FACULDADE DE DIREITO UNIVERSIDADE NOVA DE LISBOA

CEDIS CENTRO DE I&D SOBRE DIREITO E SOCIEDADE

DIREITO, SEGURANÇA E DEMOCRACIA

THE APPLICABILITY OF INTERNATIONAL AGREEMENTS ON THE PROHIBITION OF CERTAIN WEAPONS TO NON-STATE ACTORS

A Aplicabilidade de Tratados Internacionais Sobre Certas Armas aos Atores Não-Estatais

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ABSTRACT

In the framework of international law, non-State actors, and specifically non-State armed groups, still represent a debated category due to the difficulty to determine univocally their legal stance, in particular their lawmaking capacity.

The status quo of the law of armed conflicts establishes that customary international law is also applicable to non-State armed groups; but what about treaty law? The question can be analysed from two standpoints. From the point of view of the very regulation, the two main bodies of law represented by the 1949 Geneva Conventions and the 1977 Additional Protocols contain provisions aiming at imposing obligations on non-States belligerents without granting formal participation to the instruments and drawing a distinction in the discipline for groups fighting for specific instances of self-determination and others. From

their own side, non-State armed groups can render conventional rules applicable through different means, ranging from factual respect to formal expressions.
The evolution and the panorama of provisions on the applicability of treaties on certain weapons to non-State groups are relatively speckled, due to the substantial differences between the weapons considered, but still revealing the assertive legal personality of States.

KEYWORDS

Non-State armed groups – lawmaking capacity – weapons conventions.

RESUMO

No âmbito do direito internacional os atores não-estatais, e nomeadamente os grupos armados não-estatais, representam ainda uma categoria debatida em razão da dificuldade na determinação unívoca da qualificação jurídica deles, em particular a capacidade de ação.

A situação atual do direito dos conflitos armados determina que o direito internacional consuetudinário seja aplicável aos grupos armados não-estatais; e as disposições dos tratados? A questão pode ser analisada sob duas perspetivas. Sob o ponto de vista da própria regulamentação, as duas legislações principais, as Convenções de Genebra de 1949 e os Protocolos Adicionais de 1977, contêm disposições destinadas a impor obrigações aos beligerantes não-estatais sem garantir a oportunidade de tornar-se parte dos tratados e a traçar uma distinção na disciplina de grupos combatentes no exercício de específicas circunstâncias de autodeterminação e outros. Sob o ponto de vista dos próprios grupos armados não-estatais, eles podem provocar a aplicabilidade das normas convencionais através diferentes modalidades como o respeito fatual ou expressões formais.

A evolução e o panorama das prescrições acerca da aplicabilidade de tratados sobre certas armas aos grupos não-estatais são relativamente heterogêneos por causa das diferencias substancias entre as armas consideradas, mas ainda reveladores da personalidade jurídica dominante dos Estados.

PALAVRAS-CHAVE

Grupos armados não-estatais – capacidade de ação – convenções sobre armas.

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i. Abbreviations

AP = Additional Protocols I and II
API = 1977 Additional Protocol I to the Geneva Conventions of 1949
APII = 1977 Additional Protocol II to the Geneva Conventions of 1949
CCW = 1980 Convention on the Use of Certain Conventional Weapons
IAC = International Armed Conflict(s)
ICJ = International Court of Justice
ICRC = International Committee of the Red Cross
IHL = International Humanitarian Law
ILA = International Law Association
LOAC = Law of Armed Conflict
NIAC = Non-International Armed Conflict(s)
NLM = National Liberation Movements
NSA = Non-State Actors
NSAG = Non-State Armed Group(s)
VCLT = Vienna Convention on the Law of Treaties
1986 Vienna Convention = Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

1. Introduction

In the State-centric scheme of public international law, historically inherited from the peace of Westphalia, the role of non-State actors (hereinafter NSA) constitutes the *vexata quaestio* par excellence. The category of NSA comprises a panoply of subjects possessing very different characteristics, reason why the consideration for such entities has to be fractionated and limited to the analysis of a specific group of actors: non-State armed groups (hereinafter NSAG). The complexity of the study of this class is given by the fact that, unlike international organisations or corporations traditionally born from formal constitutive documents declaring the scope and registered, NSAG often do not follow such formalities and take action against the archetype of subjects of international law, States.

The present essay scrutinises the passive and active roles of NSAG in the system of international treaty law, and in particular within the field of international humanitarian law (hereinafter IHL),[1] for the specific purpose of assessing the applicability to those groups of the international agreements on certain weapons.

2. Non-State Actors

The category of NSA is extremely composite, stretching from companies to individuals and armed groups. For this reason, international law presents neither a general conventional definition, nor a unique term of art. Among the copious definitional attempts,[2] an extremely open definition was given by the International Law Association (ILA) that referred to NSA as "all actors who are not State".[3] Later, the very ILA elaborated the classification by introducing three working elements, two of them being respectively the fact of not being "bodies comprised of and governed or controlled by States or groups of States"[4] and the fact of "perform[ing] functions in the international arena that have real or potential effects on international law".[5] If these two features can be considered incontrovertible, the third and last one that refers to legal recognition and organisation[6] opens to discussion,

1 In the present document, the term IHL will be used interchangeably with the term 'law of armed conflict' (LOAC).
2 ILA, pp. 613-614, listing some examples.
3 Idem, p. 612.
4 Ibidem.
5 Ibidem.
6 *Ibidem.*

especially when the reference goes to IHL. This issue will be addressed in the following Section.

