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The International Legal Personality of Non-State Armed Groups

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BIOGRAPHY

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In recent years, the number of inter-state conflicts has declined, and still, the lives of millions are threatened by violence. This is due to the increasing number of intra-state conflicts between the State and one or more Non-State Armed Groups (Buckley, 2012). In 2007, there were over 261 active Non-State Armed Groups (NSAGs). Conflicts that involve such NSAGs often involve excessive violations of human rights law (HRL) and international humanitarian law (IHL).

However, these two bodies of law remain state-centric and there is no consensus on how the international system can properly respond to conflicts of a non-international character. Additionally, it is not clear if and how NSAGs are considered to be actors on the international plane. Underlying this ambiguous

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status is the concept of international legal personality (ILP). Traditionally, only states had ILP, which can simply be summarized as the capacity to act on the international plane. As the international system is developing rapidly and other Non-State-Actors (NSAs) start to appear, this traditional approach seems no longer appropriate. The International Court of Justice (ICJ) states in Reparations for Injuries Suffered in the Service of the United Nations:

> Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States (Reparations for Injuries, 1949, p. 178)

Not only has the definition of actors in the field expanded to include intergovernmental organizations like the UN, it has also allowed for certain Non-State Actors (NSAs) to obtain a degree of legal personality. Indeed, some NSAGs have become signatories to a

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treaty or a Deed of Commitment. The fact that some of these groups have now signed these documents shows that they acquired a limited form of ILP, which brings new problems to light. For instance, there are no internationally accepted criteria by which ILP can be granted (Portmann, 2010). Therefore, this study will attempt to answer the following question: are there criteria that several armed groups possess that relate to the likelihood that they will get limited ILP? Although it is often thought that ILP is arbitrarily granted to NSAGs, there are in fact some criteria that make it more likely that they will get this capacity.

This study is divided into four distinct parts. Part I of this study outlines the theoretical background related to this question, Part II will be centered around four case studies of NSAGs that are signatories to one or more international treaties to find common characteristics that may predict the likelihood that they will get ILP, Part III will assess the case-studies and explain the difference in legal status, and Part IV will consist of concluding remarks and recommendations for further research.

Theoretical Background of International Legal Personality

Theory and History of International Legal Personality Theory.

For centuries, it was easy to determine who were the actors in international law. States were the entities international law dealt with, and they were the only ones to have ILP (Hickey, 1997). Indeed, ILP was even regarded as synonymous with statehood (Crawford, 2006). To understand ILP, the personality of states must be addressed. Statehood is identified by several criteria laid down in the Montevideo Convention on the Rights and Duties of States. Article 1 states that: "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states" (Montevideo Convention, Art.1, 1934). These criteria can be grouped into two categories of requirements: the capacity requirement and the independence requirement (Murray, 2016). The capacity requirement shows that there must be a central structure capable of exercising control over a population in a specific territory. This shows the capacity of a state to adhere to its rights and obligations under international law (Murray, 2016). The second requirement is the independence requirement, which holds that a state should not be subject to another, superior, authority (other than international law itself). This requirement ensures that a state is a distinct actor capable of having rights and duties (Murray, 2016).

The two theories in which a state is recognized as an entity that has legal status are the declaratory and constitutive approaches. According to the declarative theory, an entity has a legal status based on the fact that it exists (Crawford, 2006). In opposition to this is the constitutive theory. This theory assumes that the rights and duties that come with statehood are derived from recognition of other states (Crawford, 2006). The capacity to bear rights and duties is an important aspect of ILP. However, this concept entails much more than just these two aspects and remains abstract.

The concept is easiest to explain by comparing it to 'municipal legal personality'. This analogy may make the concept and the role it plays in international law clearer. What must be noted is that this is not a perfect fit, but it is still a helpful comparison. Generally, a legal system has to determine to whom to give rights and duties and whose actions will have legal consequences (Portmann, 2010). Municipal law therefore includes a law of persons who have rights, duties and whose actions have legal consequences. In the 19th century, this law of persons was expanded to include associations and groups of a more corporate nature (Portmann, 2010). They were seen as distinct legal entities from the persons of whom they were composed. By now, individuals and different forms of corporations are seen as distinct legal entities in municipal private law. As legal persons, these different entities have rights and duties and can, in case they violate the law, be penalized in accordance to the legal system (Portmann, 2010). International law also had to decide which entities could have rights, bear duties and act in legally relevant ways. These capacities are traditionally subsumed in the term 'legal personality', which in this case would become ILP.

International law makes use of the municipal concept, but there are two main differences that distinguish the municipal and the international personality. The first difference is that in international law, legal personality refers not only to having rights, duties and capacities under the law, but also to the competency to create the law. This peculiarity has occurred in the international system due to the fact that there is no centralized legislative body that determines the rules. In municipal legal systems, this capacity to create the law is vested in the hands of a centralized legislature and therefore not in the hands of legal persons (Portmann, 2010). This is not the case in international law as it is commonly accepted that this law derives from coordination between states based on

their own will. As states are still seen as the main actors on the international plane and thus the main legal persons of the system, it is accepted that their ILP includes the capacity to create law.

The second difference is that in international law, there is no such thing as a law of persons that discusses all the different entities that can have this legal personality and gives a clear explanation of what ILP actually is (Portmann, 2010). The closest the international community has come to establishing a law of persons is in an ICJ opinion on *Reparations for Injuries Suffered in the Service of the United Nations*. This opinion goes into the reasoning on ILP for the UN as an intergovernmental organization, "...It is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims" (Reparations for Injuries, 1949, 179). This statement is commonly referred to in matters regarding the ILP of Non-State Actors. However, the statement does not clear up the question of what actors have ILP, nor does it establish criteria according to which personality is acquired or attributed (Portmann, 2010). As a result, international personality is still an abstract concept, and many different positions are present on the aforementioned questions in the international community. But it is still seen as a very relevant concept in international law due to the fact that it helps give a voice to the actors in the international legal system. Those actors that have legal personality can claim protection directly from international law and are subjects to the obligations of the legal system. Those who are excluded do not directly exist for the international legal order (Portmann, 2010).

Historical development of the International System.

Traditionally, those included in the international system were the states and all other entities were excluded. But this is no longer the case, as the concept of ILP, and therefore also the concept of an 'actor' in international law, has developed over time. This evolution started when bilateral diplomatic relations were no longer effective, and the states decided to arrange multi-state conferences. One of the main problems with these conferences was state sovereignty. This meant that decisions could only be taken by unanimity and by means of complete equality in voting to make sure one group of states could not overrule the others (Hickey, 1997). As a result, no practical, timely decisions could be made for long-term pressing problems in the world. To cope with matters like these, permanent international organizations or structures needed to be established. The unions that were put in place to fill this gap were mostly non-political, functional unions that were established by means of multilateral treaties, for instance the postal, telegraphic and railway unions, and the sugar union (Hickey, 1997). These unions had some form of ILP, as for instance the sugar union was able to push for changes in municipal law through a majority vote by means of a permanent commission (Hickey, 1997). After the two World Wars, several states also started working together on a more political level to address the international political problems these two wars had brought forth (Hickey, 1997). This cooperation first resulted in the establishment of the League of Nations in 1919 by the Treaty of Versailles. Its main goals: to maintain peace, prevent wars and provide international arbitration (The Covenant of the League of Nations, 1919; Treaty of Versailles, 1919). When this entity emerged, the opinion that this could possibly also have ILP gained footing (Waschefort, 2011). This entity was later on recognized as having ILP. This was done by deriving the ILP from all the 'civilized' states that together formed the League of Nations. The League was said to be sui generis in this context, as it was the only non-state entity that held ILP derived from the states themselves (Oppenheim, 1920). But this intergovernmental organization failed in its

primary purpose in the 1930s, as aggression from Germany and the other Axis powers occurred and led to World War II. In 1946, the League was disbanded with its successor, the UN, already in place (Charter of the United Nations, 1945). The UN's main objectives are similar to those of its predecessor: ensuring peace and security and to achieve international cooperation (Charter of the United Nations, 1945).The successor to the League of Nations was also granted ILP, but only in 1949, when an ICJ judgement on this topic was reached:

> Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state. Still less is it saying that it is a 'super-State', whatever that expression might mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims (ICJ, 1949, 179).

