Chapter 15

Non-state Actors and International Criminal Law

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Abstract

The legal position of non-state actors in international law has been on the agenda of international scholars for several decades, particularly in terms of defining various kinds of non-state actors, clarifying the issue of their international legal personality, and, ultimately, addressing the most controversial question – that of their international responsibility. In this context, the author analyses the position of armed opposition groups as a specific category of non-state actors in situations of non-international armed conflicts, in which violations of international law frequently occur. The author thus defines the international legal framework relevant for the regulation of the rights and duties of these non-state actors, and places special emphasis on violations of international legal norms amounting to the most serious international crimes. The author warns that there is a legal lacuna in respect of the international responsibility of armed opposition groups since the international criminal law framework still does not offer adequate legal and institutional mechanisms for holding them directly accountable as groups. However, the reality of international relations and the enormous extent and gravity of international crimes committed by armed opposition groups in armed conflicts advocate for recognition of their direct international responsibility. Such a view is supported by an increasing number of scholars, the jurisprudence of international courts and tribunals, and Security Council decisions, all of which are analysed in this paper. The author concludes that, in order to complement the international criminal justice framework, all

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the aforementioned actors should enhance their cooperation and find more suitable solutions for explaining the role of armed opposition groups as collectives in the commissioning of international crimes, as well as for defining the prerequisites for their direct international responsibility. The author also offers possible solutions in this regard.

Keywords: non-state actors, armed opposition groups, international humanitarian law, international human rights law, international crimes, direct international criminal responsibility

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1. Introduction

The issue of the position of non-state actors (NSAs) in international relations can be approached from many different perspectives and scientific fields, depending on the specific problem that forms the focus of the research. The subject of this paper is the analysis of NSAs within the international criminal law framework, i.e. the analysis of a particular category of NSAs who are frequently in a position to commit the most serious international crimes (war crimes, crimes against humanity, genocide). This issue, however, is still rather controversial in both legal theory and international criminal jurisprudence since there are still no adequate mechanisms available for holding them directly accountable for these crimes.

In order to explore how NSAs fit or do not fit within the international criminal framework, we must start from the perspective of international public law and choose an adequate definition of NSAs relevant for the application of certain international legal rules, violations of which can amount to international crimes. The International Law Commission dealt with various aspects of NSAs' activities trying to clarify whether they have any international rights and duties, i.e. whether they have an international legal personality (section 2). In this context, we use the term NSAs to refer to armed opposition groups participating in non-international armed conflicts and that often commit violations of international law to the detriment of civilians. Furthermore, we analyse the international legal framework relevant for the regulation of the rights and duties of these NSAs, particularly the rules of international humanitarian law applicable in non-international armed conflicts, as well as the rules of international human rights law. As will be explained in more detail later in the paper (section 3), the fact that the rules of international humanitarian law apply to all parties to an armed conflict is widely accepted in legal theory and has been confirmed in numerous decisions of international courts and tribunals. Decisions adopted by the UN Security Council are also of particular significance in this context. On the other hand, it is still rather disputable in theory whether the rules of human rights law are applicable to NSAs, since according to the still prevailing point of view, states are the primary holders

of human rights obligations. However, we will explain that under certain conditions, NSAs can also have international obligations towards individuals under their control.

The crucial issue under consideration, however, is violations of international legal norms committed by NSAs, which amount to the most serious international crimes. In this context, the central questions posed in this paper, and analysed in section 4, are the following: are armed groups responsible as collectives for violations of international law? Can they be held accountable for international crimes, such as war crimes, crimes against humanity, genocide and torture? How can theory bridge the legal *lacuna* in which there are still no legal mechanisms for determining their international criminal responsibility as groups, as opposed to the responsibility of a state or an individual?

There are still no definite answers to these questions; however, we will try to demonstrate how some alternative legal mechanisms can be used to arrive at the conclusion that armed groups are not only bearers of international obligations but are also internationally responsible as groups for international crimes committed in armed conflicts (section 5). Their international responsibility can be deduced indirectly, through the determination of the international responsibility of a state based on the attribution of internationally wrongful acts committed by NSAs. On the other hand, the establishment of the international criminal responsibility of individual members of a group can also contribute to a finding of the group's indirect responsibility for enabling the commission of crimes by its members. These considerations can serve as the starting point for further development of international criminal law and the search for more suitable solutions in explaining the role of NSAs as groups in the commission of international crimes, as well as the prerequisites for their direct international responsibility (section 6).

2. Non-state actors as subjects of international law

One of the consequences of the globalisation process is the weakening of the *de facto* power of states and the loss of state control over developments, both within their territory and on the international level. This has paved the way for the inclusion of many new actors, organisations and institutions in the international arena, conducting their activities more or less autonomously and outside the control of the state's central government.[1] The International Law Commission's Committee on

1 This group of NSAs also includes organisations that participate in cross-border activities, that are oriented towards creating transnational relationships, and that connect with different political systems, economies, and societies, thus intentionally or non-intentionally influencing political trends in one or more states and/or international organisations. See more in Josselin and Wallace, 2001, pp. 3–4.