2.1. Non-State Armed Groups

As anticipated in the introduction, the type of NSA considered are NSAG, that is to say groups, distinct from and not controlled by the State(s) where they operate, that take up arms to pursue their objectives in a context that amounts to armed conflict. [7]

IHL treaty regulation does not contain an inclusive definition of NSAG. Common Art. 3 to the 1949 Geneva Conventions[8] (hereinafter 'common Art. 3'), addresses "each Party to the conflict";[9] this indirect indication results to be the most comprehensive reference because it includes all NSAG fighting in non-international armed conflicts (hereinafter NIAC) without outlining classification requirements.

Art. 1(4) of Additional Protocol I to the 1949 Geneva Conventions[10] (hereinafter API) considers a particular category of armed groups, identified as those peoples battling against specific instances for the purpose of self-determination, that can be named as national liberation movements (hereinafter NLM). For these groups, the paragraph establishes that applicable law is the law of international armed conflicts (hereinafter IAC). On the contrary, Art. 1(1) of Additional Protocol II to the 1949 Geneva Conventions[11] (hereinafter APII) qualifies those groups as 'organised' and lists the related descriptive criteria.[12]

The adoption of the term NSAG (without 'organised') follows the purpose to include in the scope of the present document also those actors considered by common Art. 3. But a specification should be made. Notwithstanding the broader scope of application, the vague wording of the aforementioned rule does not imply that every combination of armed persons falls into the scope of the regulation; conversely, the organisational requirement explicitly presented three decades later with the APII was in fact already envisaged during the

[7] For comparison, see the definition given by Bellal and Casey-Maslen, p. 176: "any armed group, distinct from and not operating under the control of the State or States in which it carries out military operations, and which has political, religious, or military objectives".
[8] 75 UNTS 31, 75 UNTS 85, 75 UNTS 135 and 75 UNTS 287.
[9] Different from 'High Contracting Party', which refers exclusively to States.
[10] 1125 UNTS 3.
[11] 1125 UNTS 609.
[12] The criteria are: responsible command; control over a part of the territory; ability to carry out sustained and concerted military operations; ability to implement API.

discussion on the Geneva Conventions, as reported by the International Committee of the Red Cross (ICRC) in its commentaries, and constantly supported by international courts and scholars,[13] notwithstanding the fact that the illustrative factors are still open to question.[14] Furthermore, the inclusion of common Art. 3 is necessary to respect the working definition given above with regard to NIAC fought between NSAG, where State actors are not involved, otherwise excluded by the wording of Art. 1(1) of APII.[15]

Therefore, NSAG are here intended as those armed groups with a certain degree of internal organisation that fight against groups of the same nature or against State forces, no matter what the purpose of the resort to armed force is (included the exercise of the right to self-determination codified by API).

2.2. Non-State Armed Groups in International Law: Legal Personality and Legal Capacity

The participation of NSAG to the international scene cannot be approached without considering the nature of such entities. The debate on the issue is still unsettled and involves the deep roots of the international legal order, which are also characterised by political considerations. Without endeavouring in discourses on the philosophy of international law, the question of the nature of NSAG revolves around the acknowledgment of legal subjectivity or personality to entities that are diverse from States, which are the full-fledged international subjects and, consequently, the reference parameter. The decision not to focus on the doctrinal angle (which would lead to the analysis of the foundations of the current international law system and the presentation of reflections *de lege ferenda*), signifies that the present document will develop considerations that maintain the *status quo* that is (still) guided by the decision-making power of States as epicentre.

In terms of general acceptance of the existence of subjects of international law that are different from States, two notable references have to be mentioned, presented in chronological order. Firstly, in 1949 the International Court of Justice (ICJ) in its advisory

[13] ICRC, 1952 Commentary on Geneva Convention I, Art. 3; 2016 Commentary on Geneva Convention I, Art. 3, pars. 422-430. See references in Bellal and others, p. 54.
[14] ICRC, 2016 Commentary on Geneva Convention I, Art. 3, par. 430, which refers to the elements identified by the International Criminal Tribunal for the Former Yugoslavia.
[15] ICRC, 2016 Commentary on Geneva Convention I, Art. 3, par. 394.

opinion on the 'Reparation for injuries suffered in the service of the United Nations' (hereinafter 'Reparation'), explained that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community".[16] Secondly, the 1969 Vienna Convention on the Law of Treaties (VCLT),[17] cardinal normative instrument created by States, refers in Art. 3 to "other subjects of international law": no further specification is furnished, but it is accepted by commentators that several entities and also NSAG are included.[18]

The concept of legal personality as starting point of every reflection on the actions of entities in international law already suffers a sort of catch-22 situation, punctually noted by the International Law Association (ILA), related to the possession of rights and duties that portrays the very notion: "it is […] not fully clear whether actors must become subjects of international law in order to be able to acquire rights and duties under this law and if so, how the status is actually gained (*a priori* approach) or whether they become subjects of international law by acquiring concrete rights and duties (*a posteriori* approach)". [19] Notwithstanding the uncertainty, it is possible to say that legal personality means to hold rights and duties. The two approaches that constitute the dilemma are reflected in the theories on the acquisition of legal personality, ranging from that of recognition to the actor conception, and including the individualistic and formal ideas (the State-only conception is excepted from the outset because it is considered overpassed in the current situation).[20] If none of the theories mentioned is capable of acquiring alone the position of justifier of the acquisition, this is due to the fact that at the present state each one suffers shortcomings, which may in fact be covered by elements of other theories. Shaw appears to implicitly refer to that by declaring that "[i]nternational personality is participation plus some form of community acceptance".[21]