This judgement settled the question of if the Organization is an international person. But one unresolved issue still remains: does the United Nations (UN) have inherent legal capacity to act beyond what is explicitly conferred to it by its founding treaties? If this inherent capacity exists, then the international organization "might have to be viewed as a dynamic institution, evolving to meet changing needs and circumstances and, as time goes by, becoming further and further removed from its treaty base" (Bowett,1982). Regardless of the answer to this unresolved question, the ultimate power to decide the fate of an international organization is still vested in the states that founded it (Hickey, 1997).

Not only has the definition of actors in the international field expanded to allow in intergovernmental organizations like the UN, but it has also allowed for certain NSAs to obtain a degree of legal personality. It is increasingly acknowledged that these NSAs have an influence on the workings of international relations. So the questions that logically follows is: are these NSAs bound by customary international law, do they have rights, bear duties (and if so, can they be punished for violations thereof)? This study will adhere to the actor-focused position that rejects the state-focused legal system and states that "… effective actors of international relations are relevant for the international legal system. The specific rights and duties held by particular actors are determined in an international decision-making process in which the actors themselves participate depending on their effective power" (Portmann, 2010, 14). In accordance with this statement, NSAs have rights and bear duties, as they are bound by, and subjected to, customary international law.

While NSAs can be bound to international law, it remains vague what an NSA actually is. For this study, the following definition will be used: "…any entity that is not actually a state, often used to refer to armed groups, terrorists, civil society, religious groups, or corporations; the concept is occasionally used to encompass intergovernmental organizations" (Clapham, 2012, 1). Many different types of NSAs exist. Non-Governmental Organizations (NGOs), are international actors that are made up not of states, but of persons from two or more different countries, who have joined forces in order to try to influence international politics by lobbying and promoting their cause. Their cause can range from promoting gender equality to lobbying for the rights of indigenous peoples (Clarke, 1998). Armed Non-State Actors (ANSAs) are of a different nature than NGOs, as their objectives are less peaceful. ANSAs are defined as "any armed group, distinct from and not operating under the control of the State or States in which it

carries out military operations, and which has political, religious, or military objectives" (Bellal & Casey-Maslen, 2011, p. 176). Usually, this definition does not include gangs or private military companies. The conflicts these ANSAs take part in are usually against the state, or against other ANSAs in a failed state (Bellal & Casey-Maslen, 2011).

The most relevant NSA in this research is the Non-State Armed Group (NSAG). This type of NSA is defined as "...groups that do not pursue a private agenda but rather political and/or economic objectives. It includes armed groups, rebel groups, liberation movements and de facto governments; it excludes criminal organizations (mafiosi, and drug cartels), mercenaries, private security companies and terrorists" (Hofmann, 2006, p. 396). The classification of an NSAG is strongly influenced by politics. To one, a NSAG fights for liberation, but to the other, the NSAG is nothing more than a terrorist group. This is problematic, and as noted by the ICRC:

> A recent challenge for IHL has been the tendency of States to label as 'terrorist' all acts of warfare committed by non-State armed groups against them, especially in non-international armed conflicts. While armed conflict and acts of terrorism are different forms of violence governed by different bodies of law, they have come to be perceived as almost synonymous due to constant conflation in the public domain (ICRC, 2013, para 7).

The fact that a state can label a group as terrorist is a problem of definition. Even though there is great concern about terrorism, notwithstanding the fact that terrorism has been considered an international problem since the 1920's, there is no universally accepted definition of terrorism on the international plane (Young, 2006). Generally, a state is hesitant to recognize an armed conflict under international humanitarian law in their territory, as this would mean that the international community would become involved in the conflict (Yildiz, 2010). Classifying the group as terrorists or rebels gives the state the opportunity to deal with them through domestic law enforcement (Yildiz, 2010). For instance, in Dutch law, article 97a deals with terrorist attacks, and states that they are punishable with a lifelong prison sentence (art. 97a, WvS). Dealing with terrorism on a national scale like the Dutch do gives the state the power to judge the attackers according to domestic standards, not international ones. But this leads to an overlap between military and criminal approaches to such attacks, and a massive amount of legal problems. A struggle over the proportionality of response, targeted killings and foreign military intervention started to occur more often (Yildiz, 2010). Not only does this complicate matters, it is also the case that international law is not equipped to deal with terrorism. Terrorism was even excluded from the jurisdiction of the International Criminal Court due to the fact that no consensus could be reached on the definition of the crime (Rome Statute, 1998, 2187 U.N.T.S. 90). Instead of creating a harmonious international approach to terrorism, the community has opted for creating a web of overlapping national criminal jurisdictions that deal with this matter (Young, 2006). This gap in international law gives the states the liberty to deal with groups they characterize as terrorists. If a group would be characterized as a NSAG, then international law becomes applicable. Another problem with the recognition of a NSAG occurs when another state would engage with the NSAG in question. This would enhance the status of the group and perhaps even grant it a form of legitimacy for their cause or control over a territory (Hofmann, 2006). From an outsider perspective, this could be interpreted as condoning the 'terrorist' group in the territory of a legitimate state (Hoffman, 2006). Another difficulty in the definition used before is that it resembles the definition of the more common term ANSA. This is due to the fact that there is no universally accepted

definition of an ANSA, and no universally accepted definition of a NSAG. These two concepts refer to approximately the same sort of entity. However, for the sake of clarity, the term NSAG will be used herein. This study is concerned with NSAGs that do not act on behalf of a state but rather often contrary to the state system.

Applicability of International Law to NSAGs

One of the underlying questions of this study is: how does international law apply to NSAGs? If international law would be approached from the traditional point of view, one could see that it simply does not apply to other actors than states (Murray, 2016). Non-State Actors (NSAs) that appear in the system therefore do not fall under the international legal system, but are subjected to their states' domestic jurisdiction. This principle does not work in practice as the NSA is there to go against the state and the state usually lacks capacity to enforce the law (Murray, 2016). This ultimately results in no legal system dealing with these actors. This is deemed problematic as these actors are not restricted in their actions or held accountable for their actions against a civilian population by any legal system. If a group is not even held accountable by any legal system, theoretically, they could do whatever they like without having to face consequences.

However, there is a small exception to this legal lacuna. Armed groups that are party to a non-international armed conflict (NIAC) are bound by the customary international law of armed conflict (Murray, 2016). The law that binds them are Common Article III (CA III) of the Geneva Convention of 1949 and, if applicable, Additional Protocol I (AP I) and II (AP II) to these conventions (Bellal & Casey-Maslen, 2011; Murray, 2016). These articles were first considered to be part of customary international law by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Prosecutor v. Tadić, as it was stated that the core of AP II belongs to this field of international law (Prosecutor v. Tadić, 1999, Case No. IT-94-1). International customary law is, as defined in Article 38 (1)(b) of the Statute of the ICJ, "evidence of a general practice accepted as law." CA III is now considered to be a part of customary law, and in *Nicaragua v. United States of America*, the ICJ found that CA III was applicable to the NSAG (the Contras) that fought the government: "The conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the Contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character" (Nicaragua, 1986, p. 219).

But the protocols and common articles only enter into force when two specific requirements are fulfilled. 1.) there must be an armed conflict as defined in International Humanitarian law and 2.) the NSAG must be sufficiently structured (Bellal & Casey-Maslen, 2011). Geneva Convention I art. 2 states that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" (Geneva Convention I art. 2, 1949). In this context, a 'high contracting party' simply means a state. What can be seen in this article is, again, the state-centric approach to international law. But it has been recognized that there are other types of conflicts than the aforementioned International Armed Conflicts (IACs). The conflicts dealt with in this study are NIACs. In CA III and AP I & II, it is determined what falls in the scope of a NIAC. CA III applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties" (Geneva Convention III art. 3, 1949).

