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In search of responsibility for ANSAs to apply the right to education during armed conflict.

Defining legal and practical approaches to ensure the right to education
during non-international armed conflict.

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Abstract

The importance of the right to education is often neglected in non-international armed conflicts. This neglect is even worse when it comes to the obligation of ANSAs to ensure the right to education. A reason for this is the difficulty to confer on ANSAs legal obligations under international human rights law, during armed conflict. Hence, a thorough assessment on the status of ANSAs in an armed conflict, under international humanitarian law and international human rights law imposes itself. For that reason, it is important to assess what the concept of 'ANSA' entails, what its status is in an international armed conflict and whether extra requirements like the control over a certain part of a territory are important to confer on them human rights obligations, and in particular the right to education. If this is established, the last part of the research will deal with its compliance through engagement with humanitarian organisations and accountability under international law.

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1 Introduction

Children are increasingly involved in conflicts.¹ In that regard, research has shown that today's armed conflicts, mostly involve non-international armed conflicts.² This automatically implies the involvement of Armed Non-State Actors, who in practice take control over parts of the territory, where influence of the State is reduced to zero. Consequently, the people living under control of the ANSA, in practice, are not protected by the law of the State anymore. This means that the ANSA (hopefully) acts 'like' a State and provides for a decent life of people living under its control.

When children are asked about what they find important in times of armed conflict, they address education as a top-priority.³ In that regard, it is argued that the continuation of education brings back "the normal life in a community".⁴ Nevertheless, this topic is often neglected in the heat of the moment, where other rights gain more attention.

Given that, the law of the State does not provide for protection anymore when the ANSA has taken over control, is at this point that the rules of international law can provide for protection. In particular, international humanitarian law (IHL) and international human rights law (IHRL) can protect people living in such areas. The latter receives attention, because it is acknowledged that IHL does not extensively regulate matter of daily life in an armed conflict.⁵ In that regard, armed conflicts often take several years and are characterised by, intermezzos of heavy fighting and rather sustained control over parts of the territory by an ANSA (or ANSAs.)

It might appear pretty straightforward to apply all these kinds of rules, if one reads such an introduction. Yet, none of it is true. The application of international human rights law in armed conflict, is up to date, still sometimes contested. For that reason, it is of utmost importance to not skip a part of the test to confer on ANSAs the obligation to ensure the right to education. Hence, the research will start by defining a clear scope of the research, with an in-

¹ Scott Sheeran and Nigel S Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 137.

² Claudia Hofmann, 'Engaging Non-State Armed Groups in Humanitarian Action' (2006) 13 *International Peacekeeping* 396.

³ 99% of the more than 8000 interviewed children addressed education as a top priority. Save The Children, 'What Do Children Want in Times of Emergency and Crisis? They Want an Education' (2015) 1 <<https://www.savethechildren.org/content/dam/global/reports/education-and-child-protection/what-children-want.pdf>> accessed 22 July 2022.

⁴ Tavassoli_Naini Manuchehr, 'Education Right of Children during War and Armed Conflicts' (2011) 15 *Procedia - Social and Behavioral Sciences* 302, 304.

⁵ Jean-Marie Henckaerts and Cornelius Wiesener, 'Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020) 196.

dept analysis of the peculiarities of an ANSA (who controls a part of the territory) and if such an ANSA can be considered to have legal personality or capacity under international law. The latter is important to support the claim that ANSAs are both bound by IHL and IHRL. With regard to IHRL, particular attention will be contributed to its relation with IHL. Subsequently, the possibility of IHRL obligations for ANSAs will be researched.

Given that the aim of the research is to eventually confer on ANSA the practical obligation to ensure the right to education, social, economic and cultural rights (ESC-rights), will be briefly discussed as well.

If all of the above succeeds to confer on IHRL obligations on ANSAs, and in particular the right to education, the last chapter will analyse the options to ensure compliance with all of these obligations. This will be done through the possibility of direct engagement with ANSA by humanitarian organisations and the accountability for ANSAs under international criminal law (ICL)

Throughout the whole analysis, the methodology used to carry out the research is doctrinal legal research, with elements of other disciplines like philosophy and sociology as an additional tool to the core research.

2 Scope of the research

The aim of the research is to establish that the right to education must be guaranteed by ANSAs during armed conflict. In order to fully understand what this exactly comprises, an examination of each different part is hence required. Furthermore, the ability to argue and prove who can be qualified as an ANSA can eventually lead to a better compliance. In that regard, Kleffner explained that “The failure to argue convincingly why and how the law applies to organized armed groups will hinder effective strategies to engage them in the quest to ensure better compliance with IHL.”⁶. For that reason, the research will carefully examine what is meant by an Armed Non-State Actor that can be a party to an armed conflict (chapter 2.2). Subsequently, an in-dept analysis of the legal personality and capacity of ANSAs will be carried out (chapter 2.3), in order to be able to conclude that ANSAs possess human rights obligations (chapter 3.1).

⁶ Jann K Kleffner, ‘The Applicability of International Humanitarian Law to Organized Armed Groups’ (2011) 93 International Review of the Red Cross 443, 444.

2.1 Armed Non-State Actors

To date, no internationally agreed definition on Armed Non-State Actors (ANSAs) exists. According to Policzer this is because “one person’s terrorist is another person’s freedom fighter”.⁷ Hence, it is hard to fit ANSAs into one straightjacket. Furthermore, ANSAs were long time not considered to have IHL nor IHRL obligations. The latter was only meant for States. Consequently, there was no need for a definition for ANSAs given that they were not the central subject on the international stage. Two milestones precluded a new era, the Cold War and 9/11. It is now accepted that, IHL and IHRL violations can also be committed by other actors than a State. From a non-hierarchical perspective it is indeed true that it does not matter who committed a human rights violation, but it is rather the acknowledgement that someone is responsible for this, that matters. In order to be responsible or to have obligations, one must be identifiable. In that regard it is “crucial to determine accurately the exact nature of ANSAs so as to facilitate the analysis and determination of the correct applicable legal framework.”⁸ For that reason, this part will briefly analyse and decompose each part of ‘Armed’, ‘None-State’, ‘Actor’ (in a reverse order) to be able to understand and qualify the ANSA that is the subject of this research.

First, ‘Actor’, refers, according to Bellal, “to the collective nature of ANSAs”, but does not include individuals and hence only comprises groups.⁹ Nevertheless, the UNSC does not exclude individuals from being a non-State actor referring to “individual or entity”¹⁰. Hence, an ‘actor’ not necessarily equals a ‘group of people’. In that regard, actors are a very diverse group consisting of e.g. (not exhaustive) states, non-recognised states, international organisations, corporations, non-governmental organisations, individuals, private militaries, national liberation movements, civil society, religious groups, rebels, armed opposition groups etc. For that reason, the following factors are of crucial importance, to distinguish actors and to be able to exclude them from the research.

Second, ‘Non-State’ refers to the opposite of what a state is. As defined by Weber “the state is the form of human community that (successfully) lays claim to the monopoly of

⁷ Pablo Policzer, ‘Neither Terrorists nor Freedom Fighters’ [2005] International Studies Association Conference 1.

⁸ Annyssa Bellal, ‘What Are “Armed Non-State Actors”? A Legal and Semantic Approach’ in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020) 38.

⁹ *ibid.*

¹⁰ UNSC, ‘UN Security Council Resolution on the Non-Proliferation of Weapons of Mass Destruction S/RES/1540 (2004)’.

legitimate physical violence [...]”.¹¹ Following upon this definition of a State being the legitimate force, Policzer suggests that “Non-state armed groups are challengers to the state’s monopoly of legitimate coercive force.”¹² Nevertheless, ‘Non-State’ does not automatically mean ‘armed’. Following the wording of ‘Non-State Actor’, Noortmann, Ryngaert and Reinisch formulated that “ultimately, the only unifying definitional bond holding them together is the fact that they are not states and that they are still somehow participating in and increasingly shaping the international system originally set up by states”.¹³ This leads to the same enumeration of actors as mentioned above, only without the actor ‘state’. Therefore, in order to separate non-state actors and an extra requirement is necessary. For this research, ‘armed’ is considered to be the crucial factor, yet other factors can distinguish actors as well.¹⁴ Remarkably, Bruderlein considers ‘armed groups’ as intrinsically independent from state control, without including the wording ‘non-State’.¹⁵ However, this understanding is too narrow given that armed groups can be ‘agents of the state’. This does not mean that they completely overlap with a state military, yet they are controlled by a state.¹⁶ For that reason, non-State is a necessary requirement, as confirmed by the UNSC that distinguishes state actors from armed non-state actors by the sole fact that they do not to act “under the lawful authority of any State [...]”.¹⁷

Third, ‘Armed’ encompasses the non-state actor who carries weapons and is able or has the ‘potential’ to use arms.¹⁸ It is important that this kind of actor, is armed in its ‘nature’ and ‘means’¹⁹, so that the group can be considered as armed in a whole. This makes clear that it is not mandatory to bear in practice arms the whole time. Nevertheless, there is a different

¹¹ Max Weber and others, *The Vocation Lectures* (Hackett Pub 2004) 33.

¹² Policzer (n 7) 8.

¹³ Math Noortmann, August Reinisch and Cedric Ryngaert, *Non-State Actors in International Law* (Hart Publishing 2015) 2.

¹⁴ For example, the Holy See is not considered to be a State in international law but distinguishes itself from other non-state actors by its political purpose. For an extensive elaboration on the topic see: Hersch Lauterpacht, ‘Hersch Lauterpacht (1970), “The Subjects of International Law”, in E. Lauterpacht (Ed.), *International Law. Being the Collected Papers of Hersch Lauterpacht, Volume I: The General Works*’ in Andrea Bianchi (ed), *Non-State Actors and International Law* (Cambridge University Press 2005).

¹⁵ Claude Bruderlein, ‘The Role of Non-State Actors in Building Human Security’ [2000] *Centre for Humanitarian Dialogue* 19, 9.

¹⁶ For a discussion on armed groups, private militaries, mercenaries, security companies etc., see e.g.: Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 271–316; Keith Krause and Jennifer Milliken, ‘Introduction: The Challenge of Non-State Armed Groups’ (2009) 30 *Contemporary Security Policy* 202, 204; Alexandre Faite, ‘Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law’ (2004) 4 *Defence Studies* 166.

¹⁷ UNSC, ‘UN Security Council Resolution on the Non-Proliferation of Weapons of Mass Destruction S/RES/1540 (2004)’ (n 10).

¹⁸ Bellal (n 4) 27; with reference to EEAS, ‘Factsheet: Mediation and Dialogue in Transitional Processes from Non-State Armed Groups to Political Movements/Political Parties’.

¹⁹ Bellal (n 8) 24.

presumption of ‘armed’ under IHL. For example, in an IAC, an administration of an armed non-state actor is still a part of the ANSA.²⁰ This means they are considered to be combatant, and that “civilians [...] are persons who are not, or no longer, members of the armed forces”.²¹ This is different in a NIAC, where only people with a ‘continuous combatant function’²² are considered to be part of the Armed Non-State Actor.²³ Regardless this difference, it is obvious that an actor, who never carries arms cannot be considered as ‘armed’. Due to the normative difference in NIACs (but not in IACs) between ANSAs and “armed forces”, the research will continue using the term ANSA or armed group.²⁴

From the above, it is clear that the terminology of ‘Armed’, ‘Non-State’, ‘Actor’ is cumulatively required and interwoven. As wisely stated by Aristotle: “the whole is something besides the parts”.²⁵ Nevertheless, to be able to qualify as “armed forces of a party” in an IAC, as laid down in article Article 43(1) of AP I, or as “a party” in a NIAC as laid down in common article 3 to the GCs, a certain degree of organisational structure is required. The ICTY has put forward five factors that can amount to this level of organisation (to any type of armed conflict), *i.e.*, “command structure”, “carry out operations in an organised manner”, “level of logistics”, “a level of discipline and the ability to implement the basic IHL obligations” and if the “armed group is able to speak with one voice”.²⁶ It is important to bear in mind that these factors are not decisive nor exhaustive. In practice, these factors can e.g. express themselves as “the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability

²⁰ See ICRC, ‘Treaties, States Parties, and Commentaries - Geneva Convention (III) on Prisoners of War, 1949 - 3 - Article 3 : Conflicts Not of an International Character - Commentary of 2020’ paras 555–568 <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096>> accessed 5 July 2022.

²¹ *Prosecutor v Tihomir Blaskic* [2000] ICTY IT-95-14-T [180]; See also ICRC, *Handbook on International Rules Governing Military Operations* (2013) 78.

²² The reference to ‘combatant’ is a generic meaning, because legally speaking ANSAs in a NIAC are not considered as combatants and therefore enjoy lesser protection than the State armed forces and they do not enjoy Prisoner of War (POW) status. See: Jean-Marie Henckaerts and others (eds), *Customary International Humanitarian Law* (Cambridge University Press 2005) 12.

²³ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross 2009) 27–34.

²⁴ In a NIAC armed forces are considered as a part of the State, whereas the armed actor not of the State (*i.e.* non-State) is considered as either “organised armed group” or “dissident armed forces”. See: *ibid* 20–34.

²⁵ WD Ross (ed), *Aristotle’s Metaphysics Book VIII*, vol VIII (Clarendon Press 1924) s 1045a. 8–10.

²⁶ *Prosecutor v Boskoski and Tarculovski (Trial Judgment)* [2008] ICTY No. IT-04-82-T [199–203].

to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.”²⁷

The FARC, for example, throughout its different stages, has been proven to have a hierarchical structure together with an army-like effective chain of command.²⁸ In Myanmar, a Brotherhood alliance of different ethnic ANSAs was created, that had proved to be sufficiently organised.²⁹ This structure, however, remains unclear in 2022 with regard to Boko Haram, but not with regard to ISWAP (a detached group from the former) in Northern-Nigeria.³⁰ Hence, the argument of organisational structure sometimes works the opposite way of what is to be achieved in international law. In that regard, it is difficult to directly attribute international law violations to al-Qaida (and previously to the Taliban as well) because of the lack of organisational structure.³¹

Besides the organisational structure, the conflict needs to attain a certain intensity as put forward in the Tadic case.³² Likewise as with the organisation structure, several practical requirements can be taken into account like e.g. the continuous involvement of the UNSC, police actions, sporadic acts of violence with a lot of casualties, military operations, the use of weapons for other purposes than they are meant (anti-personnel instead of anti-aircraft), a number of small violent incidents at the same time, substantial shooting, heavy fighting, the blocking of access roads together with installing checkpoints, the expansion of the complexity of the situation, the violent takeover of important supply points etc.³³ According to Schindler this level of intensity can also be shown by the fact that it no longer suffices for a State to use its police forces to stop a conflict, but that it “compelled to employ its armed forces”.³⁴ Yet, the mere deployment of soldiers will not be sufficient, because they are often used in addition to police-men (sometimes because the police is not specialised in a matter, or because soldiers can

²⁷ *Prosecutor v Haradinaj et al (Trial Judgment)* [2008] [60].

²⁸ Ezequiel Heffes, ‘From Words to Deeds: A Research Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms’ (Geneva Academy and Geneva Call 2021) 9; ICRC, *The Roots of Restraint in War* (2020) 38.

²⁹ Rulac | Geneva Academy, ‘Non-International Armed Conflicts in Myanmar’ <<https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-myanmar>> accessed 8 July 2022.

³⁰ Rulac | Geneva Academy, ‘Non-International Armed Conflicts in Nigeria’ <<https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-nigeria>> accessed 8 July 2022.

³¹ Martti Koskenniemi, Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff Publishers 2003) 213.

³² *Prosecutor v Dusko Tadic aka ‘Dule’ (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* [1995] ICTY No. IT-94-1-AR72 [562–568]; See also: *The Prosecutor v Jean-Paul Akayesu (Trial Judgment)* [1998] ICTR ICTR-96-4-T [620].

³³ *The Prosecutor v Fatmir Limaj, Judgment* [2005] ICTY IT-03- 66-T [135–170].

³⁴ Dietrich Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’ (1979) Volume 163 *Recueil des Cours de l’Académie de Droit International de La Haye* 147.

be deployed quicker). For that reason, Melzer argues that the conflict “must be clearly distinguishable from internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”.³⁵

From the above it is clear that many factors can be taken into account in order to determine that an ANSA is a party to an armed conflict. In international law, actors can be individuals as well, however, they can never be considered as a party to an armed conflict because “as war is traditionally understood as confronting entities and not individuals, a non-state party must be a collective entity”.³⁶ Furthermore, technical requirements with regard to the compliance with IHL exist as well. However, this differs in an IAC, where the ANSA must be able to respect all the rules of IHL³⁷, and a NIAC, where the ANSA only has to comply with certain IHL standards.³⁸ This last condition is directly linked with the requirement of a command structure.³⁹

Following upon this technical requirement of the compliance with IHL, it is rather unclear what the role of territorial control plays in this matter. Moir argues that the non-control over a certain part of the territory by an ANSA does not preclude the application of IHL.⁴⁰ What is true is that common article 3 GCs does not require any territorial control, however, this article is supplemented by article art. 1 (1) AP II, that does require the latter threshold in order to be applicable. It is to say, that the material scope of Additional Protocol is to protect victims. In that regard, this Protocol would become illusory if a party did not exercise effective control, because this would not enable the party to “to carry out sustained and concerted military operations”⁴¹ and, consequently, give them the ability to take care of victims. Even the ICTY erred in attributing a bigger role to the notion of territorial control than required.⁴² Even though, this error was restored by the Appeals Chamber, it shows the complexity of the debate.

Consequently, the territorial control may not be a decisive factor for determining if an ANSA is a party to an armed conflict, it is a crucial factor for determining IHRL obligations.⁴³

³⁵ Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross 2019) 70.

³⁶ Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, vol 1 (Oxford University Press 2018) 40.

³⁷ Article 43(1) AP I.

³⁸ Common article 3 to the Geneva Conventions.

³⁹ Anne-Marie La Rosa and Carolin Wuerzner, ‘Armed Groups, Sanctions and the Implementation of International Humanitarian Law’ (2008) 90 *International Review of the Red Cross* 327, 329.

⁴⁰ Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002) 38.

⁴¹ Article 1 (1) AP II.

⁴² The Trial chamber relied on the Nicaragua case of the ICJ that actually comprised State responsibility rather than individual responsibility that was at stake in the case at hand: *Prosecutor v. Dusko Tadic aka ‘Dule’ (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (n 32) paras 69–70.

⁴³ Bellal (n 8) 208–214.

Weber too made the connection with territorial control. In that regard, the sentence cited in the beginning of this chapter finishes with “[...] within a particular territory-and this idea of "territory" is an essential defining feature.”⁴⁴ Fortin only makes a distinction between armed groups that exercise control over a certain part of a State’s territory and those who do not.⁴⁵ However, this does not take into account the wide variety of the level of organisation and consequently the abilities of ANSAs to comply with IHRL standards. To overcome this issue, Rodenhäuser argues for a three-way distinction between ‘quasi-governmental authority in defined territory’, ‘de facto control over territory and population’ and ‘no control’.⁴⁶ Even though, the assessment of this level of control will be mainly practical, it confirms the possibility to gradually applying IHRL obligations.⁴⁷ Such an approach “avoids demanding a local and poorly organized armed group without control over territory and population to live up to the same standards as a state-like non-state entity”.⁴⁸

Claiming that ANSAs are bound by IHL because the State they operate in has ratified it may sound like a *contradictio in terminis* and a denial of the crucial point of their existence.⁴⁹ The same argument is followed by Klabbers: “[...] to argue that non-state entities are by definition represented by their governments is implausible where the very *raison d’être* of those non-state entities is to deny the representative nature of their government. Surely, it is awkward to claim that the Kurds are represented internationally by Turkey or Iraq; surely, [...] that the Chechens are represented by Russia, or that a movement like Unita is bound by humanitarian law for the simple reason that the Angolan movement may at some point have signed up to the Geneva Conventions.”⁵⁰

In practice, being bound by IHL through the state can be considered as a ‘direct way’, which has been rejected by the FARC previously.⁵¹ Zegveld addresses this as the “normative

⁴⁴ Weber and others (n 11) 33.

⁴⁵ Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).

⁴⁶ Rodenhäuser (n 36) 146–209; Annyssa Bellal, ‘Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution’ (17 June 2014).