Participation recalls the actor conception, forwarded by a group of scholars and Higgins in particular,[22] which has the merit to give a qualification to the positioning (which

[16] ICJ, Reparation, p. 8.
[17] 1155 UNTS 331.
[18] Corten and Klein, p. 73.
[19] ILA, p. 626.
[20] Murray, pp. 29-33. Portmann, pp. 13-14.
[21] Shaw, p. 156.
[22] See Murray, pp. 32-33 and Portmann, p. 3.

evokes the 'organisation') and the actions of the entity as entailing legal implications. On the contrary, the acceptance by the community can be interpreted as mainly referring to the unavoidable dominant role of States, whether through the theory of recognition or the formal conception.[23]

It is undeniable that NSAG participate to the international arena through legally relevant acts, as the actor concept would assert, but this factual element has necessarily to be placed in conjunction with an external form of acceptance, reserved to States. On the one hand, the recognition conception is given by the discretion of States in granting personality to other entities,[24] as intended by the ICJ in the 'Reparation' opinion that pointed at international organisations, namely the United Nations.[25] Therefore with regard to NSAG this way holds the risk of being used as a political instrument to avoid the conferral of subjectivity.

On the other hand, the formal conception argues that international personality comes from the existence of a norm of international law that addresses the entity.[26] In the case of NSAG in the context of IHL the three rules presented above in Section 2.1, namely common Art. 3 (also as a crystallisation of customary law), Art. 1(4) API and Art. 1(1) APII, are the paramount dictates that bring NSAG into the scope of application of the regulation applicable to armed conflicts and, as a consequence, confer legal personality to those entities.

At this point, it is possible to resume by saying that the participation by holding rights and duties is the first facet of legal personality. Then, external acceptance (in whatever form) appears as the completion of the notion of personality, because of the current State-centric system.

[23] The individual conception puts individual human beings as ultimate international subjects and this concept is, to a certain extent, evoked in Section 4.2.3 dedicated to the applicability of treaties to NSAG through national law.
[24] Portmann, pp. 80-84.
[25] The Court first presents the argument in a veiled manner as follows: "Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States" (p. 8); later it makes it clear by saying: "[i]t must be acknowledged that its [of the United Nations; editor's note] Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged" (ICJ, Reparation, p. 9).
[26] Portmann, pp. 173-177.

The continuation of the discourse on the articulation of the concept of international legal personality leads to the consideration of the concept of capacity.[27] The line of thinking presented above considers the personality primarily as a static attribution of an entity, detached from but at the same time prerequisite for the identification of a 'functionalised' characterisation,[28] the capacity to act, which expresses the eligibility to carry out specific actions. The two main exemplifications of this feature are lawmaking and bringing international claims.[29] Lawmaking in its full breadth is intended as the capacity to participate to the processes of formation and identification of customs and creation of treaties.[30] The role of NSAG with regard to customs lies outside the scope of this document, whereas it is common knowledge that those actors cannot participate in the drafting of and neither can they become parties to treaties.[31] Once this point is clarified, it is possible to determine that the remainder of the present document will deal with a subset of the lawmaking capacity of NSAG, namely the applicability of treaties.

3. International Agreements and Contracting Parties

The State-centric setting of international law signifies that, historically, States are the quintessential contracting parties to treaties (primary sources of international law as indicated by Art. 38 of the ICJ Statute), as crystallised by the VCLT in its Art. 2(1)(a). A significative opening of the system comes from the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter 1986 Vienna Convention). Art. 2(1)(a) extends the meaning of

[27] Following the formal conception exclusively, no consequences would be attached to the acknowledgment of the legal personality of an entity, therefore capacity would not come into question. See Portmann, p. 176.
[28] As a matter of concept, distinguishing capacity from personality serves the argumentative purpose, but it could also be held that capacity is a declension of personality. See Shaw, p. 155, Worster, pp. 210-211.
Kassoti explains: "the capacity to act on the international plane is viewed as a subspecies of international legal personality. Disengaging international legal personality from the capacity to act enjoys the benefit of circumventing the misleading dichotomy between subjects and objects of international law. Instead, the weight of enquiry falls on the extent of the actual rights, duties and capacities an entity is bestowed with in a particular field of law" (p. 79).
To make a parallel, *mutatis mutandis*, with domestic legal theories it recalls the distinction between legal personality and capacity to act of individuals (e.g. Italian legal system having 'capacità giuridica' and 'capacità d'agire', see Roppo, pp. 125-127).
[29] Kassoti, p. 78, Worster, p. 211.
[30] On the definition of 'treaty', see the next Section 3.
[31] Bellal and Casey-Maslen, p. 177.

the term 'treaty', extending its scope of application *ratione personae* to treaties contracted by international organisations.[32] As a result, treaties are those international agreements that see States and/or international organisations as parties.

What is accepted is that ulterior subjects of international law can be contractors of international agreements (other than treaties). The indication is given by Arts. 3 of both the VCLT and the 1986 Vienna Convention (which guarantee that capacity[33] with open clauses), in particular by Art. 3(iv) of the latter that refers to "subjects of international law other than States or international organizations". Moreover, Section (a) of both articles recognises the legal force of the agreements finalised by these entities.