An armed conflict as meant in this article was distinguished from less serious cases of violence, such as riots or internal tension by means of AP II (ICRC, 2008). In this AP, two criteria were used: 1) the hostilities must have

a certain intensity (the Prosecutor v. Fatmir Limaj, 2005, Case No. IT-03- 66-T). This can mean that there is either violence of a collective nature, or that the use of police forces is no longer sufficient and military force has to be used against the belligerents; and 2) these NSAGs must be considered as 'parties to the conflict' and thus have sufficiently organized armed forces (ICRC, 2008). Before 2008, it was unclear what degree of organization an NSAG has to have in order to be subject to these articles. This issue was resolved in the ICTY judgement in *Prosecutor vs Haradinaj et al.*, that stated that

> The existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accord (Haradinaj, 2008, Case No. IT-04-84-T).

When the NSAG has a sufficient degree of organization as per the *Prosecutor vs Haradinaj et al.* criteria, AP II and CA III apply. These articles form the basis of one of the two branches of IHL. The Geneva Conventions and its APs belong to the specific strand of IHL that deals with the conduct of the armed forces when hostilities take place. This is referred to as 'Jus in Bello' (Stahn, 2006). The second branch is the law that deals with the recourse to the use of force, also referred to as 'Jus ad Bellum' (Stahn, 2006).

The second question that logically follows is: what is the legal basis underpinning the application of international law to NSAGs? It is relevant to know what legal basis underpins the applicability to NSAGs and how this functions. It is necessary to understand this, not just for the sake of legal clarity but also as a way to regulate the behavior of NSAs, and most importantly, NSAGs (Murray, 2016).

Many different theories exist that try to answer this question. One of the theories has already been hinted at before when CA III and AP I & II were discussed. As mentioned before, these articles are part of customary international law. It has been argued that NSAGs are bound to the international laws that have reached the status of custom, even without the group's consent to be bound (Murray, 2016). One of the problems with this theory is that custom is referred to as a general practice accepted by law that is based on state practice and the corresponding views of these States that they are bound to that specific law (*Opinio Juris*). In this definition, the traditional state-centric system becomes clear, and as a consequence, it is argued that this body of law only applies to states (Murray, 2016). The moment customary international law applies to an NSAG, it means that this group possesses ILP (Murray, 2016).

This notion is in accordance with the main approach that will be taken in this research, the Dynamic State Approach. "State dynamists, however, would continue to insist that new international political identities to claim ILP must be able to point to some international law treaty, custom, or general principle of law." (Hickey, 1997, p. 17). Other theories regarding the source of legal personality are the legal traditionalist and factual realist approach. The legal traditionalist approach considers states to be the main actors that have authority over all NSAs. This approach places ILP in the hands of states, and the legal personality of all NSAs has to have been derived from states, just as what was argued as the basis for the personality of the League of Nations (Hickey, 1997).

The factual realist approach is based at the other end of the spectrum, as it claims that the state is deteriorating and other, non-

state entities are slowly gaining ground and getting more influence in international relations (Hickey, 1997). The factual realists therefore consider it necessary to rethink the source of ILP. They argue that due to global integration, the relevance of the state with regards to ILP is in decline. Next to that, the ever-growing number of non-state entities are in the process of reshaping international law to properly respond to changes in a globalizing society (Hickey, 1997). Therefore, factual realists are of the opinion that NSAs should be able to determine for themselves whether they have ILP instead of relying on states for this capacity (Hickey, 1997). The last element of this theory is in accordance with the declaratory theory of state recognition. This theory seems to be extended further in the factual realist approach to apply to NSAGs as well. Nonetheless, the Dynamic State approach will be adhered to for this study. The cases that are selected for the analysis are all selected based on the fact that they can point to an international treaty of which they are a signatory. The other approaches were not taken due to the fact that the legal traditionalist approach excludes entities other than states, and it does not seem to be a practical approach to take in the rapidly changing international system. Nor would the factual realist approach be suitable, as this theory is too broad, not clearly defined, and not measurable. The fact that the dynamic state approach is measurable, clearly defined and in accordance with the changing system make it the most suitable approach to take.

Even when this approach is taken, conferring ILP to an NSAG remains a difficult question. In the case of the Sudan People's Liberation Movement/ Army (Sudan People's Liberation Movement/ Army (SPLM/A), it has worked out in accordance to what was decided in the *Prosecutor vs Haradinaj et al.* case. "… all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess ILP and are therefore bound by the relevant rules of customary international law on internal armed conflicts referred to above" (Darfur Commission of Inquiry, 2004, para. 172). This is still a very disputed approach to binding NSAGs. ILP gives a notion of legitimacy to the NSAG (Kleffner, 2011). This concern was raised during the negotiations on CA III. For this reason, the provision "shall not affect the legal status of the Parties to the conflict" was included in the article (Geneva Convention III art. 3, 1949).

International Humanitarian Law in relation to NSAGs

IHL "aims to restrict the methods and scope of warfare through treaties and customs that limit the use of violence in armed conflict and protect civilians and persons who are no longer participating in hostilities" (Buckley, 2011, p. 808). On a very basic level, the documents that are essential to international humanitarian law are the Hague convention of 1907 and the four Geneva Conventions with its AP I & II that were created in 1977 (Solis, 2016).

The two questions that must be asked to see if the conventions are applicable are the following: What is the conflict status, and what is the status of the individuals involved in the conflict? (Solis, 2016). Common Article II (CA II) of the Geneva Conventions states that it applies to all cases of declared armed conflict between two high contracting parties, even when one of them has not recognized the state of war (Geneva Convention I art. 2, 1949). However, as NSAGs are not 'high contracting parties to the treaty' the conflicts they take part in are not part of CA II, but are described in CA III. This article focuses on the conflicts that occur within the territory of one of the high contracting parties.

The part of this article that mentions the relevance of such a NIAC occurring in the territory of one state party has fallen into disuse. This is argued on the basis of the *Tadić*

case, in which it was stated that the rules of CA III reflect "elementary considerations of humanity", and that it is therefore applicable to any armed conflict regardless of its international or non-international nature (Tadić, 1995, Case No. IT-94-1, para. 102). AP II also applies to NIACs when the armed group has control over the territory, is able to carry out organized military operations and, is able to implement the protocol. If these conditions are not met, AP II will not be applicable (Solis, 2016).

How is International Humanitarian Law enforced?

One way IHL can be enforced is through international criminal law (ICL) which relates to war crimes and penalizes those who committed serious violations (Sivakumaran, 2012). ICL places individual responsibility on the individual(s) who committed war crimes by interpreting the relevant IHL to give a verdict on the guilt or innocence of an individual (Sivakumaran, 2012). Through the verdicts based on these humanitarian laws, it has become clear that this field of international law applies to conflicts of a non-international nature (Sivakumaran, 2012). The verdicts and interpretations of IHL have therefore not just fleshed out the legal system, but have also helped understanding the relevant legal provisions. While the criminalization of individuals under international law has now been well-established with regard to war crimes and crimes against humanity, the criminalization of armed groups as a whole remains a debatable matter (Solis, 2016). However, the generally accepted position on this matter is that the obligations under IHL apply not just to states but also to NSAs, as long as they are sufficiently organized. When it concerns crimes against humanity, however, NSAs can be prosecuted even when they are not the 'de facto' authority or have a 'state-like' organizational structure (Casey-Maslen, 2014).

How are NSAGs bound to International Humanitarian Law?

According to one of the most commonly accepted theories in international law, NSAGs are bound by IHL due to the fact that their 'parent state' accepted a particular rule of IHL, and has the capacity to accept legislation on behalf of its nationals. This means that an NSA that rebels against the state is still bound and does not have to consent to be bound (Solis, 2016). Indeed, state practice has shown that NSAGs are bound by CA III and AP II, and that this binding force applies to them as a group (Zegveld, 2002). The following question needs to be answered to see if these articles are applicable in the conflict: what is the status of the individuals involved in the conflict?