⁴⁷ Henckaerts and Wiesener (n 5) 214.

⁴⁸ Rodenhäuser (n 36) 148.

⁴⁹ A rejection of being bound by IHL because the State had ratified is has happened before by the National Liberation Front of South Viet Nam, who declared only to be bound when they itself had declared it. International Committee of the Red Cross, ‘ICRC External Activities’ 634, 636.

⁵⁰ Jan Klabbers, ‘(I Can’t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors’ in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: essays in international law for Martti Koskenniemi* (Brill | Nijhoff 2003) 359.

⁵¹ Heffes (n 28) 16.

gap” in international humanitarian law.⁵² To bring clarity in this debate Kleffner explored different routes to prove that ANSAs are bound by IHL.⁵³ In that regard, ANSAs can possibly be bound by IHL because of their *de facto* exercise of governmental functions. Zegveld adds in this debate that this attribution of IHL rules to ANSAs also requires the *de facto* control over a certain part of the territory.⁵⁴ This automatically implies that the high threshold of art. 1 (1) AP II is met.⁵⁵ Pictet too argues that ANSAs are bound by IHL through the effective control of a part of the territory stating that: “if the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country”.⁵⁶ Hence, this is a practical requirement that is disconnected from the aspirations of ANSAs who might not want to exercise governmental functions. However, it does not take into account ANSAs who do not have the control over a certain part of the territory. The shortcoming of this argument can be remedied by a combination of the attribution of legal personality⁵⁷ to ANSAs together with the formation of customary IHL, so that ANSAs are indirectly bound by IHL rules. Even though, this claim too, involves States (be it indirectly), customary IHL can be considered to “embody a more universal claim to adherence”.⁵⁸ In that regard, it remains debatable amongst scholars to what extent ANSAs can contribute to the creation of customary IHL. The practice tells us that this has been rather inconsistent and that the topic requires further exploration.⁵⁹ Nevertheless, in the ICRCs work on customary IHL, the practice of ANSAs was included under the section of ‘other practice’, but has not formally been taken into account

⁵² Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (1st edn, Cambridge University Press 2002) 7–94 <<https://www.cambridge.org/core/product/identifier/9780511495199/type/book>> accessed 8 July 2022.

⁵³ The five explored routes are: (1) via the state on whose territory they operate; (2) because their members are bound by IHL as individuals; (3) because they exercise *de facto* governmental functions; (4) due to their (limited) international legal personality; (5) because they have consented thereto. This last option is not relevant for the research given that its aim is to argue that IHL generally applies to ANSA without the explicit need for consent. Kleffner (n 6).

⁵⁴ Zegveld (n 52) 15.

⁵⁵ This is a confirmation of the earlier argument that an ANSA does not necessarily control a part of the territory in order to be considered as a party to the conflict.

⁵⁶ Jean Pictet (ed), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva (ICRC 1958) 37. Note that the ICRC, in its Commentary on GC III of 1960 endorsed the same argument, but does not state this anymore in its commentary of 2020: ICRC, ‘Commentary of 1960 to Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ <<https://ihl-databases.icrc.org/ihl/COM/375-590006?OpenDocument>> accessed 11 July 2022; ICRC, ‘Commentary of 2020 to Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096#_Toc44265103> accessed 11 July 2022.

⁵⁷ For a more extensive elaboration on this topic see chapter 2.3

⁵⁸ Kleffner (n 6) 454. See also Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (First edition, Oxford University Press 2014) 237.

⁵⁹ See for an elaboration on this topic: Anthea Roberts and Sandesh Sivakumaran, ‘Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law’ 37 (2012): 107–152.

because “its legal significance is unclear”⁶⁰ As will become clear under the next chapter, to quote the French chemist Lavoisier: “Rien ne se perd, rien ne se crée, tout se transforme”. Hence, it is logical to argue that it should be open to ANSAs to contribute to customary IHL, even if only for the rules that apply to them. This is because, it is not defensible that rules that apply to other actors than states are only open for State-contributions. Indeed, at the time of the drafting of IHL treaties, this question was not of paramount importance, but to date, other actors gain much more attention in the international field. This teleological interpretation is followed by Arend.⁶¹

It is clear that ANSAs appear in different forms. In that regard, Clapham identified the following ANSAs, rebels, insurgents, belligerents, national liberation movements, rebel groups, unrecognised insurgents and armed opposition groups.⁶² Even though, Clapham performed a thorough assessment on the differences between these groups, Bellal argues that belligerents are often referred to as ‘armed opposition groups’, ‘national liberation movements’, ‘rebels’, or ‘guerrilla fighters’. Bellal further adds as potential ANSAs: ‘militias’, ‘criminal organisations’, ‘so-called terrorist organizations/terrorists’ and ‘Private Military Security Companies (PMSCs)’.⁶³ What all of these groups have in common is that they “challenge the authority, power, and legitimacy of the state” and that they “use violence and force”, but they might express it in a different way.⁶⁴ Although it is tempting as a lawyer to define each different type of ANSA, it is not relevant what name they carry for the purpose of the research.⁶⁵ From the moment they meet the characteristics discussed above, they can be an ANSA in an armed conflict and hence are able to have human rights obligations (see chapter 3.1).

According to the UN working definition, ANSAs are “groups that have the potential to employ arms in the use of force to achieve political, ideological or economic objectives; are not within the formal military structures of States, State-alliances or intergovernmental organizations; and are not under the control of the State(s) in which they operate.”⁶⁶ This working definition comprises the elements enlisted above as crucial to identify as an ANSA. Therefore, the research will keep this definition in mind in the further research.

⁶⁰ Henckaerts and others (n 22) xlii.

⁶¹ Anthony C Arend, *Legal Rules and International Society* (Oxford University Press 1999) 177.

⁶² This division follows that of Clapham, *Human Rights Obligations of Non-State Actors* (n 16) 271–316.

⁶³ Bellal (n 8) 28.

⁶⁴ Richard Shultz, Douglas Farah and Itamara Lochar, ‘Armed Groups: A Tier-One Security Priority’ (USAF Institute for National Security Studies USAF Academy 2004) 16.

⁶⁵ Moir, *The Law of Internal Armed Conflict*, 3 – 11.

⁶⁶ Gerard McHugh and Manuel Bessler, *Humanitarian Negotiations with Armed Groups Humanitarian Negotiations with Armed Groups A Manual for Practitioners* (United Nations 2006) 87.

2.2 Armed conflict

Traditionally two types of armed conflict exist, either international or non-international. Armed conflicts are regulated by International Humanitarian Law and is particularly (but certainly not exclusively) regulated by the Hague Regulations and the Geneva Conventions and their Additional Protocols. In that regard, common article 2 to the GCs defines an international armed conflict as a conflict “between two or more High Contracting Parties”. This necessarily involves two States and does not refer to ANSAs, whereas a non-international armed conflict is negatively defined by common article 3 to the GCs as “not of an international character” and hence does not involve a conflict between two States but between a State and “dissident armed forces” or “organised armed groups”. Even though these articles give guidance on how to understand the two concepts, it does not regulate what requirements that have to be fulfilled to trigger their application. In that regard, in the Tadic case, the ICTY ruled that regardless the type of armed conflict, 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.”⁶⁷ This point of view is further confirmed by ICRC⁶⁸ and the article 8 §2 (f) of the Rome Statute. One may wonder whether ‘protracted’ refers to the duration of the armed conflict, but given that the shortest war in history took between 38 and 41 minutes, this is a clear answer to that question.⁶⁹ Instead, ‘protracted’ refers to the intensity of the armed conflict and the organisation of the parties.⁷⁰

In some doctrine reference is made to the terminology of rebellion, insurgency and belligerency.⁷¹ Armed conflict or ‘belligerency’ distinguishes itself from rebellion or insurgency by some kind of ‘equality’ of the parties to the conflict. In that regard, rebellion is an “uprising could be dealt with swiftly and effectively in the normal course of internal security” whereas rebellion indeed poses a threat to the government, but they lack the legal recognition

⁶⁷ *Prosecutor v. Dusko Tadic aka ‘Dule’ (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (n 32) para 70.

⁶⁸ ICRC, ‘Opinion Paper: How Is the Term “Armed Conflict” Defined in International Humanitarian Law?’ <<https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 7 July 2022.

⁶⁹ This war was between Zanzibar and Great Britain and started at 9am on 27 August 1896 : Alf Wilkinson, ‘The Shortest War in History’ (2014) <<https://www.proquest.com/openview/5a08d5b1cdbfb58fa8baa060c69bcd8/1?cbl=32374&pq-origsite=gscholar&parentSessionId=Ac%2Ffir5Adl0mqIcTo38F0KBanwijiMgH5ggVTS%2BIuthNM%3D>> accessed 8 July 2022.

⁷⁰ *Prosecutor v Dusko Tadic aka ‘Dule’ (Opinion and Judgment) (Trial Chamber)* [1997] ICTY IT-94-1-T [562].

⁷¹ For an in-dept explanation of these concepts: see e.g. Moir (n 40) 3–11; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010) 8–23.

to amount to an armed conflict.⁷² In that regard, “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” are not considered as armed conflict.⁷³ Furthermore, it is not required that the parties to a NIAC to recognise that an armed conflict is taking place. However, this was the case before the coming into being of common article 3 to the GCs.⁷⁴

However, what if an ANSA is in armed conflict with another State than that of the territory it operates in? In IHL, there only exist two types of armed conflict, there is no third kind of armed conflict like some kind of “transnational armed conflict” or “internationalised armed conflict”.⁷⁵ For that reason, in such a situation common article 3 GCs remains applicable as some kind of minimum standard in addition to the rules of an IAC, because the latter article is considered to enshrine “elementary considerations of humanity”.⁷⁶ As a result, the territorial requirement of common article 3 GCs “seems to be less relevant” with regard to the applicability of IHL.⁷⁷ As formulated by Zegveld: “The conclusion is that internal conflicts are distinguished from international conflicts by the parties involved rather than by the territorial scope of the conflict”.⁷⁸

Furthermore, an ANSA can unilaterally declare to be bound by IHL rules, regardless of the qualification of the conflict.⁷⁹ This is to be encouraged given the higher protection and regulation of the conflict.⁸⁰ Moir clarified that this is necessary for several reasons, namely, to avoid the “spill over” of hostilities to neighbouring countries, to regulate the “influxes of refugees fleeing the war zone”, to regulate or avoid third States to intervene in the conflict, to

⁷² Moir (n 40) 3–11.

⁷³ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH/I/287/Rev.1)*, vol X (Federal Political Department Bern 1974) 40 and 94.

⁷⁴ This practice was referred to as the ‘belligerency doctrine’, see: Cullen (n 71) 14–23.

⁷⁵ For a discussion on this topic see: James G Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict’ (2003) 85 *International Review of the Red Cross* 313.

⁷⁶ *Corfu Channel Case (Merits)* (1949) 1949 ICJ Reports 4 (ICJ) 22; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Merits)* 1986 ICJ Reports 14 (ICJ) [218].

⁷⁷ Mindia Vashakmadze, ‘EUI Working Paper: The Applicability of International Humanitarian Law to “Transnational” Armed Conflicts’ 6–7 <https://cadmus.eui.eu/bitstream/handle/1814/12676/MWP_2009_34.pdf?sequence=1> accessed 8 July 2022.

⁷⁸ Zegveld (n 52) 136.

⁷⁹ Article 96 (3) AP I. There is not such an article with regard to AP II, even though this could be useful as well given that not every conflict meets the threshold for the applicability to AP II. For that reason, ANSAs are free to make whatever unilateral declaration they want, but when it comes to criminal responsibility this will only be taken into account if there is not an other option to find an ANSA bound by the respective rules. See Klabbers (n 50) 360–361; *Case Concerning the Frontier Dispute (Burkina Faso / Republic of Mali)* (1986) 1986 ICJ Reports 1986 554 (ICJ) [39–43].

⁸⁰ Moir, *The law of internal armed conflict*, 40; with reference to, Hersch Lauterpacht, red., *International Law. By L. Oppenheim. Volume 1. Seventh Edition.* (London: Longmans, Green & Co., 1952), 211–212.

safeguard the wellbeing of individuals and to protect civilians.⁸¹ The consent of an ANSA to be bound by IHL rules, can moreover play a role in accountability mechanisms.⁸² Building further on the accountability argument, the ICTY has proven that, for the purpose of criminal responsibility, it is sufficient to prove the “existence of an armed conflict”, without an in-depth analysis or categorisation of the actual type of conflict.⁸³ Nevertheless, it has to be kept in mind that, even if parties agree to apply the rules applicable to an international armed conflict, the conflict remains of a non-international nature.⁸⁴

To conclude, armed conflict can occur in two different ways, international or non-international (also referred to as ‘internal’). Whereas, international armed conflicts only apply when two or more States are fighting against each other, the law of non-international armed conflict regulates the conflict between ANSAs and States (or between ANSAs). In that regard, every dispute involving the IHL obligations of ANSAs will be governed by the law on non-international armed conflicts. Even though the conflict has shown some international characteristics, there is not some kind of third type of armed conflict like a transnational armed conflict. The landmark decision of the ICTY, the Tadic case, has shown the importance of the application of common article 3 to the GCs in conflicts of a non-international character. Given that the central subjects of the research are ANSAs, the research will further build on the IHL rules applicable to NIACs.

2.3 Legal Personality and Capacity

Legal personality is often considered as “the capacity to be the bearer of rights and duties under international law”⁸⁵. This is confirmed in the Reparation for Injuries Advisory Opinion of the ICJ: “[...] an international person [...] is a subject of international law and capable of possessing international rights and duties, and [...] has capacity to maintain its rights by bringing international claims”.⁸⁶ Nevertheless, the latter judgement itself shows the complexity of defining legal personality by reference to what it is certainly not, without providing for a

⁸¹ Moir (n 40) 2.

⁸² See e.g. *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)* (n 32) 627; Inter American Commission on Human Rights, ‘Third Report on the Human Rights Situation in Colombia 1999’ (1999) OEA/Ser.L/V/II.102 Doc. 9 rev. 1 14 paragraph 39; *The Prosecutor v Clément Kayishema and Obed Ruzindana (Trial Judgement)* [1999] ICTR ICTR-95-1-T [157].

⁸³ See e.g. *Prosecutor v Stanislav Galic (Trial Judgement and Opinion)* [2003] ICTY IT-98-29-T [22]; *Prosecutor v Vujadin Popovic (Judgment)* [2010] ICTY IT-05-88-T [744].

⁸⁴ ‘Non-International Armed Conflict | How Does Law Protect in War? - Online Casebook’ (*International Committee of the Red Cross*) <<https://casebook.icrc.org/law/non-international-armed-conflict#chapter10>> accessed 8 July 2022.

⁸⁵ James Crawford, *The Creation of States in International Law* (2. ed.; repr, Clarendon Press 2011) 28, with reference to Georg Schwarzenberger, *A Manual of International Law* (Stevens 1947) 53.

⁸⁶ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Reports (International Court of Justice) 179.

clear-cut definition.⁸⁷ Nevertheless, legal personality is a prerequisite for acting on the international stage. Even more, it is considered to be a ‘*conditio sine quo non*’⁸⁸, without which no obligations can be conferred upon another actor.⁸⁹ It is hence of utmost importance that ANSAs have legal personality to confer on them IHRL obligations.

As explained by Ryngaert “States decide who is in and who is out”⁹⁰ and hence decide who receives legal personality. Therefore, the legal obligations created for ANSAs are determined by States and not by ANSAs themselves. If ANSAs take up the responsibility to comply with IHRL it can be important to demonstrate that this obligation is customary law, so that a (direct or indirect) link with their State-opponent is excluded. In that regard, customary international law is addressed by some scholars as transcending the State-centric legal system, representing “a set of ‘laws of humanity’, common to all mankind”.⁹¹ The same argument was used in *The Prosecutor v. Morris Kallon and Brima Buzzy Kamara* of the Special Court for Sierra Leone: “[...] they are bound as a matter of international customary law to observe the obligations declared by Common Article 3 which is aimed at the protection of humanity.”⁹²

At first sight, there appears no legal impediment to attribute legal personality to ANSAs given that “international law is an open system from which no entity is a priori excluded”.⁹³ Even more, with legal personality being a hierarchical system⁹⁴ where rights and duties are not the same for everyone, attributing legal personality to ANSAs is independent from the outcome of the conflict. Consequently, legal personality finds itself on a sliding scale.⁹⁵ This argument is moreover expressed in the aforementioned ICJ Advisory Opinion: “The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community”.⁹⁶ It is this ‘need of the community’

⁸⁷ The ICJ expressed that ‘international persons’ are not a State and that their rights and duties can differ from one another. They furthermore, do not necessarily possess ‘all’ rights and duties. *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (n 86).

⁸⁸ Fleur Johns (ed), *International Legal Personality* (Ashgate 2010) 5.

⁸⁹ Giorgio Gaja, ‘First Report on Responsibility of International Organizations (A/CN.4/532)’ para 15.

⁹⁰ Cedric Ryngaert, ‘Non-State Actors: Carving out a Space in a State-Centred International Legal System’ (2016) 63 *Netherlands International Law Review* 183, 187.

⁹¹ International Law Association and others (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill Nijhoff 2018) 79; Jordan J Paust, ‘Nonstate Actor Participation in International Law and the Pretense of Exclusion Essay’ (2010) 51 *Virginia Journal of International Law* 977, 997.

⁹² *The Prosecutor v. Morris Kallon and Brima Buzzy Kamara, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber)* (Special Court for Sierra Leone) [47].

⁹³ Roland Portmann, *Legal Personality in International Law* (1st edn, Cambridge University Press 2010) 283.

⁹⁴ Malcolm Nathan Shaw, *International Law* (9th ed, Cambridge University Press 2021) 185.

⁹⁵ Fortin (n 45) 89.

⁹⁶ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (n 86) 178.

that triggers the international legal personality according to Schoiswohl.⁹⁷ Furthermore, it would be paradoxical to not confer any kind of legal personality to an armed group that is exercising control over a part of the territory, because this would leave a part of a State without human rights protection.

More specifically, when it comes to the technical requirements of legal personality, it is rather difficult to define when ANSAs come into being, given that they mostly emerge organically. In that regard, Portmann explores five ways to conceptualise legal personality (states-only conception, recognition conception, individualistic conception, formal conception, actor conception).⁹⁸ Out of these five concepts, Fortin identified ‘participation’ as the most important factor to determine the legal personality of ANSAs. Hence, the more involved an ANSA is in the participation in a territory, the more likely they will be attributed some kind of legal personality.⁹⁹ Furthermore, Schoiswohl argues that only ANSAs who have a ‘State-like structure’ and who are exercising control over a certain part of the territory are eligible to qualify as international legal person.¹⁰⁰ This second argument of effective control or authority is considered by many scholars of utmost importance.¹⁰¹ The ICJ has explored this element earlier in the Western Sahara Advisory Opinion. Although it did not deal with ANSAs as such, the ICJ researched the possibility to consider a non-State actor as a ‘legal entity’. In the said Advisory Opinion the lack of “common institutions or organs” led to the non-recognition of the legal personality of the non-State actor.¹⁰² This reasoning can be applied analogously to ANSAs.¹⁰³

Subsequently, legal personality further encompasses the ability to create law.¹⁰⁴ Portmann first illustrates that this ability results from the fact that there is not one global sovereign that has the ability to create laws. Even though States are the central law-makers, international law is created through different ways of coordination where other actors are involved too, like e.g. international organisations.¹⁰⁵ On the other hand, Portmann, secondly,

⁹⁷ Michael Schoiswohl, ‘De Facto Regimes and Human Rights Obligations - The Twilight Zone of Public International Law?’ (2003) 6 *Austrian Review of International and European Law Online* 45, 54.

⁹⁸ Portmann (n 93) 30–242.

⁹⁹ Fortin (n 45) 71–89.

¹⁰⁰ Schoiswohl (n 97) 50.

¹⁰¹ See e.g. Schoiswohl (n 97); Bellal (n 46); Fortin (n 45); Rodenhäuser (n 36); Shaw (n 94).

¹⁰² In this Advisory Opinion the ICJ assessed the ties between the territory of the Western Sahara and the Kingdom of Morocco and the Mauritanian entity (the current Islamic Republic of Mauritania). *Western Sahara (Advisory Opinion)* (1975) 1975 ICJ Reports [149].

