press 2005) 16.
[26] Evans and Newnham (n 22) 3.
[27] Alston (n 25).
[28] Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 Yale Journal of International Law 107, 118.
[29] International Law Association (n 14) 614.
[30] ibid 612. The report cites the previous International Law Association Report of Rio de Janeiro, of 2008.
[31] Roberts and Sivakumaran (n 28) 118.

they are not considered to be States",[32] then "non-state actors can be any actor on the international plane, other than a sovereign state".[33]

It appears that the wide variety of entities and the "definition-non definition" are inevitably connected in a reciprocal causal connection. Simply defining NSAs as "actors that are not States" entails the creation of a heterogeneous category of actors, which share only their non-State nature. Reversing the perspective, the differences between these entities are so wide that it is hard to find another common element, besides their non-State nature. At the same time, this "definition-non definition" makes it easy to add new entities to the category of NSAs, since it can virtually contain any entity different from States that has gained international relevance, affecting international law.

The resort to this type of loose definition has two main shortcomings. First, it appears almost redundant, as it adds very little to the comprehension and inclusion of new entities in the system of international law. If NSAs are identified only because of their non-state nature, then they are identified and united only in a dichotomous/binary analysis, in which they are compared against states. Secondly, treating NSAs as a homogeneous category, tempting as it may be to pursue aims of simplification, can severely compromise the effectiveness of any legal framework designed to govern and engage with them, as it hinders grasping the nature of NSAs. Indeed, this lack of clarity regarding their nature may have negative effects on the legal framework applicable to them.[34] For instance, the international legitimacy varies from one NSA to another, as they are differently perceived by the international community. The goals they pursue and the means they resort to are also extremely different. Engaging with them in the same manner and establishing an accountability regime resorting to the same approach leads to unsatisfying results.

In addition, almost paradoxically, the "definition-non definition" may reinforce the role of states in the international scenario. Defining a whole category of entities only in relation to States, using their nature as the only distinguishing criterion, reaffirms the relevance of being a state. States, playing an

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[32] Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (TMC Asser Press 2020) 5.

[33] Mary Ellen O'Connell, 'Enhancing the Status of Non-State Actors Through a Global War on Terror?' (2005) 43 Columbia Journal of Transnational Law 435, 437. See also James Summers and Alex Gough (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill Nijhoff 2018).

[34] In this regard, Resolution no. 6 of the Committee on Non-State Actors and International Law of the International Law Association appears as a recognition of the limits of a too general definition. In fact, in the resolution, the Committee acknowledges that it "has adopted a broad working definition of non-state actors, and that it is not possible to draw general or particular conclusions, in terms of *de lege lata* or *de lege ferenda*, without more specific analysis of individual types of non-state actor" and recognises "a corresponding need for an applied typology of non-state actors and a differentiated examination of the status, rights and/or duties of specific types of non-state actors under international law". International Law Association, 'Resolution No. 6/2016. Non-State Actors and International Law' (2016) 6.

"indispensable and pivotal [role] around which all other entities revolve",[35] are thus the parameter for the identification of actors in the international scenario. Indeed, "the very term 'non-state actor' demonstrates the bias that exists within international law and international relations. The category [of NSAs] is construed by its opposition to, and difference from, the State".[36]

Last, it has to be recalled that a unanimously shared definition of NSAs does not exist. Most of the definitions of NSAs are explicitly and voluntarily limited in their scope of application. In its report on NSAs, the International Legal Association clarifies that the definition of NSAs it provides is only "for the purposes of this report", as "[i]t is a working, operational definition which might not, and does not aspire to, be shared by all scholars".[37] In Resolution 1540 (2004), even the UN Security Council limits its definition of NSA to an individual or entity "conducting activities which come within the scope of this resolution".[38] These statements prove the uncertainty surrounding the exact definition – and the very existence of an exact commonly accepted definition – of NSAs.

For organizational purposes, it has been affirmed that the different types of NSAs can be considered as a "spectrum".[39] Thus, it is possible to organize NSAs on a scale, choosing the criterion best suitable for a specific analysis, for instance resorting to the organizational criteria of acceptability and/or legitimacy, overcoming the dichotomy between state and non-state actors.[40] This approach is consistent with international case law on the issue, notably the *Reparation* case.[41] Of course, it affects ILP; as noted by Bílková, this means that

> "under this scheme subjects of international law differ in the extent and content of the rights and duties they enjoy but this does not prevent them from being all included in the same general category [of subjects of law]. […] Moreover, as such roles could develop over time, the concept of legal subject is also a dynamic one, undergoing gradual changes in the course of the evolution of international law".[42]

However, the informal organisation of NSAs in a spectrum leaves space for misuse of existing rules and categories. Therefore, given the vast variety of entities included in the category of NSAs, it

[35] Alston (n 25) 3.
[36] International Law Association (n 14) 615.
[37] ibid 614.
[38] UN Security Council, 'Resolution 1540 (2004), S/RES/1540 (2004)' (n 20).
[39] O'Connell (n 33) 440.
[40] Veronika Bílková, 'Treat Them as They Deserve?! Three Approaches to Armed Opposition Groups under Current International Law' (2010) 4 Human Rights & International Legal Discourse 111.
[41] *Reparation for injuries suffered in the service of the Nations, Advisory Opinion* (1949) I.C.J. Reports 1949 174 (International Court of Justice).
[42] Bílková (n 40) 115.

appears better to analyse each type of non-State actor separately and take into due consideration its peculiar characteristics.

Having said so, the analysis indeed focuses on one particular type of NSA, namely Armed Non-State Actors, to analyse possible legal developments, given their increasing inclusion in the production (and, consequently, in the implementation) of rules of international law. The existence of several subcategories is taken into consideration, as "[t]ypologies can be useful to understand the behaviour of a particular actor and bring clarity to general and elusive concepts".[43]

3. Armed Non-State Actors. Definition

3.1. Preliminary considerations

Dealing with ANSAs on a legal level presents several difficulties, and the complexity of identifying and classifying them is conceptually the first. In fact, as part of the macro-category of NSAs, ANSAs suffer from the same "definition-non definition" problem, and the same variety that distinguishes NSAs affects this sub-category as well.

First, a definition of ANSAs is provided neither in conventional nor in customary rules of international law. Different legal instruments and documents have dealt with ANSAs several times; hence, they are considered in this defining process. However, rather than providing clarity on the topic, the broad and inconsistent production of documents related to ANSAs has had the opposite effect, increasing vagueness and uncertainty. In addition, looking at texts discussing the subject, it appears that several synonyms have been used to refer to this type of NSAs, such as Violent Non-State Actors[44] or Non-State Armed Groups,[45] adding to the confusion on the topic. In addition, ANSA is a wide and varied category in itself, composed of several subcategories, which vary deeply in nature, organisation, means, purposes and reception by the international community. ANSAs can

[43] Annyssa Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020) 27.
[44] Phil Williams, 'Violent Non-State Actors and National and International Security' (ETH Zurich 2008); Özden Zeynep Oktav, Ali Murat Kursun and Emel Parlar Dal (eds), *Violent Non-State Actors and the Syrian Civil War* (Springer International Publishing 2018).
[45] Benjamin Perrin, *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* (UBC Press 2012); Annyssa Bellal, 'Non-State Armed Groups in Transitional Justice Processes Adapting to New Realities of Conflict', *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (2017).

change and evolve, as they "relentlessly […] splinter, proliferate, merge, and splinter again"[46] and can assume characteristics typical of other subcategories of ANSAs, thus blurring the lines between the latter.[47] For clarification purposes, the proposed classification regards ideal types of ANSAs, aware that these types do not accurately replicate reality. Nothing, however, precludes the possibility to reassess the categories or to re-classify certain specific typologies of ANSAs, as they, in practice, evolve in time.

3.2. Peculiar features of Armed Non-State Actors

As already noticed, "ANSA" is a particular type of "NSA". Consequently, it shares the common elements of all NSAs with other entities belonging to this category. However, it also has particular distinguishing features.

Considering the term "Armed Non-State Actor" in etymological analysis, the adjective "armed" should be considered. Not surprisingly, it appears in the Geneva Conventions of 1949, the international core treaties of international humanitarian law (IHL). In particular, this adjective is mentioned also in CA3, titled "Conflicts not of an international character", which establishes that

> "Persons taking no active part in the hostilities, including members of *armed* forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria" (emphasis added).[48]

No more precise definition of what constitutes armed forces is provided there. Discussing this Article, the ICRC Commentary clarifies that the term refers to the armed forces of both the State and Non-State parties to the conflict, but does not add anything more to better define the term "armed".[49]

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[46] Wendy Pearlman and Kathleen Gallagher Cunningham, 'Nonstate Actors, Fragmentation, and Conflict Processes' (2012) 56 Journal of Conflict Resolution 3, 4.
[47] Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' (n 43). See also Geneva Call, 'Armed Non-State Actors and Landmines, Volume I. A Global Report Profiling Non-State Actors and Their Use, Acquisition, Production, Transfer and Stockpiling of Landmines' (2006); Ulrich Schneckener, 'Spoilers or Governance Actors?: Engaging Armed Non-State Groups in Areas of Limited Statehood' (2009) 21.
[48] 'Geneva Conventions on the Law of War' (12 August 1949) common Art. 3.
[49] International Committee of the Red Cross, 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Commentary of 2016' (2016) Art. 3 para. 530.

A more detailed definition of "armed forces" is given in Article 43.1 of Additional Protocol I to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts (API):

> "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict".[50]

Since it refers to international armed conflicts (IACs), this provision cannot be applied to ANSAs engaged in NIACs. It must be noted, however, that it also refers to armed forces under the responsible command of a Party, even if the latter is not recognised by the adverse Party. The lack of the requirement of recognition thus implies that armed forces do not have to be linked to a recognised state authority. Therefore, it has been inferred that these armed forces of a non-recognised party can consist of ANSAs.[51]

Given this lack of a precise definition, it is possible to understand the adjective "armed" as characterising ANSAs in their essence. However, considering that some ANSAs have a complex structure that includes also members not directly involved in operations implying the use of force,[52] it may be more appropriate to consider the adjective "armed" as a peculiar feature referred to the *resort* to armed force by these actors.[53]

In this sense, it can be intended as a functional element: to pursue their aims, these actors resort to violence and armed force.[54] The functional character expressed by the adjective "armed" emerges also in the definition of "non-state armed groups" given by the European Union:

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[50] '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).
[51] Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' (n 43).
[52] For instance, the People's Protection Units (YPG), non-state armed forces which also established an interim government in the Kurdish region of Syria. See 'PYD Announces Surprise Interim Government in Syria's Kurdish Regions' (*RUDAW*, 13 November 2013). See also Hamas in Palestine, which was born with the purpose to fight against Israel, but also to deliver social welfare. See 'Profile: Hamas Palestinian Movement' (*BBC News*, 12 May 2017).
[53] Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' (n 43).
[54] See, in this sense, Schneckener (n 47) 6.

> "'[n]on-state armed groups' refers to groups who retain the potential to deploy arms for political, economic and ideological objectives […]".[55]

This definition highlights not only that the use of armed force is a peculiar feature of ANSAs, but also that the latter can engage in conflicts for disparate purposes. The ends pursued by ANSAs are not distinctive; their means are. The functional nature of the adjective "armed" also appears in all the instruments that discuss those "NSAs" that resort to violence and use weapons. For example, the Non-State Actors Working Group of the International Campaign to Ban Landmines has identified the "groups that fall under the NSA heading"[56] as "organizations with less than full international recognition as a government who employ a military strategy".[57] Also, it can be noticed that this is another example of the imprecise use of various terms to refer to ANSAs.

Another implicit but fundamental element of ANSAs is their organisational structure. In this sense, it is useful to refer to the conventional rules of IHL, in particular to the Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (APII). In fact, this Protocol

> "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application"[58]

and establishes its applicability to NIACs, between the forces of a Party to the Protocol

> "[a]nd 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" (emphasis added).[59]

It thus appears that a certain degree of organisation is required for the identification of non-state groups involved in NIACs. It is also a necessary component of the already discussed "armed" feature of ANSA. In fact, the requirement of an organisation is a basic prerequisite for the participation of ANSAs in conflicts, since the control over part of the territory and the ability to carry out sustained

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[55] European Union, 'Mediation and Dialogue in Transitional Processes from Non-State Armed Groups to Political Movements/Political Parties' (2012) Factsheet - EEAS Mediation Support Project.
[56] Margaret S Busé, 'Non-State Actors and Their Significance' (2001) 5 Journal of Conventional Weapons Destruction 1.
[57] ibid.
[58] '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) Art. 1.1.
[59] ibid.

and concerted military operations logically imply the presence of a certain level of organisation. The latter is a functional precondition for the requisites indicated in the provision. In fact,

> "engaging in armed conflict consists of performing a number of essential operations, such as co-ordination, mobilization, and the manipulation of information, to undermine rivals within a contested territory. Amorphous entities such as civilizations, ethnic groups, or the masses cannot perform such operations – only organizations can do so".[60]

This is also coherently argued by the ICRC, which, discussing NIACs, underlines that "the parties involved in the conflict must show a *minimum of organisation*" (emphasis added).[61]

The requirement of organisation has also been affirmed in case-law. In particular, in the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia affirmed that

> "[t]he test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the *organization of the parties to the conflict*" (emphasis added).[62]

However, the specific degree of organisation and structural characteristics are not relevant. Indeed,

> "[i]n order for a non-State armed group to be sufficiently organized to become a Party to a non-international armed conflict, it must possess organized armed forces. Such forces 'have to be under a certain command structure and have the capacity to sustain military operations'. In addition, '[w]hile the group does not need to have the level of organisation of state armed forces, it must possess a certain level of hierarchy and discipline and the ability to implement the basic obligations of IHL'".[63]

Since a distinguishing attribute of ANSAs is their collective, organised nature,[64] the frequent use of the term "non-state armed groups" instead of "ANSAs" is not surprising. Indeed, it emphasises the qualitative gap between the entity and the mere sum of its members.[65] "Actor", on the other hand, can

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[60] Abdulkader H Sinno, 'Armed Groups' Organizational Structure and Their Strategic Options' (2011) 93 International Review of the Red Cross 311, 312.
[61] International Committee of the Red Cross, 'How Is the Term "Armed Conflict" Defined in International Humanitarian Law?' (International Committee of the Red Cross 2008) Opinion Paper 5.
[62] *Prosecutor v Dusko Tadić (Opinion and Judgement)* [1997] International Criminal Tribunal for the Former Yugoslavia, Trial Chamber IT-94-1-T.
[63] International Committee of the Red Cross, 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Commentary of 2016' (n 49) Art. 3 para. 429.
[64] Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' (n 43).
[65] See, e.g., Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002).

also include individual entities.[66] However, the term "actor" implies, as already underlined, a certain relevance at the international level. Given that the research question is based on the consideration that new non-state entities with a significant role in the international scenario have emerged, it is preferred to use the term "actor" instead of "groups", to highlight this aspect. Moreover, some ANSAs provide services comparable to those offered by states, so it has been affirmed that in some cases they reach the level of quasi-states, at least for a certain period. Therefore, the more general term "actor" is preferable,[67] as they are not active only in armed conflicts. As affirmed by Mastorodimos, "it could capture in a more neutral way the idea that a political branch might be also included or even be in charge of the armed elements of the group".[68]

In conclusion, all ANSAs are characterised by non-State nature, international relevance, use of armed means and a collective, organisational structure. As stated by Geneva Call in its report on displacement in armed conflict:

> "There is no universally agreed definition of an ANSA. For the purposes of this study, the term ANSA is used to indicate organized armed entities that are primarily motivated by political goals, operate outside effective State control, and lack legal capacity to become party to relevant international treaties".[69]

These attributes are not specific; thus, entities can present different attributes, but still remain in the realm of ANSAs. Consequently, it is possible to classify ANSAs into subcategories.

3.3. The international legal personality of ANSAs

Among the several theoretical problems linked to ANSAs, the issue of whether ANSAs possess international legal personality (ILP) or not is particularly significant. This issue is relevant for the present research as well, as the latter is focused on the involvement of ANSAs in law-making processes. The matter of ANSAs' ILP is complicated by several problems, mainly related to the concept of ILP and the reluctant position of states.

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[66] See, e.g., Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' (n 43); Gáspár Bíró and Iulia Antoanella Motoc, 'Working Paper on Human Rights and Non-State Actors'; James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press 2012).
[67] Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' (n 43).
[68] Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability* (Routledge 2017) 10.
[69] Geneva Call, 'Armed Non-State Actors and Displacement in Armed Conflict' (2013) 5.

Regarding the first difficulty, the concept of ILP does not have an undisputed definition,[70] as its only undisputed element is the ability to have rights and duties and certain capacities in international law.[71] In addition, international legal instruments on the topic do not exist. This unclarity led to the development of several theories on the matter at issue.[72]

As ANSAs have emerged as groups in opposition to the legitimate state authorities, the latter have been reluctant to recognise them any international relevance for a long time, preferring to treat them as criminals under domestic law. A significant breakthrough occurred with the development of the practice of recognition of insurgency and belligerency, during the American civil war and the Spanish civil war in particular.[73] In this regard, Hersch Lauterpacht affirmed that the insurgency is defined by the recognition of states, both the state involved in the armed conflict against the insurgent party and third states.[74] Consequently, once the recognition of the insurgency is granted, due to different reasons, then legal rights and duties between the insurgents and the recognising state exist.[75] However, discussing full recognition of the insurgents "as a government or a State",[76] Lauterpacht affirmed that "[s]o long as the issue has not been definitely decided in favour of the rebellious party, recognition is premature and unlawful".[77] Consequently, if one adopts the recognition-based approach submitted by Lauterpacht, it appears that insurgents may have a limited form of ILP, in the relations between themselves and the states that have recognised them.

Indeed, the ILP of insurgent movements is now commonly accepted. It is temporarily limited, as it expires with the defeat or success of the movement. In the latter case, their subjectivity is merged with the subjectivity of the state. This conclusion is consistent with relevant secondary rules, as Art. 10 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts establishes that

> "[t]he conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of the State under international law.

[70] Portmann defines it as a "controversial concept of international law". Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010) 7.
[71] ibid.
[72] See, e.g., ibid; Claudie Barrat, *Status of NGOs in International Humanitarian Law* (Martinus Nijhoff Publishers 2014).
[73] See, e.g., Hersch Lauterpacht, 'Recognition of Insurgents as a De Facto Government' (1939) 3 The Modern Law Review 1.
[74] See also Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).
[75] Lauterpacht, 'Recognition of Insurgents as a De Facto Government' (n 73).
[76] ibid 6.
[77] ibid.

> 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".[78]

The international subjectivity and accountability of such groups are based on their actual control over at least part of the territory of a state. As affirmed by the Commentary to this Article, "[o]nce an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities".[79]

However, despite the presented evolution regarding insurgency and belligerency, the ILP of ANSAs in the absence of a recognised state of insurgency or belligerency is still debated.

In this regard, one of the theoretical positions submitted states that, even though ANSAs have often concluded agreements with the legitimate authorities, they do not necessarily possess ILP. This position is based on CA3; indeed, while this provision encourages parties to a NIAC to conclude special agreements to bring into force other provisions of the Geneva Conventions, it also clarifies that the conclusion of such agreements shall not affect their legal status.[80] Consequently, it must be inferred that ANSAs can conclude these agreements without possessing ILP. However, this theory can be dismissed; in fact, it does not take into due account the fact that ANSAs can also be obliged by other rules of international law, especially under customary international law.

It has also been submitted that, since ANSAs are traditionally obliged by rules of IHL, ANSAs may only be subjects of IHL.[81] However, this theory is not convincing. In particular, doubts regard the possibility to distinguish between different branches of international law. Indeed, it is normally accepted that if an entity is recognised under a specific branch of international law, it has legal personality at the international level in general.[82]

To try and solve this debate for the purpose of the present research, the theory submitted by Arangio-Ruiz and the theory based on the actor-based approach to ILP are presented.

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[78] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' II Yearbook of the International Law Commission (2001) Art. 10.
[79] ibid. 50.
[80] 'Geneva Conventions on the Law of War' (n 48) common Art. 3.
[81] See *Judgement No C 225/95* (1995) (Constitutional Court of Colombia).
[82] See Daragh Murray, 'Non-State Armed Groups and Peace Agreements - Examining Legal Capacity and the Emergence of Customary Rules' in Marc Weller, Mark Retter and Andrea Varga (eds), *International Law and Peace Settlements* (Cambridge University Press 2021).

To conduct his research, Arangio-Ruiz assesses the elements considered "fundamental" in the identification of states. He bases his inquiry on the behaviours of states in dealing with the territory, on the relationship between states and their territories from a historical approach and on the comparison between states and other entities without territories. The analysis of the practice of states leads to the conclusion that territory is "external to subjects".[83] The relationship between a state and its territory appears, hence, as a "control over an external object".[84] This conclusion is also supported by a historical assessment of the matter. Moreover, considering the unanimously accepted existence of subjects of international law that do not have a territory, e.g., the Holy See, Arangio Ruiz concludes that territory is not a constitutive element of a state.

Arangio-Ruiz reaches a similar conclusion regarding the element of the population, intended as "subjects" ("sudditi"). Dividing the population of a certain state between those who govern and those who are governed, he affirms that the governing organisation is the only one participating in the legally significant external activity with a relevant intensity. It is therefore this active component of the group of individuals to have relevance in international law. However, the individuals who are governed are not relevant. In addition, even in this case, there are subjects of international law that do not have a population. In this regard, Arangio-Ruiz mentions, e.g., the Holy See, the Order of Malta, and exiled governments.[85]

Given all this, he concludes that it is possible for a non-state entity to acquire legal rights and duties. Applying this conclusion to the topic of insurgents, he affirms that insurgent parties may emerge in opposition to the legitimate government, and he adds:

> "[a]cquistando così una certa misura di soggettività giuridica internazionale, tale partito-governo si presenta, dal punto di vista dell'ordinamento internazionale, come un'entità qualitativamente non diversa dall'ente al quale si contrappone nella lotta per il potere parziale o totale".[86]

Ultimately, this theory affirms that, despite the uncertainties and the provisional nature linked to the conflictual situation in which they act, insurgents do not present qualitative differences from states as long as they exercise governmental-type functions. This is particularly relevant, considering how

[83] "Il territorio è oggetto estraneo ai soggetti". Gaetano Arangio-Ruiz, *Sulla Dinamica Della Base Sociale Nel Diritto Internazionale* (Giuffrè 1954) para. 27 a]. Translation from Italian by the author.
[84] "dominio su oggetto esteriore". ibid para. 27 a]. Translation from Italian by the author.
[85] ibid para. 34.
[86] "Acquiring a certain degree of international legal subjectivity, the government-party appears, from the point of view of the international legal system, as an entity which is not different under a qualitative perspective from the entity it fights in the conflict for the (partial or total) power. ibid para. 48 a]. Translation from Italian by the author.

certain insurgencies can last for an extended period, especially when insurgents are supported by the local population. For instance, the Liberation Tiger of Tamil Eelam (LTTE) insurgency lasted more than 20 years.[87]

Arangio-Ruiz justifies this conclusion by referencing the general necessity of the international community to govern the relations between independent entities. In fact,

> "si tratta di non lasciare esente da un minimo di disciplina giuridica *internazionale* l'attività di un ente – o nei riguardi di un ente – che per la condizione in cui si trova e l'azione che persegue si è emancipato, almeno temporaneamente, dal controllo dell'ordine interindividuale dello Stato colpito dall'insurrezione, sì da operare sul terreno delle relazioni esterne con individualità propria".[88]

While grounded upon different considerations, the conclusion maintained by Arangio-Ruiz is consistent with the conclusion reached adopting an actor-based approach to ILP. Under this approach, which is based on the "presumption that all effective actors of international relations are relevant for the international legal system",[89] ANSAs possess ILP under certain circumstances. Indeed, they have the rights and duties set in a decision-making process in which they take part, as actors of the international community. In Vierucci's words, "the international subjectivity of armed opposition groups is a quality deriving, necessarily, from the qualification of the agreements [concluded by ANSAs] as acts regulated by international law".[90]

Following an actualized approach that considers ILP as the result of the ownership of international rights and duties,[91] the conclusion that insurgents can have ILP, at least in a limited form, is reached. Indeed, when insurgents can effectively implement such rules in an independent manner, they acquire ILP.[92] Ultimately, their ILP is functional to the effective respect of rules of international law addressed to them. As affirmed by Fortin,

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[87] Kristian Stokke, 'Building the Tamil Eelam State: Emerging State Institutions and Forms of Governance in LTTE-Controlled Areas in Sri Lanka' (2006) 27 Third World Quarterly 1021.
[88] "it is a matter of providing a (at least) minimum international regulation for the activity of, or directed to, an entity which has become, at least temporarily, independent from the control of the state in which the insurgency is taking place. This ultimately allows the insurgency to act in the field of external relations having its own subjectivity". Gaetano Arangio-Ruiz, *Diritto Internazionale e Personalità Giuridica* (CLUEB 1972) 102. Translation from Italian by the author.
[89] Portmann (n 70) 14.
[90] "la soggettività internazionale dei gruppi armati di opposizione sarà una qualità che deriverà, di necessità, dalla qualificazione degli accordi quali atti regolati dal diritto internazionale". Luisa Vierucci, *Gli Accordi Fra Governo e Gruppi Armati Di Opposizione Nel Diritto Internazionale* (Editoriale Scientifica 2013) 117. Translation by the author.
[91] See ibid.
[92] Natalino Ronzitti, *Introduzione al Diritto Internazionale* (5th ed., Giappichelli 2016).

> "[w]hen one examines the case law on 'threshold' from the perspective of 'legal personality' of armed groups, it is seen that one of its main functions is to address the requirement that there should be a distinguishable 'legal entity' which can be bound by common Article 3, as a counterpart to the State. The implicit need for such a test stems from the fact that common Article 3 can only be applied to a particular factual situation if the norms which it contains are applied by both parties to the conflict, i.e. the State and the armed group or both armed groups".[93]

It can thus be concluded that ANSAs may have ILP, limited in scope and duration, but not qualitatively different from the ILP of states.

4. Armed Non-State Actors. Proposed classification

4.1. Preliminary considerations. A difficult categorisation

There is no commonly accepted categorisation of ANSAs. The topic of NSAs in the first place and, consequently, of ANSAs is characterised by unclarity, and ANSAs involved in armed conflicts, or which control a territory resorting to the use of force, are diverse in their characteristics and evolve very rapidly.[94] Moreover, these actors tend to engage in activities that fall under different definitions of subcategories of ANSAs. Doctrinal, ideal types are not easily reconciled with empirical reality. For instance, a group may act to gain independence from a government, employing terroristic means; hence, it could be considered as both a national liberation movement and a terrorist group.[95] These difficulties in the research negatively affect the consolidation of an accepted classification in abstract terms. In fact, several categorisations have been proposed, both in doctrinal works and reports. As affirmed by Bellal, in fact, "[t]ypologies differ from author to author"[96] and in this sense, she submits that "one can narrow down ANSAs to the following categories: insurgents, militias, criminal organizations, so-called terrorist organizations/terrorists and PMSCs [private military and security companies]".[97]

[93] Fortin (n 74) 126.
[94] Schneckener (n 47). The paper presents the example of the IRA as an entity that has evolved from a purely national liberation movement into a terrorist group, and the UÇK as an entity undergone the opposite evolution, finally becoming a rebel organisation.
[95] See ibid; Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' (n 43).
[96] Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' (n 43) 28.
[97] ibid.

However, Zohar proposes a classification, based on the purposes and especially the organisational structure, in

- "Secessionist
- Revolutionary left
- Revolutionary sectarian
- Global revolutionary"[98]

Other reports classify ANSAs differently. The Non-State Actors Working Group, classify

> "rebel groups, irregular armed groups, insurgents, dissident armed forces, guerrillas, liberation movements, and de facto territorial governing bodies",[99]

Whereas Shults *et al*. identify

> "insurgents, terrorists, militias, and organized crime",[100]

Vigny and Thompson discuss

> "[n]on-State actors such as militia, armed groups (including terrorists) or national liberation movements"[101]

and McQuinn and Oliva opt for a broader classification, which includes

- "Paramilitaries
- Vigilante groups
- Youth gangs
- Pirates
- Criminal networks
- Drug cartels
- Warlords
- Terrorist groups
- Rebels and insurgent groups

[98] Eran Zohar, 'A New Typology of Contemporary Armed Non-State-Actors: Interpreting the Diversity' (2016) 39 Studies in Conflict & Terrorism 423.
[99] Cited in Richard H Shultz, Douglas Farah and Itamara V Lochard, 'Armed Groups: A Tier-One Security Priority' (USAF Institute for National Security Studies 2004) 57 14.
[100] ibid 16.
[101] Jean-Daniel Vigny and Cecilia Thompson, 'Fundamental Standards of Humanity: What Future?' (2002) 20 Netherlands Quarterly of Human Rights 185, 185.

- Mafias
- Private security companies".[102]

The matter is even more complicated by the fact that every term that can be used to define sub-categories of ANSAs has a political or ethical connotation. None of these terms is neutral; they are all subjective, and the perception of groups labelled under one or the other of such terms can evolve.[103] This connotation affects the acceptance of ANSAs and consequently the possibility of establishing relationships with them. Indeed, "joining 'rebels' or 'freedom fighters' can be perceived as a noble and even just endeavour, while being part of a so-called 'terrorist group' or 'criminal organization' can be much more problematic not only from a moral but also from a legal point of view".[104]

Subcategories of ANSAs can be identified, assessing the type of conflict in which they are involved, the means employed, their purposes and their organisation. In the following, possible classifications, based on these different criteria, and consequently the relevant typologies of ANSAs, are presented.

4.2. Focus on the type of conflict. Insurgents

Insurgents are particularly relevant among the different categories of ANSAs. Insurgencies have gained international relevance during the 19th Century, and the doctrinal research and case law of that time contributed to shaping the applicable legal regime. Despite their relevance and wide recognition, contemporary international law does not provide a definition of insurgency. Consequently, it has been variously described, e.g., as

> "an uprising or rebellion by an organized group against their government or governing authority",[105]
>
> "an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control"[106]

[102] Brian McQuinn and Fabio Oliva, 'Preliminary Scoping Report - Analyzing and Engaging Non-State Armed Groups in the Field' (United Nations System Staff College 2014) 24.
[103] See Jan Klabbers, 'Rebel with a Cause? Terrorists and Humanitarian Law' (2003) 14 European Journal of International Law 299.
[104] Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' (n 43) 22.
[105] Emily Crawford, 'Insurgency' (*Max Planck Encyclopedias of International Law*, June 2015).
[106] US Department of Army, 'Army Field Manual 3-24: Counterinsurgency' (*Homeland Security Digital Library*, 2006) <https://www.hsdl.org/?abstract&did=> para. 1-2.

and

> "a protracted political-military struggle directed toward subverting or displacing the legitimacy of a constituted government or occupying power and completely or partially controlling the resources of a territory through the use of irregular military forces and illegal political organizations. The common denominator for most insurgent groups is their objective of gaining control of a population or a particular territory, including its resources".[107]

From a comparative analysis of the definitions submitted, it can be inferred that insurgents are politically motivated non-state armed forces involved in a NIAC and present a minimum level of organisation and strength, usually controlling part of the territory of the state. As insurgents are identified because of their participation in an insurgency, the analysis also considers the rules governing insurgencies (mainly rules of IHL), in particular CA3 and APII. In fact, these provisions establish the requirements of insurgent groups.

The relevance of the requirements of organisation and territorial control of the parties involved in an insurgency was already affirmed by Vattel:

> "[w]hen a party is formed in a state, who no longer obey the sovereign, and are possessed of sufficient strength to oppose him, - or when, in a republic, the nation is divided into two opposite factions, and both sides take up arms, - this is called *civil war*. […] A civil war breaks the bands of society and government, or at least suspends their force and effect: it produces in the nation *two independent parties* [emphasis added], who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily, be considered as thenceforward constituting, at least for a time, *two separate bodies, two distinct societies*" (emphasis added).[108]

This excerpt highlights how the conflict involving insurgents is characterised by the presence of two comparable parties active within the territory of a state. Consequently, it can be inferred that, in Vattel's opinion, insurgents were considered as such when they had acquired a certain control over part of the territory, thus reaching a minimum threshold of organisation and control.

The requirement of territorial control is considered as necessary so far that the loss of such control would cause a substantial transformation from "insurgents to "rebels".[109] In this sense, Arangio-Ruiz affirms that insurgents distinguish themselves from rebels because they exercise authority and their

[107] US Government, 'Guide to the Analysis of Insurgency 2012' (2012) 28.
[108] de Vattel (n 3) vol. III, paras. 292-293.
[109] Carlo Focarelli, *Diritto Internazionale* (4th ed., CEDAM 2017).

international relevance as authorities that can have international, legally relevant relations.[110] This is consistent with the theory submitted by Lauterpacht.[111] While insurgents often have the support of the population, this is not considered a mandatory requirement. Nonetheless, insurgents often put efforts to gain this support, e.g., providing basic necessities or exercising state-like functions to administer the territory under their control, aiming to acquire popular support and, ultimately, legitimacy. Indeed, "without a degree of legitimacy and of popular recognition, armed groups are inevitably reduced to a form of banditry".[112]

To distinguish insurgents from other subcategories of ANSAs, the aim pursued is also significant. It must be noted that the political motivation typical of insurgents refers, in general terms, to the goal of achieving political power. It may appear that the motivation at the base of insurgencies is to defeat and substitute the legitimate authority of the state, as normally the exercise of power by insurgents and by the state are inversely proportional: when the former acquires power, the latter loses it, and *vice versa*. However, insurgents may also be active in failing or failed states, where there is no effective governance structure to fight against.

When an ANSA possesses the mentioned requirements, it is considered an insurgent movement. This conclusion is consistent with the definition of NIAC provided by IHL. In this sense, Art. 1 APII states:

> "[t]his Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts […] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[113]

The Article thus extends the application of the rights and obligations established under the rules of IHL to ANSAs involved in a NIAC. The international practice concerning this provision[114] highlights how the group must have an independent identity, separate from the sum of its single members, and

[110] Arangio-Ruiz (n 88).
[111] Lauterpacht, 'Recognition of Insurgents as a De Facto Government' (n 73).
[112] Francis O'Connor, 'The Spatial Dimension of Insurgent-Civilian Relations: Routinised Insurgent Space' (Peace Research Institute Frankfurt 2019) Working Papers 44 1.
[113] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)' (n 58).
[114] *Prosecutor v Ljube Boškoski, Johan Tarčulovski* [2008] International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II IT-04-82-T.

thus that it can be "deemed to be a legal entity capable of being bound by international humanitarian law".[115]

It appears that today, for an ANSA involved in an insurgency to be considered as an insurrectional movement, the requirements of organisation and territorial control should be interpreted based on the principle of effectiveness, in relation to the rules of IHL. In this sense, insurgents must be able to abide by the relevant rules of international law (mainly, the IHL rules addressed to them). Ultimately, this would enhance the effectiveness of these rules, as they could be applied by states and insurgents as well.

This conclusion is confirmed by a comparative analysis of CA3, which establishes a series of minimal basic obligations applicable to "each Party" to a NIAC, and APII; indeed, this approach explains the higher threshold established by APII. In fact, as the provisions established in APII provide a wider and more specific normative framework than CA3, it appears reasonable to require a higher threshold of application for the addressees of the latter rules. Ultimately, a higher threshold is functional to the respect of APII provisions, as the entities deemed addressees under Art. 1 APII must have the capacity to respect and implement the rules established in the same protocol. After all, "there is no value in designating an entity as the bearer of a set of international norms if it does not have the capacity to enforce them".[116]

Besides CA3 and APII, the state of insurgency does not confer a fixed set of rights and obligations. As Fortin explains,

> "it refers mainly to the patchwork of *ad hoc* obligations which sometimes arose between the parties to a non-international armed conflict inter se and between the parties to a non-international armed conflict and third parties".[117]

This lack of consistent regulation may appear surprising. Indeed, insurgencies have existed for centuries. However, warfare has been considered an affair between states for a long time.[118] In addition, states have always been reluctant to recognise the international relevance of internal conflicts, such as insurgencies. Thus, insurgencies have not been duly studied and regulated for a

[115] Fortin (n 74) 133.
[116] ibid 137.
[117] ibid 101. The Author cites Lauterpacht, 'Recognition of Insurgents as a De Facto Government' (n 73) 4.
[118] See, e.g., Oppenheim: "[t]o be considered war, the contention must be going on between States". Lassa Oppenheim, *International Law: A Treatise* (2nd ed., Longmans, Green & Co 1912) 62–63.

long period of time.[119] Before the adoption of CA3, the only way for an insurgency to gain international relevance and consequently to fall under the regulation of international law was for the insurgency to be recognised as a belligerency by states. The distinction between insurgency and belligerency is based on the level of intensity, the belligerency being more intense than the insurgency. As such criterion is intrinsically subjective, the main distinguishing criterion was, in fact, the recognition of belligerency by states. Such recognition was not mandatory; a state might refuse to recognise the ongoing conflict within its borders for various reasons, e.g., political ones. Without the recognition, the relevant international rules would not have applied. Thus, the legal relevance of an internal conflict, and the legal position of an ANSA, ultimately depended on a subjective act of states.

While insurgencies were not internationally regulated until 1949, for decades insurgents (thus even without the recognition of a state of belligerency) have concluded agreements with states, creating rights and obligations, even applicable outside a conflictual situation. In the words of Lauterpacht,

> "it is clear that unrecognised insurgents, without having acquired a specific status of belligerency, may be admitted to various forms of intercourse with outside States. Such intercourse, which involves the application of international law by and in relation to the insurgents, may include the conclusion of agreements, diplomatic and consular relations, and recognition of the insurgent authority as a government […]. It would therefore appear that not only insurgents recognised as belligerents, but also insurgents not recognised as such, may be subjects of international rights and duties".[120]

In conclusion, insurgents are internationally recognised actors with limited ILP. They demonstrate that ANSAs can have international rights and obligations and engage with states in a legally relevant manner.

4.3. Focus on the purpose. National liberation movements

NLMs distinguish themselves from other types of ANSAs by the particular aim pursued. Indeed,

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[119] See, e.g., Norman J Padelford, 'International Law and Insurgency' (1937) 37 Die Friedens-Warte 191; International Committee of the Red Cross, 'Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Commentary of 1958' (1958).
[120] Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons, Ltd 1950) 12–13. Cited in Fortin (n 74) 107–108.

> "[n]ational liberation movements correspond to a category of armed non-state actors who are defined by their objective (self-determination), the quality of their constituency (peoples) and the conduct and/or quality of the opposing government".[121]

NLMs distinguish themselves from other ANSAs because of the conventional provisions especially addressed to them. Indeed, the scope of application of API includes

> "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".[122]

As will be shown shortly, this provision refers to NLMs. Consequently, it can be inferred that these ANSAs have obligations of IHL under API, but also that the conflicts they participate in are international armed conflicts (IACs), rather than NIACs. This provision is not a *unicum*; besides the instruments mentioned in the provision itself, it is interesting to note the resemblance with the UN resolutions discussing the right to self-determination. It can be concluded that there is a consistent definition of the conditions for the application of the right to self-determination.

To better understand the characteristics of NLMs, it is therefore necessary to first define the concepts of "peoples" and "self-determination". The former has proven to be vague, and has consequently been defined in different ways. In this regard, the Special Rapporteur on Prevention of Discrimination and Protection of Minorities affirmed:

> "in the context of the elimination of colonialism, any difficulties met with in determining what peoples should have the right of self-determination have proved easier to resolve. […] Otherwise, when the question of defining the concept of a "people" has come up for consideration it has very often been noted that the task is difficult, and doubts have been expressed as to whether it is possible or even desirable to draft a definition that would be both universally applicable and generally accepted".[123]

This consideration appears almost tautological. The term "peoples" has been thus defined in relation to the right to self-determination, as a "people" is the beneficiary of such right. However, the contrary

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[121] Konstantinos Mastorodimos, 'National Liberation Movements: Still a Valid Concept (with Special Reference to International Humanitarian Law)?' (2015) 17 Oregon Review of International Law 71, 72.
[122] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)' (n 50) Art. 1.4.
[123] Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Aureliu Cristescu, 'The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments, U.N. Doc. E/CN.4/Sub.2/404/Rev. I' (United Nations, 1981) para. 276.

is also true: to verify whether a struggle falls into the scope of application of the right to self-determination, it is necessary to verify whether it is conducted by a people or not. The aforementioned Special Rapporteur integrated the definition with a list of requirements:

> "*(a)* The term "people" denotes a social entity possessing a clear identity and its own characteristics;
>
> *(b)* It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;
>
> (c) A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights".[124]

However, these criteria are still quite broad; for example, the concepts of "clear identity" and "own characteristics" are not more precisely defined. After all, a significant component of a "people" consists in a common sentiment of belonging to a certain people, an extremely subjective element. For sure, an essential aspect of the definition lies in the difference between peoples and states, and this distinction is at the basis of the right to self-determination and ultimately of NLMs.

Concerning the "right to self-determination", this right is based on the observance of factual elements, namely the existence of peoples living in territories under alien domination, colonization or a racist regime. The right has been widely discussed and endorsed at the international level, in particular within the UN. In fact, it was first endorsed in the UN Charter, which includes, among the purposes of the United Nations,

> "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".[125]

Coherently, the UN General Assembly Resolution 1514(XV) of 1960, considered by the ICJ as the "basis for the process of decolonization",[126] mentions the right to self-determination discussing the granting of independence to countries and peoples subjected to colonial regimes.[127]

The right was then confirmed in the International Covenant on Civil and Political Rights:

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[124] ibid para. 279.
[125] United Nations, 'Charter of the United Nations' (24 October 1945) Art. 1.2.
[126] *Western Sahara Advisory Opinion* (1975) I.C.J. Reports 1975 12 (International Court of Justice) 12 para. 57.
[127] UN General Assembly, 'Resolution 1514(XV). Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV)' (14 December 1960).

> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[128]

In particular, peoples subject to colonial powers, alien domination and racist regimes are entitled to determine their political status, according to the right to self-determination. As later affirmed by the UN General Assembly in Resolution 2625, this right is one of the "principles of international law".[129] The ICJ case law has not only confirmed this right, but also specified its *erga omnes* character as an essential principle of contemporary international law.[130]

Looking at international practice, it can be affirmed that NLMs have been widely accepted by the international community, as their aims, which are their distinguishing feature, have been widely endorsed. As the right to self-determination refers to non-self-governed territories, it mainly concerns territories under the colonial rule[131]. Indeed, this right was consolidated during the decolonisation process, which took place in particular during the second half of the 20th Century; however, it is also applicable in cases of alien domination (e.g., in Palestine, Western Sahara) and racist regimes (e.g., in South Africa).

The international support of NLMs appears also considering the prohibition of resorting to the use of force, established first of all in the UN Charter.[132] Indeed, the UN General Assembly explicitly affirmed that

> "[t]he struggle of peoples under colonial and alien domination and racist régimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law […] [i]n their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are

[128] 'International Covenant on Civil and Political Rights' (19 December 1966) Art. 1.1.
[129] UN General Assembly, 'Resolution 2625 (XXV). 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/25/2625' (24 October 1970).
[130] *Case Concerning East Timor (Portugal v Australia)* (1995) I.C.J. Reports 1995 90 (International Court of Justice) para. 29.
[131] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion* (1971) I.C.J. Reports 1971 (International Court of Justice) para. 52.
[132] "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". United Nations (n 125) Artt. 2.3, 2.4.

> entitled to seek and to receive support in accordance with the purposes and principles of the Charter".[133]

Moreover, the duty of states to support peoples in the enjoyment of the right to self-determination is substantiated even in the support of their armed struggle. An exception to the prohibition to resort to the use of force is made, confirming the wide acceptance of the claims of self-determination by the international community. A further, indirect, recognition of the legitimacy of the armed struggle carried out by NLMs lies in their subjection to the rules of IHL applying to IACs, which has been recalled above.

NLMs have "[t]he right to seek and receive support and assistance" [134]. It has been noted that this "necessarily implies that they have a *locus standi* in international law and relations. This right necessarily implies also that third States can treat with liberation movements, assist and even recognize them without this being considered a premature recognition or constituting an intervention in the domestic affairs of the colonial or alien government" [135]. Considering that relations between states and NLMs were based on the general endorsement of the right to self-determination of peoples, it follows that "limited international legal personality of national liberation movements, directly deriv[es] from the peoples they represent".[136] Such a people-centred approach to ILP is consistent with Lauterpacht's vision of the subjects of law, which are

> "the persons, natural and juridical, upon whom the law confers rights and imposes duties".[137]

The limited international personality of NLMs is proven by the recognition of some NLMs at the international level, even outside the application of IHL. For instance, the Palestine Liberation Organization (PLO)[138] has been granted the status of observer in the UN. With its resolution 3237

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[133] UN General Assembly, 'Resolution 3103 (XXVIII). Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Régimes, A/RES/3103(XXVIII)' (12 December 1973) para. 1.
[134] Georges Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979) 4 Recueil des Cours (Collected Courses of the Hague Academy of International Law) para. b]2)c].
[135] ibid.
[136] Mastorodimos (n 121) 88.
[137] Hersch Lauterpacht, *International Law - Collected Papers*, vol 1 (Elihu Lauterpacht ed, Cambridge University Press 1970) 136. Cited in Malcolm Shaw, 'The International Status of National Liberation Movements' 5 Liverpool Law Review 19, 19.
[138] Regarding the nature of PLO as an NLM, suffices to recall the Palestinian National Charter. In particular, Art. 9 and Art. 26 state: "Armed struggle is the only way to liberate Palestine. This it is the overall strategy, not merely a tactical phase. The Palestinian Arab people assert their absolute determination and firm resolution to continue their armed struggle and to work for an armed popular revolution for the liberation of their country and their return to it. They also assert their right to normal life in Palestine and to exercise their right to self-determination and sovereignty over it"; " The Palestine Liberation Organization, representative of the Palestinian revolutionary forces, is responsible for the Palestinian Arab people's movement in its struggle - to retrieve its homeland, liberate and return to it and exercise the right to self-determination in it - in all military, political, and financial fields and also for whatever may be required by the Palestine

(XXIX), indeed, the UN General Assembly invited the PLO to participate in its sessions in the capacity of observer.[139] In 1998, its rights and privileges of participation in the UN General Assembly were specified in Resolution 52/250, including the right to participate in general debates, the right of reply, the right to raise points of order related to the proceedings on Palestinian and Middle East issues, the right to co-sponsor draft resolutions and decisions on Palestinian and Middle East issues, and the right to make interventions.[140]

Given that the process of decolonisation has come to an end, the extensive application of the right to self-determination today is hardly conceivable beyond the case of PLO or the Western Sahara situation. Consequently, the position of NLMs cannot be considered as common today. For instance, the recent situation in Kosovo has been considered as exceptional, a *sui generis* case.[141] In this sense, Mastorodimos affirmed that

> "it is at least difficult to envision any kind of future for the category of national liberation movements, particularly in international humanitarian law, where the stakes are lower, and by implication to other areas of international law […]. Unless there is a shift in attitudes, both from states and armed non-state actors, it might be time to declare liberation movements as a legal term dead".[142]

The experience of NLMs is relevant, nonetheless. In fact, it proves that if the aim pursued by an ANSA is considered acceptable by the international community, then not only is it possible to help and support the ANSA in its struggle, but it is also possible for the latter to have rights and duties conferred and recognised under international law and, consequently, a large extent of ILP. Surely, not all the aims pursued by ANSAs today are acceptable and consequently accepted by the international community. Nonetheless, the experience of NLMs proves that international law is not static, rather it can change with the evolution of the international scenario; it also proves that involving NSAs in discussions at the international level can have positive effects. It has to be noted that NLMs have not been recognised by every state; significant, in this sense, is the case of PLO and Israel, as

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case on the inter-Arab and international levels". Palestine Liberation Organization, 'The Palestinian National Charter' (1968).

[139] UN General Assembly, 'Resolution 3237 (XXIX). Observer Status for the Palestine Liberation Organization, A/RES/3237 (XXIX)' (22 November 1974).

[140] UN General Assembly, 'Resolution 52/250. Participation of Palestine in the Work of the United Nations, A/RES/52/250' (13 July 1998).

[141] See 'Written Statement of the Government of Japan' (17 April 2009) <https://www.icj-cij.org/public/files/case-related/141/15658.pdf>; 'Written Statement of the Grand Duchy of Luxembourg' (30 March 2009) <https://www.icj-cij.org/public/files/case-related/141/15634.pdf>t.

[142] Mastorodimos (n 121) 109.

the reciprocal formal recognition occurred only in the nineties.[143] Also, it is useful to recall that the UN had to urge the states that had not done so to grant to the representatives of recognised NLMs the status of observer and the facilities, privileges and immunities necessary for the performance of their functions in accordance with the relevant provisions on the matter.[144] Nonetheless, the global reception of NLMs and the general belief that it is better to engage with them rather than oppose them in a conflictual way, proved beneficial and should be taken into consideration discussing possible developments of the relations with ANSAs

4.4. Focus on the means. Terrorist groups

Today, it is common practice to resort to the term "terrorism" to label ANSAs. Over the years, states have tackled the issue by adopting national legislations;[145] moreover, as terrorism often affects several states (especially the so-called transnational terrorism) and is generally condemned by the international community, a commonly accepted international definition at the international level is appropriate. However, international law does not provide such a definition. This shortcoming led to abuse in the use of the term "terrorism". Indeed, today, the label "terrorist group" is often inappropriately used for political and ideological reasons, as this term is linked to widely condemned and criminalised conducts. An assessment of the several provisions and international practice dedicated to the topic shows that terrorist groups distinguish themselves among other ANSAs mainly because of two aspects: the typology of means used, and the general purpose pursued. Regarding the first aspect, namely the means adopted, terrorist groups are characterised – somewhat tautologically – by the resort to acts of terrorism;[146] it is therefore necessary to define acts of terrorism to grasp the particular features of terrorist groups. Regarding the second aspect, terrorist groups are characterised – even more tautologically – by the purpose of spreading terror among the population to achieve political objectives. Thus, even though uncertainties remain, it is possible to attempt a more precise definition in legal terms of the expression "terrorism", starting from the above characteristics. Such

[143] Palestine Liberation Organization and Israel, 'Exchange of Letters on Israel-PLO Mutual Recognition (1993)' (9 September 1993).
[144] UN General Assembly, 'Resolution 41/71. Observer Status of National Liberation Movements Recognized by the Organization of African Unity and/or by the League of Arab States, A/RES/41/71' (3 December 1986) para. 2.
[145] See, for instance, Art. 270 of Italian criminal code, focused on subversive associations, and Art. 270-bis, dedicated to associations for acts of terrorism, also international terrorism, and subversion of democratic order. In particular, Art. 270-bis, initially destined to criminalize internal terrorism, has been modified in order to criminalize international terrorism as well after September 11, 2001. See, in this regard, Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press 2005) 30 note 58.
[146] Ganor (n 11).

precise definition may be useful, as it allows a more correct terminological usage, with possible benefits under both a legal and practical point of view. Indeed, it may favour the development and implementation of international rules on terrorist groups. At the same time, providing a more precise definition of terrorism may make engagement with non-terrorist ANSAs in normative production easier.

The first definition of "acts of terrorism" dates back to 1937. The 1937 Convention for the Prevention and Punishment of Terror (1937 Convention) defined such acts as

> "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public".[147]

Art. 2 further clarifies that this term refers to "[a]ny wilful act causing death or grievous bodily harm or loss of liberty"[148] to public officials, and "[a]ny wilful act calculated to endanger the lives of members of the public".[149] From this definition, a significant feature of these acts, confirmed in subsequent instruments, emerges: the duplicity of targets. Terrorism is not only directed against a state, but also persons. Indeed, the latter are the target of acts aimed at creating a state of terror to compel authorities to keep a certain conduct.[150]

After the mentioned 1937 Convention, which has never entered into force, several international and regional instruments on the issue have been adopted. Within the UN, 19 international legal instruments[151] have been elaborated on the matter; however, they are sectoral instruments, so they provide measures against terrorism only on specific matters, e.g., the seizure of aircraft,[152] the prevention of crimes against internationally protected persons,[153] nuclear material,[154] maritime navigation.[155] None of them is an omni comprehensive instrument, providing a conclusive definition

[147] League of Nations, 'Convention for the Prevention and Punishment of Terrorism' (16 November 1937) Art. 1.2. It has to be noted that Art. 2 complements Art. 1 with a list of criminal acts which states must make criminal offences, when these acts are directed against another state if they constitute "acts of terrorism within the meaning of Article I".
[148] ibid Art. 2.1.
[149] ibid Art. 2.3.
[150] See, e.g., Fiona de Londras, 'Terrorism as an International Crime' in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011); Martin Scheinin, 'Terrorism' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd ed., Oxford University Press 2018).
[151] The complete list is available on the website UN Office of Counter-Terrorism, 'International Legal Instruments'.
[152] 'Convention for the Suppression of Unlawful Seizure of Aircraft. Signed at The Hague on 16 December 1970'.
[153] 'Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents' (14 December 1973).
[154] 'Convention on the Physical Protection of Nuclear Material' (3 March 1980).
[155] 'Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (10 March 1988).

of "terrorism" or "terrorist group" applicable in all circumstances.[156] It is therefore appropriate to look for the key features of terrorist groups elsewhere.

The UN General Assembly defined terrorist acts as

> "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes […] [they] are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them".[157]

The declaration does not allow any justification for terrorism, regardless of the aim pursued.[158] In this sense, it seems that the classification as "terrorist" because of the terrorist means employed should prevail over any other classification, thus implicitly affirming the primacy of the means criterion. The International Convention on the Suppression of Financing of Terrorism, adopted in 1999, provides a more specific definition, affirming that a terrorist act is any act

> "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act".[159]

In accordance with the double target set in the 1937 Convention, the 1999 Convention sets two possible, alternative and quite broad purposes: to intimidate a population *or* to compel a government or international organisation.[160] Interestingly, this definition limits acts of terrorism to acts directed against any physical persons. The indifference towards the identity of the victims has been highlighted as a peculiar characteristic of terrorist groups and an element of distinction between terrorism and ordinary crimes. Indeed, while ordinary criminals are normally interested in attacking a specific person, or at least a person belonging to a certain typology or class,[161] the identity of the victims is

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[156] See, e.g., Scheinin (n 150).
[157] UN General Assembly, 'Resolution 49/60. Declaration on Measures to Eliminate International Terrorism, A/RES/49/60' (17 February 1995).
[158] See Christian Walter, 'Terrorism' (*Max Planck Encyclopedias of International Law*, April 2011).
[159] UN General Assembly, 'International Convention for the Suppression of the Financing of Terrorism, A/RES/54/109' (25 February 2000) Art. 2.1 (b).
[160] In this sense, the UN Security Council affirmed that it "[u]rges the further development of international cooperation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of terrorism". UN Security Council, 'Resolution 638 (1989)' (31 July 1989) para. 6.
[161] See Andreas Armborst, 'Conceptualizing Political Violence of Non-State Actors in International Security Research' in Andreas Kruk and Andrea Schneiker (eds), *Researching Non-State Actors in International Security. Theory and Practice* (Routledge 2017).

irrelevant for terrorists. As terrorist actions are meant to cause widespread terror among the population, the indifference towards the victims can maximize the terror provoked, as it undermines the sense of security in the population.

The primacy of means in identifying terrorism appears also in Resolution 1566 (2004) of the UN Security Council, which defines terrorist acts as

> "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act".[162]

According to the Resolution, these types of acts can be committed by any entity, even single individuals.[163] Thus, the recourse to terrorist acts, which consist in particular in attacks against civilians, remains as the main feature of terrorist acts and terrorist groups. The functional link between the means and the ends, and the primacy of the means over other characteristics of the conduct and of the actor, reappear.

In this sense, the resort to terrorist means *per se* is not sufficient to identify terrorist groups; the means must be the primary features of such groups. Many other types of ANSAs have resorted, from time to time, to terrorist means. It thus appears that other groups can conduct terrorist activities without becoming terrorist groups, as long as their resort to these types of attacks does not become part of their nature. In fact,

> "[l]egal definitions of terrorism should refer to the methods used, not the underlying aim. What transforms political or ideological aspirations into terrorism is the decision by one or more morally responsible individuals to employ the morally inexcusable tactics of deadly or otherwise serious violence against 'civilians', that is, innocent bystanders".[164]

There is no set definition regarding the type of primacy of the means required, which can therefore be quantitative or qualitative. In the first case, an entity can be considered as a terrorist group if most of its actions are terrorist acts. In the second, an entity can be considered as such if it engages in terrorist acts. The legitimacy of the purposes cannot overcome the illegitimacy of the means:

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[162] UN Security Council, 'Resolution 1566 (2004), S/RES/1566 (2004)' (8 October 2004) para. 3.
[163] Walter (n 158).
[164] Scheinin (n 150) 586.

> "even if its declared ultimate goals are legitimate, an organization that deliberately targets civilians is a terrorist organization. There is no merit or exoneration in fighting for the freedom of one population if in doing so you destroy the rights of another population. If all the world's civilian populations are not to become pawns in one struggle or another, terrorism – the deliberate targeting of civilians – must be absolutely forbidden, regardless of the legitimacy or justice of its goals. The ends do not justify the means".[165]

All this considered, it appears that the only element which allows the distinction of terrorist groups and on which general agreement has been reached and *can be reached* is the resort to violent means to spread terror (that is terroristic acts); the aims are irrelevant. This reference to the means used helps identify terrorist groups more objectively, overcoming the obstacle caused by the obvious subjective perception of the legitimacy of the aims pursued.[166]

In fact, besides their primary resort to terror, terrorist groups can present differences in aims, organisation and strategies adopted.[167] There are no restrictions regarding the motivations behind terrorist acts. On the other hand, it has been submitted that the purpose must be political. In this regard, terrorists "are convinced that rather than breaking the law, they are restoring justice".[168] As they believe the legal *status quo* is unlawful, they try to change it. At the very least, the adjective "political" has to be interpreted as "non-material", linked to ideological and religious motivations.[169] For instance, terrorism based on religious extremism is today quite widespread.[170]

In most cases, regional conventions against terrorism have not provided comprehensive definitions as well. For instance, the Inter-American Convention against Terrorism refers to previous conventions and protocols (not dedicated to terrorism exclusively) to establish a list of "offences" relevant for the Convention itself, without providing an abstract definition.[171] This approach has been easily explained, affirming that references to specific offences offer sufficient certainty and clarity to

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[165] Ganor (n 11) 288.
[166] See, in this sense, Ganor (n 11).
[167] Ignacio Sánchez-Cuenca, 'Terrorism as War of Attrition: ETA and IRA. Working Paper 2004/204' (2004) 2004/204 Working Paper 1.
[168] Armborst (n 161) 17.
[169] See, e.g., de Londras (n 150).
[170] During 2019, several Al-Qaeda and ISIS-affiliated groups, e.g., the ISIS West Africa and Allied Democratic Forces, have conducted terrorist operations in different parts of the African continent, such as the Lake Chad basin and the Democratic Republic of the Congo. ISIS, albeit the collapse of its caliphate, remained active in Middle East states as well, e.g., through its ISIS-Sinai Province unit. See US Bureau of Counterterrorism, 'Country Reports on Terrorism 2019' (US Department of State 2020). The issues related to the nature of ISIS will be presented below.
[171] Organization of American States, 'Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02)' (3 June 2002) Art. 2.

the provisions, as the term "terrorism" *per se* is ambiguous and open to too different interpretations based on non-legal considerations (such as political ones).[172]

An exception is provided by the Convention of the Prevention and Combating of Terrorism of the Organisation of African Unity, which defines "terrorist act". Under Art. 1.3, the latter is defined as

> "any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
>
> (i) intimidate […]to do or abstain from doing any act […];
>
> (ii) disrupt any public service […]:
>
> (iii) create general insurrection in a State".[173]

It has been submitted that the inclusion of a definition in this regional convention is due to the willingness to avoid confusion between acts of terrorism and acts pursuing the self-determination of a people.[174] In this sense, Art. 1 must be read with Art. 3, which establishes:

> "Notwithstanding the provisions of Article 1, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.
> Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act".[175]

The main limitation to the definition of terrorist acts provided in Art. 1 is laid down in Art. 3, which indirectly clarifies the difference between terrorist groups and NLMs.

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[172] See, e.g., de Londras (n 150).
[173] Organisation of African Unity, 'Convention on the Prevention and Combating of Terrorism' (14 July 1999) Art. 1.3.
[174] Martin Ewi and Kwesi Aning, 'Assessing the Role of the African Union in Preventing and Combating Terrorism in Africa' (2006) 15 African Security Review 32.
[175] Organisation of African Unity (n 173) Art. 3.

Another regional instrument providing a comprehensive definition is the 1999 Treaty on Cooperation Among the States Members of the Commonwealth of Independent States in Combating Terrorism, which defines "terrorism" as

> "an illegal act punishable under criminal law committed for the purpose of undermining public safety, influencing decision-making by the authorities or terrorizing the population".[176]

It thus appears that the only elements commonly recognised as attributable to terrorism are the spreading of terror to compel authorities to adopt a certain conduct and the primacy of terrorist acts.

International scholarship has tried to remedy the lack of a comprehensive and commonly accepted definition of terrorism and acts of terrorism. For instance, Cassese submitted that, for a conduct to be considered as a terrorist act, it has to i) be an already criminalized act under any national body of criminal law; ii) be of transnational nature; iii) have as purpose to spread of terror among the population or to compel public authorities to do or abstain from a certain act; iv) spread fear or anxiety among civilians or engage in criminal conduct against a public institution; v) be based on political, ideological or religious motivations.[177]

However, Cassese himself admits that exceptions are possible. Regarding the first feature, he recognises that certain conducts, *per se* legitimate (for instance, the financing of an organisation), can constitute terrorist acts when they are carried out in connection with terrorism. Even the motive "may not suffice for the classification of a criminal act as terrorist".[178] Such an issue is complicated by the fact that, in general, it can be difficult to identify the motives of an act.

The definitions briefly presented confirm that the term terrorism still does not have a commonly accepted, precise definition. Nonetheless, terrorism is surely characterised by a strong negative connotation, and terrorist groups are generally condemned and disapproved by the international community. In this sense, it has been observed that "since the latter 1970s 'terrorism' has frequently been used pejoratively to discredit and de-legitimize".[179] For instance, the UN Secretary-General affirmed, discussing the aftermath of the terrorist attacks on 11 September 2001: "we are in a moral

[176] 'Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism' (1999) Art. 1.
[177] A Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 Journal of International Criminal Justice 933.
[178] ibid 941.
[179] Shultz, Farah and Lochard (n 99) 21.

struggle to fight an evil that is anathema to all faiths".[180] The UN Security Council has reaffirmed that "terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations" on more occasions.[181] Also, it has been affirmed that "[t]errorism aims at the very destruction of human rights, democracy and the rule of law. It attacks the values that lie at the heart of the Charter of the United Nations and other international instruments".[182] In particular, the actions undertaken after UN Security Council Resolution 1373 (2001) are telling. Adopted under Chapter VII of the UN Charter, the Resolution requires states not only to criminalise funding of terrorist activities and prevent the commission of terrorist acts, but also to criminalize acts associated with terrorism. Consequently, "some States have deployed the international legitimacy conferred by Council authorization to define terrorism to repress or de-legitimize political opponents, and to conflate them with Al-Qaeda".[183] Indeed, it has been affirmed that "[i]t has become common for affected States to dismiss insurgent groups as terrorists […] and repudiate the applicability of international law altogether".[184] Undeniably, the label "terrorism" contributes, with its emotional charge, to the loss of legitimacy in front of the international community of ANSAs labelled as terrorist groups.

This subjective[185] and improper use of the term "terrorism" can have negative effects. In particular, it can impair the possibility constructively to engage with ANSAs. In its research, the NGO Geneva Call noted that

> "[i]n several cases, the ANSAs consulted strongly feel that the humanitarian organizations have not engaged with them in an appropriate, proactive, or impartial manner. In some contexts, engagement is hindered by external political pressures, with perilous consequences for aid workers and civilians alike. Some States […] have listed several of the movements interviewed as 'terrorist groups', which

[180] UN Secretary-General, 'UN Press Release - Secretary-General, Addressing Assembly on Terrorism, Calls for 'Immediate, Far-Reaching Changes" in UN Response to Terror, SG/SM/7977-GA/9920' (1 October 2001).
[181] See, e.g., UN Security Council, 'Resolution 2178 (2014), S/RES/2178 (2014)' (24 September 2014); UN Security Council, 'Resolution 2396 (2017), S/RES/2396 (2017)' (21 December 2017).
[182] Office of the United Nations High Commissioner for Human Rights, 'Human Rights, Terrorism and Counter-Terrorism' (2008) Fact Sheet 32 7.
[183] Ben Saul, 'Definition of Terrorism in the Un Security Council: 1985-2004' 4 Chinese Journal of International Law 141, 160.
[184] Crawford, 'Insurgency' (n 105).
[185] In this regard, it has been noted that the subjectivity problem is emphasised by the influence that narratives, often proposed by ANSAs themselves, have on public perception; see Alexander Spencer, 'Rebels without a Cause. Narrative Analysis as a Method for Research on Rebel Movements' in Andreas Kruk and Andrea Schneiker (eds), *Researching Non-State Actors in International Security. Theory and Practice* (Routledge).

> has led some agencies to avoid direct engagement with them for fear of falling afoul of counter-terrorism legislation".[186]

The stigma associated with the term "terrorism" impairs the possibility to establish possibly productive relations with ANSAs labelled as terrorist groups. The absence of a set definition and the exploitation of the term are causally connected in a reciprocal way. Indeed, this absence makes the politicisation of the term possible; at the same time, it is extremely difficult to reach a shared definition because of the particular perspective of the entity providing the definition. After all, the already mentioned statement "one man's terrorist is another man's freedom fighter"[187] has been called into question,[188] but maintains its appeal.

A recent and relevant example of the difficulties in identifying terrorist groups is provided by the Islamic State of Iraq and Syria (ISIS),[189] which has been active in Iraq from 2013 until its (relative) defeat in 2017.[190] As noted in the UN Secretary-General's Report, the emergence of ISIS in the territories of Syria and Iraq has been facilitated by the instability and weak national institutions due to protracted conflicts in the region.[191] ISIS has often resorted to terrorist means of action, to pursue its fundamentalist agenda. Indeed, the UNSC has condemned ISIS for terrorist acts.[192] However, at its peak, ISIS was also exercising governance functions in the territory under its control, an element that seems to facilitate the assimilation with insurgents.[193] As summarised by Callamard, "ISIL ran day-to-day operations of the territories and their populations under its control, including by raising taxes, issuing birth certificates and officialising marriages, policing the streets, imprisoning, judging and sentencing through its court systems, along with mediating over petty disputes".[194] Thus, the possibility of considering ISIS as a state has been debated. In this regard, ISIS has defined itself as 'an all-encompassing entity, one that eventually is meant to shoulder all the responsibilities of

[186] Ashley Jackson, 'In Their Words: Perceptions of Armed Non-State Actors on Humanitarian Action' (Geneva Call 2016) 24.
[187] Walter Laqueur, *The Age of Terrorism* (Little, Brown 1987) 302.
[188] Ganor (n 11) 218.
[189] Also known as Islamic State of Iraq and the Levant (ISIL) and Islamic State (IS).
[190] Agnes Callamard, 'Towards International Human Rights Law Applied to Armed Groups' (2019) 37 Netherlands Quarterly of Human Rights 85.
[191] UN Security Council, '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/2016/92' (29 January 2016).
[192] See, e.g., UN Security Council, 'Resolution 2253 (2015), S/RES/2253 (2015)' (17 December 2015).
[193] In this regard, it should be recalled that, at its peak, ISIS was controlling close to 40% of the territory of Iraq. See Callamard (n 190).
[194] ibid 89.

traditional state'.[195] However, it appears "somewhat imprudent to follow the IS in its self-characterization as a State".[196] Indeed, either adopting an approach based on a constitutive theory of recognition or one based on a declaratory theory of recognition, it can be concluded that ISIS has never been a state. Adopting the constitutive theory on recognition, which reserves a constitutive power to the recognition of a state made by other states, ISIS cannot be considered a state. Indeed, no state has recognised it as such.[197] Adopting the declaratory theory, which confers only a declaratory function to recognition as states are distinguished because they present a series of objective requirements, the same conclusion is reached, since ISIS has not acquired any of the substantive requirements required for the purposes of statehood, usually identified with the criteria set in Article 1 of the Montevideo Convention on the Rights and Duties of States.[198] It has been noted that, despite the governance activity conducted on a wide territory, the presence of a permanent population, of a defined territory, and a government (all required by Article 1 of the mentioned Montevideo Convention) are, at least, debatable.[199] The overall structure of ISIS has been defined as "extremely shaky";[200] ISIS has not established fixed borders, and most of the population under ISIS control has not chosen to be part of the alleged new state.[201] Moreover, the respect of *jus cogens* rules and obligations *erga omnes* is today considered an additional criterion of statehood developed after World War II. Indeed, Tomuschat affirmed that "the principles of peace and non-use of force, on the one hand, and human rights, on the other, nowadays embody the central philosophy of the international legal order".[202] ISIS could not be considered a state under this criterion as well, since it often resorts to torture and other violations of human rights.[203] Having excluded the possibility to consider ISIS a state, it appears that its main distinguishing element is the terrorist means ISIS resorted to. Therefore, it can be concluded that ISIS can be considered a terrorist group. Nonetheless, its widespread diffusion and governance have generated debates.

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[195] See Charles C Caris and Samuel Reynolds, 'ISIS Governance in Syria' (Institute for the Study of War 2014) 22. Cited in Callamard (n 190) 89.
[196] Christian Tomuschat, 'The Status of the "Islamic State" under International Law' (2015) 90 Die Friedens-Warte 223, 226.
[197] On the international condemnation of ISIS, see, e.g., UN Security Council, 'Letter Dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council, S/2014/691' (22 September 2014).
[198] See *supra*, 'Montevideo Convention on the Rights and Duties of States' (n 15) Art. 1.
[199] See, e.g., Tomuschat, 'The Status of the "Islamic State" under International Law' (n 196).
[200] ibid 228.
[201] Tomuschat, 'The Status of the "Islamic State" under International Law' (n 196); Noam Zamir, 'The Armed Conflict(s) Against the Islamic State' (2016) 18 Yearbook of International Humanitarian Law 91.
[202] Tomuschat, 'The Status of the "Islamic State" under International Law' (n 196) 231.
[203] See, e.g., UN Security Council, '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/2016/92' (n 191).

In conclusion, the terms "terrorism" and "terrorist group" are still often used in a politicised way, as a precise definition does not exist. Analysing doctrine and practice, it appears that the distinguishing attribute of terrorist groups is the resort to violent means, normally against civilians, to spread terror and reach their purposes, without any respect for rules of international law. Terrorist groups challenge statehood in the sense that they often do not recognise constituted international order in the first place and do not respect even basic rules of international law.[204] Consequently, they often refuse any engagement in initiatives aimed at guaranteeing the respect of such rules. Given their explicit refusal, doubts arise regarding the possibility of engaging with them for the elaboration of the rules of international law. At the same time, states are not inclined to consider them as entities protected by rules of international law; indeed, they are widely criminalised and condemned. This, of course, limits the possibility to confer them any sort of international subjectivity and accountability. In any case, the term "terrorist group" has to be used with caution: the acts of several ANSAs can produce a sense of fear, however not all ANSAs resort to acts aimed at spreading terror. Thus, the involvement of the latter ANSAs in normative production processes should be considered, to improve effectiveness and compliance with international law. On the other hand, the practice of deliberately labelling ANSAs as "terrorist groups" even without the fulfilment of the necessary criteria to block any engagement with them should be abandoned.

4.5. Focus on the relationship with authorities. Militias

In the wide group of ANSAs, it is possible to identify militias, using as distinguishing attribute their link to authorities, both at the national and local level. In this sense, militias are not always ANSAs. When they operate as part of the armed forces of a legitimate government, acting under a legitimate authority, they are not ANSAs. In this case, they lack key features of such entities; in particular, they cannot be considered as *non-state* actors. On the other hand, when they escape the control of the legitimate authority the militias, the militias are indeed ANSAs, hence becoming relevant for the present discussion. In fact, in this case, they are armed actors not belonging to the regular armed forces of a state and have an organisational structure, thus satisfying the conditions to be considered ANSA.

[204] See David Rapoport, 'The Politics of Atrocity' in Yonah Alexander, Seymour Maxwell Finger and Hans J Morgenthau (eds), *Terrorism: Interdisciplinary Perspectives* (John Jay Press New York 1977).

The term "militias" has been used for centuries. Traditionally, it refers to the citizens enrolled in the military as a support unit, who enter into action only in case of emergency.[205] The Oxford Manual on the Laws of War on Land defined the armed forces of a State as "[t]he army properly so called, including the militia".[206] However, the meaning of the term "militia" has expanded in time, and today a commonly accepted definition of militias does not exist. Current practice (from the 1950s onwards)[207] shows that militias are normally founded to support the regular armed force of a state. Consequently, they are supported, or at least tolerated, publicly or covertly, because of the pro-governmental aims pursued and the weakness of regular state armed forces. However, in many cases, militias become too strong for the authorities to control them, thus creating a pathological situation in the system. "Physiological" militias act under the control and direction of a legitimate authority, and these authorities can be held accountable, under the rules on international responsibility,[208] for violations of rules of international law. Legitimate authorities have often relied on militias to use force in a non-legitimate manner. However, militias have often managed to elude the control of governmental authorities and have consequently become more autonomous and powerful.[209] This is particularly true in fragile states, where the official armed forces are not sufficiently equipped to maintain law and order, and/or the governmental authorities are too weak to avoid aggregations of the population in communities based on, e.g., ethnicity or religion. In addition, militias that gain power undermine the power of States. Williams well describes the relationship between states and militias:

> "[b]ecause they often come into existence to provide security where the central government – for whatever reason – has failed to do so, however, 'militias are often considered legitimate entities' filling the gap resulting from 'the absence of effective national, provincial, or local security institutions.' If they fill a functional hole left by the state, however, this in turn further challenges the legitimacy of

[205] Chris Alden, Monika Thakur and Matthew Arnold, *Militias and the Challenges of Post-Conflict Peace: Silencing the Guns* (ed Books Ltd 2011); Samuel T Ansell, 'Legal and Historical Aspects of the Militia' (1917) 26 The Yale Law Journal 471; Julia Gebhard, 'Militias' (*Max Planck Encyclopedias of International Law*, October 2010).
[206] Institute of International Law, *Oxford Manual on the Laws of War on Land* (1880) Art. 2.
[207] See Richard H Shultz and Andrea J Dew, *Insurgents, Terrorists and Militias - The Warriors of Contemporary Combat* (Columbia University Press 2006).
[208] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (n 78) Art. 8. In particular, the Commentary states: "cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad".
[209] Alan Bryden and Marina Caparini, *Private Actors and Security Governance* (LIT Verlag 2006); Williams (n 44).

> the state […]. Militias 'do not support state institutions. Loyalties lie within the militia organization'".[210]

In addition, as current militias tend to operate in weak states and often represent a particular group,[211] their actions on behalf of governmental authorities are often non-existent. It may be affirmed that current practice does not mirror the formal subordination of militias to state authority. Indeed, they often "address the needs of a specific group that is something less than the entire citizenry of a country. They are 'quasi-state' organisations, assuming some functions which the state would normally perform such as the provision of security, administration, and a range of activities designed to facilitate economic activity".[212]

The evolution of militias from forces supporting states to ANSAs is here briefly presented, with reference to three practical examples: the Janjaweed in Sudan, the Popular Mobilization in Iraq, and Hezbollah in Lebanon.

Even though rules of IHL do not define "militias", the Geneva Conventions mention militias, so it can be useful to analyse the relevant articles to better understand these actors. In particular, Article 4 of the Geneva Convention (III) relative to the Treatment of Prisoners of War (Geneva Convention III) establishes that:

> "A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;

[210] Williams (n 44) 10.
[211] Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' (n 43) 10.
[212] Steven Metz, 'Rethinking Insurgency' (Strategic Studies Institute 2007) 16.

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war […]".[213]

Article 4A(1) establishes a fundamental connection between militias and a Party of a conflict. Referring to "the armed forces of a Party […] *as well as* members of militias", an implicit yet clear separation between the two is made. Nonetheless, these militias are formally included in the armed forces of a Party, together with other volunteer corps. The expression "forming part of such armed forces" has been included because of the practice of certain states of having militias and volunteer corps which were "quite distinct from the army as such".[214] Indeed, the 2020 Commentary of the ICRC states that the category of prisoners of war mentioned in Article 4A(1)

"expressly includes militias or volunteer corps forming part of the armed forces. For such groups to fall within subparagraph 4A(1), they must have been formally incorporated into the armed forces prior to falling into enemy hands and must be under the responsible command of a Party to the conflict. How they are incorporated depends on the domestic law of the State in question".[215]

In addition, the mentioned category

"consists of members of the armed forces of a Party to the conflict, *including members of militias* or volunteer corps forming part of the armed forces" (emphasis added).[216]

Thus, even though this type of militia is not composed of regular soldiers, it is still considered a part of the armed forces of a Party. In fact,

"[t]he expression 'members of the armed forces' refers to all military personnel under a command that is responsible to a Party to the conflict".[217]

Militias mentioned in Article 4A(1), being formally incorporated into the armed forces, cannot be considered ANSAs, as they act under the control of another subject.

[213] 'Geneva Convention (III) Relative to the Treatment of Prisoners of War' (12 August 1949) Art. 4.
[214] International Committee of the Red Cross, 'Convention (III) Relative to the Treatment of Prisoners of War. Commentary of 2020' para. 979.
[215] ibid para. 979.
[216] ibid para. 975.
[217] ibid para. 976.

Militias not incorporated – but still "belonging to a Party to the conflict" – are mentioned in Article 4A(2).[218] These are armed groups, composed of regular citizens, displaying a certain level of organisation. As they are not included in the regular armed forces, they cannot be considered as part of a regular army. Their character of non-regular armed forces is implicitly emphasised by the wording "[m]embers of other militias *and members of other volunteer corps*". Given that they are non-regular forces, Article 4A(2) indicates a series of conditions to satisfy. They were not a novelty; in fact, similar requirements were mentioned in Article 1 of Annex to The Hague Convention (IV) respecting the Laws and Customs of War on Land (Hague Convention IV), of 1907.[219] These conditions are grounded on practical reasons, as they are instrumental for the respect of other rules and principles of IHL. Indeed, having a responsible command and distinctive signs recognisable at a distance and carrying arms openly all serve the purpose of distinguishing the members of armed forces from civilians. Doing so makes the respect of the principle of distinction,[220] a basic customary rule of IHL, easier.[221] The fourth condition establishes that armed groups must act in accordance with the "laws and customs of war". This term is not more precisely defined, but is normally intended as a reference to IHL.[222] Its aim is "to encourage compliance with international humanitarian law";[223] on a theoretical level, it confirms that irregular armed forces involved in a conflict must respect the rules of IHL as well.[224] It appears that the four conditions indicated in Article 4(2) also serve to bring the entities mentioned in Art. 4(2) closer to the entities of Art. 4(1), thus putting the "members of the armed forces of a Party", including militias and volunteer corps "forming part of such armed forces" *ex* Art. 4A(1) on par with armed forces and militias that are not part of the armed forces of a Party *ex* Art. 4A(2).

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[218] 'Geneva Convention (III) Relative to the Treatment of Prisoners of War' (n 213) Art. 4A(2). Interestingly, this letter discusses militias and organised resistance movements together. Ideally, they are opposite and in contrast, as militias can be engaged by states fighting against resistance movements; however, they are mentioned together, when discussing the prisoners of war.

[219] 'The Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land' (18 October 1907).

[220] International Committee of the Red Cross, 'Rule 1. The Principle of Distinction between Civilians and Combatants' (*IHL Database. Customary IHL*). The principle states: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians".

[221] International Committee of the Red Cross, 'Convention (III) Relative to the Treatment of Prisoners of War. Commentary of 2020' (n 214) Art. 4 para. 983.

[222] ibid para. 1024.

[223] ibid para. 1025.

[224] The conditions of Article 4A(2) are not requested to regular armed forces, as they, being regular armed forces, already satisfy them: "regular armed forces fulfil these four conditions *per se* and, as a result, they are not explicitly enumerated with respect to them". International Committee of the Red Cross, 'Rule 4. Definition of Armed Forces' (*IHL Database. Customary IHL*) 4.

The IHL rules are therefore based on the concept of state-affiliated militias. Traditionally, both formally and informally incorporated militias depend on state authorities, and the customary rule no. 149 contained in the ICRC's study on customary IHL coherently establishes that

> "a State is responsible for violations of international humanitarian law attributable to it, including:
>
> […]
>
> (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control".[225]

Practice has clarified that the type of control required for the conduct to be attributed to a state is of an "overall character",[226] which means that if a group is under the overall control of a state,

> "it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State".[227]

However, the relationship between militias and states has evolved. Three practical examples are provided to illustrate this evolution.

The Janjaweed militia was created by the central government of Sudan. The latter wanted to contain a rebellion in the region of Darfur but, at the same time, it was also conscious of its weak army. It thus supported irregular armed groups, called "Janjaweed", mainly of Arab identity. The governmental authorities provided weapons, money and other resources from authorities,[228] while denying any connection with the Janjaweed.[229] Over time, the militias gained more and more autonomy and power.

The fracture between the government and the militia was intensified by the Darfur Peace Agreement, in which the requests of the Arab militias were disregarded.[230] As the authorities did not confer the promised reward to the Janjaweed, the latter decided to act autonomously, and get its reward on its

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[225] International Committee of the Red Cross, 'Rule 149. Responsibility for Violations of International Humanitarian Law' (*IHL Database. Customary IHL*).
[226] *Prosecutor v Dusko Tadić (Judgement)* [1999] International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber IT-94-1-A para. 137.
[227] ibid para. 122.
[228] Human Rights Watch, 'Darfur Documents Confirm Government Policy of Militia Support' (Human Rights Watch 2004) Human Rights Watch Briefing Paper.
[229] Human Rights Watch, 'Entrenching Impunity Government Responsibility for International Crimes in Darfur' (2005).
[230] Government of the Sudan, Sudan Liberation Movement/Army and Justice and Equality Movement, 'Darfur Peace Agreement' (5 May 2006).

own, resorting to incursions against the civilian population in Darfur. The actions thus undertaken by the militia were not effectively contrasted by the governmental authorities; the latter were indeed too weak. The UN Security Council demanded that

> "the Government of Sudan fulfil its commitments to disarm the Janjaweed militias and apprehend and bring to justice Janjaweed leader and their associates who have incited and carried out human rights and international humanitarian law violations and other atrocities, and further requests the Secretary General to report in 30 days, and monthly thereafter, to the Council on the progress or lack thereof by the Government of Sudan on this matter".[231]

However, this request did not take into due consideration the weakness of Sudanese legitimate authorities. Also, the mutual connection between government and militias was not duly considered. Indeed,

> "the Government of the Sudan has failed to take appropriate steps to disarm non-State armed groups in areas where it can do so, particularly armed groups associated with tribes that on occasion have conducted military operations alongside Government forces. The Panel has found conclusive evidence of operational coordination between elements of the Sudanese armed forces and militia groups associated with tribes that support the Government. The Ministries of the Interior and Defence, and the National Intelligence and Security Service, have not taken action to disarm armed groups in Darfur".[232]

It appears that the inability of the government to fully control its forces was already evident.[233]

The Janjaweed case is an example of the evolution of militias. Even though it started as an anti-insurgency militia, thus pursuing an aim shared by the central government, at a certain moment it started to pursue its own interests, not always shared by the legitimate authorities. Although the authorities did not welcome the shift in aims, they were too weak to effectively stop the activities of Janjaweed. They thus became an irregular armed force that pursued private interests, beyond the control of state authorities.

