

## Armed Non-State Actors in International Humanitarian Law: The Need for a Definition for Legal Adaptation

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### Abstract

Today, non-international armed conflicts involving the participation of Armed Non-State Actors (ANSAs) are of remarkable significance, especially when compared to inter-state armed conflicts. Yet, despite the significant role ANSAs play in modern-day conflicts, they constitute an “anomaly” in the current State-centric international legal system. ANSAs’ degree of dispersion, influence, and effect on international politics challenges the Westphalian notion of sovereignty and Max Weber’s definition of State as an entity that successfully “claims the monopoly over the legitimate use of force within a given territory”. Thus, it is necessary to establish strategies for interacting with ANSAs considering the possibility of “adapting” international law, especially International Humanitarian Law (IHL), in light of their role. To identify the main shortfalls of the relevant IHL norms, particularly the 1949 Geneva Conventions and their Additional Protocols, firstly it is necessary to establish a clear and consistent definition of ANSAs, which is still lacking both in law and in theory. Secondly, it is also fundamental to consider the limitations of International Human Rights Law since it does not apply in situations of internal strife or disturbance, where ANSAs also pose serious threats. Starting with the Syrian armed conflict, this paper aims to put forward innovative solutions, such as “backchannel diplomacy”, to foster States’ and ANSAs’ collaboration. Within the scope of the study, some recommendations are proposed, including the establishment of a working table with the participation of States, international and regional organizations, and civil society, with the task to adapt IHL while mindful of ANSAs’ role. Lastly, there is an attempt to find effective tools to ensure that ANSAs comply with IHL.

**Keywords:** *Statecentricism, Armed Non-State Actor, international humanitarian law, backchannel diplomacy, human rights.*

### Résumé

Aujourd’hui, les conflits armés non internationaux impliquant la participation d’Acteurs Armés Non-étatiques (AANE) revêtent une importance remarquable, en particulier en comparaison avec les conflits armés interétatiques. En dépit de leur rôle toujours plus important dans les conflits modernes, les AANE constituent une “anomalie” dans le système juridique international actuel centré sur l’État. Le degré de dispersion, d’influence et les effets des AANE sur la politique

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internationale remettent en question la notion westphalienne de souveraineté ainsi que la définition donnée par Max Weber de l'État comme une entité qui "revendique avec succès le monopole de l'usage légitime de la force sur un territoire donné". Il est donc nécessaire d'établir des stratégies pour interagir avec les AANE en prenant en considération la possibilité d'"adapter" le Droit International, en particulier le Droit International Humanitaire (DIH). Afin d'identifier les lacunes principales des normes édictées par le DIH, en particulier les Conventions de Genève de 1949 et leurs Protocoles Additionnels, il est d'abord nécessaire de donner une définition claire et cohérente des AANE, qui fait encore défaut tant en droit qu'en théorie. Il est également fondamental de prendre en considération le Droit International des Droits de l'Homme, car le DIH ne s'applique pas dans les situations de conflits ou de troubles internes, là où les AANE représentent également de graves menaces. En se basant sur le conflit armé syrien, cet article vise à proposer des solutions innovantes pour une meilleure collaboration entre les États et les AANE, telles que la "diplomatie parallèle". Il suggère par ailleurs la mise en place d'une table de travail avec la participation des États, des organisations internationales et régionales et de la société civile, l'objectif étant d'adapter le DIH en tenant compte du rôle des AANE. La recherche tentera également de trouver des outils efficaces pour s'assurer que les AANE respectent le DIH.

**Mots-clés :** *Statecentricism, Acteurs Armés Non-étatiques, droit international humanitaire, diplomatie parallèle, droits de l'homme.*

## **Introduction. The Trend of Armed Non-State Actors in War**

In 2011, a civil war broke out in Syria. Without participating in the hostilities, many Syrians found themselves living in a territory that went from being administered by the State apparatus to being under the control of an Armed Non-State Actor (ANSA).<sup>1</sup>

Physical and psychological uncertainty prevailed. At first, the question was: what are ANSAs? Which soon led to: are they good or bad?

In 2020, the International Committee of the Red Cross (ICRC) estimated that between 60 and 80 million people were living under the control of ANSAs, while an approximate 100 million were living in areas where this control is contested.<sup>2</sup> In most of these situations, the armed group is considered within Non-International Armed Conflict (NIAC) and therefore bound by

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<sup>1</sup> Udi Dekel and Nir Boms and Ofir Winter, 'Mapping the Non-State Actors in Syria and their Attitudes toward Israel' (2016) Institute for National Security Studies 25-50 <https://www.jstor.org/stable/resrep17013.6> accessed 16 May 2022.

<sup>2</sup> ICRC, 'ICRC Engagement with Non-State Armed Groups Why, how, for what purpose, and other salient issues' (2021) <https://international-review.icrc.org/articles/icrc-engagement-with-nsags-why-how-for-what-purpose-icrc-position-paper-915> accessed 6 February 2022.

international humanitarian law (IHL).<sup>3</sup> According to the ICRC's legal classification, non-international armed conflicts have more than doubled between 2001 and 2016, from fewer than 30 to more than 70.<sup>4</sup>

Non-international armed conflicts are those waged between a State's armed forces and one, or more, armed non-State Actors. These conflicts are to be distinguished from international armed conflicts, or IACs, which involve only States.<sup>5</sup> A NIAC may also occur between armed non-State actors only. This type of war is not necessarily defined by the territory where it takes place but rather by the nature of the parties, one of whom must be an armed non-State actor. Over the past two decades, third states were often involved in conflicts between one state and ANSAs. Such states support central governments fighting against armed non-state actors.<sup>6</sup> This is the case of Afghanistan, Iraq, Mali.

These important new trends in the last decade have raised profound challenges and led to the emergence of new actors.

Since the birth of nation-States, conflicts involving ANSAs have replaced interstate wars as the dominant form for the first time, as shown by the Uppsala Conflict Data Program (UCDP).<sup>7</sup>

2017 and 2018 recorded the highest number of conflicts involving armed non-State actors since the end of the Cold War. Meanwhile, there has been a substantial increase in the number of victims of non-State conflicts worldwide since 2014. This trend has mainly been driven by the conflict in Syria involving the Islamic State. Nevertheless, these types of conflict also dominate,

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<sup>3</sup> Tilman Rodenhauer, 'The legal protection of persons living under the control of non-State armed groups' (2022) 102(915) *International Review of the Red Cross* 991-1020 DOI <10.1017/S1816383121000205> <https://international-review.icrc.org/sites/default/files/reviews-pdf/2022-01/legal-protection-persons-under-control-of-nsags-915.pdf> accessed 6 February 2022.

<sup>4</sup> ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2019) [https://www.icrc.org/sites/default/files/document/file\\_list/challenges-report\\_ihl-and-non-state-armed-groups.pdf](https://www.icrc.org/sites/default/files/document/file_list/challenges-report_ihl-and-non-state-armed-groups.pdf) accessed 6 February 2022.

<sup>5</sup> ICRC, 'International Humanitarian Law and the challenges of contemporary armed conflicts' (2011) <https://www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> accessed 21 February 2022.