¹⁰³ Fortin (n 45) 126.

¹⁰⁴ Portmann (n 93) 8.

¹⁰⁵ *ibid* 8–10.

distinguishes legal personality from legal capacity stating that “it is not a consequence of personality to have the capacity to create international law”.¹⁰⁶ However, legal personality inherently comprises the capability to create law. The capability or the success of the creation of law does, in that sense, not depend on the legal personality but rather on the willingness of other international persons to cooperate and comply with the ANSAs.¹⁰⁷ Whether or not the ANSA is recognised by the international community is, according to Schoiswoll, independent from their legal personality.¹⁰⁸ On the contrary, Shaw considers international legal personality as “participation plus some form of community acceptance”.¹⁰⁹ Indeed, the latter argument has to be taken into account given that no State or humanitarian organisation would engage with an ANSA if they are not considered to have some kind of legal personality.

When it comes to ANSAs who are a party to an armed conflict, Fortin revealed: “[...] that the legal personality of armed groups bound by common Article 3 is general in nature. [...] The significance of this for human rights law is that it provides a strong argument that the legal personality of armed groups will be general in instances where it is deemed to have arisen out of the control of territory.”¹¹⁰ Given that the research limits itself to the application of human rights obligations during armed conflict, the latter article is of great value.

In particular, common article 3 to the Geneva Conventions passes on obligations to all parties to an armed conflict, hence, this also includes ANSAs.¹¹¹ Even though this is a clear example that ANSAs possess legal personality and capacity, Waschfort suggests that it automatically comprises that the latter has a clear starting- and end-point, namely the armed conflict.¹¹² Nevertheless, this reading does not take into account the practical authority of a

¹⁰⁶ *ibid* 283.

¹⁰⁷ Two legal schools of thought on the concept of international persons exist:

1. According to American scholars an international person means an individual who has a legal personality in international law. They link the concept of international persons with international law. Meaning that, it is a person who is subject to international law.

2. On the other hand in the *Reparation for Injuries* case, it was observed that ‘an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claim’ can have the status of an international person. [ICJ Reports 1949 p. 179]. Hence this school of thought links the personality to the ability to bring a claim before a judicial mechanism.

¹⁰⁸ Schoiswohl (n 97) 54.

¹⁰⁹ Shaw (n 94) 181.

¹¹⁰ Fortin (n 45) 153.

¹¹¹ Article 3 common to the four Geneva Conventions entails legal obligations for all parties to a non-international armed conflict. Hence, distinction between an international and non-international armed conflict is of relevance when conferring rights and duties on ANSAs.

¹¹² Gus Waschefort, ‘The Pseudo Legal Personality of Non-State Armed Groups in International Law’ (2011) Vol. 36, No. 1 226, 234; See also: Gregory H Fox, Kristen E Boon and Isaac Jenkins, ‘The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law’ (2017) 67 *American University Law Review* 649, 293–724.

particular ANSA, nor does it take into account the practice of the UN Security Council. In that regard, an analysis of the practice of the UNSC by Fox, Boon and Jenson exposed that the UNSC reflects human rights obligations on ANSAs or condemns their human rights violations.¹¹³ Even more, the UNSC does not step back to address ANSAs in a peacekeeping mission in order to ensure the safety of civilians.¹¹⁴ This shows a tendency to extend the legal personality of an ANSA even after the termination of the armed conflict. Even more, this point of view is confirmed by Andrew Clapham, illustrating the example of a peace agreement between a State and an ANSA, encompassing the capacity and the will of the ANSA to protect human rights.¹¹⁵ It moreover confirms the relation between legal personality and capacity. In that regard, a peace-agreement can only be signed by an ANSA when it has legal capacity. Nevertheless, this does not give leeway for all ANSAs to have legal capacity. Therefore, only ANSAs who comply with the requirement of having control over a certain part of the territory and who have a State-like structure can be eligible to have legal capacity.¹¹⁶ Whether this includes the capacity of international law-making remains unclear, however, ANSAs can indirectly contribute to customary IHL.¹¹⁷

In principle, human rights treaties are created from a State-centric approach. From a historical point of view it is logical that IHRL was created by States¹¹⁸, but this argument cannot be upheld anymore. One of the central objectives of IHRL is equality, but this is impossible to achieve if not all actors are involved. In that regard, the UN Secretary General called upon the international community to engage with ANSAs to improve their human rights compliance.¹¹⁹ The involvement of other actors in order to reach the goal of human rights law, needs careful consideration. Similarly, Rondeau argues “Still, it cannot be disputed that the increasing threats

¹¹³ Fox, Boon and Jenkins (n 112) 671–673.

¹¹⁴ UNSC, ‘UN Security Council Resolution on the Situation Concerning the Democratic Republic of the Congo. S/RES/1925 (2010)’.

¹¹⁵ Clapham, *Human Rights Obligations of Non-State Actors* (n 16) 272–273. With reference to San José Agreement on Human Rights, between El Salvador and the ANSA, Frente Farabundo Martí para la Liberación Nacional (FFMLN). Subsequently, the same reference to human rights is made in the Colombian Peace Agreement (Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace), between Colombia and the Revolutionary Armed Forces of Colombia -People’s Army (FARC).

¹¹⁶ Roberts and Sivakumaran (n 59) 121.

¹¹⁷For an extensive elaboration on this topic see e.g.: Koskeniemi, Petman and Klabbers (n 31); Marco Sassòli, ‘Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law’ (2010) 1 *Journal of International Humanitarian Legal Studies* 5; Roberts and Sivakumaran (n 59); *International Law Association and others* (n 91).

¹¹⁸ Note the debate about the Western perspective of human rights where it is perceived as created by Western States. However, it is proven that this history does not preclude the universality and plurality of human rights: for a detailed assessment see: Janne Mende, ‘Are Human Rights Western—And Why Does It Matter? A Perspective from International Political Theory’ (2021) 17 *Journal of International Political Theory* 38.

¹¹⁹ United Nations Security Council, ‘Report of the Secretary-General on Children and Armed Conflict’ (UNSC 2010) S/2010/579 para 52.

posed by armed groups seriously challenge the traditional conception of such order. Lavoisier's formulation, 'Rien ne se perd, rien ne se crée, tout se transforme' speaks volumes about the fact that states are losing ground"¹²⁰ It is indeed not a disruption of the international legal order but rather a transformation that is required. When States are not able to protect their citizens in an armed conflict due to the presence of ANSAs, it is the latter on who this obligation is transferred to. Nevertheless, it sounds paradoxical to involve an actor in a law-making process that, at first sight, is not interested in the matter, but entitled to it. On the contrary, their non-involvement in law-making has not led to their compliance either, so trying the opposite may lead to a better result.¹²¹ Furthermore, it is important to distinguish legal personality from legitimacy, so that attributing legal personality to an ANSAs does not actually threaten the position of States in international law.¹²²

To conclude, ANSAs possess, without a doubt, legal personality due to the implicit enshrinement in common article 3 GC and the practice of the UNSC. Hence, ANSA do, in theory, possess at least a *de facto* temporary legal personality arising from their obligation to respect IHL. Even though, this may not be as extensive as that of States, given that their different starting point (*i.e.* the armed conflict for ANSAs), it does include IHRL obligations. The most important factors for this are the effective control over a certain part of the territory, their participation in society and their recognition by other international entities. The question whether human rights obligations apply for ANSAs as well hence has to be responded in the affirmative. This confers on them the duty to protect the human rights of civilians under their control.

3 The relationship between international humanitarian law and human rights law

The previous chapters have shown that ANSAs are capable of taking up obligations under international law. Where this is already obvious for humanitarian law, it is not yet for human rights law. Given that the research is interested in human rights obligations during armed conflict, it is unavoidable to analyse the interplay between IHL and IHRL.

In that regard, the interplay between IHL and IHRL has been food for thought over decades. An extra element in this debate is how this relates to ANSAs, but this will be discussed in the

¹²⁰ Sophie Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts' (2011) 93 *International Review of the Red Cross* 649, 653.

¹²¹ Sassòli (n 117).

¹²² Kleffner (n 6) 455. The author further argues that a State is not necessarily legitimate itself because some states commit serious IHRL violations against their own population. The opposite can be true for ANSAs but this is irrelevant for the attribution of legal personality.

following chapter. It is clear from the previous chapters that IHL governing NIACs does not offer such a wide protection as the IHL law governing IACs. Hence, IHRL may help in governing different situations that are not covered by IHL. As put by Shany: “It allows the filling out of normative gaps, the effective regulation of factually and legally ambiguous situations and enhances the possibilities of accountability for law-violations and remedy for victims.”¹²³ Subsequently, Vashakmadze explains that, where IHL in NIACs does not recognise the combatant status of ANSAs, human rights law comes into play to offer them protection (may it be lesser than the protection offered by IHL in IACs).¹²⁴ This is an example of the complementary use of IHRL to IHL. Such a complementary application is obvious at first sight, but the difficulties arise when the outcome of the application of IHL and IHRL lead to different results. Two main different approaches to overcome this issue exist. Milanovic addresses these school of thoughts as the human rights enthusiasts and scepticists.¹²⁵ The first considers IHL as a “lex specialis” that precedes IHRL when there is a conflict between rules, the second, which I will call the “effectiveness approach” in which the rule that offers the greater protection prevails. The ICRC has stated that it is not in favour of one approach or the other, but that it will assess on a case-by-case analysis ‘which rule can be more precise vis-à-vis the situation’.¹²⁶ In my opinion, this is the same as the IHRL-approach without the acknowledgement that it is the latter approach. Nevertheless, this shows that it is no secret that the interplay between IHRL and IHL is not clearly defined. In that regard, Giacca notes that different doctrines have identified this interplay as either “concurrent, convergent, confluent, complementary, contradictory, or even in conflict”.¹²⁷ This wide diversity in approaches is

Lex specialis

The relationship between IHL and IHRL is often identified as *lex specialis derogat generalis* in which the former is considered to be the ‘lex specialis’ and the latter the ‘lex generalis’. The most well-known example of this view is the ICJ’s Nuclear Weapons Advisory Opinion¹²⁸ Notwithstanding, Oberleitner does not consider the Nuclear Weapons case as an

¹²³ Yuval Shany, ‘Co-Application and Harmonization of IHL and IHRL: Are Rumours about the Death of Lex Specialis Premature?’ in Robert Kolb, Gloria Gaggioli and Pavle Kilibarda (eds), *Research handbook on human rights and humanitarian law: further reflections and perspectives* (Edward Elgar Publishing 2020) 28.

¹²⁴ Vashakmadze (n 77) 2.

¹²⁵ Marko Milanovic, ‘The Lost Origins of < Lex Specialis >: Rethinking the Relationship between Human Rights and International Humanitarian Law’ in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016) 1.

¹²⁶ ‘Non-International Armed Conflict | How Does Law Protect in War? - Online Casebook’ (n 84).

¹²⁷ Giacca (n 58) 165.

¹²⁸ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) 1996 ICJ Reports 226 (International Court of Justice) 240.

example of *lex specialis* in which IHL generally prevails over IHRL. In that sense, Oberleitner argues that *lex specialis* does not refer to the two legal regimes (IHL and IHRL) but to two opposing laws in a specific question. Therefore, the Nuclear Weapons case is not to be regarded emanation of the overall prevalence of IHL over IHRL, but that a specific norm at stake in this case did not prevail over the opposing norm in IHL.¹²⁹ Confusion around the point of view of the ICJ remained, because it changed its wording again in the Palestinian Wall Advisory Opinion and later again in the Armed Activities on the Territory of the Congo case.¹³⁰ Both the ECtHR and the UN Human Rights Committee referred to three cited ICJ cases, in order to establish their view on the relation between IHL and IHRL. Whereas the ECtHR in the Hassan case did not explicitly take the *lex specialis* route, even though both parties extensively referred to it, it used IHRL to interpret a rule of IHL, which, in the end has the same result.¹³¹ Subsequently, the UN Human Rights Committee followed the view of the Nuclear Weapons Advisory Opinion on the interplay between IHL and IHRL, however, likewise as the ECtHR it did so without explicit reference to it.¹³² A reason for this may be the evolvement to a new kind of interpretation of the *lex specialis* approach, that is more nuanced than the initial one.¹³³

Nevertheless, what is clear from the above is that, the current jurisprudence does not give much guidance on the interplay between both legal regimes. In that regard, Heintze argues that the *lex specialis* approach is problematic from a legal point of view, given that it would be against the Martens Clause and article 72 AP I that both do not exclude the application of one legal regime.¹³⁴ For that reason the strict application of the *lex specialis* approach would be problematic. Nevertheless, the approach can be interpreted in different ways. In that regard, Milanovic identified that *lex specialis* can be used as: “a rule of total displacement”, “a rule of norm conflict resolution” or as a “mere interpretative tool or rule of norm conflict avoidance”.¹³⁵ This makes the approach even more ambiguous. Todeschini goes even further

¹²⁹ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 95–96.

¹³⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports 136 (International Court of Justice) [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 2005 ICJ Reports 168 (ICJ) [216].

¹³¹ *Hassan v The United Kingdom* [2014] ECtHR 29750/09 [106].

¹³² UN Human Rights Committee, ‘General Comment No. 36, Article 6 (Right to Life), (CCPR/C/GC/35)’, September 2019, para. 64; See also: Shany, ‘Co-Application and Harmonization of IHL and IHRL: Are Rumours about the Death of *Lex Specialis* Premature?’, 25.

¹³³ See for an extensive discussion on jurisprudence: Shany (n 123).

¹³⁴ In detail, the Martens clause considers human rights law as a ‘supplementary tool’ to IHL. Whereas article 72 AP I demands for ‘openness’ towards other rules of international law that are able to protect human life. Hans-Joachim Heintze, ‘On the Relationship between Human Rights Law Protection and International Humanitarian Law’ (2004) 86 *International Review of the Red Cross* 789, 797–798.

¹³⁵ Milanovic (n 125) 24.

by eliminating the *lex specialis* approach as helpful for the debate in question.¹³⁶ In order to be comprehensive, I also refer to the Inter-American system and the African system, but their contributions to the debate on the interplay between IHL and IHRL are not entirely relevant. The Inter-American Commission and Court on Human Rights use IHL as a tool to interpret human rights law in times of armed conflict to overcome disputes about competence.¹³⁷ This way of applying IHL and IHRL is also referred to as the ‘Interpretive Reference Method’.¹³⁸ Subsequently, the African Commission on Human and Peoples Rights has no extensive case law on the topic, but seems to consider (some) IHL as ‘general principles of law’ to include it under the scope of the African Charter.¹³⁹ Noteworthy is the fact that a doctrinal research of references to *lex specialis* before the Nuclear Weapons case, exposed that only two examples of this approach existed (one in French, one in English), but that they did not even proclaim this as a general approach.¹⁴⁰ Even though this may not bring any clarity on the debate of the interplay between the two legal regimes, it is important, in terms of accountability, that human rights mechanisms have the ability to decide on matter during armed conflict. For that reason, the approach of the Inter-American System may not be entirely irrelevant. Furthermore, important to note, is that all of the cases cited above relate to civil and political rights and leaves in question how it applies to socio-economic rights.

One may ask the question whether there is possibly no clash between IHL and IHRL when it comes to socio-economic rights because they are not precisely regulated by IHL? Hampson clarified that in international law (regardless of the type of law), a default regime exists: “The general is the default position, unless it is displaced by a specific provision. It seems highly unlikely that there would be a conflict between the areas of law themselves, since

¹³⁶ Vito Todeschini, ‘The ICCPR in Armed Conflict: An Appraisal of the Human Rights Committee’s Engagement with International Humanitarian Law’ (2017) 35 Nordic Journal of Human Rights 203, 206.

¹³⁷ Whereas the Commission first took a somewhat ambiguous approach (when it applies IHL, it refers to the *lex specialis* principle, whereas it refers to ‘the-most-protective-norms prevails principle’ when it applies human rights law), it is now clear that the Commission uses IHL as an interpretative tool for human rights law, because its competence is based on IHRL and not on IHL. It is consequently, in this particular human rights body that IHL is used in this way in order to overcome a competence issue. see: *La Tablada case (Juan Carlos Abella v Argentina)* [1997] Inter American Commission for Human Rights OEA/Ser.L/V/II.95 271 [166]; *Case of The Santo Domingo Massacre v Colombia (Preliminary objections, merits and reparations)* (Inter-American Court of Human Rights) [24]; Gerd Oberleitner, ‘The Development of IHL by Human Rights Bodies’ in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International humanitarian law and non-state actors: debates, law and practice* (Asser Press, Springer 2020) 305–309.

¹³⁸ Shana Tabak, ‘Ambivalent Enforcement: International Humanitarian Law at Human Rights Tribunals’ (2016) 37 Michigan Journal of International Law 661.

¹³⁹ *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* [2003] African Commission on Human and Peoples’ Rights Communication 227/99, 2004 AHRLR 19 [70].

¹⁴⁰ It is clear that a general acceptance amongst scholar of the *lex specialis* principle did not exist before the Nuclear Weapons case (like it does not now); Milanovic (n 125) 19–20.

the specific prevails over the general. Any conflict is likely to be based on whether the situation falls within the general or special regime.”¹⁴¹ At first sight, this seems a clear answer to the question of the interplay between IHL and IHRL. Unfortunately, the question is not that clear (as the debate around the *lex specialis* already showed, although it might have overcomplicated the issue). The difficulty lies in the derogability of human rights in times of emergency. This will be further analysed in chapter 3.2.

Effectiveness approach

Another way of defining the interplay between IHL and IHRL is by letting the most protective norm prevail. I address this approach in this research as the ‘effectiveness approach’, but it is mostly referred to as the ‘systemic integration approach’. Even though this may lead to a little bit of confusion, I prefer the former term, because it stands loose of article 43 (3) VCLT where this approach is derived from. As aforementioned, it might not be the most appropriate way to confer obligations on ANSAs by referring to treaty law, because they have nothing to do with treaty law. Nevertheless, the same reasoning as that of the ‘systemic integration’ approach is followed. In that regard, this approach is pretty straightforward compared to the *lex specialis approach* and does not cause for much confusion. Whenever norms of IHL and IHRL protect the same right, but in a different way, the one that offers the widest protection prevails. Koskeniemi explains that ‘The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole.’¹⁴² Consequently, IHL and IHRL can only be effective if one takes into consideration what they are created for: to protect people, and in particular victims.¹⁴³ These rights are in principle guaranteed by international human rights law, which highlights the material connection between IHL and IHRL. Consequently, there is no issue of derogability of IHRL at any time.¹⁴⁴

However, the application of this approach is not always straightforward. E.g. a discussion about the right to life is more precarious in armed conflict and is strictly regulated

¹⁴¹ Françoise J Hampson, ‘The Relationship between International Humanitarian Law and International Human Rights Law’ in Scott Sheeran and Nigel S Rodley (eds), *Routledge handbook of international human rights law* (Routledge 2013) 188.

¹⁴² Martti Koskeniemi, ‘Report of the Study Group of the International Law Commission, Finalized by Mr. Martti Koskeniemi (A/CN.4/L.682)’ (International Law Commission 2006) para 414.

¹⁴³ Along with the regulation of the conduct of warfare, protect people from the state and other goals

¹⁴⁴ Anne-Laure Chaumette, ‘Droit International Pénal et Droit International Des Droits de l’homme, Illustration d’un Dialogue Des Juges »’ (2014) 1 11, 2.

by IHL rules. Given that such an issue falls outside the scope of the research, it will not be further elaborated on.¹⁴⁵

The latter approach will be further used during this research.

3.1 Human Rights obligations of ANSAs during an armed conflict

Above it is argued that ANSAs possess IHL obligations due to a combinations of treaty law, customary international law and their (although not full) international legal personality. This combination also enables ANSAs to take on IHRL obligations. Consequently, this part aims to find out when ANSAs possess these obligations, how they occur and which obligations they have. The answer would have been rather easy if, in non-international armed conflicts, a counterpart to ‘occupation’ in international armed conflicts, existed.¹⁴⁶ Although a literal counterpart would be a bit short-sighted and ignore the fact that it governs the extraterritorial application of IHRL, it, nevertheless, would solve many issues in the debate at stake. Sivakumaran somewhat summarises the above-mentioned reasons for applying IHRL obligations to ANSA. In that regard, Sivakumaran distinguishes four conditions, which relate to the fact that there is no such thing as ‘occupation in NIACs’.¹⁴⁷

First, IHRL obligation have to apply for all parties in a conflict, so not only the ANSA. Second, an ANSA is bound by it, because it is an integral part of the international community.¹⁴⁸ Third, the moment ANSAs can benefit from IHRL protection themselves, they automatically get obligations. Lastly, fourth, they need to possess effective control over a certain part of the territory.¹⁴⁹ This last condition will be further elaborated on later in this research.

