

Re-conceptualizing the International System: The Need for NSA Inclusion in the International Human Rights Regime

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Abstract

The growing role of nonstate actors in an international system that was created to deal mainly with state and not entities has allowed these actors considerable freedom from the accountability of their actions, especially in the realm of human rights. Both International Relations theory and International Law need to deal in an interdisciplinary manner to close this

loophole in order to at least offer an incentive for nonstate actors to avoid further violations of human rights and humanitarian law in the future.

Key words: Nonstate Actors; Human Rights; International System; International Law; Global Governance.

1. INTRODUCTION

1.1. Topic

Today's globalized world of entrenched communications and fast connections has played around with power distributions and capabilities in the international system –the realist vision of states as the sole holders of power is no longer wholly applicable since a myriad of non state actors (violent and non violent) have come to change the way in which the modern world is configured and decisions are taken.

The growing role and influence of nonstate actors in the current international system added to the fact that the system was created to contend with individuals and states and not other entities, has allowed them a considerable amount of liberty of action with human rights violations remaining unaccounted for. Nonstate actors have all the rights but none of the responsibilities being a member of international system affords. The growing number of accusations of human rights violations, ranging from the cultural to the political arena, has signaled the need for creating accountability mechanisms, considered both legitimate and effective under which these actors assume responsibility for their actions.

International law and global governance can both work together in order to create a system that helps make nonstate entities, corporations, transnational terrorists and crime groups accountable for their human rights violations and this paper aims to explore the ways in which this can be made possible. New political realities resulting from this new world have called to our attention the need to create accountability mechanisms for increasingly powerful nonstate actors and human rights violators.

1.2. Background

With the current political backdrop the political role of nonstate actors cannot be questioned any more. The ongoing battles in the Middle East between state factions and groups like ISIL and Hamas, the crash of the Malaysian plane in Ukraine, the Ogoni people's legal battle against Royal Dutch Petroleum and the plight of the communities in isolation in the Yasuní against Chevron all illustrate distinct scenarios where non-state actors have a basic yet decisive political influence.

Globalization, as a pervasive force, is an evermore-important part of our current reality. It has shortened distances in all possible aspects: today's entrenched communication and fast connections have altered the way in which we think about markets, social interaction, the ways in which we do business and even the nature of conflict and politics. Huntington hinted at this when in his *Clash of Civilizations* he pinpoints the role of globalization in creating and reshaping perceptions and misperceptions thereby pointing at a whole new dimension of political interaction and conflict.

In the field of international relations, globalization has also played around with power capabilities, creating new actors and empowering others¹. International relations theory studies a variety of actors focusing on ones and sidelining others depending on the theory you choose to focus on. While realism deems states the only actors in the international system², liberalism believes in the possibility of cooperation presenting a win-win situation for the parties involved, with institutions in the central role of converging interests and negotiation strategies³. This possibility for cooperation leaves ground for other actors, nonstate actors, to participate in the international system with decisive roles and missions. Globalization has served the international regime –that intricate web of norms, rules and decision-making procedures around which actors’ expectations converge—international law and institutions to pave the way towards a conceptual «global governance» where a «a new world order» is deemed possible by some as hinted by Anne Marie Slaughter in her seminal 2004 work *A New World Order*.

In reality, this international regime has fallen short. International law and international institutions have come a long way since Grotius, Vattel and Bretton Woods creating responsibility mechanisms for states when they misbehave and bringing individuals to justice for grave crimes against humankind. However, while the international system has been mostly successful in terms of arbitration and finance (although the recent financial crisis 2008 might disprove the «success» of said system while maintaining the intricate «connectedness» of it), in the realm of human rights protection it lacks real responsibility and deterrents from harmful behavior. Currently, in International Human Rights Law (IHRL) and International Humanitarian Law (IHL) both states and individuals can be made accountable for human rights violations through a variety of mechanisms, but what happens with the other actors in the system, those who fall short of this status? What about nonstate actors like corporations, transnational crime networks, terrorist groups, international security forces and the like?

Due to globalization, power capabilities in the system have shifted, while states remain the main actors in the system, nonstate entities have garnered increasing amounts of power and influence making them decisive cogs in the wheel of current foreign policy decision-making processes⁴. *Mwani v. Bin Laden, Estate of Atban et al.*

1. See ZAKARIA, Farid. 2012: *The Post American World. Release 2.0*. New York, USA: W.W. Norton & Company and KAY, Sean. 2004: «Globalization, Power and Security». *Security Dialogue*, 2004, 35.1: 9-25.

2. See MORGENTHAU, Hans. 1978: *Politics among Nations*. New York, USA: Knopf, and WALTZ, Kenneth. 1979: *Theory of International Politics*. New York, USA: Random House.

3. See KEOHANE, Robert and NYE, Joseph. 2011: *Power and Interdependence*. New York, USA: Pearson.

4. See LA PORTE, Teresa. 2012: «The legitimacy and effectiveness of nonstate actors and the public diplomacy concept». Paper presented at ISA Annual Convention: Public Diplomacy Theory and Conceptual Issues conference. San Diego, April 2012.

v. *Xe/Blackwater et al.*, *Wiwa et a. v. Royal Dutch Petroleum et al.*, are all examples of cases where nonstate entities face grave human rights accusations and no formal forums where they can be made accountable⁵. The fact that the international system was created, inspired by the events at the time to deal with states and then later individuals has created a sort of loophole for nonstate entities to escape accountability for their increasing accusations of human rights violations.

Why human rights? Patricia Williams answers this consideration when declaring

For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity; rights imply a respect that places one in a referential range of self and others, that elevates one's status from human body to social being... It is the magic wand of inclusion and exclusion, of power and no power. The concept of rights, both positive and negative, is the maker of citizenship, our relation to others⁶.

If human rights are universal, inalienable and based on human dignity, and we believe that these rights should be enjoyed by all without curtail, furthermore, if we believe that the violations of these rights on behalf of states are so severe that they should at least receive a diplomatic shun, it follows that these violations when committed by nonstate entities cannot be left in impunity.

The possibility of creating accurate accountability mechanisms for nonstate actors delves into legal as well as theoretical concerns: whom do we deem as nonstate actors? Do non-state actors have legal personality? Can nonstate actors have obligations without legal personality? Who do we make accountable? Can we make them accountable for human rights violations? These are some of the questions that this article strives to answer proposing that while the concept of global governance is attractive, it has yet to be developed in order to thwart the many logistical shortcomings it still possesses and that while the international system remains as is, states can and should be made accountable for the human rights violations of its nonstate actors and those financed by them until international law and international relations as academic fields catch up to each other. The intricate relationship between both fields of study cannot be emphasized enough, in fact, one is born from the other and many of the great legal minds, like Kelsen and Lauterpacht that helped create the framework we apply still today, dabbled in both areas⁷.

This work will go on to examine the issue of lack of responsibility for human rights violations committed by nonstate actors as a whole, contending that nonstate actors

5. See ALSTON, Phillip. 2005: *Non-state Actors and Human Rights*. Oxford, England: Oxford University Press.

6. See WILLIAMS, Patricia. 1991: *The Alchemy of Race and Rights*. Boston, USA: Harvard University Press.

7. See PORTMANN, Roland. 2010: *Legal Personality in International Law*. New York, USA: Cambridge University Press.

do in fact have human rights duties and responsibilities and examining the existing criteria on responsibility mechanisms in order to propose an alternative to the existing impunity, where nonstate actors are held responsible for their own human rights violations. It is important to point out that this analysis, while touching on international law doctrine is not meant to be a legal analysis per se, it will be done from the standpoint of international relations and it is meant to be understood as a contribution in international politics. Both international relations and international law cannot be divorced from each other since both start as studies to put forth order in and among states. Furthermore, all advances in legal doctrine henceforth mentioned clearly sprout from an international political context, without these specific political events said advances may have never happened.

1.3. Methodology

This study is based on qualitative methods of social research with the main body of analysis designed as interpretative work. The focus on qualitative methods over quantitative methods is derived from Corbin and Strauss⁸ as they declare there is a specific advantage from building theory instead of testing theory since the result will probably resemble reality more than a hypothesis that needs to be later tested. As Paul Thomas contends in his review on political science methodology

... social science methodology (1) requires systematic and continuous concept formation and refinement (2) employs empirical evidence not only to confirm but also to develop and explore theories, and (3) must come to terms with causal complexity. Taken together, they provide support for a provocative possibility: if social science has a unified logic, it is found in approaches traditionally associated with qualitative methods rather than statistical inference⁹.