CA III states that the 'parties' to the conflict are bound by the provisions of the article (Geneva Convention III art. 3, 1949). But the term 'party' is rather vague. Factors that show that a group can be called a 'party' are the following:

- the ability to implement IHL
- the existence of a headquarters
- disciplinary rules and mechanisms must exist
- ability to plan, coordinate, and carry out military operations
- designated zones of operation
- the ability to produce, distribute and transport arms
- an ability to conclude agreements, such as ceasefires and peace accords

(Solis, 2016, p. 182; Prosecutor v Boskoski, 2008, Case No IT-04-82-T, para. 196).

If a party meets these criteria, then they have reached a sufficient level of organization for AP II and CA III to apply (Sassòli, 2011). If a

party does not reach the established degree of organization, CA III still applies, but AP II does not (Sassòli, 2011). So even though the aforementioned legal distinctions between NIACs and IACs are still present in the treaties, case law and state practice has moved the law of both types of conflict closer to each other. The reasoning behind this convergence is that in customary international law, the distinction between the two has disappeared over time (Sassòli, 2011). Indeed, a study by the ICRC has shown that 136 rules out of the 161 on customary humanitarian law apply equally to both types of conflict ("Non-International Armed Conflict", ICRC Casebook, 2018).

Geneva Call's Deed of Commitment

In 2007, there were over 261 active NSAGs in armed conflict (Buckley, 2012). Several of these groups have effective control over territory and sometimes fulfill the role of a de facto governmental authority. This status means that the entity has effective control and power over territory, but it has not yet been recognized as the legitimate governing authority and has not shown that it will maintain the stability of the state over a longer period of time (Serralvo, 2016).

But, because of the fact that these entities fulfill the role of a vertical authority, there needs to be a body of law that deals with the regulation of the relationship between the de facto authority and the individual citizen. Otherwise, a legal vacuum would exist, and this entity would not be covered by international law (Murray, 2016). One of the problems with filling this vacuum is that these NSAGs do not have the formal capacity to enter into international agreements or conclude treaties. However, bringing NSAGs under the scope of international humanitarian law and human rights is considered to be very important by the international community (Buckley, 2012). This led to the creation of the NGO 'Geneva Call' in 2000 (Geneva Call, "Mission"). This NGO tries to promote respect by NSAs for IHL especially related to the safety of civilians. Since 2000, they have engaged over 90 NSAGs on topics ranging from banning the use of anti-personnel mines to the elimination of gender discrimination.

> *"because...these entities [NSAGs] fulfill the role of a vertical authority, there needs to be a body of law that deals with...the relationship between the de facto authority and the individual citizen."*

The NGO has put their main points of attention in an innovative instrument called *The Deed of Commitment.* This document allows NSAGs to undertake action to respect certain humanitarian laws and norms (Geneva Call, "Deed of Commitment"). Up until now, about 55 NSAGs have signed the Deed of Commitment and have generally respected the obligations in the document. Next to the pledge of respect that comes with this document is the fact that these groups also agree to being held publicly accountable for their commitments under the Deed of Commitment. There are three Deeds of Commitment:

1. *Deed of Commitment* for Adherence to a Total Ban on Anti-Personnel Mines and for *Cooperation in Mine Action*, launched in 2000.

2. *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict*, launched in 2010.

3. *Deed of Commitment* for the Prohibition of Sexual Violence in Situations of Armed *Conflict and towards the Elimination of Gender Discrimination*, launched in 2012(Geneva Call, "Deed of Commitment").

By signing these documents, the NSAG promises to take the necessary steps to enforce their commitment, and also gives Geneva Call permission to verify and monitor compliance with the Deeds they signed.

So why would NSAGs willingly bind themselves to international humanitarian norms that they did not agree to in the first place? According to Geneva Call, there are several reasons NSAGs chose to do so. Signing a Deed of Commitment can help them improve stability, protect civilians and their own fighters, facilitate peace processes, improve their reputation and show that they are willing and capable to adhere to humanitarian law (Geneva Call, "FAQs"). Up until now, 49 NSAGs have signed the Deed of Commitment that prohibits the use of landmines, 19 NSAGs have signed the Deed that focuses on the protection of children in conflict and, 16 have signed the Deed that prohibits sexual violence and gender discrimination. But even if an NSAG were to sign such a document, it does not make them legitimate in any way. Geneva Call only gives NSAGs the possibility to commit to IHL via a special agreement, as is encouraged in CA III. Interestingly, NSAGs have signed Deeds not adhered to by the state they are based in, showing that they have accepted obligations that go beyond those of the state (Casey-Maslen, 2014).

This is in contrast to the previously explained notion that the IHL obligations of NSAGs only derive from the parent state. Another focus point of this NGO is broadening the knowledge of NSAGs on topics of IHL and the best ways to implement these norms. They do so by creating "ANSA-specific IHL training modules in different languages, which address ANSAs' practical concerns and include realistic exercises relevant to their operating contexts, have been created and used in several contexts" (Geneva Call, "Approach"). By providing this training and monitoring compliance with international humanitarian norms, Geneva Call has become a forum for communication with the NSA . Their engagement with the NSAG fills the gap in international law that was mentioned before (Hofman, 2006). The recognition of the obligations of NSAGs themselves changes the debate on recognition of the human rights obligations of NSA. The willingness to abide to international law and to act in accordance with their obligations weaken the argument of non-applicability (Casey-Malsen, 2014).

Human Rights Obligations of NSAGs

NSAGs are growing in number and influence over the lives of many individuals throughout the world (Murray, 2016). The current conflict in Syria, that in Libya in 2011, and the conflict in the Congo show that NSAGs can have an enormous impact on the lives of civilians (Murray, 2016). NSAGs also have significant influence in situations that do not fall under the scope of a Non-International Conflict. For instance, Hezbollah in Lebanon has established social structures such as health care and education for civilians, and in the Central African Republic, NSAGs are suspected of committing crimes against humanity in non-conflict situations (Murray, 2016). All the individuals that are impacted by the presence of the NSAG live in uncertain circumstances, and it is essential that the fundamental human rights of these civilians are respected and protected. Human rights are meant to be universal and applicable at any time.

This aim becomes clear by looking at the UN declaration against torture, which created a "guideline for all States and other entities exercising effective power" (UN Resolution 3452, 1975). In *Elmi v. Australia*, the Committee Against Torture said that an NSAG can and should be regarded as a vertical authority, especially in the case of an absence of central government (Elmi v Australia, 1998). Armed groups with effective control over the territory and population should, when the state is unable to impose its will, be considered as such an authority (Murray, 2016). This means that these armed groups must also be subjected to international regulation. If they would be unchecked by international law, the effectiveness of the system would be undermined and the civilians would not have the proper protection that ensures their rights (Murray, 2016). Subjecting NSAGs to international law gives the international

system the opportunity to set clear standards for the conduct of NSAGs. Therefore, certain international treaty obligations which include international HRL can apply to NSAGs.

It is generally accepted that the human rights treaties regulate the relation between the state and the individuals under their jurisdiction. That may have suited the international system at that time, but it is no longer an effective way to protect human rights (Murray, 2016). As was mentioned before, there is an increasing number of NSAGs that have power over an ever-increasing number of civilians. Such an approach is not in line with the basic motivation that underpins the entire body of HRL: human dignity. This underlying motivation can be seen in the draft preamble of the Universal Declaration of Human Rights (UDHR) that stated that: "the Declaration of Human Rights sets forth the rights and freedoms which are essential to the highest expression of human dignity" (Draft Preamble UDHR, E/CN.4/124).

Article 1 of the UDHR indeed confirms what was mentioned in the draft, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (UDHR, 1948). Establishing a distinction between the human rights obligations of states and NSAGs purely based on their status is inconsistent with the underlying motivation of human rights protection (Murray, 2016). In order to make sure human rights protection is safeguarded, it is necessary that international law regulates the relationship between individual and authority, even when the latter is of a non-state nature. Accepting the alternative and not regulating this relationship means accepting the legal vacuum it creates and discarding the human rights of millions (Murray, 2016). Even though the standpoint on the motivation of HRL has gotten some support from the ICJ, it is not universally agreed upon. As the ICJ put it: "the protection offered by Human Rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights" (ICJ Advisory Opinion, 9 July 2004, para. 106). Additionally, there are some international human rights treaties that were argued to be directly binding on NSAGs. For instance, the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, *the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, and the *International Convention for the Protection of All Persons from Enforced Disappearance* (Murray, 2016, p. 160).