Subsequently, UN human rights experts emphasised “the far-reaching negative human rights impacts of armed non-State actors on rights’ holders and human rights defenders”.¹⁵⁰ Nevertheless, there impact does not give leeway in their application.

Whereas the application of IHL to NSAs is quite obvious, it is not with regard to IHRL. For example, Henckaerts and Doswald-Beck identified that, out of 154 customary IHL rules,

¹⁴⁵ See e.g. Louise Doswald-Beck, ‘The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?’ (2006) 88 *International Review of the Red Cross* 881; Ian David Park, *The Right to Life in Armed Conflict* (First Edition, Oxford University Press 2018).

¹⁴⁶ See e.g.: Noam Lubell, ‘Human Rights Obligations in Military Occupation’ (2012) 94 *International Review of the Red Cross* 317. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 130).

¹⁴⁷ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (1st ed, Oxford University Press 2012).

¹⁴⁸ See e.g. Lubell (n 146); Oberleitner (n 129).

¹⁴⁹ Sivakumaran (n 147) 95–96.

¹⁵⁰ United Nations, ‘Joint Statement by Independent United Nations Human Rights Experts* on Human Rights Responsibilities of Armed Non-State Actors’.

applicable regardless the type of armed conflict, 148 apply to ANSAs as well.¹⁵¹ Even more, as argued in chapter 2.1 and confirmed by the Special Court for Sierra Leone, ANSAs are not only bound by customary IHL, but also “bound by necessity” by treaty law.¹⁵² This is yet different for IHRL, where States are the central subjects with legal responsibilities. Even though the previous chapters made clear that the central subjects of IHL were States as well, ANSAs were addressed even in the treaty law. This is different in human rights obligations, where no reference is made to ANSAs in treaty law.¹⁵³ A reason for this may be one of the preliminary objectives of human rights law, namely protecting individuals from the State. Indeed, this is considered to be one of the main differences between IHL and IHRL, where the first is characterised by the equal applicability of rules to all parties, the second “generally applies to only one party, namely the State”¹⁵⁴.¹⁵⁵ This ‘general’ application of IHRL to States is for example, explicitly formulated by the IACHR.¹⁵⁶ It is in this regard that the word “generally” is of utmost importance, leaving the door open for a broader interpretation of duty barriers under human rights law. Subsequently, Sassòli identified three ways to enforce international law upon armed groups. First, indirectly through the State, second, individually through international criminal law or, third, directly on the armed group.¹⁵⁷ The former will not be further elaborated on in this research, given that the research assesses the IHRL responsibilities of armed groups as a subject of international law itself.

One of the reasons for attributing legal personality to ANSAs was the aim of equality by IHRL. The same argument can be used in order to attribute IHRL obligations to ANSAs. This approach has also been taken by the Guatemalan Commission on Historical Clarification

¹⁵¹ Henckaerts and others (n 22).

¹⁵² Special Court for Sierra Leone, ‘Prosecutor v. Sam Hinga Norman - Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No.SCSL-2004-14-AR72(E), Special Court for Sierra Leone, 31 May 2004’ (31 May 2004) para 22. This necessity stems from the fact that the ANSA as a ‘collective entity’ “may be held responsible for the conduct of their members, whether by opposing parties or the outside world”. See: F Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th ed, Cambridge University Press 2011) 73.

¹⁵³ Except for the reference to ANSAs in the Optional Protocol to the CRC with regard to recruitment of child soldiers and the target audience of the Kampala Convention that explicitly includes ANSA (and other international actors) to attribute obligations with regard to internally displaced people: article 4 (1) Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000. See in particular article 2 and 7 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (‘Kampala Convention’) 2009. However, article 7 of the latter convention reiterates the accountability of individuals of an armed group and not of the group as a whole. See also Andrew Clapham, ‘The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement’. who argues for addressing ANSAs in human rights treaties in a clear, unambiguous and explicit manner.

¹⁵⁴ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)* [2001] ICTY IT-96-23-T&IT-96-23/1-T [470 (i)].

¹⁵⁵ Sivakumaran (n 147) 95.

¹⁵⁶ Inter American Commission on Human Rights (n 82) 50. Para 13.

¹⁵⁷ Sassòli (n 117) 9.

that declared that it does not matter for an individual who committed an IHRL violation and therefore chose to, “in order to treat the parties equally”, apply IHRL and IHL both to the guerrilla fighters and the State, because “the human dignity of the person is equally offended whoever the perpetrator [...] is”.¹⁵⁸ This would mean that ANSA would take the place of a State in the vertical relationship in human rights law, between a State and an individual. From a State-centred approach, however, it would be logical that ANSAs cannot replace the State in this vertical relationship, due to the fact that a State is considered to have the ability to hold ANSAs accountable for IHRL violations in the domestic system.¹⁵⁹ Nevertheless, this approach misses the mark, because the State is, due to circumstances, unable to perform IHRL obligations itself.

For that reason, Rodenhäuser adds the ‘effectivity’ argument in favour of attributing IHRL obligations to ANSAs. In that regard, “the human rights protection system needs to be readapted to reality”.¹⁶⁰ This reasoning further builds on the earlier approach of Kelsen in international law where he finds that, “the principle that a legal order, as a whole, must be by and large effective in order to be valid is itself a norm”.¹⁶¹ The same approach seems to be followed by the UNSC. In that regard, the ICJ referred in its Kosovo Advisory Opinion to the practice of the UNSC to call upon other actors than States to abide by IHRL¹⁶². Fortin revealed that the UNSC consistently refers to ‘violations’ when it addresses IHRL infringements committed by a State. Whereas it refer to ‘abuses’ when the latter is committed by an ANSA.¹⁶³ This confirms the tendency towards the general acceptance of human rights obligations for ANSAs. Even more, according to information of a diplomat, revealed to Rodenhäuser, the reference to ‘abuses’ instead of ‘violations’, “merely reflects a linguistic arrangement to

¹⁵⁸ Comisión para el Esclarecimiento Histórico (Guatemala) (ed), *Guatemala, Memoria Del Silencio: Informe* (1. ed, CEH 1999) 46 paragraph 76. Author’s own translation: “In addition, the Commission applied to the acts of violence committed by the guerrillas the principles common to International Human Rights Law and International Humanitarian Law, in order to give equal treatment to the Parties, taking into account that the predominant tendency is to consider that the dignity of the human person is equally offended whoever the perpetrator of the violation or infringement is.”

¹⁵⁹ Henckaerts and Wiesener (n 5) 205.

¹⁶⁰ Rodenhäuser (n 36) 158.

¹⁶¹ Although Kelsen is a positivist, the research uses the quote as a matter of natural law where effectivity is derived from characteristics common to human kind as represented by the philosophy of John Locke or scholar Hugo Grotius. Hans Kelsen, *Principles of International Law* (Rinehart 1952) 414.

¹⁶² *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion)* (2010) 210 ICJ Reports 403 (International Court of Justice) [116].

¹⁶³ Katherine Fortin, ‘Armed Non-State Actors and International Human Rights Law: An Analysis of the UN Security Council and UN General Assembly’, *Utrecht Centre for Accountability and Liability Law* (blog), accessed 4 July 2022, <http://blog.ucall.nl/index.php/2017/10/armed-non-state-actors-and-international-human-rights-law-an-analysis-of-the-un-security-council-and-un-general-assembly/>; See also: Jessica Burniske, Naz K. Modirzadeh, and Dustin A. Lewis, ‘Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and the U.N. General Assembly’, Harvard Public Law Working Paper No. 17-37, June 2017.

distinguish between different actors”.¹⁶⁴ On the contrary, Boon considers this linguistic difference as a way to circumvent the fact that not all State Parties to the UN are in favour of IHRL obligations for ANSAs.¹⁶⁵ This introduces the argument of legitimacy. Whereas this argument was independent from the question of the attribution of legal personality to ANSAs, it is different with regard to human rights obligations.

Firstly, human rights law is drafted with a State-individual relationship in mind. Hence, if one claims that human rights violations are taking place, this automatically presumes that the ANSA is some kind of State-entity.¹⁶⁶ Consequently, the State would be ‘obliged’ to consider the ANSA as a State-like entity for the purpose of IHRL protection.

Secondly, if an ANSA would interfere in the enjoyment of human rights, a legitimate aim is required. Such a legitimate aim is mostly linked to national security, the protection of health, to safeguard the rights of others, prevention of crime or prevention of morals. There is no doubt that the ability to invoke such aims requires the exercise of State-like functions.

In order to solve (or maybe circumvent) this issue, guidance may be found in common article 3 to the GCs, where the application of the enumerated IHL provisions “shall not affect the legal status of the Parties to the conflict”. Some human rights instruments have already adopted an analogous approach, however, they are all connected to armed conflict, so that the application of this approach to other instruments is not (yet) straightforward.¹⁶⁷ Even more, the legitimacy argument is a rather weak one, knowing that, if the only way to hold ANSAs accountable is through the State it operates in, a State should be rather relieved that an ANSA can possess IHRL obligations. Not attributing IHRL violations to ANSAs would give leeway to them to commit this. The same was already argued in 1997 by Buergenthal who explained that: “Potential violators will obviously not be deterred from engaging in massive human rights abuses in these countries if they know that they will enjoy domestic impunity and that, at most, only the state will be held internationally responsible for their acts”.¹⁶⁸ This domestic impunity

¹⁶⁴ Rodenhäuser (n 36) 157.

¹⁶⁵ Kristen Boon, ‘The UN Security Council and Non-State Actors’ (2019) 113 Proceedings of the ASIL Annual Meeting 209, 210.

¹⁶⁶ Andrew Clapham, *Focusing on Armed Non-State Actors*, vol 1 (Andrew Clapham and Paola Gaeta eds, Oxford University Press 2014) 788.

¹⁶⁷ See e.g.: article 7 (1) African Union, ‘African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“Kampala Convention”)’ (2009); article 4 (3) UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

¹⁶⁸ Thomas Buergenthal, ‘The Normative and Institutional Evolution of International Human Rights’ (1997) 19 Human Rights Quarterly 703, 718.

would nevertheless only be at stake if the State can be regarded as what is considered to be a ‘failed state’¹⁶⁹ or if it is unwilling to do this.

Furthermore, it is clear from the chapter that analysed Armed Non-State Actors, that the protection of NIACs in international humanitarian treaty law is not as rigorous as that of IACs. A solution to this may be the application of IHRL to the conflict in order to complement the rules of IHL. In that regard, Henckaerts and Wiesener identified that “While international humanitarian law (IHL) applies, where relevant, to the conduct of hostilities between the belligerents, it has little to offer on matters of daily life and public governance in areas not affected by active fighting [...]”¹⁷⁰. Furthermore, where ANSAs strive to set up a social order, whether or not similar to the government, human rights law is complementary to IHL.¹⁷¹ Clapham too, links the attribution of IHRL obligations to IHL as a complementary tool, stating that: “If armed groups possess enough international legal personality to be subject to a sliding scale of obligations under international humanitarian law, it seems logical that they should also be subject to international obligations under human rights law”.¹⁷² Even more, Giacca argues that the very reason why ANSAs possess human rights obligations is because of their legal personality.¹⁷³ The same was argued by the Darfur Commission of Inquiry: “[...] like all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law [...]”.¹⁷⁴ Consequently, ANSAs possess IHRL obligations because they possess legal personality, but they also possess legal personality because there is a need for attributing them IHRL obligations. This looks like a *perpetuum mobile* or vicious circle (depends on the expression one prefers).

Subsequently, Sivakumaran splits ‘human rights law in non-international armed conflict, into two schools of thought: the ‘unification school’ and the ‘threshold school’. Whereas the former applies a unified body of law, regardless of the intensity of the conflict, the latter applies IHRL when the intensity of the conflict is lower, and applies IHL on conflicts with high intensity.¹⁷⁵

¹⁶⁹ For an elaboration on this topic see: Neyire Akpınarlı, *The Fragility of the ‘failed State’ Paradigm a Different International Law Perception of the Absence of Effective Government* (Martinus Nijhoff Publishers 2010).

¹⁷⁰ Henckaerts and Wiesener (n 5) 196.

¹⁷¹ For an extensive elaboration on the social construction and political theory of ANSAs, see: Miroiu and Klimowich, *Political Theory of Armed Groups* (Springer International Publishing 2020).

¹⁷² Clapham, *Focusing on Armed Non-State Actors* (n 166) 789.

¹⁷³ Giacca (n 58) 236.

¹⁷⁴ ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004’ (2005) para 172.

¹⁷⁵ Sivakumaran (n 147) 94.

This approach of recognising ‘human rights law in non-international armed conflict’ differs from the aforementioned approaches by not using human rights as an interpretative tool or complementary tool to IHL, but as an independent body of law that is able to regulate NIACs.¹⁷⁶ Hence, it does not matter whether IHL applies or not, because IHRL has the capability to govern situations in armed conflict itself and therefore goes beyond humanitarian law.¹⁷⁷

Another approach to the matter, is not to confer upon ANSAs human rights obligations through human rights law, by addressing it as ‘legal obligations’, but to regard human rights obligations like certain standards or principles.¹⁷⁸ For that reason, Clapham argues for a theoretical basis of ‘human dignity’: “the most promising theoretical basis for human rights obligations for nonstate actors is first to remind ourselves that the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person’s inherent dignity.”¹⁷⁹ This approach was moreover taken by Vigny and Thompson who researched “the issue of fundamental standards of humanity” encompassing a set of rules derived from IHL as well as IHRL “as a means to address the insufficient protection of persons”.¹⁸⁰ Within these fundamental standards, the convention on the right of the child would be encompassed.¹⁸¹ A way to summarise the approaches of Clapham, Vigny and Thompson and Sivakumaran is to address them as theories where human rights are considered as ‘peremptory norms’ or ‘*jus cogens*’.¹⁸² Nevertheless, a more holistic approach would be to consider human rights law as customary human rights law, that binds every subject of international law.

To conclude, it is clear that ANSAs are bound by IHRL through different ways be it to protect individuals, provide for an effective application of human rights norms or because (some) human rights are *jus cogens*¹⁸³. Given that several ways to claim IHRL obligations for ANSAs exists, there is greater potential for negotiators to convince them of their obligations. Where

¹⁷⁶ *ibid.*

¹⁷⁷ Andrew Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’ (2006) 88 *International Review of the Red Cross* 492, 511.

¹⁷⁸ Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, ‘International Law and Armed Non-State Actors in Afghanistan’ (2011) 93 *International Review of the Red Cross* 47, 68.

¹⁷⁹ Clapham, ‘The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement’ (n 153) 24.

¹⁸⁰ Jean-Daniel Vigny and Cecilia Thompson, ‘Fundamental Standards of Humanity: What Future?’ (2002) 20 *Netherlands Quarterly of Human Rights* 185, 1.

¹⁸¹ *ibid* 199. It remains only the question whether this would be certain specific rights or the whole set of rules laid down in the CRC.

¹⁸² Koskenniemi (n 142); Fortin (n 163); Rodenhäuser (n 36).

¹⁸³ Note that only some human rights are considered to be *jus cogens*. Nevertheless, this list is non-exhaustive, but far from long: Koskenniemi (n 142) 146–147. For that reason, the *jus cogens* idea will not be used in this research.

one ANSA would agree on IHRL obligations to protect the people living under their control another would e.g. accept this claim by means of customary international law.

Important to bear in mind is that the whole research does not preclude the human rights obligations of States during armed conflict. Subsequently, the possibility that an armed group that becomes the State or a part of the government after the armed conflict is not encompassed in the research either.¹⁸⁴ Furthermore, the research does not preclude the attribution of IHRL obligations to ANSAs who are not a party to an armed conflict.¹⁸⁵

3.1.1 “Under control” of the Armed Non-State Actor?

Over the previous chapters a particular condition appeared to be very relevant. This is the control of an ANSA over a certain part of the territory it operates in. In that regard, it seems logical that IHRL obligations are connected to a certain control, because it would be difficult to exercise this over a certain period of time if the ANSA was just ‘on the move’. According to Henckaerts and Wiesener, an ANSA who is a ‘de facto authority’ is the only armed actor who possesses IHRL obligations.¹⁸⁶ Nevertheless, Giacca warns for a too high threshold of *de facto* governmental control, because this would mean that even more conditions have to be fulfilled than required by the application of AP II. In that regard “It implies relatively stable control over persons and territory and the exercise of some kind of public power. This would leave out many ANSAs that do not reach such a threshold.”¹⁸⁷ The ‘*de facto* control approach’ nuanced by the “Three-Pronged Approach” of Rodenhäuser, who, as aforementioned in chapter 2.1 distinguishes between ‘quasi-governmental authority in defined territory’, ‘de facto control over territory and population’ and ‘no control’.¹⁸⁸ This approach is connected to the gradual application of IHRL obligations to ANSAs of Henckaerts and Wiesener¹⁸⁹ and is a reflection of reality where ANSAs do not have one and the same appearance. Yet, ANSAs come in different forms, “from hierarchically complex, well-financed armed groups that exercise

¹⁸⁴ See e.g.: Jean D’Aspremont, ‘Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents’ (2009) 58 *International and Comparative Law Quarterly* 427; Sassòli (n 117).

¹⁸⁵ See e.g. Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’ (n 177). who argues for a practical approach to attributing IHRL violations to ANSAs without fitting them into a legal box, similar to practice of the UN.

¹⁸⁶ Henckaerts and Wiesener (n 5) 83.

¹⁸⁷ Giacca (n 58) 236.

¹⁸⁸ Rodenhäuser (n 36) 146–209. Note that this ‘three-pronged approach’ is meant to apply both in times of peace and war. Nevertheless, this research only concerns with IHRL obligations of ANSAs in the latter stage.

¹⁸⁹ Henckaerts and Wiesener (n 5) 214.

control over large swathes of territory at one extreme, to minimally organized, poor, and mobile groups at the other.”¹⁹⁰

At first sight this last approach seems to deny the universal application of human rights, but with a closer look, the gradual application of human rights on ANSAs seems quite logical. In that regard, Rodenhäuser suggests to apply a ‘baseline’ set of human rights to all armed groups, whatever their control over a territory is (be it almost full or none). See this as a ‘core set of human rights’.¹⁹¹ Where an ANSA gains more control over a territory and thus over people’s daily lives as well, more IHRL obligations would be applied. For example, when an ANSA has control over a small part of the territory where no other people live, the right to education would become illusory and an ANSA would not even have the opportunity to comply with.

Taking a closer look at the division suggested above, when an ANSA is a ‘quasi-governmental authority in a defined territory’, the functions they exercise are State-like and “represent the sole [...] authority for a given region”.¹⁹² Hence, in this case, the ANSA is the only authority who is able (not necessarily willing) to protect the human rights of citizens. This approach is confirmed by the Human Rights Council, that emphasised that “non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control”.¹⁹³ Hence, the whole set of IHRL obligations is in this case conferred upon the ANSA. Besides, an ANSA can exercise ‘*de facto* control’, without having a State-like control. This often happens when the ANSA has recently gained control over the territory and still has to develop in its role as new power.¹⁹⁴ Lastly, when an ANSA has ‘no control’ over a territory it may first seems difficult to confer on them IHRL obligations. Nevertheless, this is when the previously mentioned ‘baseline’ comes into play where core human rights principles have to be protected all the time.

¹⁹⁰ International Committee of the Red Cross, ‘Concluding Report. Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty (32IC/15/19.1)’ (2015) 33.

¹⁹¹ Rodenhäuser (n 36) 148.

¹⁹² Schoiswohl (n 97) 52.

¹⁹³ Human Rights Council, ‘Human Rights Situation In Palestine And Other Occupied Arab Territories (A/HRC/10/22)’ para 22. See also Human Rights Council, ‘Joint Report of Special Rapporteurs to the Human Rights Council (A/HRC/2/7)’ para 19. Note that in this report reference is also made to an identifiable structure of the ANSA, which can be compared to one of the requirements put forward in the Tadic case, as discussed in chapter 2.1

¹⁹⁴ See e.g. Rodenhäuser (n 36) 181; Oberleitner (n 129).