Based on the above, this observational and exploratory study aims to use qualitative methodology based on groundwork theory in order to examine existing literature on nonstate actors from both the international relations perspective and the international law perspective in order to arrive at a interdisciplinary approach that will devise a possible framework of action for responsibility of nonstate actors active in the international system from an international relations theory perspective.

8. See CORBIN, Julie and STRAUSS, Anselm. 1998: *The Basics of Qualitative Research*. Washington. D. C., USA: Sage Publications Inc.

9. See THOMAS, Paul. 2005: «The Qualitative Foundations of Political Science Methodology I». *Perspective on Politics*, 2005, 3.4: 855-866.

During the research process for this paper some issues were encountered. While there is literature available on the subject from both fields, literature stemming from the field of international relations sprouts from classic works and hence can appear dated although the main academic theories still stand true. Regarding international law, the available literature seems to follow certain academic trends: works on this topic seem to be published intermittently and do not follow a consensus on who NSAs are and how they should be legally included in the system creating a «winding path» of doctrine that had to be followed.

2. DOCTRINAL AND PRACTICAL DEVELOPMENT: THEORY AND CONCEPTS

2.1. *Defining Contending Actors in the International System*

2.1.1. *Through the Looking Glass, from an International Relations Standpoint*

International relations has centered on states as the main actors in the international system for the past decades. This is a result, in part, of the predominant realist tradition of international politics where states are considered the only valid actors in an international system torn apart by considerations of power and security¹⁰. International relations, however, are not static and in the past decades, new actors have emerged on to the world stage altering the dynamics of conflict and cooperation that have been the hallmark of international relations theory.

This investigation is meant as an interdisciplinary «dive» of sorts that will allow the reader to engage with the appearance of nonstate actors and the growing doubt and frustration their lack of accountability in the area of human rights signifies for both victims and professionals across the international sphere. States, on the other hand, have an intricate international regime they must answer to a system of rules, principles, norms, decision-making procedures to which they owe accountability and reputation considerations that are taken into account whenever accountability for human rights violations is a concern. International courts have been created in order to ensure that states do not escape their international responsibility and there is a whole interdisciplinary realm of international relations theory and international law devoted to this effort.

When it comes to rising international actors, the international regime has yet to adjust, rights and obligations are yet to be fully understood. In this regard it becomes

10. See WALT, Stephen. 1999: «One World, Many Theories». *Foreign Policy*, 1999, 110: 29-34 + 34-46.

imperative that we comprehend thoroughly where our current state-centered international system comes from in order to recognize where and how new actors emerge and the manner in which they have as a key factor in making international responsibility a reality.

The modern concept of statehood is said to be an invention of the 17th century, mainly one of 1648 when a series of distinct treaties were signed in the German cities of Munster and Osnabruck. We have come to know this event as the Peace of Westphalia¹¹, «peace» by virtue of bringing an end to the Thirty Years War in Europe. This treaty has been afforded the distinction, perhaps inadequately as Krasner¹² contends, of setting the basic conditions for sovereign recognition among states. In this respect, Westphalia has long been a term of reference within the international relations community and is often used to invoke the creation of the modern notion of sovereign states by reformulating state relations through the recognition of their sovereign status. As Stephen Krasner¹³ defines it, Westphalian sovereignty refers to the «political organization based on the exclusion of external actors from authority structures within a given territory» as such; this concept has served as the foundation for the modern international system of state relations and a starting point for the discussion about actors in international relations. This simple Westphalian notion recognizing statehood presupposes states as the dominant actors in international relations, a trend –and realist principle– that continued well into the twentieth century.

A concise survey across international relations theory will reveal that «who the valid actors in international relations are» is a contentious topic, and a much disputed one at large. Classical realist tenets define states as the only valid actors in international relations¹⁴ by defining power as the *raison d'être* for all politics and states as the only entities capable of exercising power at the international level. This last declaration, nonetheless, is problematic as events in the last decade have shown that states are, in fact, not the only entities capable of exercising power, nor of making and/or taking political decisions.

In this vein, the liberal tradition of international politics, with Nye and Keohane mainly in charge, introduces complex interdependence to explain the growing role of nonstate actors in international relations¹⁵. Moreover, by introducing the distinctions

11. See STRAUMANN, Benjamin. 2008: «The Peace of Westphalia as a Secular Constitution». *Constellations*, 2008, 15.2: 174-188.

12. See KRASNER, Stephen. 1999: *Sovereignty: Organized Hypocrisy*. New Jersey, USA: Princeton University Press.

13. See KRASNER, Stephen. 1999: *Sovereignty: Organized Hypocrisy*. New Jersey, USA: Princeton University Press.

14. See MORGENTHAU, Hans. 1978: *Politics among Nations*. New York, USA: Knopf.

15. See KEOHANE, Robert and NYE, Joseph. 2011: *Power and Interdependence*. New York, USA: Pearson.

between hard and soft power, Nye¹⁶ alone recognizes the critical role of entities other than states in international politics and the effect that other elements may have outside of the systemic reading of power relations that neorealism later reasserts¹⁷.

Complex interdependence introduces us to the pervasive effects of globalization on the international system¹⁸. Globalization, the growth and explosion of economic interdependence¹⁹ and the revolution in communication have created networks through which finance, politics, culture, etc. find themselves in constant ebullient argument. By not taking this evolution with all its complexities into account, realism falls short in its analysis of actors and their interaction. By recognizing that globalization has created a network of relations –connections– that cannot be forgone nor ignored when analyzing how decisions are made and how they affect all international dimensions, complex interdependence gives credit to rising nonstate actors and their increasing relevance in international relations. Hence, the analysis used will take neoliberal institutionalism vis-à-vis realism as its cornerstone to delve into the topic of nonstate actors in world politics and their role regarding accountability.

Nonetheless, while recognition of nonstate actors poses an improvement in our understanding of how international relations work, it is not merely enough. We need to understand or at least define whom these nonstate actors are, why is their importance significantly increasing.

In essence, what are nonstate actors? Is this a select group? How do we define these actors without falling into conceptual fallacies or labyrinths? According to a report by the National Intelligence Council²⁰, nonstate actors are non-sovereign entities that exercise significant economic, political, or social power and influence at a national, and in some cases international, level. In dealing with the difficulties of defining the spectrum for international actors in world politics as a starting point for the abovementioned

16. See NYE, Joseph. 2008: *Understanding International Conflicts*. New York, USA: Longman.

17. See WALTZ, Kenneth. 1979: *Theory of International Politics*. New York, USA: Random House.

18. See KEOHANE, Robert and NYE, Joseph. 2011: *Power and Interdependence*. New York, USA: Pearson.

19. Interestingly the levels of globalization focused solely on trade peaked the year before World War One and these levels were not surpassed again until 1970. Today the levels of globalization are far beyond that for more detail, see GRIECO, Joseph and IKENBERRY, John. 2002: *State Power and International Markets. The International Political Economy*. New York, USA: WW Norton & Company.

20. See NATIONAL INTELLIGENCE COUNCIL. 2007: «Nonstate actors impact on international relations and implications for the United States». Paper DR-2007-16D prepared under auspices of National Intelligence Officer of Economics and Global Issues. Federation of American Scientists, USA.

definition, Hocking and Smith²¹ widened the scope of recognition of international actors by defining them through the following criteria: autonomy, representation and influence. This widened scope and specific criteria is broad enough in order to apply to nonstate actors as described earlier. Using these same criteria, nonstate actors may encompass a varied group of members of which there exists no global consensus²². Nonstate actors are not new however and their presence throughout history is well documented, as Patrick Finney²³ so eloquently recognizes «the history of NSAs and NGOs is a history of international society».

Nonstate actors have been around since the Roman Empire in the form of merchant organizations, banking enterprises and marauding pirates, nevertheless their influence was reduced. As the world continued to merge through the effects of globalization, loose associations such as these changed in nature in order to respond to the changing nature of international relations²⁴.

The mercantilist nature of the 19th century saw globalization rise as a powerful catalyzer for international relations –trade, migration and capital all show movement across spheres²⁵. Intergovernmental cooperation during this period of entrenched alliances encouraged the formation of non-governmental organizations (NGOs) in order to bolster coordination in areas like labor relations, navigation, trade, health services, among others²⁶. The Red Cross is an excellent example of the rising NGOs and NSAs of the period since the nonstate character of this institution made it possible for doctors and nurses to cross through battlefields without the having to choose sides in combat politics.