More recent is the case of the Popular Mobilization Forces (PMFs). This is an umbrella organisation formed in 2014 to fight against ISIS, composed of several militias. The Iraqi government, recognizing that its regular forces were too weak to effectively contrast ISIS in several areas of the country, called

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[231] UN Security Council, 'Resolution 1556 (2004), S/RES/1556 (2004)' (30 July 2004) para. 6.
[232] UN Panel of Experts, 'Second Report of the Panel of Experts Established Pursuant to Paragraph 3 of Resolution 1591 (2005) Concerning the Sudan, S/2006/250' (19 April 2006) para. 85.
[233] Jan Pronk, 'Statement on Darfur to the UN Security Council, November 2004' (4 November 2004) para. 6.

on volunteers.[234] Several pre-existing militias joined and grouped under the name of Popular Mobilization Units (PMUs). They operated with the support of the legitimate government[235] and participated in several crucial battles against ISIS.[236] They were formally integrated into the Iraqi security apparatus, to allow authorities to control them. The Law of the Popular Mobilization Authority reaffirmed that the PMFs "is an independent organization with corporate personality".[237] However, it also states that the Popular Mobilization (PM) "is a part of the Iraqi armed forces, and reports directly to the general commander of the armed forces […] the PM is subject to all military laws in effect except those related to age and education requirements".[238] Moreover, the commander of the PM must be appointed with the approval of the Parliament.[239] Nonetheless, given the independence from the regular security forces, this militia maintains a high level of autonomy from the Iraqi government. In practice, it often acts outside the control of governmental authorities,[240] conscious of its power.[241]

Concerning militias, another interesting case is provided by Hezbollah (transliterated also as Hizbollah or Hizballah). Hezbollah's nature as ANSA is multifaceted and has evolved over the years. Hezbollah was born as a Shiite militia, supporting the Syrian forces in eastern Lebanon.[242] In the first place, the presence of this military group in Lebanon was due to the weakness of the Lebanese armed forces. In addition, the Syrian authorities accepted this support due to the recent Israeli invasion of Lebanon.[243] Moreover, Hezbollah aimed to advocate for the Shiite Muslim community of Lebanon. Indeed, Hezbollah has traditionally defined its activity as a "legitimate resistance to Israeli occupation of Lebanese territory and as a necessary response to the relative weakness of Lebanese state security institutions".[244] Because of the aims pursued, at the beginning, Iran supported Hezbollah, both financially and through military training. Even though the relations between Hezbollah and the Iraqi

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[234] See Bill Roggio and Amir Toumaj, 'Iraq's Prime Minister Establishes Popular Mobilization Forces as a Permanent "Independent Military Formation"' (*FDD's Long War Journal*, 28 July 2016); Amnesty International, 'Iraq: Turning a Blind Eye. The Arming of the Popular Mobilization Units' (Amnesty International 2017).
[235] Amnesty International (n 234).
[236] ibid.
[237] Iraqi Parliament, Law of the Popular Mobilization Authority 2016 Art. 1.1. Cited in English translation in Issam Saliba, 'Iraq: Legislating the Status of the Popular Mobilization Forces' (*Library of Congress*, 7 December 2016).
[238] Iraqi Parliament Law of the Popular Mobilization Authority (n 237) Art. 1.1, 1.2.1. Cited in English translation in Saliba (n 231).
[239] Ibid.
[240] See European Asylum Support Office, 'Popular Mobilisation Units and Tribal Mobilisation Militias' (*EASO*, June 2019).
[241] Amnesty International (n 234).
[242] Gary C Gambill and Ziad K Abdelnour, 'Hezbollah: Between Tehran and Damascus' (2002) 4 Middle East Intelligence Bulletin; Nicholas Blanford, *Hezbollah's Evolution - From Lebanese Militia to Regional Player* (Middle East Institute 2017).
[243] Gambill and Abdelnour (n 242); Blanford (n 242).
[244] Casey L Addis, *Hezbollah: Background and Issues for Congress* (DIANE Publishing 2011) 1.

and Syrian authorities have changed significantly over the years, Hezbollah still has the external support of Iran and Syria.[245]

Over time, Hezbollah has become stronger from both a financial and military perspective, and acquired more control over parts of the Lebanese territory. Oftentimes, Hezbollah has proven more solid and stronger than the legitimate Lebanese authorities, ultimately undermining Lebanese sovereignty and authority on the territory. It has managed to "dominate[s] the political and military landscape of Lebanon, and possess[es] tens of thousands of trained fighters as well as an array of sophisticated armaments".[246] Indeed, Hezbollah has acquired radio and TV stations, and has gained seats in the Lebanese government.[247] Moreover, it has launched social development programs in the Lebanese areas under its control.[248] Their involvement in social welfare has been so intense to lead many Lebanese people to consider Hezbollah "a state within the state".[249] In this regard, in the Resolution 1559 (2004), the UNSC expressed its grave concern

> "at the continued presence of armed militias in Lebanon, which prevent the Lebanese Government from exercising its full sovereignty over all Lebanese territory".[250]

The UNSC thus recognised the danger for stability in Lebanon caused by the presence of "militias" in that territory. Despite the absence of a clear reference, the specific mention of Lebanon allows us to infer that the Resolution 1559 (2004) was also addressed to Hezbollah.

It thus appears that Hezbollah's nature has evolved, from a traditional militia to an ANSA with financial strength and control, to the point where it is involved also in non-military activities. However, it has always maintained a strong (both conventional and unconventional) military wing, participating in conflicts in Yemen and Iraq[251] and engaging in armed clashes with the Israeli forces.[252]

Hezbollah still classifies itself as a resistance movement. However, its nature can be debated. It is true that certain states, e.g. Iran, still support and influence it. In light of this support, it appears that

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[245] On the evolution of these relations, see, e.g., Gambill and Abdelnour (n 242).
[246] Blanford (n 242) 1.
[247] Addis (n 244).
[248] Hussain Abdul-Hussain, 'Hezbollah: A State within a State' (2009) 8 Current Trends in Islamist Ideology 68; Addis (n 244) 1.
[249] See, e.g., Abdul-Hussain (n 248); Addis (n 244) 9.
[250] UN Security Council, 'Resolution 1559 (2004), S/RES/1559 (2004)' (2 September 2004) Preamble.
[251] Blanford (n 242).
[252] ibid; Abdul-Hussain (n 248); Addis (n 244).

Hezbollah may be still considered a traditional militia. However, the relevance and power gained by Hezbollah make this statement debatable.

Moreover, many states and international actors have defined Hezbollah as a terrorist group.[253] In this regard, in Resolution 1701 (2006), the UNSC referred to "the continuing escalation of hostilities in Lebanon and Israel since Hizbollah's attack on Israel on 12 July 2006",[254] and determined that "the situation in Lebanon constitutes a threat to international peace and security",[255] adopted an arms embargo "to any entity or individual in Lebanon"[256] and reinforced the United Nations Interim Force in Lebanon (UNIFIL). Even though it did not label Hezbollah as a terrorist group, the UNSC admitted that its actions may constitute a threat to peace and security. Also, the UN has recognised that Hezbollah may violate human rights.[257]

The various international statements affirming the terrorist nature of Hezbollah are not decisive for labelling the latter as a terrorist group. The qualitative prevalence of terrorist actions over any other activity must also be assessed. If they are sufficiently prevalent, Hezbollah should be considered a terrorist group. Also, one cannot ignore the relevant influences of states in Hezbollah's activities. If these influences are sufficiently strong, then Hezbollah should be viewed as a traditional militia. These considerations led some to consider Hezbollah as an example of "state-sponsored terrorism".[258] Last, if the control effectively exercised by Hezbollah on the territory is sufficiently strong, one may consider it as an entity exercising *de facto* control over that area of Lebanon. In the tumultuous, ever-changing scenario in the area, it appears that over time Hezbollah has been a militia, a terrorist group, and ultimately a *de facto* regime that can be assimilated to insurgents, often shifting from one type of ANSA to another in an unclear manner.

These cases exemplify the common evolution of current militias. In the beginning, militias are linked to legitimate authorities, as they are irregular armed forces supporting the legitimate state forces.

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[253] See, e.g., Council of Europe, 'Council Implementing Regulation (EU) 2021/138 of 5 February 2021 Implementing Article 2(3) of Regulation (EC) No 2580/2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism, and Repealing Implementing Regulation (EU) 2020/1128, Annex' (5 February 2021); Martin Beck, 'The Arab League's Declaration of Hezbollah as a Terrorist Organization - News Analysis' (Center for Mellemøststudier - Syddansk Universitet 2016).
[254] UN Security Council, 'Resolution 1701 (2006), S/RES/1701 (2006)' (11 August 2006) Preamble.
[255] ibid Preamble.
[256] ibid para. 15(a).
[257] International Peace Academy, 'Human Rights, the United Nations, and the Struggle against Terrorism' (United Nations Office of the High Commissioner for Human Rights 2003).
[258] See, e.g., Monika Heupel, 'Adapting to Transnational Terrorism: The UN Security Council's Evolving Approach to Terrorism' (2007) 38 Security Dialogue 477, 480.

However, they often gain power and control, acquire independence from the central authorities, and engage in armed conflicts, even against the legitimate authorities that created them in the first place.

Some attributes of militias have not changed over time. They continue to be *irregular* armed groups. Even when they act on behalf of a state, they are not part of the official armed forces. They resort to *armed* force, and they have coercive capacity, as all militias have an armed component.[259] It is difficult to find other common attributes of contemporary militias, as they vary in organisation, structure, dimension, resources available.[260] Even the purpose criterion is of little help in defining contemporary militias. There is not any established aim pursued, and goals pursued by militias range from economic to social ones.[261] In this sense, "multiple categories are possible".[262]

Moreover, most of the definitions proposed are broad and tend to use synonyms, e.g., militias and paramilitary groups, thus increasing the terminological confusion. For instance, it has been stated that

> "militias or paramilitaries are irregular combat unites that usually act on behalf of, or at least tolerated by, a given regime. Their task is to fight rebels, to threaten specific groups or to kill opposition leaders. These militias are often created, funded, equipped and trained in anti-guerrilla tactics (counter-insurgency) by state authorities".[263]

Other authors consider militias and paramilitaries as synonyms:

> "in the context of contemporary armed conflicts, militias (also referred to as 'paramilitaries'; 'self-defence groups'; 'vigilantes') should be understood differently than in Article 4 of GC III (1949) [Geneva Convention III]".[264]

It has even been suggested that

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[259] See Metz (n 212) 16.
[260] See John Buchanan, *Militias in Myanmar* (The Asia Foundation 2016).
[261] Alden, Thakur and Arnold (n 205) 9.
[262] Sabine C Carey, Neil J Mitchell and Will Lowe, 'Pro-Government Militias Database (PGMD) Codebook Version 1.1' (June 2013) 14. It is interesting to note that the authors admit the presence of various purposes, even though their research is focused on pro-government militias. Even though the field of research is limited and should be homogeneous, it nonetheless actually includes militias with different aims pursued.
[263] Alyson Bailes and others, *Revisiting the State Monopoly on the Legitimate Use of Force* (Geneva Centre for the Democratic Control of Armed Forces (DCAF) 2007) 11. See also Ulrich Schneckener, 'Fragile Statehood, Armed Non-State Actors and Security Governance' in Alan Bryden and Marina Caparini (eds), *Private Actors and Security Governance* (LIT Verlag 2006); Williams (n 44).
[264] Bellal, 'What Are "Armed Non-State Actors"? A Legal and Semantic Approach' (n 43) 26.

> "[l]abels such as paramilitaries, civil defense forces, or vigilantes vary regionally and culturally, and are not useful for comparison".[265]

Scholar analyses demonstrate the difficulties faced in defining present militias. Many researchers on militias discuss *pro-governmental* militias which have been identified by reference to the following criteria:

> "the group is
>
> (1) pro-government or sponsored by the government (national or subnational),
>
> (2) not a part of the regular security forces,
>
> (3) armed, and
>
> (4) organized to some degree".[266]

Considering the features shared by all ANSAs, it appears as if the only distinguishing element of militias is their affiliation, formal or informal, with governmental authorities, if they are "pro-governmental militias". However, as seen, this relation can change over time; sometimes authorities openly support these armed forces, even incorporating them, while in other cases the former try to suppress, or deny any connection with, the latter.[267]

Militias as traditionally intended would not fall within the scope of this research. They depend on the authority of the party involved in the conflict, thus are an irregular armed force acting on its behalf. They are indeed armed; however, they do not always challenge the monopoly on the use of force of the State. On the contrary, their engagement implicitly confirms this monopoly. In this case, they use armed force because a state has asked, or sponsored, or at least not impeded, them to do so. Militias do not decide the ultimate goal pursued, and thus cannot be considered accountable for their actions; legitimate authorities are. However, today the element of connection between militias and a State has become weak, in certain cases practically non-existent. In fact,

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[265] Sabine C Carey and Neil J Mitchell, 'The Monopoly of Violence and the Puzzling Survival of Pro-Government Militias' [2016] Paper submitted to Annual Review of Political Science.
[266] Ragnhild la, 'Do States Delegate Shameful Violence to Militias? Patterns of Sexual Violence in Recent Armed Conflicts' (2015) 59 Journal of Conflict Resolution 877, 879.
[267] See Paul Staniland, 'Militias, Ideology, and the State Militias in Civil Wars' (2015) 59 Journal of Conflict Resolution 770.

> "[t]here are limited exceptions where 'militias' are still developed as official state institutions, and these should be understood more as historical anomalies, such as ongoing efforts in Venezuela to form 'Bolivarian' militias, and even as the foundation of a state's national defence, such as the Swiss military in its militia structure. Rather, the vast majority of current militias should still be understood as non-state actors distinct from official state structures, even though their relationship with the state is imperative. Indeed, militias as paramilitary forces are a driving dynamic in contemporary international relations, especially in the context of weak and failed states, where militias provide an expediency of force for governments. Conversely, however, militias can also be understood in certain instances as insurgent forces as well. […] the key point of militias is that they apply violence in pursuit of their respective objectives, including both challenging established state power structures and acting in the interests of particular identities, including those of a state".[268]

In this sense, contemporary militias tend to challenge the monopoly of states on the use of force. Thus, they often not only receive education on the rules of IHL, but also participate in the drafting of regulations; some of them have adopted internal codes of conduct.[269] Therefore, militias operating as irregular but effective authorities in weak States should be considered as falling under the scope of the legal regulation of ANSAs.

5. Conclusion

Four main terms used to label ANSAs have been presented: insurgents, NLMs, terroristic groups and militias. They have been characterised in particular for one element, namely the conflict they are involved in, the aim pursued, the means used and the relationship with legitimate authorities. These criteria may provide a possible classification of ANSAs; however, such a classification is difficult to apply in practice. In this sense, the principal problems emerging regard the contamination, in practice, of characteristics belonging to different ideal types of ANSAs and the ever-changing nature of real ANSAs.

Moreover, in practice, ANSAs tend to resort to tactics typical of other types of ANSAs. For instance, terrorist tactics are often used by other types of ANSAs as a tool to pursue their aims. Taking this into account, it can be inferred that the identification of the main distinguishing characteristics of a specific ANSA may be difficult.

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[268] Alden, Thakur and Arnold (n 205) 4.
[269] Geneva Call, 'The Third Meeting of Signatories to Geneva Call's Deeds of Commitment, Summary Report' (2014).

The misuse of terms increases the uncertainty surrounding the classification of subcategories. For instance, since there is not any internationally accepted definition of terrorist groups and of the quantitative threshold required to be labelled as such, the term is often used improperly for political aims, exploiting the moral stigma associated with the word. In addition, the perception of a specific ANSA changes, depending on the endorsement of its claims. On the one hand, it must be recognised that this endorsement, which can be manifested internationally by a plurality of states or other non-state actors, has its first origin in the individual sphere. Therefore, it may be affected by subjective views. On the other hand, whether the claim of a certain ANSA is endorsed or not can also be influenced by political considerations.

These considerations lead to a series of proposals to better identify ANSAs to engage with them more effectively, also considering the rules and the system of international law and their evolution. In this sense, Bílková suggests using a continuous scale to classify and analyse ANSAs.[270] This is based on the consideration that ANSAs present different characteristics that are organised on a continuous scale in the first place. The change among them is not drastic, but nuanced. In addition, it has been submitted that a particular ANSA may be divided into several "parts", each falling into a different sub-category of ANSA. For instance, as far as Hezbollah is concerned: "they have a terrorist wing, and they will kill you if you step out of line. But they also have a community militia that will protect you and keep crime down, and they have charities that will help you if you are poor, and they can get you a job, and teach your children in their schools, and treat you in their hospital if you are sick, and represent you in parliament through their political party, and you can watch their television channel, al-Manar, and listen to their radio station and read their newspaper".[271]

This excursus proves that it is extremely difficult to identify and classify existing ANSAs into different subcategories. It is true that, while ANSAs can have different features in practice, they all fall into the macro category of ANSA, because they share common features. Namely, they are all characterised by their resort to armed force, their international relevance and their non-state nature. In this sense, it is useful to emphasise the dichotomy between ANSAs and non-ANSAs. At the same time, however, different international rules govern different subcategories, and ultimately this different legal framework affects the ILP of ANSAs. In addition, the lack of clear and unanimously

[270] Bílková (n 40).
[271] David Kilcullen, *Counter Insurgency* (Hurst & Company 2010) 153. Cited in James Khalil, 'Know Your Enemy: On the Futility of Distinguishing Between Terrorists and Insurgents' (2013) 36 Studies in Conflict & Terrorism 419.

accepted definitions frequently leads to incorrect labelling, which can negatively affect the application of international rules.

In light of this research, thus, it is appropriate to consider those ANSAs with enough power to have a relevant position in international dynamics, especially (but not only) in conflictual situations. Besides being a key feature of the term "ANSA" itself, the significant role at the level of international law-making is relevant, as it has been widely recognised that the involvement of ANSAs in the drafting of rules of international law (IHL in particular) can help improve their effectiveness. Also, ANSAs under the control of a State should not be included, as their existence does not challenge the system of international law as a system of sovereign States as other ANSAs do. In this regard, it must be underlined that the specific aims of an ANSA are not particularly relevant. The main relevant aspect is their concrete power, especially but not limited to armed conflicts, and their eagerness to legitimate their international position, from which their willingness to respect, and be involved in the production of, international law follows. Several ANSAs have enough power to require the international community to take into due consideration their position and claims. These ANSAs often want to respect the rules of the international community to legitimise their position and claims at the international level. At the same time, several claims have been made within the international community for the involvement of ANSAs, in order to improve the effectiveness of international law. Of course, such involvement would affect the international accountability and personality of ANSAs. Therefore, while it is useful, if not necessary, to know the principal characteristics that ANSAs can have, thus understanding the legal framework applicable, it is important not to establish a rigid classification, as fruitfully engaging with them requires not only the ability to understand the features of a specific group, but also to grasp its characteristics as a unique group.

Chapter II – Theoretical perspectives on engaging ANSAs in law-making processes

1. Introduction

International law has developed as the law of states, produced by the latter to regulate their relations. Today, however, the international community is not composed by states only. A wide evolutionary process, ultimately entailing the essence of international law-making, is occurring. Although states maintain a central role within the international community,[272] international rules do not appear as destined to regulate the affairs between states, like contracts of domestic law, but rather to reach the aims shared by the wider international community, taking into consideration the positions of various NSAs, including ANSAs.

In particular, a shift from considering ANSAs as passive objects of regulation, to accommodating them in law-making processes, to finally involving them in the mentioned processes, can be noted. The difference between the last two phases can be better grasped resorting to a dictionary. The first meaning of "to accommodate" is "to give consideration to";[273] on the other hand, the first meaning of "to involve" is "to engage as a participant".[274] It thus emerges a significant variation of the role of ANSAs in international law-making, with the ultimate aim of providing better compliance with rules, belonging in particular to the legal frameworks of IHL and IHRL. In this sense, the matter is not only a good example of the evolutionary nature of international law, but also of the growing role of ANSAs within the international community, as well as of the connected problems arising for international law. The variety of ANSAs and their rapid evolution, presented in the previous chapter, not only raise practical obstacles from the point of view of their involvement in the process of law-making and law-enforcement, but also raise several theoretical legal questions. In d'Aspremont's words, "non-state actors [ANSAs included] shed new light on the dynamics of international law-making […], which have long been underestimated in a state-centric normative system".[275]

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[272] See, e.g., Jan Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non- State Actors' in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism. Essays in International Law for Martii Koskenniemi* (Martinus Nijhoff 2003).
[273] Merriam-Webster's Staff, 'Accommodate'.
[274] Merriam-Webster's Staff, 'Involve'.
[275] Jean d'Aspremont, 'Non-State Actors in International Law: Oscillating Between Concepts and Dynamics', *Participants in the International Legal System - Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 1.

The theoretical issues linked to the impact of this evolution of normative production processes are the object of the present chapter. Being somewhat a novelty in international law, law-making processes involving ANSAs have not, by now, been systematically explored and monitored, and the outcome of these processes is still debated. In particular, theoretical doubts exist about the nature of the instruments produced and their impact on international law, especially from the point of view of the traditional ways of normative production, the legal effects of the rules produced, and the role of the actors involved.

On a theoretical level, the active participation of ANSAs in the law-making process does not match with the traditional modes of production of the rules of international law, as the traditional makers and recipients of international law are states. Rather, these processes of normative production can be considered as an example of the wider phenomenon of informal law-making, in which the "informal" element may be due to the characteristics of the actors, the process and the final product.[276]

Other authors have included the norms produced with the involvement of ANSAs in the category of soft law,[277] described as containing all the instruments producing legal effects, without however amounting to proper law.[278] Some authors have divided soft law into two subcategories, which may be called "formal" and "substantive" soft law. The "soft" nature of the first subcategory is related to formal elements, e.g., the lack, in the process of norms production, one or more technical elements required for traditional law-making (i.e., they are not the result of a treaty-making process, or are generated by an international body lacking the formal power of adopting binding acts). Conversely, the "soft" nature of the second subcategory derives from substantive elements, e.g., the rules produced are hortatory or too general to be considered as the source of binding commitments.[279] In this sense, the law-making activities involving ANSAs would fall into the first subcategory of formal soft law.

Discussing this matter, one cannot ignore the doctrinal macro-division between the theories based on a clear distinction between what is law and what is not law, and the theories that accept the existence of varying degrees between what is undisputedly law and what is undisputedly not law, defined as

[276] Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).
[277] Jaye Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25 Leiden Journal of International Law 313.
[278] Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 Nordic Journal of International Law 167.
[279] See, e.g., Richard R Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 International & Comparative Law Quarterly 549; Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 The American Journal of International Law 413; Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850; Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2 Journal of Legal Analysis 171.

"bright line school" and "grey zone school" respectively.[280] The adoption of one theory instead of the other has dramatic implications for the perception of whether regulatory instruments produced with the involvement of ANSAs have legal character or not.

This theoretical inquiry may have practical effects as well, as it may have an impact on the reception of ANSAs by the international community and the willingness of ANSAs to respect international standards and rules.[281] At the same time, the inquiry itself cannot disregard international practice. In this regard, it must be noted that states tend to be reluctant to accept the law-making processes involving NSAs, as they are worried about losing the central role they have within the international legal system. Greater criticisms address the informal law-making processes involving ANSAs, because the latter usually hold a conflictual or antagonist position *vis-à-vis* states. This problem is exacerbated by the recent phenomenon of mislabelling ANSAs. Consequently, the possibility of constructively engaging with ANSAs in the elaboration of norms may be dramatically reduced.

Considering these difficulties, one can argue that the involvement of ANSAs in normative production processes should be avoided, as it is inconsistent with the traditional theoretical framework of international law-making. However, their involvement cannot be easily dismissed. Indeed, it has been affirmed that the international legal order "needs" the participation of armed groups in the development of relevant rules.[282] As observed by Sassòli, "[i]f we want to revise IHL in a certain area, we have to discuss with the actors, which, in the area of non-international armed conflicts, include the armed groups. No one would suggest revising the law of naval warfare without speaking with navies".[283] Therefore, the involvement of ANSAs in these processes appears not only desirable, but also necessary. Moreover, it must be recalled that if ANSAs commit themselves to the respect of legal rules, and an approach admitting a grey zone in international acts is adopted, a third way between binding and non-binding, thus between accountable and non-accountable, must be taken into account. In any case, this would imply an expansion of the rules applicable to ANSAs, and may positively affect the compliance of the latter with the relevant rules.

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[280] See, e.g., Eva Kassoti, 'Beyond State Consent? International Legal Scholarship and the Challenge of Informal International Law-Making' (2016) 63 Netherlands International Law Review 99. The term "grey zone" is used by Klabbers as well; see Klabbers, 'The Redundancy of Soft Law' (n 278).

[281] Regarding the involvement in the production of rules of IHL, see, e.g., Sophie Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts' (2011) 93 International Review of the Red Cross 649. See also, e.g., Sandesh Sivakumaran, 'Implementing Humanitarian Norms through Non-State Armed Groups' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law* (Cambridge University Press).

[282] See Rondeau (n 281).

[283] Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 Journal of International Humanitarian Legal Studies 5, 18.

The Chapter discusses the main theories regarding the requirements of international law-making and the nature of soft law. In this regard, the principal theoretical strands, namely the grey zone school and bright line school, are presented. In particular, the theories submitted by selected exponents of each school are illustrated. These descriptive paragraphs prove that, depending on the theoretical approach adopted (choice often linked to extra-legal evaluation, such as political or sociological reasons), the legal impact of the instruments adopted at the international level varies considerably, ultimately affecting the theories of sources in international law.

First, a theoretical assessment of these theories is conducted, focusing on the possible accommodation of ANSAs in the international legal order and bearing in mind the already mentioned debate surrounding informal law-making processes and soft law. In this context, a functional approach is adopted, based on the consideration of the effectiveness of international law and the necessities of the international community. This leads to a position which is capable of accommodating law-making processes that involve ANSAs. Indeed, the shift produced by the engagement of ANSAs in normative processes requires a re-consideration of the entire structure of the international community as a whole. In this sense, the traditional community of international law as a community of states leaves space to the participation of other actors, in a process defined as "bottom-up international lawmaking".[284]

Relevant international practice is also taken into account. This analysis shows that several among the international instruments adopted by ANSAs may be considered as having legal effect, because they possess the elements required for such a qualification. At the same time, this inquiry also proves that the existence of several theories on the issue may be detrimental. In fact, the instruments may be legal or not, depending on the theory adopted for the assessment.

Finally, conclusions are drawn. It appears that, in the context of the broad debate that still surrounds the issue of informal law-making, there are theoretical positions that corroborate the conclusions concerning the legal nature of instruments produced *via* informal law-making. This is also true when adopting a pragmatic approach that takes into account concrete and desirable effects in practice. In this regard, the appropriateness of an approach engaging with ANSAs in normative production processes, based on the due consideration of their position and difficulties in complying with rules, and ultimately enhancing the effectiveness of international law,[285] emerges clearly.

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[284] Janet Koven Levit, 'Bottom-up International Lawmaking: Reflections on the New Haven School of International Law' (2007) 32 Yale Journal of International Law 393.
[285] See, e.g., Sassòli (n 283).

2. Fundamental features of the rules of international law and the instruments produced with the involvement of ANSAs

2.1. Introduction

The involvement of ANSAs in the production and adoption of rules of international law raises theoretical issues. First, their involvement may be considered as a type of informal law-making. Indeed, this term has been used to indicate the processes which "dispense with certain formalities traditionally associated with international law, in terms of authorship, output and process, and thus they are not readily cognizable as international law proper".[286]

Given all this, there is a debate on the nature of the instruments produced *via* these procedures in the traditional theory of sources of international law.[287] The studies on this topic are part of a theoretical reconsideration of the features and nature of law, originated by the observation of the evolution of the international community. Insofar as the international community is changing, the proponents of these studies submit that it is appropriate to reconsider the main aspects of law from a theoretical point of view. The assessment of the role of ANSAs in law-making processes, and the products and effects of these processes, may thus benefit from the conclusions reached in these matters.

In other words, due to the non-state nature of ANSAs, the appraisal of the legal impact of their involvement in international law-making processes requires some preliminary assessments. First, it is necessary to evaluate what law is and what its characteristics are, and whether it is possible to have different typologies of rules within the international legal system. In carrying out this analysis, it should be reminded that the identification of international law is unclear – today possibly more than

[286] Kassoti (n 280) 102.
[287] Regarding in particular the procedures and instruments of international organisations, see, e.g., Rosalyn Higgins, 'The Development of International Law by the Political Organs of the United Nations Development of International Law by International Organizations' (1965) 59 American Society of International Law Proceedings 116; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995); Stefan Kirchner, 'Effective Law-Making in Times of Global Crisis - A Role for International Organizations' (2010) 2 Goettingen Journal of International Law 267; Michael C Wood, 'International Organizations and Non-State Actors in the International Law Commission's Conclusions on Identification of Customary International Law' in Sufyan Droubi and Jean d'Aspremont (eds), *International organisations, non-State actors, and the formation of customary international law* (Manchester University Press 2020).

ever, as non-formal methods to identify international law have emerged.[288] This development is intertwined with the mentioned evolution of the international community. In d'Aspremont's words,

> "it is not a coincidence that the growing abandonment of formal law-identification criteria in the international legal scholarship has taken place against the backdrop of the dramatic pluralization of norm-making at the international level, for the latter has conveyed the impression that formal law-ascertainment was no longer attuned to contemporary realities".[289]

It has been submitted that the main theories on the fundamental features of instruments of international law, depending on the approach adopted, focus on the following basic features: 1. the form of the relevant instruments; 2. their effect; 3. their substance; and 4. the intent pursued by the parties.[290] It is possible to add to this list at least 5. the provision of sanctions[291] and 6. the identity of the parties involved as formal representatives of the party.[292]

2.2. The criterion based on the form

The theories affirming that formal aspects are the fundamental features of international legal instruments can be easily rejected in light of the relevant general rules of international law. Regarding treaties between states, the VCLT[293] affirms that international agreements not within the scope of the VCLT itself may have legal force.[294] Moreover, no standard form is required.[295] For instance, the parties have a high degree of autonomy in choosing the means to express their consent to be bound.[296] In this regard, Aust affirmed that "there is no difference in legal effect between a treaty contained in a formal, single instrument and one constituted by the more informal method of an exchange of notes".[297] Besides treaties, it is well accepted that international law instruments in general do not

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[288] See, e.g., Joost Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).
[289] Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011) 118.
[290] Pauwelyn (n 288).
[291] John Austin, *The Province of Jurisprudence Determined* (John Murray 1832).
[292] Pauwelyn (n 288).
[293] On the customary nature of the VCLT, see, e.g., Karl Zemanek, 'Vienna Convention on the Law of Treaties' (United Nations Audiovisual Library of International Law) <https://legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf> accessed 17 November 2021; Anthony Aust, 'Limping Treaties: Lessons from Multilateral Treaty-Making' (2003) 50 Netherlands International Law Review 243.
[294] 'Vienna Convention on the Law of Treaties' (22 May 1969) Art. 3.
[295] See Lassa Oppenheim, *Oppenheim's International Law*, vol I-Peace (Robert Jennings and Arthur Watts eds, 9th ed., Longman Group 1992).
[296] 'Vienna Convention on the Law of Treaties' (n 294) Art. 11.
[297] Anthony Aust, *Modern Treaty Law and Practice* (3rd ed., Cambridge University Press 2013) 15.

require a particular form to produce legal effects.[298] Therefore, the form does not constitute a fundamental feature of international legal instruments. Consequently, it does not appear as a sufficient criterion to distinguish legal instruments of international law. Indeed, the formal features are not constitutive elements of a treaty, but rather clues of the legal nature of the instrument at issue; "they are, therefore, elements applicable *ad adiuvandum*".[299] Consequently, assessing the nature of the instruments concluded involving ANSAs on the basis of formal features does not appear useful, and the widespread practice of concluding regulatory instruments with ANSAs may still be productive of rules of international law.

2.3. The criterion based on the effect

Another theory submitted considers the (binding) legal effect that instruments produce as a fundamental feature for identifying law. The unreliability of this theory, as will be shown, regards its ultimately tautological nature. Supporters of this theory submit that, if something produces legal effects (in Alvarez's words, anything that has "normative ripples"),[300] then this "something" is law. In other words, ultimately adopting a functionalist approach, "as far as results go, it hardly matters where norms are legal or not".[301]

The main weakness of this approach consists in the uncertainties it produces under both a temporal and causal aspect. Under a temporal perspective, it is not possible to grasp the nature of an instrument before its application, as it is necessary to assess the effects on an instrument to understand whether it is law or not. This is even more apparent in the case of informal instruments, because of their indirect production of legal effects, as submitted by Pauwelyn. Moreover, it appears that its legal nature is only a consequence of the assessment of legal effects, rather than a necessary condition to produce these effects. As noted by Klabbers, "looking for the 'normative ripple' makes it impossible to know in advance what the law will be on any given topic".[302] Last, adopting a more practical approach, an almost paradoxical conclusion is reached. Indeed, sometimes instruments concluded with the participation of ANSAs produce more legal effects (in terms of respect of the provisions)

[298] See, in this sense, *Nuclear Tests (Australia v France), Judgement* (1974) I.C.J. Reports 1974 253.
[299] "Sono cioè elementi utilizzabili *ad adiuvandum*". Vierucci (n 90) 139. Translation by the author.
[300] Jose E Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005).
[301] Jan Klabbers, 'Law-Making and Constitutionalism' in Anne Peters, Jan Klabbers and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press 2009) 102.
[302] Jan Klabbers, 'José E. Alvarez, International Organizations as Law-Makers' (2006) 3 International Organizations Law Review 153, 155.

than traditional instruments of international law.[303] Soft law and informal instruments can be as effective as, sometimes even more effective than, hard law and formal instruments. It thus appears that the effect of the instrument cannot be considered a reliable criterion to identify rules of law, including international law rules.

Assessing international practice, the "normative ripples" emerge from many texts of instruments adopted by ANSAs, as they establish that the parties, e.g., "(solemnly) commit"[304] themselves, or "undertake"[305] a series of provisions. Nonetheless, given the discussed limitations of this criterion, it appears difficult and ultimately useless to verify the normative effects of instruments concluded with the participation of ANSAs.

2.4. The criterion based on the substance

Another theory contends that instruments are law when their substance reaches a certain threshold. However, the lack of clarity of this criterion makes it inadequate and not useful to identify legal instruments. In this sense, Frank has identified four elements to verify the legitimacy of norms, including the norms of international law: determinacy, symbolic validation, coherence, and adherence.[306] The necessity of reaching minimum (albeit different) objective standards has been claimed by Kingsbury as well, as he has affirmed that "only rules and institutions meeting these publicness requirements immanent in public law (and evidenced through comparative materials) can be regarded as law".[307] The author has identified "publicness" as the fundamental feature of law, as it is "a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related quality of generality, are necessary to the concept of law in an era of democratic jurisprudence".[308]

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[303] A similar conclusion, regarding informal lawmaking in general, is reached by Pauwelyn. See Pauwelyn (n 288). See also Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 International & Comparative Law Quarterly 901; Klabbers, 'Law-Making and Constitutionalism' (n 301).

[304] See, e.g., Geneva Call, 'Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action'; Geneva Call, 'Deed of Commitment under Geneva Call for the Protection of Health Care in Armed Conflict'; Geneva Call, 'Deed of Commitment under Geneva Call for the Prevention of Starvation and Addressing Conflict-Related Food Insecurity'. See also Government of the Sudan and Sudan People's Liberation Movement, 'Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack' (31 March 2002).

[305] See, e.g., 'Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords)' (23 February 1999).

[306] See Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990).

[307] Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 European Journal of International Law 23, 30.

[308] ibid 31.

This brief excursus shows that the concept of "substance" is evasive, and it has been variously interpreted. Indeed, there is not any commonly accepted definition of the requirements of substance itself. Consequently, this criterion is not widely endorsed. In this regard, Aust affirms that "[t]he fact that some treaties […] have little substance […] does not affect their treaty status".[309]

2.5. The criterion based on the intent pursued by the parties

The intention of the parties has been considered as another possible criterion of identification of rules of international law, to a certain extent in opposition to the above-mentioned formal requirement. In Pauwelyn's words, "[i]f the parties want the instrument to be law, it is law; if not, it is not law".[310]

Discussing the concept of treaty, Oppenheim suggested

> "that the decisive factor [to identify an international agreement governed by international law] is still whether the instrument is intended to create international legal rights and obligations between the parties. […] Although the designations given to these various procedures [not intended to create legal rights and obligations] may be indicative of their non-binding character, the decisive element in any particular case is the intention of the parties".[311]

The relevance of intent in the process of international normative production arises also when considering the features of customary international law.

It is well known that customary rules are composed of two elements, namely *diuturnitas* and *opinio juris*.[312] The latter refers to the belief that a certain practice is accepted as law, thus it is considered the subjective element[313] of customary law, and distinguishes binding custom from other, non-legal practices. Whether the subjective element corresponds to the intention of the subjects to create rules

[309] Aust, *Modern Treaty Law and Practice* (n 297) 18. See also Boyle (n 303).
[310] Pauwelyn (n 288) 134. See also, e.g., Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 The American Journal of International Law 581.
[311] Oppenheim (n 295) 1202–1203. See also Aust, *Modern Treaty Law and Practice* (n 297).
[312] But see, e.g., Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1988) 12 Australian Year Book of International Law 22. Here, the author affirmed that state practice is the only constitutive element of international customary law, as *opinio juris* emerges later.
[313] Indeed, it has been submitted that "*opinio juris* arises as a mental state", see Sufyan Droubi, 'Opinio Juris: Between Mental States and Institutional Objects' in Sufyan Droubi and Jean d'Aspremont (eds), *International organisations, non-State actors, and the formation of customary international law* (Manchester University Press 2020) 69. See also Pellet (n 312).

or to a belief that such rules exist, or is connected to expressed statements, is debated;[314] nonetheless, the link between the intent and the legal nature of customary law is accepted. As affirmed by the ICJ,

> "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*".[315]

Therefore, for the purposes of international customary law, the intent of the parties is fundamental to consider a certain practice as law.[316] More generally, Klabbers affirmed that "there is virtual unanimity among international lawyers that, at the very least, intent is one of the main determinants of international legal rights and obligations".[317]

Considering international practice, the intention of ANSAs to commit themselves frequently emerges. The practice of Geneva Call is particularly significant: the very text of the Deeds of Commitment[318] shows the intent of the signatories to comply with them.[319] Indeed, "when signing Geneva Call's Deeds of Commitment, ANSAs accept that IHL and IHRL apply to and bind all the parties to armed conflicts".[320] Within the practice of Geneva Call, the participation of representatives of signatory ANSAs to specific meetings should also be highlighted. Indeed, these meetings have proven to be the occasion for ANSAs to not only report on their implementation of the Deeds, but also express the difficulties encountered in such a process.[321] Moreover, in this context the participating ANSAs reaffirmed their willingness to comply with the Deed of Commitment at issue.[322] Besides the Deeds of Commitment, it has been submitted that "[t]he structure and language of peace agreements

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[314] See Droubi (n 313).
[315] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (1969) I.C.J. Reports 1969 3 (International Court of Justice) para. 77.
[316] See Raphael M Walden, 'The Subjective Element in the Formation of Customary International Law' (2017) 50 Israel Law Review 310.
[317] Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International 1996) 68.
[318] For a description of the Deeds of Commitment of Geneva Call, see Ch. III, par. 4.5.
[319] See, e.g., the Deed of Commitment for the Protection of Children from the Effects of Armed Conflicts: "[a]ny reservation to this *Deed of Commitment* […] must be expressed in writing upon signature and will be periodically reviewed towards attaining the highest possible respect for the rights of children. Geneva Call will be the final arbiter on the permissibility of any reservation". Geneva Call, 'Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict' Art. 15.
[320] Geneva Call, 'Positive Obligations of Armed Non-State Actors: Legal and Policy Issues' (2015) Issue 1 29.
[321] See, e.g., Geneva Call, 'The Third Meeting of Signatories to Geneva Call's Deeds of Commitment, Summary Report' (n 269).
[322] ibid.

[concluded between states and ANSAs] suggest that the parties mutually view them as legal documents".[323] In addition, it has been affirmed that

> "[i]n many peace agreements signed by armed opposition groups, grounds can be found to assert that the parties intended the agreement to be binding on the international legal plane, and that the nonstate signatories were 'subjects of international law' – based on the recognition of such groups under international law, in particular through humanitarian law".[324]

This is confirmed by several agreements adopted. For instance, in the Bicesse Accords, it is explicitly stated that the Angolese Government and the National Union for the Total Independence of Angola (UNITA) "[a]ccept as binding the following documents, which constitute the Peace Accords for Angola".[325]

The Chapultepec Agreement concluded by the Government of El Salvador and the Frente Farabundo Martì para la Liberaciòn Nacional (FMLN) states:

> "the Parties […] reaffirming that their purpose, as set forth in the Geneva Agreement of 4 April 1990, is "to end the armed conflict by political means as speedily as possible, promote the democratization of the country, guarantee unrestricted respect for human rights […],
>
> Bearing in mind the San José, Mexico and New York Agreements of 26 July 1900, 27 April 1991 and 25 September 1991 respectively, arrived at by them in the course of the negotiating process conducted with the active participations of the Secretary-General of the United Nations and of his Representative, which Agreements form a whole with the Agreement signed today […]
>
> Have arrived at the set of political agreements that follow".[326]

However, it has been submitted that the criterion of intent is not sufficiently reliable to identify rules of international law,[327] also because of the inherent difficulty in identifying the intent of international actors.[328]

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[323] Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 American Journal of International Law 373, 378.
[324] ibid 381. The author appears to endorse the intent criterion to identify legal instruments of international law.
[325] 'Peace Accords for Angola between the Government of the People's Republic of Angola and the National Union for the Total Independence of Angola (UNITA) (Bicesse Accords)' (31 May 1991) Enclosure.
[326] 'Chapultepec Agreement between the Government of El Salvador and the Frente Farabundo Martì Para La Liberaciòn Nacional (FMLN)' (16 January 1992) Annex.
[327] Pauwelyn (n 288).
[328] See Klabbers, *The Concept of Treaty in International Law* (n 317).