As commentators to the aforementioned treaties reported, [34] also NSAG are considered subjects of international law with the capacity to enter into lawmaking processes, but not into the treaty-making process intended by the two Vienna Conventions. The next chapter will analyse the lawmaking capacity of NSAG with regard to treaties or, in other words, the relation of NSAG with treaties, taking into consideration IHL treaties.

4. Applicability of Treaties to Non-State Armed Groups

4.1. Applicability of Treaty Provisions Reflective of Customary International Law

It is common knowledge that some provisions contained in treaties represent, separately,[35] a crystallisation of rules that have acquired the status of international customs (as defined by Art. 38 of ICJ Statute), whose process of creation is made of the practice and the *opinio iuris* of States.[36] The dominant opinion holds that those rules that are considered customary in character bind not just States but also NSA, included NSAG. The point was clarified by the ICJ in the North Sea Continental Shelf cases: "customary law rules and obligations which, by their very nature, must have equal force for all members of the international community".[37] It is not within the scope of this document to analyse the opinions

[32] Corten and Klein, p. 58.
[33] *Idem*, p. 72, using the same wording.
[34] Corten and Klein, p. 73.
[35] On the separate existence of a rule as treaty law and as customary law, see ICJ, Nicaragua, p. 85, par. 178.
[36] See, as explanatory reference, Shaw, pp. 53-66.
[37] ICJ, North Sea Continental Shelf cases, p. 39, par. 63.

that are critical toward that view, adducing various arguments ranging from the previous behaviour of other NSAG[38] to, above all, the participation in the creation of customary law.[39]

Corroborated by the decision of international judicial and semi-judicial bodies,[40] as well as by authoritative entities such as the ICRC,[41] the photography of the situation as it stands at this point in time shows that customary IHL binds NSAG. And those binding customs arise exclusively from the practice of States, being the practice of NSAG considered "unclear" in that regard.[42]

The first and foremost example of treaty article whose provisions (maybe not all of them, considering the clause on special agreements) posses customary status that is applicable to NSAG is common Article 3, the legal bedrock of NIAC. This very article will be recalled in the upcoming sections by considering its provisions as treaty law.

4.2. Applicability from the Perspective of International Agreements

4.2.1. Final Provisions on Ratification and Accession

The examination of the applicability of IHL treaties to NSAG from the point of view of the rules contained in those documents is limited to the four Geneva Conventions of 1949 and the first two of their 1977 Additional Protocols (hereinafter AP). The consideration for drafting processes and the eventual participation, in whatever form, of entities other than States lies outside the scope of this document, due to the fact that the final drafts were open to the signature of States exclusively.

The first issue to be considered is whether the final provisions referring to ratifications and accession of the six texts contain rules that attribute that faculty to NSAG. The four Conventions use the term 'Powers' clearly referring to States.

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[38] See Sivakumaran, Binding armed opposition groups, p. 373.
[39] Sassoli, pp. 427-428; Bellal and others, p. 62.
[40] For references to the Special Court for Sierra Leone and the International Commission of Inquiry on Darfur, see Sivakumaran, Binding armed opposition groups, pp. 371-372.
[41] ICRC, Customary international humanitarian law, p. xvi ("Rules of customary international humanitarian law on the other hand, sometimes referred to as "general" international law, bind all States and, where relevant, all parties to the conflict, without the need for formal adherence.") and p. xxxv ("many rules of customary international law apply in both international and non-international armed conflicts and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts.").
[42] ICRC, Customary international humanitarian law, p. xlii.

But there is a provision, reported with the same wording respectively in Arts. 62, 61, 141 and 157 of the Conventions that reads as follows: "[t]he situation provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited an accession notified by the Parties to the conflict before or after the beginning of hostilities or occupation". And this raises a major question if the attention falls on the reference to Article 3 that disciplines conflicts where NSAG are parties: can the Convention be ratified or accessed by NSAG? If the ICRC commentary of 1952 is silent on the point,[43] the updated edition of 2016 is very clear in pointing exclusively at States, also in the Section dedicated to the explanation of the characterisation of 'Party to the conflict'.[44]

As for API, Art. 4 extends the scope of application of the treaty to conflicts involving NLM, therefore Art. 96(3) has to be looked at. But this provision neither deals with ratification nor with accession, therefore it will be analysed in the following section. Lastly, the rules of APII on the participation to the protocol contemplate as addressees the parties to the 1949 Conventions that, as it was reported above, are States.

In conclusion, the provisions on ratification and accession rule out the possibility for NSAG to become parties to the treaties. Among the various enumerable reasons behind this choice by States, political justifications and arguments to avoid legitimacy of NSAG are determinant and illustrate the will not to confer treaty-making capacity to those international actors, not even *ex post* treaty's conclusion.

4.2.2. Substantive Rules and Obligations Imposed

Notwithstanding the exclusion of NSAG from formal participation, the treaties under scrutiny contain rules that impose obligations or invocations to apply specific sets of IHL regulation. First of all, common Art. 3 establishes that the provisions listed are the minimum standard that has to be applied by each party to a NIAC. The opening words of the provision are clear in creating obligations for both States and NSAG, as confirmed by the ICRC

[43] ICRC, 1952 Commentary on Geneva Convention I, Art. 62.