In such a volatile context as non-international armed conflict, the type of control can easily change over time. It is important for people that human rights protection remains stable at any stage of the conflict. For that reason, the ongoing State obligation of IHRL protection is important. This is however, out of the scope of the research and will likewise not be further elaborated on.¹⁹⁵

To conclude, the research does not consider effective control over a territory as a prerequisite to confer IHRL obligations to ANSAs. It rather considers it as a practical condition for the effective exercise and ability to guarantee human rights protection. Without control over a certain part of a territory IHRL obligations would only become illusory.

3.1.2 During and after the armed conflict

Even though, it is not the focus of the research. In order to be comprehensive and because of its importance in times of peace as well as in war, the question raises whether ANSAs possess IHRL obligations before or after the armed conflict, or in a situation that the threshold of armed conflict is not met. This option was covered by the *Institut de Droit International* that declared that: “To the extent that certain aspects of internal disturbances and tensions may not be covered by international humanitarian law, individuals remain under the protection of international law guaranteeing fundamental human rights. All parties are bound to respect fundamental human rights under the scrutiny of the international community”¹⁹⁶

Nevertheless, it appears that the UNSC refers to IHRL obligations in one breath with IHL obligations. Hence, it seems that the UNSC only accepts IHRL obligations for ANSAs from the moment an armed conflict exists.¹⁹⁷ The same reasoning is followed by Clapham who

¹⁹⁵ Rodenhäuser (n 36).

¹⁹⁶ ‘The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in Which Non-State Entities Are Parties (Official English Translation)’ para X. The outcome of the meeting even suggested to establish a new type of document that covered IHL both for international armed conflict and non-international armed conflicts.

¹⁹⁷ The analysed resolutions sometimes refer to earlier resolutions where the situation of armed conflict was discussed. In that regard, all of these resolutions could be linked to an armed conflict that has a direct relation with the IHRL obligations. Afghanistan: UNSC, ‘S/RES/2274’, 2016; Angola: UNSC, ‘S/RES/1213’, 1998; Burundi: UNSC, ‘S/RES/ 2248’, 2015; Chad: UNSC, ‘S/RES/2349’, 2017; Central African Republic: UNSC, ‘S/RES/2605’, 2021; Côte d’Ivoire: UNSC, ‘S/RES/1716’, 2006; Democratic Republic of Congo UNSC, ‘S/RES/2641’, 2022; East-Timor: UNSC, ‘S/RES/1272’, 1999; Guinea-Bissau: UNSC, ‘S/RES/1216’, 1998; Haiti: UNSC, ‘S/RES/1716’; UNSC, ‘S/RES/1529’, 2004; Iraq: UNSC, ‘S/RES/2299’, 2016; Liberia: UNSC, ‘S/RES/1509’, 2003; Mali: UNSC, ‘S/RES/2295’, 2016; Nigeria: UNSC, ‘S/RES/2349’, 2017; Lake Chad Basin Region: UNSC, ‘S/RES/2349’, 2017; Sierra Leone: UNSC, ‘S/RES/1370’, 2001; Somalia: UNSC, ‘S/RES/2093’, 2013; South Sudan: UNSC, ‘S/RES/2327’, 2016; Sudan: UNSC, ‘S/RES/2340’, 2017; Syria: UNSC, ‘S/RES/2449’, 2018; Yemen: UNSC, ‘S/RES/2624’, 2022. Only with regard to the conflict in Georgia no reference was made to IHL. Probably because Russia was involved in the conflict. However, this conflict is categorised as an armed conflict by the ICRC, so that it does not alter the conclusion. Georgia: UNSC, ‘S/RES/1716’.

emphasises that there is no possibility to attribute IHRL obligations to ANSAs “outside armed conflict”.¹⁹⁸ On the contrary, other scholars argue that ANSAs (who exercise effective control over a territory) are bound by IHRL due to customary international human rights law that applies at all times.¹⁹⁹ This can be justified by the universality of human rights²⁰⁰ and is also confirmed by the ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ where the threshold of armed conflict was not (yet) met.²⁰¹ Hence, a difference in practice between the Human Rights Council and the UNSC exists.

3.2 The application of Economic, Social and Cultural Rights rights during armed conflict

IHL covers a wide set of issues that arise during armed conflict. However these issues do not cover every aspect that happens in war. As argued above, IHL has little to offer on the regulation of daily life.²⁰² Moreover, Giacca stated that “armed conflicts encompass a larger spectrum of situations than those foreseen by IHL”.²⁰³ The previous chapter explained that IHRL offers guidance on these matters of daily life. The final idea of the research is to confer on ANSAs the obligation to ensure the right to education during armed conflict. Given that the right to education falls under the scope of ESC-rights, it is important to analyse the application of such rights in armed conflict. In that regard, the Committee on Social, Economic and Cultural Rights (CESCR) has declared that “Even in a situation of armed conflict, fundamental human rights must be respected [. . .] Basic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law and are also prescribed by international humanitarian law”.²⁰⁴ The application of ESC-rights in armed conflict has moreover been confirmed by the ICJ in its Wall Advisory Opinion.²⁰⁵ Nevertheless, these cases relate to occupation and the State obligations resulting from this. However, it has been argued above that similarities can be drawn between the law on occupation and the

¹⁹⁸ Clapham, *Focusing on Armed Non-State Actors* (n 166) 787.

¹⁹⁹ Rodenhäuser (n 36); Fortin (n 45).

²⁰⁰ For an extensive analysis of the topic see: William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021).

²⁰¹ Human Rights Council, ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/19/69)’ para 106.

²⁰² Henckaerts and Wiesener (n 5) 196.

²⁰³ Giacca (n 58) 173.

²⁰⁴ UN Committee on Economic, Social, and Cultural Rights, ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel (E/C.12/1/Add.90)’ para 31. Notwithstanding, the question arises, which ‘basic’ ESC-rights are meant by the statement of the ESC Committee. This issue is solved by e.g. General Comments 3, 16 and 20 that explicitly refer to this basic rights, of whom the ‘basic right to education’ is one.

²⁰⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 130) para 112. Note that this case relates to the law of occupation and the ICESCR was ratified by Israel.

obligations of ANSAs when they exercise State-like functions. Therefore, these opinions can give guidance on the application of ESC-rights in times of armed conflict.

The importance of ESC rights has moreover been expressed by the UNGA: “when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the idea of the free man”²⁰⁶ This directly counters the idea that ESC rights are of ‘less relevance’ to armed conflict.²⁰⁷ Subsequently, the ICESCR does not provide for a derogation clause in times of emergency which only pleads in favour of the full application of ESC rights in times of armed conflict.²⁰⁸ Nevertheless, the ICESCR provides for a limitation clause in its article 4, but this would require a thorough judicial system set up by the ANSA, because limitations have to be justified.²⁰⁹ Nevertheless, the sole argument that an armed conflict is ongoing is insufficient. Consequently, the justification of limitations on ESC-rights can only play a role in a later stage, namely that of accountability.

In that regard, solutions have to be found through IHRL, because IHL treaty law is, expect for the right to education in article 4.3 (a) AP II, rather silent on the matter.²¹⁰ The rules that are connected to ESC-rights are according to Giacca, not the same as those enshrined in IHRL, but can be best compared to the obligation to respect ESC-rights for ANSAs.²¹¹ Niyo explains that this is the same for article 4.3 (a) AP II²¹², that even though this article enshrines an obligation for the parties to the conflict, it will practically entail that the parties have to refrain from educational infrastructures.²¹³ Given that ESC-rights enshrine the obligation, to respect, protect

²⁰⁶ UN General Assembly, ‘Draft International Covenant on Human Rights and Measures of Implementation: Future Work of the Commission on Human Rights (A/RES/421)’ 43 (Preamble (E)).

²⁰⁷ Moreover, the idea that CCP rights would be more important than ESC rights is obsolete and will therefore not be discussed any further. See Eibe Riedel, *Economic, Social, and Cultural Rights in Armed Conflict*, vol 1 (Andrew Clapham and Paola Gaeta eds, Oxford University Press 2014) 442–446 <<http://oxfordhandbooks.com/view/10.1093/law/9780199559695.001.0001/law-9780199559695-e-18>> accessed 20 July 2022.

²⁰⁸ Elizabeth Mottershaw, ‘Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law’ (2008) 12 *The International Journal of Human Rights* 449, 464.

²⁰⁹ For an extensive elaboration on this topic see: Amrei Müller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law an Analysis of Health Related Issues in Non-International Armed Conflicts* (Martinus Nijhoff Publishers 2013) 111–148.

²¹⁰ References to e.g. food, water, health, work, housing and clothing can be found in the provisions of the Geneva Conventions and their Additional Protocols, but it is mostly related to IACs or to means and methods of warfare. See: Asbjorn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers 2001) 409–413. See also Declaration of Minimum Humanitarian Standards (Turku Minimum Declaration) 1990. Hampson (n 141) 209; Bellal, Giacca and Casey-Maslen (n 178) 169.

²¹¹ Giacca (n 58) 174–175. This is different for states, where provision refer to the protection and fulfilment of those rights.

²¹² It has been argued earlier that not every non-international armed conflict meets the threshold to apply this protocol.

²¹³ Joshua J Niyo, ‘Economic, Social and Cultural Rights in Non-International Armed Conflicts: Human Rights Obligations of Non-State Armed Groups’ 1, 9.

and fulfil, IHL is not sufficient confer these obligations on ANSAs. Nevertheless, as argued above, directly binding ANSAs through treaty law, is not the most preferred option. For that reason, it might be useful to, again, use the principle of effectiveness and customary international law.

First, following the principle of Kelsen who claims that the international legal order can only be valid if it is (largely) effective²¹⁴, the role of ESC-rights in the international legal system is important.²¹⁵ In that regard, Scheinin declared that “Economic and social rights are an essential part of the normative international code of human rights”.²¹⁶ Even more, Riedel, Giacca and Golay emphasise that CPP and ESC rights “are interdependent, indivisible, interrelated and universally applicable”.²¹⁷ Consequently, in order to obtain a well-functioning legal order, ANSAs are bound by ESC-rights when they qualify as a duty bearer of human rights as explained in the previous chapter.

Second, the most important documents that have gained the status of customary international law for this research, are the Universal Declaration of Human Rights (UDHR) and the Convention on the Rights of the Child (CRC). It was already clear in the 1960s that (parts of) the UDHR is recognised as customary international law. Although the Proclamation of Teheran refers to “members of the international community”²¹⁸, which was at that time meant only to address States, the research has shown that thanks to a teleological interpretation, ANSAs can be regarded as a part of the international community as well. In that regard, the UDHR reflects “inalienable human rights, ultimately flowing from human dignity”.²¹⁹ Although, the UDHR, at first sight does not enumerate obligations for any actor in international law, “it is clear that principles initially considered by the international community to be “only” goals or aspirations can develop into binding norms over time, if they become accepted as customary international law”.²²⁰ Nevertheless, whether the UDHR is customary international law as a whole is not entirely relevant. For this research, it is only relevant that article 26 UDHR,

²¹⁴ Kelsen (n 161) 414.

²¹⁵ For a history on ESC-rights see: Eide, Krause and Rosas (n 210) 9–28.

²¹⁶ Martin Scheinin, ‘Economic and Social Rights as Legal Rights’ in Asbjorn Eide, Catarina Krause and Allan Rosas (eds), *Economic, social and cultural rights: a textbook* (Martinus Nijhoff Publishers 2001) 29.

²¹⁷ Eibe H Riedel and others (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (First published in paperback 2016, Oxford University Press 2016) 35.

²¹⁸ United Nations, ‘Final Act of The International Conference on Human Rights in Teheran (A/CONF.32/41)’ 4 para 2.

²¹⁹ Riedel and others (n 217) 7.

²²⁰ Hurst Hannum, ‘The UDHR in National and International Law’ (1998) 3 *Health and Human Rights* 144, 148. See also Philip Alston, ‘A Human Rights Perspective on the Millennium Development Goals: Paper Prepared as a Contribution to the Work of the Millennium Project Task Force on Poverty and Economic Development’ 62, para 42.

enshrining the right to education has gained this status. The latter is confirmed by an extensive analysis of Schabas.²²¹

Again the legitimacy argument comes into play, but this time from the perspective of the ANSA. In that regard, an ANSA who aspires to be recognised by the international community is according to Giacca, more likely to set up a structure in which ESC-rights are respected.²²²

As previously analysed, a lot of conditions have to be met before a group is qualified as an ANSA who is able to carry IHRL obligations. Nevertheless, once the “entity has achieved sufficient capacity to provide governmental services to a given population in a defined territorial area. The establishment of an administration may include the provision of education, health services, or a judicial system”.²²³ Hence, it is a matter of achieving the above-explained threshold before ESC rights come into play. Consequently, every armed conflict will require a practical assessment in order to know whether ESC rights apply.²²⁴ Nevertheless, once this is achieved, it is sure that ESC-rights apply because of the very nature of these rights, reflecting rights flowing from human dignity of which the right to education has moreover gained the status of customary international law. Moreover, the possibility of accountability is a proof of the validity of the respect of the right to education by all parts of the conflict, including ANSAs.

3.2.1 The right to education

The right to education is enshrined in article 4.3 (a) AP II. This provision is rather vague on the duties it puts on parties to a conflict. For that reason, the commentary of 1987 declares that this article “answers the concern to ensure continuity of education so that children retain their cultural identity and a link with their roots. This rule is aimed at removing the risk that children separated from their family by the conflict might be uprooted by being initiated into a culture, religion or moral code which may not correspond with the wishes of their parents, and in addition could in this way become political pawns. Religion and morality are an integral part of education, but it was considered preferable to specify "including religious and moral education" so that the word "education" should be understood in its broadest sense, and not be

²²¹ Schabas (n 200) 316.

²²² Giacca (n 58) 270.

²²³ *ibid.*

²²⁴ Ian Scobbie, ‘Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict’ (2010) Vol. 14 No. 3 449.

interpreted restrictively.”²²⁵ The ICRC further notes that “the territory under their control, the authorities, both de jure and de facto, have the duty to protect children from the consequences of hostilities by providing the care and aid they require, preventing physical injury or mental trauma, and ensuring that they develop as normally as circumstances permit”²²⁶

In that regard, education is of primary importance for the development of a child. Nevertheless, as explained above, article 4 (3) AP II is mostly linked to the respect for educational structure and does not confer any obligation on a party to the conflict to practically provide for education.²²⁷ This is moreover confirmed by Giacca, who notes that IHL does not provide for positive obligations of ANSAs governing territory under their control.²²⁸ For that reason, the previous chapters about human rights and more specifically, ESC-rights for ANSAs are of utmost importance. It is proved that ANSAs are bound by the latter rights, which include the right to education.

Although the ICESCR is the leading document for States on this matter, solace has to be found in other documents with regard to ANSAs. As argued above, the UDHR enshrines the right to education in its article 26 which has gained the status of customary international law. Even though this article is one of the most specific rights enshrined in the UDHR, the Convention on the Rights of the Child (CRC), may be helpful for further guidance on the notion. In that regard, the CRC has almost gained universal recognition and can therefore be regarded as customary international law. In particular, this Convention does not allow for derogations under any circumstances, meaning that, its full application also needs to be guaranteed in times of war. As emphasised by Schabas, “There may be no better case for recognition of a fundamental human right as a matter of customary international law than the right to education.”²²⁹

From the above it is clear that the right to education must be ensured by ANSAs, yet, it is not very clear what the scope of the right to education in that regard is: do they have to hire teachers, build schools, set up an educational program, who checks the quality of the education, do they have to provide for primary, secondary and higher education?

²²⁵ ICRC, ‘Commentary of 1987 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)’ para 4552 <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CBB47A6753A2B77C12563CD0043A10B>> accessed 21 July 2022.

²²⁶ *ibid* 4546.

²²⁷ Niyo (n 213) 9.

²²⁸ Giacca (n 58) 242.

²²⁹ Schabas (n 200) 312.

Schabas exposed a “universal recognition of a right to education at the primary level and free of charge”.²³⁰ Considering the universal acceptance of the right to education in the UDHR and Convention on the Rights of the Child, the interpretation of these instruments can provide for guidance on this notion. Article 26 UDHR, enshrines the spirit is of the right, enumerating that “education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms”²³¹. Subsequently, the first General Comment on the CRC emphasised the importance of education in armed conflict.²³² On the other hand, Giacca relies on the The Guiding Principles on IDPs to interpret the right to education, given that these principles are strongly adhered to by ANSAs and have a rather broad understanding.²³³ Article 23 of these guiding principles put a strong emphasis on the equal education for all children.²³⁴ It is true that the education of girls is disproportionately affected by armed conflict.²³⁵

Subsequently, Geneva Call argues that “Although efforts should be made to maintain the national education system, in case this is not possible, ANSAs are required to provide inclusive and equitable quality education when they have the capacity to do so, or otherwise shall seek to cooperate with relief organisations specialized in child protection or with States”²³⁶ This reference to State education can be considered a bit unfortunate, because “Promoting the State system is not the goal. Quality education is the goal.”²³⁷ As stated by Niyo “there is no reason why the quality of education should not be a priority during armed conflict”²³⁸ Nevertheless, building further on the structure provided for by the State that exercised the particular territory before, can be useful to avoid an unnecessary *tabula rasa*.

²³⁰ *ibid* 316.

²³¹ Article 26 UDHR

²³² UN Committee on the Rights of the Child, ‘General Comment No. 1 (2001), Article 29 (1), The Aims of Education (CRC/GC/2001/1)’ para 16.

²³³ Giacca states that “The point here is that if this framework is said to be realistically applicable to ANSAs regarding IDPs, then it can be assumed that this holds true for the whole population living under their control. And the fact that a great number of ANSAs have unilaterally adhered to its principles is a case in point” Giacca (n 58) 264–265.

²³⁴ UN High Commissioner for Refugees (UNHCR), ‘Guiding Principles on Internal Displacement (ADM 1.1,PRL 12.1, PR00/98/109)’ art 23.

²³⁵ United Nations Girls’ Education Initiative (UNGEI), ‘Policy Note: Addressing Threats to Girls’ Education in Contexts Affected by Armed Conflict’ <<https://www.ungei.org/sites/default/files/2020-10/Addressing-threats-to-girls-education-in-contexts-affected-by-armed-conflict-2017-eng.pdf>> accessed 21 July 2022.

²³⁶ Geneva Call, ‘Armed Non-State Actors Share Their Policies and Practice with Regards to Education in Armed Conflict’ (2017) 7.

²³⁷ Geneva Call, ‘Report of PEIC/Geneva Call Workshop on Education and Armed Non-State Actors: Towards a Comprehensive Agenda’ (2015) 11.

²³⁸ Niyo (n 213) 10.

Furthermore, even though the legal effect of a certain practice amongst different ANSAs is unclear, a study of 2018 by Geneva Call has exposed that ten different ANSAs recognise the importance of the right to education. In that regard, “All groups that were consulted stressed the importance of education, in particular with a long-term goal of developing a society and building a prosperous country. Various ANSAs referred to education as a basic need and lifesaving (“as important as food and water”, some ANSAs claimed) and a way of building resilience, enabling children to live better lives in the future.”²³⁹ This promising practice however, cannot be considered as binding on other ANSAs because of the limited number of ANSAs that expressed their views.²⁴⁰

In case an ANSA is not capable of providing for education itself due to different circumstances (e.g. lack of resources or knowledge), they should allow for humanitarian assistance. The UNSC has emphasised the importance of humanitarian access for children.²⁴¹ Where IHL only covers “food, medicines, medical equipment, or other vital supplies to civilians in need”²⁴², this should be open to the assistance from third parties to ensure the right to education because of the aforementioned vital importance for the development of children.²⁴³ In that regard Heintze emphasises the importance of consent to allow for this assistance, but also brings to the attention that an “unjustified denial of consent constitutes a violation of international law”.²⁴⁴ This is confirmed by Müller, who emphasises that: “Non-state armed groups are obliged to give their consent to the provision of impartial and humanitarian assistance to civilians in need if they cannot guarantee a minimum socioeconomic well-being of the population under their control”.²⁴⁵

To conclude, an ANSA has the positive obligation to provide for the right to education. In particular, it has to ensure the quality of primary education and the equal access to it for all children. In the case, the ANSA has no capacity to provide for this, humanitarian assistance of a third party should be allowed.