2.6. The criterion based on the provision of sanctions

The presence of a connected sanctioning system is another element often indicated as a requirement for identifying legal rules. This theory dates back to John Austin. In his view, rules of international law must be matched by effective sanctions to be considered law.[329] At first sight, if one assesses the instruments produced at the international level with the involvement of ANSAs under this perspective, the conclusion that such instruments are not law seems inescapable. However, the basic theoretical approach can be contested, considered that many instruments undisputedly deemed to be sources of international law, such as treaties,[330] are often not accompanied by a system of effective sanctions or other enforcement measures.[331] In this sense, Boyle has even submitted that "soft law is law that is not readily enforceable through binding dispute resolutions",[332] thus expressly including within this concept all the international treaties providing only non-binding dispute resolution procedures. Therefore, it appears that the Austinian perspective, based on a centralised and effective sanctioning regime, may lead to the extreme conclusion that a large part of rules of international law, extending well beyond the instruments adopted with the involvement of ANSAs, are not law. On the other hand, the suitability of the criterion under consideration for identifying legal rules can also be questioned if one considers that instruments adopted with the participation of ANSAs are sometimes accompanied by international guarantees aimed at ensuring the respect of the instruments at issue, providing for the application of negative consequences in the case of violations.[333]

These guarantees are often provided for in peace agreements concluded by ANSAs and the opposing government, which frequently establish some form of international supervision or verification. For instance, the Angolese Government and the UNITA committed to cooperate with the United Nations representatives:

> "[t]he Government and UNITA recognize that the successful completion of the peace process within the framework of the 'Acordos de Paz para Angola' (Bicesse), the relevant resolutions of the United

[329] Pauwelyn (n 288). The author refers to Austin (n 291). See also Josef L Kunz, 'Sanctions in International Law' (1960) 54 The American Journal of International Law 324.
[330] See, e.g., the ICCPR, ICESCR and the Convention against Torture. For a scholarly assessment, see, e.g., Christian Tomuschat, 'International Covenant on Civil and Political Rights' (United Nations Audiovisual Library of International Law) <https://legal.un.org/avl/pdf/ha/iccpr/iccpr_e.pdf> accessed 17 November 2021; Matthew Lippman, 'The Development and Drafting of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1994) 17 Boston College International and Comparative Law Review 275.
[331] See, e.g., Anthony D'Amato, 'Is International Law Really Law' (1984) 79 Northwestern University Law Review 1293.
[332] Boyle (n 303) 902.
[333] See Antonio Cassese, *Il Controllo Internazionale* (Giuffrè 1971).

> Nations Security Council and the Lusaka Protocol is, first and foremost, their own responsibility, and undertake to cooperate fully and in good faith with the United Nations […].
>
> The Government and UNITA invite the United Nations to perform, in addition to its missions of good offices and mediation, the tasks defined in the present mandate".[334]

The guarantee may be provided by non-UN bodies. An example is given by the Verification Mission, established by the Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack. This mission, which "will investigate, evaluate and report on alleged incidents involving serious violations of the obligations or commitments described in paragraph 1 of Article 1" (namely the basic undertakings of the parties to the agreement),

> "will be headed by a senior person of proven international stature with experience in field operations and the investigation of military incidents or the violations of laws and customs of war. […] He will be assisted by an international staff of approximately 8-10 professional people with experience in field operations, logistical support and incident investigation".[335]

Some agreements expressly establish the possibility of triggering sanctions in the case of violations of their provisions. For instance, the Linas-Marcoussis agreement states:

> "[t]he Monitoring Committee shall be specifically empowered to bring any instances of failure to implement the Agreement to the attention of the United Nations Security Council through the appropriate channels so that the Council may draw the appropriate conclusions and take the necessary decisions".[336]

Other instruments adopt a more specific terminology. The Rambouillet Accords affirm that

> [t]he Parties understand and agree that the KFOR [Kosovo Force] shall have the right:
>
> a. to monitor and help ensure compliance by all Parties with this Chapter and to respond promptly to any violations and restore compliance, using military force if required […]".[337]

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[334] Government of Angola and UNITA, 'Lusaka Protocol' (15 November 1994) Annex 8, A, I, artt. 2, 3.
[335] Government of the Sudan and Sudan People's Liberation Movement (n 304) Art. 2 para. 2.a.
[336] 'Linas-Marcoussis Agreement - Conclusions of the Conference of Heads of State on Cote d'lvoire' (25 January 2003) para. 9.
[337] 'Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords)' (n 305) Ch.7, Art. VIII.2.a.

This brief assessment of international practice casts doubts on the appropriateness of the criterion based on the presence of a sanctioning system for assessing the legal character of instruments adopted with the involvement of ANSAs. Therefore, this criterion does not appear useful.

2.7. The criterion based on the identity of the parties involved

Discussing the criterion based on the identity of the individuals involved in the law-making process as formal representatives of the party, the impact of the non-state nature of ANSAs must be addressed. In fact, this does not entail *per se* the non-legal nature of instruments adopted with their involvement. Regarding written instruments, namely treaties, Art. 3 of the VCLT establishes that

> "[t]he fact that the present Convention does not apply to international agreements concluded between states and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:
>
> (a) the legal force of such agreements;
>
> (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
>
> (c) the application of the Convention to the relations of states as between themselves under international agreements to which other subjects of international law are also parties".[338]

The term "subjects of international law" is not further clarified in the VCLT. Thus, this term must be defined. In this regard, it has been argued that it refers to "those entities which are capable of holding rights or of being made subject to obligations created by international law".[339] Traditionally, states are the only subjects of international law, thus possessing international legal personality (ILP). However, the subjectivity of other entities, e.g., international organisations, is now commonly accepted,[340] and the expansion of the notion of subjects of international law has also affected ANSAs.

In this regard, it has been noted that questioning the legal subjectivity of ANSAs that have concluded international agreements is redundant. The mere fact that they have been engaged in the adoption of

[338] 'Vienna Convention on the Law of Treaties' (n 294) Art. 3.
[339] Christian Walter, 'Subjects of International Law' (*Max Planck Encyclopedias of International Law*, May 2007) para. 29.
[340] See, e.g., *Reparation for injuries suffered in the service of the Nations, Advisory Opinion* (n 41); *Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion* (n 4).

international agreements indicates they have, at least, treaty-making capacity. In Bell's words, "[r]ecognizing peace agreements as international agreements therefore seems to require the nonstate group and the agreement to 'bootstrap' each other into the international legal realm".[341]

The appraisal of international practice on the basis of the criterion at issue does not lead to clear conclusions. The Lomé Agreement, concluded between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), under the auspices of the then Chairman of the ECOWAS, shows the relevance of ANSAs *per se* at the international level. This agreement establishes that

> "[t]he Government of Sierra Leone shall accord every facility to the RUF/SL to transform itself into a political party and enter the mainstream of the democratic process.
>
> […]
>
> The Parties shall approach the International Community with a view to mobilizing resources for the purposes of enabling the RUF/SL to function as a political party".[342]

RUF/SL, as one of the parties involved in the civil conflict in Sierra Leone, fighting against the state government, was indisputably falling under the category of ANSAs. On the other hand, RUF/SL is one of the parties to the above-mentioned agreement, on an equal ground with the national governmental authority of Sierra Leone. This would imply, insofar as peace agreements can be concluded not only by states, but by ANSAs as well, that the latter ultimately may acquire international rights and obligations. It should be noted that this conclusion has not been endorsed by the Special Court for Sierra Leone. The Appeals Chamber, in the *Kallon* case, concludes that the agreement at issue is not an international agreement, because the RUF/SL has not been granted international recognition. In fact,

> "[n]o doubt, the Sierra Leone Government regarded the RUF as an entity with which it could enter into an agreement. However, there is nothing to show that any other State had granted the RUF recognition as an entity with which it could enter into legal relations or that the Government of Sierra Leone regarded it as an entity other than a faction within Sierra Leone. […] the question of law, with which the issue in these proceedings is concerned, whether as between them and the legitimate government international law regarded them as having treaty–making capacity. International law does

[341] Bell (n 323) 384.
[342] 'Peace Agreement between the Governement of Sierra Leone and the RUF (Lomé Peace Agreement)' (7 July 1999) artt. III(1), III(4).

not seem to have vested them with such capacity. The RUF had no treaty-making capacity so as to make the Lomé Agreement an international agreement".[343]

It should also be noted that the Appeals Chamber does not provide any reasoning supporting its conclusion.[344] Ultimately, the criterion of the identity of the parties involved in the formation of rules cannot be considered as decisive for affirming the legal nature of the rules themselves.

2.8. Is it possible to choose one among many criteria?

At the end of the day, the issue appears particularly complex, as there is no criterion undisputedly preferable over the others. The criteria briefly presented above cannot easily coexist. Consequently, giving preference towards one of them may lead to disregarding the others. For instance, the criteria of form and substance appear mutually exclusive. On the contrary, they appear inversely related: the more relevance is given to the criterion of form, the less importance is given to the criterion of substance, and *vice versa*. Conversely, other criteria appear strictly connected; in this regard, it has been affirmed that the assessment of the legal effect cannot disregard the aim of the producers of the instruments to produce binding outputs.[345] Given all this, the criterion of form appears less relevant. It is true that in case of treaties "the legal form is decisive: if the form is that of a treaty it cannot be soft law. If the form is that of a non-binding agreement, such as the so-called Helsinki Accords,[346] it will not be a treaty for precisely that reason and we will have what is in effect a 'soft' agreement".[347] However, such criterion may only be applicable to treaties, which do not correspond to all the instruments of hard law. In addition, the result of the analysis can change significantly, depending on the perspective adopted; for instance, if the form criterion is chosen, then all treaties are instruments of hard law. On the contrary, if the presence of an effective sanctioning system is adopted as a diriment criterion, some treaties may be considered soft law.

The brief analysis here conducted shows that, ultimately, none of these criteria can be used singularly as a reliable criterion to assess the legal value of international instruments. There is no prevailing criterion to distinguish legal instruments from non-legal ones. Rather, different criteria have been

[343] *Prosecutor v Kallon (Morris) and Kamara (Brima Bazzy), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* Special Court for Sierra Leone, Appeals Chamber Case No SCSL-2004-15-AR72(E), SCSL-04-15-PT-060-I, ICL 24 (SCSL 2004) paras. 47-48.
[344] See Vierucci (n 90).
[345] See Klabbers, 'Law-Making and Constitutionalism' (n 301).
[346] 'Conference on Security and Co-Operation in Europe, Helsinki - Final Act' (1975).
[347] Boyle (n 303) 901.

submitted and can be chosen, depending on the theoretical perspective adopted. In this sense, d'Aspremont noted that "[t]he impression is nowadays rife that the international legal scholarship has become a cluster of different scholarly communities, each using their different criteria for the ascertainment of international legal rules".[348] Thus, even though several examples of international instruments adopted by, or with the involvement of, ANSAs appear to pass the threshold set in each case, they cannot be pacifically positioned within the system of the sources of international law. Moreover, specifically regarding the topic at issue, not all the theoretical analyses of the fundamental features of international law-making take into due consideration the phenomenon of instruments concluded with the involvement of NSAs.[349]

In conclusion, if the identification of rules of international law still appears to be a contentious issue, this cannot but affect the appraisal of instruments produced with the involvement of ANSAs, as well as their qualification as sources of international law. This uncertainty has been worsened by the increasingly widespread trend, both in doctrine and practice, of qualifying the instruments concluded by ANSAs under the controversial category of the so-called soft law.

3. Is there room for soft law? Theoretical approaches

3.1. Introduction

Assessing the current theoretical trends regarding normativity in international law, a widespread support for the so-called soft law appears. The diffusion of this trend is most likely related to the emergence of NSAs. Indeed, the latter have been increasingly engaged in the production of regulatory instruments to govern their conducts. This is true for ANSAs as well. However, the non-state nature of ANSAs inescapably involves consequences regarding the nature of the instruments they adopt. As seen above, the difficulty surrounding the issue arises from the unclarity affecting the presence of significant normative elements in the relevant instruments. Thus, several theories have been submitted to overcome this problem, submitting that the regulatory instruments concluded by NSAs are starkly to be classified under the label of soft law. To investigate about this possibility, it is necessary to define the term "soft law" and clarify its role in international law.

[348] d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (n 289) 3. Cited in Pauwelyn (n 288).
[349] Raustiala (n 310).

Albeit being frequently used, the term "soft law" does not have, today, a clear and undisputed definition. For example, Dupuy has affirmed it is a "paradoxical term for defining an ambiguous phenomenon".[350] Not surprisingly, its legal nature is widely contested. Chinkin identified soft law instruments as a variety of instruments, "ranging from treaties, but which include only soft obligations ("legal soft law"), to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organisations ("non-legal soft law"), to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles",[351] thus focusing not only on the informal capacity of the producers, but also on the soft nature of the rules. Ellis identifies three categories of soft law, including also non-legal phenomena:

> "binding legal norms that are vague and open-ended and therefore (arguably) neither justiciable nor enforceable; non-binding norms, such as political or moral obligations, adopted by states; and norms promulgated by non-state actors".[352]

This definition allows to highlight that soft law can, and often is, produced by states, even though they are the only entities capable of producing hard international law under traditional theory of sources of international law. Goldmann, as Ellis partially does, highlights the absence of an effective sanctioning system as a core feature. In Goldmann's words, in fact,

> "the breach of soft law does not entail the same legal consequences as violations of binding international law, commonly referred to as 'hard law'".[353]

Klabbers identifies soft law with

> "those instruments which are to be considered as giving rise to legal effects, but do not (or not yet, perhaps) amount to real law. It may concern General Assembly resolutions, but it may also concern declarations issued at ministerial conferences, codes of conduct, joint declarations or statements, perhaps even the more flexible provisions of otherwise hard treaties".[354]

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[350] Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1990) 12 Michigan Journal of International Law 420, 420. See also, e.g., Chinkin (n 279); Matthias Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law' (2012) 25 Leiden Journal of International Law 335.
[351] Chinkin (n 279) 851.
[352] Ellis (n 277) 315.
[353] Goldmann (n 350) 336.
[354] Klabbers, 'The Redundancy of Soft Law' (n 278), 168.

Similarly, Gruchalla-Wesierski submits that "soft law is often unenforceable because the parties retain discretion over the content of the obligation or over its exigibility",[355] as "the term soft law is used as a convenient shorthand to include vague legal norms".[356]

From these definitions, it emerges that soft law is a wide category. Moreover, from the definition submitted by Klabbers, it appears that soft law is essentially identified by what it is *not*, namely "real law".

In this regard, the first macro division regards the bright line school and the grey area school. These two doctrinal schools are thus presented, highlighting the advantages and limits of both. Finally, the feasibility of considering instruments concluded with the involvement of ANSAs in both the two mentioned doctrinal frameworks submitted is assessed.

3.2. "It is simply not law at all". The bright line school

The fundamental concept at the base of the bright line school is that law has a binary nature.[357] In this sense, an instrument is law, or it is not; *tertium non datur*. In the opinion of the scholars belonging to this school, there is no room in international law for soft law or non-binding instruments.[358] To execute its various functions, public international law must be sufficiently clear. In fact, it has been submitted that, besides the somewhat obvious normative (binding) function within the international society, international law has a coordinating function between the conflicting interests of the different international actors. Also, international law conveys a shared understanding of the basic characteristics of the international society, and legitimises the international behaviour of the different subjects operating at the international level.[359] Given all that, bright line school's exponents argue that soft law impedes the achievement of these objectives.

The advocates of the bright line school affirm that this approach to the reconstruction of international law presents several advantages. First, it helps to preserve the neutrality of international law and shield it from the threats of powerful states. It is true that the neutrality of law can still be impaired.

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[355] Tadeusz Gruchalla-Wesierski, 'A Framework for Understanding "Soft Law"' (1984) 30 McGill Law Journal 37, 40.
[356] ibid 44.
[357] Pauwelyn (n 288).
[358] Regarding the necessary binding character of law see, e.g., Oscar Schachter, 'The Nature and Process of Legal Development in International Society' in Ronald St John Macdonald and Douglas Johnston (eds), *The structure and process of international law: essays in legal philosophy, doctrine and theory* (Martinus Nijhoff 1983).
[359] See Onuma Yasuaki, 'International Law in and with International Politics: The Functions of International Law in International Society' (2003) 14 European Journal of International Law 105.

However, it is more difficult to do so if the production of rules of international law is carried out by states, following a set of rules based on a binary distinction between law and non-law. As observed by Tomuschat,

> "[d]iscourse on what is right and what is wrong must be crystal-clear and should not fall into the hands of a few magicians who invariably are able to prove that law and justice are on their side".[360]

Another advantage of this approach towards soft law is the greater clarity in the manifestation and reception of rules. It has been noted that international law suffers from an unbearable fragmentation due to the absence of a *lingua franca* that would not leave gaps in the practice of international relations and in the application of international law. As Bianchi noted:

> "[t]he empty space left by the theoretical inadequacies of formalism accounts for a certain 'mushrooming of theory' that has spurred the emergence of countless approaches and methods, among which even skilled readers will have difficulty in orientating themselves. Most of the problems find their roots in the way in which we think of international law. It may well be true that in diversity lies richness. It would be simplicistic, however, to believe that such a huge variety of approaches leading to an extreme doctrinal fragmentation has no bearing on the practice of international law and, consequently, on the functioning of the international legal system".[361]

This fragmentation in the theoretical approaches towards international law is in all likelihood exacerbated by the existence of a grey zone of several instruments with more or less binding force. Indeed, the existence of a grey zone may exacerbate the mentioned fragmentation, impairing the communication and cognition of international law, and ultimately the "capacity of international law to impose itself as an effective constraint on the conduct of actors".[362] It is therefore preferable to adopt a binary approach.

Discussing the theories supporting the binary nature of law, one cannot ignore the thesis submitted by Prosper Weil. His work *Towards Relative Normativity in International Law?* is premised on the following question: "what is international law *for*?".[363] To provide an answer, Weil starts recalling

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[360] Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century - General Course on Public International Law' (1999) 281 Recueil des Cours (Collected Courses of the Hague Academy of International Law) 27–28. Cited in Kassoti (n 280) 110.
[361] Andrea Bianchi, 'Reflexive Butterfly Catching: Insights from a Situated Catcher' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012) 208.
[362] ibid 209.
[363] Weil (n 279) 418.

that international public law is "the aggregate of the legal norms governing international relations".[364] This definition of the nature of international public law helps to identify the function of the latter, namely the regulation of relations at the international level. Thus, Weil submits that certain qualities are necessary for the legal framework at issue to achieve this goal:

> "while the emergence of international law as 'normative order' is due to the need to fulfill certain functions, it will not be capable of actually fulfilling them unless it constitutes a normative order of good quality".[365]

To be true, Weil recognises the existence of vague rules of international law, which are rules of hard law nonetheless. Even though Weil admits that this type of "hortatory" or "programmatory law" "does not help strengthen the international normative system",[366] he also affirms that its textual vagueness does not compromise its legal nature. Indeed, paraphrasing Weil's observation on the resolutions adopted by international organizations, "to ascribe permissive or abrogatory force to certain [instruments] is tantamount to attributing normative force to them, full and undiluted".[367] In addition, Weil recognises that the legal interpretation of vague legal instruments may be aided by non-binding instruments, which may acquire legal effects by doing so.[368]

Needless to say, in Weil's opinion, the quality of the international normative order is compromised by instruments of soft law. He even states that

> "recent years have seen a development that attacks the very substance of the norm. All norms are affected, the 'hard' no less than the 'soft'. This time it is no longer a question of determining where the legal norm begins or ends: it is the very nature of the international normative system that is challenged and, by the same token, the functions for which it was created, which are its raison d'être".[369]

In addition, Weil expresses concern over the possibility of having "more or less" normative rules, with particular reference to the rules of *jus cogens*,[370] because of the risk of relativisation of legal rules. Indeed, a conventional rule may be overruled by a rule of *jus cogens*, whose authority is based on the general recognition by the international community as a whole, rather than that of the single

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[364] ibid 413. Citing Paul Guggenheim, *Traité de Droit International Public I* (2nd ed., Librairie de l'Université, Georg & Cie SA 1967).
[365] Weil (n 279) 413.
[366] ibid 414.
[367] ibid 416.
[368] See Kassoti (n 280).
[369] Weil (n 279) 418.
[370] Weil (n 279).

state – a feature that affects the principle of consent of states, and ultimately the principle of sovereignty. Indeed, "the scale of normativity is reemerging in a new guise, its gradations no longer plotted merely between norms and non-norms, but also among those norms most undeniably situated on the positive side of the normativity threshold".[371] Given all that, Weil notes with concern a "dilution"[372] of the unity of the normative regime of international law. Doing so would compromise the correct functioning of international law; its normativity would be relativised, but "for the man of law […] a simplifying rigor [of law] is essential".[373]

Another noteworthy exponent of the bright line school is Jan Klabbers. In his view, while scholars have dedicated much attention to the issue in recent decades, soft law is not only redundant,[374] but even undesirable.[375]

In the work "The Redundancy of Soft Law", he first bases his thesis on the assessment of international practice, considering not only the practice of states, but also the practice of national and international courts. The analysis leads the author to conclude that, while seemingly applying soft law instruments, international lawyers and courts are actually "recasting" these instruments in terms of treaties and customs, namely instruments of hard law.[376] He also notices that the latter "are typically applied in a binary fashion. Soft law instruments turn out to be either violated or not, either complied with or not".[377]

Albeit focusing on international practice, Klabbers is not oblivious of the wide endorsement of soft law in doctrine. In this regard, Klabbers refutes Fastenrath's thesis supporting soft law, based on the lacunae of international law. Fastenrath, in fact, affirms that soft law may be useful to fill the gaps inevitably left by legal language, while simultaneously reconciling law and politics. However, Klabbers finds this theory "far from convincing".[378] In Klabber's view, the indeterminate language of law, which may impair its effectiveness, may not be reduced by resorting to soft law instruments. On the contrary, it may be exacerbated by the latter (which are oftentimes "deliberately kept vague").[379] In Klabbers's words,

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[371] ibid 421.
[372] ibid 422.
[373] ibid 441.
[374] Klabbers, 'The Redundancy of Soft Law' (n 278).
[375] Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 Nordic Journal of International Law 381.
[376] Klabbers, 'The Redundancy of Soft Law' (n 278).
[377] ibid 174.
[378] ibid 178.
[379] ibid.

> "it is unclear why exactly soft law instruments would be eminently suitable for interpretative purposes. Why not simply fill the gaps by means of hard law instruments? After all, international law itself does not erect any obstacles on the road to hard law; whatever obstacles one may encounter are usually the result of domestic legal or political considerations, but at least some of those (e.g., the acquisition of the requisite powers, or receiving the necessary instructions) are also pertinent to the making of soft law".[380]

Klabbers adds that soft law is redundant to take into consideration political choices and integrate them in legal instruments. In fact, he submits that hard law can be the vehicle of political choices as well, as it is ultimately the product of political agreements. All things considered, therefore, the resort to soft law appears redundant. In his words,

> "as soon as soft law comes to be applied, it becomes indistinguishable from hard law. It is one thing to note that soft law considerations may stand at the origins of norms, but even if this were the case, at some point during their existence as norms they are inevitably transformed into either hard law or non-law".[381]

While submitting a theory based on a binary perspective, and contrary to Weil, Klabbers does not reject the existence of more or less specific rules of hard law. On the contrary, Klabbers admits that certain rules may be "more important" than others. In fact, despite their variety, in his view all rules of international law are binding, thus they all share the common nature of hard law. It may be concluded that, in Klabber's opinion expressed in "The Redundancy of Soft Law", soft law simply does not exist. Consequently, resorting to the category of "soft law" is a redundant process.

Later on, Klabbers reaches the conclusion that soft law is not only redundant, but even dangerous for international law. Such conclusion is reached as he shifts the focus from international practice to the general aim, and consequently the philosophical connotation, of international law. In the analysis, he concludes that law (thus international law as well) ultimately serves the scope of bridging values and actions. Klabbers affirms that "the very *raison d'être* of law is [based on the fact that] organising life directly on values turned out impossible".[382] In Klabber's opinion, this role requires law to be simple. In fact,

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[380] ibid 178–179.
[381] ibid 179.
[382] Klabbers, 'The Undesirability of Soft Law' (n 375) 387. The author refers to this statement by Koskenniemi: "[w]e have recourse to legal rules precisely because organising social life directly on values turned out to be impossible: values are too general as policy guidelines when formulated so that all would agree. If transformed into concrete reforms, they will inevitably overrule some interests in favour of other interests and seem thus no longer reflective of the society as a

> "the simplicity of the law, knowing only categories of legal or illegal, in force or not in force, binding or not binding, makes it possible to survive in this complex world. It is the simplifying rigor of law, the way in which it can translate complexity into something we can handle, which makes law such a useful tool".[383]

Adopting this approach, which is more focused on the purposes of law, Klabbers concludes that soft law may be detrimental to the clarity necessary for law to reach its objective: "instead of substituting legal simplicity for everyday complexity, it proposes to substitute legal complexity for everyday complexity".[384]

In Klabber's view, accepting soft law in its various shades and consequently admitting a progressive scale of normativity would compromise the aim of law, as "law ideally should be cognizable, and should be cognizable as such".[385] The introduction of several levels of norms and normativity would compromise this feature of law. In other words, used by Klabbers himself, "if law, in its binary simplicity, functions as the go-between our values and our actions, then there is no point whatsoever in diminishing the value of law".[386]

Weil and Klabbers are not the only scholars criticising the notion of soft law. In this regard, the theory submitted by Jean d'Aspremont, who affirmed that soft international law is "a self-serving quest for new legal materials"[387] must be mentioned. D'Aspremont recognises the widespread emergence of theories accepting soft law instruments as part of the international legal system. He ascribes the development of these theories to a general difficulty to accommodate new issues in the international legal framework:

> "[t]he general idea of softness commonly rests on the presupposition that the binary nature of law is ill suited to accommodate the growing complexity of contemporary international relations, and that complementary normative instruments are needed to regulate the multi-dimensioned problems of the modern world".[388]

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whole" Martti Koskenniemi, 'International Law in a Post-Realist Era' (1995) 16 Australian Year Book of International Law 1, 8.

[383] Klabbers, 'The Undesirability of Soft Law' (n 375) 387.

[384] ibid. See also Klabbers, 'Law-Making and Constitutionalism' (n 301).

[385] Klabbers, 'Law-Making and Constitutionalism' (n 301) 103.

[386] Klabbers, 'The Undesirability of Soft Law' (n 375) 387.

[387] Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 European Journal of International Law 1075.

[388] ibid 1076.

The author admits the difficulties often encountered by positivism to accommodate new instances produced by the evolution of the international scenario. However, he submits that the resort to soft law instruments does not provide an effective solution to such difficulties. Similarly to Klabbers, d'Aspremont grounds his disapproval of soft law on the nature and aim of law. In particular, d'Aspremont makes reference to the distinction, well-known in the French doctrine but unfamiliar to Anglo-Saxon scholars, between legal acts and legal facts. The former have legal effects directly originating from the will of the legal subject that produces the act. Indeed, the legal effect is not originated by a pre-existing rule of the system.[389] The latter, on the contrary, produce legal effects in an indirect manner, because of the existence of pre-existing rules in the legal system that establish the legal effect of an act before the act is adopted. On the one hand, "the legal act is what usually allows legal subjects to create new rules"[390] and "despite the existence of rules regulating the expression of the intention of the parties, the act concerned *directly* originates in the will of its authors".[391] On the other hand, the legal effects of legal facts "originate in the legal system itself, which provides for such an effect prior to the adoption of the act. Their fallout is usually envisaged by what are called secondary rules of this system. Because these legal effects are not the direct consequence of the will of the state but stem from a pre-existing secondary rule of the system, the acts generating them cannot be construed as legal acts in the strict sense".[392]

Assessing this theoretical division under a positivist approach, d'Aspremont rapidly dismisses the feasibility of international soft legal facts. In fact, as softness only derives from the will of subjects, and legal facts are only indirectly connected to the will of the producing subjects, legal facts cannot be envisaged as soft legal instruments. In d'Aspremont's words,

> "There is no such thing as a *soft international legal fact*. In a positivist logic, although contested, softness can be envisaged only in connection with legal acts in the strict sense, as it is necessarily the outcome of the intention of the subjects, not the result of a pre-existing rule of the international legal system. In other words, softness is not programmed by the international legal order but is simply determined by its subjects and, for that reason, only legal acts can prove soft".[393]

D'Aspremont then assesses whether it is possible to have soft legal acts. To do so, he first distinguishes two components of legal acts, namely the *negotium* (the content of the legal act) and

[389] d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (n 387).
[390] ibid 1078.
[391] ibid 1079.
[392] ibid.
[393] ibid 1080.

the *instrumentum* (the instrument where the content is recorded). The feasibility of soft law must be appraised separating the research into the two components.

D'Aspremont rejects the possibility of having legal acts with soft *instrumentum*, e.g., the final declaration of a conference. Indeed, the choice of a soft *instrumentum* "generally suffices to indicate the intention of the parties not legally to commit themselves".[394] In other words, the resort to this type of *instrumentum* proves the lack of willingness of the legal subject that has produced the act to create legal effects. These instruments are legal facts, but do not reach the threshold to be legal acts, which as mentioned allow for the creation of new rules. In d'Aspremont words,

> "[b]eing merely a fact generating legal effects irrespective of the will of their authors, they cannot qualify as legal acts, and thus as law. They simply remain, from a positivist vantage point, *facts* to which some legal effects are attached".[395]

On the other hand, focusing on the normative requirement, or lack of such requirement, d'Aspremont acknowledges that legal acts can have soft content (soft *negotium*). In his opinion, in fact,

> "While soft law understood as an act with a soft instrument proves deeply flawed in the light of the above-mentioned distinction between *legal act* and *legal facts*, the same distinction does not bring about a similar rejection of this second category of soft law. The compatibility of legal acts endowed with a soft *instrumentum* with the premises mentioned above, however, presupposes that the formulation of clear obligations is not a *constitutive element* of any legal act. Accepting that there may be legal acts with a soft *negotium* means that the normative character of an act is not the prerequisite of its legal character".[396]

Indeed, the assessment of international law and practice leads d'Aspremont to affirm that "[i]t seems to be commonly agreed today that a legal act ought not to be normative to be legal".[397] Therefore, it is possible to have soft legal acts only if the softness regards their content, as their normative character is not a necessary requirement to their validity.

It thus appears that, adopting this approach, soft elements of legal instruments may be connected to the binary division between law and non-law, typical of the bright line school. On the other hand, the inclusion of soft law instruments in the legal realm without linking them to the binary nature of

[394] ibid 1082.
[395] ibid 1083.
[396] ibid 1084–1085.
[397] ibid 1085.

law may cause unclarity, which is detrimental to the ultimate function of international law. Ultimately, as Weil and Klabbers have observed, the acceptance of soft instruments within the realm of international law may lead to the loss of the simplicity of law, which is necessary for it to pursue its regulating aim effectively.

Also, the thesis submitted by d'Aspremont balances the emergence of new instances in the international community with the notion of the binary nature of law. As observed by Kassoti, indeed, the mentioned distinction between legal acts and facts

> "allows bright line theorists to take into account the normative contours of conduct that is not per se binding and thus to assimilate social reality in a much subtler way than they have been given credit for. […] [C]onduct that may itself remain below the threshold of bindingness may create legal effects to the extent that another party has relied thereon. […] the sophisticated distinction between legal acts and legal facts allows bright line theorists to keep a distinct conceptual boundary between law and non-law, while at the same time admitting that legal effects may arise from output that is below the normativity threshold".[398]

3.3. International law in its "infinite variety". The grey zone school

Opposite to the bright line school just discussed is the so-called grey zone school.[399] Indeed, the authors belonging to this school believe that law exists along a spectrum, thus it may present various formal features and levels of bindingness and still be law.

Ultimately, the theories ascribable to the grey zone school blur the distinction between law and non-law. Nonetheless, the advocates of this school submit that it is necessary to abandon the traditional doctrines on sources to "accommodate the growing complexities of modern international life".[400] In fact, the theories at issue allow to integrate in the international legal framework instruments recently adopted at the international level. Concerning the topic at issue, these theories make it possible to accommodate the emergence of more and more powerful NSAs, including ANSAs, in normative production processes.

[398] Kassoti (n 280) 115–116.
[399] Kassoti (n 280).
[400] Kassoti (n 280) 102-103.

Regarding the existence of a spectrum of rules of international law, the theory submitted by R.R. Baxter must be presented. Assessing international practice, the author concludes that the binary nature of international law cannot be supported. Rather, rules of international law may present different levels of bindingness. Baxter bases the thesis on the analysis of international law in its actual features. Indeed, he analyses the emergence of various rules within the international legal framework, emphasising the existence of norms with different legal values. In this regard, he observes that soft norms can also be found in various written instruments. For instance, as already noted by Weil, treaties may only set guidelines without requiring the parties to comply, may include hortatory norms, or may be destined to influence the conduct of states, without setting any legal obligation. In general, it is possible for treaties not to be susceptible to enforcement.[401] Contrary to Weil, this observation leads Baxter to affirm that it would be "a gross oversimplification"[402] to consider treaties as binding instruments, as they may lack the requirement of compliance. In Baxter's words,

> "[w]ritten international understandings, to which States signify their assent in one way or another, have […] commonly been divided into two categories – those norms that are binding and those norms that are not. My thesis has been that the differences are not qualitative but quantitative – that different norms carry a variety of differing impacts and legal effects".[403]

In Baxter's opinion, therefore, the absence of a sanctioning system does not preclude an instrument to have a legal nature; however, it precludes the latter to be binding. Consequently, international instruments may present deep differences, while still being lumped together because they have legal effects. This considered, the distinction between law and non-law becomes less clear. Ultimately, the binary nature of international law submitted by the bright line school is compromised. Moreover, Baxter submits that this theory may reconcile the current international practice and the international legal framework.

Another theory blurring the distinction between law and non-law is the New Haven School of international law, whose earliest main exponents were McDougal, Lasswell and Reisman. The theory submitted by this school is based on the understanding of law as a decision-making process:

[401] Baxter (n 279).
[402] ibid 561.
[403] ibid 563.

> "rules did not matter to the New Haven School because of some sort of positivists reverence for such rules as 'law'. Rather, rules were deemed important because they formed part of a 'world constitutive process' in which political decisions were reached".[404]

Indeed, in the introduction of their work "Jurisprudence for a Free Society", Lasswell and Smith declare that

> "[l]aw will be regarded not merely as rules or as isolated decisions, but as a continuous process of authoritative decision, including both the constitutive and public order decisions by which a community's policies are made and remade. The processes of authoritative decision in any particular community will be seen to be an integral part, in an endless sequence of causes and effects, of the whole social process of that community".[405]

In New Haven School's theorists, law must not be recognised, but rather created through decisional processes. Thus, the needs of the community (in the case of international law, of the international community) are always taken into due account. Falk concludes that "the decision maker […] is constrained by 'the making of effective choices in conformity with demanded public order'".[406]

Rosalyn Higgins, echoing the views of this school, submits that law is not a static set of rules, but rather "a comprehensive process of authoritative decision in which rules are continuously made and remade".[407] This conclusion is inferred from the observance of reality. In Higgins's view, indeed, adopting an approach based on the immutability of rules leads to unsolvable contrasts with practice. Indeed,

> "[f]rom this perspective, the reality is that there continue in existence certain rules which regrettably are widely disobeyed, and it is the task of the international lawyer to point to the existence of these rules and to take every opportunity to urge compliance with them — even if the battle against power politics takes very many years".[408]

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[404] Paul Schiff Berman, 'A Pluralist Approach to International Law' (2007) 32 Yale Journal of International Law 301, 305–306.
[405] Harold Dwight Lasswell and Myres Smith Macdougal, *Jurisprudence for a Free Society - Studies in Law, Science, and Policy*, vol I (Martinus Nijhoff Publishers 1992) 25.
[406] Richard A Falk, 'Casting the Spell: The New Haven School of International Law' (1995) 104 The Yale Law Journal 1991, 1992. The author cites Lasswell and Macdougal (n 405) 184.
[407] Myres S Mcdougal, 'A Footnote' (1963) 57 American Journal of International Law 383, 383. See also Rosalyn Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 The International and Comparative Law Quarterly 58.
[408] Higgins, *Problems and Process: International Law and How We Use It* (n 287) 19.

It has been affirmed that the theories attributable to the grey zone school appear to not be able to guarantee the features of clarity and certainty, which are necessary for law to be law under the bright line school. This constitutes one of the main criticisms about the grey zone school. Higgins, however, attempts to reconcile the clarity requirement and the non-exclusive and potentially open process of authoritative decisions. In Higgins's words, "law as a process does *not* entail a rejection of that core predictability that is essential if law is to perform its functions in society".[409] This reconciliation is made possible through the unitarian perspective of power and control. In Higgins's theory, in fact, international law is created by authorised decision-makers through their decision-making activity, as "[t]hat which we describe as law is the confluence of authority and control".[410] Therefore, entities must possess both power and authority to participate in the law-making process.

Considering this statement from the opposite perspective, however, it may be inferred that authority and power are the *only* requirements to participate in such processes. Therefore, it can be concluded that law-making processes are not a prerogative of States; rather, NSAs may participate in such processes as well. In this sense, viewing law as a process allows to accommodate the developments in the international community, including the emergence of NSAs.[411]

This approach is coherent with the use of the term "participant" in international, instead of "subject" and "object". First, as the New Haven school submits that international law is not composed of static rules, but it is rather a constantly developing process, and it does not set unequivocal requirements for recognising "subjects" and "objects" of international law through a specific rule (as affirmed by the exponents of positivism). Therefore, it must be inferred that it is not possible to operate such distinction between subjects and objects. Moreover, Higgins affirms that, in the current international scenario, this distinction is a relic of the past, without any purpose and credible reality. In Higgins's words,

> "[w]e have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint. […] [I]t is not particularly helpful, either intellectually or operationally, to rely on the subject-object dichotomy that runs through so much of the writings. It is more helpful, and closer to perceived reality, to return to the view of international law as a particular decision-making process.

[409] ibid 8.
[410] ibid 19.
[411] It should be noted, however, that this opening towards NSAs (ANSAs included) does not necessarily compromise the centrality of states in the processes of normative production.

> Within that process (which is a dynamic and not a static one) there are a variety of participants, making claims across state lines, with the object of maximizing various values".[412]

In this perspective, the non-state nature of ANSAs does not, *per se*, constitute a limit to their production of legal instruments. Indeed, they can be participants in the process of law-making, provided they present sufficient authority and power. It is worth noting that the term "participant" has not only been used by the New Haven School, but also by other scholars.[413]

However, the New Haven school has not received wide support. Even without espousing a bright-line-school-oriented approach, the substantial lack of a clear division between what constitutes law and what does not, typical of the New Haven School theories, appears to be a shortcoming, as it compromises the certainty required to law. In Tomuschat's words,

> "law, understood as a set of authoritative precepts possessing characteristics of stability which guarantee legal certainty, recedes to some extent into the background, being replaced by the figure of the decision maker, who is called upon to shape its contents".[414]

In this sense, Kassoti adds that

> "[a]bolishing the dichotomy between formal and informal participation in the law-making process would undermine stability and predictability in international relations. If all types of activities, such as lobbying and making policy statements, were considered as 'law' then the distinction between law and non-law would collapse".[415]

Last, it has been affirmed that this approach would deplete law of its legal nature. Expanding the norm-creating process to all processes within international relations, "law" loses its main characteristics, which distinguish it from other products of international relations. It would then be impossible to maintain law and the products of other international activities separate, leading to the equivalence of international law and international politics. Ultimately, this would compromise the certainty of law. As Kassoti observes,

> "[a]bolishing the dichotomy between formal and informal participation in the law-making process would undermine stability and predictability in international relations. If all types of activities, such

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[412] Higgins, *Problems and Process: International Law and How We Use It* (n 287) 49–50.
[413] See, e.g., Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002); Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007).
[414] Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century - General Course on Public International Law' (n 360) 26.
[415] Kassoti (n 280) 104.

> as lobbying and making policy statements, were considered as 'law' then the distinction between law and non-law would collapse […] it is difficult to disagree with the view that the elevation of decision-making processes to the status of 'law' would ultimately benefit powerful States that are in a much better position to shape these processes".[416]

Given all that, the statement made by Higgins that "[t]his view rejects the notion of law merely as the impartial application of rules"[417] acquires dangerous implications. In this sense, Hathaway bluntly observes that this view

> "depletes international law of the certainty required for meaningful accountability. Indeed, the extraordinarily vague and potentially far-reaching nature of the policy-oriented paradigm in practice dissuades governments from treating international law as a meaningful source of real obligations at all".[418]

In conclusion, despite the commendable efforts to reconcile international law and international relations, the New Haven School's theory, based on the view of law as a process, does not effectively distinguish law as the product of law-making processes, compromising the certainty, stability, and predictability of law. Ultimately, the essential features of law are at risk.

Another theory which recognises the existence of a variety of shades of law and various participants in the law-making process is based on the so-called pluralist approach. In this regard, McCorquodale carries out the analysis in light of international practice and the developments that occurred within the international community. Adopting an approach based on global legal pluralism, it appears that "there are several systems operating at the same time in relation to a specific situation",[419] which are interacting with each other at the international level. Indeed, legal pluralism has been defined as "a situation in which two or more legal systems coexist in the same social field".[420]

This plurality also concerns the subjects of international law. In this regard, McCorquodale argues that considering states as the only subjects of international law "ignores the reality of changes in the

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[416] ibid.
[417] Higgins, 'Policy Considerations and the International Judicial Process' (n 407) 59.
[418] James C Hathaway, *The Rights of Refugees under International Law* (1st ed., Cambridge University Press 2005) 19.
[419] Robert McCorquodale, 'Sources and the Subjects of International Law: A Plurality of Law-Making Participants' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 760.
[420] Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law & Society Review 869, 870. Cited in Ralf Michael, 'What Is Non-State Law? - A Primer' in Michael A Helfand (ed), *Negotiating state and non-state law: the challenge of global and local legal pluralism* (Cambridge University Press 2015) 52.

international community through, for example, globalization, privatization and fragmentation".[421] Indeed, scholars who adopt a pluralist approach argue that "the 'international community' is not a monolithic entity, but a collection of interests".[422] States and NSAs "interact, merge and conflict in dynamic and even volatile combinations";[423] often the various actors have dialectical interactions with each other.[424] Ultimately, the approach at issue considers different actors as simultaneously acting in a "shared social space".[425]

This observation is not free of impacts on international law-making processes. Indeed, McCorquodale affirms that an international legal principle tying the status of "subject" to the status of "law-maker" exists. Moreover, it is not static, but can expand or compress itself, depending on the circumstances of the international community.[426]

The pluralist approach does not reject the central role states still have in the international community and in normative production processes; this approach affirms that they are not the only actors involved. In fact, it is possible for NSAs to participate in law-making processes, related to the fields in which they operate. Indeed, McCorquodale affirms that states remain the "main source"[427] of international law; however,

> "[w]hile the extent of non -State actors' lawmaking may not be as extensive as States, and it may only be binding in certain areas of the international legal system, it is nevertheless a source of international law".[428]

Adopting the pluralist approach, therefore, it is possible to consider the instruments concluded with the involvement of ANSAs as legal instruments. The non-state nature of ANSAs does not constitute an obstacle.