Article 4 of the aforementioned Optional Protocol states that:

> 1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
>
> 2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
>
> 3. The application of the present article shall not affect the legal status of any party to an armed conflict" (Optional Protocol CRC, 2000, art. 4).

The idea that this protocol gives NSAGs direct obligations under international law is still debated. However, it has been argued that when the word 'shall' is used in international treaties it refers to a binding obligation. When the word 'should' is used in this context, it is a recommendation (Murray, 2016). As 'shall' is used in this protocol, it seems likely that the drafters indeed intended to create the binding obligation on NSAGs as well. Besides this, it has been argued that the phrase 'under any circumstances' indicates that there are absolutely no exceptions to the binding obligations this Optional Protocol imposes on

parties to a conflict (Murray, 2016). When the Optional Protocol is read according to this tradition, it establishes direct obligations for NSAGs. The aforementioned assumption will be discussed and supported below. Although this protocol seems to establish obligations for NSAGs, there are still problems with the applicability of human rights treaties to NSAGs. One of the main problems with the core international human rights treaties is the ratione personae restriction. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) explicitly mention that they intend to bind states. This becomes clear when reading the following article of the ICCPR: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant" (ICCPR, 1966, art. 3). When this is taken at face value, it would seem that this human rights treaty applies only to the party to which it is directed, the ratione personae, in this case, the state.

What must be taken into consideration is that this treaty was drafted when states were still the main actors in the international system. But as was stated in the ICJ opinion on Reparations for Injuries Suffered in the Service of the UN:

> Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States (Reparations for Injuries, 1949, 178).

A similar principle is applied by the ICJ in the case of Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276. In this case, the Court stated:

> That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (Advisory Opinion, 1971, p. 31).

As the ICJ therefore concluded, treaties must be interpreted and applied by taking the current international legal order into account (Murray, 2016). As HRL obligations are important in our current system, and are even considered to be erga omnes obligations, treaty interpretation should take these principles into account (Murray, 2016). If HRL is, again, applied to fill the legal vacuum and bind entities that fulfil the role of a vertical authority, the protection of human rights and the effectiveness of the international legal system can be secured (Murray, 2016). Additionally, these treaties were concluded with a certain object and purpose in mind. Their main purpose is to establish international rights for individuals, with a goal of the protection of basic rights of individuals (Murray, 2016). As human rights are considered to be erga omnes obligations that are applicable in all situations, it seems appropriate to interpret the treaties as to allow their application even when a state authority is replaced by an NSAG (Murray, 2016).

Yet, this idea of an NSAG that would replace the state does not affect the state's sovereign claim over the territory. In the Advisory Opinion on the presence of South Africa in Namibia, the Court also stated:

> The fact that South Africa no longer has any title to administer the Territory

> does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States (Advisory Opinion, 1971, p. 54).

Therefore, it is clear that there are limits to what a state authority can do when they are not in effective control over a territory. Besides this, the statement by the Court also makes clear that effective control over a territory does not necessarily change the legality of the territorial state's title (Murray, 2016). Therefore, NSAGs can have obligations under HRL. This body of law was traditionally aimed at states, but due to the acknowledgement of the UN and the ICJ, interpreting human rights treaties in light of their object and purpose, to protect human dignity,, can now also apply to NSAGs. They are not able to take part in the creation of international law, and therefore cannot possess full ILP but enjoy a limited form.

Part II: Selection and Description of four NSAGs

The Polisario Front

History of the Polisario Front.

Between 1884 and 1975, the Spanish empire controlled a part of Morocco and the Western Sahara. More than thirty years after the Spaniards left the area, there is still a conflict about the territory of the Western Sahara (Moniquet, 2005). Both Morocco and Mauritania claimed the territory after the colonizers left, but this was opposed by the Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro (Polisario Front or the Front). The Front came into existence in 1973. It was a revolutionary, left-wing organization that was born during the Cold War that incited and supported several National Liberation Movements in Africa. On the regional level, Algeria and Morocco's policies were also directly opposed to one another. Due to an earlier war, there was animosity between the two countries, which was only invigorated by Morocco's friendly attitude toward the West, and Algeria's dislike for the Western 'imperialists' (Moniquet, 2005). Another significant factor in the creation of the Polisario Front was Cuba's support for the Front. Not only did Cuba advise them but they also provided them with weapons with the goal of destabilizing the region.

Regardless of this new opposing party, Morocco and Mauritania took over the territory. But Mauritania renounced all its claims to the territory in 1979. Ever since Spain left the territory, the UN has tried to seek a settlement between Morocco - which had 'reintegrated' the territory- and the Polisario Front, supported by neighboring country Algeria (MINURSO, "Background").

The UN Secretary-General stated that it is important to know what the Sahrawi People want for their future, and the way to involve them directly is through the referendum. This is in accordance to the UN's notions on the right of a people to self-determination. To affirm this view, the UN General Assembly has named the Polisario Front in their 34/37 resolution in 1979 the 'representative of the people of the Western Sahara'(UN, A/RES/34/37, 1979). In General Assembly resolutions 3458A (XXX) and 3458B (XXX), the UN actually expressed their wish that the population would have the right to self-determination (Shaw, 1983).

> *"It is clear that there are limits to what a state authority can do when...not in effective control over a territory"*

In 1985, the UN and OAU initiated a mission of good offices which led to settlement proposals between Morocco and Polisario Front in 1988.

These settlement proposals were meant to create a just solution by means of a cease-fire and a referendum that would allow the people of the Western Sahara to exercise their right to self-determination and choose between independence or integration in the Moroccan territory (Secretary-General's report S/21360, 1990, 4). Both parties agreed to this settlement proposal. The Organization of African Unity (OAU) became occupied with establishing a peaceful settlement in that year as well. The UN observed these events by means of MINURSO, the United Nations Mission for the Referendum in Western Sahara. This referendum should have taken place in January 1992, in accordance with the settlement proposals (MINURSO, "Background"). However, the plans made for the cease-fire and the tasks that needed to be completed beforehand could not be finished by the time the Secretary-General had proposed. Meanwhile, hostilities had started again, which interrupted the informal cease-fire that had lasted two years. In 2000, Morocco refused to move forward by holding the referendum, and the country has obstructed it since 2004. In that year, the Secretary-General of the UN received a letter rejecting the referendum as, according to Morocco, it undermined their sovereignty in the region (Beisat, 2012). Morocco claims ownership over the territory and also expelled MINURSO staff members from their territory (UN, GA/COL/3295, 2016). Since 2004, Morocco has stated that the Western Sahara can act as an autonomous region under the sovereignty of their power (Beisat, 2012).

Up until now, the MINURSO mission has not been able to achieve its goals, and is still active in the area. Next to finally being able to carry out the referendum, the mission has the following other goals:

1. Monitoring the ceasefire

2. Verifying the reduction of Moroccan troops in the Territory

3.Monitoring the confinement of Moroccan and Frente POLISARIO troops to designated locations

4.Overseeing the exchange of prisoners of war (International Committee of the Red Cross)

5. Implementing a repatriation programme (United Nations High Commissioner for Refugees)

6.Identifying and registering qualified voters

7.Proclaiming the results of an election

8.Taking steps with the parties to ensure the release of all Western Saharan political prisoners or detainees" (MINURSO, "Mandate").

Human rights violations by the Polisario Front.