Non-State Actors (the ILA Committee), established in 2007, dealt with the issue of the position of various NSAs in international law, focusing on the identification of their international rights and obligations and their place in the framework of international responsibility. The ILA Committee confirmed that the common feature of all NSAs is their autonomy from state power, and that their establishment and activities are independent of the state's political influence, control and financing. For the purpose of its research, the ILA Committee offered a working definition of NSAs, according to which NSAs are 'legally recognised and organised entities that are not comprised of nor governed or controlled by states nor groups of states and that actually perform functions in the international arena that have real or potential effects on international law'.[2] Five categories of NSAs are included in the ILA Report of 2010 based on this definition: (a) non-governmental organisations (NGOs); (b) multinational enterprises (MNEs) or transnational corporations (TNCs); (c) organised armed opposition groups (AOGs), rebel groups, insurgent and belligerent groups, and parties to an internal conflict that reaches the threshold for the applicability of international humanitarian law, as well as national liberation groups; (d) *sui generis* or unique entities (such as the Holy See or the International Committee of the Red Cross) and (e) organised groups of indigenous peoples.[3]

Although each of these categories of NSAs undoubtedly brings some new challenges in international relations, as well as in the development and adaptation of the international legal framework with regard to the issues of their international legal personality and their international responsibility, the assigned topic of the position of NSAs in international criminal law directs our focus to NSAs who, by the nature of their activities and goals, are most closely related to violations of international legal norms, often amounting to international crimes. In this context, our focus is on AOGs participating in non-international armed conflicts, which, according to the ILA Committee, are defined as 'collective entities that use organised military force, have an authority responsible for their acts, and have the means of respecting and ensuring at least the rules of international humanitarian law (…). They are generally engaged in protracted armed violence with the Government of a State, or with another armed opposition group, typically in the context of a(n) (international or non-international) armed conflict'.[4] The activities of this particular category of NSAs quite often involve violations of international law due to the use of armed force in the realisation of their primary goals: the establishment of territorial control and/or

2 Brus and Kunzelmann, 2017, p. 612. The ILA focused on actors who actually perform functions in the international arena and who have real or potential effects on international law. ILA Report, 2010, p. 637.

3 ILA Report, 2010, pp. 637–638.

4 ILA Report, 2014, p. 690. See also ICTY, 1995, para. 70, where the ICTY explained that '(…) an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. On the existence of an armed conflict, whether international or non-international, as a factual question, on which the application of the rules of the international humanitarian law depends, see Akande, 2012, pp. 40–44.

taking over the government, or the establishment of some level of autonomy on part of the state's territory.

Therefore, it is crucial not only to analyse the issue of the legal position and the international legal personality of armed groups as NSAs under international law, but also to detect the current stance of the law concerning the establishment of their international responsibility for violations of international law and identify possible solutions to bridge the legal gap with regard to their direct international responsibility for international crimes.

3. The international legal framework applicable to non-state actors in non-international armed conflicts

Theoretical understanding of the concept of international legal personality has drastically changed during the 20th century, when the state-centric comprehension of international subjectivity ceased to dominate. One of the accepted definitions of international legal persons is the one that describes them as entities 'possessing the capacity to have and to maintain certain rights and being subject to perform specific duties'.[5] However, we must bear in mind that it is the function of the law to apportion rights and duties to such entities as it sees fit. Therefore, the recognition of the international legal personality of AOGs as NSAs depends on their influence on international relations, the needs of the international community and international law, as well as the circumstances in which it is important to assign concrete rights and/or obligations to particular participants in the international arena.[6]

A major change in the doctrinal understanding of the legal personality under international law was brought about by the Advisory Opinion 'Reparation for Injuries Suffered in the Service of the United Nations' of the International Court of Justice (further in the text: "ICJ", "the Court"), in which the Court accepted a functional approach, confirming that legal subjects of any legal system are not identical, and that they differ in their nature and in their rights, which depend on the needs of the community.[7] They all participate in international relations and

5 Shaw, 2008, p. 195.

6 Shaw mentions human rights law, international law of armed conflicts and international economic law as especially important branches of international law in generating and reflecting increased participation and personality in international law. Ibid. p. 197. On the concept of international legal personality in general, see Crawford, 2019.

7 Furthermore, the Court explains that international law develops under the influence of the requirements of international relations and the inclusion of some other entities that are not states. ICJ Reports, 1949, p. 178. These conclusions are valid not only for the UN and for other international organisations but for other entities having international legal personality as well, such as international liberation movements, insurgents, *sui generis* entities, individuals etc. Andrassy, Bakotić, Seršić, and Vukas, 2010, pp. 65–179.

contribute to the creation of the international legal rules, thus reaffirming the constant development and adaptation of the international legal framework to new actors who play non-negligible roles both on the national and international level.[8]

The question of the substantive rights and duties of NSAs, however limited they might be, is inextricably linked to the question of their legal personality. It is widely accepted that AOGs participating in non-international armed conflicts are subject to a particular set of international legal rules because they are belligerents in armed conflicts, being thereby obliged to respect the rules of international humanitarian law. This is primarily dependent on a group's level of organisation, the existence of a military command structure, the *de facto* administration and control of a part of a state's territory, and the intensity of hostilities relevant for the activation of the international law of armed conflicts.[9] Their international legal personality is also manifested in their capacity to conclude international agreements (*jus contrahendi*) with the Government of a State against which they are fighting, or with other armed groups parties to the conflict, with the purpose of regulating certain aspects of the conduct of hostilities and the protection of civilians.[10]

In the next two paragraphs, we will demonstrate how and to what extent AOGs are bound by the rules of international humanitarian law, and also by the rules of human rights law, which, as we will explain further in the text, is a more disputable issue. In any case, it is important to underline that international humanitarian law and human rights law are oriented on the protection of the fundamental principles of humanity and the efficient protection of human beings, both in time of peace and time of war.[11]

3.1. International humanitarian law

Looking at the legal position of NSAs and possible obligations that they might have under international law, there is no doubt anymore that there are rules that, although primarily related to states and international organisations as the main international actors in the creation and implementation of international law, directly address other subjects as well. International humanitarian law, which regulates the rights and obligations of belligerents in armed conflicts, contains the rules applicable to AOGs participating in non-international armed conflicts.[12]

8 Clapham identified four reasons for the rise of NSAs in the international legal arena: globalisation of the world economy, privatisation of sectors which were dominantly governed by states in the past, fragmentation of states' power on the use of armed force, and feminisation of international law and international relations. Clapham, 2006, pp. 3–19.