The purpose of the pluralist approach is to improve the legitimacy and equality in the international law-making processes. Surely, it would make the involvement of NSAs, ANSAs included, in law-

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[421] McCorquodale (n 419) 751.
[422] Berman (n 404) 311.
[423] Boaventura de Sousa Santos, *Toward a New Legal Common Sense Law, Globalization, and Emancipation* (Butterworths 2002) 94. Cited in McCorquodale (n 419) 761.
[424] See Berman (n 404).
[425] McCorquodale (n 419) 761.
[426] McCorquodale (n 419). See also Berman (n 404).
[427] McCorquodale (n 419) 765.
[428] ibid. See also Paul Schiff Berman, 'Non-State Lawmaking through the Lens of Global Legal Pluralism' in Michael A Helfand (ed), *Negotiating state and non-state law: the challenge of global and local legal pluralism* (Cambridge University Press 2015).

making processes possible. McCorquodale himself submits that ANSAs with effective control over territory may participate in these processes. However, the achievement of the objective of legitimacy and equality *via* the application of the pluralist approach is debatable.

Indeed, authors have criticised the chaotic approach to authority and rules as a threat to legitimacy. The pluralist approach, which endorses the existence of different relevant entities with different interests, does not provide an effective solution to the problem of fragmentation within the international community, as it does not duly take into consideration the presence of possibly clashing interests. As noted by Merry, some authors see legal pluralism as "an assault on legitimacy", because "the lack of a clear hierarchy, and the ambiguity of authority pose a serious problem. […] This fragmentation reflects the different interest groups engaged in constructing international law".[429]

While providing a compromise solution that allows the coexistence of different actors and different interests, the pluralist approach suffers from the shortcomings caused by the ensuing international fragmentation. As they may negatively affect the legality of international law, the theories based on a pluralist approach to international law are not undisputedly endorsed.

Last, it is worth mentioning that the criteria for distinguishing legal and non-legal instruments, presented in the previous paragraphs, have been used by grey zone school exponents "[i]n their attempt to cast the net wide and thus to capture manifestations of normativity that escape the traditional framework".[430] More generally, all theories belonging to the grey zone school present the same shortcoming, namely they do not clearly distinguish between law and non-law. In Kassoti's words, "[u]ltimately, all the above theories fail to convince exactly because they create uncertainty about the distinction between law and non-law".[431] In addition, the same author notes that these theories do not take into due consideration the logical distinction between law-making and law, mixing in the same doctrinal research the *process* and the *product* of such process. In fact, in Kassoti's opinion, the emergence of new, different actors and their involvement in law-making processes has been tackled as a problem related to the threshold between law and non-law:

> "[b]y equating 'law-making' with 'law', grey zone theorists have come to the conclusion that in order for international law to tackle the problems at the empirical level, the theoretical definition of 'law'

[429] Sally Engle Merry, 'International Law and Sociolegal Scholarship - Toward a Spatial Global Legal Pluralism' in Michael A Helfand (ed), *Negotiating state and non-state law: the challenge of global and local legal pluralism* (Cambridge University Press 2015) 69.
[430] Kassoti (n 280) 109.
[431] ibid.

> needs to be stretched. In doing so, grey zone theorists have largely ignored the system's existing mechanisms for incorporating social developments".[432]

In conclusion, the attempt of the theories belonging to the grey zone school has not been unanimously endorsed. It is true that maintaining a sharp division between international law and non-law serves the purpose of clarification. However, the latter is only instrumental to the ultimate purpose, which is the conservation of the functions of law. Conversely, considering international law as only composed by instruments belonging to the classical, international hard law may lead to a gap between formal and substantive functioning of international law. In other words, the simplicity praised by Klabbers may not be adequate in the present, overcomplicated international scenario.

3.4. Possible ways of reconciliation of the different schools

As discussed above, international scholarship is divided into two main categories, one accepting various degrees of "law", and the other affirming that law has a binary nature.

The involvement of ANSAs in normative production processes can be assessed under the two main doctrinal schools presented. Adopting a grey zone school perspective, it appears that ANSAs may well participate in such processes. Assessing the instruments with a bright line school approach, it *prima facie* appears that the involvement of ANSAs in the production of instruments of regulation may affect international law-making only if these instruments match a minimum threshold of normativity and can thus be considered hard law – which is indeed the only type of law. Any other impact of the above-mentioned involvement would only fall into the scope of extra-legal disciplines, e.g., international relations. It appears, however, that these incompatible theories may have something in common, enough to reconcile the different approaches and assess current developments of international practice.

First, the analysis of the concept of normativity may decrease the contrast between the bright line and the grey zone schools. As proposed by Pauwelyn,

> "[t]he key to resolving this debate is this: being law and having legal effect must be distinguished. The mere fact that something falls on the non-law side does not mean that it has no legal effect".[433]

[432] ibid.
[433] Pauwelyn (n 288) 130.

However, the author himself warns against too simplistic – and extreme – conclusions. In fact, to apply this conclusion to the letter means to muddle legal norms with norms originated otherwise, such as political or moral ones. In this regard, Pauwelyn comes close to the theory of the bright line school. In fact, he affirms that

> "to maintain law's independence there must be a conceptual line (not a zone) separating law from other norms (as the bright line school calls for). The distinction between law and legal effects (or other norms) may, in practical applications, be difficult to apply (as in the establishment of custom; that is where the real grey zone arises) or be of little practical consequence (the norm changes behaviour, or determines a tribunal's decision, independent of whether it is law or merely has legal effect). Yet, to have a theoretical bright line which separates law from non-law (as difficult as it may sometimes be to actually draw that line in a particular case) remains conceptually important".[434]

Nevertheless, it has been noted that "[i]f international law were not observed by states at all, the very validity of international law would be lost".[435] Thus, this inquiry cannot ignore the practical validity of law.

Boyle, attempting to accommodate non-law-making processes within the legal realm, emphasises the role that non-law instruments may have in normative production processes. He affirms that

> "[t]he proposition is not that non-binding declarations or resolutions of the General Assembly or any other soft law instrument are law *per se*, but that in appropriate cases such instruments may be evidence of existing law, or formative of the *opinio juris* or State practice that generates new customary law. Widespread acceptance of soft law instruments will tend to legitimize conduct, and make the legality of opposing positions harder to sustain".[436]

In Boyle's opinion, soft law is not law, but it leads to law. It appears that, while recognising the unbridgeable difference between soft law and law instruments, Boyle adopts a constructive approach between the two. In this regard, he argues that "[f]rom a law-making perspective the term 'soft law' is simply a convenient description for a variety of non-legally binding instruments used in contemporary international relations by States and international organizations […] the legal form is

[434] ibid.
[435] Yasuaki (n 359) 114.
[436] Alan Boyle, 'Soft Law in International Law-Making' in Malcolm D Evans (ed), *International Law* (3rd ed., Oxford University Press 2010) 123.

decisive".[437] However, "an agreement involving a State and another entity may be binding, even if it is not a treaty".[438]

Despite recognising the limitations under a legal perspective of soft law instruments, Boyle does not dismiss the thesis that soft law may have legal value. In fact, soft law has a "normative significance. […] There is at least an element of good faith commitment".[439]

Shifting the focus towards the theories belonging to the bright line school, it appears that they are less linked to traditional conceptions of law-making production, as they appear at first glance. In particular, considering the core reasoning underlying these theories, it appears that law-making processes could include relevant non-state entities. In fact, the bright line school's theories ultimately aim to maintain the normative value of international law.

In this regard, Weil does not ignore the close relationship between law and society. On the contrary, he refers to their historical development. It thus appears feasible to evaluate his conclusions adopting the same perspective. His analysis leads him to recognise that the international scenario has deeply evolved over centuries; nonetheless, he finally affirms that, despite the changes occurred, the function of international law has remained the same. In his words, in fact,

> "[d]espite the profound transformations that international society has undergone, especially since the end of the Second World War, the functions of international law have remained what they have always been since the outset, and there could be no greater error than to contrast 'modern' or 'present-day' international law with 'classic' international law in this respect".[440]

Weil's statement that the main objective of international law has not changed can be endorsed: the regulation of the coexistence of different actors and the pursuit of common aims remain. As noted by Ago, international law was born to regulate conflicting interests in a scenario characterised by a pluralistic nature.[441]

The effective achievement of this purpose must be assessed in light of an inquiry on international practice. In this sense, endorsing the conclusions reached by Weil and Klabbers appears more

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[437] ibid 124.
[438] See, e.g., *Anglo-Iranian Oil Co Case, Preliminary Objections, Judgement* (1952) I.C.J. Reports 1952 93 (International Court of Justice).
[439] Boyle (n 436) 125.
[440] Weil (n 279) 419.
[441] Roberto Ago, 'Pluralism and the Origins of the International Community' (1977) 3 Italian Yearbook of International Law 3.

difficult. Unlike the goals pursued by law, international society has deeply changed in recent years, in particular through a qualitative shift in its actors. The involvement of NSAs, including ANSAs, in international law-making is an example of this qualitative shift in international society and international law.

The legal quality of law would be compromised by non-hard forms of law. However, soft law is not necessarily linked to the involvement in the normative productive process of NSAs, as non-hard law instruments are not produced only and always by NSAs. Also, on the contrary, it may be inferred that involving relevant stakeholders (as ANSAs) in normative processes may have positive effects. In this sense, the engagement of ANSAs in processes of normative production is not impossible *per se*. Indeed, considering as the key element of international law (as of law in general) its functionality, rather than its simplicity, it is possible to modify the law-making processes to maintain such function. This, of course, significantly affects the topic at issue, namely the framework of action of ANSAs in the normative production of international law. It has been previously submitted that the bright line school theories mainly aim to guarantee the certainty and stability of law, to satisfy the "needs of society".[442] Focusing on this purpose, it can be concluded that ANSAs may participate in normative production processes, even adopting a bright line school perspective.

In conclusion, it appears that both schools may eventually accept the participation of NSAs, ANSAs included, in law-making processes, subject to the requirements prescribed by the different theories. Given all this, relevant examples of international practice regarding the participation of ANSAs in international law-making processes are assessed in the following.

4. Conclusion. Can ANSAs participate in the creation of international law?

This chapter has, first, demonstrated that the involvement of ANSAs in law-making processes may produce different results from a legal point of view, depending on the theory one may adopt on sources and law-making.

A macro-division can be made between the theories that do not accept any third way as to the binding effects of law, belonging to the so-called bright line school, and the theories that accept a variety of instruments with different levels of normativity, belonging to the so-called grey zone school.

[442] *Reparation for injuries suffered in the service of the Nations, Advisory Opinion* (n 41) 178.

According to the bright line school theories, an instrument is simply law, or not law at all. Adopting this approach, the distinguishing features of "law" must be assessed and then used to appraise the relevant provisions. The content of relevant rules is often sufficiently broad to leave space for debate and ambiguities; however, the main role of states in normative production is undisputed. Given the central role of states in law-making processes and the binary nature of international law (i.e., an instrument is law, or it is not), it seems *prima facie* that instruments produced with the involvement of ANSAs cannot be considered law.

However, on a closer look, it appears that the main purpose of the bright line school theories is the protection of the predictability and certainty of international law, which may be compromised by accepting several grades of normativity. Therefore, bright line school theories do not aim to preserve the traditional framework of international law, but rather to preserve the functioning of international law in the present international context.

The grey zone school theories admit that there are various instruments, with different legal value. These theories aim to reconcile the emergence of different actors and stakeholders within the international community with international law, offering a third way between law and non-law, which would allow NSAs to participate in normative production processes. However, it must be noted that such theories, if fully applied, easily lead to uncertainty and unpredictability of law, thus creating legality issues. Given all this, it appears that the grey zone school theories, while appealing at first glance because of their supposed ability to take into due consideration the developments occurring within the international community, do not offer a stable doctrinal framework.

On the contrary, the focus on the main purpose of the bright line school theories shows that these theories are less static than they initially appear. Applying these theories to international instruments produced by, or with the involvement of, ANSAs, it appears that these instruments may be considered law. Assessing these instruments from the informal law-making theories point of view, several agreements concluded by ANSAs can be considered as having legal value. In fact, these agreements have the requirements demanded by the different sub-theories of informal law-making. The non-state nature of at least one of the parties does not constitute an obstacle to that effect. Under the bright line theories, it is necessary that the instruments at issue are classifiable as law, thus respecting predictability and certainty. However, as already noted, the non-state nature of ANSAs does not compromise, *per se*, the mentioned predictability and certainty. Looking at other aspects of the production and application of instruments involving and addressed to ANSAs, it appears that these requirements are often met.

Chapter III – International law rules governing ANSAs. An evolving practice

1. Introduction

After having assessed the theoretical positions regarding the engagement of ANSAs in the adoption of instruments of international law, the present Chapter provides an assessment of relevant international practice. This appraisal shows an evolutionary pattern: indeed, the rules of international law governing ANSAs have increased in number, as ANSAs have gained relevance within the international community. This evolution also shows a qualitative development, as ANSAs have changed their role in law-making processes, becoming actively involved in the production of rules. Despite the theoretical issues raised by this development, the latter can be considered as a proof of the evolutionary nature of law in general and of the fact that international law evolves to meet the needs of the international community.

Currently, several rules of international law are addressed to ANSAs. These rules are not novelty (see, in this regard, the relevant rules of IHL, CA3 in particular), and the applicable rules have been the subject of study for decades. However, the legal basis for their application to ANSAs is still debated. Nevertheless, an assessment of international practice shows that the rules binding ANSAs have recently expanded; indeed, it has been affirmed on several occasions that, currently, ANSAs are not only bound by rules of IHL, but also by those belonging to IHRL. Last, also for the purpose of ensuring an enhanced compliance, ANSAs have been involved in the adoption of instruments of international law. Investigating on such practice may allow to understand the evolutionary process affecting international law as a consequence of the emergence of ANSAs and the evolution of armed conflicts. In particular, this investigation reveals how the role of ANSAs at the international level has evolved with their status, expanding from the situation of entities excluded from the production of international law and addressees of rules made by others to that of actors directly and actively engaged in law-making processes. The present chapter focuses on the evolution of international law concerning ANSAs, adopting a functional approach.

Following a historical perspective in the analysis of the international regulation addressed to ANSAs, the three main stages of evolution of relevant international law can be considered. In particular, IHL rules, IHRL rules and self-imposed rules will be assessed. After the Second World War, IHL rules

regulated ANSAs through the famous "convention in miniature"[443] contained in CA3, followed by the two Additional Protocols to the four Geneva Conventions of 1977 (in particular, APII). The application of rules of IHRL to ANSAs has developed more recently, especially through the practice of the UN. The more recent application of IHRL to ANSAs is coherent with the development of this body of rules, as the latter emerged as the regulation of the dichotomous relationship between individuals and States, aiming to protect the former from the latter.[444] Consequently, while the bindingness of several IHL rules (both conventional and customary)[445] for ANSAs is endorsed and commonly accepted today, the application of IHRL rules to ANSAs (and, more generally, to NSAs) is still debated. While the uncertainty surrounding the theoretical justification for the imposition of IHL rules to ANSAs has been overcome by the widespread practice, the application of rules of IHRL on these actors is still a relatively recent phenomenon, thus it does not benefit from the existence of a widely established legal practice. Even more recent and discussed is the practice of involvement of ANSAs in the production of soft-law instruments. The debate regards, in particular, the legal feasibility of engaging ANSAs in normative production processes, as well as its legal value, justification and consequences. Despite its unclarity, this phenomenon presents several elements of interest for the present analysis. On the one hand, it highlights the growing recognition, at the international level, of the necessity to involve ANSAs in the process of creation and adoption of rules to guarantee their effectiveness, and it proves that ANSAs are willing to be bound by rules of international law, ultimately legitimising them and their activity. On the other hand, this process has an impact on the international law-making process as a whole.

Based on this chronological approach, the Chapter analyses the rules of IHL, IHRL and self-imposed rules applicable to ANSAs, considering the relevant theoretical challenges posed. First, the established IHL rules binding ANSAs are presented. Despite the established practice, they nonetheless raise theoretical issues; in particular, these rules are intended to bind ANSAs without their consent, contrary to the paradigmatic consent-based normative production mechanism of international law. Therefore, after having considered the theoretical issues involved, a critical assessment will follow. Second, the recent practice of applying IHRL rules to ANSAs is presented, and the related doctrinal justifications examined. Besides the problem linked to consent, such theories

[443] Jean S Pictet, *Commentary on the Geneva Conventions Relative to the Treatment of Prisoner of War* (International Committee of the Red Cross 1960) 34.
[444] See, e.g., Jean-Marie Henckaerts and Cornelius Wiesener, 'Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (TMC Asser Press 2020).
[445] See Marco Sassòli, Antoine A Bouvier and Anne Quintin, 'Non-International Armed Conflict' (*How Does Law Protect in War?, Online Casebook*, 2014) <https://casebook.icrc.org/law/non-international-armed-conflict#toc-click-on-chapter-bibliography-or-specific-bibliography-to-see-content>.

must also overcome the established State-centric approach to IHRL. Third, the current emergence of self-imposed regulations by ANSAs is assessed. This phenomenon takes different forms, e.g., bilateral agreements, codes of conduct, unilateral declarations. As this practice has emerged very recently, it is difficult to define its main features and legal implications. However, it is still possible to pinpoint the main aspects of such practice, in particular the somewhat new recognition of the active role of ANSAs in processes of production of rules. In fact, ANSAs are involved in the drafting of rules and are encouraged to adopt rules governing their conduct, even outside the context of armed conflicts. Such practice is not immune to criticisms; for instance, it may diminish the central role of states within the international legal community, as the gap between states and NSAs would be reduced. Also, it has been noted that this involvement may lead to a regression of the content of the norms. As noted by Ryngaert with particular reference to customary law, "[a]rmed opposition groups […] are not known for their respect for IHL. Indeed, quite the contrary is true. Accordingly, including non-state actors in the process of customary law formation may possibly lead to *regression*".[446] On the other hand, it has been suggested that the involvement of ANSAs may make them more aware, accountable, and even willing to respect the rules, as they would feel a sense of ownership of such rules.[447] In addition, obligations of IHRL addressed to ANSAs have emerged. Indeed, as the rules of IHL have become insufficient to regulate the conduct of ANSAs, new rules, often of IHRL, have arisen. The development of IHRL rules addressed to ANSAs is, ultimately, due to the application of a functional approach to the matter at issue. Conclusions on the practical and theoretical aspects related to this evolution can thus be inferred. Also, an approach focused on the effectiveness of the law must be adopted to assess the development of the law-making process. In fact, the practice of engaging with ANSAs in the adoption of regulatory instruments, ultimately based on their consent, appears appropriate to maintain the effectiveness of the rules. This represents a novelty for a legal system in which consent has always been linked to the sovereignty of states.

[446] See Cedric Ryngaert, 'Non-State Actors in International Humanitarian Law' in Jean d'Aspremont (ed), *Participants in the International Legal System - Multiple perspectives on non-state actors in international law* (Routledge 2011) 289.
[447] See Sandesh Sivakumaran, 'The Ownership of International Humanitarian Law: Non-State Armed Groups and the Formation and Enforcement of IHL Rules' in Benjamin Perrin (ed), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* (UBC Press 2012).

2. Consolidated practice. ANSAs and rules of IHL

2.1. Lack of consent and doctrinal justifications

Considering the long history of the law of war, "as old as an institution as war itself",[448] IHL rules binding ANSAs are relatively recent; however, this is not true in an absolute sense. In fact, NIACs have been considered for a long time to fall within the scope of the *domaine reservé* of states, therefore they were not governed by IHL.[449] Ultimately, however, the international system had to admit the relevance of ANSAs - at least during armed conflicts - and take them into consideration to develop effective rules of IHL. In this regard, the first significant evolution occurred with the adoption of the Four Geneva Conventions of 1949; CA3, in fact, applies to each party of a NIAC, consequently imposing obligations also on the ANSAs involved.[450] The discipline of NIACs has then been supplemented by other rules, especially by APII.[451] Thus, despite being emerged more recently and in stark contrast with the traditional framework of international law of warfare, conventional rules of IHL have bound ANSAs at least for decades. Moreover, if one compares these rules compared to other bodies of rules relevant for ANSAs, it appears that the provisions of IHL correspond to the most numerous prescriptions of international law applicable to ANSAs. This is not surprising because, after all, the principal events involving ANSAs have been, historically, armed conflicts.

Even though they are today generally endorsed, IHL rules addressed to ANSAs present peculiarities, which are difficult to explain with the application of the paradigms of traditional international law. Rules of international law are created by states to govern their conduct and depend on their consent.[452] Therefore, binding third, non-state parties to the respect of obligations they did not consent to

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[448] Ian Harding, 'The Origins and Effectiveness of the Geneva Conventions for the Protection of War Victims' (1973) 13 International Review of the Red Cross 283, 285.

[449] See, e.g., David A Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949' (1979) 11 Case Western Reserve Journal of International Law 37. Even though, as noted by Elder, previous experiences show that non-state entities could wage in war under a practical point of view, the main international treaties on warfare previous to the Geneva Conventions of 1949, e.g. the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864, regarded states only. See 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Commentary of 2016' (n 49) para. 358.

[450] 'Geneva Conventions on the Law of War' (n 48) common Art. 3.

[451] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)' (n 58). Other relevant provisions are contained in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

[452] In this regard, see the *Lotus case*: "[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims". *The Case of the S.S. 'Lotus'* [1927] Permanent Court of International Justice Series A No. 10 18.

constitutes a theoretical obstacle to overcome. In fact, the Diplomatic Conference of Geneva of 1949 was composed by States only.[453] The issue posed by CA3 was already clear when the Geneva Conventions were drafted, as Pictet noted in the first Commentary to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field:

> "what justification is there for the obligation on the adverse Party in revolt against the established authority? At the Diplomatic Conference doubt was expressed as to whether insurgents could be legally bound by a Convention which they had not themselves signed".[454]

To be true, several NLMs participated in the following Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which led to the adoption of API and APII.[455] However, their participation must not be considered as a substitute for consent. First, only a small group of NLMs participated in the Diplomatic Conference. Indeed, only 11 NLMs participated as observers, and only 3 signed the final act.[456] Second, these Protocols bind other ANSAs as well. In fact, defining its scope of application, API states that it applies also in "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",[457] without any further clarification, hence without any substantive restriction. APII establishes a threshold for its application,[458] binding every ANSA party of a conflict once the threshold for the application of APII itself is reached, however no substantive limitation is provided. As time went on, the Protocols started applying to new ANSAs, which of course did not even exist when the Protocols were adopted. Therefore, API and APII are intended to apply despite the lack of participation of the affected ANSA in their adoption. In addition, it must be underlined that, as already mentioned, the ANSAs participating in the Diplomatic Conference were only NLMs. At the time of the adoption of the two Additional Protocols, there was widespread recognition of the right of people to self-determination

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[453] Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, *Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I* (Federal Political Department 1963) 196.

[454] "[W]hat justification is there for the obligation on the adverse Party in revolt against the established authority? At the Diplomatic Conference doubt was expressed as to whether insurgents could be legally bound by a Convention which they had not themselves signed". Jean S Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross 1952) 51.

[455] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-1977), Vol. I*, 7.

[456] See Judith Gardam, 'Protocols Additional to the Geneva Conventions of 12 August 1949 - Introductory Note' (*United Nations Audiovisual Library of International Law*).

[457] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)' (n 50) Art. 1.

[458] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)' (n 58) Art. 1.

and endorsement of the goals of NLMs; however, NLMs are only one type of ANSAs. This subjective limitation implies that a pre-evaluation of the legitimacy of ANSAs on the basis of the aims pursued was made, and that this assessment of legitimacy was considered necessary for an ANSA to be accepted as part of the international discourse. In conclusion, the relevant provisions of IHL addressed to ANSAs raise theoretical issues regarding the lack of consent, which cannot be considered solved by the invitation of ANSAs to the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Similar issues concern the rules of IHL having a customary law status, as the role of ANSAs in the formation of custom is still unclear and debated.[459]

The existence of IHL provisions binding ANSAs without their consent has been variously justified in doctrine. Over the years, several theories have been submitted,[460] and different international courts and tribunals have resorted to them.[461] In particular, the theory based on customary law, the theory based on general principles of international law, the effective sovereignty theory, the third Party theory, and the legislative jurisdiction theory have been proposed and applied. These doctrinal justifications can be gathered according to the main element at the base of each reasoning: the particular nature of the rules, the particular nature of ANSAs, and the particular relationship between States and members of ANSAs. An additional categorisation proposed is based on the distinction between justifications referring to the type of rule and justifications referring to the type of ANSA.[462] The mentioned theoretical justifications for the application of IHL rules to ANSAs are therefore analysed. From the analysis of these theoretical justifications, it appears that doctrinal efforts have focused on connecting this phenomenon to the traditional system of international law, despite the lack of a key element of traditional international law: consent.

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[459] Jean-Marie Henckaerts and others (eds), *Customary International Humanitarian Law. Practice*, vol 2 (Cambridge University Press 2005); Yoram Dinstein, 'The ICRC Customary International Law Study' (2006) 82 International Law Studies 99.

[460] See, e.g., Jann K Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 International Review of the Red Cross 443; Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 International and Comparative Law Quarterly 369; Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 International Law and Comparative Law Quarterly 416.

[461] See, e.g., *The Prosecutor vs Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu,* Special Court of Sierra Leone, Trial Chamber II Case No SCSL-04-16-T .

[462] In particular, see Sivakumaran, 'Binding Armed Opposition Groups' (n 460). The classification has then been recalled by other authors, e.g. Kleffner (n 460).

2.2. Focus on the type of rules. Customary law and general principles

The alleged peculiar nature of IHL rules has been evoked to justify the imposition of international obligations to ANSAs. In this regard, two theories have been proposed, one based on the customary nature of the rules of IHL and the other based on the nature of general principles of these rules. According to these theories, the characteristics of customary law and general principles of international law can justify the application of IHL rules to ANSAs without their consent to be bound.

The first theory argues that the rules of IHL have a customary nature, and, for this reason, they bind ANSAs.[463] The theory is therefore based on two premises: the bindingness of customary rules for NSAs (ANSAs included), and the customary nature of IHL rules. It is therefore appropriate, first, to consider these premises separately and, then, to consider possible objections.

The first premise, namely the bindingness of customary rules for NSAs, is widely accepted today.[464] In this regard, the ICJ affirmed that "general or customary law rules and obligations […], by their very nature, must have equal force for all members of the international community".[465] As the ICJ makes a general reference to "members of the international community", rather than states, it can be inferred that the binding force of customary rules is not limited to states. As widely known, the consent of each entity involved is not necessary for the formation of a customary rule.[466] In Sivakumaran's words, "custom, as a source of international law, binds all entities with personality under international law".[467] As ANSAs have, at least in a limited form, ILP, it can be inferred that they are bound by rules of customary law even without their consent.[468]

However, doubts about the above conclusion can be raised, especially if one considers the process of identification of customary rules of IHL. Indeed, such a process reveals to be particularly complex, and its results far from undisputed. This is demonstrated, for instance, by the research undertaken

[463] See, e.g., Sassòli (n 283).
[464] UN Security Council, 'Resolution 2286 (2016), S/RES/2286 (2016)' (3 May 2016); UN General Assembly, 'Resolution 73/204. Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts, A/RES/73/204' (9 January 2019).
[465] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* (n 315) para. 63. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Merits* (1986) I.C.J. Reports 1986 14 (International Court of Justice).
[466] See, e.g., Niels Petersen, 'The Role of Consent and Uncertainty in the Formation of Customary International Law', *Max Planck Institute for Research on Collective Goods Preprint* (2011).
[467] Sivakumaran, 'Binding Armed Opposition Groups' (n 460) 373.
[468] See, e.g., D Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20 Journal of Conflict and Security Law 101.

within the ICRC. The manual finally produced,[469] in fact, was not unanimously welcomed.[470] Doubts have been raised regarding the methodology employed, in particular regarding the selection of the relevant practice. Indeed, while the relevance of state practice in the reconstruction of customary rules of international law is uncontested,[471] the importance given to the practice of ICRC, which can only contribute to the evolution of State practice but not directly participate in the process, has been described as "surprising (and inappropriate)",[472] especially considering the limited relevance granted to the practice of other NSAs.

In the same vein, the ILC Special Rapporteur Michael Wood in its Second Report on the Identification of Customary International Law, in the Second Report of Formation and Evidence of Customary International Law, affirmed that the practice of non-state actors other than international organisations "[is] not 'practice' for purposes of the formation or evidencing of customary international law".[473] This opinion appears in Conclusion 4 of the Draft conclusions on identification of customary international law, which states:

> "The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.
>
> […]
>
> Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law".[474]

The Commentary to this conclusion further clarifies that "the conduct of entities other than States and international organizations — for example, non-governmental organizations (NGOs) and private individuals, but also transnational corporations and non-State armed groups — is neither creative nor

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[469] Jean-Marie Henckaerts and others (eds), *Customary International Humanitarian Law. Rules*, vol 1 (Cambridge University Press 2005); Henckaerts and others (n 459).
[470] See, e.g., Dinstein (n 459); George H Aldrich, 'Customary International Humanitarian Law -- An Interpretation on Behalf of the International Committee of the Red Cross' (2006) 76 The British Year Book of International Law 503.
[471] 'Statute of the International Court of Justice' (1945) Art. 38. For case law references see, e.g., *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* (n 315); *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* (n 4).
[472] Dinstein (n 459) 102.
[473] International Law Commission, 'Second Report on Identification of Customary International Law by Michael Wood, Special Rapporteur, A/CN.4/672' (UN General Assembly 2014) para. 45.
[474] International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) II Yearbook of the International Law Commission, 2018 Conclusion 4.

expressive of customary international law. As such, their conduct does not contribute to the formation, or expression, of rules of customary international law".[475]

It must be noted that this approach is not unanimously confirmed by previous international case law. In fact, the ICTY cited the practice of different ANSAs, e.g., the FMLN in El Salvador,[476] in order to reconstruct customary IHL rules, and affirmed that "the behaviour of belligerent States, Governments and insurgents"[477] contribute to the formation of customary rules of IHL.

Be that as it may, it can be concluded that an assessment of customary IHL that gives scarce attention to the practice of ANSAs (such as the one adopted by the ICRC) may compromise the willingness of ANSAs to comply with the customary IHL rules, ultimately impairing the effectiveness of the customary provisions of IHL in the protection of humanitarian interests.[478]

Considering the second premise, namely that IHL rules have a customary nature, many drawbacks emerge. In particular, it must be clarified whether all IHL rules have acquired the *status* of customary law or not, and, if not, which ones enjoy such a *status*. In fact, only a limited number of IHL rules are expressly recognised as having customary *status*. It is true that CA3 has undisputedly acquired the *status* of customary law,[479] yet because of its limited content, it is considered only a "minimum yardstick",[480] a "rudimentary framework".[481] The customary *status* of the other rules of IHL is not equally certain. APII has customary *status* only in its "core provisions".[482] Hence, despite the efforts of the ICRC to identify customary IHL rules, the customary nature of IHL rules is still limited and widely debated.

In conclusion, it may be concluded that both the main grounds upon which the "customary law" theory is premised present different shortcomings.

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[475] ibid 132.
[476] *Prosecutor v Dusko Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* [1995] International Criminal Tribunal for the Former Yugoslavia IT-94-1-AR72 para. 107.
[477] ibid para. 108.
[478] See Annyssa Bellal, 'Welcome on Board: Improving Respect for International Humanitarian Law Through the Engagement of Armed Non-State Actors' in Terry D Gill and others (eds), *Yearbook of International Humanitarian Law Volume 19, 2016*, vol 19 (TMC Asser Press 2018). But see, in contrast, Olivier Bangerter, 'Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not Todays Armed Groups: Structure, Actions and Strategic Options' (2011) 93 International Review of the Red Cross 353.
[479] *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* (2004) (Special Court for Sierra Leone).
[480] *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Merits* (n 465) para. 218.
[481] Henckaerts and others (n 469) xxxv.
[482] *Prosecutor v Dusko Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (n 476) para. 98. See also ibid. para. 117.

The second doctrinal justification based on the particular nature of IHL rules assumes that IHL rules correspond to general principles of international law, which have been considered part of the body of general international law.[483] In this regard, it must be noted that, in the case on *Military and Paramilitary Activities in and against Nicaragua,* the ICJ has affirmed that CA3 reflects "elementary consideration of humanity";[484] however, this theory presents several shortcomings.

First, this doctrinal justification suffers the indeterminacy due to the unclear identification of the fundamental principles of IHL. Some scholars consider the principles of distinction, proportionality, and military necessity as general, or fundamental, principles of IHL, and this expansive definition of general principles of IHL was explicitly endorsed by the ICRC;[485] however, it is not unanimously accepted. Sivakumaran identifies as general principles of IHL only the principles of distinction and proportionality.[486] Seeking a solution to this debate, it has been claimed that all IHL rules are general principles of international law, because they descend from the principles unanimously recognised as general principles of international law. For instance, as the principle of humanity attempts to humanise armed conflicts, it leads to the limitations of the means and methods of warfare. Consequently, it can be considered the ground for the application of rules requiring humane treatment of prisoners or prohibiting the use of weapons which cause unnecessary sufferings.[487]

However, it must be observed that the other IHL rules only *descend* from general principles; consequently, they are not general principles themselves. In the ICRC casebook "How does law protect in war?", it is affirmed that the principles "inspire existing rules, support them, make them understandable, and have to be taken into account when interpreting them";[488] the ICJ affirmed that "the Geneva Conventions are in some respects a development, and in other respects no more than the

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[483] See, e.g., Rosemary Abi-Saab, 'The "General Principles" of Humanitarian Law According to the International Court of Justice' [1987] International Review of the Red Cross 367.

[484] *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Merits* (n 465) para. 218. The ICJ cited *The Corfu Channel Case, Merits* (1949) I.C.J. Reports 1949 4 (International Court of Justice) 22. It has to be noted that such conclusion was not accepted by all its judges in the first place. In his separate opinion, Judge Ago stated: "I am moreover most reluctant to be persuaded that any broad identity of content exists between the Geneva Conventions and certain 'fundamental general principles of humanitarian law', which, according to the Court, were pre-existent in customary law, to which the Conventions 'merely give expression' or of which they are at most 'in some respects a development'". *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Merits* (n 465) Separate opinion of Judge Ago, para. 6.

[485] Marco Sassòli, Antoine A Bouvier and Anne Quintin, 'Fundamental Principles of IHL' (*How Does Law Protect in War?, Online Casebook*, 2014) <https://casebook.icrc.org/glossary/fundamental-principles-ihl>.

[486] See, e.g., Sivakumaran, 'Binding Armed Opposition Groups' (n 460) 369. For another doctrinal classification, see Dieter Fleck, 'General Principles of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Law* (4th ed., Oxford University Press 2021).

[487] Nicholas Tsagourias and Alasdair Morrison, *International Humanitarian Law: Cases, Materials and Commentary* (Cambridge University Press 2018).

[488] Marco Sassòli, Antoine A Bouvier and Anne Quintin, 'Fundamental Principles of IHL' (*How Does Law Protect in War?* (n 485), Fundamental principles of International Humanitarian Law.

expression, of such principles".[489] This implies that not all the rules of IHL are general principles of international law. Furthermore, the general principles of international law are characterised by a significant degree of vagueness, and do not consist in a detailed regulation.[490]

In conclusion, the two doctrinal justifications which refer to the particular *status* of IHL rules (as customary law and general principles of international law) suffer from similar shortcomings and do not satisfactorily explain why and how ANSAs are bound to respect IHL rules. Tellingly, Sivakumaran has identified these theories as "*limited* by the type of rule"[491] (emphasis added). These theories argue that ANSAs are undisputedly bound by rules of IHL; however, since this inference is limited to a minimum core of relevant customary norms or principles, it does not automatically solve the problems linked to the lack of consent of ANSAs or their participation to the formation of relevant rules.

2.3. Focus on the ANSA. The effective sovereignty argument

Other authors have justified the application of IHL rules to ANSAs on the basis of the characteristics of these actors. One of the doctrinal justifications submitted is the so-called effective sovereignty argument. The latter applies the principles of succession in treaties and claims that ANSAs are obliged to respect the international obligations derived from conventional instruments ratified or accessed by the State they are fighting against (in particular when the ANSA claims to represent the country), as a successor State would. The ICRC supported this justification at the time of the adoption of the Geneva Conventions. As stated in the ICRC Commentary to the Geneva Convention III:

> "if the responsible authority at [ANSA's] head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country".[492]

Under international law, a change in government does not affect the validity of international treaties signed by the previous government. Hence, if an ANSA becomes the new government of a certain state, it is bound to the respect of treaties previously signed by its previous governments, even when the ANSA opposes the national authorities and is engaged in a conflict against them. Reading the above-mentioned excerpt from Pictet's Commentary, it may be inferred that the legal argument at

[489] *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Merits* (n 465) para. 218.
[490] Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Bloomsbury Publishing 2016).
[491] Sivakumaran, 'Binding Armed Opposition Groups' (n 460) 371.
[492] Pictet (n 443) 37.

issue may be pushed even further, up to the point of affirming that, under the principle of succession, even ANSAs only *claiming* to be the government of a territory should be bound by obligations arising from relevant treaties.

This theory presents several shortcomings. First, under a practical point of view, it is subjectively limited in its application, as ANSAs must have a particular *status* for it to apply. In fact, the mentioned statement contained in the ICRC Commentary is based on a condition, namely that the responsible authority exercises effective sovereignty. It is true that successive theoretical elaborations have affirmed that the willingness to become the new government suffices; however, even this condition does not apply to all ANSAs. Indeed, this theory takes for granted that ANSAs claim to represent the State, which is not always the case. Quite the opposite can be true, as practice shows that many ANSAs pursue other interests, such as new elections, or are driven by fundamentalist beliefs. For instance, the Free Aceh Movement (GAM) was a separatist armed group active until the peace agreement of 2005, claiming independence for the Aceh region from Indonesia.[493] The Moro Islamic Liberation Group (MILF) is an armed group seeking independence for the Moro region from the Philippines and the creation of a State ruled by the Islamic law.[494] The same purpose is pursued by the group Boko Haram, a "Sunni Islamic fundamentalist sect"[495] active in Nigeria. Also, "it has been shown that parties to an armed conflict may at times have an interest *not* to end an armed conflict and become the new government, but instead thrive on the general insecurity in the region where they operate, because that insecurity enables them to retain access to economic resources".[496] Nonetheless, international practice shows that rules of IHL bind ANSAs despite their claims to represent or to act as the legitimate government.[497]

In addition, it has been noted that the reference to "claims" without any further specification can be applied to the extreme and can lead to the conclusion that every ANSA claiming to represent the Country is bound by IHL rules, without taking into due consideration the concrete possibilities of success of the ANSA. Sivakumaran has posed this question, prompted by a realistic perspective: "[i]f an armed opposition group claims to represent the country and is defeated some two days later, would

[493] Kirsten E Schulze, *The Free Aceh Movement (GAM): Anatomy of a Separatist Organization* (East-West Center 2004).
[494] Zachary Abuza, 'The Moro Islamic Liberation Front at 20: State of the Revolution' (2005) 28 Studies in Conflict & Terrorism 453.
[495] Muyiwa Adigun, 'Boko Haram's Radical Ideology and Islamic Jurisprudence' in John-Mark Iyi and Hennie Strydom (eds), *Boko Haram and International Law* (Springer International Publishing 2018) 205.
[496] Kleffner (n 460) 453–454. Citing Herfried Münkler, *Die Neuen Kriege* (Rowohlt Verlag 2002).
[497] Raphaël van Steenberghe, 'Non-State Actors from the Perspective of the International Committee of the Red Cross' in Jean d'Aspremont (ed), *Participants in the International Legal System - Multiple perspectives on non-state actors in international law* (Routledge 2011).

it really make sense for it to have been subject to the rules governing internal armed conflict by reason of its claim to represent the state?".[498]

Zegveld has proposed a variation of this theory. She has argued that the principle of succession applies to ANSAs exercising *de facto* control over a territory, as this control substantially shows that the ANSAs aims to represent the State, without the need of explicit claims.[499] However, even this modified version is subjectively limited in its application, as it excludes ANSAs that do not exercise such control. Moreover, even the administration of *de facto* control over part of a State does not imply that the ANSA exercising such power claims to be the government of a State, or of part of a State, as noted by Sivakumaran and Kleffner.[500] Ultimately, this reasoning does not justify the application of IHL rules to all ANSAs, as it does not justify how ANSAs that do not exercise sovereignty or at least claim to represent the country are bound by IHL rules without their consent.[501]

Furthermore, this theory does not explain under a theoretical point of view how ANSAs *per se* are bound by IHL rules. As ANSAs become legally relevant only when they claim to represent a state, IHL rules do not apply to ANSAs *qua* ANSAs, but *qua* the government they may form. Applying the rules on state succession, the theory prioritises the maintenance of the *status quo* of the international legal system and its actors over the practical compliance to its rules. This reconstruction risks creating a wide gap between theory and practice, as it is premised on a legal interpretation that is not necessarily matching with reality.