<sup>6</sup> *Ibid.*

<sup>7</sup> Pettersson Thérèse, Davis Shawn Deniz Amber, Engström Garoun, Hawach Nanar, Högladh Stina, Sollenberg Magnus Öberg Margareta, 'Organized violence 1989-2020, with a special emphasis on Syria' (2021) 58 (4) *Journal of Peace Research* 809-825 DOI <10.1177/00223433211026126> <https://journals.sagepub.com/doi/full/10.1177/00223433211026126> accessed 23 February 2022.

but not only, Africa and the Middle East as a whole.<sup>8</sup> The frequent participation of ANSAs in conflicts is part of the global phenomenon of decentralisation of State competencies that has been taking place since the Second World War. There have been cases where this happened peacefully, as in the case of non-governmental organizations (NGOs) and multinational corporations (so-called non-State Actors), and violently in the case of ANSAs.<sup>9</sup>

Worth noting is that the focus on contemporary armed non-State actors and their actions overshadowed the fact that their presence has been a constant feature in the history of international politics. Following their interests, desires, or situations, ANSAs have existed throughout history alongside States that have fought them. From the bands of marauders in the days of the ancient empires, to the mercenary bands of the early Middle Ages to the age of pirates, and buccaneers who roamed the high seas for centuries, ANSAs are not as exotic or novel as the concept may seem.<sup>10</sup>

It is interesting to consider the following famous passage in Augustine's *De Civitate Dei* that already in the Middle Ages questions the difference between States and non-States in form and purpose:

Justice being taken away, then, what are kingdoms but great robberies? For what are robberies themselves, but little kingdoms? The band itself is made up of men; it is ruled by the authority of a prince, it is knit together by the pact of the confederacy; the booty is divided by the law agreed on. If by the admittance of abandoned men, this evil increases to such a degree that it holds places, fixes abodes, takes possession of cities and subdues peoples, it assumes the more plainly the name of a kingdom, because the reality is now manifestly conferred on it, not by the removal of covetousness, but by the addition of impunity. Indeed, that was an apt and true reply which was given to Alexander the Great by a pirate who had been seized. For when that king had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, what you mean by seizing the whole earth; but because I do it with a petty ship, I am called a robber, while you who does it with a great fleet are styled emperor.<sup>11</sup>

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<sup>8</sup> Rudolfson Ida, 'Non-State Conflicts: Trends from 1989 to 2018' (2019) Peace Research Institute Oslo <https://reliefweb.int/report/world/non-state-conflicts-trends-1989-2018> accessed 3 March 2022.

<sup>9</sup> Duncan Hollis, 'Why State Consent Still Matters-Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) 23(137) Berkeley Journal of International Law 137-174 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=722126](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=722126) accessed 7 February 2022.

<sup>10</sup> Miroiu Andrei and Ungureanu Radu Sebastian, 'Armed non-state actors as a distinct research topic' (2015) 5(3) International Review of Social Research 153-155 DOI <10.1515/irsr-2015-0014> <http://archive.sciendo.com/IRSR/irsr.2015.5.issue-3/irsr-2015-0014/irsr-2015-0014.pdf> accessed 7 February 2022.

<sup>11</sup> Marcus Dods, 'Nicene and Post-Nicene Fathers' (1887) 1(2) Christian Literature Publishing, citing Augustine of Hippo, 'The City of God' Book IV Chapter 4 <http://www.newadvent.org/fathers/120104.htm> accessed 23 May 2022.

Although the debate is part of a broader discussion regarding the context of legality in religious themes, the passage reveals that the problem of recognition between States and non-States was also debated many centuries ago. Furthermore, it is interesting to notice that even then there was a need for a systematisation of the concepts of “law” and “State” that would return more than a thousand years later, to enshrine the legitimacy of a State versus a non-State.

Despite what has been described, today’s ANSAs are perforce to be compared to those of the last decades vice centuries for two main reasons. Firstly, only from 1648, the year of the Peace of Westphalia, according to most historians,<sup>12</sup> is it possible to start talking about the State in the modern sense. Secondly, the first armed non-State Actors did not aspire to become a State as their founding objective, since avoiding military confrontation would limit any form of waste of resources. The first ANSAs are often compared with criminal groups whose aim did not concern control over the territory or population. These ANSAs used violence primarily for financial rather than political gain.<sup>13</sup> In the early 1900s, such groups were still relatively insignificant, overlooked by the process of State consolidation and competition between powerful nation-States.<sup>14</sup>

It is since the end of the war in Yugoslavia that it is possible to notice certain common elements of ANSAs. The Western Balkans offered a perfect example of how different ANSAs resisted State authority while trying to impose their own. Indeed, the former Yugoslavia provided fertile ground for the emergence of different types of ANSAs.<sup>15</sup> During this period, all the insurgents of the different subnational entities had control over their territory and had authority over the legitimation of the respective population. Every one of these groups achieved separatism and created new States for their ethnic groups.<sup>16</sup> This trend did not begin with the outbreak of war but went back almost a decade earlier with the death of Josip Bros Tito, former President of the Socialist Federal Republic of Yugoslavia. As the forced equilibrium held by the Yugoslav president

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<sup>12</sup> See e.g., Jason Farr, ‘Point: The Westphalia Legacy and The Modern Nation-State’ (2005) 80(3/4) International Social Science Review 156-159 <http://www.jstor.org/stable/41887235>; Andreas Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’ (2001) 55(2) International Organization 251-287 <https://library.fes.de/libalt/journals/swetsfulltext/10676369.pdf>.

<sup>13</sup> Glaser Max, ‘Humanitarian engagement with non-state armed actors: the parameters of negotiated access’ (2005) 51 Humanitarian Practice Network 1-20 <https://odihpn.org/wp-content/uploads/2005/06/networkpaper051.pdf> accessed 13 March 2022.

<sup>14</sup> Williams Phil, ‘Violent Non-State Actors’ (2008) International Relations and Security Network 1-21 <https://www.files.ethz.ch/isn/93880/vnsas.pdf> accessed 14 March 2022.

<sup>15</sup> Seferi Fabio, ‘Regions of Blurred Power: Violent Non-State Actors in the Western Balkans’ (2018) <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1002&context=ese> accessed 13 April 2022.

<sup>16</sup> *Ibid.*

broke down, the Federation imploded into a violent ten-years-long agony during which nationalist projects clashed with each other.<sup>17</sup> Indeed, armed non-State actors emerge during the collapse of a State, taking as a window of opportunity to fill the vacuum created by the State's disappearance or disintegration.