9 ICTY, 2008, para. 60.

10 Ryngaert and Van de Meulebroucke, 2012, p. 453 et seq. Some authors refer to agreements concluded between NSAs and the Government of a State as internationalised agreements. See, for example, Kooijmans, 1998, pp. 338-339. The applicability of the agreements entered into by the parties to a conflict was confirmed in the jurisprudence of the ICTY. See ICTY, 1995, para. 143.

11 Meron, 1984, p. 21.

12 Depending on a particular group's degree of organisation and the hierarchical division of functions

Although common Article 3 of the four Geneva Conventions on the protection of victims of war is rather unspecific in terms of the definition of concrete actors participating in non-international armed conflicts,[13] its incorporation in the Geneva Conventions undoubtedly represents a breakthrough in the process of the codification of international humanitarian law. One of the reasons for such an appraisal is the fact that this provision explicitly obliges all parties to an armed conflict occurring within the territory of a state to respect the minimum standards of humanity and humane behaviour, thus preventing them from escaping the responsibility to act within the mentioned limitations and demands of law.[14] Therefore, the existence of a non-international armed conflict is the main requirement for the application of these rules to all parties to such a conflict.[15] This has been confirmed in the ICJ's jurisprudence on several occasions, for example in the Nicaragua case.[16] Furthermore, it is important to emphasise that the recognition of insurgents as belligerents is no longer a necessary precondition for the application of common Article 3 of the Geneva Conventions, as well as of the Protocol II Additional to the Geneva Conventions of 1977.[17]

The other proof of the significance of common Article 3 is the confirmation of its customary character, particularly because AOGs as NSAs cannot become parties to the Geneva Conventions. The jurisprudence of the ICJ and the ICTY is extremely

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within the group, as well as their recognition by the government or other states, one can distinguish rebels, insurgents and belligerents. For more details on this differentiation, see Andreopoulos, 2006, pp. 141–142, 157. See also ILA Report, 2014, p. 691.

13 Common Article 3 of the four Geneva Conventions reads as follows: *˝In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions˝* (…). See four Geneva Conventions, 1949, Article 3.

14 Article 3, para.1 prescribes the following prohibitions: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Geneva Conventions, 1949, Article 3, para. 1.

15 The criteria for the identification of an armed conflict as a non-international one are determined during the diplomatic conference in Geneva. See Pictet, 1952, pp. 49–50. See also Commentary of Additional Protocol II, 1987, para. 4459.

16 The ICJ explained: (…) *they are rules which, in the Court's opinion, reflect what the Court in 1949 called ˝elementary considerations of humanity˝* (…). Furthermore, the Court said that Common Article 3 provisions, as they are identical for both the parties to an international, as well as to a non-international armed conflict, bind the members of the *contras* (an armed group in Nicaragua). ICJ Reports, 1986, paras. 218, 219. See also ICJ Reports, 1949, para. 22.

17 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977. Clapham, 2006, pp. 271–273; Andrassy et al., 2010, p. 101. This provision of international law has mostly disappeared from practice and no longer has any legal significance. Meron, 1987, p. 50. However, there are some recent examples of the recognition of insurgents as belligerents, such as the recognition of the Sandinistas in Nicaragua in 1979, the insurgents in El Salvador by France and Mexico in 1981, and the Revolutionary Armed Forces of Colombia (FARC) in Colombia by the Venezuelan government in 2008. For more details, see Akande, 2012, p. 50; Mastorodimos, 2013, pp. 306–307.

valuable in this regard.[18] Regarding the Additional Protocol II to the Geneva Conventions, although it does not record a universal acceptance among states, as is the case with the Geneva Conventions, international jurisprudence has confirmed that the majority of its provisions reflect the existing legal rules, are emerging customary rules or represent a manifestation of general principles of law.[19] The purpose of these rules is the protection of victims of non-international armed conflicts, as well as of the vital humanitarian interests of states and other actors in the international community, the application of which must not depend on the sole discretion of the parties to armed conflicts.[20]

The inclusion of serious violations of common Article 3 of the Geneva Conventions in non-international armed conflicts, as well as other serious breaches of the laws and customs of war in such conflicts, as war crimes in the Statute of the International Criminal Court (the Rome Statute, the ICC) represents a clear confirmation of the obligatory character of these rules for all parties to non-international armed conflicts and, more importantly, of the existence of responsibility for their violations. According to Article 8, para. 2 (f) of the Rome Statute, armed conflicts not of an international character are defined as 'armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'.[21] Such a definition of non-international armed conflicts, i.e. the ones which, along with the traditional types of conflicts, also include conflicts conducted only between organised armed groups, enables the application of the provision of Article 8 to a broad range of armed conflicts.

18 The ICTY confirmed in the case Prosecutor v. Duško Tadić: '*The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218)*'. ICTY, 1995, para. 98.

19 ICTY, 1995, para. 117. The comparison of the scope of application of common Article 3 of the Geneva Conventions and Additional Protocol II, particularly with regard to the definition of the parties of non-international armed conflicts, is given by Matas, 1996/1997, pp. 621–664.

20 On the obligatory character of certain rules of international customary law in relation to armed groups as international persons, see Kleffner, 2011, pp. 454–456; Bellal, Giacca and Casey-Maslen, 2011, pp. 55, 62–63. The ICRC has also confirmed that many rules of international humanitarian law have crystallised into customary international law applicable in both international and non-international armed conflicts as a result of widespread, representative and virtually uniform practice. Henckaerts, 2005, p. 189. For the overview of different doctrines explaining the legal basis for the obligatory character of international humanitarian law rules on armed opposition groups, see Ryngaert, 2011, pp. 284–294.