Over the years, the Polisario Front has committed war crimes. They have kept Moroccan prisoners of war, who have suffered repeated maltreatment (Moniquet, 2005). Some of these prisoners have been held for more than thirty years. The detention period and the conditions thereof are in violation of international law. These violations have been investigated by the Fondation France Libertés, a foundation focused on defending human rights. They found that practically every prisoner had been tortured during the interrogation that followed their capture (Karmous & Dubuisson, 2003). Sometimes, the prisoner died after having been tortured for too long, or, in the case that they did not want to provide the information the Front wanted, were doused in kerosene and burned alive (Karmous & Dubuisson, 2003). This took place not only before the ceasefire of the UN I 1991, but also after. Not only did the prisoners of war suffer forms of physical torture, they were starved, often ill, and had to do forced labor (Karmous & Dubuisson, 2003). This treatment is in grave violation of the Geneva Convention on the Treatment of Prisoners

of War (III). Art. 3 of the aforementioned convention that deals with armed conflicts of a non-international character:

> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture (Geneva Convention III, 1949).

For years, the leadership of the Front has been accused of keeping thousands of Sahrawi in camps with the aid of the government of Algeria (Moniquet, 2005). The Sahrawi are the original inhabitants of the Western Sahara, and the Polisario Front only represents a small fraction of this people (Moniquet, 2005). This people is of Berber origin and were organized in nomadic tribes before the Spaniards colonized the area. The majority of these tribes pledged their allegiance to the Sultans of Morocco. When Spain controlled the area, several tribes fled to Morocco to enjoy the protection of the Sultan (Moniquet, 2005). When Spain left the area under massive international pressure, Mauritania and Morocco went to the ICJ. In 1974, the Court recognized that bonds of allegiance had existed between the Sultans and the tribes. What the UN did not recognize however, was Morocco's sovereignty over the Western Sahara territory. An interesting organizational matter is that the refugee camp that houses over 165,000 refugees is not located in the territory of the Western Sahara, but in Algeria. The refugees in this camp sought shelter after Moroccan air strikes in the beginning of the conflict (Pazzanita, 1994; Zoubir, 2005). These refugees have been protected by Algeria ever since the conflict started in the 1970s (Joffé, 2010).

The Polisario Front has remained very secretive about the political happenings in these refugee camps and the attitudes of the Sahrawi with regard to the conflict, which did not help them get more support from the West for their case. By keeping these matters a secret, they cannot refute the claims Morocco makes that the Front keeps the refugees in the camps against their will (Pazzanita, 1994). Another accusation brought against the leadership of the Front is that they divert the humanitarian aid intended for these refugees (Moniquet, 2005).

Organizational Structure of the Front.

The Front was mostly composed of young people, and some of these young adolescents were asked to take care of difficult tasks or became leaders of the Front. Indeed, Hametti Rabani, a former member of the Front, explained how he was put in charge of the education of children in the refugee camps. Another case like this was that of Moustapha Bouh, who was put in charge of propaganda, (newspaper and radio) was appointed Foreign Relations Commissar, and later on became a member of the Politburo and was put in charge of training the army in the role of Political Commissar of the Army. Not only has the Front created their own education centers and propaganda, they also have their own medical facilities (Bhatia, 2001).

The Front also has an army branch, the Sahrawi Popular Liberation Army (SPLA). This branch was trained and supervised by Algeria, and counted several thousand combatants (Moniquet, 2005). At first, the Front got their weapons from Algeria and Libya, but at the end of the seventies, they also got support from North-Korea in the form of anti-aircraft missiles, multiple rocket launchers and the like (Moniquet, 2005). This branch became highly organized and specialized in a form of Guerilla warfare. Its exact numbers are still unknown, but it has been speculated to have consisted of more than 20,000 combatants the 1980s (Moniquet, 2005).

In 1976, the Front structured itself in a way that has remained unchanged ever since. The group was run by a Secretary-General, aided by an executive power of nine members that also belong to the 'Politburo' that consisted

of 21 members. Three of these members were charged with the 'mass organizations' that encompassed three specific categories of the Sahrawi people: women, peasants and women (Moniquet, 2005, p. 24). Together with nine elected officials of 'the Basic People's Committees', the members of the Politburo formed the 'National People's Council.'

This strict hierarchy meant that initiatives could only come from the top political level, initiatives from the members were ruled out and all decisions had to be ratified by the top level. This level of organization brought an obsession over security forth (Moniquet, 2005). Every expression of dissent was seen as a threat and was monitored by the Military Security. This branch of the Front was trained and supervised by Algeria.

In 2005, the Front tried to become a player in the world-trade union community, and took part in an international trade union conference. Their presence was requested by three Italian organizations, of which only the one ended up taking part in the conference. In response to the Front's presence, Moroccan trade representatives made the point that it is not a real 'trade union' as there is no freedom of association nor manufacturing units (Moniquet, 2005, p. 25). This is not only the case in the organizational structure of the Front itself, but also noticeable in the refugee camps in Tindouf, where freedom of expression, peaceful assembly, association and movement are still limited (US dep. State, 2001).

International declarations by the Front.

In 2015, the Front declared unilaterally, as per article 96(3) of AP I of the Geneva Conventions, that they would undertake to apply the conventions and AP I by means of a declaration to the depository (the Swiss Federal Council). They were only able to do so if the high contracting party they were in conflict with ratified the conventions and the AP(Fortin, 2015). As Morocco ratified the AP in 2011, the Swiss government was able to accept this unilateral declaration. However, this does not mean that the Front has become a party to the conventions, nor does it mean that it is a state. What this declaration does is bind Morocco to the obligations of the conventions vis-à-vis the Polisario Front (Fortin, 2015). What this means for the Front is that the Conventions and Additional Protocol apply, and that they have the same rights and obligations as a high contracting party (Shaw, 1983).

The Front has also signed Geneva Call's Deed of Commitment on banning landmines, which does not change their international status (Geneva Call, "Armed Non-State Actors"). The Front has, through their ratifications of international treaties, become an actor in the international legal system.

Internal problems of Polisario Front.

The Polisario Front has been under the leadership of Mohammed Abdelaziz, Secretary-General of the NSAG itself and President of the SADR, the Sahrawi Arab Democratic Republic. This is a self-proclaimed Republic that has only been recognized by a few States (Moniquet, 2005). The organizational structure of this Republic coincides, more or less, with that of the Front. The existence of the Republic is mostly theoretical, as its territory only spans a few square kilometers. But this fictitious entity gave the Front another dimension. The SADR has 'acted as a state' by ratifying OAU/AU conventions (Fiddian-Qasmiyeh, 2011). For example, the Republic has ratified the Kampala Convention, The African Union Convention on Preventing and Combating Corruption, and the African Charter on Democracy, Elections and Governance (AU, "Kampala Convention"). The fact that they have signed and ratified international conventions shows that they have acted in the international system, and as per the Dynamic State theory, have a degree of legal personality.

After the SADR was created, it has been recognized by several States: Madagascar,

Burundi, Mozambique, Algeria, Angola, Benin, Guinea Bissau, North-Korea and Rwanda. At some point, the SADR was recognized by 79 States in total, was admitted to the OAU (which led to Morocco's withdrawal from the Organization) and its delegates were allowed to take part in the Addis-Ababa Summit (Moniquet, 2005). Even though the number of States that recognized this republic seems impressive, most of them did so under the pressure of Algeria, which, of course, supported and housed the Front. Still, this impressive number made sure that the existence of the SADR and its demand for independence had to be taken seriously by the UN (Moniquet, 2005).

In the Montevideo Convention, it is stated that "The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable" (Montevideo Convention, Art. 6, 1934).

Even though recognition is supposed to be irrevocable, many countries have now cancelled or frozen their recognition of SADR (Moniquet, 2005). Indeed, in September 2005, only 54 of the States still recognized the Republic (Moniquet, 2005).

The Front has been under the same leadership for three decades, and suffers from a lack of internal democracy. No elections took place for a long time, and only in 2016, when Abdelaziz died, did elections take place to choose a new Secretary-General: Brahim Ghali (Lamin, 2016).

The Palestine Liberation Organization

History of the Palestine Liberation Organization.