World War I saw the mobilization of national armies across Europe. The unprecedented level of violence and despair brought about by the Great War served as the starting point for the League of Nations, Woodrow Wilson's pet project and the foundation of what after World War II would become the United Nations, one of the most, if not the most well-known NSA and most prominent body of inter-governmental cooperation

21. See HOCKING, Brian and SMITH, Michael. 1990: *World Politics*. New York, USA: Harvester and Wheatsheaf.

22. See GEERAERTS, Gilles. 1995: «Analyzing Non-state Actors in World Politics» Vrije Universiteit Brussels POLE Paper Series vol. 4, n.º 1 retrieved from <http://poli.vub.ac.be/publi/pole-papers/pole0104.htm>.

23. See FINNEY, Patrick. 2005: *Remembering the Road to World War Two: International History, International Identity, Collective Memory*. London, England: Routledge.

24. See FINNEY, Patrick. 2005: *Remembering the Road to World War Two: International History, International Identity, Collective Memory*. London, England: Routledge.

25. See GRIECO, Joseph and IKENBERRY, John. 2002: *State Power and International Markets. The International Political Economy*. New York, USA: WW Norton & Company.

26. See KENNEDY, Paul; MESSNER, Dirk and NEUSCHELER, Franz. 2001: *Global Trends and Global Governance*. London, England: Pluto Press.

in human history²⁷. Along with the United Nations (UN), the number of international institutions also grew during this period with the creation of what we have come to know as the Bretton Woods institutions. Since then, NSAs have none but proliferated. Growing interest in human rights and empowerment of civil society reflected in the increase of international institutions, the main type of NSAs²⁸. Today, there is virtually no area of international cooperation left untouched by international organizations²⁹.

As mentioned earlier, there is no real unified classification of nonstate actors³⁰, however, there is some consensus on dividing nonstate actors mainly into nongovernmental organizations (NGOs) and intergovernmental organizations (IGOs) and placing all the «uncertain» actors within the best fitting category³¹. Then, to truly define NSAs we must delve into an analysis of what classifies as an NGO and how IGOs are defined.

As Fortna and Martin³² declare in their piece in Milner and Moracsvik's compilation *Power, Interdependence and Nonstate Actors in World Politics*

International institutions are not the only nonstate actor of importance to neoliberal institutionalism. NGOs and private sector actors may also play key roles in world politics, especially in certain issue areas³³.

Nongovernmental organizations are largely private, voluntary organizations with individuals or associations as members, coming together for a single purpose³⁴. Under

27. See FINNEY, Patrick. 2005: *Remembering the Road to World War Two: International History, International Identity, Collective Memory*. London, England: Routledge.

28. See SURI, Jeremy. 2003: «Nongovernmental Organizations and Non-state Actors». In P. Finney (2005): *Palgrave Advances in International History*. London, England: Palgrave McMillan, 223-245.

29. See STONE, Randall. 2009: «Institutions Power and Interdependence». In H. Milner and A. Moracsvik: *Power, interdependence and nonstate actors*. Princeton, USA: Princeton University Press, Chapter 2.

30. See MILNER, Helen and MORACSVIK, Andrew. 2009: *Power, interdependence and nonstate actors*. Princeton: USA Princeton University Press and KEOHANE, Robert and NYE, Joseph. 1971: «Transnational Relations and World Politics. An Introduction». *International Organization*, 1971, vol. 25, n.º 3 Summer, 1971: 329-249. MIT Press, GEERAERTS 1995.

31. See GEERAERTS, Gilles. 1995: «Analyzing Non-state Actors in World Politics» Vrije Universiteit Brussels POLE Paper Series vol. 4, n.º 1 retrieved from <http://poli.vub.ac.be/publi/pole-papers/pole0104.htm> and BROWN, Seyom. 1995: *New Forces, Old Forces and the Future of World Politics*. New York, USA: Harper Collins College Publisher and MILLER, Lynn. 1994: *Global Order, Values, Power and International Politics*. Boulder, USA: Westview Press.

32. See FORTNA, Virginia and MARTIN, Lisa. 2009: «Peacekeepers as Signals: The Demand for International Peacekeeping in Wars». In Helen Milner and Andrew Moracsvik: *Power, interdependence and nonstate actors*. Princeton, USA: Princeton University Press.

33. See MILNER, Helen and MORACSVIK, Andrew. 2009: *Power, Interdependence and Nonstate Actors*. Princeton, USA: Princeton University Press.

34. See MINGST, Karen and ARREGUIN-TOFT, Ivan. 2010: *Essentials of International Relations*. New York, USA: WW Norton & Company.

this definition of NGOs we can group most organizations from Amnesty International to violent NSAs (VNSAs) like terrorist organizations and transnational crime rings since all are voluntary organizations formed by individuals or associations coming together for a single purpose. Under international relations theory, the growing political role of organizations like these is not disputed.

Violent nonstate actors, nonstate organizations that use collective violence, have proliferated in today's international system as they are formed in response to the environments in which they exist: a globalized world with entrenched communications where as societies come closer together, differences are highlighted as an unintentional byproduct and necessities and perceived necessities remain unfulfilled³⁵.

In reference to violent NSAs, a small mention must be given to Islamic State in Iraq and Levant, ISIL, since their contention is that they are, in fact, a state and not an NSA. This assertion and the ways in which the world –mainly Syria, Russia, the United States and France, deal with it in the future hinge not only on their acceptance of it being a legitimate actor on the international stage but also of their recognition of what type of actor ISIL is. As per UN Security Council Resolutions 2170, 2178, and 2199, there is broad consensus that while ISIL is in fact recognized as a violent NSA, the legitimacy of actions carried out against it within Syrian territory is subject to debate.

Intergovernmental organizations, on the other hand, are what we describe as international institutions –structures created through agreements like the United Nations and World Treaty Organization– working within the framework of the international regime³⁶. It should be noted that IGOs tend to represent a collective will or desire that may be legally distinct from that of its individual members³⁷.

Nonetheless, recent literature has revised this classification in order to include other, newer elements. Until recently, IGOs were the predominant NSAs in the international system, but as established earlier, the development of NSAs hinges on the changing dynamics within the international system, and today IGOs no longer stand alone in the limelight. Multinational corporations (MNCs) also must be taken into consideration since these entities have expanded their range of profit-oriented action to cover a wide

35. See CASEBEER, William; KISER, Stephen and THOMAS, Troy. 2005: *Wartlords Rising, Confronting Violent Nonstate Actors*. Maryland, USA: Lexington Books. HUNTINGTON, Samuel. 1993: «Clash of Civilizations». *Foreign Affairs*, 72.3: 22-49.

36. See KEOHANE Robert and NYE Joseph. 1973: «Power and Interdependence». *Survival*, 1973, vol. 15, n.º 4: 158-165 (July, 1973), and KEOHANE, Robert and NYE, Joseph. 1971: «Transnational Relations and World Politics. An Introduction». *International Organization*, 1971, vol. 25, n.º 3 Summer: 329-249. MIT Press, and JACOBSON, Harold. 1984: *Networks of Interdependence: International Organizations and the Global Political System*. New York: USA Knopf.

37. See DIEZ DE VELASCO, Manuel. 2015: *Instituciones del Derecho Internacional Público*. Madrid, Spain: Tecnos.

arrange of undertakings, national and international, and without much regard for the consideration of state actors³⁸.

For the purposes of this study all references to «nonstate actors» will make allusion to all of the entities mentioned within that classification as a group. Specific reference to NSAs within that classification will be made only when strictly necessary to advance criteria or analysis of scenarios within the alternate academic discipline this study hinges on.

2.2. *Defining Nonstate Actors in International Law*

Important as it was to justify the consideration of non state actors as veritable actors within the international system within the theoretical framework of international relations, it is equally important to proceed towards that same justification in the realm of international law in order to emphasize the relevance of our aforementioned topic of discussion.

Just as international relations, international law has also had to adapt to the myriad of changes being brought on by the post-cold war world order. Globalization, privatization, free market, the changing nature of conflict and security provision have created more actors and more power brokers for a system that is still trying to catch up with them. When it comes to NSAs in international law there is a difference between the *de jure* and *de facto* conceptions of the NSA as a legitimate legal actor (NIJMAN, 2010). While NSAs may not be legally recognized as «potential criminal violators» and little responsibility is accorded to them in the human rights system, they are in fact major rule breakers. Why the disparity?