21 The full text of Article 8, para. 2 (f) of the Rome Statute reads as follows: 'Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'. Rome Statute, 1998.

The exclusion from the Rome Statute of the requirement for territorial control or the involvement of the government in such conflicts reflects the awareness of states participating at the diplomatic conference in Rome that such a criterion is inadequate and even irrelevant in contemporary non-international armed conflicts. This is because the parties to non-international armed conflicts do not necessarily respect state borders in the course of their activities. In addition, the protection of civilians – those most at risk in all armed conflict – must be the *ultima ratio* of legal protection.[22]

The decisions adopted within the UN organs, especially the Security Council, also contribute to the awareness that NSAs (AOGs) are bound by the rules of international humanitarian law. On many occasions, the Security Council has called upon various NSAs, in accordance with the requirements of Chapter VII of the UN Charter, to respect the rules of international humanitarian law for the protection of civilians, particularly the Geneva Conventions.[23] Although there is no consensus among scholars on whether the resolutions adopted by the Security Council, even in the context of Chapter VII, are legally binding on AOGs as NSAs, their significance cannot be denied, particularly in cases where the Security Council explicitly condemns violations of international law committed by all parties to a conflict. Moreover, in these "smart" sanctions, the Security Council categorises such violations as a threat to the peace, thus making AOGs the target of enforcement measures contained in the UN Charter for the purpose of maintaining the international peace and security.[24]

Undoubtedly, the confirmation in the Security Council resolutions that AOGs have obligations under international humanitarian law and that they must end all violations of these obligations helps in the development of awareness that both states and AOGs are obliged to conduct their activities in accordance with the rules of international humanitarian law and are responsible for any breaches committed. In addition, the extent to which such actions by the Security Council can help afford more efficient protection for civilians in armed conflicts should not be underestimated.[25]

22 Triffterer and Ambos, 2016, pp. 313–314, 575–576; Sivakumaran, 2009, pp. 363–380. Schabas points to the commentary of the ICRC, that the implementation of the criterion of territorial control would mean a step back in the international legal regulation of armed conflicts, and that that would prevent the ICC from conducting proceedings in relation to crimes committed in many recent armed conflicts. Schabas, 2010, pp. 204–206.

23 See, for example, Security Council resolution 864 (1993) referring to the situation in Angola and the activities of the insurgent group UNITA (The National Union for the Total Independence of Angola), resolution 1343 (2001) against Liberia, which collaborated with the Sierra Leone insurgent group RUF (Revolutionary United Front), and resolution 1556 (2004) against the Janjaweed militia, which committed numerous violations of human rights and the rules of international humanitarian law in Darfur, Sudan.

24 On the development of the so-called "smart sanctions", see Bolani, 2003, pp. 401–439; Lapaš and Rusan Novokmet, 2018, pp. 34–48.

25 The role of the UN Secretary-General in the protection of civilians in armed conflicts is also very important, particularly in terms of providing support to the Security Council. In the most recent report, the Secretary-General particularly emphasised that the protection of civilians depends on adherence to the applicable rules of international humanitarian law and human rights law. He has

3.2. International human rights law

International human rights law primarily binds states in relation to individuals under their jurisdiction. The applicability of international human rights law to NSAs is still a rather controversial concept. However, more and more international lawyers and practitioners advocate for the view that certain NSAs, such as AOGs in non-international armed conflicts, are bearers of some duties under human rights law, even though they cannot become parties to human rights treaties. The factors that influence the existence of such obligations are the degree of *de facto* control of part of a state's territory by armed groups and their performance of governmental functions.[26] This is based on the conclusion that AOGs have the duty to respect human rights where the legitimate government, particularly in circumstances of an armed conflict, is unable to provide legal protection to its citizens, perform its public functions or implement territorial control.[27] What is even more important, the *ratio* for the expansion of the rules of international human rights law to NSAs is to bridge the legal gap that emerges in situations of incompatibility between the broad powers of AOGs and the possibility of holding them accountable for violations of human rights, which unfortunately often occur in times of an armed conflict.[28] Otherwise, if certain actors were to remain outside the framework of human rights obligations and accountability for violating those obligations, mechanisms for human rights protection would be very limited and inefficient.

The view that AOGs are addressees of human rights obligations is supported by numerous resolutions adopted by the Security Council, in which the Council condemned violations of both international humanitarian law and human rights law by AOGs, and expressed its stand that it holds them responsible for the violations of these rules.[29] Moreover, the Security Council confirmed that parties to an armed conflict bear the primary responsibility for the implementation of all possible measures for the protection of civilians, and called upon them to strictly respect their obligations arising from international humanitarian law, human rights law and refugee

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also called upon states and NSAs to conclude the relevant treaties and incorporate their international humanitarian law and human rights law obligations into their national laws, military manuals, codes of conduct, and other rules relevant to their activities. UN Secretary-General Report, 2023, para. 90. See also UN Secretary-General Report, 2015, para. 59.