The Palestine Liberation Organization (PLO) is a national liberation movement that has attained some degree of ILP. This group was accorded certain rights and duties in the international system, but cannot create international law as States can. Therefore, they have a limited form of ILP and they function as an agent of the territory they want to liberate (Worster, 2015). The PLO has been established in 1964, and is considered by some to be the representative of the Palestinian people. This is important, as the Palestinian people have been scattered over small settlements under different circumstances since 1948. The need for an expression of their identity increased when Mandatory Palestine, which used to be under the control of the British, got divided between Egypt and Jordan (Hilal, 1993). In 1969, the PLO had de facto sovereignty over Palestinian refugee camps in Lebanon and in 1974, was recognized to be the sole representative of the Palestinian people by the Arab League. Interesting to note is that the PLO was actually founded by the Arab League, who claimed that the Palestinians had the right to liberate themselves of the Israeli occupation (Shukairy,1964). In 1993, the PLO entered into the Oslo Accords with Israel (Worster, 2015). These accords were a promise to work toward peace and the peaceful coexistence of the Israelis and Palestinians.

Organization of the PLO.

The PLO has an elaborate structure, and has provided the Palestinian people with health care, education and social services. As per the Interim Agreement between the PLO and Israel, the Palestinian National Council will establish a

> Palestinian Electricity Authority, a Gaza Sea Port Authority, a Palestinian Development Bank, a Palestinian Export Promotion Board, a Palestinian Environmental Authority, a Palestinian Land Authority and a Palestinian Water Administration Authority, and any other Authorities agreed upon, in accordance with the Interim Agreement that will specify their powers and responsibilities" (Oslo Agreements, Art. VII, 1993).

Since the beginning, the PLO has had a

military branch. First, this was the Palestinian Liberation Army (PLA), but in the 1990s, changes were made to the structure of this branch and it was renamed the Palestine National Authority (PNA) (Palestineun, "Palestine Liberation Organization").

This NLM has a government-like structure, with a parliament (the PNC), an executive committee, and a Central Council. The parliament, the Palestine National Council is considered to be the parliament of all Palestinians. This body sets the policies, elects the Executive Committee and makes changes in its own functioning, the laws of the organization, and the Palestine National Charter. The Council has several committees for specific aspects, such as legal and political committees. This Council also includes political parties (Palestineun, "Palestine Liberation Organization"). The Central Council functions as an intermediary between PNC and the Executive Committee.

The Executive Committee that is elected by the PNC is the body that deals with day-to-day business. This body is accountable to the PNC. It has to execute the policies decided upon by the PNC and the Central Council, oversee the functioning of the departments of the PLO and set a budget. Besides this, the Executive Committee is also the international representative of the PLO. They have a legislative and an executive branch of government. But they also have independent judicial organs, which was developed and specified in the Interim Agreement following the Oslo Accords (Oslo Agreement, 1993). Besides these government branches are the other organizations established by the PLO. For instance, the PLO also set up a system of assistance for martyr's families, artisan centers, and professional organizations (Hilal, 1993).

As is explained in the 1994 Cairo Agreement, the PLO is allowed to deploy its police force to maintain social order (Cairo, 1994). This police force was established when the Oslo Accords of 1993 were signed. In these Accords, it was stated that:

> In order to guarantee public order and internal security for the Palestinians of the West Bank and the Gaza Strip, the Council will establish a strong police force, while Israel will continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order (Oslo Agreement, Art. VIII, 1993).

Terrorist actions by the PLO.

At first, the PLO operated from bases in Jordan, Lebanon, Syria, Gaza, and the West Bank. It was involved in hijackings, gun- and bomb attacks against Israelis all over the world. In 1988, the PLO decided it would no longer occupy itself with terrorism, and accept Israel's right to exist. These were the preconditions set by the United States for opening the dialogue with the PLO (Wright-Neville, 2010).

The status of the PLO in the international system.

The PLO has represented Palestine for instance in the UN, the Movement of Non-Aligned Countries (NAM), the Economic and Social Commission for Western Asia, the Group of 77 and the United Nations Educational, Scientific and Cultural Organization and the Organization of the Islamic Conference (OIC) (UNSC, S/2011/705, 2011). The PLO fights for an independent State of Palestine, and has been recognized by 137 states. Many have recognized it as a state after its declaration of independence in Algeria, 1988. (Palestineun, "Diplomatic Relations"). Up until now, the PLO has been recognized by 106 sovereign states as the representative of the Palestinian people (Kassim, 2002).

The PLO became a UN observer in 1970's. This status is usually only for non-UN member states. The General Assembly adopted resolution 3237 (XXIX) in 1974, and in a vote

95 to 17, the PLO was invited to the meetings of the Assembly and take part in international conferences (Shaw, 1983). This newly granted observer status was due to General Assembly resolution 3102 (XXVIII), that stated that in the case of the debate on International Humanitarian Law, it "urges that the national liberation movements recognized by the various regional intergovernmental organizations concerned be invited to participate in the Diplomatic Conference as observers in accordance with the practice of the United Nations" (UNGA, A/RES/3102, 1973). The recognition by the Arab League and the observer status in the UN give the organization more legitimacy, beside the general recognition by the Palestinian people (Hilal, 1993).

Under rule 39 of its rules of procedure, the UN Security Council is able to invite "members of the Secretariat or other persons, whom it considers competent for the purpose to supply it with information or give other assistance in examining matters within its competence" (UNSC, 1983, 7). The UNSC has invited members of African NLMs to participate, and has stated in resolution 381(1975) that when the UNSC reconvenes in 1976, that the PLO would be invited to participate in the debate (UNSC, 381(1975)). The Security Council made another, quite risky move in 1975, in which it was decided that the PLO could participate in a debate on Israeli air raids on Lebanese territory.

> "...this proposal is not being put forward under rule 37 or rule 39 of the provisional rules of procedure of the Council, but, if it is adopted by the Council, the invitation to the PLO to participate in the debate will confer on it the same rights of participation as are conferred when a Member State is invited to participate under rule 37." (UNSC, S/PV.1859, 1975)

This statement has been the reason for serious concern because the participation of an NLM in the Council cannot be justified under the UNSC's own rules of procedure. Anyhow, this decision was reaffirmed in subsequent years, and so it appears a precedent has been set (Shaw, 1983).

Even though this NLM has been invited to participate, signing the final document is the second step. Objections have been made to the NLM signing the document, but these have been side-stepped by asking the NLM to sign on a separate page (Shaw, 1983).

The PLO has not signed any of the three Deeds of Commitment (Geneva Call, "Armed Non-State Actors"). However, their signature on the Oslo Accords of 1993, and the participation in the debate on Israeli air raids show that this group has attained a limited form of ILP.

South West Africa People's Organization

History of the South West Africa People's Organization.

Before Namibia became independent in 1990, it had first been a German colony, a protectorate of the Union of South Africa, a Mandated Territory of the League of Nations, and lastly, a direct responsibility of the United Nations Organization (UNO). In its last form, before gaining statehood, the territory was illegally occupied by South Africa (Kaela, 2016). When the territory was a Mandated Territory of the League of Nations, it was mandated to South Africa. In the ICJ Advisory Opinion of 1971, it was stated that the presence of South Africa was illegal due to their racist policies and UN General Assembly resolution 2145 (XXI), that terminated the mandate (Shaw, 1983). South Africa did not accept the opinion of the ICJ, and remained in the territory.

The South West Africa People's Organization (SWAPO) was founded in 1960 (Udogu, 2011). Its headquarters was in Dar es Salaam, Tanzania. This was the nearest semi-self-governing country. SWAPO's leaders had to go into exile due to a harsh crackdown in 1960, by the police.

In 1960, Sam Nujoma was elected its president in absentia (Dobell, 1998). This liberation movement fought for the independence of Namibia from the South-African administration and claimed to represent the entire territory of what used to be South West Africa. Ever since the beginning, two wings of SWAPO existed: an internal wing, focused on moderate, less radical measures to resolve the problem in the area, and the external wing, that focused on diplomatic relations and guerilla warfare (Udogu, 2011).