As Philip ALSTON³⁹ has long recognized, defining an actor in terms of what it is not was an intentional decision in order to «reinforce the assumption that the state is not the only central actor, but also the indispensable and pivotal one around which all the other entities revolve». This lack of specificity within international law may have its purpose (some contend the recognition of further actors makes it possible for these actors to create law, making it difficult to keep tabs on legal doctrine), while simultaneously excluding these same actors from specific legal regimes, as the case for human rights. Why and how NSAs should be included within a human rights regime will be addressed later on after we consider who these non state actors present in the international realm are –no easy task when various working legal definitions of NSAs abound.

38. See WEISS, Thomas. 2013: «The Rise of Nonstate Actors in Global Governance: Opportunities and Limitations». Discussion paper for One Earth Future Discussions available at <http://acuns.org/wp-content/uploads/2013/11/gg-weiss.pdf>.

39. See ALSTON, Phillip. 2005: *Non-state Actors and Human Rights*. Oxford, England: Oxford University Press.

The descriptions advanced by Josselin and Wallace as well as Bas Arts present comprehensive definitions with an interdisciplinary approach that will be useful to this current analysis since other definitions available are built on a context specific basis or are too wide to provide workable definitions for studies of this type.

Bas ARTS⁴⁰ determines NSAs are

... all those actors that are not (representatives of) states, yet that operate at the international level and are potentially relevant to international relations.

The International Campaign to Ban Landmines and the EU for example both define NSAs depending on the issue area they are tackling, referring to them either as «armed opposition groups» or «organizations created freely by citizens» but as we know as per the above, NSAs can include so much more.

Arts' definition is compatible with the definition of NSAs offered in the international relations section of this study. Josselin and Wallace⁴¹, on the other hand, define NSAs as including all organizations

- Largely or entirely autonomous from central government funding and control: emanating from civil society, or from the market economy, or from political impulses beyond state control and direction;
- Operating as or participating in networks which extend across the boundaries of two or more states – thus engaging in «transnational» relations, inking political systems, economies, societies;
- Acting in ways that affect political outcomes, either within one or more states or within international institutions – either purposefully or semi-purposefully, either as their primary objective or as one aspect of their activities.

Both definitions incorporate most actors that are not states and have a pervasive cross-border presence and while politics is not their main focus, they may end up wielding political power nonetheless. In this respect, organizations such as corporations and global institutions become part of the rather encompassing club of NSAs.

In the past thirty years, corporations have come up with various ways to sidestep regulation and work around it, liberation movements have grown in strength and legitimacy, civil society has created new tools of empowerment, terrorists and armed opposition groups are proliferating and implementing new ways to spread their objectives, even international organizations are being distinguished for their transgressions and negative impact as much as for the benefits they create.

40. See ARTS, Bass. 2005: *Nonstate Actors in Global Governance: Three Faces of Power*. Bonn, Germany: Max Plank Project Group on Common Goods.

41. See JOSSELIN, Daphne and WALLACE, William. 2001: *Nonstate Actors in World Politics*. New York, USA: Palgrave.

For the purposes of responsibility, a working definition of NSA must contain all major actors responsible for human rights violations. By leaving these actors unrecognized and unnamed we are by default perpetuating a cycle where violators are not held responsible for their crimes and victims are left excluded from a system that insists on their protection therefore as Robert McCorquodale⁴² so aptly put it, «legalizing silence».

There has been much debate surrounding the issue of what entities to «legally» include within the NSA definition since the main purpose is to create accountability mechanisms and the more and more varied the actors included, the harder and less uniform those mechanisms will be.

To further illustrate this point let us look at the following examples. Corporations and multinational companies are incorporated on the basis of accusations of human rights violations that go unpunished, one might surmise through the use of economic power as leverage as has been suggested previously by the Foundation for International Environmental Law and Development (FIELD) based on the OECD Guidelines» choice of words. These allegations cover a vast array of possibilities from corporations being lax on the application of international labor regulations, disregarding basic human rights issues to assistance and complicity in egregious human rights violations spanning from rape to torture⁴³. On the other hand, in the case of terrorists and other armed opposition groups, the accusations diverge between those occurring during armed conflict and those occurring in times of peace; fundamental information that will determine legal regimes and possible forums as well as accountability mechanisms. It must be noted that these «other armed opposition groups» can range from rebels and belligerents to liberation movements and insurrections and that the human rights violations committed by these groups may cover all sorts of heinous crimes from torture and rape to crimes against humanity and war crimes. When it comes to nongovernmental organizations (NGOs) and international organizations (IOS) the range and specter of violations is a lot less clear, since as one might imagine organizations such as these are also responsible for the calls for increased accountability in the area of human rights. International financial institutions bear the brunt of accusations in this group⁴⁴, often unpopular for their role in guiding financial and market development in less developed and developing countries⁴⁵. Private security provision enterprises, such as the ones made popular

42. See McQUORCODALE, Robert. 2009: «Nonstate Actors and International Human rights Law». In Sarah Joseph and Adam McBeth (2010): *Human Rights Law*. Research Handbooks in International Law Series Cheltenham. England: Edward Edgar Publications.

43. See HUMAN RIGHTS WATCH. 2013: «World Report 2013» available at <http://www.hrw.org/world-report/2013/essays/112459>.

44. See CLAPHAM, Andrew. 2006: *Human Rights Obligations for Nonstate Actors*. Oxford, England: Oxford University Press.

45. See STIGLITZ, Joseph. 2002: *Globalization and Its Discontents*. New York, USA: WW Norton & Company.

in Iraq after the war in 2003, also become well-known entities for their alleged torture mechanisms⁴⁶.

How is it possible for these violations to occur in impunity? How is it possible for us to know about these violations and yet have these actors face no charges for their crimes in the international system? Well, the simple answer is that NSAs cannot apparently breach international human rights law⁴⁷. It is important to bear in mind that no advances within the realm of international relations regarding the topic of NSAs mean anything if not coupled by advances within the realm of international law for of what use is it to recognize actors with rights but no duties accorded to them? This relationship makes one wonder about the social contract at a transnational level; with no supra-Leviathan is it really possible to have rights and duties at a global level? Does the increasingly popular yet unreal system of global governance provide a sketch of such a reality?

The International Law Association's Hague Conference of 2010, on the other hand, uses a working definition of NSAs that excludes all those that are «not legally recognized nor organized entities» thereby excluding organizations like Al Qaida and the mafia for their lack of organization and legitimacy respectively⁴⁸.

The international human rights regime as it stands today was conceived in the years following World War II for a world order that is no longer, where international accountability was in its earlier stages and states were the sole actors because they were the sole subjects of international law capable of exercising rights and duties under such system⁴⁹. The mention of subjects and capacity leads us to the topic of international legal personality, a much debated area when referring to NSAs since many authors, Clapham, Alston, McCorquodale, and Gaja among them, have long debated whether it is even necessary to bestow NSAs with international legal personality to allow for the jump from objects to subjects of international law or if it would better serve the purposes to just skip the debate and look for other ways in which to solve this dilemma and integrate these actors into the system.

Relevant to the above, actors in international law are defined according to notions of personhood, more specifically, legal personality⁵⁰. Legal personality in and of itself

46. See ALSTON, Phillip. 2005: *Non-state Actors and Human Rights*. Oxford, England: Oxford University Press.

47. See McQUORCODALE, Robert. 2009: «Nonstate Actors and International Human rights Law». In Sarah Joseph and Adam McBeth (2010): *Human Rights Law*. Research Handbooks in International Law Series. Cheltenham, England: Edward Edgar Publications.

48. See INTERNATIONAL LAW ASSOCIATION. 2010: Hague Conferences, ILA Non State Actor Committee, First Report, 6.

49. See CLAPHAM, Andrew. 2006: *Human Rights Obligations for Nonstate Actors*. Oxford, England: Oxford University Press.

50. See RYNGAERT, Cedric. 2009: «Imposing International Duties on Non-state Actors and the Legitimacy of International Law». Working paper presented at FWO: Research Community on Non-State actors on International Law. Leuven.

is not an easy concept to define since various distinct views on what it stands for are available in the international system simultaneously⁵¹. Furthermore, because legal personality is employed to distinguish between those social entities that are relevant to the international legal system and those excluded from it, the definition of how actors gain legal personality is imperative and for the purposes of this work, why the definition of NSAs is of critical importance. Consequently, we will carefully delve into the contentious relation between international legal personality and NSAs. How do we typify NSAs within international law, for the purpose of accountability is it more efficient to recognize these actors as legal persons or to find an alternate method?