Compared to the present day, this trend has been well illustrated by the Syrian case over the past ten years. According to The Rule of Law in Armed Conflict Project (RULAC), Syria is currently engaged in a series of armed conflicts.<sup>18</sup> In the first place, the Syrian government is engaged in several non-international armed conflicts against a wide range of rebel groups. Secondly, there is an international armed conflict between Syria and members of the US-led international coalitions and Turkey. Furthermore, there is a military occupation led by the Republic of Turkey in northern parts of Syria. Finally, a part of Syrian territory, namely the Golan Heights, has been occupied by Israeli troops since the Six-Day War.<sup>19</sup>

The international situation within the Syrian territory enables and highlights the wide dissemination of ANSAs today in international affairs, resulting in the emergence of ANSAs as real players along with States. It also gives a unique perspective on the numerous terrorist groups operating in cross-border contexts, such as Islamic State of Iraq and Syria (ISIS). Considering what has been written above, ISIS could be considered a special case since it is an ANSA that not only directly challenged two States, namely Syria and Iraq, but also challenged the concept of borders, leading to a dangerous precedent that casts doubt on inter-State delimitations resulting from agreements and historical vicissitudes. As its name indicates, ISIS embraces a transnational jihadist agenda with the ambition to unify Syria and Iraq under an Islamic caliphate.<sup>20</sup> ISIS has attempted to create a pseudo-state across Syria and Iraq. The Islamic State has publicly declared that it wants to destroy the border lines separating the two countries, a clear opposition to the order established by the West with the *Sykes-Picot Agreement*.<sup>21</sup> In the specific case of the Middle East, such artificial

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<sup>17</sup> Strazzari Francesco, 'The Decade Horribilis: Organized Violence and Organized Crime along the Balkan Peripheries' 1991–2001' (2007) 12(2) Mediterranean Politics 185–209 DOI <10.1080/13629390701388661>.

<sup>18</sup> Sulce Marija, 'The Syrian armed conflict: nearing the end?' (2018) The War Report 2018 of Geneva Academy 1–8.

<sup>19</sup> *Ibid.*

<sup>20</sup> Asli Bâli, 'Sykes-Picot and "Artificial" States' (2016) AJIL Unbound 115–119 110 DOI <10.1017/S2398772300002919> <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/535345E5393DD5D17EF33F0D616FA365/S2398772300002919a.pdf/sykes-picot-and-artificial-states.pdf> accessed 30 July 2022.

<sup>21</sup> 'The Map ISIS Hates' The New York Review (25 June 2014) <https://www.nybooks.com/daily/2014/06/25/map-isis-hates/> accessed 30 July 2022.



borders have struggled to be accepted and changing the status quo would inevitably reignite long-dormant historical disputes, destabilising the region even further.

Furthermore, Syria is the case that best underlines the complex arrangements possible within non-State armed actors. In Syria's case, the collaboration between the State and ANSAs is reflected in the Syrian regime's alliance with Hezbollah (along with other Shia militias under Iranian auspices). Such collaboration between Hezbollah and the Assad government has existed since late 2012.<sup>22</sup> Although its initial objective of aiding the Syrian government was accomplished, Hezbollah has subsequently challenged Assad's ability to enforce full governance, transforming itself into another local authority that exercises control within State borders by providing public services and promoting an agenda that is not always aligned with the central regime in Damascus. The rivalries between States and ANSAs, such as the Kurds,<sup>23</sup> is also to be considered as they are one of the main forces fighting ISIS, helping to restore regional stability by neutralising other non-State challengers in Syria and Iraq.<sup>24</sup> Despite the tactical cooperation in an anti-terrorist function between the Kurds and the central regime in Damascus, the results of the first attempts have legitimised the former to demand a certain level of territorial autonomy within the Syrian and Iraqi territories, thus colliding with the sovereignty of these countries, a clear example of how the phenomenon is subject to sudden changes in fronts.<sup>25</sup>

The analysis conducted on the trend of ANSAs in war has made it possible to understand how the phenomenon is not recent but dates back many centuries. The ANSAs went from being a form of disturbance, albeit a serious one, to a serious organisation aimed at controlling territory. The causes of the establishment of ANSAs stem from two essential elements: first is the institutional weakness of the State, i.e., the inability to respond to the needs of the population or the territory which is taken over by an armed non-State actor. The other essential element is a

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<sup>22</sup> Matthew Levitt, 'Hezbollah's Regional Activities in Support of Iran's Proxy Networks' (2021) The Middle East Institute [https://www.mei.edu/sites/default/files/2021-07/Hezbollah%E2%80%99s%20Regional%20Activities%20in%20Support%20of%20Iran%E2%80%99s%20Proxy%20Networks\\_0.pdf](https://www.mei.edu/sites/default/files/2021-07/Hezbollah%E2%80%99s%20Regional%20Activities%20in%20Support%20of%20Iran%E2%80%99s%20Proxy%20Networks_0.pdf) accessed 4 May 2022.

<sup>23</sup> *Inter alia* People's Protection Unit, Women's Protection Unit, Syrian Democratic Forces, Kurdistan Workers' Party.

<sup>24</sup> Valensi Carmit, 'Alliances with Violent Non-State Actors in Middle East Conflicts: Between Theory and Practice' (2021) Institut Européen de la Méditerranée 239-242 [https://www.iemed.org/wp-content/uploads/2021/11/Violent-Non-State-Actors-Middle-East-Alliances-Conflicts\\_MedYearbok2021.pdf](https://www.iemed.org/wp-content/uploads/2021/11/Violent-Non-State-Actors-Middle-East-Alliances-Conflicts_MedYearbok2021.pdf) accessed 23 March 2022.

<sup>25</sup> See e.g., 'Lessons from the Syrian State's Return to the South' International Crisis Group (25 February 2019) <https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/196-lessons-syrian-states-return-south>; 'If We Have to Choose Between Compromise and Genocide, We Will Choose Our People' Foreign Policy (13 October 2019) <https://foreignpolicy.com/2019/10/13/kurds-assad-syria-russia-putin-turkey-genocide/>.

situation of conflict that can act as an accelerator to this phenomenon by allowing ANSAs to establish more rapidly.

Over time, the ANSAs have gradually shifted to becoming serious territorial impositions, ceasing to limit themselves to the sole function of “disturbance” that characterised them over the centuries. Thus, ANSAs are attempting to find their space against those State institutions that are weak or weakened by multiple factors.

## **Part 1. The Definition of an Armed Non-State Actor**

This paper is divided in three parts. In the first this research paper will try to secure a thorough definition of “Armed Non-State Actor”, by delimiting the concept from a juridical point of view and by exploring its legal and political consequences, with a special focus on the juridical-linguistic approach. In the second part it will focus on the shortcomings of IHL on ANSAs. In the final part it will attempt to improve the incorporation of Armed Non-State Actors into an international legal regulation of armed conflict, in particular trying to adapt IHL mindful of ANSAs’ role.

A clear and consistent definition of Armed Non-State Actor is still lacking in IHL. Scholars<sup>26</sup> underline that they can take many forms, from pirates to warlords and criminal organizations, but, despite these attempts, no clear definition of the phenomenon exists.

On the contrary, recognising a State actor is not as complex as identifying an ANSA. First, for States, there is a specific definition and the underlying recognition of the norms of international law.

States are unwilling to recognise ANSAs as actors in international law in order to avoid implicitly declaring their existence and power. As Professor Clapham explains in an eloquent metaphor, “This seems as likely as turkeys voting for Christmas”.<sup>27</sup> Indeed, as long as the norms

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<sup>26</sup> See e.g., Williams Phil, ‘Violent Non-State Actors’ (2008) International Relations and Security Network <https://www.files.ethz.ch/isn/93880/vnsas.pdf>; John Sullivan, ‘From Drug Wars to Criminal Insurgency: Mexican Cartels, Criminal Enclaves and Criminal Insurgency in Mexico and Central America. Implications for Global Security’ (2011) Hal Open Science <https://halshs.archives-ouvertes.fr/halshs-00694083/document>.