26 Zegveld, 2002, pp. 148–149; Henckaerts and Nohle, 2018, p. 31.

27 Ronen, 2013, pp. 21 et seq.

28 Ibid. p. 24.

29 For example, in Resolution 1417 (2002) the Security Council condemned ethnically and racially based calls for violence, killings and attacks against civilians and soldiers by the RCD-Goma (Rassemblement Congolais pour la Democratic-Goma) in Congo, explicitly mentioning that it holds this group, 'as the *de facto* authority, responsible to bring to an end all extrajudicial executions, human rights violations and arbitrary harassment of civilians in Kisangani (…)'. Security Council Resolution 1417 (2002), para. 4. See also Constantinides, 2010, pp. 89-110, who explains the role of the Security Council in the extension of human rights obligations to armed groups in control of a territory.

law.[30] The General Assembly also contributed to the understanding that NSAs have certain human rights obligations in the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, where it stated that this document was 'a guideline for all States and other entities exercising effective power'.[31] The Office of the United Nations High Commissioner for Human Rights also emphasised that the understanding of the responsibility of NSAs for human rights violations is a reflection of a pragmatic acceptance of the reality of armed conflicts, without which individuals would lose any possibility of claiming their rights.[32]

However, these assertions are not without certain deficiencies. For one, it is quite difficult to imagine that AOGs have the same resources or capacities as states do to implement these obligations. This is the factor that can aggravate their ability to effectively exercise political authority over the population living in a part of a state's territory.[33] Another problem lies in the possible unwillingness of a state to acknowledge that such NSAs actually exercise territorial control, thus denying them state-like entitlements.[34] The consequence of such a situation is that some armed groups cannot be held responsible under human rights law.

Nevertheless, it is not superfluous to remind ourselves that many obligations under human rights law have a *jus cogens* character, which means that they are imperative norms, from which no derogation is allowed. The prohibition of slavery, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the prohibition of racial discrimination, and respect for the principle *nullum crimen, nulla poena sine lege* are just some of the rules recognised in the International Covenant on Civil and Political Rights, which cannot be abolished in any circumstance, not even in time of armed conflict.[35] Some international bodies, such as the Human Rights Committee or the UN Commission on Human Rights, have confirmed the applicability of the obligations contained in this treaty to NSAs.[36] The protection of human beings and human dignity remains the fundamental principle and the ultimate objective of legal protection in times of armed conflict.

30 Security Council Resolution 1894 (2009), preamble and para. 1. In Resolution 1564 (2004) the Security Council emphasised that 'the Sudanese rebel groups (…) must also take all necessary steps to respect international humanitarian law and human rights law'.

31 General Assembly Resolution 3452 (1975), preamble.

32 Office of the UN High Commissioner for Human Rights, 2011, p. 25.

33 Ibid. p. 149. Armed opposition groups might lack the infrastructure to guarantee a fair trial or to conduct effective investigations of torture or extrajudicial killings. ILA Report, 2014, p. 693.

34 States fear that the recognition of armed groups having *de facto* control over a part of the state's territory might give them some kind of legitimacy. Instead, they prefer to treat them as illegitimate, criminal individuals or groups. Clapham, 2006, pp. 271–273; Cassese, 1981, pp. 426 et seq. See also ICTY, 1995, para. 96.

35 International Covenant on Civil and Political Rights, 1966, Articles 4, 7, 8, 11, 15, 16.

36 Zegveld, 2002, pp. 149–150.

4. Issues of the international responsibility of non-state actors

In the previous chapters we have analysed the position of AOGs as NSAs in armed conflicts and concluded that not only are they international subjects having certain obligations under international humanitarian law, and, under certain conditions, international human rights law, but that they are capable of violating those obligations and being held internationally responsible for so doing. These conclusions are supported by international lawyers, who explain the role of the needs and changes in modern society, which affect the development of international law, and by the interpretations and decisions of international courts and tribunals, backed up by the various UN organs.

The central questions posed in this paper are: if the violations committed by AOGs amount to international crimes, can they, as groups, be held criminally responsible for them? How do they fit into the framework of international criminal law? How does international criminal law treat groups responsible for international crimes?

There are no clear and simple answers to these questions. First of all, the concept of criminal responsibility is primarily related to individuals, physical persons. Indeed, this fundamental principle of international criminal law was confirmed at the very beginning of the development of the concept of individual international criminal responsibility, in the judgement of the International Military Tribunal in Nuremberg in 1946. In its judgement, the Tribunal explained: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[37] It is also worth mentioning the Genocide Convention in this context, which prescribes individual criminal responsibility for genocide, as well as the competence of national and international courts to decide on the responsibility of persons accused of this crime.[38] On the other hand, some national legal systems also provide for the criminal responsibility of legal persons as collectives, such as political parties or companies. The idea of including legal persons in the *ratione personae* jurisdiction of the ICC was also discussed at the diplomatic conference in Rome, with the argument that such a solution would be important in terms of restitution and compensation for victims. However, the proposal was ultimately not accepted in the final text of the Rome Statute.[39] A significant step forward in the development of the criminal responsi-

37 ICC Legal Tools, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.legal-tools.org/doc/45f18e/pdf/ (Accessed: 12 January 2025). See also Schabas, 1998, p. 409.

38 Convention for the Prevention and Punishment of the Crime of Genocide, 1948, Articles IV and VI. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 also provides for the criminal responsibility of an individual.

39 The proposed provision reads as follows: 'Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute'. See United Nations Diplomatic Conference of Plenipotentiaries on the

bility of legal persons on the international level was the inclusion of such a provision in the Draft Articles on Prevention and Punishment of Crimes against Humanity, adopted by the International Law Commission in 2019. Article 6, paragraph 8 obliges each state, subject to the provisions of its national law, to take measures to establish the liability of legal persons for crimes against humanity, which may be criminal, civil, or administrative.[40] On the other hand, a state can also be held responsible for genocide under the Genocide Convention.[41]

As regards the existence of secondary rules of international law establishing the responsibility of AOGs for violations of international humanitarian law or human rights law, there is no consensus among scholars, judges and other experts.[42] We can establish that there are legal *lacunae* in respect of holding an armed opposition group directly responsible for international crimes because there are no mechanisms for determining its international criminal responsibility as a group.[43] However, there are mechanisms by which one can determine the responsibility of AOGs indirectly, whether through the individual responsibility of their members, or through the responsibility of a state, depending on whether it is possible to attribute the wrongful conduct of an armed group to a state.