According to Andrew Clapham⁵² most doctrine defines actors of international law as the state and those groups that have state-like qualities and those recognized by states. This definition however is open to wide debate based on both practice and doctrine:

While States have remained the predominant actors in international law, the position has changed in the last century, and international organizations, individuals and companies have also acquired some degree of international legal personality; but when one tries to define the precise extent of the legal personality which they have acquired, one enters a very controversial area of international law. The problem of including new actors in the international legal system is reflected in the very concept of legal personality, the central issues of which have been primarily related to the capacity to bring claims arising from the violation of international law, to conclude valid international agreements, and to enjoy privileges and immunities from national jurisdictions⁵³.

Roland PORTMANN⁵⁴ takes on this topic by surveying distinct appreciations on international legal personality since the 19th century and contrary to Clapham's above-mentioned description recognizes five distinct conceptions of legal personality present in international legal argument today.

A brief description of these five conceptions will be presented in order to provide context. The «states only conception» and the «recognition conception» are positivist at their core. In the former, states are the only actors within the system and therefore with international personality and in the latter, the only valid actors are those - recognized by

51. See PORTMANN, Roland. 2013: *Legal Personality in International Law*. New York, USA: Cambridge University Press.

52. See CLAPHAM, Andrew. 2006: *Human Rights Obligations for Nonstate Actors*. Oxford, England: Oxford University Press.

53. See MALANCZUK, Peter. 2012: *Akehurst's Modern Introduction to International Law*. New York, USA: Routledge.

54. See PORTLAND, Roland. 2013: *Legal Personality in International Law*. New York, USA: Cambridge University Press.

states as such and hence accorded international personality⁵⁵. This is the dominant conception in international law still today. Both this and the previous conception follow the realist tenet of international relations whereby states are the capital actors within the international system. Interestingly so, one is the evolution of the other since an adjustment to social reality was needed in the years following WWI. This clearly shows that an evolution in the conception of legal personality is clearly both possible and necessary.

It is important to point out however that legal personality for nonstate actors based on recognition by states hinges on consensus and cannot function unilaterally and thus has to be applied restrictively. This proposition is based mainly on the International Court of Justice's (ICJ) Reparations for Injuries Opinion of 1949 where the Court famously declares that

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, throughout its history the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States⁵⁶.

and

... The Courts opinion is that fifty States representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to bring international claims⁵⁷.

Reparations for Injuries is decisive in that it not only serves as argument for the notion of recognition by states being the precursor to international legal personality, it also exemplifies that non-state entities in this case international institutions, specifically the United Nations, can be recognized as international actors with international legal personality as well as seek claims against a state not member of that same institution⁵⁸.

With the advent of World War II and the revelation of wide spread systematic human rights violations, the conception of individuals as actors with international legal

55. See PORTMANN, Roland. 2013: *Legal Personality in International Law*. New York, USA: Cambridge University Press.

56. See ICJ 1949 Opinion of II IV 49 Reparations from Injuries Suffered 178.

57. See ICJ 1949 Opinion of II IV 49 Reparations from Injuries Suffered 185.

58. See CLAPHAM, Andrew. 2006: *Human Rights Obligations for Nonstate Actors*. Oxford, England: Oxford University Press.

personality was advanced⁵⁹. The proposition of said framework is based on Hersch Lauterpach's interpretation⁶⁰ of the individual as the fundamental international person with rights and duties accorded to it regardless of if it is acting on behalf of a state or privately. Under this conception the individual is a legal person a priori due to its precedence over the state –the state being nothing more than a conglomerate of individuals who govern it and international law the expression of fundamental principles surpassing state will.

Building on Kelsen's constitutional foundations and his reading of the entrenched relationship between law and state⁶¹ identifies the «formal conception» of international legal personality where the international system is considered open and no a priori legal persons exist, making legal personality a concept that can only be acquired a posteriori once a norm addresses the actor in question specifically. Crucially, legal personality is not directly related to the capacity to create law in the international system. This last point is especially important since it has been contended that the recognition of further international actors with legal personality –other than states– in international law would derive in disarray making it impossible to keep record of laws created. Some as Ryngaert⁶² suggest that nonstate actors should be included within this system as full actors by giving them a voice in the legal framework that is being created to include them. This, he argues, would make the law directed at NSAs part of a more legitimate framework for the debate stands on how norms, duties and responsibilities can be directed at actors that have not, at any point, been included in the law-making process or agreed to become part of the system at all, no consent to be bound has been expressed. In fact, their status hinges on them not wanting to be bound to the system. The wider debate about the validity of this argument is out of the scope of this study yet it must not go without mention that organizations like Geneva Call have tried this approach with some success in limiting the use of anti-personnel mines through the signature of Deeds of Commitment between the organization and NSAs⁶³. The two existing branches of legal thought on legitimacy of the law diverge on if law is legitimate

59. See PORTMANN, Roland. 2013: *Legal Personality in International Law*. New York, USA: Cambridge University Press.

60. See LAUTERPACHT, Elihu. 1957: *The life of Hersch Lauterpacht*. Cambridge, England: Cambridge University Press.

61. See LEY, Isabelle. 2009: Which role for theory in international law? Report on the workshop: Kelsen-Schmitt-Arendt: Constitutionalism in International Law. Leipzig, and PORTMANN Roland, 2013: *Legal Personality in International Law*. New York, USA: Cambridge University Press.

62. See RYNGAERT, Cedric. 2009: «Imposing International Duties on Non-state Actors and the Legitimacy of International Law». Working paper presented at FWO: Research Community on Non-State actors on International Law. Leuven.

63. See GENEVA, Call. 2014: available from <http://genevacall.org/how-we-work/deed-of-commitment/> and ALSTON, Phillip. 2005: *Non-state Actors and Human Rights*. Oxford, England: Oxford University Press.

because its process of creation was just or if law is legitimate based on it being just in and of itself⁶⁴. This study is inclined towards the latter.

Lastly, Portmann explores Rosalyn Higgins' work regarding legal personality and international actors. Renowned scholar and former president of the ICJ, Higgins declared

We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint... the whole notion of subjects and objects has no credible reality, and in my view, no functional purpose⁶⁵.

While scholars as GAJA⁶⁶ stand by the state-only and recognition conceptions, it is clear that other scholars and experts are prepared to admit an evolution towards other conceptions. In fact, PORTMANN⁶⁷ proposes and BROWNLIE⁶⁸ seem to agree on the possibility of the coupling of the formal and legal conceptions to address the international personality of non-state actors.

On the other hand, Rosalyn HIGGINS' declaration about international legal personality being nothing more than a legal fiction renders further credibility to the prospect of the formal and legal conceptions existing as a possible combination resulting in international legal personality for non-state actors and therefore responsibility for their violations. Evidently, we must reconsider how we view non-state actors under international law and CLAPHAM⁶⁹ supports this vision, in agreement with HIGGINS, in declaring that subjectivity must not be used when dealing with NSAs since to do so would result in an equivocal analogy between international law and municipal law where an entity that authoritatively decides on legal personality existent in the latter is assumed in the former.

As PORTMANN's study establishes, and HIGGINS⁷⁰ and KLABBERS⁷¹ emphasize, the current conceptions on legal personality are based on doctrine and can therefore

64. See RYNGAERT, Cedric. 2009: «Imposing International Duties on Non-state Actors and the Legitimacy of International Law». Working paper presented at FWO: Research Community on Non-State actors on International Law. Leuven.

65. See HIGGINS, Rosalyn. 1994: *Problems and Process: International Law and How We Use It*. Oxford, England: Clarendon Press; Oxford University Press.

66. See GAJA, Giorgio. 2003: Reports of the Special Rapporteur of the ILC on the Responsibility of International Organizations Docs A/CN.4/532.

67. See PORTMANN, Roland. 2013: *Legal Personality in International Law*. New York, USA: Cambridge University Press.

68. See BROWNLIE, Ian. 2003: *Principles of Public International Law*. Oxford, England: Oxford University Press.

69. See CLAPHAM, Andrew. 2014: «Rethinking the Role of Nonstate Actors in International Law» in United Nations Visual Library of International Law available at http://legal.un.org/avl/ls/Clapham_IL_video_1.html.

70. See HIGGINS, Rosalyn. 1994: *Problems and Process: International Law and How We Use It*. Oxford, England: Clarendon Press; Oxford University Press.