<sup>27</sup> Clapham Andrew, ‘Human rights obligations of non-state actors in conflict situations’ (2006) 88(863) International Review of the Red Cross 491-523 [https://www.icrc.org/en/doc/assets/files/other/irrc\\_863\\_clapham.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_863_clapham.pdf) accessed 9 February 2022.



of international law are applied to ANSAs, *nulla quaestio*; doubts will arise as to when they will gain active power in legal fora to regulate and govern conflicts on a par with or alongside States. However, despite the growing and unequivocal prevalence of ANSAs, their role in shaping the political order does not occupy sufficient space in international fora. The analytical gap often stems from the dominance of the State-centric approach created by the Westphalian system, whereby the State is the primary and exclusive actor in the political system.<sup>28</sup> In essence, States aim, above all, to protect their sovereignty according to the logic of State-centrism.<sup>29</sup>

The non-recognition of ANSAs goes hand in hand with their “demonisation” or criminalisation. This is a consequence of the absence of a clear definition of armed non-State actors within international codes.<sup>30</sup> If a definition were commonly accepted, the State would see its arbitrariness in complying with IHL provisions significantly reduced.

IHL norms (notably Common Article 3 of the *Geneva Conventions*) expressly flag that their broad recognition of belligerents does not confer any legal status on a non-State party to an armed conflict. Despite this, some States are dehumanising adversaries and employ rhetoric to indicate that actors designated as “terrorists” do not deserve International Law protection, not even IHL: this is an alarming trend. The terms “terrorist” or “terrorist group” are too often used by States, primarily to serve the political purpose of delegitimization. It is, therefore, necessary to ensure that the definition is devoid of partisanship.

The concept of reputation is just as important for ANSAs as it is for States. ANSAs must not be at the centre of phenomena condemned by public opinion. The same principle applies to States. Many ANSAs take years to deviate from previously brutal actions, losing the possibility of being considered for dialogue. The socially positive (even previously juridical) judgment on ANSAs is indeed of extreme relevance in international political processes because it can help or,

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<sup>28</sup> Cf Valensi (n 24).

<sup>29</sup> Esposito Leopoldo, ‘The importance of Non State Actors nowadays’ (2017) *filodiritto* <https://www.filodiritto.com/importance-non-state-actors-nowadays> accessed 18 February 2022.

<sup>30</sup> See e.g., Banu Baybars Hawks, ‘Non-State Actors in Conflicts: Conspiracies, Myths, and Practices’ (2018) Cambridge Scholars Publishing 4 <https://www.cambridgescholars.com/resources/pdfs/978-1-5275-0411-0-sample.pdf>; Stefanie Herr, ‘Binding Non-State Armed Groups to International Humanitarian Law Geneva Call and the Ban of Anti-personnel mines: Lessons from Sudan’ (2010) Peace Research Institute Frankfurt 27-28 [https://www.hsfk.de/fileadmin/HSFK/hsfk\\_downloads/prif95.pdf](https://www.hsfk.de/fileadmin/HSFK/hsfk_downloads/prif95.pdf).

in the opposite case, hinder a possible dialogue between the international community and an armed non-State actor.<sup>31</sup>

Starting with an analysis of the legal language of the term “Non-State Armed Actor”, the aim is to arrive at a definition that can subsequently clarify and circumscribe ANSAs. At the same time, the aim will be to confirm the correct use of this designation adopted by renowned international organisations such as the ICRC and the Geneva Academy. Thus, a linguistic analysis of the terminology “Armed non-State Actor” is important since it can help to reduce the politicization of the term, as mentioned earlier.

The only explicit mention of IHL on ANSAs is in Article 1.1 of *Additional Protocol II to the 1949 Geneva Conventions (Additional Protocol II)*, referring to ANSAs as “dissident armed forces or other organised armed groups”. Apart from providing basic criteria, it does not offer a clear definition. The 1987 ICRC commentary on Article 1 implicitly refers to this brief description as “insurgents who are organised into armed groups”.<sup>32</sup>

For the purpose of this research, the terminology used is “Armed non-State Actor” since within this designation, each word is weighted to fit its definition, following the legal-linguistic analysis. The linguistic-legal approach will enable the concept of ANSA to become clearer by allowing a better grasp of the differences between an ANSA and a State dwelling on the terminology adopted. Using the words of Jan Engberg and Anne Lise Kjaer:

... in general terms, the interdiscipline of legal linguistics is directed towards studying the relations between law and language[...]. [T]he interdiscipline of legal linguistics covers a broader range of approaches to the description of language, including language as a

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<sup>31</sup> The most illustrative case of this statement can be found in European (but especially Italian) relations with Yasser Arafat of the Palestine Liberation Organisation (PLO). In the first half of the 1980s, numerous European leaders attempted to break every hesitation concerning the unity of the front in order to expel the most violent and extremist fringes. This *sine qua non* was essential to start a serious political dialogue aimed at negotiating with Israel and at the same time justify the political dialogue with the PLO to the electoral body in Europe. In fact, in Italy, the situation created a major scandal because Arafat was treated as a head of state, whereas he was only a representative of a non-state armed group that often resorted to armed struggle, moreover against an allied state, i.e. Israel. For Tel Aviv there was a full openness to the association of the Palestinians in the negotiation process, but an equally clear refusal to consider the PLO as an interlocutor as they continued to use terrorist methods. See e.g., Francesco Lefebvre D'Ovidio and Luca Micheletta, ‘Giulio Andreotti e l'Europa’ (2017) (80) *Storia e Letteratura* 1-329 56 58 60; Luigi Vittorio Ferraris, *Manuale della politica estera italiana 1947-1993* (1998) Laterza 391.

<sup>32</sup> See para. 4460: “The Protocol applies on the one hand in a situation where the armed forces of the government confront dissident armed forces, i.e., where there is a rebellion by part of the government army or where the government’s armed forces fight against insurgents who are organized in armed groups, which is more often the case. This criterion illustrates the collective character of the confrontation; it can hardly consist of isolated individuals without co-ordination”.

structured system (grammar), as a vehicle for expressing and creating meaning (semantics), and as a contextually embedded use of language (pragmatics).<sup>33</sup>

As for the phrase “armed”, it calls into question Max Weber’s definition of the State at the end of the First World War: “that human community that within a given territory [...] claims for itself (successfully) the monopoly of the legitimate use of physical force”.<sup>34</sup> Based on this historical definition, it can therefore be stated that the concept of a “monopoly of violence” necessarily presupposes certain elements: firstly, the existence of a State that emanates laws, and secondly, the presence of an administration (i.e., of organs and offices under the State) that, within the framework of the laws, is legitimised to use force. This means that in modern societies, the legitimate use of violence is exclusively the responsibility of the State and that individual violence (of one citizen against another citizen) is, by definition, illegitimate. To repeat Weber’s words: “it is specific to the present time that all other associations or individuals are attributed the right to physical force only insofar as it is granted by the State; it is considered the sole source of the “right” to force”.<sup>35</sup> This definition disregards any assessment of merit on the use of the State’s prerogative, no matter how just or unjust, balanced or excessive, that may be.<sup>36</sup> However, it must be emphasised that the State has never been as dominant as it appeared in the conflicts of the great “powers of the 20th century; in the 21st century, the State monopoly of the use of force is increasingly reduced to a convenient fiction. [...] Relatively few of the sovereign States represented in the United Nations can truly claim a monopoly of force within their territorial borders”.<sup>37</sup> In fact, a clarification is necessary: the nation-state is a concept that originated in Europe after the Peace of Westphalia, consolidated during Romanticism and various historical events then slowly spread to the rest of the world, but in all countries.<sup>38</sup> In many Latin American or African countries, for example, there is not a legitimate monopoly of the use of force within one’s sovereign territory because those States have not dealt with the same vicissitudes as in countries where this has happened like “the statebuilding impetus of the total wars of the 20th century”.<sup>39</sup>