In conclusion, this argument also has shortcomings under both a practical and logical point of view. On the practical side, it may undermine the willingness of ANSAs to accept and respect rules of international law. From the point of view of logical consistency, it must be recalled that ANSAs may not claim to represent the State, and they may be, and they frequently are, in open contrast with the legitimate government they fight against, and refuse to respect its rules. Therefore, almost paradoxically, this argument is ultimately based on ANSAs' acceptance of the rules to which the state has abode by.[502]

[498] Sivakumaran, 'Binding Armed Opposition Groups' (n 460) 380.
[499] Zegveld (n 59); Kleffner (n 460).
[500] Sivakumaran, 'Binding Armed Opposition Groups' (n 460); Kleffner (n 460).
[501] Sivakumaran, 'Binding Armed Opposition Groups' (n 460).
[502] Kleffner (n 460).

2.4. Focus on the ANSAs. Binding nature of treaties on third parties

Another theory focused on ANSAs, developed by Antonio Cassese,[503] refers to the rules concerning treaties and third parties, and is thus based on Articles 34-37 of the Vienna Convention on the Law of Treaties (VCLT). The basic rule in this regard establishes that treaties do not produce effect on third parties without their consent,[504] and a treaty to which a state is not party is actually a *res inter alios acta (alteri nocere non debet)*, namely a treaty concluded by others that shall not affect third parties.[505] However, exceptions are possible. To create rights or obligations on third parties, two conditions must be satisfied: the intention of the contracting parties to create a right or an obligation on a third party (first condition),[506] and the acceptance by the third party of such obligation or right (second condition).[507] The latter condition has different characteristics, depending on whether the treaty creates rights or obligations. In the first case, the consent is presumed "so long as the contrary is not indicated, unless the treaty otherwise provides";[508] in the second case, the third party must expressly accept the obligations in writing.[509] This doctrine attempts to reconcile an anomaly of the system of traditional international law using the instruments provided by the system itself. In fact, it allows the establishment of obligations without the consent of the recipient of the obligations at issue through the application of established rules of international law.

This theory has been widely criticised. First, the VCLT is a treaty, so its provisions only bind its parties. It is true that the VCLT has been ratified by a consistent number of states;[510] however, it has not been ratified by *all* the states. Consequently, its provisions are not always applicable, as a treaty could be concluded by a state that is not party to the VCLT. The second criticism focuses on the fact that the VLCT provisions regard treaties concluded by states. In fact, not only Art. 1 affirms that the Convention applies to "treaties between States",[511] but Artt. 34-37 repeatedly mention, rather than

[503] Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (n 460).
[504] 'Vienna Convention on the Law of Treaties' (n 294) Art. 34.
[505] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 93.
[506] 'Vienna Convention on the Law of Treaties' (n 294) artt. 35, 36.
[507] ibid.
[508] ibid Art. 36.
[509] ibid Art. 35.
[510] At the time of writing, the VCLT has 116 parties.
https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII1&chapter=23&Temp=mtdsg3&clang=_en
[511] 'Vienna Convention on the Law of Treaties' (n 294) Art. 1.

third parties, "third States".[512] Given that ANSAs are ontologically different from states,[513] it does not appear clear how and why these provisions may bind ANSAs.

These criticisms were confuted by Cassese himself, resorting to international customary law. In fact, international practice and case law have repeatedly proven that the VCLT is an "authoritative statement of the law of treaties"[514] and that questions regarding the non-applicability of certain VCLT rules because of their non-customary nature have been disregarded by international courts.[515] Cassese then affirmed that "the customary rules on the matter have a broader scope, in that they govern the effects of treaties on any international subject taking the position of a third party *vis-à-vis* a treaty".[516] In addition, he suggested that the text of VCLT does not expressly limit its application to treaties between States. Indeed, while Art. 1 affirms that the VCLT applies to a particular type of treaties, namely the "treaties between States",[517] it does not expressly state anything on the types of treaties to which it does *not* apply.[518] Consequently, since it is not expressly forbidden, VCLT provisions would also be applicable to non-state entities. The customary status of the VCLT provisions would lead to their application to all states, regardless of their ratification or accession to the treaty, while the broader subjective application of these rules would justify the application of these rules to non-State entities, such as ANSAs.

Adopting a neutral approach, it must be noted that this theory confirms the relevance of the willingness of ANSAs to be bound for the application of IHL rules. After all, even CA3 includes the possibility for parties to a NIAC to conclude further agreements between the parties to an armed conflict, thus recognising the possible legal relevance of the will expressed by ANSAs.

However, this theory is still not unanimously supported. The customary status of the relevant provisions of VCLT is "less than clear".[519] Even accepting their customary nature, their applicability to actors other than states cannot be easily endorsed. In this sense, Sivakumaran has affirmed that

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[512] ibid Artt. 34-37.
[513] Even more so not all the ANSAs proclaim themselves as the legitimate government of a States, and surely, they are not all considered as States by the international community.
[514] Aust, 'Limping Treaties: Lessons from Multilateral Treaty-Making' (n 293) 250.
[515] Aust, 'Limping Treaties: Lessons from Multilateral Treaty-Making' (n 293).
[516] Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (n 460) 423.
[517] 'Vienna Convention on the Law of Treaties' (n 294) Art. 1.
[518] Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (n 460).
[519] Sivakumaran, 'Binding Armed Opposition Groups' (n 460) 377. See also Kleffner (n 460); Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490); Ian M Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., Manchester University Press 1984); Aust, 'Limping Treaties: Lessons from Multilateral Treaty-Making' (n 293).

> "Article 1 of the VCLT explicitly limits the Convention to treaties concluded between states […]. In light of this, it is difficult to argue that the rules governing treaties and third parties contained in the VCLT apply to non-state third parties. The rules may not be applied *qua* treaty".[520]

Looking at international practice, there are not relevant issues regarding the willingness of states parties to the Geneva Conventions to bind ANSAs. It has been affirmed that the will to confer rights to third parties, while possible, must be thoroughly assessed, in order to duly respect the sovereignty of states. In this regard, the Permanent Court of International Justice already affirmed:

> "[i]t cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such".[521]

Applying this reasoning to the subject at issue, it is true that several IHL rules have established obligations addressed to ANSAs,[522] thus manifesting the willingness to bind these entities. Hence, the first condition established by the articles of the VCLT on treaties and third parties, namely the intention of the parties of the treaty to establish an obligation on a third party, can be considered fulfilled. Indeed, it has been affirmed that "[i]t is evident, both from the plain text of the provisions and the *travaux préparatoires*, that common Article 3 and Additional Protocol II were intended to apply equally to all parties to a non-international armed conflict".[523]

However, the fulfilment of the second condition in practice is more problematic. In particular, if the *pacta tertiis* principle and its exception based on consent can also apply to non-state entities, then the application of obligations to ANSAs relies on their express consent to be bound. This leads to uncertainty, as it is not always possible to determine whether an ANSA consents to treaty obligations of IHL before a conflict takes place. In addition, if each ANSA can consent to rules of IHL, then the consent may vary from conflict to conflict and from one ANSA to another, leading to practical difficulties.[524] As already mentioned, it is true that some NLMs participated in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in

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[520] Sivakumaran, 'Binding Armed Opposition Groups' (n 460) 377.
[521] *Case of the Free Zones of Upper Savoy and the District of Gex (France v Switzerland), Judgement* [1932] PCIJ Series A/B (Permanent Court of International Justice) No. 46 para. 149.
[522] See CA3 and APII.
[523] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 110.
[524] Sivakumaran, 'Binding Armed Opposition Groups' (n 460).

Armed Conflicts and were involved in the drafting of API; however, these NLMs were only a limited selection of ANSAs, and later other ANSAs have emerged. In conclusion, the second condition required for a treaty to apply to third parties, namely the consent of the latter, cannot be considered satisfied. In this sense, Sivakumaran pessimistically affirmed:

> "at most [this theory] binds only certain types of armed opposition groups, namely those that agree to be bound. Armed opposition groups that do not consider themselves bound – the very groups that are the most in need of being bound – would not be bound".[525]

Under a theoretical perspective, this justification may accidentally reinforce the position of ANSAs in the international legal community. In fact, the request of consent as an exception to the *pacta tertiis* rule is a corollary of state sovereignty, as it ultimately allows states to be bound only by obligations they freely accept. As ANSAs are not states, it may be inferred that they are not protected by such principles. In fact, "states have consistently imposed obligations on non-state international persons, absent the consent of such entities".[526] Ultimately, this theory may not be well received by states.

Besides these theoretical doubts, this theory cannot be used to explain how ANSAs are bound by rules of international law they did not consent to. The theory based on the application of conventional obligations on third Parties cannot provide a satisfactory explanation for the bindingness of IHL rules on ANSAs, as this theory is subjectively limited and do not apply to all ANSAs.

2.5. Focus on the relationship between states and individuals. Legislative jurisdiction argument

Under the doctrine of the legislative jurisdiction, considered by Sivakumaran "the overarching explanation",[527] ANSAs are bound to the respect of obligations *via* the State. This theory is based on the reasoning that "when a state ratifies a treaty, it does so not just on behalf of the state but also on behalf of all individuals within its territory",[528] hence "the treaty becomes part of domestic law and therefore obliges all citizens, including rebels".[529] It is submitted that, when a State commits to respect certain rules, ANSAs – actually, the individuals, members of ANSAs – are bound to respect these rules as well, because governments have the power to legislate for all their nationals. Despite being

[525] ibid 379.
[526] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 104.
[527] Sivakumaran, 'Binding Armed Opposition Groups' (n 460) 381.
[528] Considering this argument as "the overarching explanation", ibid.
[529] Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (n 460) 429.

widely accepted,[530] this theory has received several criticisms. First, it has been contested that it does not correctly distinguish rules of international and domestic level. Second, the limit set by the nationality of members of ANSAs as foundation of the theory have been highlighted. Third, the reluctance of ANSAs to be bound by the rules binding the authorities they are opposed to should be taken into consideration. In this regard, the use of the term "rebels" by Cassese[531] is significant.

Regarding the first point, it has been submitted that this justification does not provide a proper explanation of how IHL rules bind ANSAs since it fails to properly distinguish international and domestic law. In fact, it only focuses on rules that are binding because they have become part of domestic law. As Cassese affirmed:

> "[the issue] [i]s plainly based on a misconception of the relationship between international and domestic law. Undisputedly, in most States international treaties become part of domestic law upon ratification, but they then bind individuals and State authorities qua domestic law, and indeed benefit from all the judicial guarantees provided for by that legal system. However, what is at stake in the present case is not whether rebels are subjects of domestic law, but their legal standing in international law – their status vis-à-vis both the lawful Government and third States and the international community at large".[532]

This inaccuracy is not limited to the sphere of theoretical speculation, but can have practical effects, leading to three main problems. First, this theory implies that if a State does not consent to be bound to a certain rule, then the ANSA will not be bound as well. This observation is not irrelevant, as several treaties governing the conduct of ANSAs are not ratified by all States. For instance, despite the large number of ratifications and accessions, APII has not been ratified by States in which NIACs have taken place in recent years, such as Syria,[533] and other IHL treaties, such as the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, have even less State Parties.[534] The second problem arises considering the non-self-executing rules of international law, which require specific procedures to be incorporated into domestic law.[535] These rules do not bind nationals of the state before the adoption of the necessary internal instruments. Consequently,

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[530] See Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002).
[531] Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (n 460).
[532] Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (n 460) 429.
[533] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)' (n 58).
[534] 'Convention for the Protection of Cultural Property in the Event of Armed Conflict' (14 May 1954); 'First Protocol for the Protection of Cultural Property in the Event of Armed Conflict' (14 May 1954); 'Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict' (26 March 1999).
[535] Crawford, *Brownlie's Principles of Public International Law* (n 66).

"[o]rganized armed groups would not incur any obligations in the absence of the necessary implementing legislation".[536] Third, justifying the application of IHL rules to ANSAs through the domestic law also overlooks problems of compliance. In fact, this theory ignores that ANSAs would ultimately be bound by internal rules of the State they are fighting against. As noted by Murray:

> "should armed groups be bound by domestic law and not international law […] this would negate the very purpose of the relevant international humanitarian law provisions. These were intended to offer protection beyond the national authorities by ensuring the international supervision of non-international armed conflicts".[537]

Binding ANSAs to IHL *via* domestic law thus impairs the achievement, in practice, of the purpose justifying the adoption of rules addressed to ANSAs.

This criticism has, in turn, been subjected to criticisms. In fact, it has been noted that "the direct applicability (or effect) of an international rule […] is a question of international law and not a question of domestic law",[538] as "[t]he direct applicability of a rule, by contrast to the issue regarding the incorporation of such a rule into national law, is regulated by international law".[539] Nonetheless, the practical shortcomings persist.

In addition, the legislative jurisdiction argument does not take into due consideration the ontological difference between a group and the sum of its members, ultimately leading, again, to problems of compliance. ANSAs, which are groups by definition, are organised under the form of internal authority. This is confirmed by studies and case law on the topic.[540] The mere fact that ANSAs can engage in armed conflicts and/or control part of a territory, even for a short time, implies that they can be considered a system, which is "more than collections of isolated individuals – key is the connection and the organization".[541] Indeed, several obligations of IHL are inherently addressed to group entities and would difficultly bind individuals.[542] Consequently, ANSAs falling under the scope of CA3 must be considered as organised groups, rather than single individuals. In addition, ANSAs

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[536] Kleffner (n 460) 446.
[537] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 111. See also Moir (n 530).
[538] van Steenberghe (n 497) 217.
[539] ibid.
[540] See, e.g., International Committee of the Red Cross, 'How Is the Term "Armed Conflict" Defined in International Humanitarian Law?' (n 61); International Committee of the Red Cross, 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Commentary of 2016' (n 49). Regarding international practice, see, e.g., *Prosecutor v Dusko Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (n 476); *Prosecutor v. Dusko Tadić (Opinion and Judgement)* (n 62).
[541] Andre Nollkaemper, 'Introduction' in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 15.
[542] For instance, the rules on internment of fighters and the guarantees of fair trial.

in control of a territory often declare that domestic law of the State is null in the territory under their control.[543] The legislative jurisdiction argument, creating a direct link between States and nationals and rejecting the possibility that ANSAs can bind themselves *qua* ANSAs, does not consider the ontological independence of these actors. As noted by Clapham, "[t]o explain in the alternative that the treaty binds all entities and individuals within the jurisdiction is less than convincing, especially where the entity at issue rejects not only the legitimacy of the state to enter into international obligations that would bind the non-state actor, but also rejects the operation of any such obligations through the medium of national law, which too is often rejected as illegitimate. Even if the theory is satisfactory for some, it can hardly be seen as useful for generating a sense of ownership over the norms in question".[544]

In conclusion, the theoretical issue raised by the imposition of IHL obligations to ANSAs without their consent has not been satisfactorily explained. The justifications submitted are limited to certain types of IHL rules, certain types of ANSAs, or are not politically feasible. In general, it can be affirmed that they all lack a thorough recognition of the peculiar characteristics of ANSAs as international actors and the connected implications, ultimately undermining the compliance to applicable rules of IHL. It is true that practice shows a wide recognition of IHL obligations addressed to ANSAs. However, this is not sufficient to consider such doctrinal problems as not relevant anymore. Moreover, as today ANSAs are often required to respect not only IHL rules, but also IHRL ones, it appears that the doctrinal issue linked to the lack of consent is emerging again.

3. Recent practice. ANSAs and rules of IHRL

3.1. Introduction

Looking at recent practice, it appears that ANSAs are recipients not only of obligations of IHL, but also of IHRL. This evolution, inevitably, has caused debates and legal issues. Indeed, "[w]hile it is largely uncontested that international humanitarian law imposes certain obligations on ANSAs, the application of other bodies of international law – particularly human rights law – is controversial".[545]

[543] Moir (n 530).
[544] Andrew Clapham, 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement (Draft for Comment)' (2010) 23.
[545] Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, 'Towards Engagement, Compliance and Accountability' (2011) 37 Forced Migration Review 4, 4.

These difficulties are mainly based on the traditional scope and field of application of IHRL and on the limited and unclear legal framework.

Regarding the first aspect, IHRL has emerged and has been developed to govern the relations between States and individuals. IHRL establishes rights that individuals can hold against states only,[546] and obligations binding states only;[547] NSAs, ANSAs included, have traditionally been excluded by this body of rules. In this regard, Zegveld concisely observed that "[t]he main feature of human rights is that these are rights that people hold against the state only".[548] Moir noted that "the law has not yet reached the stage whereby, during internal armed conflict, insurgents are bound to observe the human rights of government forces, let alone of opposing insurgents".[549] The author noted that this limitation is also linked to practical problems caused by the limited capacity of ANSAs; in fact, "[n]on-government parties are particularly unlikely to have the capacity to uphold certain rights (e.g. the right to due process, being unlikely to have their own legal system, courts, etc.)".[550]

As for the relevant legal framework, it must be noted that it is still debated and not coherently structured. Starting the analysis from the relevant conventional law, it appears that the conventional provisions on the matter confirm the existence of an ongoing debate. In fact, these provisions are not only limited in number, but also not sufficiently clear and open to different interpretations. Besides conventional instruments, looking at recent international practice (e.g., UNSC resolutions and Reports of the Human Rights Committee), it appears that, despite a noticeable trend towards the affirmation of rules of IHRL addressed to ANSAs, their application is not endorsed by the totality of international practice. In this chaotic scenario, the more and more relevant role of ANSAs even beyond armed conflicts emerges, together with the necessity to protect human rights even against the conducts of NSAs.

The role of legal scholarship becomes fundamental to confirm and justify the application of IHRL obligations to ANSAs. Therefore, several doctrinal justifications have been submitted, somewhat following the path already traced for IHL obligations. For Sivakumaran, the same theoretical

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[546] See, e.g., Zegveld (n 65); Andrew Clapham, 'The Challenge of Non-State Actors for Human Rights Law' [2010] International Human Rights Law.
[547] Robert McCorquodale, 'Overlegalizing Silences: Human Rights and Nonstate Actors' (2002) 96 Proceedings of the Annual Meeting (American Society of International Law) 384; Moir (n 530); Alexander Breitegger, 'The Legal Framework Applicable to Insecurity and Violence Affecting the Delivery of Health Care in Armed Conflicts and Other Emergencies' (2013) 95 International Review of the Red Cross 83; Yael Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 Cornell International Law Journal 21.
[548] Zegveld (n 65) 53.
[549] Moir (n 530) 194.
[550] ibid.

justifications provided for the application of rules of IHL to ANSAs can also be valid for the application of IHRL rules.[551] However, other theories especially focused on IHRL rules have been provided. In particular, it has been submitted that ANSAs are bound to respect these rules because of the *de facto* control over a territory or population. However, these justifications are not valid for all ANSAs and all relevant IHRL rules. This paragraph traces the emergence of IHRL obligations addressed to ANSAs, presenting relevant instruments, as well as the related theoretical justifications and criticisms.

3.2. Conventional law

Conventional law is characterised by its written form. Since the subject at issue is marked by a degree of uncertainty, these provisions can provide a more precise starting point for its assessment. Therefore, it appears appropriate to start the assessment of the framework of IHRL binding ANSAs from these, unequivocally existent, provisions.

International instruments of IHRL are normally addressed to States. For instance, the International Covenant on Civil and Political Rights (ICCPR) establishes:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant".[552]

Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) states:

> "Each State Party to the present Covenant undertakes to take steps […] with a view to achieving progressively the full realization of the rights recognized in the present Covenant".[553]

Despite the different characteristics between the obligations in the two Covenants (more immediate in the ICCPR, progressive in the ICESCR), they are both addressed to states.

It must be recalled that these conventional instruments oftentimes include both negative and positive obligations; the former oblige the state to abstain from a certain action, the latter to adopt a certain

[551] Clapham, 'The Challenge of Non-State Actors for Human Rights Law' (n 546).
[552] 'International Covenant on Civil and Political Rights' (n 128) Art. 2.
[553] 'International Covenant on Economic, Social and Cultural Rights' (12 December 1966) Art. 2.

course of action. This may lead to a state being accountable for violations committed by ANSAs. As explained in the General Comment no. 31 to the ICCPR,

> "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities".[554]

Paraphrasing the words of Clapham and Garcia Rubio regarding the relationship between states and corporations,[555] "failure to act to prevent, investigate or punish certain human rights abuses committed by [non-state] actors will result in a finding that the state has failed in its international human rights obligations".[556] However, given the particular context in which ANSAs operate, characterised by conflicts between national authorities and ANSAs, as well as the frequent weakness of state authorities, it appears appropriate to look for rules of IHRL directly addressed to ANSAs.

In this sense, Art. 30 of the Universal Declaration of Human Rights (UDHR) appears significant, as it affirms:

> "Nothing in this Declaration may be interpreted as implying for any State, *group* or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein" (emphasis added).[557]

However, such text cannot be interpreted as an admission that NSAs, thus ANSAs as well, can be bound by international obligations. Besides the non-binding character of the UDHR,[558] which led several commentators to affirm that the provision set only a rule of interpretation,[559] the other articles of the Declaration suggest an interpretative approach based on the right-holders, rather than on the duty-bearers. In this sense, Art. 2 states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration".[560] Therefore, the focus of the UDHR appears to be, rather than a series of

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[554] Human Rights Committee, 'General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 1326' (29 March 2004) para. 8.
[555] Corporations and multi-national enterprises are another type of NSAs.
[556] Andrew Clapham and Mariano Garcia Rubio, 'The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health' (World Health Organization 2002) 3 8.
[557] UN General Assembly, 'Resolution 217 (III). Universal Declaration of Human Rights, A/RES/3/217 A' (10 December 1948) Art. 30.
[558] It was adopted through a UN General Assembly resolution. See ibid.
[559] See, e.g., Cedric Ryngaert, 'Human Rights Obligations of Armed Groups' (2008) 41 Revue Belge de Droit International / Belgian Review of International Law 355.
[560] UN General Assembly, 'Universal Declaration of Human Rights' (n 551) Art. 2.

duties, the affirmation, an aspirational affirmation as suggested,[561] of a series of rights to be implemented in international law. Brown suggested that the openness of the UDHR on this issue is probably due to the political resistance of states against explicit international obligations addressed to them.[562] It is true that the same author affirms that the time has come to expand the meaning of the UDHR, as "[t]he rights in the Declaration should be understood as generating rights for states, international institutions, corporations, private persons, and even rights-bearing individuals themselves".[563] However, given the non-binding character of the UDHR and the absence of agreement on the recipients of its obligations, it appears more appropriate not to consider the UDHR as a valid example of obligations of IHRL addressed to NSAs. Instead, attention should be given to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPCRC) and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).

Starting with the OPCRC, its Art. 4.1 should be mentioned. In fact, it establishes that

> "Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years".[564]

Considering the analysis undertaken in Chapter 1, the armed groups mentioned in this Article are ANSAs; therefore, at first glance it appears that this Article imposes an obligation of IHRL to ANSAs. However, the Article continues as follows:

> States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
>
> The application of the present article shall not affect the legal status of any party to an armed conflict".[565]

Examining the Article in its entirety, it emerges that, indeed, ANSAs are not bound by this obligation: the real addressees of the obligation are states. ANSAs are called not to recruit children or use them in armed conflicts; however, the effective "feasible" measures to prevent such conduct must be

[561] Ronen (n 547); Gordon Brown (ed), *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (Open Book Publishers 2016).
[562] Brown (n 561).
[563] ibid 72.
[564] 'Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict' (25 May 2000) Art. 4.1.
[565] ibid artt. 4.2, 4.3.

adopted by States. The different legal positions of ANSAs and States appear also in the distinct use of the words "should" and "shall", in Art. 4.1 and 4.2 respectively. As noted by Szasz, the latter implies a stronger obligation:

> "[t]ypically, when used in UN treaties, the word 'shall' is used to denote a binding obligation, while the word 'should' denotes a recommendation, or 'soft-law' provision".[566]

In this sense, it appears that the obligation addressed to ANSAs has only a moral character, while the legal duty is imposed on states.[567] This thesis has also been supported by the ICRC, which highlights the possible "concern of many States not to depart from the classical approach to international human rights law, according to which the broad rule is that only States have an obligation under human rights law, whereas the behaviour of non-State entities is to be regulated by domestic law";[568] however, the exact nature of the Article in question is still debated; the presence of a debate on the topic is confirmed by the *travaux préparatoires*.[569] On the other hand, the above conclusion is has not been generally endorsed. In fact, Clapham noted that the phrase "under any circumstances" implies the creation of binding obligations for the mentioned armed groups.[570] The Commission of inquiry on the Syrian Arab Republic adopted a similar view in its report of 5 February 2013.[571] In fact, discussing the "violations in the treatment of civilians and hors de combat fighters" and the "violations in the conduct of hostilities", the report shows a dual approach: the description of the violations is split into the violations committed by governmental forces and anti-government groups. Moreover, in the "Conclusions and recommendations" section, it is stated that

> "the shared responsibility of the international community and the various actors in the country should be underlined in the search for peace and the commitment to international human rights and

[566] Paul C Szasz, 'General Law Making Processes' in Christopher C Joyner (ed), *The United Nations and International Law* (Cambridge University Press 1997). Cited in Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 160. In this sense, see also Jérémie Labbé and Reno Meyer, 'Engaging Nonstate Armed Groups on the Protection of Children: Towards Strategic Complementarity' (International Peace Institute 2012); Daniel Helle, 'Optional Protocol on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child' (2000) 82 Revue Internationale de la Croix-Rouge/International Review of the Red Cross 797.
[567] Ryngaert (n 559). See also Tilman Rodenhauser, 'Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example' (2012) 3 Journal of International Humanitarian Legal Studies 263.
[568] Helle (n 566).
[569] Commission on Human Rights, 'Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on Its Sixth Session, E/CN.4/2000/74' (UN Economic and Social Council 2000) paras. 35-40.
[570] See Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006).
[571] Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/22/59' (UN General Assembly 2013).

humanitarian law. This complements, and is complemented by, the State's responsibility to protect its population".[572]

Last,

"the commission recommends that anti-Government armed groups:

(a) Abide by human rights law and humanitarian law, commit effectively to rules of conduct in line with international standards, and participate in the peace process;

[…]".[573]

On a regional level, the Kampala Convention is particularly relevant, especially its Art. 7, titled "Protection and Assistance to Internally Displaced Persons in Situations of Armed Conflict".[574] Art. 7.1 and Art. 7.2 establish that the provisions included in the same article do not afford legal status to armed groups and do not affect the sovereignty and accountability of states.[575] Nonetheless, as Art. 7.3 states that "the protection and assistance to internally displaced persons under this Article shall be governed by international law and in particular international humanitarian law",[576] it can be inferred that ANSAs are under an obligation to respect not only IHL, but international law in general, therefore also IHRL.

It has thus been affirmed that this Convention "takes the approach of attempting to obligate the non-state actors themselves",[577] and that Art. 7 is "an entire article directed towards their specific obligations, responsibilities, and roles under the Kampala Convention".[578] Murray simply affirms that "[t]he drafters' intent to bind armed groups seems clear".[579]

Nevertheless, it must be noted that the Kampala Convention, like the OPCRC, imposes obligations on states to ensure that ANSAs respect these provisions. This emerges in several Articles, e.g., Art.

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[572] ibid para. 171.
[573] ibid para. 177.
[574] 'African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)' (23 October 2009) Art. 7.
[575] "1. The provisions of 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. 2. Nothing in this Convention shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State." ibid artt. 7.1, 7.2.
[576] ibid Art. 7.3.
[577] Lauren Groth, 'Engendering Protection: An Analysis of the 2009 Kampala Convention and Its Provisions for Internally Displaced Women' (2011) 23 International Journal of Refugee Law 221, 221.
[578] Groth (n 577).
[579] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 161.

3 and 4 (tellingly titled "general obligations relating to state parties" and "obligations of state parties relating to protection from internal displacement" respectively) which establish obligations to "respect and ensure respect"[580] on state parties, with an evident similarity with the already mentioned Art. 2 ICCPR. On the other hand, Art. 5.11 establishes that "State Parties shall take measures aimed at ensuring that armed groups act in conformity with their *obligations* under Article 7" (emphasis added).[581] These elements may lead to the conclusion that the Kampala Convention does not unequivocally bind ANSAs.[582] On the contrary, some authors have submitted that the Convention in question does impose obligations on ANSAs.[583] In conclusion, similarly to Art. 4 of the OPCRC, the scope of the Article is still debated.

A possible interpretation of these provisions above can be submitted by assessing the implementation of these two instruments. In fact, both the OPCRC and the Kampala Convention have been adopted without the involvement of ANSAs, and the latter did not express their consent to be bound. One may think that problems regarding the lack of consent, similar to those considered in the context of IHL, would emerge; however, this was not the case. Perhaps the issue discussed was considered not relevant enough for a debate to take place; however, the absence of a debate on this issue may also be interpreted as a proof that these provisions are not meant to establish legal obligations *vis-à-vis* ANSAs. The issue of the lack of consent to IHL rules is linked to the fact that the latter are intended to produce legal obligations for ANSAs, thus consent to be bound is required. *A contrario*, it can be argued that a debate on the lack of consensus can be considered unnecessary in relation to a group of provisions not directly addressed to ANSAs.

Besides the uncertainty surrounding the legal nature of these provisions, it has been noted that "although important, the obligations established by existing treaties [if considered as binding obligations] are exceedingly narrow. […] As such, these treaties, and the obligations they establish, are of relatively limited relevance to the vast majority of individuals affected by the activities of armed groups".[584]

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[580] 'African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)' (n 574).
[581] ibid Art. 5.11.
[582] Andrew Solomon, 'An African Solution to Internal Displacement: AU Leaders Agree to Landmark Convention' (*Brookings*) <https://www.brookings.edu/research/an-african-solution-to-internal-displacement-au-leaders-agree-to-landmark-convention/>. Cited in Groth (n 577).
[583] Katinka Ridderbos, 'The Kampala Convention and Obligations of Armed Groups' (2011) 37 Forced Migration Review 36.
[584] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 162.

In conclusion, the presented analysis leads to two main findings. First, the limited application of IHRL rules to the relations between individuals and states is surpassed, and it is now widely accepted that obligations of IHRL are not addressed to states only, as the normative body is more focused on the right-holders than the duty-bearers. Second, however, until now the conventional provisions on the matter have not yet offered a clear answer regarding the bindingness of conventional IHRL obligations on ANSAs and have established a very restricted set of rules in that respect.

3.3. Practice of the UN Security Council and General Assembly

Besides the case of human rights conventions directly addressed to ANSAs, UN organs have considered the issue of the obligations of IHRL arising for ANSAs. In this sense, the practice integrated by UN Security Council (UNSC) resolutions and UN General Assembly (UNGA) resolutions is particularly significant.

3.3.1. The UN Security Council

The practice of the UNSC cannot be ignored, as its resolutions allow us to reconstruct the development of the role and obligations of ANSAs as perceived by the international community. As observed by Orakhelashvili, "[t]he Council's practice can also be seen as developing certain aspects of international law, and even contributing to the formation of customary norms by providing the elements of state practice or legal conviction that are essential in the process of custom-generation".[585] In particular, the UNSC practice acquires relevance in case of repetition of its view in several resolutions, also considering the connected acceptance of states.[586] In this regard, the ICTY has affirmed that "certain resolutions unanimously adopted by the Security Council [are] [o]f great relevance to the formation of *opinio juris*".[587] Indeed, it has been affirmed that the UNSC "is a central

[585] Alexander Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 Max Planck Yearbook of United Nations Law 143, 145.
[586] See Higgins, 'The Development of International Law by the Political Organs of the United Nations Development of International Law by International Organizations' (n 287); Gregory H Fox, Kristen E Boon and Isaac Jenkins, 'The Contributions Of United Nations Security Council Resolutions To The Law Of Non-International Armed Conflict: New Evidence Of Customary International Law' (2018) 67 American University Law Review 649.
[587] *Prosecutor v Dusko Tadic (Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction)* (n 476) para. 133. This is consistent with the Draft Conclusions on Identification of Customary International Law which, in conclusion 4, state that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression,

player by virtue of its capacity to make legal declarations, interpret the Charter's text, promote the relevance of legal norms in resolving disputes, and require states to follow legal rules, even those outside the Charter".[588] Thus, the relevance of UN resolutions in the development of international law is widely endorsed. In addition, it has been affirmed that these resolutions have a symbolic and political value and are able to influence international law.[589]

Having clarified the significant role that the practice of the UNSC may have in the international community, a preliminary issue must be discussed. In fact, it is well established that the UNSC has the power to establish binding obligations for the UN member states. On the other hand, the UN Charter does not explicitly mention the possibility for the UNSC to address its actions to ANSAs. Thus, it appears *prima facie* that UNSC resolutions cannot apply to ANSAs.

However, this conclusion has not been unanimously endorsed. Indeed, it can be easily refuted, resorting to a textual and teleological approach. Applying a textual approach, it has been submitted that the absence of any reference to ANSAs in the UN Charter does not mean that the UNSC can only take action towards states; rather, ANSAs were simply not considered when the UN was established. Indeed, it has even be affirmed that Artt. 39 and 41 of the UN Charter "do not refer to States or to any other addressee of the provisioned measures [...] [therefore] we could easily conclude that the sanctions may be imposed on States as well as non-state entities and individuals".[590] In light of this, it would be possible for the UNSC to take action not only towards states, but towards various entities, ANSAs included.

Adopting a teleological (or effectiveness-oriented) approach, it has been submitted that, since the international context has changed, the UNSC can adopt measures to "prevent or control transborder effects which might lead to, for example, a clash with or between neighboring states".[591] Indeed, it is well established that the activities of ANSAs may constitute a threat to international peace and

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of rules of customary international law. International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (n 474) Conclusion 4.

[588] Steven R Ratner, 'The Security Council and International Law' in David M Malone (ed), *The UN Security Council - From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 602.

[589] See, e.g., Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 European Journal of International Law 879; Fox, Boon and Jenkins (n 586); Christopher C Joyner, 'U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation' (1981) 11 California Western International Law Journal 445.

[590] Maria-Lydia Bolani, 'Security Council Sanctions on Non-State Entities and Individuals' (2003) 56 Revue Hellenique de Droit International 41, 430.

[591] Pieter H Koojimans, 'The Security Council and Non-State Entities as Party to a Conflict' in Karel Wellens (ed), *International Law: Theory and Practice - Essays in Honour of Eric Suy* (Martinus Nijhoff Publishers 1998) 333. Cited in Ezequiel Heffes, Marcos D Kotlik and Brian E Frenkel, 'Addressing Armed Opposition Groups through Security Council Resolutions: A New Paradigm?' (2014) 18 Max Planck Yearbook of United Nations Law Online 32.

security, thus requiring the intervention of the UNSC,[592] which has the primary responsibility to maintain international peace and security.[593]

Taking into consideration the UNSC practice on ANSAs and human rights, it appears that it is not only legally significant, but also ample. From the analysis of the UNSC practice based on the data available in the UNSC *Repertoire*, as well as dataset gathered by scholars,[594] it emerges that the UNSC has often dealt with the conduct of ANSAs in its resolutions. This trend is due, on one hand, to the emerging role of a vast number of ANSAs in the context of internal conflicts, often in concomitance with the loss of control of state authorities in the same territories. On the other hand, this trend can be explained in light of the undefined scope of some basic provisions of the UN Charter itself; in particular, the term "threat to the peace"[595] has been considered not as referring to (inter-state) conflicts only, but as open enough to allow the UNSC to consider under its scope a variety of situations, including those involving the risk for international stability and possible tensions.[596] As affirmed in one statement by the President of the UNSC,

> "The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters".[597]

Regarding the theoretical underpinnings of this practice, it has been submitted that it is based on the coherency of the system of international law. Indeed, Heffes, Kotlik and Frenkel submit that when an ANSA accepts a rule of international law, it accepts the international legal system as a whole, "its structure and its basic functioning rules".[598] Consequently, the rules granting a higher hierarchical grade to the rules established in the UN Charter are accepted by ANSAs as well. The only alternative for ANSAs, in the words of Heffes, Kotlik and Frenkel, "could be to deny any link whatsoever with

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[592] See Zegveld (n 65).
[593] United Nations (n 119) Art. 24.1.
[594] Fox, Boon and Jenkins (n 586); Leonardo Borlini, 'The Security Council and Non-State Domestic Actors: Changes in Non-Forcible Measures between International Lawmaking and Peacebuilding' (2020) 61 Virginia Journal of International Law 489; Jessica Burniske, Naz K Modirzadeh and Dustin A Lewis, 'Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and the U.N. General Assembly' (Harvard Law School 2017) Harvard Law School Program on International Law and Armed Conflict.
[595] United Nations (n 119) Art. 39.
[596] See, e.g., Borlini (n 594); Bolani (n 590).
[597] UN Security Council, 'Note by the President of the Security Council, S/23500' (31 January 1992).
[598] Heffes, Kotlik and Frenkel (n 591) 62.

international law in the first place, that is, not to recognize the validity of the international legal system as a whole".[599]

Having clarified that, first, it is possible for the UNSC to discuss the conduct of ANSAs in issues related to human rights and that, second, the UNSC has actually dealt with the matter in several resolutions, it is appropriate to assess this practice.

The UNSC has not referred to ANSAs in its resolutions in a uniform manner. On the contrary, it "has seemingly chosen to remain vague when defining the addressees of its resolutions, and it has used different terms to refer to [ANSAs]".[600] For instance, in Resolution 1529 (2004) the UNSC, discussing the deteriorating situation in Haiti, generically referred to "all the parties to the conflict".[601] In other resolutions, however, the UNSC made expressed reference to ANSAs. For instance, in Resolution 1906 (2009), the UNSC

> "[d]emand[ed] that all armed groups, in particular the Forces Démocratiques de Libération du Rwanda (FDLR) and the Lord's Resistance Army (LRA), immediately cease all forms of violence and human rights abuse against the civilian population in the Democratic Republic of the Congo, in particular gender-based violence, including rape and other forms of sexual abuse".[602]

Moreover, certain resolutions have even imposed sanctions on ANSAs. For instance, in Resolution 2071 (2012), the UNSC

> "call[ed] upon Malian rebel groups to cut off all ties to terrorist organizations, notably AQIM [Al-Qaida in the Islamic Maghreb] and affiliated groups, and expresses its readiness to adopt targeted sanctions against those rebel groups who do not cut off all ties to terrorist organizations, including AQIM and affiliated groups".[603]

The UNSC has often considered the conducts of ANSAs a "threat to the peace" under Art. 39 of the Charter, independent of the acts of states.[604] For instance, in its resolution 1333 (2000), the UNSC determined that

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[599] ibid 63.
[600] Heffes, Kotlik and Frenkel (n 591) 46.
[601] UN Security Council, 'Resolution 1529 (2004), S/RES/1529 (2004)' (29 February 2004) para. 7. See also, e.g., UN Security Council, 'Resolution 1880 (2009), S/RES/1880 (2009)' (30 July 2009).
[602] UN Security Council, 'Resolution 1906 (2009), S/RES/1906 (2009)' (23 December 2009) para. 10.
[603] UN Security Council, 'Resolution 2071 (2012), S/RES/2071 (2012)' (12 October 2012) para. 3. For reference to other relevant UNSC resolutions, see, e.g., Bolani (n 590).
[604] Bolani (n 590).

> "the failure of the Taliban authorities to respond to the demands in paragraph 13 of resolution 1214 (1998) and in paragraph 2 of resolution 1267 (1999) constitutes a threat to international peace and security".[605]

Also, in resolution 1521 (2003), it determined that

> "the situation in Liberia and the proliferation of arms and armed non-State actors, including mercenaries, in the subregion continue to constitute a threat to international peace and security in West Africa".[606]

Thus, it can be affirmed that, despite the frequently unclear references to ANSAs, the UNSC has not refrained from adopting binding resolutions addressed to ANSAs, acting under Chapter VII of the UN Charter. Even though the approach adopted by the UNSC has not always been consistent, the expressed reference to particular ANSAs has to be considered as a proof of its willingness to address the conduct of these entities. While some resolutions discuss the conduct of "all parties to armed conflicts",[607] others distinguish between state authorities and "other armed groups",[608] and others explicitly refer to specific ANSAs. For instance, in the already mentioned resolution 1333 (2000), the UNSC demanded that the Taliban comply with its previous demands,[609] whereas in its resolution 1794 (2007) it demanded that "the militias and armed groups that are still present in the eastern part of the Democratic Republic of the Congo, in particular the FDLR, ex-FAR/Interahamwe and the dissident militia of Laurent Nkunda and the LRA, lay down their arms".[610] Notably, both these resolutions have been adopted by the UNSC acting under Chapter VII of the UN Charter.