71. See KLABBERS, Jan. 2002: *An Introduction to International Institutional Law*. Cambridge, England: Cambridge University Press.

be unmade and clarified by doctrine as well, as further publications and cases on this topic are published and reviewed. As CLAPHAM⁷² and ALSTON⁷³ consider, the international system needs to change the way it thinks about NSAs emphasizing the need to proactively rethink how we see NSAs in international law and align this to how we perceive them in international relations.

3. RE-CONCEPTUALIZING THE INTERNATIONAL SYSTEM AND NSA RESPONSIBILITY

Judicial decisions and legal renderings⁷⁴ illustrate the prevalence of the states-only and recognition approaches in the international system, and when it comes to international relations we still live in a state-centric international regime. Realist tenets still ring true today and they remain extremely effective analytical tools when evaluating international conflict scenarios, as states still hold the main, legitimate monopoly of force in the international system. Notwithstanding the idealist inclusion of the existence of an international regime, Hobbesian elements of behavior remain. The international regime is henceforth not an adequate representation of the leviathan HOBBS introduced to solve anarchy within the system⁷⁵. Even if we take into account the appearance and rising power of NSAs⁷⁶, the realist premise of power and security as a zero-sum game adequately serves to predict future state behavior vis-à-vis these actors.

Moreover, the hypothetical potential threat that the recognition of NSAs alleged by states based on equating recognition to legitimacy and this, in turn, to the provision of state-like qualities⁷⁷ further exemplifies the centrality of states in the system: states are still considered to be the conceptual go-to in the system.

72. See CLAPHAM, Andrew. 2006: *Human Rights Obligations for Nonstate Actors*. Oxford, England: Oxford University Press and CLAPHAM, Andrew. 2014: «Rethinking the Role of Nonstate Actors in International Law» in United Nations Visual Library of International Law available at http://legal.un.org/avl/ls/Clapham_IL_video_1.html.

73. See ALSTON, Phillip. 2005: *Non-state Actors and Human Rights*. Oxford, England: Oxford University Press.

74. The *Mavrommatis Concessions (Greece v. UK, para. 12 1924)* decision in asserting diplomatic protection as the invocation of the state's own rights and not those of the state on behalf of the individual; the *Genocide Case (Bosnia Herzegovina v. Serbia and Montenegro, para. 392 2007)*; in the assertion of the State asserting its own rights when exercising diplomatic protection in *Barcelona Traction (Belgium v. Spain para.78, 1970)*; the *Lotus Case* in recognizing states as the sole subjects and therefore sources of international law; as well as the decision to pursue human rights violations by non-state actors via the Alien Torts Statute in American courts.

75. See MORGENTHAU, Hans. 1978: *Politics among Nations*. New York, USA: Knopf.

76. Which realist theory does not.

77. See ROBERTS and SIVAKUMARAN. 2012.

However, the distinct conceptions of international legal personality presented in the previous section demonstrates how these conceptions exist simultaneously recognizing individuals, international organizations and nonstate entities for various purposes. This recognition entails an evolution away from the statist doctrine towards a more inclusive vision of the role and capabilities of nonstate actors in the international system.

Pursuant to the above, PORTMANN⁷⁸ suggests and HIGGINS⁷⁹, CLAPHAM⁸⁰, D'ASPREMONT⁸¹, and ROBERTS and SIVAKUMARAN⁸² purport to agree that a move away from the state-centric doctrine towards a combination of what PORTMANN⁸³ has termed the «formal» and «individual» conceptions is called for. One must ask why a combination? Well, while the «formal» conception envisions an open system with norms directly addressing actors and thus bestowing them with legal personality, the «individual» conception treats individuals as legal persons based solely on them being human beings under the obligation to respect fundamental international norms⁸⁴. Tying in both conceptions resolves responsibility for peremptory norms even when no norms are directed towards NSAs specifically⁸⁵. Again, supporting the above declarations, legal personality remains a matter of doctrine built on norm interpretation and not on age-old principles.

By providing nonstate actors with legal personality, we are creating the conditions for international responsibility since both are invariably linked⁸⁶. The gradual shift towards a «formal-individual» conception of legal personality would entail envisioning

78. See PORTMANN, Roland. 2013: *Legal Personality in International Law*. New York, USA: Cambridge University Press.

79. See HIGGINS, Rosalyn. 1994: *Problems and Process: International Law and How We Use It*. Oxford, England: Clarendon Press; Oxford University Press.

80. See CLAPHAM, Andrew, 2006: *Human Rights Obligations for Nonstate Actors*. Oxford, England: Oxford University Press.

81. See D'ASPREMONT, Jean. 2011: «Nonstate Actors in International Law: Oscillating Between Concepts and Dynamics». ACIL research paper n.º 2011-05 available on SSRN.

82. See ROBERTS, Anthea and SIVAKUMARAN, Sandesh. 2012: «Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law». *Yale Journal of International Law*, 2012, 37.1: 108-152.

83. See PORTMANN, Roland. 2013: *Legal Personality in International Law*. New York, USA: Cambridge University Press.

84. See PORTMANN, Roland. 2013: *Legal Personality in International Law*. New York, USA: Cambridge University Press.

85. Even though guaranteeing and providing human rights can be considered erga omnes obligations according to Ryngaert. For further detail please see RYNGAERT, Cedric. 2009: «Imposing International Duties on Non-state Actors and the Legitimacy of International Law». Working paper presented at FWO: Research Community on Non-State actors on International Law. Leuven.

86. See BROWNLIE, Ian. 2003: *Principles of Public International Law*. Oxford, England: Oxford University Press.

NSAs as actors of international law whenever norms address them as such or whenever peremptory norms are involved safeguarding responsibility on human rights violations of nonstate actors. Teubner's interdisciplinary insight also arrived to a similar conclusion when noting that it was best to establish a legal pluralism defined by a «plurality of legal discourse rather than a hierarchy of legal orders»⁸⁷.

In addition, this conception does not recognize any type of law-making capacity for NSAs doing away with the most controversial element of the NSA legitimacy debate and posing a less aggressive challenge to traditional legal paradigms⁸⁸. Furthermore the fact that the protection against human rights violations may be considered erga omnes obligations⁸⁹ strengthens the legitimacy of the law-making process notwithstanding the lack of involvement of these actors in the process. The possibility of interpreting norms directed at nonstate entities without starting from a particular presumption widens the scope of application of said norms creating international law that can adjust itself to the changing nature of the international system providing the malleability and capacity for adjustment that is much needed in today's rapidly changing system.

It is important to mention that prior enforcement of norms in order to challenge the accountability of nonstate actors, particularly in the case of armed nonstate actors, has been achieved through a variety of forms, none that solve the issue of accountability in the long term. As LANGER⁹⁰ recognizes however that international courts been set up to try mainly Nazis, Rwandans and former Yugoslavs, those nonstate actors that no one would dispute should be held responsible, accountable, judged and punished. MUSILA⁹¹ equally contends that it is the complexity of these conflicts that creates the main difficulties in the application of international norms but as current events and daily headlines demonstrate, the strenuous application of these norms in a system that provides for accountability is ever more necessary.

87. See TEUBNER, Gunther. 1997: *Global Law Without a State*. Brookfield, USA: Dartmouth Publishing Company.

88. See PORTMANN, Roland. 2013: *Legal Personality in International Law*. New York, USA: Cambridge University Press and CLAPHAM, Andrew. 2006: *Human Rights Obligations for Nonstate Actors*. Oxford, England: Oxford University Press.

89. See RYNGAERT, Cedric. 2009: «Imposing International Duties on Non-state Actors and the Legitimacy of International Law». Working paper presented at FWO: Research Community on Non-State actors on International Law. Leuven.

90. See LANGER, Maximo. 2011: «The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes 105». *American Journal of International Law*, 2011: 1-55.

91. See MUSILA, Godfrey. 2010: «Armed non-state actors in international law: states and challenges of accountability». In Augustine Ikelegbe and Wafula Okumu: *Militias, Rebels, and Islamist Militants: Human Insecurity and State Crises in Africa*. Pretoria, South Africa: Institute for Security Studies. NATIONAL INTELLIGENCE COUNCIL. 2007: *Nonstate actors impact on international relations and implications for the United States*.

3.1. Need for the Inclusion of Actors in the Human Rights Regime

To address the issue of legal personality is to resolve whether nonstate actors can have claims or have claims brought against them and where. The issue currently at hand however is if nonstate actors can have human rights claims brought against them.