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<sup>33</sup> Jan Engberg, Anne Lise Kjaer, ‘Approaches to Language and the Law’, (2011) 46 Research Gate 7 7-10 DOI <10.7146/hjlc.v24i46.97359>

[https://www.researchgate.net/publication/292496311\\_Approaches\\_to\\_Language\\_and\\_the\\_Law\\_-\\_Some\\_Introductory\\_Notes](https://www.researchgate.net/publication/292496311_Approaches_to_Language_and_the_Law_-_Some_Introductory_Notes) accessed 31 July 2022. See e.g.: Peter Goodrich Peter, ‘The Role of Linguistics in Legal Analysis’ (1984) 47(5) The Modern Law Review 523-534 <http://www.jstor.org/stable/1096317>.

<sup>34</sup> Max Weber, ‘Weber: Political Writings’ (1994) Cambridge University Press 339.

<sup>35</sup> *Ibid* 311.

<sup>36</sup> Cf Williams (n 14) 4.

<sup>37</sup> Randall Schweller, ‘Maxwell’s Demon and the Golden Apple: Global Discord in the New Millennium’ (2014) Johns Hopkins Univ Pr 55 1-196.

<sup>38</sup> Farr Jason, ‘Point: The Westphalia Legacy and the Modern Nation-State’ (2005) 80 (3/4) International Social Science Review 156 156-159.

<sup>39</sup> Cf Williams (n 14).

Continuing with the phrase “non-State”, as mentioned earlier, it is necessary to go back to the birth of the Westphalian State when, at the end of the Thirty Years’ War in 1648, the Modern State was born. It was there that the prohibition of interference, i.e., respect for the territorial rights of each State signatory to the Peace of Westphalia, was conventionally born.<sup>40</sup> It is therefore possible to speak from a historical point of view of the affirmation of the principle of sovereignty, i.e., the supreme power of government, originated and not derived from higher bodies and independent of any other power.<sup>41</sup>

It is necessary to reflect on the appropriateness of the term “actor”. In this case, the terminology adopted is that of international law. Consequently, the analysis will focus on international subjectivity, otherwise known as international legal personality. International subjectivity identifies States as the basic subject, and international organizations as the entities. Legal personality is a correlation established between the historical reality of a subject on the one hand and the international order on the other. New States do not acquire their status through a formal act (so-called recognition), as the latter is a mere political act, but by the general principle of effectiveness. An entity becomes *ipso facto* a subject and therefore a recipient of the rules of the international legal system when it *de facto* affirms itself as a sovereign subject and, as such, effectively controls the activities of a human community settled on a territory (so-called internal sovereignty), and places itself in a position of independence concerning other international subjects (so-called external sovereignty).<sup>42</sup> International legal personality appears to disregard actors other than States or international organisations. Another interpretation that may be useful comes from an evolutionary theory of international relations where there is a definition of “actor” that does not consider international legal personality. This theory is provided by Professor Ryo Oshiba<sup>43</sup> and has been very well illustrated by Professor Hideki. The latter explains that

... an actor in international politics is defined as an entity that possesses the following three characteristics: the autonomous capacity to determine its own goals and interests; having the ability to mobilise human and material resources to achieve these goals and interests; and conducting actions significant enough to influence relations between States or the behaviour of other non-State actors in the global system.<sup>44</sup>

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<sup>40</sup> Scuccimarra Luca, ‘Proteggere l’Umanità. Sovranità e Diritti Umani dell’Epoca Globale’ (2016) il Mulino.

<sup>41</sup> Aubert Alberto and Simoncelli Paolo, ‘Storia moderna. Dalla formazione degli Stati nazionali alle egemonie internazionali’ (2012) Cacucci.

<sup>42</sup> Marchisio Sergio, ‘Corso di Diritto Internazionale’ (2013) 4 Giappichelli.

<sup>43</sup> Oshiba Ryo, ‘A Re-examination of Actors in International Relations’ (1998) 1998(119) International Relations 1-10.

<sup>44</sup> Kan Hideki, ‘actors in world politics’ (1999) 2 Government and Politics 1-18 3.

By including the four elements abovementioned in this definition and the historical and political analysis, it is possible to define an Armed non-State Actor as any entity with a minimum level of organisational coherence which, through its armed form, exercises *de facto* control over a given territory and the resident community. This is done by exploiting the institutional weakness of the State due to a situation created by the conflict, which is the cause, the consequence, and the method of existence of an ANSA itself. By existing, it represents a departure from the traditional system of Westphalian sovereignty by challenging States' legitimate monopoly of violence through the mobilisation of material and immaterial resources and by carrying out protracted and intense fighting over a part of the opposing State (or more) for political purposes that define its activity and aims.

Finally, it is important to remember that an ANSA does not necessarily only fight against the State, but can also fight against other ANSAs, as emerged in the Syrian case. This reflects the situation on the ground, for instance in Kobane, where, in 2014, ISIS attempted to capture the city where Kurdish forces (People's Protection Units and Women's Protection Units) were located.<sup>45</sup>

The inclusion of combat amongst ANSAs in the definition is also in line with the position of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic Case*.<sup>46</sup> The ICTY stated that an armed conflict exists whenever there is a resort to armed force between States, protracted armed conflict between governmental authorities and organized Armed Non-State Actors, or between such groups within a State.

## Part 2. The Shortcomings of International Humanitarian Law on ANSAs

The multiplication of ANSAs, their diverse nature and the different ways in which they can operate make it increasingly difficult for humanitarian organisations to operate safely and engage effectively with armed non-State actors on IHL compliance.

International criminal jurisprudence has tried to remedy these shortcomings of IHL with rulings that are among the most important and thorough legal foundations on the subject. As can

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<sup>45</sup> Miriam Karouny and Jonny Hogg, 'Islamic State defies air strikes by shelling Syrian Kurdish town' (27 September 2014) Reuters <https://www.reuters.com/article/us-mideast-crisis-idUSKCN0HM06920140927> accessed 5 March 2022.

<sup>46</sup> The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70 ICTY.

be seen from Bouchet-Saulnier,<sup>47</sup> International Criminal Tribunals have contended that while a certain level of organization is required,<sup>48</sup> “armed non-State actors do not need a hierarchical system of military organization similar to those of regular armed forces to be considered as such (Musema Case, ICTR-96-13-T, January 27 2000, para. 257)”.<sup>49</sup>

The ICTY Trial Chamber<sup>50</sup> found that:

an “organized armed group” must be characterized by:

1. The existence of a command structure and disciplinary rules and mechanisms within the group;
2. The existence of a headquarters; and
3. The fact that the group controls a certain territory.<sup>51</sup>

However, these judgments only accentuate the deficiencies of the IHL in this respect. Their teleological function is directed towards the determination of the individual criminal responsibility of the members of Armed non-State Actors towards war crimes, and not specifically to the application of obligations under *Additional Protocol II of 1977* (AP II).