[44] ICRC, 2016 Commentary on Geneva Convention I, Art. 62, par. 3240 ("Article 62 provides that the six-month interval which normally separates the ratification or accession of a State from the entry into force of the Convention is dispensed with for any State party to that conflict."), par. 3245 ("When a State is a Party to one of the situations provided for in common Articles 2 and 3, its ratification of or accession to the Convention takes effect immediately.") and par. 3250 ("in view of Article 62, the depositary, while staying impartial, also has to make a preliminary assessment of whether a State is a Party to a conflict at the time of the deposit of its instrument of ratification or accession").

commentary of 2016, which resumes and extends the content of the 1952 commentary; and the comment clarifies that the duties are imposed as treaty law (and not only as a customary rule).[45] Then, the penultimate clause of the article refers to the determination of the parties to the conflict to enforce the provisions of the four Geneva Conventions other than common Art. 3; but this will be scrutinised in Section 4.3.3 because it demands a specific lawmaking capacity of NSAG.

Secondly, Art. 1(4) of API determines that the scope of application of common Art. 2 to the 1949 Geneva Conventions, regulating international armed conflicts (hereinafter IAC), includes situations where the specific subgroup of NSAG represented by NLM are belligerents. However, as it is made clear by the commentators of the AP, the applicability of the related rules to those NSAG is subordinated to the procedure given by Art. 96(3) of API.[46] It invokes the NSAG authorities to apply the body of rules indicated through unilateral declarations, which will be analysed in Section 4.3.2. Therefore, the treaty rules coming into play in case of a war of national liberation do not by themselves directly impose rights and duties on NLM.

Thirdly, Art. 1 of APII declares that the Protocol applies to NIAC where NSAG match the specific requirements enumerated and therefore binds all the parties to the conflict. However, once again, it does not impose obligations expressly.

Apart from the external mechanisms proposed by the clauses in common Art. 3 and in Art. 96(3) of API, which bring the decision-making capacity of NSAG in, what is the rationale that creates the legal bond on NSAG? Several theories have been presented,[47] but the issue is still unsettled. Some of these theories will be taken into consideration in the upcoming parts, but here one is considered, due to the fact that it conceptually belongs to the topic of this section. It is the theory of the treaty obligations on third parties on the basis of Arts. 34-36 of VCLT, which was presented by Cassese.[48] The idea suffers two criticalities: the VCLT intends third parties to be States; in any case, even if a broader interpretation is

[45] ICRC, 1952 Commentary on Geneva Convention I, to Art. 3; 2016 Commentary on Geneva Convention I, to Art. 3, pars. 504-505.
[46] ICRC, Commentary on the Additional Protocols, p. 55, par. 114: "At what moment does humanitarian law as a whole become applicable in pursuance of this paragraph? [….] in accordance with Article 96 *(Treaty relations upon entry into force of this Protocol),* paragraph 3, which provides for the way in which an authority representing a people engaged in a struggle may undertake to apply the Conventions and the Protocol and make them applicable to the conflict.".
[47] See the list in ICRC, 2016 Commentary on Geneva Convention I, Art. 3, par. 507. Also Clapham, p. 772.
[48] Cassese, pp. 423-429.

accepted, it then requires the consent of the third party, which signifies actions, such as unilateral declarations,[49] that are in the dominion of NSAG. Independently from the feasibility and success of unilateral declarations, which will be discussed later in the document, the outcome of the theory is that the imposition of obligations needs an act of consent by the recipients.

4.2.3. Intersection Between International and National Law

Participation to IHL treaties is the result of the decision of States to legislate on behalf of single individuals and groups of individuals within its territory, result of it being the fact that these agreements created in the international law scheme become part of national law. This is another theory that has been advanced, primarily by Sivakumaran, to justify the applicability of treaty regulations to NSAG, labelled as 'principle of legislative jurisdiction'.[50]

The idea is possibly the most disputable. Among the different arguments presented against it, two have to be highlighted. On the one hand, the fact that it blurs the distinction between international law and domestic law if the focus goes on the reception of the former in the latter.[51] On the other hand, the fact that the binding force of the IHL treaties on NSAG derives from the applicability to the individuals, and more specifically on the basis of the nationality of those individuals, that compose these groups, [52] undermining the very stance on the personality of NSAG as entities separated from the individual members.[53]

4.3. Applicability from the Perspective of Non-State Armed Groups

4.3.1. De Facto Acceptance and Compliance

The most intuitive manner for NSAG to render IHL treaties applicable is to comply with the rules. This fact would have advantages in terms of public impact, morals and

[49] *Idem,* p. 428.
[50] Sivakumaran, pp. 381-382.
[51] Cassese, p. 429. Henckaerts, pp. 126-127. Kefflner, pp. 446-448, who tries to defuse the arguments against the theory by maintaining the discussion on the international law plane of rights and obligations, but such an argument seems to open to the hypothesis that IHL obligations are addressed directly to individuals. And this recalls the second point presented.
[52] Kleffner, p. 449. Clapham, p. 778.
[53] But the argument of the separate international legal personality of NSAG is used by the very Sivakumaran (p. 390) to support the thesis.

political leverage, as reported by Bangerter.[54] From the legal perspective NSAG compliance would render IHL more effective and would protect two potential consequences: accountability of the very entity, [55] and criminal accountability of individual members. The downside of the mere factual application by NSAG is that it would be difficult to assess due to the absence of formal parameter of reference to verify which rules or treaties they commit to respect.