²³⁹ Geneva Call, ‘Armed Non-State Actors Share Their Policies and Practice with Regards to Education in Armed Conflict’ (n 236) 7.

²⁴⁰ *ibid* 4.

²⁴¹ United Nations Security Council (n 119) 16 para 68.

²⁴² ‘Humanitarian Assistance | How Does Law Protect in War? - Online Casebook’ <<https://casebook.icrc.org/glossary/humanitarian-assistance>> accessed 21 July 2022.

²⁴³ For discussion on the topic of humanitarian assistance see: Emilie E Kuijt, ‘Legal Challenges in the Provision of Humanitarian Assistance: The Case of Non-International Armed Conflicts’ in Terry D Gill and others (eds), *Yearbook of International Humanitarian Law Volume 17, 2014*, vol 17 (TMC Asser Press 2016).

²⁴⁴ Hans-Joachim Heintze and Andrej Zwitter, *International Law and Humanitarian Assistance: A Crosscut through Legal Issues Pertaining to Humanitarianism* (Springer-Verlag Berlin Heidelberg 2011) 28.

²⁴⁵ Müller (n 209) 289.

4 Compliance

What is the previous assessment without compliance? It would mean that the law in books does not correspond to the law in action. Although, this may, for a large part be true, mechanisms need to exist to strive to full compliance by ANSAs. In that regard, the former UN Secretary General stressed that a more “consistent” and “effective” engagement with non-State armed groups is required to “improve their compliance with the law”.²⁴⁶ This engagement can either be during the armed conflict, in terms of humanitarian assistance and dialogue with humanitarian organisations. Or, it can appear in the form of accountability through international criminal law. This last option, is indeed a last resort, and will not lead solve any issues with regard to an armed conflict, where atrocities have happened, but it can show the world that it is not ignorant for human rights violations of ANSAs.

Important to note is that other ways of compliance exist too like “monitoring, reporting, and fact-finding instruments”, but these will not be elaborated on in this research.²⁴⁷

4.1 Engagement with Armed Non-State Actors

Direct engagement with ANSAs can also be regarded as horizontal interactions between non-state actors.²⁴⁸ From the analysis on ANSAs it is very clear that ‘armed’ is a crucial element to distinguish ANSAs from other non-state entities. Such other non-state entities are humanitarian organisations, who brought to life to safeguard the dignity of people (more particular victims) in armed conflict.²⁴⁹ Engagement between humanitarian organisation and ANSAs have the advantage of being neutral, impartial and independent, “without being attributed international diplomatic or political status”.²⁵⁰

Engagement with ANSAs may take the form of e.g. “advocacy, negotiation, mediation and liaison interactions”²⁵¹ One of the aims of negotiation is “ensuring the provision of humanitarian assistance and protection to vulnerable populations”.²⁵² This is directly linked

²⁴⁶ Ban-Ki Moon, ‘Secretary-General’s Remarks to Security Council’s Open Debate on the Protection of Civilians in Armed Conflict’ (9 November 2011) <<https://www.un.org/sg/en/content/sg/statement/2011-11-09/secretary-generals-remarks-security-councils-open-debate-protection>> accessed 22 July 2022.

²⁴⁷ Giacca (n 58) 231.

²⁴⁸ Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (Asser Press, Springer 2020) 350.

²⁴⁹ ICRC, ‘The Fundamental Principles of The International Red Cross and Red Cressant Movement’; UNICEF, ‘The Core Commitments for Children Are the Core UNICEF Policy and Framework for Humanitarian Action’ <<https://www.corecommitments.unicef.org/cc-1-3>> accessed 22 July 2022; ‘Geneva Call - Humanitarian Engagement with Armed Groups and de Facto Authorities’ (*Geneva Call*) <<https://www.genevacall.org/>> accessed 22 July 2022.

²⁵⁰ Hofmann (n 2) 399. Apart from that, another characteristic is that they are driven by principles of “humanity”.

²⁵¹ McHugh and Bessler (n 66) 5.

²⁵² *ibid.*

with the providence of education for children in armed conflict. Even more, Hofmann concludes that “engaging with ANSAs and entering into legal obligations with them therefore *becomes as important as peace treaties in traditional wars and the Geneva Conventions* with regard to humanitarian concerns.”²⁵³ (own emphasis added)

Now what is the reason for engaging with humanitarian organisations when ANSAs are normally considered as the bogeyman. Bellal, Giacca and Casey-Maslen identified several reasons for engagement with humanitarian organisations, namely “the need for popular support (‘winning hearts and minds’), the self-image of the group, the group’s own norms, reciprocity, the need or desire to project a good national or international image, and family ties with the concerned population.”²⁵⁴ On the contrary, reasons for not allowing humanitarian assistance into a territory controlled by an ANSA are e.g.: the avoidance of “witnessing”²⁵⁵, the NGO is not perceived as neutral or impartial²⁵⁶ or because they are simply not willing to engage²⁵⁷.²⁵⁸ The non-access to areas challenges “the principle of impartiality, according to which humanitarian assistance should be solely needs-driven”.²⁵⁹ Furthermore, the situation is more complex than it may first seem. In that regard, the research has already stated that “one person’s terrorist is another person’s freedom fighter”²⁶⁰, which is particularly relevant for providing humanitarian assistance. This assistance is mostly granted through a State²⁶¹, but when States regard ANSAs as terrorists, humanitarian personnel is often refused to access the territories under their control.²⁶² Furthermore, if a person is considered to be a terrorist²⁶³, humanitarian assistance is not allowed from e.g. UNICEF.²⁶⁴ Nevertheless, it might be relevant to draw experience from

²⁵³ Hofmann (n 2) 396.

²⁵⁴ Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, ‘Towards Engagement, Compliance and Accountability’ 4 <<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/non-state/04-06.pdf>> accessed 21 July 2022.

²⁵⁵ *ibid.*

²⁵⁶ McHugh and Bessler (n 66) 71.

²⁵⁷ Luke Moffett, ‘Violence and Repair: The Practice and Challenges of Non-State Armed Groups Engaging in Reparations’ (2020) 102 *International Review of the Red Cross* 1057, 1065.

²⁵⁸ Another challenge is the relation between Islamic law and IHL, because several ANSAs give authority to Islamic law, but not to IHL. See in that regard: Heffes, Kotlik and Ventura (n 248) 361.

²⁵⁹ Alejandro Pozo Marín and Rabia Ben Ali, ‘Guilt by Association: Restricting Humanitarian Assistance in the Name of Counterterrorism’ (2021) 103 *International Review of the Red Cross* 539, 546.

²⁶⁰ Policzer (n 7) 1.

²⁶¹ Gal explains that it can be enough if an ANSA gives its consent for humanitarian assistance, but in practice the State will retain influence in this process: Tom Gal, ‘Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance’ (2017) 50 *Israel Law Review* 25, 35.

²⁶² For an extensive elaboration on this topic see: Pozo Marín and Ben Ali (n 259).

²⁶³ Since it is not easy to define who is a ‘terrorist’ or not this may cause serious problems on the delivery of humanitarian assistance.

²⁶⁴ UNICEF, ‘Programme Cooperation Agreement’ art 21 <https://open.unicef.org/sites/transparency/files/documents/PCA_0930_Colombia_2021.pdf> accessed 22 July 2022.

the laws governing occupation, where unconditional access is required “as long as the relief is directed to the civilian population in the occupied territory”.²⁶⁵

Similar to the attribution of IHRL obligations to ANSAs, Gal introduces the effectivity argument for allowing humanitarian assistance into territory controlled by ANSAs.²⁶⁶ Even more, Stoffels exposed that “the obligation of all parties to a conflict to allow the free passage of humanitarian aid has become part of customary law”.²⁶⁷

For whom again wishes to involve the legitimacy argument in order to prevent humanitarian organisations from engaging with ANSAs, McHugh and Bessler stressed that “Humanitarian negotiations do not in any way confer legitimacy or recognition upon armed groups.”²⁶⁸ Subsequently, important to note is the punishment under international criminal law for attacks against personnel involved in humanitarian assistance.²⁶⁹ This enumerates the high value of the international community attributed to the work of humanitarian organisations.²⁷⁰ Furthermore, the avoidance of criminal persecution appears to be a reason for engaging with NGOs.²⁷¹

How this engagement with ANSAs, with regard to the right to education, is carried out in practice is analysed below with specific attention to the practices of the ICRC, UNICEF and Geneva Call in Colombia, Myanmar and Nigeria.²⁷² These conflicts are particularly chosen in order to apply a transcontinental approach, covering a diverse set of cultures.

4.1.1 International Committee of the Red Cross

The ICRC is not in its core “a child protection agency”, however “children are nevertheless the beneficiaries of 40% of the ICRC’s assistance and protection activities.”²⁷³ Only since 2017 the ICRC has a formalised approach to the right to education. Before, no clear framework on

²⁶⁵ Gal (n 261) 36.

²⁶⁶ *ibid* 40–47.

²⁶⁷ Ruth Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’ (2004) Vol. 86 No. 855 515, 522.

²⁶⁸ McHugh and Bessler (n 66) 6.

²⁶⁹ Rome Statute of the International Criminal Court (last amended 2010) 1998 art 8.2 (e) (iii).

²⁷⁰ For an overview on the history on the protection of humanitarian personnel before the adoption of the Rome Statute see: Heffes, Kotlik and Ventura (n 248) 80–83.

²⁷¹ Bellal, Giacca and Casey-Maslen (n 254) 5.

²⁷² More specifically these organisations take different approaches in terms of confidentiality: UNICEF: non-confidential dialogue; the ICRC: confidential dialogue and Geneva Call: between confidential and non-confidential. See Jérémie Labbé and Reno Meyer, ‘Engaging Nonstate Armed Groups on the Protection of Children: Towards Strategic Complementarity’ <<https://resourcecentre.savethechildren.net/document/engaging-nonstate-armed-groups-protection-children-towards-strategic-complementarity/>> accessed 5 May 2022.

²⁷³ Ellen Policinski and Kvitoslava Krotiuk, ‘The ICRC’s Engagement on Children in Armed Conflict and Other Situations of Violence: In Conversation with Monique Nanchen, Global Adviser on Children, ICRC’ (2019) 101 *International Review of the Red Cross* 653, 654.

how the ICRC acted with regard to safeguarding the right to education existed. Yet, even though a “Framework for Access to Education”²⁷⁴ was created, the approach of the ICRC stays the same. Besides, being “neutral, impartial and independent” its negotiations remain confidential. Nevertheless, an insight in the recently streamlined approach of the ICRC is to be encouraged and is useful to draw experience from. In 2021 a new follow-up framework on that of 2018-2020 was released.²⁷⁵

The ICRC acknowledges the role of ANSAs for providing for education in armed conflict, be it rather briefly and by referring to another NGO, namely Geneva Call.²⁷⁶ Furthermore, as argued above, it is only clear that ANSAs have the obligation to provide for primary education. This is in line with the view of the ICRC, who regards the ‘lack of support for secondary and tertiary education’ as a challenge to overcome.²⁷⁷ If these types of education are to be considered the same as primary education, I assume, that research on this practice (both by States and ANSAs in armed conflict) is of utmost importance.

Furthermore, the ICRC carries out negotiations with regard to different topics all requiring a the “a specific engagement designed to facilitate learning and to ensure that standards are accepted.”²⁷⁸ It is, up to now, only to guess, what this ‘specific engagement’ entails. Even more, evaluating the effectiveness of this approach is due to the confidentiality strategy of the ICRC impossible.²⁷⁹ From an academic point of view this is rather unfortunate, however, if this strategy allows for a better compliance by ANSAs, there is nothing unfortunate about it, so that this approach can only be regarded with the highest respect.

²⁷⁴ ICRC, ‘Framework for Access to Education’ <https://www.icrc.org/sites/default/files/wysiwyg/Activities/icrc_framework_for_access_to_education.pdf> accessed 22 July 2022.

²⁷⁵ ICRC, ‘ANNEX 2 – Access to Education (A2E): Strategy for 2018-2020’ <https://www.icrc.org/sites/default/files/wysiwyg/Activities/annex_2_-_access_to_education_.pdf> accessed 22 July 2022; ICRC, ‘Access-to-Education-Strategy 2021-2026’ <https://www.icrc.org/sites/default/files/wysiwyg/Activities/2021-2026_access_to_education_strategy_final.pdf> accessed 22 July 2022.

²⁷⁶ ICRC, ‘Framework for Access to Education’ (n 274) 11.

²⁷⁷ *ibid* 15.

²⁷⁸ The ICRC specifies “principle of respect for continuing education during armed violence where possible, non-interference with schools or children, certification of education, transferability of documentation, movement of teachers and curriculum content” as topics in which engagement with actors is required. See: *ibid*.

²⁷⁹ Some practical specific examples can be found on the ICRC’s website, but it is not clear whether the ICRC had to engage with an ANSA or if, which ANSA they engaged with or what strategy they applied. See e.g.: ‘Sandra’s Story: A Journey in Search for Education’ <<https://www.icrc.org/en/access-education-papua-new-guinea>> accessed 22 July 2022; ‘Myanmar: No Limit to Education’ <<https://www.icrc.org/en/document/myanmar-no-limit-education>> accessed 22 July 2022; ‘Ukraine: Helping Children Living along the Contact Line Avoid Dangers of Conflict’ (*International Committee of the Red Cross*, 31 May 2019) <<https://www.icrc.org/en/document/ukraine-helping-children-living-along-contact-line-avoid-dangers-conflict>> accessed 22 July 2022.

Nevertheless, information about the legal tools operated by the ICRC to improve respect for international law by ANSA is analysed by Mack. In that regard, “Special Agreements”, “Unilateral Declarations”, “Codes of Conduct” and “Peace Agreements” are used.²⁸⁰ The last two are especially relevant with regard to the conflicts analysed below.

Colombia

Different non-international armed conflicts exist between the government and different ANSAs, but also amongst ANSAs. This makes the conflict very complex. However, in 2016 a historical peace agreement was concluded with the FARC²⁸¹ in which the equal and free access of children to pre-school, primary and secondary education was included along with the free access to “material, textbooks, school meals and transport”.²⁸²

The ICRC has been rather silent on its role within this negotiation process and claims it only has provided for logistical support, because of its position as neutral actor.²⁸³ Even though the role of the ICRC was at that time not an active one, I assume they have played a major role in enhancing awareness of IHL because of their presence on the ground.²⁸⁴ Even more, Kaplan revealed that in 2016 the ICRC went into dialogue with armed groups to protect a school during an ongoing fight.²⁸⁵

Myanmar

Myanmar is involved in a number of non-international armed conflicts with different ethnic armed groups.²⁸⁶ The ICRC is present in different states that are controlled by ANSAs (Rakhine, Shan and Kachin). With regard to education, it is only known that they have successfully rolled out a programme about mine risks awareness and have provided for facilities in schools.²⁸⁷

²⁸⁰ Michelle Mack, ‘Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts’ [2008] *ICRC* 16–30.

²⁸¹ A part of this ANSA formed another ANSA, named the FARC-EP, that is currently still fighting in a NIAC.

²⁸² ‘Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (2016)’ 26–27 <<https://www.peaceagreements.org/viewmasterdocument/1845>> accessed 22 July 2016.

²⁸³ ‘Colombia: The ICRC Clarifies Its Role in the Transport of FARC-EP Negotiators’ (*International Committee of the Red Cross*, 22 February 2016) <<https://www.icrc.org/en/document/colombia-icrc-clarifies-its-role-transport-farc-ep-negotiators>> accessed 22 July 2022.

²⁸⁴ See in that regard: Oliver Kaplan, ‘The International Committee of the Red Cross and Support for Civilian Self-Protection in Colombia’ (2021) 47 *International Interactions* 898; Miriam Bradley, ‘International Humanitarian Law, Non-State Armed Groups and the International Committee of the Red Cross in Colombia’ (2013) 4 *Journal of International Humanitarian Legal Studies* 108.

²⁸⁵ Kaplan (n 284) 920.

²⁸⁶ For a brief overview of the conflict see: Miriam Bradley, *Protecting Civilians in War: The ICRC, UNHCR, and Their Limitations in Internal Armed Conflicts* (First edition, Oxford University Press 2016) 16–21.

²⁸⁷ In that regard, the ICRC has installed hand washing stations in high schools in Kachin. See: ICRC, ‘Shan State Facts And Figures’ <https://www.icrc.org/sites/default/files/topic/file_plus_list/2021_shan_fact_figure-

Nigeria

Nigeria on the other hand is involved in “two parallel non-international armed conflict” with Boko Haram and ISWAP as the two opponent ANSAs.²⁸⁸ The role of the ICRC in the regions under their control is not entirely clear. However, it is clear that Boko Haram agrees on the neutrality of the ICRC, because it has demanded its logistical support after it had agreed with the State to release kidnapped school girls.²⁸⁹ With regard to education, it is only known that ISWAP provides for Islamic education. The respect of ISWAP for the ICRC however is rather limited given that they e.g. executed two persons working for the ICRC.²⁹⁰ This event can amount to their accountability under international criminal law. On the other hand, Boko Haram seems to depict education as adverse to their values and norms.²⁹¹

The conflict in this country is an example of the difficulties arising when engaging with ANSAs.²⁹² In that regard, the exception proves the rule. Engagement with ANSAs is necessary to ensure their compliance with international human rights law, and in particular the right to education.

4.1.2 United Nations International Children’s Education Fund

“UNICEF policy requires [...] to pursue and maintain systematic engagement with armed non-state actors (ANSAs) whenever operationally necessary to access children or to implement principled humanitarian programming on their behalf”²⁹³ In particular, the UNICEF 2020 Core Commitments for Children in Humanitarian Action enshrines the priorities for education in such situations. Specific attention is paid to vulnerable children (girls, disabled, displaced etc.).²⁹⁴ It moreover draws the attention to two initiatives, namely the ‘Safe Schools

web_version.pdf> accessed 22 July 2022; ICRC, ‘Rakhine State Facts And Figures’ <https://www.icrc.org/sites/default/files/topic/file_plus_list/2021_rakhine_fact_figure-web_version.pdf> accessed 22 July 2022; ICRC, ‘Kachin State Facts And Figures’ <https://www.icrc.org/sites/default/files/topic/file_plus_list/2021_kachin_fact_figure-web_version.pdf> accessed 22 July 2022.

²⁸⁸ Rulac | Geneva Academy (n 30).

²⁸⁹ ‘Red Cross Not Involved in Negotiations with Boko Haram, ISWAP - Official’ <<https://www.premiumtimesng.com/regional/north-east/379715-red-cross-not-involved-in-negotiations-with-boko-haram-iswap-official.html>> accessed 22 July 2022.

²⁹⁰ Jacob Zenn and Mary-Jane Fox, ‘Negotiating with Boko Haram? Examining the Jihadist Exception’ (2020) 10 *African Conflict and Peacebuilding Review* 158, 170.

²⁹¹ Olumuyiwa Babatunde Amao, ‘A Decade of Terror: Revisiting Nigeria’s Interminable Boko Haram Insurgency’ (2020) 33 *Security Journal* 357, 361 and 365.

²⁹² For an analysis on the possible engagement with Boko Haram and ISWAP see: Zenn and Fox (n 290).

²⁹³ ‘UNICEF’s Position on Engagement with Armed Non-State Actors (ANSAs)’ (*Humanitarian UNICEF*) <<https://www.corecommitments.unicef.org/ANSA>> accessed 22 July 2022.

²⁹⁴ UNICEF, ‘The Core Commitments for Children Are the Core UNICEF Policy and Framework for Humanitarian Action’ (n 249) 59.

Declaration’ and the ‘Safe to Learn: Call to Action’.²⁹⁵ Whereas the former is mostly linked with the prohibition under IHRL to attack educational infrastructure, the second is linked to its HRL counterpart of the effective provision for education.²⁹⁶ Nevertheless, these two documents are open for compliance by States. Given that UNICEF also recognises the importance of engagement with ANSAs,²⁹⁷ I suggest to open up this document for signature and endorsement by ANSAs as well.²⁹⁸

Colombia

In Colombia UNICEF is, with regard to children, mostly engaged in the prevention on the recruitment and use of child soldiers and the reintegration of former child soldiers into society.²⁹⁹ With regard to education, UNICEF “supports national and local authorities, teachers and communities to develop school-based peace-building, reconciliation and resilience initiatives.”³⁰⁰ There is presumably no link with ANSAs in that regard.