The shortcomings of the Conventions and Protocols are due to several reasons. These legal instruments came into being at a time when the ANSAs of today did not exist, and the phenomenon was not so widespread.

The IHL applicable in Non-International Armed Conflict does not include a complete set of rules on how ANSAs should administer the territory they conquer and the populations in that territory, including violence.<sup>52</sup>

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<sup>47</sup> Bouchet-Saulnier Françoise, ‘The practical guide to humanitarian law’ (2013) Rowman & Littlefield Publishers 440.

<sup>48</sup> *Limaj et al. Case*, ICTY, IT-03-66-T, November 30 2005, para. 89.

<sup>49</sup> Cf Bouchet-Saulnier (n 47).

<sup>50</sup> *Haradinaj et al. Case*, ICTY, IT-04-84, April 3 2008, para. 60.

<sup>51</sup> Cf Bouchet-Saulnier (n 47). the source cites additional requirements found by the court in “*Haradinaj et al. Case*, ICTY, IT-04-84, April 3 2008, para. 60”. The list as provided by this contribution is not exhaustive because it is not of direct research interest, see below for the rest of the characteristics:

4. The ability of the group to gain access to weapons, other military equipment, recruits and military training;
5. Its ability to plan, coordinate and carry out military operations, including troop movements and logistics;
6. Its ability to define a unified military strategy and use military tactics and;
7. Its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.

<sup>52</sup> See e.g., Annyssa Bellal and Ezequiel Heffes, ‘Yes, I Do’: Binding Armed Non-State Actors to IHL and Human Rights Norms through Their Consent’ (2018) 12(1) Human Rights & International Legal Discourse 120-136 [https://www.geneva-academy.ch/joomlatools-files/docman-files/Bellal\\_Heffes\\_HRLD.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/Bellal_Heffes_HRLD.pdf).



Françoise Bouchet-Saulnier in “The Practical Guide to Humanitarian Law”<sup>53</sup> explains very well that the law of Non-International Armed Conflicts does not recognize either the status of combatants for members of non-State armed groups nor the rights attached to it, i.e., prisoner of war status. This has led to a legal unbalance unfavourable to the imposition of reciprocal obligations under humanitarian law. Bouchet-Saulnier emphasizes that:

... under IHL, members of armed non-State actors paradoxically belong to the category of civilians. But they lose most of the protection attached to this status, at least the protection against direct attack, while they directly participate in hostilities. However, the non-recognition of the combatant status does not release Armed non-State Actors from respecting IHL as parties to the conflict. Moreover, this does not deprive them of certain protections provided by IHL for persons hors de combat.<sup>54</sup>

As Sassòli explains, when States developed IHL rules for NIACs, they rejected “the horrible idea” of a non-State party taking control of part of a State’s territory “simply by ignoring it”.<sup>55</sup> In the Introductory Note of the *Additional Protocol II* emerges the following:

... the fear that the *Protocol* might affect State sovereignty, prevent governments from effectively maintaining law and order within their borders and be invoked to justify outside intervention led to the decision of the Diplomatic Conference at its fourth session to shorten and simplify the *Protocol*. Instead of the 47 articles proposed by the ICRC, the Conference adopted only 28.<sup>56</sup>

The result is that, to date, the AP II is not only the least ratified, but also very meagre and less substantial when compared to the four *Geneva Conventions* and the *Additional Protocol I*. There has been reluctance on the part of States to regulate an issue they wanted to manage independently, thus emptying *Additional Protocol II* of its potential.

As far as IHL is concerned, as seen above, the most explicit reference to the categorization of ANSAs is contained in Article 1 of the AP II on NIAC, which develops and supplements Article 3, common to the *Geneva Conventions* of 12 August 1949, without modifying its existing conditions of application. The first paragraph of Article 1 of the AP II mentions “dissident armed forces or

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<sup>53</sup> Cf Bouchet-Saulnier (n 47) 441.

<sup>54</sup> *Ibid.*

<sup>55</sup> Marco Sassòli, ‘L’administration d’un territoire par un groupe armé, peut-elle être régie par le droit?’ (2019) Geneva 269.

<sup>56</sup> Introductory Note of 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), 8 June 1977.

other organised armed groups”. The conditions to be deemed parties to the conflict are: “i) be under a responsible command, ii) exercise such control over a part of its territory as to iii) enable them to carry out sustained and concerted military operations and to implement this Protocol (as said in Article 1.1)”.<sup>57</sup>

Those criteria aim to distinguish armed conflicts from situations of internal disturbances or tensions in which confrontations are not organised, structured, or planned by one or more identifiable commands. They exclude situations of disorder, isolated acts of violence, protests and individual acts of terrorism that do not constitute an armed conflict under International Humanitarian Law. This does not apply to all cases of violence but only to non-international armed conflicts, i.e., those that meet the requirements of the *Additional Protocol II* to the *Geneva Conventions of 1949* and reach a certain level of intensity and possibly duration.

Despite the difficulties in correctly identifying armed conflicts under IHL, there is no authority designated to officially establish when an armed conflict takes place. The closest thing is the United Nations’ Security Council and General Assembly that can call for the application of IHL in certain conflict situations, therefore implying the existence of such armed conflict.

### Part 3. The Legal Adaptation

To address these shortcomings, Common Article 3 of the *Geneva Conventions* was created, which applies to NIAC and establishes mandatory obligations and minimum guarantees for the parties involved regardless of their nature, to encourage the implementation of the provisions of humanitarian law through special agreements. According to the commentary of 1987, *Additional Protocol II* complements the obligations and guarantees of armed non-State actors as parties to non-international armed conflicts.

In “The Practical Guide to Humanitarian Law” of Medecins Sans Frontiers under the heading “Special Agreement” it is possible to understand that:

... [t]he effective use of special agreements between parties to the conflicts was brought into focus in the judgment pronounced by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic Case* (Decision on the Defense Motion for Interlocutory

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<sup>57</sup> Cf Bouchet-Saulnier (n 47) 439.

Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, §73). In this judgment, the Tribunal noted that the belligerents signed memorandums of understanding in 1991 to apply international humanitarian law applicable to international armed conflicts, and then international humanitarian law applicable to non-international armed conflicts when the Federal Republic of Yugoslavia was no longer officially part to the conflict.<sup>58</sup>

Bringing the parties legally closer during the conflict can also be achieved through alternative practices that are not the sole responsibility of the State, such as foreign policy. This is the case of second-track diplomacy and humanitarian diplomacy, which should be promoted as much as possible and that the research paper will analyse below.