With respect to the first of the abovementioned mechanisms, an individual is responsible for his own conduct. If he commits an international crime as a member of an armed opposition group, it usually implies a war crime (a breach of international humanitarian law), a crime against humanity, or genocide, for which he can be criminally prosecuted before national or international courts.[44] However, the group he is a member of and which, presumably, enabled or even encouraged the commission of such crimes, cannot be held criminally liable, at least not at the current stage of development of international criminal law.[45] One can only draw conclusions on the possible responsibility of the group itself on the basis of the criminal sentences handed to its individual members, but only under certain preconditions: that the crimes committed are on a massive scale; that members of the group benefit from the membership; that their acts are collectively pursued as part of the group's ideology

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Establishment of an International Criminal Court, Working Paper on Article 23, 1998, para. 5. For a more detailed discussion on the proposed inclusion of legal persons under the Rome Statute see Van den Herik, 2012, pp. 1–26; Schabas, 1998, pp. 409–410. See also Schabas, 1998, p. 410.

40 Draft Articles on Prevention and Punishment of Crimes against Humanity, 2019, Article 6, para. 8.

41 According to Article IX of the Genocide Convention, the International Court of Justice has jurisdiction over disputes concerning, among others, the international responsibility of a state party for genocide and other acts enumerated in Article III of the Convention. Genocide Convention, Article IX.

42 ILA Report, 2014, p. 695.

43 During the drafting of the Rome Statute of the ICC there were proposals for the criminalisation of armed opposition groups and their inclusion in the Statute on the basis of the attribution of individual member's conduct to the group. However, this idea was eventually rejected, and the Statute retained the criminal responsibility of individuals only. Rome Statute, 1998, Article 25.

44 Under the Rome Statute, the ICC has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Rome Statute, 1998, Article 5.

45 ILA Report, 2014, p. 696.

or policy; that the group has an organised structure; and that the members are subject to military command.[46] Under these conditions, a collective organisational responsibility of AOGs in non-international armed conflicts can be construed and recognised. If a group somehow enables the commission of crimes, supports and/or encourages violations of international humanitarian law or human rights law, and if the crimes are committed with the aim of realising political or other goals of the group, then the rules of attribution of individual members' acts to the group itself might apply.[47]

As regards the connection between the responsibility of a state and an armed opposition group, such a connection is usually evident in times of armed conflicts in situations where a state engages a private entity, a group, to achieve its goals by circumventing the use of its own state organs. This manoeuvre allows a state to circumvent the establishment of its direct international responsibility for potential violations of international law.[48] However, it turns out to be quite difficult in practice, in a judicial process, to satisfy the high threshold of attribution of the acts of armed groups to a state. According to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, breaches of international law can be attributed to a state in several cases: first, if a group is empowered by the law of that state to exercise elements of governmental authority; second, if a group is acting under the instructions, direction, or control of that state; and third, if that state acknowledges or adopts the conduct of a group as its own.[49] Since it is rare in practice for a state to overtly use such groups for its purposes, the link between a state and an armed group usually stays hidden, so the rules of attribution of their acts to a state rarely apply. Even if they are applied by a court, it is almost impossible to prove a sufficiently strong and indisputable connection between a state and a group to satisfy the attribution test. The application of the effective control test by the ICJ in such well-known cases as Nicaragua v. United States of America of 1986[50] and Bosnia and Herzegovina v. Serbia and Montenegro of 2007[51] shows that to prove state control of military and paramilitary operations in the course of which the alleged violations of international law were committed[52] is almost impossible. It is logical to conclude that states can relatively easily escape responsibility for the international wrongful acts

46 Ibid. p. 697.

47 The Draft Articles on the Responsibility of States provisionally adopted by the International Law Commission in 1996 envisaged the possibility of the attribution of conduct of the organ of the insurrectional movement to that movement 'in any case in which such attribution can be made under international law'. This provision was eventually deleted since, according to the Special Rapporteur, it concerned questions of the responsibility of insurrectional movements, which are, by definition, not states, thus falling outside the scope of the Draft Articles. ILC Report, 1996, p. 129.

48 ILC Draft Articles, 2001, Articles 2, 4–6.

49 Ibid., Articles 5, 8, 11.

50 ICJ Reports, 1986, para. 115.

51 ICJ Reports, 2007, paras. 396–413.

52 ICJ Reports, 1986, para. 115. For a more detailed analysis of the effective control test, see Boon, 2014, pp. 346 et seq; Milanović, 2006, pp. 577, 597–598; Talmon, 2009, pp. 502 et seq.

(and international crimes) of private persons and private groups who are formally outside the state apparatus, but who are engaged to act as instruments of the state. On the other hand, it is significant that in both of the cases mentioned, although limited by its *ratione personae* competence, the ICJ concluded: '[The Court] takes the view that the *contras* remain responsible for their acts (…)',[53] and that '(…) all the indications are…that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without the instruction from or effective control by the FRY'.[54]

In our opinion, this reasoning by the Court actually opened the door for future discussions of the direct responsibility of NSAs for violations of international humanitarian law and genocide.[55] The analogy with the rules of attribution of a conduct to a state could serve for this purpose, at least in respect of AOGs characterised by a high level of organisation, with clear division of functions and a hierarchy between its members or its organs, as well as by the exercise of control of part of the state territory,[56] although this theory is not unequivocally accepted by scholars.[57] The inclusion of an additional mode of international responsibility, along with the responsibility of a state and that of an individual, could be seen as a positive development in international criminal law, in terms of creating a more complete regime of responsibility and serving the needs of international criminal justice.[58]

5. Direct international criminal responsibility of non-state actors – continuing challenges

The above-described legal *lacuna* in regard to the existence of mechanisms for the determination of the direct international responsibility of NSAs has been provisionally settled in theory with the proposition that the responsibility of AOGs (insurrectional movements) is "transferred" either to the new government they establish (if they succeed in overthrowing the current government), or to the new state (if they succeed in establishing a new state on part of the territory of the pre-existing state).[59]

53 ICJ Reports, 1986, para. 116.

54 ICJ Reports, 2007, para. 413. See also Bolani, 2003, pp. 414–415.

55 There are currently three cases involving the issue of state responsibility for genocide under deliberation before the ICJ: the case between The Gambia and Myanmar, the case between Ukraine and the Russian Federation, and the case between South Africa and Israel. International Court of Justice, https://icj-cij.org/home (Accessed: 13 January 2025).