Myanmar

UNICEF particularly engages with the Tatmadaw, who is the State armed force of Myanmar, concerning the topic of the recruitment of child soldiers.³⁰¹ A recent report exposed that “security risks and severe travel restrictions” hinder the assistance to “children in direct need of assistance.”³⁰² UNICEF has set up educational programs and provided for logistical support as well³⁰³, but it is unclear to what extent ANSAs were involved in this matter. Earlier UNICEF

²⁹⁵ UNICEF, ‘Core Commitments for Children in Humanitarian Action (CCC)’ 60 <[https://www.unicef.org/media/87611/file/Core%20Commitments%20for%20Children%20\(English\).pdf](https://www.unicef.org/media/87611/file/Core%20Commitments%20for%20Children%20(English).pdf)> accessed 22 July 2022.

²⁹⁶ Oslo Conference on Safe Schools, ‘Safe Schools Declaration’ <https://protectingeducation.org/wp-content/uploads/documents/documents_safe_schools_declaration-final.pdf> accessed 22 July 2022; ‘Safe to Learn: Call to Action | End Violence’ (*End Violence Against Children*) <<https://www.end-violence.org/safetolearn/call>> accessed 22 July 2022.

²⁹⁷ UNICEF, ‘Core Commitments for Children in Humanitarian Action (CCC)’ (n 295) 60.

²⁹⁸ UNICEF refers to another document that can be signed by ANSAs, but this disregards the equality of the parties in an armed conflict and ignores the important role ANSAs play in children’s rights during armed conflict. Reference is made to the ‘Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict’: UNICEF, ‘Education Under Threat in West and Central Africa’ 7 <<https://files.eric.ed.gov/fulltext/ED599625.pdf>> accessed 22 July 2022.

²⁹⁹ UNICEF, ‘25 Years Of Children And Armed Conflict: Taking Action To Protect Children In War’ 40 <<https://www.unicef.be/sites/default/files/2022-06/EMBARGOED%20UNTIL%2028%20JUNE%202022%20-%2025%20Years%20of%20CAAC%20-%20Web%20English%20Final%20June%202022.pdf>> accessed 22 July 2022.

³⁰⁰ UNICEF, ‘Childhood in the Time of War: Will the Children of Colombia Know Peace at Last?’ (2016) 11.

³⁰¹ UNICEF, ‘25 Years Of Children And Armed Conflict: Taking Action To Protect Children In War’ (n 299) 36.

³⁰² UNICEF, ‘UNICEF Myanmar Humanitarian Situation Report No. 4’ 2.

³⁰³ *ibid* 4.

has engaged with the Democratic Karen Benevolent Army to sign a Joint Action Plan to end the use and recruitment of child soldiers.³⁰⁴

Nigeria

As aforementioned, engagement with the ANSAs in Nigeria is difficult. So far, UNICEF has not engaged with them either, but only with the armed forces of the Nigerian State. Again this was done with regard to the topic on the recruitment of child soldiers. Noteworthy is the fact that the approach has been proven to be efficient, because no recruitment of a child soldier was recently reported.³⁰⁵

I assume that the focus on the topic of child soldiers is strongly connected to the reference to ANSAs by the Optional Protocol to the CRC, which is one of the few human rights instruments that directly address ANSAs. Furthermore, UNICEF remains a UN Body, that derives its value (and funds) mostly through its Member States. On the other hand, examples of engagement between UNICEF and States with regard to the right to education are abundant.³⁰⁶

4.1.3 Geneva Call

Different than the other humanitarian organisations, Geneva Call particularly focuses on non-state actors who operate outside effective state control, meaning “armed groups and de facto authorities”.³⁰⁷ With regard to education, Geneva Call has contributed to exposing the practices of ANSAs by directly engaging with them.³⁰⁸ Even more, Geneva Call has created a ‘Deed of Commitment for the Protection of Children from the Effects of Armed Conflict’³⁰⁹. This document also enshrines the protection of the right to education and the access thereto.³¹⁰ Moreover meetings are organised that bring together ANSAs to discuss its implementation.³¹¹

³⁰⁴ This was done through the UN CTFMR of which UNICEF is a part: ‘UN CTFMR Signs Joint Action Plan with Democratic Karen Benevolent Army to End Use and Recruitment of Children’.

³⁰⁵ UNICEF, ‘25 Years Of Children And Armed Conflict: Taking Action To Protect Children In War’ (n 299) 37.

³⁰⁶ UNICEF, ‘25 Years Of Children And Armed Conflict: Taking Action To Protect Children In War’ (n 299).

³⁰⁷ ‘Our Different Missions’ (*Geneva Call*) <<https://www.genevacall.org/mission/>> accessed 22 July 2022.

³⁰⁸ See e.g.: Geneva Call, ‘Armed Non-State Actors Share Their Policies and Practice with Regards to Education in Armed Conflict’ (n 236); ‘21 Armed Movements Gathered to Discuss Child Protection’ (*Geneva Call*, 1 December 2016) <<https://www.genevacall.org/geneva-call-gathers-21-armed-movements-geneva-discuss-end-child-recruitment-better-protect-children-armed-conflict/>> accessed 22 July 2022; Geneva Call, ‘Report of PEIC/Geneva Call Workshop on Education and Armed Non-State Actors: Towards a Comprehensive Agenda’ (n 237).

³⁰⁹ Geneva Call, ‘Deed of Commitment for the Protection of Children from the Effects of Armed Conflict’ <<https://www.genevacall.org/wp-content/uploads/2019/11/Official-DoC-Protecting-children-in-armed-conflict.pdf>>.

³¹⁰ *ibid.*

³¹¹ Geneva Call, ‘The Third Meeting of Signatories to Geneva Call’s Deeds of Commitment’ <<https://www.genevacall.org/wp-content/uploads/2020/09/3rd-Meeting-of-Signatories-Report-1.pdf>> accessed 22 July 2022.

Given that it is difficult to ensure compliance with international law by ANSAs, the approach of an annual meeting, bringing together actors with similar characteristics, might be very advantageous for the protection of IHL and IHRL due to the fact that it provides for peer pressure. To date, 31 ANSAs have signed the deed of commitment.

Colombia

Geneva Call has directly engaged with different ANSAs in Colombia, but not with regard to the right to education. Nevertheless, it has trained people in areas most affected by the conflicts (Chocó, Cauca, Nariño, Putumayo, Arauca and Norte de Santander) on the matter of IHL, whereby raising awareness on children's rights and education.³¹²

Myanmar

Several ANSAs have engaged with Geneva Call to follow IHL training. With regard to the right to education, the dialogue with Geneva Call is very productive. The New Mon State Party/Mon National Liberation Army (NMSP/MNLA), the Pa-O National Liberation Organization/Pa-O National Liberation Army (PNLO/PNLA), Karen National Union/Karen National Liberation Army (KNU/KNLA), Karenni National Progressive Party/Karenni Army (KNPP/KA) and the Chin National Front/Chin National Army (CNF/CNA) have signed the Deed of Commitment for the Protection of Children from the Effects of Armed Conflict.³¹³ This shows a 'national' practice of ANSAs in Myanmar to accept the right to education in armed conflict. Geneva Call has reported that they have taken steps to effectively implement this document.³¹⁴

Nigeria

Geneva Call does not operate in Nigeria. Hence no information is available.

To conclude, the practice of the three organisations show the practical difficulties that can arise when engaging with armed groups. Although many promising initiatives have been illustrated, a need for comprehensive research about the effective implementation of the theoretical educational strategies is much required. This will allow scholars to link the practical guides on negotiations, mediation etc. with practical examples. It is not entirely relevant to only post succeeded operations, because, as aforementioned, the exception confirms the rule. The above is particularly relevant for the ICRC and UNICEF. Given that the ICRC's approach is

³¹² 'Where We Work' (*Geneva Call*) <<https://www.genevacall.org/where-we-work/>> accessed 22 July 2022.

³¹³ *ibid.*

³¹⁴ *ibid.*

confidential it is doubtful that practical examples will be provided for. The opposite is true for UNICEF, who does not take such an approach, but here, the dependence on the influence of Member States will play an important role. For that reason, the practice of Geneva Call, with a focus on the engagement with ANSAs and taking a transparent but independent approach, is to be applauded.

4.2 Accountability through international criminal law

Where IHL and IHRL bind ANSAs as a collective entity, this is different for ICL that holds individuals accountable for violations enshrined in the Rome Statute.³¹⁵ Bellal calls this “the paradox of ANSA accountability” given that “IHL binds ANSAs as collective actors, but the only mechanism to hold them legally accountable for IHL violations is through individual criminal responsibility.”³¹⁶

Unfortunately, not every ANSA aspires to comply with IHRL, and in particular the right to education. Therefore, this chapter aims to find out whether ANSAs can be held accountable for IHRL violations under international law, and to what extent they can be held accountable for violating the right to education.

Given that the whole research is built on arguments of customary international law and the effectiveness approach, trying to circumvent the direct application of treaty law, this forms an obstacle to the accountability of ANSAs under international, because this intrinsically requires the breach of a rule. For that reason alone, to avoid a situation of complete anarchy, the accountability of ANSAs is problematic. Nevertheless, breaches of customary international law can give rise to accountability.³¹⁷ Even more, Clapham argues that “rather than focusing on treaties or custom it makes more sense here to focus in the Declaration as the appropriate Universal Standard. As we shall see, in practice human rights accountability has been more focused on the application of such universal standards rather than the traditional sources of treaty and custom”³¹⁸

Subsequently, with regard to the right to education, practice of the ICC has shown that this right is encompassed within the definition of a crime against humanity.³¹⁹ In several decisions it

³¹⁵ Zegveld (n 52) 229.

³¹⁶ Bellal (n 8) 210.

³¹⁷ Zegveld (n 52) 151.

³¹⁸ Clapham, ‘The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement’ (n 153) 24.

³¹⁹ Schabas (n 200) 126.

declared that “fundamental rights may include a variety of rights, whether derogable or not, such as the right to life [...] and the right to education”³²⁰

Furthermore, Rottensteiner argues for the inclusion of the denial of humanitarian assistance within the scope of the Rome Statute.³²¹ In that regard, the Rome Statute only encompasses attacks on humanitarian personnel as a war crime.³²² This approach is confirmed by other scholars.³²³

Particularly relevant for his research is the practice of the ICC to regard the right to education as a fundamental right encompassed under the scope of crimes against humanity. Even though such a crime can also be committed in peacetime, it confirms the claim of this research that ANSAs have to ensure the right to education in armed conflict.

5 Conclusion

Armed Non-State Actors are bound by international human rights law, and more specifically as well by the right to education. This is true in an armed conflict, where ANSAs are moreover bound by IHL. Through a step-by-step analysis, starting from defining the scope of ‘ANSAs’ and ‘Armed Conflict’, towards attributing de facto legal personality to ANSAs, to ultimately conclude that they are bound by international human rights obligations. Subsequently, these obligations also comprise economic, social and cultural rights in an armed conflict, of which the right to education is a part. A constant in this research was the role of customary law, and the effectivity of international law to finally confer on ANSAs the obligation to ensure the right to education. In cases that they cannot allow for this particular right due to given circumstances, humanitarian assistance ‘comes to the rescue’ to help children in need. In this case, in need for education. Because it is true that education is vital for the development of children and because it is true that children are the hope for the future of human kind.

³²⁰ *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar* [2019] [101]; *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi* [2017] [155]. See also: *Prosecutor v Lubanga*, *Dissenting opinion of Judge Odio-Benito* [2012] [21].

³²¹ Christa Rottensteiner, ‘The Denial of Humanitarian Assistance as a Crime under International Law’ (1999) Vol. 81 No. 835 555.

³²² Rome Statute of the International Criminal Court (last amended 2010) art 8.3 (e) (iii).

³²³ Eide, Krause and Rosas (n 210) 418.

6 Bibliography

‘21 Armed Movements Gathered to Discuss Child Protection’ (*Geneva Call*, 1 December 2016) <<https://www.genevacall.org/geneva-call-gathers-21-armed-movements-geneva-discuss-end-child-recruitment-better-protect-children-armed-conflict/>> accessed 22 July 2022

Akpinarli N, *The Fragility of the ‘failed State’ Paradigm a Different International Law Perception of the Absence of Effective Government* (Martinus Nijhoff Publishers 2010)

Alston P, ‘A Human Rights Perspective on the Millennium Development Goals: Paper Prepared as a Contribution to the Work of the Millennium Project Task Force on Poverty and Economic Development’ 62

Amao OB, ‘A Decade of Terror: Revisiting Nigeria’s Interminable Boko Haram Insurgency’ (2020) 33 *Security Journal* 357

Arend AC, *Legal Rules and International Society* (Oxford University Press 1999)

Ban-Ki Moon, ‘Secretary-General’s Remarks to Security Council’s Open Debate on the Protection of Civilians in Armed Conflict’ (9 November 2011) <<https://www.un.org/sg/en/content/sg/statement/2011-11-09/secretary-generals-remarks-security-councils-open-debate-protection>> accessed 22 July 2022

Bellal A, ‘Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution’ (17 June 2014)

———, ‘What Are “Armed Non-State Actors”? A Legal and Semantic Approach’ in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020)

Bellal A, Giacca G and Casey-Maslen S, ‘International Law and Armed Non-State Actors in Afghanistan’ (2011) 93 *International Review of the Red Cross* 47

———, ‘Towards Engagement, Compliance and Accountability’ <<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/non-state/04-06.pdf>> accessed 21 July 2022

Boon K, ‘The UN Security Council and Non-State Actors’ (2019) 113 *Proceedings of the ASIL Annual Meeting* 209

Bradley M, ‘International Humanitarian Law, Non-State Armed Groups and the International Committee of the Red Cross in Colombia’ (2013) 4 *Journal of International Humanitarian Legal Studies* 108

———, *Protecting Civilians in War: The ICRC, UNHCR, and Their Limitations in Internal Armed Conflicts* (First edition, Oxford University Press 2016)

Bruderlein C, ‘The Role of Non-State Actors in Building Human Security’ [2000] *Centre for Humanitarian Dialogue* 19

Buergenthal T, ‘The Normative and Institutional Evolution of International Human Rights’ (1997) 19 *Human Rights Quarterly* 703

Burniske J, Modirzadeh NK and Lewis DA, 'Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and the U.N. General Assembly' (2017)

Chaumette A-L, 'Droit International Pénal et Droit International Des Droits de l'homme, Illustration d'un Dialogue Des Juges »' (2014) 1 11

Clapham A, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006)

——, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 *International Review of the Red Cross* 492

——, 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement'

——, *Focusing on Armed Non-State Actors*, vol 1 (Andrew Clapham and Paola Gaeta eds, Oxford University Press 2014)

'Colombia: The ICRC Clarifies Its Role in the Transport of FARC-EP Negotiators' (*International Committee of the Red Cross*, 22 February 2016) <<https://www.icrc.org/en/document/colombia-icrc-clarifies-its-role-transport-farc-ep-negotiators>> accessed 22 July 2022

Comisión para el Esclarecimiento Histórico (Guatemala) (ed), *Guatemala, Memoria Del Silencio: Informe* (1. ed, CEH 1999)

Crawford J, *The Creation of States in International Law* (2. ed.; repr, Clarendon Press 2011)

Cullen A, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010)

D'Aspremont J, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents' (2009) 58 *International and Comparative Law Quarterly* 427

Doswald-Beck L, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?' (2006) 88 *International Review of the Red Cross* 881

EEAS, 'Factsheet: Mediation and Dialogue in Transitional Processes from Non-State Armed Groups to Political Movements/Political Parties'

Eide A, Krause C and Rosas A, *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers 2001)

Faite A, 'Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law' (2004) 4 *Defence Studies* 166

'Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (2016)' <<https://www.peaceagreements.org/viewmasterdocument/1845>> accessed 22 July 2016

Fortin K, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017)

Fortin K, 'Armed Non-State Actors and International Human Rights Law: An Analysis of the UN Security Council and UN General Assembly' (*Utrecht Centre for Accountability and Liability Law*) <<http://blog.ucall.nl/index.php/2017/10/armed-non-state-actors-and-international-human-rights-law-an-analysis-of-the-un-security-council-and-un-general-assembly/>> accessed 4 July 2022

Fox GH, Boon KE and Jenkins I, 'The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law' (2017) 67 *American University Law Review* 649

Gaja G, 'First Report on Responsibility of International Organizations (A/CN.4/532)'

Gal T, 'Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance' (2017) 50 *Israel Law Review* 25

Geneva Call, 'Deed of Commitment for the Protection of Children from the Effects of Armed Conflict' <<https://www.genevacall.org/wp-content/uploads/2019/11/Official-DoC-Protecting-children-in-armed-conflict.pdf>>

—, 'The Third Meeting of Signatories to Geneva Call's Deeds of Commitment' <<https://www.genevacall.org/wp-content/uploads/2020/09/3rd-Meeting-of-Signatories-Report-1.pdf>> accessed 22 July 2022

—, 'Report of PEIC/Geneva Call Workshop on Education and Armed Non-State Actors: Towards a Comprehensive Agenda' (2015)

—, 'Armed Non-State Actors Share Their Policies and Practice with Regards to Education in Armed Conflict' (2017)

'Geneva Call - Humanitarian Engagement with Armed Groups and de Facto Authorities' (*Geneva Call*) <<https://www.genevacall.org/>> accessed 22 July 2022

Giacca G, *Economic, Social, and Cultural Rights in Armed Conflict* (First edition, Oxford University Press 2014)

Hampson FJ, 'The Relationship between International Humanitarian Law and International Human Rights Law' in Scott Sheeran and Nigel S Rodley (eds), *Routledge handbook of international human rights law* (Routledge 2013)

Hannum H, 'The UDHR in National and International Law' (1998) 3 *Health and Human Rights* 144

Heffes E, 'From Words to Deeds: A Research Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms' (Geneva Academy and Geneva Call 2021)

Heffes E, Kotlik MD and Ventura MJ (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (Asser Press, Springer 2020)

Heintze H-J, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' (2004) 86 *International Review of the Red Cross* 789

Heintze H-J and Zwitter A, *International Law and Humanitarian Assistance: A Crosscut through Legal Issues Pertaining to Humanitarianism* (Springer-Verlag Berlin Heidelberg 2011)

Henckaerts J-M and others (eds), *Customary International Humanitarian Law* (Cambridge University Press 2005)

Henckaerts J-M and Wiesener C, 'Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020)

Hofmann C, 'Engaging Non-State Armed Groups in Humanitarian Action' (2006) 13 *International Peacekeeping* 396

Human Rights Council, 'Joint Report of Special Rapporteurs to the Human Rights Council (A/HRC/2/7)'

—, 'Human Rights Situation In Palestine And Other Occupied Arab Territories (A/HRC/10/22)'

—, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/19/69)'

'Humanitarian Assistance | How Does Law Protect in War? - Online Casebook' <<https://casebook.icrc.org/glossary/humanitarian-assistance>> accessed 21 July 2022

ICRC, 'Commentary of 1960 to Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.' <<https://ihl-databases.icrc.org/ihl/COM/375-590006?OpenDocument>> accessed 11 July 2022

—, 'Commentary of 1987 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)' <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CB B47A6753A2B77C12563CD0043A10B>> accessed 21 July 2022

—, 'Opinion Paper: How Is the Term "Armed Conflict" Defined in International Humanitarian Law?' <<https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 7 July 2022

—, *Handbook on International Rules Governing Military Operations* (2013)

—, 'The Fundamental Principles of The International Red Cross and Red Cressant Movement'

—, 'Framework for Access to Education' <https://www.icrc.org/sites/default/files/wysiwyg/Activities/icrc_framework_for_access_to_education.pdf> accessed 22 July 2022

—, 'Commentary of 2020 to Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FC B9705FF00261C1258585002FB096#_Toc44265103> accessed 11 July 2022

——, *The Roots of Restraint in War* (2020)