Although there is no universally accepted definition for the doctrine,<sup>59</sup> the second-track diplomacy often called “parallel diplomacy” or “backchannel diplomacy” aims to reduce or resolve conflicts, within one country or between countries, by lowering existing tension and/or fear through better communication and a better understanding of the other’s point of view.<sup>60</sup> Through this approach, the main actor is not the State but the figures considered “neutral”, such as civil society and the academic world. Parallel diplomacy is a type of dialogue that allows, on the one hand, avoiding formal recognition of the ANSA by States because it is carried out unofficially but “parallel” to traditional diplomatic channels; on the other hand, it also facilitates the propensity for dialogue of the ANSA themselves which seem more open, at least in the first instance, to interact with non-governmental bodies. This approach is therefore functional to avoid legal recognition by States, while maintaining an indirect channel of dialogue that can be “institutionalized” at a later stage and in a situation of less tension. In the case of the *1993 Oslo Accords* between Israel and the Palestine Liberation Organization (PLO), for example, the contact

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<sup>58</sup> Medecins Sans Frontieres, ‘The Practical Guide to Humanitarian Law’ (under the heading “Special Agreement”) (2013) <<https://guide-humanitarian-law.org/content/article/3/special-agreement/>> accessed 9 September 2022.

<sup>59</sup> This form of diplomacy sometimes diverges in manners, taking on different names. Generally, the most frequent term is “second track diplomacy” and first appeared in an article published in Foreign Policy magazine by Joseph V. Montville only in 1981, testifying to its innovativeness. McDonald ideally argues that there are instead five tracks to parallel diplomacy and speaks of “multitrack diplomacy”. Nevertheless, one can trace the birth of this form of diplomacy to the end of World War II with the aim of dampening the climate of mutual scepticism that persisted in the Old Continent due to the conflict. In 1946, a process of parallel diplomacy was initiated within the framework of the Caux-sur-Montreux meetings in Switzerland. Over a period of five years, more than 3,000 Germans and almost 2,000 Frenchmen took part in forums whose aim was to “rebuild war-torn Europe” by working on individual change, i.e. in this case recognition and forgiveness from the past. Participants came from different sectors of society: politicians, trade unionists, industrialists, professors, with, in smaller numbers, a few journalists and some clergymen. The creation on this occasion of strong bonds of trust between German and French personalities made it possible to remove obstacles between the two countries and helped to make the Schuman Declaration possible.

<sup>60</sup> See e.g., McDonald John, ‘Further Exploration of Track Two Diplomacy’ (1991) *Timing the De-Escalation of International Conflicts* 201-220; Montville Joseph, ‘Track Two Diplomacy: The Work of Healing History’ (2006) *The Whitehead Journal of Diplomacy and International Relations* 20; McDonald John and Bendahmane Diane and Center for the Study of Foreign Affairs (U.S.), ‘Conflict resolution: track two diplomacy’ (1987) Washington D.C: Foreign Service Institute U.S. Dept. of State 1.

began as an unofficial initiative by a Norwegian scholar, culminating in a real diplomatic meeting, finalized with a handshake on the lawn of the White House between Israeli Prime Minister Yitzhak Rabin and Palestine Liberation Organization leader Yasser Arafat.<sup>61</sup>

Another technique is humanitarian diplomacy, which has been developed over the last twenty years. It can be considered “a foreign policy action aimed at protecting the interests of the most vulnerable (both in contexts of conflict and in times of peace), respecting the principles of humanity, impartiality, neutrality and independence”.<sup>62</sup> Unlike parallel diplomacy, which has the promotion of peace as its primary objective, the role of humanitarian diplomacy is to generate an appropriate implementation framework for humanitarian programs while building adequate partnerships to achieve its goals, foster the dissemination of humanitarian principles, and to prevent future conflicts. To serve as an illustration, the International Committee of the Red Cross, which is recognised as a neutral intermediary and therefore respected in its role in peacebuilding and in promoting the use of instruments such as peace and reconciliation agreements, is certainly the most relevant figure in the implementation of humanitarian diplomacy.<sup>63</sup>

Another practitioner of humanitarian diplomacy is the *Geneva Call*; in particular, In March 2000, it launched the *Deed of Commitment*<sup>64</sup> as a parallel instrument for armed non-State actors to commit to the principles of humanitarian law enshrined in the *Mine Ban Treaty*.<sup>65</sup> It appears from their Annual Report 2013 that:

*Geneva Call* is currently focused on protecting children from the effects of armed conflict; prohibiting sexual violence in armed conflict; and working towards the elimination of gender discrimination. Further, it responds to ANSAs requests to help build their knowledge of

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<sup>61</sup> Montville Joseph, ‘Track Two Diplomacy: The Work of Healing History’ (2009) 7(2) *The Whitehead Journal of Diplomacy and International Relations* 19-20.

<sup>62</sup> De Lauri Antonio, ‘The humanitarian diplomacy of International Committee of Red Cross’ (2021) 3 CMI BRIEF <https://www.cmi.no/publications/7746-la-diplomazia-umanitaria> accessed 13 April 2022.

<sup>63</sup> Churchill Ewumbue-Monono, ‘Respect for international humanitarian law by armed non-state actors in Africa’ (2006) 88(864) *International Review of the Red Cross* 905-924 [https://www.icrc.org/en/doc/assets/files/other/irrc\\_864\\_ewumbue-monono.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_864_ewumbue-monono.pdf) accessed 17 February 2022.

<sup>64</sup> “Deeds of Commitment” are standardized documents on various armed conflict-related issues prepared by the NGO Geneva Call and signed by various armed non-state actors to increase these groups’ respect for IHL. The Deeds are unilateral declarations by the armed groups whereby they commit to renounce certain means and methods of warfare or accept certain positive obligations mirrored in IHL. Geneva Call, which engages with armed groups to help them establish self-regulation mechanisms, also reserves the right to publish its findings regarding the respect or lack thereof by its interlocutors.

<sup>65</sup> Cf Ewumbue-Monono (n 63).

International Humanitarian Law and International Human Right Law (IHRL) as well as the capacities to implement them.<sup>66</sup>

Signatory ANSAs agree that the *Geneva Call* monitors and verifies their compliance. In their online Directory of Armed Non-State Actor Humanitarian Commitments<sup>67</sup> turns out that hundreds of armed non-State actors have become parties to “these Commitments in different forms: unilateral declarations or statements, internal rules and regulations, and agreements with governments, inter-governmental and humanitarian organizations”.<sup>68</sup> Thus, “the *Geneva Call* aims to build a “baseline” of ANSA policies and views on issues related to IHL and IHRL”.<sup>69</sup> This provision, therefore, aims to encourage parties on a non-international armed conflict to agree to a more comprehensive set of rules to protect those who are not or no longer participating in the hostilities as well as to better implement existing obligations.

These are instruments of accountability that reassure the civilian population under the control of an armed non-State actor and the international community at large. As a matter of fact, I believe that first, the international community should increase their adoption by promoting their practice and, secondly, find a way to enforce such acts.

Our idea is to turn special agreements based on the *Deed of Commitments*, regardless of their intensity, compulsory. To date, there is no record of accepted practices for establishing a dialogue with ANSAs. Against this background, this research paper suggests the creation of a permanent working table including the *Geneva Call*, the ICRC, and representatives of the ANSAs that, for a certain number of years, have shown commitment to the process. Regional organisations will also play a role in the working table since the dynamics of ANSAs have strongly impacted the political choices of several neighbouring States, with the regional groups being almost always actively

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<sup>66</sup> Geneva Call, ‘Annual Report 2013: Protecting Civilians in Armed Conflict’ (2014) 8 <[https://www.genevacall.org/wp-content/uploads/dlm\\_uploads/2014/06/Annual-Report-2013-web.pdf](https://www.genevacall.org/wp-content/uploads/dlm_uploads/2014/06/Annual-Report-2013-web.pdf)> accessed 9 September 2022.