Having clarified that several UNSC resolutions are addressed to ANSAs, it should be assessed whether these resolutions discuss of human rights obligations of ANSAs or not. In this regard, assessing the considerable practice offered by the UNSC, an unclear pattern emerges. First, the resort to the term "abuses" or "violations" of human rights is telling and should be analysed. A consistent

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[605] UN Security Council, 'Resolution 1333 (2000), S/RES/1333 (2000)' (19 December 2000) Preamble. The demands mentioned therein require, respectively, that the Taliban stop providing sanctuary and training for international terrorists and their organizations, ultimately to bring terrorists to justice, and that the Taliban turn over Usama bin Laden to appropriate authorities. See UN Security Council, 'Resolution 1214 (1998), S/RES/1214 (1998)' (8 December 1998); UN Security Council, 'Resolution 1267 (1999), S/RES/1267 (1999)' (15 October 1999).
[606] UN Security Council, 'Resolution 1521 (2003), S/RES/1521 (2003)' (22 December 2003) Preamble.
[607] UN Security Council, 'Resolution 1882 (2009), S/RES/1882 (2009)' (4 August 2009); UN Security Council, 'Resolution 2286 (2016), S/RES/2286 (2016)' (n 464); UN Security Council, 'Resolution 1076 (1996), S/RES/1076 (1996)' (22 October 1996).
[608] UN Security Council, 'Resolution 1591 (2005), S/RES/1591 (2005)' (29 March 2005).
[609] UN Security Council, 'Resolution 1333 (2000), S/RES/1333 (2000)' (n 605) para. 2. See also UN Security Council, 'Resolution 1267 (1999), S/RES/1267 (1999)' (n 605).
[610] UN Security Council, 'Resolution 1794 (2007), S/RES/1794 (2007)' (21 December 2007).

number of UNSC resolutions discuss the "abuses of human rights" committed by ANSAs,[611] often opposed to "violations of international humanitarian law".[612] While admitting that the conduct of ANSAs can affect human rights, these texts implicitly affirm that these conducts do not amount to a violation under IHRL. In fact, a violation requires a legal obligation to exist; consequently, to affirm that ANSAs have committed only abuses of human rights (and not violations) means that ANSAs are not bound by any legal obligation under IHRL. However, as already noted, the UNSC practice on the issue is not uniform; several resolutions discuss "violations or abuses of human rights",[613] while others have condemned ANSAs for their "violations of human rights"[614] or urged them to prevent further violations of human rights law.[615] In some cases, the UNSC has also mentioned specific measures to be adopted. In resolution 1820 (2008), it demanded that

> "all parties to armed conflict immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence, which could include, inter alia, enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces to take into account past actions of rape and other forms of sexual violence, and evacuation of women and children under imminent threat of sexual violence to safety".[616]

In resolution 2134 (2014), the UNSC

> "[c]all[ed] upon all parties to armed conflict in the CAR, including former Seleka elements and anti-Balaka elements [rebel militia groups], to issue clear orders prohibiting all violations and abuses committed against children, in violation of applicable international law, including those involving their recruitment and use, rape and sexual violence, killing and maiming, abductions and attacks on schools and hospitals".[617]

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[611] Sometimes, the ANSAs addressees are even specifically pinpointed, see UN Security Council, 'Resolution 1332 (2000), S/RES/1332 (2000)' (14 December 2000); UN Security Council, 'Resolution 1663 (2006), S/RES/1663 (2006)' (24 March 2006); UN Security Council, 'Statement by the President of the Security Council, S/PRST/2015/14' (28 July 2015); UN Security Council, 'Resolution 2076 (2012), S/RES/2076 (2012)' (20 November 2012).
[612] UN Security Council, 'Resolution 2078 (2012), S/RES/2078 (2012)' (28 November 2012).
[613] See UN Security Council, 'Resolution 2249 (2015), S/RES/2249 (2015)' (20 November 2015); UN Security Council, 'Resolution 2220 (2015), S/RES/2220 (2015)' (22 May 2015); UN Security Council, 'Resolution 2295 (2016), S/RES/2295 (2016)' (29 June 2016).
[614] UN Security Council, 'Resolution 1556 (2004), S/RES/1556 (2004)' (n 231).
[615] UN Security Council, 'Resolution 1493 (2003), S/RES/1493 (2003)' (28 July 2003).
[616] UN Security Council, 'Resolution 1820 (2008), S/RES/1820 (2008)' (19 June 2008) para. 3.
[617] UN Security Council, 'Resolution 2134 (2014), S/RES/2134 (2014)' (28 January 2014) para. 22.

Interestingly, this paragraph also highlights in an implicit manner the presence of an organised structure within ANSAs involved in the conflict. In fact, it asks for the issue of orders, an action which requires the presence of a group organised in higher and lower ranks.

Other UNSC resolutions have established peacekeeping missions to protect human rights from violations committed by ANSAs,[618] also providing for direct actions against the latter. In resolution 2164 (2014), the UNSC decided that the mandate of the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) should focus also on the

> "support of the Malian authorities, to stabilize the key population centres, notably in the North of Mali, and, in this context, to deter threats and take *active steps* to prevent the return of *armed elements* to those areas" (emphasis added).[619]

Likewise, in resolution 2304 (2016) it

> "authorize[d] the Regional Protection Force to use all necessary means, including undertaking robust action where necessary and actively patrolling, to accomplish the Regional Protection Force's mandate, to […] Promptly and effectively engage *any actor* that is credibly found to be preparing attacks, or engages in attacks, against United Nations protection of civilians sites, other United Nations premises, United Nations personnel, international and national humanitarian actors, or civilians" (emphasis added).[620]

In Resolution 1127 (1997), the UNSC "strongly deplor[ed] the failure by UNITA to comply with its obligations under the "Acordos de Paz" […], the Lusaka Protocol and with relevant Security Council resolutions".[621] Considering the topic at issue, it is worth recalling that the Lusaka Protocol called for human rights monitoring, investigation of human rights violations and human rights training[622]. However, the UNSC also "[d]emand[ed] that the Government of Angola and in particular UNITA complete fully and without further delay the remaining aspects of the peace process and refrain from any action which might lead to renewed hostilities".[623] Moreover, in part B of 23e Resolution, the UNSC adopted mandatory sanctions against UNITA. Koojimans noted that this resolution "seems to

[618] Borlini (n 594).
[619] UN Security Council, 'Resolution 2164 (2014), S/RES/2164 (2014)' (25 June 2014) para. 13(a)(i).
[620] UN Security Council, 'Resolution 2304 (2016), S/RES/2304 (2016)' (12 August 2016) paras. 10, 10(c).
[621] UN Security Council, 'Resolution 1127 (1997), S/RES/1127 (1997)' (28 August 1997) Preamble.
[622] Government of Angola and UNITA, 'Lusaka Protocol' (n 334).
[623] UN Security Council, 'Resolution 1127 (1997), S/RES/1127 (1997)' (n 621) para. 1.

be based on a quasi-judicial finding",[624] as part B was adopted because UNITA had not complied with the obligations established in previous resolutions.

The analysis of the UNSC practice from 1995 to 2017 carried out by the Harvard Law School Program on International Law and Armed Conflict concluded that "no clear pattern or practice emerges".[625] Considering this practice, however, one may conclude that the existence of resolutions directly binding ANSAs to the respect of rules of IHRL, or sanctioning ANSAs because of their violations of rules of IHRL, means that the UNSC has taken a wider approach concerning the scope of IHRL, going beyond the vision that the latter is a body of rules only regulating the relationship between individuals and states. Rather, it may be inferred that the UNSC has embraced an open conception, considering ANSAs bound by rules of IHRL as well. This is consistent with a theoretical analysis of the role of the UNSC. Having deduced, from UNSC practice, that its role of maintaining international peace and security is interpreted very broadly, a functional approach leads to the conclusion that the UNSC may, in its resolutions, address and sanction ANSAs for their breaches of HR obligations. Considering the UNSC action as limited to States would actually hinder the achievement of its purpose and impair the purposes of these resolutions. This has also significant implications for the perception of the legal international community. In fact, it demonstrates that this community cannot be considered as a community limited to states anymore. As noted by Fox, Boon and Jenkins, "[t]he Council has thus weighed in on the anti-statist side of a debate when confronted with the question of whether the traditional human rights regime applies beyond state actors".[626]

3.3.2. The UN General Assembly

The practice of the UN General Assembly (UNGA) on the issue at stake appears significant, as the ICJ noted "that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".[627]

Looking at the relevant UNGA practice on the topic at issue, however, it appears to be inconsistent. Given this unclear practice, the conclusion that ANSAs are indisputably considered bound by rules

[624] Koojimans (n 591) 337.
[625] Burniske, Modirzadeh and Lewis (n 594) 10.
[626] Fox, Boon and Jenkins (n 586) 673–674.
[627] *Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion* (n 4) para. 70.

of IHRL cannot be easily maintained; instead, it can be affirmed that it proves that such recognition is not widely accepted yet. At the same time, it also reveals that the statement that IHRL rules bind only States is far from uncontroversial.

The manners in which the UNGA resolutions refer to ANSAs vary widely, as observed in the research conducted by the Harvard Law School Program on International Law and Armed Conflict. In its resolution dealing with the situation in the Democratic Republic of the Congo (DRC), the UNGA referred to violations of IHL and IHRL committed by "parties to the conflict";[628] in the same manner, it referred to "all Afghan parties"[629] in Resolution 53/203. However, later resolutions on Afghanistan referred to "Taliban, Al-Qaida and other violent and extremist groups and other illegal armed groups".[630] In addition, UNGA resolutions do not condemn "violations" of human rights in a consistent manner. In some cases, the UNGA has condemned both "violations of humanitarian law and human rights law";[631] similarly, in other cases it has condemned "violations and abuses of international human rights law and all violations of international humanitarian law".[632] It is true that, in the latter resolution, "abuses" are mentioned; however, relevant ANSAs are condemned for "violations" of IHRL as well. Since, as already noted, a violation necessarily requires an obligation, it can be inferred that, even in the last resolution mentioned, ANSAs are considered bound by obligations of IHRL.

Not only has the UNGA internationally condemned ANSAs, it has also urged "non-State actors to respect and promote the human rights and fundamental freedoms of all persons".[633] In conclusion, a clear practice the on obligations of IHRL addressed to ANSAs does not emerge in UNGA resolutions either. Thus, as submitted in the Harvard Law School Program on International Law and Armed Conflict, "[i]t is not currently possible to state, however, that either of these principal U.N. organs has taken sufficient steps to formally endow ANSAs with human-rights obligations in general under international law […]. Nor is it possible currently to state that either of these U.N. organs has precisely

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[628] UN General Assembly, 'Resolution 56/173. Situation of Human Rights in the Democratic Republic of the Congo, A/RES/56/173' (27 February 2002) Preamble.
[629] UN General Assembly, 'Resolution 53/203. Emergency International Assistance for Peace, Normalcy and Reconstruction of War-Stricken Afghanistan and the Situation in Afghanistan and Its Implications for International Peace and Security, A/RES/53/203 A-B' (12 February 1999) para. 2.
[630] UN General Assembly, 'Resolution 68/11. The Situation in Afghanistan, A/RES/68/11' (11 February 2014).
[631] UN General Assembly, 'Resolution 58/123. Special Assistance for the Economic Recovery and Reconstruction of the Democratic Republic of the Congo, A/RES/58/123' (12 February 2004) para. 6.
[632] UN General Assembly, 'Resolution 70/234. Situation of Human Rights in the Syrian Arab Republic, A/RES/70/234' (9 March 2016) para. 1.
[633] UN General Assembly, 'Resolution 70/161. Human Rights Defenders in the Context of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/70/161' (10 February 2016) para. 7.

defined what is meant in invoking the general term 'human rights' with respect to possible human-rights obligations under international law in relation to ANSAs".[634]

3.4. Additional practice of UN organs and other UN bodies

Besides the UNSC and UNGA, other UN organs, in particular rapporteurs and commissions of the UN system of human rights protection, have dealt with the topic at issue. In particular, the reports of the Special Rapporteurs to the Human Rights Commission and the Human Rights Council, of UN-sponsored Truth Reconciliation Commissions and Commissions of Inquiry, as well as of other Commissions, should be assessed. Indeed, not only do these instruments reconstruct the conducts of ANSAs and the context in which they operate, but they also offer theoretical insights into the role of ANSAs within the international legal system. It has been affirmed that "Commissions' reports can be considered subsidiary sources of law or should be analogized as such, as they are a hybrid of doctrine and jurisprudence",[635] and provide a useful tool to assess the development of international practice regarding ANSAs.

Even though these documents do not produce immediate legal effects, they often impact on issues of international law. In this sense, Van den Herik observed that, currently, commissions of inquiry tend to acquire a legal significance that goes well beyond the limited purposes of fact-finding.[636] Ultimately, as the author notes, the reconstruction, evaluation, and communication of facts are increasingly based on findings of international law.[637] To exclude *a priori* the legal relevance of the contribution of UN commissions and rapporteurs would therefore imply a limited approach to the question.

The practice of these various organs is considered together, as it appears that these rapporteurs and commissions have often adopted a more advanced standpoint in respect to that expressed by the UNSC and UNGA. Indeed, as noted by Van den Herik "[i]n their interpretation and application of law, commissions of inquiry are generally fairly flexible and progressive".[638] These characteristics

[634] Burniske, Modirzadeh and Lewis (n 594) 27.
[635] Shane Darcy, 'Laying the Foundations: Commissions of Inquiry and the Development of International Law' in Christian Henderson (ed), *Commissions of Inquiry: Problems and Prospects* (Hart Publishing 2017). Cited in Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (Intersentia 2020) 103.
[636] Larissa J van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law' (2014) 13 Chinese Journal of International Law 507.
[637] ibid.
[638] ibid. 533.

emerge in "[the] flexible approach in the application of law to given facts",[639] and the progressive aspect in "[the] general interpretations of the law".[640] Innovations are also visible in the field of IHRL; indeed, these commissions and rapporteurs have often affirmed that ANSAs not only have obligations under IHL, but also under IHRL; in fact, ANSAs have been considered perpetrators of violations of IHRL.[641] In addition, it has been affirmed that ANSAs must respect[642] and even promote human rights,[643] acting in accordance with the legal obligations imposed under this body of rules.[644]

This attitude of UN special rapporteurs and committees has been contested in various ways. First, it can be affirmed that it is probably too advanced and not solidly grounded on accepted legal principles. Second, it has been noted that the reports produced by these organs are not binding, so their legal effect should be considered as very limited. However, other authors have noted that "also non-binding and non-legal determinations can have legal implications in terms of attribution and responsibility".[645] Therefore, it appears that the reconstruction of the current evolution in IHRL, leading to its application to non-state entities such as ANSAs, must also take into account this

[639] ibid. 535.
[640] ibid.
[641] See, e.g., the UN Commission of Inquiry for Syria which, besides reporting several violations of IHL committed by ANSAs, affirmed that "[b]oth Government-affiliated militia and anti-Government armed groups were found to have violated the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, to which the Syrian Arab Republic is a party". Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/22/59' (n 571). The International Commission of Inquiry to investigate in Libyan Arab Jamahiriya explicitly discussed "violation [of the rights of migrant workers] committed by opposition groups", term "used to connote both supporters of the opposition in the period before an armed conflict was necessarily established, as well as the opposition armed group operating during the conflict", thus ANSAs. Human Rights Council, 'Report of the Commission of Inquiry on Libya to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, A/HRC/17/44' (2011). Discussing the situation of "human rights violations and atrocities allegedly committed against ethnic groups", it was highlighted that "[t]he Special Rapporteur continue[d] to receive multiple allegations of violations committed by both the military and non-State armed groups". Human Rights Council, 'Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana, A/HRC/19/67' (UN General Assembly 2012) 67, paras. 59-60. More recently, the Human Rights Council reported several violations of both IHL and IHRL by both governmental anti-governmental forces. Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights. Situation of Human Rights in Afghanistan, and Technical Assistance Achievements in the Field of Human Rights, A/HRC/46/69' (15 January 2021). The 2010 report on the situation in Colombia denounced "gross human rights and humanitarian law violations" committed by "all sides". Human Rights Council, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston. Mission to Colombia, Addendum, A/HRC/14/24/Add.2' (UN General Assembly 2010). For even more recent practice, see the Report of the Independent Fact-Finding Mission on Lybia, which discusses the investigations conducted on the violations and abuses of international human rights and humanitarian law by all parties throughout Libya". Human Rights Council, 'Report of the Independent Fact-Finding Mission on Libya, Advance Unedited Version, A/HRC/49/4' (2022).
[642] Human Rights Council, 'Ensuring Accountability and Justice for All Violations of International Law in the Occupied Palestinian Territory, Including East Jerusalem, A/HRC/34/L.38' (UN General Assembly 2017).
[643] See UN Commission on Human Rights, 'Extrajudicial, Summary or Arbitrary Executions Report of the Special Rapporteur, Philip Alston: Mission to Sri Lanka (28 November - 6 December 2005), E/CN.4/2006/53/Add.5' (2006).
[644] See Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/S-17/2/Add.1' (UN General Assembly 2011).
[645] van den Herik (n 636) 536.

practice. The assessment will consider, first, the practice of UN organs, moving then to other subsidiary organs.

Starting with the practice of the Human Rights Council[646] and related experts and commissions, an unclear pattern emerges. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism observed:

> "[s]ome of the gravest violations of human rights are nowadays committed by, or on behalf of, non-State actors operating in conflict situations of one kind or another, including by domestic and international terrorist networks. […] The Special Rapporteur acknowledges that there is a responsible body of opinion to the effect that only States and comparable entities can violate human rights. However, he does not share this view".[647]

The Special Rapporteur on freedom of religion or belief, appointed by the Human Rights Council, noted:

> "[w]hile international human rights law traditionally focused only on the obligations of States, an evolving approach recognizes the importance and impact of certain non-State actors, arguing that some human rights obligations also apply to them, including non-State armed groups".[648]

Endorsing the possibility for ANSAs to commit violations of rules of IHRL, the Report of the independent expert on the situation of human rights in Somalia (appointed by the Human Rights Council as well) explicitly stated:

> "Al-Shabaab […] continues to perpetrate serious violations of humanitarian and human rights law, including summary executions of civilians associated with the Government, unlawful arrest and detention and acts amounting to torture and other inhumane, cruel and degrading practices, such as flogging, amputation and stoning".[649]

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[646] An "inter-governmental body within the United Nations system", 'United Nations Human Rights Council' (*OHCHR.org*). See also UN General Assembly, 'Resolution 60/251. Human Rights Council, A/RES/60/251' (3 April 2006).

[647] Human Rights Council, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Ben Emmerson, Framework Principles for Securing the Human Rights of Victims of Terrorism, A/HRC/20/14' (UN General Assembly 2012) paras. 12, 13.

[648] Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, A/HRC/28/66' (UN General Assembly 2014), para. 54.

[649] Human Rights Council, 'Report of the Independent Expert on the Situation of Human Rights in Somalia, Shamsul Bari, A/HRC/18/48' (UN General Assembly 2011) 48 para. 31.

In some cases, ANSAs have been asked to take positive actions to respect IHL and IHRL. For instance, in the 2022 Report of the Commission on Human Rights in South Sudan, the Commission recommended

> "that the South Sudan People's Defence Forces, factions of SPLM-IG, SPLM/A-IO and non-State armed groups:
>
> (a) Order, clearly and publicly, all troops and allied militias to prevent and end unlawful killings, arbitrary detentions, acts of torture, enforced disappearances, conflict-related sexual violence and looting;
>
> (b) Immediately vacate all schools, hospitals and other civilian infrastructure;
>
> (c) Immediately release all those under 18 years of age associated with armed forces".[650]

The Independent Expert on the situation of human rights in Mali, established by the Human Rights Council,[651] refers to both abuses and violations, recommending the Malian authorities "[c]onduct thorough, fair and impartial investigations in order to identify the perpetrators of human rights abuses and violations and take specific measures to put an end to the culture of impunity that has led to the perpetration of serious *human rights violations and abuses by armed groups* and the Malian defence and security forces",[652] as "since January 2018, there has been a significant increase in the number of *human rights violations and abuses*, with the parties involved" (emphasis added).[653]

However, other documents produced within the UN system still limit their denounce to "abuses" of IHRL committed by ANSAs, at the same time recalling that states, on the other hand, have obligations of IHRL. In this sense, the Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic,[654] "recommends that the Government of the Syrian Arab Republic […] [a]bide fully by human rights and international humanitarian law, as well as Security Council resolutions",[655] while it "recommends that anti-Government armed groups comply with

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[650] Human Rights Council, 'Report of the Commission on Human Rights in South Sudan, A/HRC/49/78' (UN General Assembly 2022), par. 102.
[651] Human Rights Council, 'Resolution 22/18, Assistance to the Republic of Mali in the Field of Human Rights, A/HRC/22/18' (15 March 2013).
[652] Human Rights Council, 'Report of the Independent Expert on the Situation of Human Rights in Mali, on the Situation of Human Rights in Mali, A/HRC/40/77' (UN General Assembly 2019) para. 68.
[653] ibid para. 29.
[654] Established by the Human Rights Council in 2011. See Human Rights Council, 'Resolution Adopted by the Human Rights Council at Its Seventeenth Special Session, S-17/1. Situation of Human Rights in the Syrian Arab Republic' (22 August 2011).
[655] Human Rights Council, 'Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/34/CRP.3' (2017) para. 115.

customary international humanitarian law".[656] The Commission does not make any reference to the compliance of ANSAs with IHRL.

The existence of IHRL obligations addressed to ANSAs has been endorsed by other commissions as well. The Guatemalan Historical Clarification Commission was created by the Guatemalan government and the Unidad Revolucionaria Nactional Guatemalteca (URNG) under the auspices of the UN.[657] The Commission held that relevant ANSAs had both obligations of IHL and IHRL. In fact, the Commission affirmed:

> "Los grupos armados insurgentes que fueron parte en el enfrentamiento armado interno tenían el deber de respetar las normas mínimas del derecho internacional humanitario de los conflictos armados y los principios generales comunes con el derecho internacional de los derechos humanos. Sus altos mandos tenían la obligación de instruir a sus subordinados para que respetaran dichas normas y principios".[658]

Similarly, the Truth and Reconciliation Commission for Sierra Leone "found the RUF to have been responsible for the largest number of human rights violations in the conflict".[659]

Despite this rather chaotic evolution, there is an emerging and increasingly strong conceptualization of ANSAs as duty-bearers of obligations of not only IHL, but also IHRL.[660] In conclusion, the present section has discussed the emergence, undeniable although not unanimous yet, of obligations of IHRL addressed to ANSAs. This trend is confirmed by the practice of several UN organs.

As already mentioned, these instruments are not always binding, and are tailored to specific situations. Consequently, a general obligation to respect rules of IHRL binding ANSAs cannot be inferred. Nonetheless, evaluating in general the international conventions on human rights (e.g., the OPCRC, the Kampala Convention) and the UN practice, a widespread effort to bind ANSAs to the respect of rules of IHRL *via* traditional tools of international law (e.g., conventions, UNSC

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[656] ibid para. 116.
[657] 'Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan Population to Suffer, A/48/954, S/1994/751, Annex II' (23 June 1994).
[658] Comisión para el Esclarecimiento Histórico, 'Guatemala, Memoria Del Silencio' (1999) ch. 4, para. 127. "The armed insurgent groups that participated in the internal armed confrontation had the obligation to respect the minimum standards of international humanitarian law that apply to armed conflicts, as well as the general principles of international human rights law. Their high command had the obligation to instruct subordinates to respect these norms and principles". English translation in Ryngaert (n 559) note 96.
[659] Truth and Reconciliation Commission for Sierra Leone, 'Overview of the Sierra Leone Truth & Reconciliation Report' (2004) para. 15.
[660] See Human Rights Council, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors, Agnes Callamard: The Protection of the Right to Life, Advance Unedited Version, A/HRC/38/44' (2018).

resolutions adopted under Chapter VII of the UN Charter), emerges. As noted by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors,

> "[n]otwithstanding their legal effect, these developments demonstrate that over the last decades, Member States, UNSC and UNGA, HRC and a number of special procedures have increasingly recognized that the conduct of a large number of ANSAs can amount to violations of human rights".[661]

Therefore, it appears appropriate to consider the theoretical justifications submitted to explain such obligations. As the issue is still subject of debate, the doctrinal positions against the expansion of obligations of IHRL to ANSAs are also discussed.

3.5. Theoretical justifications. *De facto* control under a pragmatic approach

Besides not being well established in practice, the applicability of rules of IHRL to ANSAs is not unanimously supported in international scholarship. In this regard, Clapham notes:

> "While political scientists have studied the reasons why certain groups may commit atrocities, and humanitarians see the case for negotiating with such groups to reduce such abuses, lawyers have done hardly any work in developing a theory as to why such groups might have human rights obligations at all".[662]

Indeed, scholars have not duly analysed the issue, and the bindingness of obligations of IHRL on ANSAs does not have a solid theoretical explanation. It can be affirmed that the matter still suffers from the traditional conception of IHRL, limited to the relations between states and individuals. As Fleck noted,

> "[w]hereas the binding effect of international humanitarian law on non-state actors was never seriously disputed, the extent to which this would also apply to underlying human rights norms was shadowed by a widely believed myth according to which human rights could be claimed against the state, but not against individuals. That myth may have been supported by a limited textual understanding of

[661] ibid para. 20. See also Fortin (n 74); Amrei Müller, 'Can Armed Non-State Actors Exercise Jurisdiction and Thus Become Human Rights Duty-Bearers?' (2020) 20 Human Rights Law Review 269; Annyssa Bellal, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council* (Geneva Academy of International Humanitarian Law and Human Rights 2016).

[662] Andrew Clapham, 'Weapons and Armed Non-State Actors' in Stuart Casey-Maslen (ed), *Weapons Under International Human Rights Law* (Cambridge University Press 2014) 174.

> human rights conventions, but was never keeping with custom, neither with practice, and cannot be upheld".[663]

Therefore, considering the above-mentioned recent practice of international organs and tribunals, it appears that the time has come to expand the doctrinal debate to the application of rules of IHRL beyond states, admitting that also ANSAs can be bound by this body of rules.

This evolutionary approach is not undisputedly supported by doctrine. In this sense, Greenwood affirmed:

> "The obligations created by international humanitarian law apply not just to states but to individuals and to non-state actors such as a rebel faction or secessionist movement in a civil war. The application to non-state actors of human rights treaties is more problematic and even if they may be regarded as applicable in principle, the enforcement machinery created by human rights treaties can normally be invoked only in proceedings against a state".[664]

This position refers to the practical difficulties in respecting rules of IHRL that ANSAs may encounter. However, while it is true that ANSAs often have rudimental organisations, it may also be the case that the state in which they operate has lost the capability to uphold rights and respect the related obligations, while ANSAs have acquired such ability and present well organised structures. In this case, rigidly denying the possible application of IHRL obligations to ANSAs may create a gap in the protection of human rights. Thus, it appears that ANSAs can affect the enjoyment of human rights. Given also the above-mentioned international practice, it seems appropriate to thoroughly investigate the obligations of IHRL binding ANSAs from a theoretical point of view.

Some authors have affirmed that the same theories justifying the application of rules of IHL to ANSAs also apply in the context of IHRL. As noted by Murray, "these theories are equally applicable with respect to other bodies of law; if they can be used to explain the direct application of international humanitarian law treaties they can also be used to underpin the application of new treaties, in fields such as international human rights law".[665] As their theoretical basis and the criticisms related to those theories have already been discussed, they are not presented again below.

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[663] Dieter Fleck, 'The Law of Non-International Armed Conflict' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd ed., Oxford University Press 2013) 598.
[664] Jann K Kleffner, 'Scope of Application of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd ed., Oxford University Press 2013) 76. See also Moir (n 530).
[665] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 83. See, also, Clapham, 'The Challenge of Non-State Actors for Human Rights Law' (n 546).

However, in this unclear scenario, another explanation has been submitted, namely the theory based on the *de facto* control carried out by ANSAs over a certain territory. This theory appears particularly useful when related to the functional assessment of a factual situation, carried out with the aim of protecting the human rights of individuals in an effective manner.

As it will be submitted, this approach is able to guarantee the most effective application of rules of IHRL, providing an evolutionary interpretation of the law. However, this theory also presents limits. To attempt to grasp these problems, the following points will be addressed. First, the *de facto* control theory is presented; second, this theory is integrated with the conclusions from a functional approach to the assessment of situations in which ANSAs are acting. Third, qualities and criticisms of this approach are presented.

The theory based on the *de facto* control, recently submitted by Murray[666] but connected to the earlier doctrine submitted by, e.g., Arangio-Ruiz,[667] affirms that the rules of IHRL apply to ANSAs when the latter exercises *de facto* control over a certain area, namely when they have the exclusive and effective control over a territory and the population residing therein.[668] If an ANSA controls an area, then the state cannot exert its legitimate authority in the same territory. Such situation may occur even out of an ongoing NIAC; the decisive point is the displacement of state authority. Indeed, in this case, states cannot subject ANSAs to their authority, and ANSAs exercise control over a territory or population, in the place of the legitimate authorities. These factual circumstances may have legal consequences, as they create a separation between factual and legitimate authority, and ultimately a "legal vacuum".[669]

It is therefore appropriate to assess the described situation by resorting to the principle of effectiveness, which "provides that only those claims and situations which are effective can produce legal consequences".[670] Therefore, this principle "demands the direct attribution of international law rights and obligations"[671] to ANSAs, including rights and obligations of IHRL, even in the absence of a treaty specifically binding ANSAs. It may appear a too simple departure from the state-centric conception of international law; however, this approach would ensure the respect of IHRL focusing

[666] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490).
[667] Arangio-Ruiz (n 83); Arangio-Ruiz (n 88).
[668] Pictet (n 443); Michael Schoiswohl, 'De Facto Regimes and Human Rights Obligations - The Twilight Zone of Public International Law' (2001) 6 Austrian Review of International and European Law 45; Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490).
[669] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 121.
[670] Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 12–13.
[671] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 126.

on the *effective* duty-bearers. In this regard, Ryngaert affirmed: "it is indeed historically and conceptually sound to require that those who exercise control and authority over individuals are bound by human rights law".[672] Similarly, Murray observed: "if the acts of a de facto entity are to be recognised as effective on the international plane, it follows that the entity must be subject to international regulation",[673] at least to the fundamental human rights of persons.[674]

This is consistent with the theory, submitted by Arangio-Ruiz, which affirms that government is the only distinctive element of states; consequently, it is possible for an ANSA that exercise governmental functions to acquire legal rights and duties.

The theoretical justification based on *de facto* control over a certain territory and/or population has been endorsed by international practice.

First, the already mentioned Report of the Special Rapporteur on Freedom of Religion or Belief states that ANSAs "with (or arguably even without) effective control over a territory"[675] have obligations of IHRL.

Moreover, in the case *Sadiq Shek Elmi v. Australia*, the Committee Against Torture had to determine whether an act of torture committed by armed groups ("clans" or "factions", as they are called by the Committee)[676] can constitute a violation of the Convention Against Torture. The latter defines torture as

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official *or other person acting in an official capacity* contained in article 1 [of the Convention Against Torture]" (emphasis added).[677]

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[672] Ryngaert (n 559) 376.
[673] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 130.
[674] See Human Rights Council, 'Report of the Commission of Inquiry on Libya to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, A/HRC/17/44' (n 641).
[675] Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, A/HRC/28/66' (n 648) para. 54.
[676] UN Committee Against Torture, 'Sadiq Shek Elmi v. Australia (CAT/C/22/D/120/1998)' (25 May 1999).
[677] 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (10 December 1984) Art. 1.

Assessing the case in question, the Committee gave an extensive and functional interpretation of "public official or other person acting in an official capacity", based on the *de facto* control of ANSAs in Somalia. The Committed noted

> "that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall […] within the phrase 'public officials or other persons acting in an official capacity'".[678]

A similar position has been affirmed with regard to the Convention on the Elimination of All Forms of Discrimination against Women. It is true that, in its General recommendation no. 30 on women in conflict, the Committee on the Elimination of Discrimination against Women has reaffirmed the substantial role of States in the prevention of gender discrimination, as they are also called upon to regulate the activities of domestic non-State actors. However, the Committee also affirms that

> "[u]nder international human rights law, although non-State actors cannot become parties to the Convention, […] under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights".[679]

In their joint report on their mission to Lebanon and Israel, the Special Rapporteurs on extrajudicial, summary or arbitrary executions, on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and on adequate housing as a component of the right to an adequate standard of living and the Representative of the Secretary-General on human rights of internally displaced persons stated that "[i]t is especially appropriate and feasible to call for an armed group to respect human rights norms when it 'exercises significant control over territory and population and has an identifiable political structure"[680].

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[678] UN Committee Against Torture (n 666) para. 6.5.

[679] Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, CEDAW/C/GC/30' (2013) para. 16.

[680] Human Rights Council, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, A/HRC/2/7' (UN General Assembly 2006) para. 19. Citing Commission on Human

More recently, the application of obligations of IHRL to ANSAs has been confirmed by a group of UN human rights experts. In fact, in their final statement on human rights responsibilities of armed non-state actors, they observe that "[c]ommon practice of various organs of the United Nations […] acknowledges that, at a minimum, armed non-State actors exercising either government-like functions or *de facto* control over territory and population must respect human rights of individuals and groups".[681]

3.6 Theoretical justifications. Focus on the right-holder and focus on the effectiveness of the law

It must be noted that the theory based on the *de facto* control is coherent with a right-holder-focused approach to IHRL, well summarised by Clapham:

> "the most promising theoretical basis for human rights obligations for non-state actors is first, to remind ourselves that the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person's inherent dignity. The implication is that these natural rights should be respected by everyone and every entity".[682]

This approach is based on the natural law conception of human rights as inherent to all human beings, because of their inherent dignity. The correlation between dignity and human rights is often attributed to Kant,[683] who envisioned dignity as an absolute inner worth to the human person, thus creating a duty to treat individuals as ends, not means.[684] Besides the philosophical theories, human dignity has been enshrined as the basis of human rights also in international legal instruments. The Preamble of the UDHR affirms that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"; Art. 1 states that "[a]ll human beings are born free and equal in dignity and rights"; the Preamble of UN Charter "reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human

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Rights, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, on Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, E/CN.4/2005/7' (UN Economic and Social Council 2004) para. 76.

[681] 'Joint Statement by Independent United Nations Human Rights Experts on Human Rights Responsibilities of Armed Non-State Actors' (*United Nations Office of the High Commissioner for Human Rights*, 25 February 2021). The statement includes the names and roles of the experts involved.

[682] Clapham, 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement (Draft for Comment)' (n 544) 24.

[683] See, e.g., Rachel Bayefsky, 'Dignity, Honour, and Human Rights: Kant's Perspective' (2013) 41 Political Theory 809.

[684] "[A] human being alone, and with him every rational creature, is an *end in itself*: by virtue of the autonomy of his freedom he is the subject of the moral law […] such a being […] is to be used never merely as a means but as at the same time an end"; Immanuel Kant, *Kritik Der Reinen Vernunft* (1781). English translation in Bayefsky (n 683) 816.

person, in the equal rights of men and women and of nations large and small".[685] Dignity is also mentioned in the ICCPR and ICESCR. The ICCPR explicitly declares the causal relationship between dignity and human rights in its Preamble, as it affirms that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"[686] and that "these rights derive from the inherent dignity of the human person".[687] In addition, in the ICCPR dignity appears as the tool to determine the content of a particular human right; in this regard, Art. 10 ICCPR states:

> "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".[688]

Similarly, Art. 13 ICESCR affirms:

> "education shall be directed to the full development of the human personality and the sense of its dignity".[689]

In light of the above statements, it can be affirmed that as any individual has inherent dignity, and human dignity leads to the recognition of human rights, every human being possesses human rights *per se*, in any situation. In this sense, dignity is not only the tool to give meaning to rules of human rights, but also the instrument to expand the field of application of IHRL beyond the relationship between states and individuals. Considering the individual, holder of human rights, as the starting point for the application of rules of IHRL, it appears that the latter cannot be limited in their application to the relations between states and individuals. Doing so would actually compromise the effective protection of human rights of individuals in situations of displaced government, where state authorities cannot be held accountable in case of violations of IHRL. As noted by Murray, "[i]t does not seem reasonable that affected individuals should be denied the protections of international human rights law solely because the entity to whose authority they are subject is not a state".[690]

However, this perspective, based only on the abstract duty to respect human rights deriving from human dignity, risks being only a wishful thinking; especially, it risks a lack of support by international actors, states included. As states are not keen to confer obligations and rights to ANSAs,

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[685] United Nations (n 119) Preamble.
[686] 'International Covenant on Civil and Political Rights' (n 128) Preamble.
[687] ibid Preamble.
[688] ibid Art. 10.1.
[689] 'International Covenant on Economic, Social and Cultural Rights' (n 553) Art. 13.1.
[690] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 157.

as they are afraid of implicitly recognising the legitimacy of the latter, the attribution of such rights and obligations must have more solid grounds. In this vein, a theory based on the principle of effectiveness, coherent with a pragmatic[691] and functional conception of international law, appears more consistent with the architecture of international law and attentive to the position of states, while satisfying the aims pursued by the rules of IHRL. The ultimate goal of the principle of effectiveness is to guarantee the functioning of international law; as noted, "if international law is not to be mere speculation, but to be significantly efficacious, it has to come to terms with reality to some extent".[692] Given all this, in accordance with this principle international law can, and should, evolve and adapt to the real situation, in order to remain effective. As affirmed by Murray,

> "[i]nternational law as a realistic legal system takes into account the factual situation, and transforms into a legal reality".[693]

In this sense, the essence of IHRL, namely the protection of human rights of individuals, is guaranteed by changing the duty-bearer. This shift does not appear dramatic, as it is still based on a criterium of control; the traditional state control over individuals is here replaced with the *de facto* control of ANSAs. The shift of focus from right-holders to the effectiveness of international law emerges from the words of Heintze, who affirms that "[t]his approach is necessary to ensure that the fundamental norms of international law apply to de facto regimes",[694] without any reference to individuals protected by human rights. This conclusion is not in contrast with international law. It is true that the majority of international treaties on human rights establish obligations for states; however, this limited approach has not been considered as the only one possible. Even the UDHR did not affirm that states were the only entities bound by the respect of human rights.[695] As ANSAs may exercise *de facto* control, they may be bound by rules of international law, including rules IHRL. However, this acquisition is a legal consequence, without any political and moral implication; it does not imply any legal legitimacy of ANSAs. Adopting this approach and accepting its consequence, states' acceptance of the international legal relevance of ANSAs may be facilitated. This pragmatic, evolutionary perspective based on the principle of effectiveness has another advantage: in fact, it is not limited to IHRL, but can be applied to any branch of international law. Therefore, it can be employed to explain the bindingness of rules of IHL to ANSAs; based on the principle of

[691] Hans-Joachim Heintze, 'Are De Facto Regimes Bound by Human Rights?' [2010] Yearbook of the Organization of Security and Co-operation in Europe (OSCE) 267, 268.
[692] Hiroshi Taki, 'Effectiveness' (*Max Planck Encyclopedias of International Law*, February 2013).
[693] Murray, *Human Rights Obligations of Non-State Armed Groups* (n 490) 122.
[694] Heintze (n 691) 269.
[695] See, in this sense, UN General Assembly, 'Universal Declaration of Human Rights' (n 551) Art. 30.

effectiveness, IHL obligations should bind all actors that may be relevant in armed conflicts in which rules of IHL apply, including ANSAs.

4. Emerging practice: self-regulation and the consent of ANSAs to be bound

4.1. Introduction

The efforts at the international level to guarantee the respect of IHL and IHRL by ANSAs have continued to develop, exceeding the limits posed by traditional sources and concepts of international law; in particular, the limits imposed by the state-centric conception of international law. In fact, ANSAs have been increasingly involved in the production of legal instruments addressed to them.

The consent of ANSAs to be bound can be expressed in several legal instruments: unilateral declarations, special agreements, commitment to soft-law instruments. These tools share two elements: the purpose of constraining the conduct of ANSAs and the nature of a formal manifestation of commitment of the latter. Therefore, they can be considered as self-regulation instruments.[696] The latter, in fact, are means of regulation adopted by non-state entities to regulate their activities. The adoption of such instruments of self-regulation usually aims at pursuing interests of the actors involved. In the case of self-regulation instruments adopted by ANSAs, they may improve the position of ANSAs within the international community, thus facilitating the acceptance of their claims. Moreover, these legal expressions of consent may improve the compliance of ANSAs to international rules, as these obligations are not imposed to, but rather accepted by, ANSAs.[697] The feeling of ownership of the rules may enhance their respect. Under a theoretical perspective, the emergence of these instruments affects several critical concepts of international law, starting from the formation of its rules; as ANSAs take part in the law-making process, the paradigm of normative production as an exclusive prerogative of states vacillates. Therefore, the phenomenon appears as a good context to test the theories on law-making presented in the previous chapter.

[696] See, e.g., Porter and Ronit (n 6).
[697] See, e.g., Ben Saul, 'Enhancing Civilian Protection by Engaging Non-State Armed Groups under International Humanitarian Law' [2016] Journal of Conflict and Security Law 39; Roberts and Sivakumaran (n 28); Ezequiel Heffes and Marcos D Kotlik, 'Special Agreements as a Means of Enhancing Compliance with IHL in Non-International Armed Conflicts: An Inquiry into the Governing Legal Regime' (2014) 96 International Review of the Red Cross 1195.

4.2. Special agreements

First, ANSAs may conclude special agreements. The latter "can be understood as explicit commitments between two or more parties to a NIAC to comply with certain rules of IHL, and they may be expressed in a signed document, a joint declaration or any other form. They are essentially public expressions of a concurrent will to abide by IHL".[698] They can be very detailed, covering a wide range of issues, not limited to IHL. In particular, they often include provisions of IHRL, providing for a complementary protection for individuals in armed conflicts.[699]

For instance, the Government of Colombia has concluded a peace agreement, the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, with the Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (FARC-EP) in 2016, and its provisions aim not only at concluding the hostilities, but also at building a long-lasting peace. In fact, part of the agreement regards the adoption of a rural reform,[700] while another section establishes historical clarification processes and reparations for the victims.[701] Other sections focus on the fight against drug trafficking[702] and the enhancement of democratic political participation.[703] Moreover, the agreement establishes a Commission for Monitoring, Promoting and Verifying the Implementation of the Final Agreement, composed by members of the national government and of the FARC-EP in equal parts. The obligations of the FARC-EP are not limited to the conclusion of the hostilities; for instance, "the FARC-EP, as an insurgent organisation that acted in the context of the rebellion, undertakes to contribute to the material reparation of the victims and in general to their comprehensive reparation".[704] Concluding this agreement, the FARC-EP have undertaken a series of obligations, regarding both hostilities and non-conflictual contexts. Having reached an agreement with the national authorities, they have thus committed themselves to respect certain legal norms, also of IHRL and IHL. In particular, Chapter 5 of the Agreement contains "a combination of judicial mechanisms that allow for the investigation and sanctioning of serious violations of human rights and serious infringements of international humanitarian law".[705]

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[698] Heffes and Kotlik (n 697) 1198. See also Cedric Ryngaert and Anneleen van de Meulebroucke, 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms' (2011) 16 Journal of Conflict and Security Law 443.
[699] See, e.g., ibid.
[700] Republic of Colombia and FARC-EP, 'Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace' (24 November 2014), cap. 1.
[701] ibid cap. 6.
[702] ibid cap. 4.
[703] ibid cap. 2.
[704] ibid paras. 5.1.3.7.
[705] Ibid. Preamble.