4.3.2. Unilateral Declarations

NSAG may decide to abide by IHL through unilateral declarations. The advantage of these instruments from the perspective of the very groups is that they are expression of their own will, reversing the paradigm of imposition generally set by the current IHL framework.[56] In the case of Art. 96(3) of API, unilateral declarations are the mechanism proposed by States to NLM. What distinguishes unilateral declarations foreseen by that provision is that the specific NSAG involved have to refer to the four Geneva Conventions and to the very API;[57] whereas in the other circumstances NSAG, if they decide to follow that procedure, can freely express more general commitments to abide by IHL or more specific declarations to respect specific rules.[58]

The main question that arises here concerns the legal status of unilateral declarations. The ILA consider the nature of unilateral acts as uncertain,[59] but a distinction should be made between internal acts such as codes of conduct or ethical codes, whose status is questionable, from unilateral declarations that are externalised through the delivery to the depositary of the treaties as in the case of Art. 96 or the registration at a third guarantor as in the case of the 'Geneva Call' mechanism.[60]

[54] Bangerter, pp. 356-368.
[55] The analysis of the related enforcement and judicial mechanisms and their criticalities lies outside the scope of the present document.
[56] It is indicative that commentators such as Ryngaert and Van de Meulebroucke, in analysing unilateral declarations, consider that "NSAGs remain bound by all relevant rules of the law of non-international armed conflict, irrespective of whether or not they are listed in the unilateral declaration" (p. 447).
[57] ICRC, Commentary on the Additional Protocols, p. 1090, par. 3767.
[58] Kassoti, pp. 72-73.
[59] ILA, pp. 622-623.
[60] Bongard and Somer, pp. 685-686.

In the latter case, the binding effects of the acts should be recognised. This is already stated clearly by Art. 96(3) in its subparagraphs (a) and (b). For the other situations it can be inferred, as many commentators did,[61] by an interpretation of the ICJ judgment 'Nuclear Tests Case' on the legal status of unilateral declarations,[62] in the light of the needs of the international community, as referred by the very ICJ in the opinion on the 'Reparation' case (exactly in the passage that scrutinises the legal personality of entities other than States).[63] But the practice of NSAG should also be taken into account.[64] And namely the practice under the 'Geneva Call' mechanism, not merely because it is consistent in numbers,[65] showing a certain pattern of behaviour, but especially because of the specificity of the declaration, which does not leave room to uncertainty with regard to the undertakings, and the clear expression of the intention to be bound, as specified by the ICJ in the 'Nuclear Tests Case' decision.[66]

4.3.3. Special Agreements with the Opposing (State) Entity

The conclusion of specific agreements[67] is another way to grant the applicability of IHL treaties to NSAG. The advantage of these means is given by the fact that they commit the belligerent parties to the same rights and obligations. On the contrary the disadvantage, as it was the case for unilateral declarations, is that content and specificity can sensibly vary, contributing to the personalisation of the applicable rules in each situation. Among the IHL treaties considered, the only provision referring to special agreements is common Art. 3, the letter of which leaves the door open to tailoring the content. The reference to such

[61] Roberts and Sivakumaran, p. 142. Ryngaert and Van de Meulebroucke, p. 446.
[62] ICJ, Nuclear tests case (Australia v. France), pars. 42-46.
[63] ICJ, Reparation, p. 8.
[64] Roberts and Sivakumaran, p. 142.
[65] To date, 59 NSAG have signed at least one of the Geneva Call 'Deed of Commitment' [Taken from: https://genevacall.org/how-we-work/armed-non-state-actors/]. Back in 2003, Klabbers expressed his doubts by saying: "[t]hat looks like a feasible solution, but the unilateral declaration appears more attractive in theory than in practice" ((I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors, p. 359).
[66] ICJ, Nuclear tests case (Australia v. France), par. 44.
[67] Multilateral agreements as analysed by some commentators (see Roberts and Sivakumaran, pp. 146-149; Ryngaert and Van de Meulebroucke, pp. 455-456) are not taken into consideration because, otherwise, the very definition of treaty under VCLT and 1986 Vienna Convention and NSAG participation should be scrutinised.

instruments is presented as an obligation for the parties, but an obligation to "endeavour", which results to be an invitation in fact.[68]

Once again, the question of the legal status comes up. Without the necessity to present new nomenclature,[69] it is clear that special agreements are not treaties in the terms of VCLT and the 1986 Vienna Convention; but, as far as clear obligations are included the binding nature shall be acknowledged, no matter if they involve State actors or only NSAG. Moreover, Art. 3 of both conventions on the law of treaties recognise the legal force of agreements that see entities other than States and international organisations as parties. In this case, the related practice presents few examples, especially if peace agreements are excluded due to the assumption that the hostilities should terminate with those arrangements.[70]

5. Applicability of Conventions on Certain Weapons to Non-State Armed Groups

5.1. Convention on Certain Conventional Weapons and its Protocols

The 1980 Convention on Prohibition or Restrictions on the use of Certain Conventional Weapons (CCW)[71] was drafted as an umbrella for the annexed protocols that cover different types of weapons. Its provision on the scope of application determined that all documents were to be applied to situations of IAC, including those conflicts were peoples were fighting for their self-determination, as expressly established by the last sentence of Art. 1. Therefore the very Convention, along with the Protocol on Non-Detectable Fragments (1980 Protocol I), the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (hereinafter, 1980 Protocol II), the Protocol on Prohibitions or

[68] The 1952 commentary to the article considers that a "duty" arises (ICRC, 1952 Commentary on Geneva Convention I, Art. 3), whereas the 2016 commentary acknowledges that it is an encouragement (ICRC, 2016 Commentary on Geneva Convention I, Art. 3, par. 848).
[69] Roberts and Sivakumaran, pp. 144-146. Rondeau, p. 659.
[70] Ryngaert and Van de Meulebroucke, pp. 454-455. ICRC, 2016 Commentary on Geneva Convention I, Art. 3, par. 849. Roberts and Sivakumaran include peace agreements in their analysis, p. 144.
[71] 1342 UNTS 137.