Robert McCorquodale, believing in the prevalence of a state only conception of legal personality and wishing to establish obligations for nonstate actors, harshly declares that in order to interpret human rights treaties as attributing responsibility to nonstate entities

... these bodies are sometimes using a form of legalized imagination to deal with the actions of nonstate actors that violate human rights. In all instances it has been the state itself that has been found to violate international human rights legal obligations and not the nonstate actor who was the real violator⁹².

MCCORQUODALE⁹³ attempts to emphasize that the temperate evolution of inclusion of nonstate actors within a human rights regime has followed from rules of state responsibility and its obligation to exercise due-diligence to protect human rights of all persons in a state because norm application has not evolved fast enough to keep up with current practice. Musila recognizes that

while it seems paradoxical that states weakened by war or those unable to exercise practical sovereignty over territory under rebel control should be required to bear responsibility for violations by [NSAs] conceptually the international human rights framework admits only state responsibility⁹⁴.

Moreover, being that the main purpose for the existence of a human rights regime is the protection of all human beings, independent of race, creed or transgressor by not addressing nonstate actors adequately a gaping hole is being left through which violators escape accountability.

92. See McQUORCODALE, Robert. 2009: «Nonstate Actors and International Human rights Law». In Sarah Joseph and Adam McBeth (2010): *Human Rights Law*. Research.

93. See McQUORCODALE, Robert. 2009: «Nonstate Actors and International Human rights Law». In Sarah Joseph and Adam McBeth (2010): *Human Rights Law*. Research.

94. See MUSILA, Godfrey. 2010: «Armed non-state actors in international law: states and challenges of accountability». In Augustine Ikelegbe and Wafula Okumu: *Militias, Rebels, and Islamist Militants: Human Insecurity and State Crises in Africa*. Pretoria, South Africa: Institute for Security Studies. NATIONAL INTELLIGENCE COUNCIL. 2007: *Nonstate actors impact on international relations and implications for the United States*.

Clapham⁹⁵ therefore holds that a human rights regime in and of itself is better equipped to deal with nonstate actors than other legal regimes because of its various monitoring mechanisms among other things. Those adherents to a state-centered approach recognizing only states as actors in the system have contested this declaration saying that the inclusion of nonstate actors into the human rights regime will serve to weaken and dilute the human rights regime, eventually crippling it⁹⁶. In response to that assertion however, the human rights regime is recognized for being capable of evolving and adapting⁹⁷.

Once NSAs are recognized as international legal persons liable for their human rights violations due to norms being directly addressed at them as in the case of the European Convention of Human Rights; Convention on the Prevention and Punishment of the Crime of Genocide, UN Convention on the Rights of Persons with Disabilities; Weapons Convention; Geneva Convention and its additional protocols and other legal documents such as Security Council Resolution 1540 of 2004, responsibility becomes a reality. Accountability still remains an issue however although it has been readily established that the absence of a forum does not mean the absence of the obligation⁹⁸.

In the past decades two distinct forums for accountability of nonstate actors have gained strength through the use of alien courts, the Alien Torts Statute and universal jurisdiction⁹⁹. Both will be briefly dealt with separately.

The Alien Torts Statute, ATS, hands the district courts of the United States «original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States»¹⁰⁰. The ATS has a long history –it’s a 200-year old documents– and was even involved in the famous Amistad case but with a very short list of legislative history¹⁰¹. The ATS has been used against individuals as in

95. See CLAPHAM, Andrew. 2014: «Rethinking the Role of Nonstate Actors in International Law» in United Nations Visual Library of International Law available at http://legal.un.org/avl/ls/Clapham_IL_video_1.html.

96. See CLAPHAM, Andrew. 2006: *Human Rights Obligations for Nonstate Actors*. Oxford, England: Oxford University Press.

97. See CHINKIN, Christine. 1998: «International Law and Human Rights». In T. Evans: *Human Rights Fifty Years On: A Reappraisal*. Manchester, England: Manchester University Press.

98. See CLAPHAM, Andrew. 2006: *Human Rights Obligations for Nonstate Actors*. Oxford, England: Oxford University Press and CLAPHAM, Andrew. 2014: «Rethinking the Role of Nonstate Actors in International Law» in United Nations Visual Library of International Law available at http://legal.un.org/avl/ls/Clapham_IL_video_1.html.

99. See SCHABAS, William. 2002: «Punishment of Non-state Actors in Non-international Armed Conflict». *Fordham International Law Journal*, 2002, 26.4: 907-1051.

100. See Alien Torts Statute 28 U.S.C. 1350 available at <https://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partIV-chap85-sec1350.pdf>.

101. See SLAWOTSKY, Joel. 2013: «Corporate Liability in Alien Tort Litigation». *Virginia Journal of International Law*, 2013, 1: 27-42.

the landmark second circuit for *Filártiga v. Peña-Irala*^{102, 103} and against corporations as in *Kiobel v Royal Dutch Petroleum*¹⁰⁴ when corporations have engaged in violations of the law of nations along with a host government or when the offense is so grave that it does not require state action¹⁰⁵. Over the past years companies such as Cisco, Exxon-Mobil, Unocal and Río Tinto have been subjected to ATS litigation¹⁰⁶.

Interestingly, and for the purpose of accountability a real major breakthrough, the ATS provides jurisdiction even though the violation is not committed on US soil and the claimant or defendant is not a US citizen¹⁰⁷. Because the statute has been used to address egregious human rights violations, most legal argument is based on the document as a human rights instrument even though language in the ATS is not exclusionary¹⁰⁸.

The use of ATS to face nonstate actors such as corporations opens the door for violations committed by nonstate entities to face accountability. As a legal document the ATS is helping to fill a void. It must be mentioned that human rights violations may be addressed in international courts specifically created for that purpose and regional systems tailored to handle them, yet the International Court of Justice and the International Criminal Court are not human rights forums hence the use of ATS and universal jurisprudence as instruments for human rights accountability. Afilalo best portrays the significance of the ATS in and out of the United States as a legal instrument in declaring that:

The ATS involves sensitive domestic choices as to a wide array of issues. These include the extent to which we take a stand for universal human rights in our courts, how we deal with international comity and relations when doing so, the balance of powers between judicial and executive branches of our government, and whether environmental and other torts going beyond egregious violations of international norms related to

102. This case concerns the torture and assassination of Joel Filártiga in Paraguay during the dictatorship. Dolly Filártiga, Joel's mother later migrates to the United States and finds Peña-Irala living there as well lodging a complaint against him.

103. This case served to revive the ATS as a human rights instrument in international law through the conception of the law of nations as it existed in the current system. Previous to this case, the ATS remained a relatively dormant legal document.

104. This case concerns the accusations by the Nigerian people of aid and abetment by the Royal Dutch Petroleum on behalf of the Nigerian government.

105. See AFILALO, Ari. 2006: «Losing control (yet again): the globalization of the alien tort statute». *Rutgers Law Journal*, 2006, 37: 847-853.

106. See SLAWOTSKY, Joel. 2013: «Corporate Liability in Alien Tort Litigation». *Virginia Journal of International Law*, 2013, 1: 27-42.

107. See MORRIN, Douglas. 2000: «People Before Profits: Pursuing Corporate Accountability for Labor Rights Violations Abroad through the Alien Torts Claims Acts». *Boston College Third World Law Journal*, 2000, 20: 427-446.

108. See VEGA, Matt. 2010: «Balancing Judicial Cognizance and Caution: Whether Transnational Corporations are Liable for Foreign Bribery Under the Alien Tort Statute». *Michigan Journal of International Law*, 2010, vol. 31, Issue 2: 385-447.

torture, forced labor or other core human rights, should be actionable... At bottom the courts define how we, as a society based on the rule of law, will treat foreigners who have been subjected to egregious violations of fundamental rights¹⁰⁹.

Universal jurisdiction is the legal principle that allows national courts to try crimes against peremptory norms even if the crimes take place on foreign soil and against non-nationals¹¹⁰. Universal jurisdiction emerged for the crime of piracy and it was not until World War II that it reached a normative evolution through the establishment of the International Military Tribunal¹¹¹ and later by being included –in reference to grave breaches of peremptory norms– in the Geneva Convention of 1949¹¹². Today universal jurisdiction is considered a rule of customary law where prosecuting states are really acting as agents of the international community and its evolution is important enough for the Sixth Legal Annual Committee of the UN to hold annual discussions on its scope and applications¹¹³.