56 Momtaz, 2010, p. 245. These territorially determined entities are recognised as having a limited and temporary international legal personality. See more in Lapaš, 2010, p. 105.

57 Sassòli, 2010, pp. 47 et seq.

58 On the differences and complementarity of the two regimes of responsibility (of states and of individuals), see Bianchi, 2009, pp. 16–24.

59 ILC Draft Articles, 2001, Article 11, paras. 1 and 2. The ILC explains that the general principle is

If, on the other hand, a movement fails in its endeavours, its responsibility cannot be established since the movement ceases to exist as an autonomous entity.[60] Moreover, it would be almost impossible in practice to successfully prosecute a claim against an armed opposition group after its defeat.[61]

However, an increasing number of scholars take into account the reality of contemporary non-international armed conflicts in which NSAs participate, often fighting among themselves, without the involvement of the government, in conflicts that last for a long time and in which many violations of international law occur to the detriment of civilians and material property. In this context, these scholars address the need for the recognition of the direct international (criminal) responsibility of AOGs as collectives in non-international armed conflicts.[62] There is a consensus among them that the only (or the most significant) requirement in this regard is the effectiveness of their territorial control, and not the recognition of their formal status.[63]

The need to criminalise NSAs as groups was highlighted during the diplomatic conference for the preparation of the Rome Statute of the ICC. One of the drafts of the future Statute envisaged the jurisdiction of the Court over physical and legal persons; however, it did not specify the definition of the legal persons that this provision would encompass.[64] The idea was ultimately abandoned due to strong advocacy by some participants that the inclusion of the criminal responsibility of NSAs might endanger the realisation of the right of peoples to self-determination.[65] On the other hand, the omission of the criminal responsibility of NSAs from the Rome Statute could also be explained by practical reasons. Namely, not all states envisage the criminal responsibility of legal persons in their criminal codes; hence, the inclusion of such a provision in the Rome Statute would create an asymmetric situation because the principle of complementarity would only be applicable in those states which prescribe such a mode of responsibility.[66] However, some progress has been made in regard to the inclusion of legal persons' liability for crimes against humanity on the international level, in the International Law Commission's Draft Articles on Prevention and Punishment of Crimes against Humanity in Article 6, para. 8.[67] Fur-

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that in respect of the actions of such movements, committed during the continuing struggle with the constituted authority, they are not attributable to the state under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the state, unless some other articles of the Draft are applicable. ILC Draft Articles, 2001, p. 50.

60 ILA Report, 2014, p. 696.

61 Dumberry, 2022, pp. 204–207.

62 Zegveld, 2002, pp. 133 et seq: Lapaš, 2015, pp. 343-351; Crawford, 2013, p. 180; Ryngaert and Noortmann, 2010, pp. 5–14; Dumberry, 2022, pp. 200–209.

63 Dumberry, 2022, pp. 203–204.

64 Article 23, para. 5 of the 1998 draft prescribed: 'The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives'. Report of the Preparatory Committee on the Establishment of an International Criminal Court, 1998, pp. 48–49.

65 Zegveld, 2002, pp. 57–58.

66 Schabas, 2006, p. 139; Saland, 1999, p. 199.

67 See *supra*, note 40.

thermore, the increasingly frequent inclusion of the concept of the criminal liability of legal persons in the criminal legislation of European states might accelerate discussions among scholars and practitioners concerning the adoption of such a concept in the Rome Statute in the future. However, the jurisdiction of the ICC, encompassing only the most serious international crimes, which are, due to their specific elements, usually attributable only to individuals, is a limiting factor in this regard.[68]

Nevertheless, it is evident that international criminal law is constantly developing and adapting to the reality of international relations and contemporary challenges involving NSAs in armed conflicts. We can identify certain rules of international criminal law that are also applicable to NSAs, including AOGs, which most frequently commit massive international crimes, often as part of a widespread or systematic attack against civilians and pursuant to some plan or policy, or the realisation of an ideology or some criminal agenda. The provisions of some international conventions on the criminal responsibility of legal persons also contribute to the acceptance of such a mode of responsibility. We see such solutions as a manifestation of the progressive development of international criminal law, which, in the future, could also be extended to the responsibility of AOGs.[69] Furthermore, the jurisprudence of international courts and tribunals, particularly the ICC, although they are limited in terms of their *ratione personae* jurisdiction, also leads to the conclusion that the international criminal responsibility of AOGs exists,[70] particularly in relation to the activities of such groups in situations of non-international armed conflicts. Further factors that are determined in judicial proceedings, from which the existence of the criminal responsibility of a group can be inferred, are the following: the crimes are committed within the realisation of the criminal purpose of the group, the organisational structure of the group provides support to the members and finances their activities, and it enables the actions of its members on the basis

68 Wattad, 2016, pp. 421–422.

69 See, for example, International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, Article 1, para. 2; International Convention for the Suppression of the Financing of Terrorism, 1999, Article 5; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000, Article 3, para. 4; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014, Article 46C. On the criminalisation of illegal acts of legal persons in various national legal systems, see Clapham, 2009, pp. 899 et seq.