Restrictions on the Use of Incendiary Weapons (1980 Protocol III) and the Protocol on Blinding Laser Weapons (1995 Protocol IV),[72] was only applicable to a specific category of NSAG, that is to say NLM. Art. 7 of the Convention then described the criteria of applicability to those groups by reference to the means provided by Art. 96(3) of API.

The situation changed in 1996 when the 1980 Protocol I was modified by an amending document, the 1996 Amended Protocol II.[73] Art. 1 of the original Protocol, titled 'Material scope of application' and defining the weapons the Protocol was related to, turned into a rule on the scope of application broadly intended, determining also the context. With this change, after 1996 this Protocol resulted the only one applicable to NIAC, due to the reference to common Art. 3 in its Art. 1(2). More specifically, Art. 1(3) established that "each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol", reinforcing the dictum of the previous Par. 2 by imposing explicitly the obligation to NSAG, without offering any mechanism of decision-making as the first clause of common Art. 3 does.

The adoption of the 1996 Amended Protocol, justified by the facility of employment of the considered weapons by all actors and the significant consequences on civilians,[74] brought a substantive imbalance in the framework of the CCW. The situation was modified once again with the adoption of the amendment to Art. 1 of CCW in 2001.[75] With the same use of words as the 1996 Protocol II, firstly Par. 2 extends the scope of application of the CCW and all its Protocols to situations referred to in common Art. 3; secondly, Par. 3 determines the obligation for NSAG to apply the entire CCW framework of documents. As a result, there are no options for NSAG fighting NIAC to express their consent to be bound by this regulation from the statist perspective.

With the modification promoted in 2001, two different standards of applicability of these weapons treaties to NSAG arise. On the one hand, CCW and its Protocols bind NSAG combating in NIAC. On the other hand, NLM are subjects to another discipline: Art. 1(1)

[72] 2024 UNTS 163.
[73] 2048 UNTS 93.
[74] Petrarca, pp. 205-206.
[75] The amendment binds exclusively the States that have ratified it, following Art. 8(1)(b) CCW.
The Protocol on Explosive Remnants of War (2003 Protocol V)(2399 UNTS 100) was adopted after the 2001 amendment and Art. 1 refers its scope of application to Art. 1 CCW as amended in 2001. For this reason it was not listed above along with the first four Protocols.

applies for them and it has to be read in conjunction with Art. 7(4) that relies on the mechanism of unilateral declarations codified by API, and therefore it defers the applicability of the weapons conventions under consideration to the undertaking of that class of NSAG.

5.2. Convention on Biological Weapons

The 1975 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction[76] does not make any reference to NSAG. Its content is solely addressed to States.

5.3. Convention on Chemical Weapons

What has been said in the previous section with regard to biological weapons holds true also for the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.[77] The prohibition of the use of this type of weapons, as well as chemical weapons, for NSAG comes from the rule of customary international law.[78]

5.4. Convention on Anti-Personnel Mines

In line with the previous two conventions, the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (hereinafter Ottawa Convention)[79] articulates provisions whose addressees are not NSAG. In any case, there is a passage that implicitly recalls NSAG: the last paragraph of the Preamble, reporting “the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”. The concepts were codified for the first time by API in Art. 35(1)(2) as basic rules on the conduct of warfare. Later, the Preamble of the CCW reported the very concepts as principles of international

[76] 1015 UNTS 163.
[77] 1974 UNTS 45.
[78] Rules 74 and 73 respectively. ICRC, Customary international humanitarian law, pp. 256-263.
[79] 2056 UNTS 241.

law.[80] As treaty provisions, the position of the two notions in the Preamble of the Ottawa Convention renders the description complicated. Following the rules given by Art. 31 VCLT, the context for the interpretation sees the preamble as having the same relevance of the body of the treaty[81] and, along with object and purpose, this leads to the conclusion that the clauses impose the applicability of the Convention to NSAG. But the main text, whose perceptive value is usually higher due to the tenor of the words, mentions only States party as recipients. Through the recourse to the teleological interpretation it can be highlighted what follows: the purpose of the treaty is extremely wide and covers obligations ranging from the non-development to the destruction of anti-personnel mines that, as a matter of principle, have to be implemented mainly in peacetime. On the contrary, prohibitions such as use and acquisition assume significant importance in time of armed conflicts.[82] The former, which are undoubtedly in the dominion of States, were developed in the text, whereas the latter were not. And these last prohibitions intuitively involve NSAG, therefore it can be inferred that the drafters opted for an indirect reference in the Preamble to manifest the cogitation on NSAG, but in their limited involvement. Nevertheless, the prohibitions that may result relevant, in particular during armed conflicts, for NSAG are applicable to them.