<sup>67</sup> To date there are more than a thousand of Deed of Commitment proposed by Geneva Call and signed by armed non state actors in all the continents. They concern different thematic: children in armed conflict; civilians; conduct of hostilities; displaced persons; emblem; fundamental guarantees; general principles of international law; Geneva Conventions of 1949; protection of health care; human rights; humanitarian assistance; humanitarian mine action; implementation; international humanitarian law; landmines; persons hors de combat; prisoner of war; protected persons; protected persons and objects; protected zones; right to education; rules on recruitment; sexual crimes; sexual violence; weapons; women. An example of a Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict is available here: [https://www.genevacall.org/wp-content/uploads/dlm\\_uploads/2013/12/DoC-Protecting-children-in-armed-conflict.pdf](https://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Protecting-children-in-armed-conflict.pdf).

<sup>68</sup> Geneva Call, ‘Their Words: Directory of Armed Non-State Actor Humanitarian Commitments’ <<http://theirwords.org/pages/home>> accessed 9 September 2022.

<sup>69</sup> *Ibid.*

involved within the State where the armed conflict is taking place.<sup>70</sup> Regional organisations are, therefore, a key player in enabling the dialogue to succeed in reaching an agreement given the existing regional interests.

The time criterion would testify to the potential of these ANSAs and, at the same time, the urgency of changing their status quo. Respect for IHL on the part of the ANSAs could be a *sine qua non* condition that States can request to sit at a working table with the ANSAs.

The document containing the subject of the special agreements, pre-drafted on the model of the *Deed of Commitment*, would be ready for signature and would concern compliance with the *Geneva Conventions* and its *Protocols*. In order not to be excluded from the international community, the Armed Non-State Actor would have to sign and deposit these documents at the archive of the permanent table. Only after a certain number of years have passed since the signing of the documents and the content of these documents has been respected, could the actual dialogue at the permanent table take place. During this interim period, the ANSAs would have to endeavour to establish an external service office with which there would be continuous contact with civil society and the ICRC through the two types of diplomacy mentioned above to better reinforce, guarantee, and monitor respect for humanitarian and human rights.

If the Armed Non-State Actor can exercise stable control over a *de facto* territory, it must ensure certain functions that were previously the responsibility of the State, such as, for example, those concerning the vaccination of the population. The civilian population in such a chaotic situation often sees its human rights as fragile, even though they should always be guaranteed, in times of war and peace. State counter-terrorism measures must, therefore, not hinder the enforcement of human rights in a territory controlled by the ANSA and must comply with IHL. States have to grant combatant status to members of armed non-State actors in humanitarian law instruments. Nowadays, they remain under the jurisdiction of the domestic law of the State against which they are fighting, which considers all of them criminals.<sup>71</sup> There must be a clear distinction

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<sup>70</sup> In the Syrian case, States such as Kuwait, Qatar and Saudi Arabia, which share divergent interpretations of Sunni Islam, have become the guarantors against Shia-affiliated ANSAs, such as Hezbollah and Iran, which instead support the Syrian regime. Thus, the externalisation of these religious differences among the member states of the Gulf Cooperation Council, in particular Qatar and Saudi Arabia, led to a breeding ground for the Muslim Brotherhood and other Islamic extremist groups in Syria, whose rift led to the proclamation of the Islamic State in the second half of 2014. The involvement of the Arab League in this case is therefore of utmost importance in order to reach an agreement given the existing regional interests.

<sup>71</sup> Cf Bouchet-Saulnier (n 47).



between those who participate only sporadically in hostilities (and therefore lack the protections granted to combatants in IHL) and those who ought to be so entitled, to reduce the ambiguity that currently exists between States and ANSAs.

This could lead to ANSAs having to cooperate and to respect their obligations in order to protect their reputation and legitimacy. Furthermore, under the aegis of the ICRC, civil society or NGOs carrying out parallel diplomacy, an environment without distrust between States and ANSA could be created. This initiative could ensure, at least in the first phase, the respect for human rights.

This would provide instruments that would make it possible to overcome the stagnant phases within a NIAC, and at the same time to have the ANSAs increasingly included in the international community, although embedded within a system more easily acceptable to States. At first, as experienced today, they would only be objects, while at a later stage, they could become subjects with a special status, as happened with the figure of permanent observer member for national liberation movements.<sup>72</sup>

## Conclusion

The bombings, sanctions, and a zero-contact policy affect the civilian population and carry out harmful consequences that do not seem to achieve the desired results. Therefore, it is necessary to promote inclusive political processes involving both increasingly weakened central States and rising armed non-State actors with “internal legitimacy”, relying on concrete popular support and real power on the ground. While international organizations and academics have addressed this issue, States should become more involved in the debate. ANSAs are now no longer negligible realities.

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<sup>72</sup> National liberation movements enjoy a special status at the UN as exponential bodies of peoples aspiring to self-determination. Resolution 3280 (29) of 10 December 1974 granted observer status to all those recognised by the African Union (AU), while Resolution 35/167 of 15 December 1980 recognised that granting observer status to national liberation movements in the organisations of the UN system constitutes a contribution to international peace and cooperation. In this way, a form of institutional legitimisation of the movement is realised, so that the right to self-determination can also be exercised through participation in the work of the UN.

These very ambitious aims are to improve the quality of, if not save, civilians' lives in the spirit of Solferino<sup>73</sup> and all IHL. This research paper has taken into account the daily plight of millions of people in ANSA-controlled areas of which very little is known. It sought to provide concrete solutions to arrive at a more inclusive framework for these 'invisibles'. The excellent humanitarian work that has been done so far must not let us believe that the way is unidirectional, it can also regress the moment the seven humanitarian principles acquired at Solferino are lost: humanity, impartiality, neutrality, independence, voluntary service, unity, and universality. Legal difficulty cannot be a justification when the will has existed for over 160 years, it just needs to be given new impetus by finding new solutions, as this paper has tried to do. What arises from this research paper is that numerous actions can and must be carried out by armed non-state actors in order to respect IHL. Without forgetting that it is on the States to put ANSAs in the condition to maintain an active and effective dialogue.

At this point, the question of the State-centric model remains: should we protect the civilian population with ANSAs or from ANSAs?

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<sup>73</sup> The Battle of Solferino was fought on 24 June 1859 in the context of the Second Italian War of Independence. Henry Dunant, who was there on business, was shocked by the cruelty of this conflict and decided to help the war wounded with local women without making any distinction between the various sides. This battle led Dunant to create the International Committee of the Red Cross with the same principles that had motivated him to serve the war wounded. This international principle based on neutrality and impartiality was among the pillars of the organisation that years later led to the Geneva Conventions.

ICRC, 'Solferino and the International Committee of the Red Cross' (2010) <<https://www.icrc.org/en/doc/resources/documents/feature/2010/solferino-feature-240609.htm>> accessed 9 September 2022.