70 For example, in the Judgment in the case The Prosecutor v. Dominic Ongwen of 2021, the ICC describes in detail the establishment, hierarchical structure and activities of the LRA (Lord's Resistance Army) in Uganda between 2002 and 2004, which, as a strategy for the realisation of its goal to violently overthrow the government, committed widespread and systematic attacks against civilians, abductions of civilians, sexual assaults and other crimes. See also, ICC, 2012; ICC, 2014; SCSL, 2007. We also refer readers to the judgement rendered by the Special Tribunal for Lebanon of 2016, in which the Tribunal decided on the existence of criminal liability of a corporation as a legal entity, which indicates the direction of the development of international criminal law; international hybrid courts may also have jurisdiction in regard to the international criminal responsibility of legal persons. See STL-14-06/T/CJ, 2016.

of the group's policy or plan, thus enabling the acts to be committed, usually, in a systematic way.

To recapitulate, the explanations of the ICC in regard to the structure of a group, its hierarchical composition and military discipline, the existence of a certain plan or policy, and particularly if the *modus operandi* of the group includes systematic violations of international humanitarian and human rights law, lead to the conclusion that the crimes committed do not necessarily involve only the issue of criminal responsibility of individual members of a group, as direct perpetrators of the crimes, but also that the group, by providing the structure, the means and the goal of the group's activities, is directly responsible under international law for the crimes committed.[71]

The current lack of efficient institutional mechanisms on the international level to determine the direct international criminal responsibility of AOGs for international crimes does not mean such a responsibility does not exist, or that the theoretical and policy solutions *de lege ferenda* will not facilitate the holding accountable of these entities for violations of international humanitarian law, human rights law and international criminal law. It is no longer contested that they are bearers of these international obligations, and that they, therefore, have a limited international legal personality.[72] It is also undisputable that they are capable of violating these obligations, from which their international responsibility derives. In this author's opinion, if the obligatory nature of these norms towards AOGs, as well as the issue of their direct international criminal responsibility, depended on the enforcement mechanisms only on the international level, the possibility to influence their behaviour in armed conflicts would be lost, and the most vulnerable victims of armed conflicts, the civilians, would remain without any legal and real protection.

6. Conclusion

The international legal framework applicable to AOGs, as we have seen, is not always clear and unambiguous, hence the issue of their direct international responsibility for international crimes remains an on-going challenge for the theory of international public and international criminal law. The vagueness of certain rules, particularly in regard to the specificity of armed groups subject to international humanitarian law or the preconditions necessary for the application of human rights law, in combination with the lack of legal institutional mechanisms for holding NSAs

71 However, we agree with authors who, although admitting that NSAs (insurrectional movements) can bear direct international responsibility, say that their responsibility is more easily obtained through other means, particularly by determining the individual responsibility of their members. Cahin, 2010, pp. 253–254.

72 Similarly, Clapham, 2009, pp. 924–926.

accountable for violations of these norms, creates a legal *lacuna* in relation to the establishment of the direct international responsibility of these international subjects, particularly in cases where the standards required for attribution of their acts to a state are almost impossible to overcome. We consider this especially worrying in situations of the most serious international crimes against civilians, such as genocide or crimes against humanity.

However, the reality of international relations and the emergence of many different actors whose activities undoubtedly affect the dynamics of the relations between states and non-state actors, and unfortunately, endanger the lives of innocent civilians, advocate taking a step forward in recognising the direct international responsibility of AOGs. The decisions of international courts and tribunals, in which it is determined that certain crimes, although committed by individuals as members of AOGs, are committed within the structured and organised group, which supported, enabled and/or financed their activities, which are furthermore perpetrated as part of a plan or policy of the group, according to a certain pattern and on a massive scale, and whose members benefit from membership in the group, are very helpful in drawing the conclusion that these groups are, as collectives, internationally responsible for the commission of these crimes. These conclusions are supported by many Security Council resolutions directly targeting AOGs, and by decisions made by other relevant UN bodies, in which NSAs are called upon to end violations of international law and adjust their behaviour in line with their international obligations.

The *ratio* for the criminalisation of NSAs for the most serious and massive international crimes is to safeguard elementary principles of humanity, which should be respected in armed conflicts in order to minimise the tragedy of the loss of innocent lives and the suffering of civilians. International criminal justice cannot be fully satisfied if one searches only for individual criminal responsibility. The variety of armed conflicts and of actors who are obliged to act in accordance with international law, along with the enormous extent and gravity of the crimes committed, call for recognition of the international criminal responsibility of NSAs as groups. Hence, in order to complement the international criminal justice framework, it is necessary, first, to reach a consensus in terms of defining specific features of NSAs that makes them capable of violating the international legal rules constituting international crimes; to use the jurisprudence of the ICC and other international courts and organs to explain the role of NSAs in the international criminal law framework and to define the legal basis for their international responsibility, as well as the prerequisites for attribution of the acts of individual members of NSAs to the group itself; to consider discussing amendments to the Rome Statute regarding the inclusion of AOGs within the jurisdiction of the ICC; to establish another suitable international forum to determine their international responsibility; to engage national and international mechanisms to put pressure on NSAs to ensure reparation for victims; and to encourage AOGs to commit themselves to respect international humanitarian and human rights law by unilateral statements or agreements.

A comprehensive theoretical, institutional and organisational approach by various actors participating in the development, interpretation and application of international criminal law is thus required in order to achieve a greater level of legal certainty and to establish the responsibility of all those who commit the most serious international crimes against civilians. The potential preventive effect of such a line of action should also not be underestimated.

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