5.5. Convention on Cluster Munitions

The last treaty under analysis, the 2008 Convention on Cluster Munitions,[83] is also devoid of provisions directed to NSAG in its body. But also here the Preamble has to be looked at.

First of all, there is a reference to the principle on the limits on means and methods of warfare already considered in the previous section, but not to the principle on the

[80] The concepts generate some qualification problems. On one side, the reference to principles, especially as for the second one, leads to the general principles of law referred by Art. 38(1)(c) of the ICJ Statute. On the other side, however, first the codification (that implies consent) in API and then the recognition as consolidated practice (see ICRC, Customary International Humanitarian Law, p. 237) create a propensity for the qualification as customs.
On the dividing line between general principles of law and customs, see Klabbers, International Law, p. 35.
[81] Corten and Klein, pp. 823-825.
[82] Roberts and Guelff explains: "[t]he treaty falls within the laws of war as is evidenced by statements in the preamble and by the prohibition on use in Article 1, a much more extensive prohibition than in any previous agreement. However, the treaty also has characteristics of an arms control and disarmament agreement because Article 1 introduces a complete prohibition of the production, acquisition, stockpiling, and transfer of anti-personnel mines" (p. 646).
[83] 2688 UNTS 39.

prohibition of certain weapons, contrary to the Ottawa Convention and the CCW due to the different typology of weapons under consideration. Secondly, another paragraph of the introductory part reads as follows: "*[r]esolved* also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention". Here, NSAG are explicitly cited; however, from the textual interpretation, in particular by pointing at the use of "permitted", it can be deduced that the obligation of the clause is directed to States party as an obligation to prevent.[84]

How can the dissonance between the two clauses be eventually resolved? The specificity of the wording and the teleological interpretation of the treaty make the last-mentioned paragraph prevailing. The expression of an obligation to prevent on States reflects the prevalent accessibility and availability of cluster munitions for States. In the more improbable hypothesis that NSAG manage cluster munitions, the broad reference to the limits imposed on the parties to an armed conflict functions as a (indirect) coverage.

5.6. Comparative Analysis of Conventional Rules and Effects on the Prohibition of Certain Weapons

The scenario of applicability of weapons treaties to NSAG is scattered, but a general consideration can be highlighted immediately: the tendency is not to address, at least not directly, NSAG in the documents considered. This is certainly due to the nature of the majority of weapons under scrutiny, which are composed of materials of difficult acquisition, assembly and utilisation. To the aforesaid, another point should be added. All the conventions contain a consistent number of provisions concerning activities, such as stockpiling, development of certain agents, removal and destruction, whose complexity naturally falls on States and whose implementation relates to peace time as well as (or even more than) time of armed conflicts.

The CCW framework represents the exception. It contains provisions expressly dedicated to NSAG, being NLM at the beginning in 1980 and gradually extending to the other NSAG from 1996 to 2001. In particular, the opening to groups fighting in NIAC came firstly with regard to mines and booby-traps, through the 1996 Amended Protocol II.

[84] Docherty, p. 959.

Precisely in the context of mines and similar devices, the stance of the Ottawa Convention is singular. The document deals with weapons that are kindred to those of the aforementioned protocol, that is to say anti-personnel mines: munitions of relatively easy preparation that can be, as a consequence, generally at the disposal of NSAG;[85] but the 1997 convention merely contains an indirect reference to those actors in the Preamble.

Where NSAG fighting NIAC are directly considered, that is in the CCW, the provisions starkly impose the application of the treaties to these entities. Conversely, NLM are under a separate regime, which roots are located in historical reasons and in the link to the right of self-determination of peoples already codified in the Charter of the United Nation,[86] and that regime relies on the resolution of the very NLM for the applicability of the treaties.

6. Conclusion

NSAG are actors existing on the international scene as holders of rights and duties, which corroborates the possession of international legal personality. This sort of 'internal' subjectivity needs to be complemented by the 'external' aspect that arises from a form of acceptance by States, gatekeepers of international law. This complementarity, which sees one of the components overlooked by the diverse constitutionalist theories, is the compromise between the current centralist system revolving around States and an ongoing process of depolarisation. As element and, a the same time, projection of personality, legal capacity entails the aptitude to carry out specific actions; in the case of NSAG, it has to be partially acknowledged and, in terms of lawmaking, once the capacity to create and participate to treaties is excluded, it involves the applicability of the very treaties.

In the field of IHL, the applicability of this kind of international agreements to NSAG can be approached from the perspective of the regulation and it primarily results on the imposition of specific rules or the entirety of the document considered. But some provisions provide mechanisms that allow bypassing the impossibility for NSAG to be parties to treaties and abiding these groups by IHL treaty law through expressions of consent, namely unilateral declarations or special agreements with the opposing belligerent entity.

[85] Geneva Call, Landmines and Armed non-State Actors, p. 1.
[86] 1 UNTS XVI.

When it comes to weapons conventions, the reality presents distinct options, which ranges from express involvement of NSAG, through the codification of obligations or the invocation of unilateral declarations, to the inclusion of indirect references or complete silence. Such a framework certainly does not favourite uniformity but it has its raison d'être in the volatility of NSAG (especially in comparison with States), apart from the connatural tendency to self-preservation of States. In the balance of interests, these can be seen as the reasons why unilateral declarations are proving to be the most practiced way for the effective applicability of weapons treaty law to NSAG.

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