——, ‘Access-to-Education-Strategy 2021-2026’
<https://www.icrc.org/sites/default/files/wysiwyg/Activities/2021-2026_access_to_education_strategy_final.pdf> accessed 22 July 2022

——, ‘Kachin State Facts And Figures’
<https://www.icrc.org/sites/default/files/topic/file_plus_list/2021_kachin_fact_figure-web_version.pdf> accessed 22 July 2022

——, ‘Rakhine State Facts And Figures’
<https://www.icrc.org/sites/default/files/topic/file_plus_list/2021_rakhine_fact_figure-web_version.pdf> accessed 22 July 2022

——, ‘Shan State Facts And Figures’
<https://www.icrc.org/sites/default/files/topic/file_plus_list/2021_shan_fact_figure-web_version.pdf> accessed 22 July 2022

——, ‘ANNEX 2 – Access to Education (A2E): Strategy for 2018-2020’
<https://www.icrc.org/sites/default/files/wysiwyg/Activities/annex_2_-_access_to_education_.pdf> accessed 22 July 2022

——, ‘Treaties, States Parties, and Commentaries - Geneva Convention (III) on Prisoners of War, 1949 - 3 - Article 3 : Conflicts Not of an International Character - Commentary of 2020’
<<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096>> accessed 5 July 2022

Inter American Commission on Human Rights, ‘Third Report on the Human Rights Situation in Colombia 1999’ (1999) OEA/Ser.L/V/II.102 Doc. 9 rev. 1

International Committee of the Red Cross, ‘ICRC External Activities’ 634

——, ‘Concluding Report. Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty (32IC/15/19.1)’ (2015)

International Law Association and others (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill Nijhoff 2018)

Johns F (ed), *International Legal Personality* (Ashgate 2010)

Kalshoven F and Zegveld L, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th ed, Cambridge University Press 2011)

Kaplan O, ‘The International Committee of the Red Cross and Support for Civilian Self-Protection in Colombia’ (2021) 47 *International Interactions* 898

Kelsen H, *Principles of International Law* (Rinehart 1952)

Klabbers J, ‘(I Can’t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors’ in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: essays in international law for Martti Koskenniemi* (Brill | Nijhoff 2003)

Kleffner JK, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 *International Review of the Red Cross* 443

Koskenniemi M, 'Report of the Study Group of the International Law Commission, Finalized by Mr. Martti Koskenniemi (A/CN.4/L.682)' (International Law Commission 2006)

Koskenniemi M, Petman J and Klabbers J (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff Publishers 2003)

Krause K and Milliken J, 'Introduction: The Challenge of Non-State Armed Groups' (2009) 30 *Contemporary Security Policy* 202

Kuijt EE, 'Legal Challenges in the Provision of Humanitarian Assistance: The Case of Non-International Armed Conflicts' in Terry D Gill and others (eds), *Yearbook of International Humanitarian Law Volume 17, 2014*, vol 17 (TMC Asser Press 2016)

La Rosa A-M and Wuerzner C, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law' (2008) 90 *International Review of the Red Cross* 327

Labbé J and Meyer R, 'Engaging Nonstate Armed Groups on the Protection of Children: Towards Strategic Complementarity' <<https://resourcecentre.savethechildren.net/document/engaging-nonstate-armed-groups-protection-children-towards-strategic-complementarity/>> accessed 5 May 2022

Lauterpacht H (ed), *International Law. By L. Oppenheim. Volume 1. Seventh Edition.* (Longmans, Green & Co 1952)

———, 'Hersch Lauterpacht (1970), "The Subjects of International Law"', in E. Lauterpacht (Ed.), *International Law. Being the Collected Papers of Hersch Lauterpacht, Volume I: The General Works* in Andrea Bianchi (ed), *Non-State Actors and International Law* (Cambridge University Press 2005)

Lubell N, 'Human Rights Obligations in Military Occupation' (2012) 94 *International Review of the Red Cross* 317

Mack M, 'Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts' [2008] *ICRC*

Manuchehr T, 'Education Right of Children during War and Armed Conflicts' (2011) 15 *Procedia - Social and Behavioral Sciences* 302

McHugh G and Bessler M, *Humanitarian Negotiations with Armed Groups Humanitarian Negotiations with Armed Groups A Manual for Practitioners* (United Nations 2006)

Melzer N, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross 2009)

———, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross 2019)

Mende J, 'Are Human Rights Western—And Why Does It Matter? A Perspective from International Political Theory' (2021) 17 *Journal of International Political Theory* 38

Milanovic M, 'The Lost Origins of < Lex Specialis >: Rethinking the Relationship between Human Rights and International Humanitarian Law' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016)

Miroiu and Klimowich, *Political Theory of Armed Groups* (Springer International Publishing 2020)

Moffett L, 'Violence and Repair: The Practice and Challenges of Non-State Armed Groups Engaging in Reparations' (2020) 102 *International Review of the Red Cross* 1057

Moir L, *The Law of Internal Armed Conflict* (Cambridge University Press 2002)

Mottershaw E, 'Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law' (2008) 12 *The International Journal of Human Rights* 449

Müller A, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law an Analysis of Health Related Issues in Non-International Armed Conflicts* (Martinus Nijhoff Publishers 2013)

'Myanmar: No Limit to Education' <<https://www.icrc.org/en/document/myanmar-no-limit-education>> accessed 22 July 2022

Niyo JJ, 'Economic, Social and Cultural Rights in Non-International Armed Conflicts: Human Rights Obligations of Non-State Armed Groups' 1

'Non-International Armed Conflict | How Does Law Protect in War? - Online Casebook' (*International Committee of the Red Cross*) <<https://casebook.icrc.org/law/non-international-armed-conflict#chapter10>> accessed 8 July 2022

Noortmann M, Reinisch A and Ryngaert C, *Non-State Actors in International Law* (Hart Publishing 2015)

Oberleitner G, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015)

———, 'The Development of IHL by Human Rights Bodies' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International humanitarian law and non-state actors: debates, law and practice* (Asser Press, Springer 2020)

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH/I/287/Rev.1), vol X (Federal Political Department Bern 1974)

Oslo Conference on Safe Schools, 'Safe Schools Declaration' <https://protectingeducation.org/wp-content/uploads/documents/documents_safe_schools_declaration-final.pdf> accessed 22 July 2022

'Our Different Missions' (*Geneva Call*) <<https://www.genevacall.org/mission/>> accessed 22 July 2022

- Park ID, *The Right to Life in Armed Conflict* (First Edition, Oxford University Press 2018)
- Paust JJ, 'Nonstate Actor Participation in International Law and the Pretense of Exclusion Essay' (2010) 51 *Virginia Journal of International Law* 977
- Pictet J (ed), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva (ICRC 1958)
- Policinski E and Krotiuk K, 'The ICRC's Engagement on Children in Armed Conflict and Other Situations of Violence: In Conversation with Monique Nanchen, Global Adviser on Children, ICRC' (2019) 101 *International Review of the Red Cross* 653
- Policzer P, 'Neither Terrorists nor Freedom Fighters' [2005] International Studies Association Conference
- Portmann R, *Legal Personality in International Law* (1st edn, Cambridge University Press 2010)
- Pozo Marín A and Ben Ali R, 'Guilt by Association: Restricting Humanitarian Assistance in the Name of Counterterrorism' (2021) 103 *International Review of the Red Cross* 539
- 'Red Cross Not Involved in Negotiations with Boko Haram, ISWAP - Official' <<https://www.premiumtimesng.com/regional/north-east/379715-red-cross-not-involved-in-negotiations-with-boko-haram-iswap-official.html>> accessed 22 July 2022
- 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004' (2005)
- Riedel E, *Economic, Social, and Cultural Rights in Armed Conflict*, vol 1 (Andrew Clapham and Paola Gaeta eds, Oxford University Press 2014) <<http://oxfordhandbooks.com/view/10.1093/law/9780199559695.001.0001/law-9780199559695-e-18>> accessed 20 July 2022
- Riedel EH and others (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (First published in paperback 2016, Oxford University Press 2016)
- Roberts A and Sivakumaran S, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 *107*
- Rodenhäuser T, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, vol 1 (Oxford University Press 2018)
- Rondeau S, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts' (2011) 93 *International Review of the Red Cross* 649
- Ross WD (ed), *Aristotle's Metaphysics Book VIII*, vol VIII (Clarendon Press 1924)
- Rottensteiner C, 'The Denial of Humanitarian Assistance as a Crime under International Law' (1999) Vol. 81 No. 835 555

Rulac | Geneva Academy, ‘Non-International Armed Conflicts in Myanmar’ <<https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-myanmar>> accessed 8 July 2022

—, ‘Non-International Armed Conflicts in Nigeria’ <<https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-nigeria>> accessed 8 July 2022

Ryngaert C, ‘Non-State Actors: Carving out a Space in a State-Centred International Legal System’ (2016) 63 *Netherlands International Law Review* 183

‘Safe to Learn: Call to Action | End Violence’ (*End Violence Against Children*) <<https://www.end-violence.org/safetolearn/call>> accessed 22 July 2022

‘Sandra’s Story: A Journey in Search for Education’ <<https://www.icrc.org/en/access-education-papua-new-guinea>> accessed 22 July 2022

Sassòli M, ‘Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law’ (2010) 1 *Journal of International Humanitarian Legal Studies* 5

Save The Children, ‘What Do Children Want in Times of Emergency and Crisis? They Want an Education’ (2015) <<https://www.savethechildren.org/content/dam/global/reports/education-and-child-protection/what-children-want.pdf>> accessed 22 July 2022

Schabas WA, *The Customary International Law of Human Rights* (Oxford University Press 2021)

Scheinin M, ‘Economic and Social Rights as Legal Rights’ in Asbjorn Eide, Catarina Krause and Allan Rosas (eds), *Economic, social and cultural rights: a textbook* (Martinus Nijhoff Publishers 2001)

Schindler D, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’ (1979) Volume 163 *Recueil des Cours de l’Académie de Droit International de La Haye*

Schoiswohl M, ‘De Facto Regimes and Human Rights Obligations - The Twilight Zone of Public International Law?’ (2003) 6 *Austrian Review of International and European Law Online* 45

Schwarzenberger G, *A Manual of International Law* (Stevens 1947)

Scobbie I, ‘Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict’ (2010) Vol. 14 No. 3 449

Shany Y, ‘Co-Application and Harmonization of IHL and IHRL: Are Rumours about the Death of *Lex Specialis* Premature?’ in Robert Kolb, Gloria Gaggioli and Pavle Kilibarda (eds), *Research handbook on human rights and humanitarian law: further reflections and perspectives* (Edward Elgar Publishing 2020)

Shaw MN, *International Law* (9th ed, Cambridge University Press 2021)

Sheeran S and Rodley NS (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013)

Shultz R, Farah D and Lochard I, 'Armed Groups: A Tier-One Security Priority' (USAF Institute for National Security Studies USAF Academy 2004)

Sivakumaran S, *The Law of Non-International Armed Conflict* (1st ed, Oxford University Press 2012)

Special Court for Sierra Leone, 'Prosecutor v. Sam Hinga Norman - Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No.SCSL-2004-14-AR72(E), Special Court for Sierra Leone, 31 May 2004' (31 May 2004)

Stewart JG, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 *International Review of the Red Cross* 313

Stoffels RA, 'Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps' (2004) Vol. 86 No. 855 515

Tabak S, 'Ambivalent Enforcement: International Humanitarian Law at Human Rights Tribunals' (2016) 37 *Michigan Journal of International Law* 661

'The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in Which Non-State Entities Are Parties (Official English Translation)'

Todeschini V, 'The ICCPR in Armed Conflict: An Appraisal of the Human Rights Committee's Engagement with International Humanitarian Law' (2017) 35 *Nordic Journal of Human Rights* 203

'Ukraine: Helping Children Living along the Contact Line Avoid Dangers of Conflict' (*International Committee of the Red Cross*, 31 May 2019) <<https://www.icrc.org/en/document/ukraine-helping-children-living-along-contact-line-avoid-dangers-conflict>> accessed 22 July 2022

UN Committee on Economic, Social, and Cultural Rights, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel (E/C.12/1/Add.90)'

UN Committee on the Rights of the Child, 'General Comment No. 1 (2001), Article 29 (1), The Aims of Education (CRC/GC/2001/1)'

'UN CTFMR Signs Joint Action Plan with Democratic Karen Benevolent Army to End Use and Recruitment of Children'

UN General Assembly, 'Draft International Covenant on Human Rights and Measures of Implementation: Future Work of the Commission on Human Rights (A/RES/421)'

UN High Commissioner for Refugees (UNHCR), 'Guiding Principles on Internal Displacement (ADM 1.1,PRL 12.1, PR00/98/109)'

UN Human Rights Committee, 'General Comment No. 36, Article 6 (Right to Life), (CCPR/C/GC/35)'

UNICEF, ‘Childhood in the Time of War: Will the Children of Colombia Know Peace at Last?’ (2016)

——, ‘Education Under Threat in West and Central Africa’ <<https://files.eric.ed.gov/fulltext/ED599625.pdf>> accessed 22 July 2022

——, ‘Core Commitments for Children in Humanitarian Action (CCC)’ <[https://www.unicef.org/media/87611/file/Core%20Commitments%20for%20Children%20\(E%20nglish\).pdf](https://www.unicef.org/media/87611/file/Core%20Commitments%20for%20Children%20(E%20nglish).pdf)> accessed 22 July 2022

——, ‘25 Years Of Children And Armed Conflict: Taking Action To Protect Children In War’ <<https://www.unicef.be/sites/default/files/2022-06/EMBARGOED%20UNTIL%2028%20JUNE%202022%20-%2025%20Years%20of%20CAAC%20-%20Web%20English%20Final%20June%202022.pdf>> accessed 22 July 2022

——, ‘Programme Cooperation Agreement’ <https://open.unicef.org/sites/transparency/files/documents/PCA_0930_Colombia_2021.pdf> accessed 22 July 2022

——, ‘The Core Commitments for Children Are the Core UNICEF Policy and Framework for Humanitarian Action’ <<https://www.corecommitments.unicef.org/ccc-1-3>> accessed 22 July 2022

——, ‘UNICEF Myanmar Humanitarian Situation Report No. 4’

‘UNICEF’s Position on Engagement with Armed Non-State Actors (ANSAs)’ (*Humanitarian UNICEF*) <<https://www.corecommitments.unicef.org/ansa>> accessed 22 July 2022

United Nations, ‘Final Act of The International Conference on Human Rights in Teheran (A/CONF.32/41)’

——, ‘Joint Statement by Independent United Nations Human Rights Experts* on Human Rights Responsibilities of Armed Non-State Actors’

United Nations Girls’ Education Initiative (UNGEI), ‘Policy Note: Addressing Threats to Girls’ Education in Contexts Affected by Armed Conflict’ <<https://www.ungei.org/sites/default/files/2020-10/Addressing-threats-to-girls-education-in-contexts-affected-by-armed-conflict-2017-eng.pdf>> accessed 21 July 2022

United Nations Security Council, ‘Report of the Secretary-General on Children and Armed Conflict’ (UNSC 2010) S/2010/579

UNSC, ‘S/RES/1213’

——, ‘S/RES/1216’

——, ‘S/RES/1272’

——, ‘S/RES/1370’

——, ‘S/RES/1509’

——, ‘S/RES/1529’

——, ‘UN Security Council Resolution on the Non-Proliferation of Weapons of Mass Destruction S/RES/1540 (2004)’

——, ‘S/RES/1716’

——, ‘UN Security Council Resolution on the Situation Concerning the Democratic Republic of the Congo. S/RES/1925 (2010)’

——, ‘S/RES/2093’

——, ‘S/RES/ 2248’

——, ‘S/RES/2274’

——, ‘S/RES/2295’

——, ‘S/RES/2299’

——, ‘S/RES/2327’

——, ‘S/RES/2340’

——, ‘S/RES/2349’

——, ‘S/RES/2349’

——, ‘S/RES/2349’

——, ‘S/RES/2449’

——, ‘S/RES/2605’

——, ‘S/RES/2624’

——, ‘S/RES/2641’

Vashakmadze M, ‘EUI Working Paper: The Applicability of International Humanitarian Law to “Transnational” Armed Conflicts’ <https://cadmus.eui.eu/bitstream/handle/1814/12676/MWP_2009_34.pdf?sequence=1> accessed 8 July 2022

Vigny J-D and Thompson C, ‘Fundamental Standards of Humanity: What Future?’ (2002) 20 *Netherlands Quarterly of Human Rights* 185

Waschefort G, ‘The Pseudo Legal Personality of Non-State Armed Groups in International Law’ (2011) Vol. 36, No. 1 226

Weber M and others, *The Vocation Lectures* (Hackett Pub 2004)

‘Where We Work’ (*Geneva Call*) <<https://www.genevacall.org/where-we-work/>> accessed 22 July 2022

Wilkinson A, 'The Shortest War in History' (2014) <<https://www.proquest.com/openview/5a08d5b1cdbfb58fa8baa060c69bcd8/1?cbl=32374&pq-origsite=gscholar&parentSessionId=Ac%2Ffir5Adl0mq1Cto38F0KBanwijMgH5ggVTS%2BIuthNM%3D>> accessed 8 July 2022

Zegveld L, *Accountability of Armed Opposition Groups in International Law* (1st edn, Cambridge University Press 2002) <<https://www.cambridge.org/core/product/identifier/9780511495199/type/book>> accessed 8 July 2022

Zenn J and Fox M-J, 'Negotiating with Boko Haram? Examining the Jihadist Exception' (2020) 10 *African Conflict and Peacebuilding Review* 158

Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion) (2010) 210 ICJ Reports 403 (International Court of Justice)

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) 2005 ICJ Reports 168 (ICJ)

Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Merits) 1986 ICJ Reports 14 (ICJ)

Case Concerning the Frontier Dispute (Burkina Faso / Republic of Mali) (1986) 1986 ICJ Reports 1986 554 (ICJ)

Case of The Santo Domingo Massacre v Colombia (Preliminary objections, merits and reparations) (Inter-American Court of Human Rights)

Corfu Channel Case (Merits) (1949) 1949 ICJ Reports 4 (ICJ)

Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi [2017]

Democratic Republic of the Congo v Burundi, Rwanda and Uganda [2003] African Commission on Human and Peoples' Rights Communication 227/99, 2004 AHRLR 19

Hassan v The United Kingdom [2014] ECtHR 29750/09

La Tablada case (Juan Carlos Abella v Argentina) [1997] Inter American Commission for Human Rights OEA/Ser.L/V/II.95 271

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJ Reports 136 (International Court of Justice)

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (1996) 1996 ICJ Reports 226 (International Court of Justice)

Prosecutor v Boskoski and Tarculovski (Trial Judgment) [2008] ICTY No. IT-04-82-T

Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment) [2001] ICTY IT-96-23-T&IT-96-23/1-T

Prosecutor v Dusko Tadic aka 'Dule' (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [1995] ICTY No. IT-94-1-AR72

Prosecutor v Dusko Tadic aka 'Dule' (Opinion and Judgment) (Trial Chamber) [1997] ICTY IT-94-1-T

Prosecutor v Haradinaj et al (Trial Judgment) [2008]

Prosecutor v Lubanga , Dissenting opinion of Judge Odio-Benito [2012]

Prosecutor v Stanislav Galic (Trial Judgement and Opinion) [2003] ICTY IT-98-29-T

Prosecutor v Tihomir Blaskic [2000] ICTY IT-95-14-T

Prosecutor v Vujadin Popovic (Judgment) [2010] ICTY IT-05-88-T

Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Reports (International Court of Justice)

Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar [2019]

The Prosecutor v Morris Kallon and Brima Buzzy Kamara, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber) (Special Court for Sierra Leone)

The Prosecutor v Clément Kayishema and Obed Ruzindana (Trial Judgement) [1999] ICTR ICTR-95-1-T

The Prosecutor v Fatmir Limaj, Judgment [2005] ICTY IT-03- 66-T

The Prosecutor v Jean-Paul Akayesu (Trial Judgement) [1998] ICTR ICTR-96-4-T

Western Sahara (Advisory Opinion) (1975) 1975 ICJ Reports

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('Kampala Convention') 2009

Declaration of Minimum Humanitarian Standards (Turku Minimum Declaration) 1990

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000

Rome Statute of the International Criminal Court (last amended 2010) 1998