Universal jurisdiction blurs the barriers between states and chips away at the state-only conception considering that many national courts do not define crimes of peremptory norms at all and when they do, they fail to follow international law guidelines and face constraints –whether inability or unwillingness– to investigate said crimes, generating an important accountability gap¹¹⁴.

The importance of universal jurisdiction is best understood by the magnitude of the well-known cases it was used in, mainly the Eichmann case, Demanjuk v. Petrovsky, Pinochet case, Habré case, and Butare Four case among others. Universal jurisdiction however is not automatic and, as a matter of national law as well, is not applied uniformly everywhere¹¹⁵. For the principle to be applied it is necessary for there to exist a specific ground for universal jurisdiction, a sufficiently clear definition of the offence

109. See AFILALO, Ari. 2006: «Losing control (yet again): the globalization of the alien tort statute». *Rutgers Law Journal*, 2006, 37: 847-853.

110. See HORTON, Scott. 2012: «All the Missing Souls: Six Questions for David Scheffer». *Harpers Magazine* available at: <http://harpers.org/blog/>.

111. See PHILIPPE, Xavier. 2006: «The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?». *International Review for the Red Cross*, 2006, 88.862: 375-398.

112. See TRIAL. 2014: Universal jurisdiction available at: <http://www.trial-ch.org/en/resources/international-law/universal-jurisdiction.html>.

113. See AMNESTY INTERNATIONAL REPORT 2012: *A Preliminary Survey of Legislation around the World - 2012 update*. London, England: Amnesty International Publications.

114. See AMNESTY INTERNATIONAL REPORT 2012: *A Preliminary Survey of Legislation around the World - 2012 update*. London, England: Amnesty International Publications.

115. See AMNESTY INTERNATIONAL REPORT 2012: *A Preliminary Survey of Legislation around the World - 2012 update*. London, England: Amnesty International Publications.

and its constitutive elements and national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes¹¹⁶.

Both the ATS and universal jurisdiction depend on how states manage their international relations. To take on jurisdiction over a specific case, in line with realist tenets, may threaten relations between states in view of state interests disrupting in one or another international relations for the higher cause of human rights accountability.

It must be recognized that both instruments are still evolving. While *Kiobel v. Royal Dutch Petroleum* was dismissed by the Supreme Court on the grounds that claims without some significant connection to the United States are not actionable under the ATS¹¹⁷, this judgment does not preclude jurisdiction on the grounds on corporate presence or «mere» corporate presence therefore victims will still be able hold corporations accountable under the ATS^{118, 119}. Additionally, and in further proof of the ATS being alive and well, federal judges undaunted by the *Kiobel* decision recently ruled that corporations might be liable for the conduct of their suppliers¹²⁰.

In regards to universal jurisdiction Langer¹²¹ determined that 80% of all the cases built on universal jurisdiction result in conviction in all or part of the charges. Nonetheless, the political effects of universal jurisdiction have been felt and countries like Spain and Belgium, who had the strongest universal jurisdiction statutes, today have since retrenched and scaled back focusing limiting the cases to those that have a direct link with the prosecuting country¹²².

116. See PHILIPPE, Xavier. 2006: «The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?». *International Review for the Red Cross*, 2006, 88.862: 375-398.

117. Doing away with decades of lower courts precedents.

118. Clearly the ATS is not yet dead as many proclaimed after the *Kiobel* judgement was announced.

119. See FEDER, Meir. 2013: Commentary: Why the court unanimously jettisoned thirty years of lower courts precedent (and what that can tell us about how to read *Kiobel*) available at: SCOTUSblog (Apr. 19, 2013, 11:30 AM), <http://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel/>.

120. See RUBENFELD, Samuel. 2014: «The Morning Risk Report: chocolatiers face child slavery liability». *Risk and Compliance Journal from the Wall Street Journal* available at: <http://blogs.wsj.com/riskandcompliance/2014/09/10/the-morning-risk-report-chocolatiers-face-child-slavery-liability/>.

121. See LANGER, Maximo. 2011: «The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes 105». *American Journal of International Law*, 2011: 1-55.

122. See VAN SCHAACK, Beth. 2013: Universal jurisdiction cases involving U.S. defendants available at <http://justsecurity.org/4707/universal-jurisdiction-cases-involving-u-s-defendants/> and EL MUNDO. 2014: «El PP saca adelante en solitario la reforma que restringe la

The limitations to the ATS and universal jurisdiction principle demonstrate both the remaining importance of states as central to the international system as well as the growing notion of nonstate actors as active violators of human rights that need to be held responsible and accountable for their actions.

The fact that nonstate actors cannot be parties to a case before the International Court of Justice or the International Criminal Court does not mean that they do not have rights and obligations under international law. As the above has proven, disputes have to be settled in other forums.

Sadly, re-conceptualizing how international law and international relations address nonstate actors regarding their human rights violations will take time. Currently the emphasis on state responsibility as envisioned through the state-only and recognition conceptions of international legal personality and realist tenets of international relations creates an obstacle for the increased use of other conceptions that would widen the scope of applicability of the human rights regime. Practice needs to invariably catch up with reasoning but in the meantime other possibilities remain in order to close the accountability gap and reject impunity. Therefore it is extremely important to prompt and support reliance on international law as an open system and to follow a conception of international legal personality that allows norm interpretation to address these actors and therefore enhance the international human rights regime. Doctrine will only be relevant if applied enough times to actually establish a precedent that will strengthen the use of said conceptions as norm.

4. CONCLUSION

John F. Kennedy talked about the need for a change in views towards problem resolutions, since the international system's problems are manmade, not the result of systemic variables, but manmade and therefore can have man made solutions with a focus on

... a more practical attainable peace, – based not on a sudden revolution but in human nature but on a sudden evolution in human institutions – on a series of concrete actions and effective agreements which are in the interest of all concerned. There is no single, simple key to this peace – no grand or magic formula to be adopted by one or two powers. Genuine peace must be the product of many nations, the sum of many acts. It must be dynamic, not static, changing to meet the challenge of a new generation. For peace is a process – a way of solving problems¹²³.

justicia universal» available at: <http://www.elmundo.es/espana/2014/02/11/52fa891822601dac018b4595.html>.

123. See KENNEDY, John F. 1963: *Commencement Speech American University*, June 1963. Washington D.C.: USA.

The above quote was made in the context of the Cold War towards the establishment of a nuclear test ban treaty between the United States and the Soviet Union. It clearly refers to the international system and the bipolar world order dominating the system at the time albeit it still applies to the international system today, from an international relations and an international law perspective. We have been calling for the adaptation of the system for a very long time, we have left impunity eyelets become gaping holes and the international community can wait no longer. Nonstate actors are not going anywhere, they will probably gain more influence in years to come and become more powerful in various dimensions. They need to be recognized as actors, hold claims and have claims be held against them. Accountability is crucial.

That nonstate actors have emerged as a powerful political force in the international world is no longer contested. Current events such as the creation of the IS, an Islamic caliphate from Iraq to the Levant, point to the fact that the international system is rapidly changing and that while the main theories of international relations account for nonstate actors and are malleable enough to offer distinct perspectives and analysis, the realm of international law especially the human rights regime needs to catch up or lose relevance. State responsibility can only go so far in punishing nonstate actors once a relation between the actors in question and the state is proven, but a gaping hole is left in the instances where no such relation exists and these states cannot control these actors, let alone end the threats they represent.

As Marco Rosini¹²⁴, reader in international law at the University of Westminster points out:

... the international law of the future will be less influenced by the «Westphalian model», for at least two reasons: the increasing role of nonstate actors, in particular armed groups and multinational corporations, which challenges existing state-centered rules of international law, and the emergence of cyberspace as a separate domain, that will entail a rethinking of traditional concepts like territory, sovereignty, and jurisdiction...

This study was devised as at least a minor contribution to the reconceptualization of Rosini's first consideration. An open system of international law where international personality is activated a priori in the case of individuals regarding peremptory norms and a posteriori in the case of nonstate actors when norms are specifically addressed at them is proposed. International personality provides recognition and responsibility for these actors creating a scenario where accountability is possible. While today this system depends solely on legal inventiveness and wit once sufficient doctrine has been created, it will be possible for forums other than foreign courts to address cases of human rights violations finally providing peace for victims.

124. See ROSSINI, Marco. 2014: As quoted by OUPblog available at <http://blog.oup.com/2014/08/what-is-the-future-of-international-law-esil2014/>.

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