Similarly, the parties to the Comprehensive Peace Agreement between the Government of Sudan and the Sudan's People Liberation Movement/Sudan People's Liberation Army (SPLM/SPLA) "undertake to fully adhere to the letter and spirit of the CPA [Comprehensive Peace Agreement]", which contains provisions regarding not only security arrangements, but also the structure of the government and the respect of fundamental human rights.

Discussing the legal basis of special agreements, it should be recalled that the already mentioned Art. 3 of the Vienna Convention on the Law of Treaties affirms that it is possible for "other subjects of international law" to conclude international agreements with legal force.[706] Moreover, the possibility for ANSAs to conclude special agreements is explicitly enshrined in CA3, which states:

> "[t]he Parties to the conflict should further endeavour to bring into force, *by means of special agreements*, all or part of the other provisions of the present Convention" (emphasis added). [707]

According to CA3, therefore, parties to a conflict can conclude, sometimes through the mediation of a neutral international actor,[708] special agreements regarding IHL.

The legal relevance of special agreements has been endorsed by international courts as well. For instance, the ICTY affirmed:

> "[t]he International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law".[709]

In addition, the significance of obligations voluntarily assumed by ANSAs under a legal perspective has been endorsed by the UNSC practice. In its Resolution 1379 (2001) on the protection of children during armed conflicts, the UNSC "[e]xpresses its intention, where appropriate, to call upon the parties to a conflict to make special arrangements to meet the protection and assistance requirements of women, children and other vulnerable groups".[710] Another indication of the endorsement of this

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[706] 'Vienna Convention on the Law of Treaties' (n 294) Art. 3.
[707] 'Geneva Conventions on the Law of War' (n 48) common Article 3.
[708] See, e.g., the agreement to reintegrate children from FARC, concluded by the latter and the Colombian government, under the guidance of the UNICEF; 'Agreement between the Government of Colombia and the FARC-EP on the Separation and Reintegration of Children in Colombia' (15 May 2016). See, in this regard, Vierucci (n 90).
[709] "[T]he International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law". *Prosecutor v Dusko Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (n 476) para. 143.
[710] UN Security Council, 'Resolution 1379 (2001), S/RES/1379 (2001)' (20 November 2001) para. 4.

trend can be found in Resolution 1612 (2005), dedicated to the protection of children in armed conflicts as well. In paragraph 15, the UNSC

> "[c]alls upon all parties concerned to abide by the international obligations applicable to them relating to the protection of children affected by armed conflict as well as the *concrete commitments they have made* to the Special Representative of the Secretary-General for Children and Armed Conflict, to UNICEF and other United Nations agencies" (emphasis added).[711]

It is true that, in the Preamble, the UNSC recalls the primary role of national Governments in guaranteeing effective protection of children in case of armed conflicts; however, paragraph 15 is addressed to "all parties concerned".[712] As current armed conflicts are mostly NIACs, it follows that Resolution 1612 (2005) is also directed to ANSAs. Consequently, in para. 15 the UNSC recognises that ANSAs can engage in the protection of children in a more active manner, adopting public commitments in this regard.

Therefore, ANSAs can be engaged in the normative production of rules of IHL and IHRL, giving them "a unique opportunity […] to actually have some input on what their concrete rights and obligations will be",[713] ultimately enhancing their compliance. Moreover, as the content of these agreements may vary, it has been observed that they may provide stronger protection for the victims of armed conflicts.[714]

Nonetheless, both the feasibility of concluding special agreements with ANSAs and the legal relevance of the practice provided by special agreements has been debated. Regarding the first aspect, the provision included in CA3 was opposed by several states, which feared that concluding an agreement with ANSAs may modify the legal status of ANSAs and give them a stronger status.[715] Consequently, CA3 adds that the conclusion of such agreements "shall not affect the legal status of the Parties to the conflict",[716] clarifying that it only has a "purely humanitarian"[717] object. In this regard, it has been noted that this paragraph of CA3 "remains as essential today as it was at that time [of the introduction of CA3], as any other interpretation will almost inevitably lead States to deny the

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[711] UN Security Council, 'Resolution 1612 (2005), S/RES/1612 (2005)' (26 July 2005) para. 15.
[712] Also, it has to be mentioned that in para. 1 the UNSC "[s]trongly condemns the recruitment and use of child soldiers by *parties to armed conflict* in violation of international obligations applicable to them and all other violations and abuses committed against children in situations of armed conflict" (emphasis added). ibid para. 1.
[713] Heffes and Kotlik (n 697) 1200.
[714] See, e.g., Heffes and Kotlik (n 697).
[715] See, e.g., Ryngaert and van de Meulebroucke (n 698).
[716] 'Geneva Conventions on the Law of War' (n 48) common Art. 3.
[717] International Committee of the Red Cross, 'Convention (III) Relative to the Treatment of Prisoners of War. Commentary of 2020' (n 214) para. 900.

applicability of common Article 3 and thereby undermine its humanitarian objective".[718] This approach is coherent with the prevalent doctrinal opinion, more focused on the effectiveness of IHL than on the interests of states. In this sense, it is worth mentioning the position of Roberts and Sivakumaran:

> "states may have a keen interest in maintaining their exclusive or dominant role in lawmaking, but the pertinent question is whether such exclusivity or dominance benefits the international community as a whole rather than states in particular".[719]

Criticism concerning the possibility of ANSAs to conclude special agreements has also regarded the substantial characteristics of these instruments. Indeed, it has been affirmed that many of these agreements have ambiguous texts, probably due to the tensions between legitimate authorities and ANSAs. This ambiguity may lead to the conclusion that these agreements do not have international legal nature.[720] Nonetheless, this conclusion is not undisputed and, in case of agreements concluded under the aegis of an international actor, the international legal nature of the agreement is more commonly accepted and recognised.[721] These agreements may include provisions beyond the rules of IHL, as noted by Heffes and Kotlik,[722] and may have various forms;[723] they may also involve various parties, as they can be concluded by ANSAs and governmental authorities[724] or between different ANSAs.[725] Ceasefire and peace agreements concluded by the parties to a conflict can also be considered as special agreements.[726]

Moreover, some doubts have been expressed in relation to issues arising from the legitimacy and legality surrounding ANSAs, as well as the temporary nature of the latter. An additional perplexity

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[718] ibid para. 908.
[719] Roberts and Sivakumaran (n 28) 133.
[720] Olivier Corten and Pierre Klein, 'Are Agreements between States and Non-State Entities Rooted in the International Legal Order?' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011).
[721] See Vierucci (n 90).
[722] Heffes and Kotlik (n 697) 1199 note 16.
[723] In this sense, special agreements were concluded between the parties to the conflict in the former Yugoslavia, under the auspices of the ICRC, in order to declare applicable rules; as noted by Sassòli, in fact, "[t]he ICRC, facing difficulties to qualify the conflict and the resulting inability to invoke the protective rules of IHL in its operations, and trying to establish a humanitarian dialogue with the parties far from the cease-fire and political negotiations, invite[d] plenipotentiaries of the belligerent sides to Geneva in order to agree on rules to be respected in the armed conflict as close as possible to those IHL provides for in international armed conflicts". Marco Sassòli, 'Case Study, Armed Conflicts in the Former Yugoslavia' (*casebook.icrc.org*, first presented 1998).
[724] See, e.g., the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, concluded by the government of Colombia and the FARC-EP, Republic of Colombia and FARC-EP (n 700). Also, see the Humanitarian Ceasefire Agreement on the Conflict in Darfur, concluded by the Government of Sudan and the Sudan Liberation Movement/Army; UN, 'Humanitarian Ceasefire Agreement on the Conflict in Darfur' (8 April 2004).
[725] See, e.g., 'General Agreement Signed in Addis Ababa' (8 January 1993) signed by several Somali ANSAs.
[726] Heffes and Kotlik (n 697).

regards the fact that the practice of NSAs in general has not been considered as pertinent in the legal framework of the sources of international law. However, such classical framework should be re-assessed, considering the emergence and relevance of NSAs today. In this sense, d'Aspremont affirmed:

> "[t]he retreat from the question of ascertainment has been dramatically accentuated by the undeniable finding that much of the international normative activity takes place outside the remit of traditional international law, and that only a limited part of the exercise of public authority at the international level nowadays materializes itself in the creation of norms which can be considered international legal rules according to a classical understanding of international law".[727]

Therefore, special agreements concluded by ANSAs should not be received with too much scepticism based on traditional paradigms of international law.

4.3. Codes of conduct

Codes of conduct are instruments adopted by ANSAs to regulate the conduct of their members, indicating the minimum standards to be respected in the relations among members of the ANSA and with persons outside the ANSA.[728] The emergence of codes of conduct is not, in fact, particularly recent. Indeed, the "Three Main Rules of Discipline and the Eight Point for Attention" were drawn up by Mao Zedong and others during the Second Revolutionary Civil War (1927-1937),[729] setting a series of rules for the Chinese People's Liberation Army (CPLA) to respect. However, as tools of self-regulation tool that may enhance the compliance of ANSAs towards the respect of rules of international law,[730] codes of conduct have become an object of study only in recent times.[731]

It has been noted that codes of conduct do not necessarily replicate rules of international law, as they may provide a higher or lower number of obligations and are thus at least slightly different from the established rules of international law.[732] In this regard, the already mentioned CPLA of 1928 adopted

[727] d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (n 289) 2.
[728] Olivier Bangerter, *Internal Control: Codes of Conduct within Insurgent Armed Groups* (Small Arms Survey 2012)..
[729] See, e.g., Nelleke van Amstel, 'A Collection of Codes of Conduct Issued by Armed Groups' (2011) 93 International Review of the Red Cross 483.
[730] See, e.g., Ryngaert and van de Meulebroucke (n 698).
[731] See., e.g., Ryngaert and van de Meulebroucke (n 698); Van Amstel (n 729); Sassòli (n 283).
[732] Sandesh Sivakumaran, 'Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War' (2011) 93 International Review of the Red Cross 463.

four policies for the treatment of captives which were inspire to consolidated principles of IHL already in 1928. Indeed, it was established:

> "1. Do not hit, swear at, kill, or maltreat captives.
> 2. Do not search captives' pockets.
> 3. Give medical treatment to wounded captives.
> 4. Let captives stay or set them free at their own will."[733]

More recently, the "Rules of conduct with the masses", issued in 2009 by the FARC-EP and ELN in Colombia as an annex to a message to their militants, set a series of obligations to ensure the enjoyment of rights (including the rights of minorities) by people under their control. In particular, it established:

> "1. Our daily behaviour, and the purpose underlying our activities, should be borne in the people's interests.
>
> 2. We should respect the political, philosophical, and religious ideas and attitudes of the population, and in particular the culture and autonomy of indigenous communities and other ethnic minorities.
>
> 3. We should not prevent people from exercising their right to vote, nor force people to vote.
>
> 4. The safety of working people and their homes and property should be taken into account when planning and executing political and military activities, and in our daily movements.
>
> […]
>
> 8. Murder and any kind of proven outrages committed against the population should be seen as a crime.
>
> […]
>
> 10. Accusations made by communities about attacks by combatants and other individuals should be investigated exhaustively with input from the community.
>
> 11. Leaders and combatants should study and comply with the rules of international humanitarian law that are applicable to our revolutionary war.
>
> 14. Leaders and combatants should bear in mind that executions may only be carried out for very serious crimes committed by enemies of the people and with the express authorization in each case of

[733] Chinese People's Liberation Army, 'Four Policies for the Lenient Treatment of Captives'. Reproduced in English in Van Amstel (729) 487.

each organization's senior governing body. In all such cases, evidence must be examined and decisions taken collectively. The leadership must produce a written record setting out the evidence.

[…]."[734]

The main principles of IHL were included in the guidelines issued by the National Transition Council (NTC), formed in Libya in 2011. The guidelines include rules on the treatment of prisoners, based on the principle of humane treatment of prisoners, and on targeting and the use of violence, based on the principle of distinction. Indeed, the guidelines establish:

- "DO NOT use any form of physical, sexual or mental violence against any detainee. No form of torture or intimidation is allowed.
- DO NOT subject detainees to humiliating or degrading treatment such as displaying them in a publicly humiliating fashion.
- DO NOT take revenge on detainees.
- DO NOT hold individuals answerable for acts for which they are not personally responsible.
  […]
- REPORT ANY INCIDENTS OF INHUMANE TREATMENT TO A SUPERIOR OFFICER
  […]
  - ONLY target Qadhafi forces and others using force against you. Permissible targets include fighters, buildings, facilities and means of transportation being used or could be used for a military purpose.
  - DO NOT allow persons who are less than 18 years of age to fight, even if they have volunteered to do so.
  - AVOID as far as possible any effect on civilians of an attack against Qadhafi forces.
  - DO NOT target fighters who are surrendering or are no longer fighting.
  - DO NOT target civilians or places where there are only civilians.
  - DO NOT target medical personnel, facilities, transports or equipment. These may be searched if you need to verify they are genuine, but REMEMBER that medical personnel are allowed by law to carry small arms to protect their patients.
  - DO NOT target religious personnel.
  - DO NOT target UN/ICRC/Red Crescent personnel or facilities.
  - DO NOT harm cultural, educational and religious buildings and historic sites

[734] FARC Secretary of Central Staff and ELN Central Command, 'Normas de Comportamiento Con Las Masas'. Reported in English translation in Van Amstel (729) 492-493.

[…]".[735]

Discussing the legal significance of these instruments, it must be noted that it is true that the minimum standard required to ANSAs parties to a conflict by CA3 and, when the threshold is reached, by APII, is always binding. In this regard, it has been noted that "[t]he choice of an armed group to adopt a code of conduct including rules of IHL does not affect the applicability of IHL to an armed group involved in a NIAC".[736] Moreover, codes of conduct are often short texts, containing only provisions, without providing for any theoretical justification of the adoption of the code. Consequently, the legal relevance of codes of conduct is quite limited.

However, like other instruments adopted by ANSAs, codes of conduct may enhance compliance, because a norm-generating process free from external impositions can create a sense of ownership.[737] In this sense, "[t]he content of these documents demonstrates the acceptance of the included norms, rather than their concrete foundations in law".[738] Therefore, they are more significant for an assessment of international practice. The latter shows that, in many cases, internal codes of conduct have been, on one hand, used to declare that ANSAs abide by the rules of already existing international law; on the other hand, these codes have also proven to be a tool to instruct members of the ANSA itself on the content of such rules.[739] Therefore, codes of conduct can have a dual function: a "regulatory" and "pedagogic" one. The "pedagogic" aspect is particularly significant, considering that members of ANSAs often have little or no knowledge about the content of rules of IHL and other relevant branches of international law, such as IHRL.

Last, for the matter at issue, it should be underlined how codes of conduct show the willingness of ANSAs to endorse the international trend towards their involvement in relevant normative production and towards the enhancement of compliance through a sense of ownership.

[735] Libya National Transition Council, 'Guidelines for the National Transition Army'. Reported in Van Amstel (729) 499-500.
[736] Van Amstel (729) 484.
[737] Saul (n 697); Ryngaert and van de Meulebrouke (n 698); Sassòli (n 283).
[738] Van Amstel (729) 484.
[739] Anne-Marie La rosa and Carolin Wuerzner, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law' (2008) 90 International Review of the Red Cross 327.

4.4. Unilateral declarations

Another example of instrument of self-regulation is provided by unilateral declarations. Indeed, ANSAs may issue unilateral declarations to commit themselves to the respect of both the rules already addressed to them, e.g. CA3, and other rules not specifically binding them.[740] In this regard, under Art. 96.3 API NLMs may undertake to apply the Geneva Conventions and the Protocol by means of a unilateral declaration addressed to the Swiss government, that is the depositary of the Geneva Conventions.[741] Consequently, ANSAs assume rights and obligations alike state parties to the Geneva Convention.[742] So far, the provision at issue has not proved very successful: the only successful unilateral declaration issued under art. 96.3 API is the one made by the Polisario Front, in 2015.[743] Unilateral declarations under art. 96.3 API had already been issued before; however, as the relevant states in these cases were not parties of the API, the Swiss government had had to reject the declarations.[744]

It is true that oftentimes ANSAs issue unilateral declarations to declare their commitment to respect rules of IHL.[745] For instance, in its declaration the Polisario Front "déclare s'engager à appliquer les Conventions de Genève de 1949 et le Protocole I dans le conflit l'opposant au Royaume du Maroc".[746] Similar declarations have been issued by FMLN[747] and the Kurdistan Workers Party (PKK) as well.[748] However, unilateral declarations can be adopted even in contexts not falling within the scope of API; moreover, these declarations do not have to be limited to IHL.

Unilateral declarations may be addressed to the public at large; an example of this kind of declarations is provided by the declarations of 1995 and 2004 of the Ejército de Liberación Nacional (ELN) of Colombia. With them, it declared its respect for IHRL rules, as it was "inspired by the clear

[740] See, e.g., Ryngaert and van de Meulebrouke (n 698).
[741] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)' (n 50) Art. 96.3.
[742] International Committee of the Red Cross, 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). Commentary of 1987' para. 3768.
[743] See, e.g., Bellal, 'Welcome on Board: Improving Respect for International Humanitarian Law Through the Engagement of Armed Non-State Actors' (n 478); Katharine Fortin, 'Unilateral Declaration by Polisario under API Accepted by Swiss Federal Council' (*Armed Groups and International Law*, 2 September 2015).
[744] See Fortin (743). A list of unilateral declarations that were not accepted by the Swiss government because the relevant states were not parties of the API is given in Churchill Ewumbue-Monono, 'Respect for International Humanitarian Law by Armed Non-State Actors in Africa Reports and Documents' (2006) 88 International Review of the Red Cross 905.
[745] In this regard, a study has concluded that "for non-State actors, the agreements refer to international human rights customary law". Vigny and Thompson (n 101) 193.
[746] Polisario Front, 'Unilateral Declaration Addressed to the Swiss Government', 21 June 2015.
[747] FMLN, *The Legitimacy of Our Methods of Struggle* (Inkwork Press 1988). See Hyeran Jo, *Compliant Rebels - Rebel Groups and International Law in World Politics* (Cambridge University Press 2015).
[748] Kurdistan Workers Party (PKK), 'PKK Statement to the United Nations', 24 January 1995.

understanding that the rules of International Humanitarian Law are absolutely and universally applicable and binding".[749] They may also be issued *vis-à-vis* an NGO, like special agreements.[750] This being said, the main difference between special agreements and unilateral declarations lies in their legal nature. The former encapsulates the expression of a concurrent will to comply with certain rules, while the latter is unilaterally adopted to express the intention of an ANSA to be bound by certain rules. It is true that their adoption is often dictated by the desire of ANSAs to publicly appear to be committed to international law; in this sense, unilateral declarations seem almost tools of propaganda.[751] Also, practice dating back to the second half of the 20th Century shows that relevant national authorities have frequently contested unilateral declarations adopted by opposing ANSAs.[752] Nonetheless, as already noted, today the adoption of these declarations is frequently encouraged.

The appropriateness of more actively engaging with ANSAs has been affirmed on several occasions. Regarding their necessary involvement to guarantee the respect of human rights, the already mentioned General recommendation no. 30 on women in conflict of the Committee on the Elimination of Discrimination against Women, in fact, states:

> "the Committee also urges non-State actors such as armed groups:
>
> (a) To respect women's rights in conflict and post-conflict situations, in line with the Convention;
>
> (b) To commit themselves to abiding by codes of conduct on human rights and the prohibition of all forms of gender-based violence".[753]

Also, the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions dedicated to civil and political rights, including the questions of disappearances and summary executions, stated that "[i]n cases in which such groups are willing to affirm their adherence to human rights principles and to eschew executions it may be appropriate to encourage the adoption of formal statements to that effect".[754]

Authors have praised the adoption of unilateral declarations by ANSAs as a tool to enhance the respect of international rules, because the latter, rather than being imposed from the outside, are

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[749] Cited in Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2002) 121.
[750] See, e.g., Ryngaert and van de Meulebrouke (n 698).
[751] See, e.g., ibid.; Sassòli (n 283); International Committee of the Red Cross, 'Improving Compliance with International Humanitarian Law ICRC Expert Seminars' (2003).
[752] See, e.g., Ewumbue-Monono (744).
[753] Committee on the Elimination of Discrimination against Women (n 669) para. 18.
[754] Commission on Human Rights (n 670) para. 76.

adopted through internal mechanisms. Moreover, being tailored to a single group, they can provide a more effective regulation, considering the characteristics of the group and of the context in which it operates.[755] Sassòli has even submitted that "[t]he mere discussion and drafting of such codes within an armed group would certainly have a considerable impact in terms of causing groups to reflect upon and perhaps alter their behaviour".[756]

Besides these practical, positive effects, the legal nature of these unilateral declarations has been studied, as they are adopted by NSAs. It has been submitted that unilateral declarations of ANSAs create binding obligations for the actors that created them.[757] In the absence of a conventional rule, unilateral declarations would create obligations for ANSAs *per se* and they may comprise rules which are not included in the Geneva Conventions. As noted by Klabbers:

> "[o]f course, non-state entities may make unilateral declarations even in the absence of a specific provision to that effect, and following general international law, it may very well be that by making unilateral declarations those entities bind themselves on the international level".[758]

International case law, in particular the combined reading of the *Nuclear Tests* cases and the *Reparation* case, has been invoked in support of these theories. The ICJ, in the former case, affirmed:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations".[759]

Of course, certain elements are required for a unilateral declaration to be binding; first, as stated in the *Nuclear Tests* cases, the intention to be bound is required. In this regard, the ICJ itself added:

> "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected".[760]

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[755] See, e.g., Sassòli (n 283).
[756] ibid 22.
[757] See, e.g., Ryngaert and van de Meulebroucke (n 698).
[758] Klabbers, 'The Redundancy of Soft Law' (n 278).
[759] *Nuclear Tests Case (New Zealand v France), Judgement* (1974) I.C.J. Reports 1974 457 para. 46; *Nuclear Tests (Australia v France), Judgement* (n 298) para. 43.
[760] *Nuclear Tests Case (New Zealand v. France), Judgement* (n 760) para. 49.

This requirement, of course, must be evaluated for each declaration. Admittedly, ICJ refers only to unilateral declarations of states, as it adds:

> "[w]hen it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. […] Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound".[761]

However, the advisory opinion of the *Reparation* case should be considered as well; in particular, the statement which affirms that "instances of action" may be given to NSAs depending on the needs of the community.[762] Also, it appears that ANSAs must be internationally relevant to adopt binding unilateral declarations:

> "[i]n the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane".[763]

Reading the judgement and the advisory opinion together, it can be inferred that, based on the current needs of the international community, unilateral declarations may be produced by, and bind, not only states, but also ANSAs.[764] The *dictum* of the *Nuclear Tests* case, assessed under a functional approach, can thus confirm the legally binding value of unilateral declarations adopted by ANSAs. In addition, considering the role ANSAs play in many contemporary armed conflicts and the control they often exercise over territories and populations, it can be inferred that today many ANSAs meet the international relevance test required by the ICJ in the *Reparation* case. Therefore, it is possible for ANSAs to adopt binding unilateral declarations, which are also often positively received by other members of the international community.

[761] ibid paras. 46-47; *Nuclear Tests (Australia v France), Judgement* (n 298) paras. 43-44.
[762] *Reparation for injuries suffered in the service of the Nations, Advisory Opinion* (n 41) 8.
[763] ibid 9.
[764] See, in this sense, Ryngaert and van de Meulebroucke (n 698).

4.5. Standardised unilateral declarations. Geneva Call's Deeds of Commitment

The drafting of standardised unilateral declarations is a recent trend (some authors even defined it "innovative")[765] in international practice. A third entity, normally an NGO, prepares a draft of unilateral declaration, destined to adoption by ANSAs. ANSAs that adopt it would thus have the same advantages in terms of ownership of the rules[766] and public image of traditional unilateral declarations with the added advantage that, since they are standardised instruments, they do not have to be re-discussed in occasion of every adoption. This would make the process of adoption of these unilateral declarations faster.

In this regard, the practice of the NGO Geneva Call is particularly significant, as, besides encouraging the adoption by ANSAs of bi-lateral or multi-lateral agreements, internal rules and regulations, unilateral declarations, it also actively participates in the production of deeds of commitment. Geneva Call was founded in 2000 by members of the International Campaign to Ban Landmines, aiming to promote the respect by ANSAs of rules of IHL and IHRL during armed conflicts or other situations of violence.[767] Geneva Call started its activity considering how the 1997 Ottawa Anti-Personnel Mine Ban Treaty, despite being an indisputable step forward in the ban of landmines, could not be a sufficient measure. Indeed, since it was a traditional treaty, it was only addressed to state parties. At that time, several ANSAs employed anti-personnel mines in armed conflicts;[768] therefore, the realisation was clear that binding only states would not provide a sufficient measure against the use of landmines. In light of this, Geneva Call drafted the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action for ANSAs to adopt, aiming to complement the protection offered by the Ottawa Convention. The ANSAs adopting this Deed committed to "adhere to a total ban on anti-personnel mines"[769] and "to cooperate in an undertake stockpile destruction, mine clearance, victim assistance, mine awareness, and various other forms of

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[765] See, e.g., David Capie, 'Influencing Armed Groups: Are There Lessons to Be Drawn from Socialization Literature?', *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law* (2007).

[766] See Pascal Bongard and Jonathan Somer, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call *Deed of Commitment*' (2011) 93 International Review of the Red Cross 673.

[767] Pascal Bongard and Ezequiel Heffes, 'Engaging Armed Non-State Actors on the Prohibition of Recruiting and Using Children in Hostilities: Some Reflections from Geneva Call's Experience' (2019) 101 International Review of the Red Cross 603, 606.

[768] See 'Engaging Non-State Actors Toward Compliance With Humanitarian Norms (with Focus on Landmines, Child Soldiers and Torture) - Summary Report' (Geneva Call 2001); Anki Sjöberg, 'The Involvement of Armed Non-State Actors in the Landmine Problem: A Call for Action' (Geneva Call 2004) Executive Summary for the Nairobi Summit on a Mine Free World.

[769] Geneva Call, 'Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action' (n 304) Art. 1.

mine action".[770] It is worth noting that the provisions of this Deed of Commitment exceed the scope of the corresponding provisions contained in the Ottawa Convention. While art. 1 of the Deed of Commitment defines anti-personnel mines as

> "those devices which *effectively explode* by the presence, proximity or contact of a person, including other victim-activated explosive devices and anti-vehicle mines with the same effect whether with or without anti-handling devices" [771] (emphasis added),

art. 2.1 of the Ottawa Convention limits the definition of "anti-personnel mines" to

> "mine[s] *designed* to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons"[772] (emphasis added).

Consequently, it can be affirmed that not only Geneva Call's Deeds of Commitment reflect international standards, but in some circumstances, they also surpass them.

Later on, Geneva Call has adopted other deeds of commitment, expanding its area of interest. In this sense, in 2006 it started working on the issue of child protection in armed conflicts, with the expert advisory opinion of, among others, UNICEF and the ICRC.[773] The final Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict was launched in 2010. Again, the drafting was based on the consideration that the protection of children in armed conflicts cannot be effective if the relevant provisions bind only states. On the contrary, the engagement of ANSAs is necessary, given that most contemporary armed conflicts include at least one ANSA.

The deeds of commitment are opened for the signature of leaders of ANSAs and countersigned by Geneva Call itself.[774] Signing a deed may produce several positive effects for an ANSA. As noted by Clapham, ANSAs "realize the advantages of being seen to abide by international norms in the context of moves towards peace negotiations; second, it is much easier to criticize governments and their armed forces for violating humanitarian norms if the group has policies in place to avoid and punish similar violations; third, factions may be able to distinguish themselves from other armed groups and thus 'get ahead' in terms of dialogue with the government or other actors; lastly in some

[770] ibid Art. 2.
[771] Geneva Call, 'Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action' (n 304) Art. 1.
[772] 'Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction' Art. 2.1.
[773] Geneva Call, 'Announcing Launch of Deed of Commitment on Children and Armed Conflict' (*genevacall.org*, 2 November 2010).
[774] Geneva Call, 'How We Work' (*genevacall.org*).

circumstances entering into such commitments will facilitate access to assistance from the international community in the form of mine clearance".[775]

By signing a deed, the ANSA undertakes not only to respect the commitments included therein, but also "to allow and cooperate in the monitoring and verification"[776] of the commitment "by Geneva Call and other independent international and national organizations and associated for this purpose with Geneva Call".[777] Indeed, it has been affirmed that "[b]y signing the Deed, ANSAs boost their legitimacy and create an entitlement to assistance from Geneva Call and other NGOs".[778] The ultimate aim is, of course, to guarantee the effective respect of the deeds.

In this regard, the deeds of commitment include different monitoring mechanisms. Indeed, Art. 3 of the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action for ANSAs establishes that the signatories ANSAs have the obligation

> "to allow and cooperate in the monitoring and verification of our commitment to a total ban on anti-personnel mines by Geneva Call and other independent international and national organizations associated for this purpose with Geneva Call. Such monitoring and verification include visits and inspections in all areas where anti-personnel mines may be present, and the provision of the necessary information and reports, as may be required for such purposes in the spirit of transparency and accountability".[779]

Articles of other Deeds of Commitment, e.g., Art. 9 of the Deed of Commitment for the Protection of Children from the Effects of Armed Conflict and Art. 9 of the Deed of Commitment for the Prevention of Starvation and Addressing Conflict-related Food Insecurity, contain the same provision.

Therefore, three mechanisms to monitor compliance are established: self-reporting activities, monitoring activities by third parties, and field missions. In this regard, it should be highlighted that

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[775] Clapham, 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement (Draft for Comment)' (n 544) 33.
[776] Geneva Call, 'Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action' (n 304) Art. 3; Geneva Call, 'Deed of Commitment under Geneva Call for the Protection of Health Care in Armed Conflict' (n 304) Art. 10.
[777] Geneva Call, 'Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action' (n 304); Geneva Call, 'Deed of Commitment under Geneva Call for the Protection of Health Care in Armed Conflict' (n 304).
[778] Ryngaert and van de Meulebroucke (n 698) 448.
[779] Geneva Call, 'Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action' (n 304) Art. 3.

both CA3 and APII do not establish monitoring mechanisms. This lack has been defined as a "weakness" of these treaties in addressing the conduct of ANSAs.[780]

The self-reporting activity requires ANSAs to provide periodic reports in their implementation of, and doubts regarding, the provisions of the Deed. This mechanism serves two purposes: on the one hand, it is possible to monitor compliance; on the other hand, it is possible to understand the difficulties faced by ANSAs in implementing these rules.

The third-party actors that may monitor the compliance of the signatories ANSAs are, e.g., governments, media, international, NGOs, and civil society organizations.[781] These parties may conduct their inquiries with field missions and help with cross checking information provided by ANSAs.

However, many believe[782] that the fields missions are the most significant mechanism to monitor the compliance with the deed. These missions, conducted "on a routinely basis", are set by Geneva Call "on its discretion when circumstances warrant field investigation".[783] When the investigation is concluded, Geneva Call discusses the results of the investigation with the ANSAs involved. The aim of this discussion is to adopt the measures deemed necessary. The lack of compliance may be publicised by Geneva Call. In this regard, Art. 7 of the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action states that

> "Geneva Call may publicize [ANSAs's] compliance or non-compliance with this Deed of Commitment".[784]

The same provision is contained in other Deeds of Commitment, e.g., in Art. 12 of the Deed of Commitment for the Protection of Children from the Effects of Armed Conflict and Art. 12 of the Deed of Commitment for the Prevention of Starvation and Addressing Conflict-related Food Insecurity. The Deeds do not contain other sanctions. Given the abovementioned benefits for ANSAs in signing a deed, however, the negative impact of the publication of non-compliance with the deed cannot be underestimated.

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[780] Bongard and Somer (n 766) 684.
[781] Bongard and Somer (n 766).
[782] See, e.g., ibid.
[783] ibid 693.
[784] Geneva Call, 'Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action' (n 304) Art. 7.

Moreover, practice shows a widespread compliance by ANSAs. As noted by Bongard, "[n]o signatory ever consistently refused a routine field visit or denied access to its areas of operation. The MILF and the Puntland authorities also fully cooperated in the verification missions conducted by Geneva Call in 2002 and 2007, respectively, the latter providing unprecedented access to its military stockpiles [and] in accordance with Article 4 of the Deed of Commitment, most signatory NSAs (21) took self-regulatory measures to enforce their commitment".[785]

Geneva Call has adopted an "inclusive approach".[786] Particularly relevant in this regard are the involvement of ANSAs in the drafting of the Deeds of Commitment and the periodic debates with them.[787] This inclusive approach can allow the adoption of more appropriate provisions, setting realistically achievable goals, and enhance the sense of ownership of such rules, ultimately improving the compliance of ANSAs.[788] Indeed, "[b]y importing [ANSAs] as participants into the system of IHL, Geneva Call not only brings about a conceptual shift in the thinking about the subjects of international law, but may also improve compliance with IHL".[789] At the same time, this approach may also lead to a progressive expansion of the issues regulated, as demonstrated by the adoption of further Deeds of Commitment following the first one, which was focused on anti-personnel mines.[790] It is also hoped that peer pressure may lead other ANSAs to sign one or more Deeds of Commitment.

During follow-up meetings, representatives of ANSAs may express (and have actually expressed) the practical difficulties they face in the application of the norms adopted[791] or, more generally, the struggles in pursuing certain objectives, enshrined in relevant international provisions.[792] Moreover, Geneva Call engaged with ANSAs also through questionnaires.[793] These requests often lead to the intervention of Geneva Call in order to provide practical guidance and trainings, to ensure the

[785] Pascal Bongard, 'Engaging Armed Non-State Actors on Humanitarian Norms: The Experience of Geneva Call and the Landmine Ban', *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law* (2007).
[786] Bongard and Somer (n 766) 686.
[787] Geneva Call, 'Engaging Armed Non-State Actors in a Landmine Ban: The Geneva Call Progress Report (2000-2007)' (Geneva Call 2007).
[788] Saul (n 697).
[789] Ryngaert and van de Meulebroucke (n 698) 450.
[790] In this sense, Saul noted that at a meeting in 2014 the issues of protection of displaced people, humanitarian access, hostage-taking and cultural heritage were identified. ibid.
[791] See, e.g., Geneva Call, 'An Inclusive Approach to Armed Non-State Actors and International Humanitarian Norms. Report of the First Meeting of Signatories to Geneva Call's Deed of Commitment' (2004); Geneva Call, 'The Third Meeting of Signatories to Geneva Call's Deeds of Commitment, Summary Report' (n 269).
[792] See, e.g., Geneva Call, 'Armed Non-State Actors Speak about Child Protection in Armed Conflict. Meeting Report 22-24 November 2016'; Geneva Call, 'Conduct of Hostilities by Armed Non-State Actors: Report from the 2020 Garance Talks' (2020) Issue 3.
[793] Geneva Call, 'In Their Words - Perspectives of Armed Non-State Actors on the Protection of Children from the Effects of Armed Conflict' (2010).

effective respect of the deeds of commitment.[794] Ultimately, the NGO seeks to provide deeds of commitment which take into account the experiences, positions, and practical possibilities of ANSAs.[795] The activity of Geneva Call has had failures as well; not all the signatory ANSAs have cooperated effectively.[796] Nonetheless, the overall positive experience proves that, today, engaging with ANSAs directly may lead to better results in their compliance with relevant rules.

5. Conclusion. The search of consent

This review of the international practice shows an evolutionary process in the legal nature of the rules of international law applicable to ANSAs. The first rules addressed to ANSAs were rules of IHL, governing their conduct during armed conflict. This is coherent with the views and needs of the international community, as ANSAs were internationally relevant only when they reached the threshold to be considered belligerents or insurgents. Later on, the body of rules applicable to ANSAs has expanded, including also rules of IHRL. This evolution implies the recognition that ANSAs are, today, more and more involved and relevant also beyond conflictual scenarios. However, the applicable legal framework is still unclear and, besides doctrinal theories and practice of IGOs, it is supported only by a very limited number of conventional provisions expressly addressed to ANSAs. Finally, in the last few decades, NGOs and IGOs have encouraged ANSAs to adopt instruments to abide by international rules and have also actively engaged with ANSAs in the drafting and adoption of such instruments.

Even though the instruments adopted are varied from a legal point of view, they have the same objective: they all aim to effectively bind ANSAs to certain provisions of international law, in light of the needs of the international community. As the Diplomatic Conference of Geneva established a minimum standard of obligations in CA3, without paying too much attention to the problem of the lack of consent of ANSAs, this has not definitely settled the questions regarding the possibility of effectively binding these groups. Scholars have tried to provide doctrinal justifications for the application of rules to ANSAs, but none of the theories submitted has gained general acceptance. Moreover, in many occasions ANSAs have refused to abide by rules they did not consent to. With

[794] Bongard and Heffes (n 767).
[795] Jackson (n 186).
[796] Geneva Call, 'The Third Meeting of Signatories to Geneva Call's Deeds of Commitment, Summary Report' (n 269).

ANSAs becoming more and more relevant and powerful, it appeared necessary to adopt another approach to normative production, ultimately leading to the practice of direct involvement of ANSAs in the production and adoption of relevant instruments.

From a legal point of view, this *excursus* proves that the paradigms of international law are not carved in stone, but they can evolve considering the needs of the international community in a certain moment. This is especially true if a functional approach to international law, focused on effectiveness, is adopted. In particular, it demands a reconsideration of the paradigm of normative production of international law, as it is now not limited to states anymore.

Conclusion

ANSAs have emerged as significant actors within the international community, both in and outside armed conflicts. Their relevance has proven difficult to accommodate within the traditional system of international law. In this regard, the main problem is the non-state nature of ANSAs in a state-centric system of international law. The assessment of doctrine and practice, however, shows that the accommodation of ANSAs in law-making processes, despite several difficulties, is possible from both a theoretical and practical point of view.

Undeniably, the practice of engaging with ANSAs presents several difficulties. First of all, this practice is often contested by states, which are reluctant to engage with ANSAs. This reluctant position, however, proves the necessity to thoroughly study the phenomenon of ANSAs. Indeed, the latter can be divided into different subcategories, and their perception by the international community varies widely from one subcategory to another. NLMs have gained explicit international support, as proven by various UNGA resolutions.[797] At the opposite side of the spectrum, the legitimacy of terrorist groups is rejected by the international community. This attitude is mutual: while NLMs aim to gain a role within the international community, terrorists usually despise it. These differences and issues of identification may negatively affect the engagement of ANSAs in law-making processes, especially taking into consideration the frequent, purposefully distorted use of the terminology to identify ANSA's subcategories. For instance, the term "terrorists" may be used to condemn ANSAs and block any engagement with groups labelled as such, beyond the actual terrorist nature of the ANSA in question.

Another issue is linked to the traditional, state-centric conception of international law. Indeed, for centuries the latter has been produced by, and addressed to, states. The practice of obliging ANSAs to rules of international law and, even more so, of engaging with them in international law-making processes, proves difficult to reconcile to the theoretical structure of international law. Difficulties arise also considering the frequent resort, in international practice, to soft law instruments to engage

[797] See, e.g., UN General Assembly, 'Resolution 3103 (XXVIII). Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Régimes, A/RES/3103(XXVIII)' (n 127); UN General Assembly, 'Resolution 41/71. Observer Status of National Liberation Movements Recognized by the Organization of African Unity and/or by the League of Arab States, A/RES/41/71' (n 144); UN General Assembly, 'Resolution 45/130. Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, A/RES/45/130' (14 December 1990).

with ANSAs. Indeed, soft law *per se* is still object of theoretical debate. In this regard, several theories have been submitted to justify, or reject, the mentioned practice. Consequently, it appears that different conclusions on the matter of engagement of ANSAs in law-making processes can be reached, depending on the theoretical approach chosen.

However, under a theoretical perspective, the engagement of ANSAs appears possible when considering the goal pursued by international law. In fact, the latter ultimately aims at guaranteeing the needs of the international community. This statement leads to several conclusions, relevant for the present research. First, it can be argued that the needs of the international community can evolve over time. Second, the concept of "international community" is not further clarified either. Therefore, it is also possible to assume that the number of actors of the international community is expanding in parallel with the development of the needs of the same community.

Therefore, it can be inferred that, in general, ANSAs can be involved in law-making processes. In addition, assessing the current international scenario, their involvement appears even desirable. Appraising their involvement in light of the elements expounded in the above chapters, indeed, the conclusion can be reached that ANSAs may well be considered as a part of the international community. As the latter is not limited to states, it may accommodate relevant NSAs. It has been argued that NSAs, as "actors", are *per se* relevant within this community; however, this is even more so in the case of ANSAs, as they are widespread, powerful and oftentimes active in areas characterised by a lack of strong legitimate authorities, thus exercising control over territories and individuals *in lieu* of state authorities. These considerations also prove that the needs of the international community may be better guaranteed with the involvement of ANSAs in the adoption of regulatory instruments to improve the effectiveness of the latter.

Considering international practice, it appears that, despite the theoretical uncertainties still surrounding the matter, ANSAs are more and more considered as addressees and producers of rules of international law. Indeed, their increasing involvement is evident. Also, international practice proves that international law can evolve to meet the needs of the international community, even at the price of challenging some of the consolidated theoretical tenets of the legal system.

In this regard, it has been pointed out that the expanding practice of considering ANSAs as possible recipients of rules of international law raises several theoretical issues. This is particularly evident considering the rules of IHL, CA3 and APII. However, considering the increasing relevance of ANSAs even outside armed conflicts, rules obliging them to the respect of IHRL have emerged. This

is *per se* particularly significant, as IHRL has traditionally been understood as governing the relationship between the individual and the state. Finally, the engagement of ANSAs in normative production processes has been confirmed.

In conclusion, it can be stated that, despite the widespread reluctance within the international community, the engagement with ANSAs in normative production processes should be endorsed. In fact, their involvement may lead to a stronger sense of ownership of the rules, thus leading to wider compliance with them. This may improve the effectiveness of rules addressed to ANSAs, ultimately providing better guarantees for the other members of the international community. The difficulties of engaging with ANSAs cannot be ignored; however, these difficulties must be tackled taking into consideration the aim pursued, namely the improved guarantee of the needs of the international community.

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