The UN was also involved in trying to resolve the conflict. With resolution 435, the UNSC stated that it wanted South Africa's involvement in the territory to end so that the people of the territory could establish their own state and elect a government through fair and free elections. It also created a UN Transition Assistance Group, that would assist the Special Representative to carry out the aforementioned mandate (UNSC, S/RES/435, 1978). This resolution, and a cease-fire, were supposed to enter into force on 1 April 1989. Fights broke out, which slowed down the implementation of the resolution (Kaela, 2016). However, in 1988, South Africa was again involved in peace talks. Due to pressures from all sides, South Africa finally caved and decided to extricate its troops from the territory and seek a diplomatic solution (Dobell, 1998). In 1989 the SWAPO got 57.3% of all the votes and became one of the governing parties of Namibia (Dobell, 1998). Sam Nujoma became the country's first president.

Organizational structure of the SWAPO.

The structure of the SWAPO consisted of a Congress, Central Committee, National Executive Committee, Regional Headquarters, and cells (Udogu, 2011). The National Executive Committee consisted of seventeen members and had to put all the decisions, resolutions, and directives of the Congress and Central Committee into practice, has to take care of policy formation, and had to hand in periodical accounts to all other governmental bodies (Udogo, 2011). The Central Committee has the task to review, annul, and adopt decisions, resolutions, and directives of the National Executive Committee. Besides this, it has to convene the Congress, and determine and adjust the political stance toward problems that arise (Udogu, 2011). The Congress has the power to determine the programmatic orientation of the SWAPO, decide on action in internal affairs, and set the basic course in international matters, elects the Central Committee, and can affirm, amend or revoke any decision made by any organ of the SWAPO (Udogu, 2011).

All these bodies were created partially because of UN resolution 3111(XXVIII) in 1973, which stated that the UN "recognized that the National Liberation Movement of Namibia, the South West Africa People's Organization, is the authentic representative of the Namibian people, and supports the efforts of the movement to strengthen national unity" (UNGA, 3111(XXVIII), 1973). The other reason was that the SWAPO hoped that when South Africa withdrew their troops, they could easily step up as the official authority (Udogu, 2011). The SWAPO was also aided by Sweden in building two hospitals and schools (Sellström, 1999). Next to the governmental bodies were (among others) the department of Foreign Affairs, Defense, Treasury, Information and Publicity, and Education and Culture. The Department of Defense occupied itself with the People's Liberation Army of Namibia (PLAN). The department trained and supplied the army branch of the SWAPO. The PLAN used classic guerilla war techniques.

International status of the SWAPO.

In 1978, SWAPO-External had established offices in many different countries -among which in Angola, New York, London, Egypt, and Algeria- to increase pressure on the UN to and South Africa to resolve the conflict. Besides this, they also spread their propaganda from these offices. In resolution

31/152, the UNGA decided to grant the SWAPO UN observer status. This meant that they could participate in the sessions and all international conferences (UNGA, A/RES/31/152, 20 December 1976).

This decision was based on UN resolution 3111(XXVIII), which stated that the UN "recognized that the National Liberation Movement of Namibia, the South West Africa People's Organization, is the authentic representative of the Namibian people, and supports the efforts of the movement to strengthen national unity" (UNGA, 3111(XXVIII), 1973). They also received significant support from the OAU, as can be seen in resolution CM/Res.1091 (XLVI), in which stated that they "Reaffirmed its full and unequivocal support for the armed struggle being waged in Namibia by the People's Liberation Army of Namibia (PLAN), SWAPO's military wing, to achieve self-determination, freedom and national independence" (OAU, CM/Res.1091, 1987).

The SWAPO has not signed international treaties, but due to their observer status, have been able to sign UN documents. For instance, they have signed the Final Act of the Conference on International Humanitarian law in 1977 (Shaw, 1983). Therefore, they got a limited degree of ILP before they became an official member of the UN. The SWAPO has not signed any Deeds of Commitment due to the fact that Geneva Call only came into existence in 2000, and the struggle for Namibian independence ended in 1990.

The Kurdistan Workers Party

History of the Kurdistan Workers Party.

The Partiya Karkerên Kurdistanê (PKK), or Kurdistan Workers Party, was founded in 1984. It is also known by the following names: Congress for Freedom and Democracy in Kurdistan (KADEK) or Kurdistan People's Congress (Kongra-Gel) (Roth & Sever, 2007). The PKK was built on a Marxist-Leninist ideology, and was created during a congress of the youth association, Ankara Higher Education Association. In this congress, it was agreed that the liberation of the Kurds that were scattered over Turkey, Syria, Iran, and Iraq was their main objective, and they should be liberated and live in the independent state of Kurdistan (Roth & Sever, 2007). To do so, they want to exercise their right to self-determination, as laid down in the UN Charter article 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..." (UN Charter, art. 55). This view has been reaffirmed by in resolution 2625 (XXV), that states that :

> the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and securityConvinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality (UNGA, 2625 (XXV), 1970).

Organizational Structure of the PKK.

The PKK was hierarchically structured under its chairman and President Abdullah Ocalan, the first and only leader of the group. A Chairmanship Council, Party Assembly, and a Central Disciplinary Board form the branches of government in cooperation under Ocalan. The Congress was the highest political organ. It held meetings every four years, and those were open for mass participation. The Congress had the power to evaluate and amend the party plan and set a four-year policy (Laoutides, 2015). This body also elected the Central Committee which, in

their turn, elected the Chairmanship Council from its members.

The Chairmanship Council had the responsibility to lead the party and its related organizations. It aided the President in all political, ideological, military, and organizational matters (Laoutides, 2015). This Council acts in the name of the President, because he has been imprisoned by Turkey (Roth & Sever, 2007). The Central Committee was the main executive body, which occupied itself with the organization and control over all other party organizations. The Central Disciplinary Board functioned between Congresses and was responsible for the maintenance and control over party discipline. All abuses thereof could be investigated by this body (Laoutides, 2015). The local and regional authorities were similar in their institutional set-up and corresponding function.

In 2003, the PKK took another name: Kongra-Gel. With its new name came a new organizational structure and an attempt to democratize its ranks. Kongra-Gel now has a General Assembly that is able to adopt or amend the party's constitution, program, and define its policy. The President is elected by the General Assembly, and together with the Executive Council, decides their strategy and philosophy, and coordinates the Kongra-Gel's policies. Despite the fact that it is stipulated in the Constitution that the President can be replaced, Ocalan remains President and continues to run the party from his prison cell (Laoutides, 2015). The Executive Committee consists of 40 members, and is elected by the General Assembly. It is the party's coordinator and executive body. Together with the General Assembly, the Executive Committee is responsible for implementing policies. The Disciplinary Board examines and investigates allegations made by the other bodies. Finally, the Advisory Board of the Kongra-Gel submits advice and opinions on internal and international matters to the President and the Executive Council. The PKK/Kongra-Gel also has a military branch, the Kurdish People's Defense Force (HPG) (Gunter, 2010). This branch specializes in guerilla warfare, and it has an estimated size of between 3,000-5,000 fighters (Gunter, 2010).

Terrorist actions by the PKK.

The second Congress of the PKK took place in 1982. During the congress, it was decided to start a violent armed campaign to establish Kurdistan. Their guerilla war began in 1984, and its actions consisted of suicide bombings, car bombings, and kidnapping foreign tourists (Roth & Sever, 2007). The PKK/Kongra-Gel uses violence (called 'terrorism' by some) to attain their goals. In a report by the Commissioner for Human Rights of the Council of Europe, it was shown that "since July 2015, 799 security personnel and 323 civilians were murdered; 4,428 security personnel and 2,040 civilians wounded; 231 civilians kidnapped by the PKK" (HR Commissioner, 2016, 2). Turkey, NATO, the European Union, and the United States have placed the PKK/Kongra-Gel on their list of terrorist organizations (Roth & Sever, 2007).

International Status of the PKK.

The status of the conflict between the Turkish forces and the PKK falls under CA II, as this article applies to conflicts of a non-international nature in the territory of a high contracting party. Besides this, the PKK has reached the appropriate degree of organization for AP II to apply as well (Akreyi, 2008). However, Turkey is hesitant to sign the Geneva Conventions and its APs due to the fact that it might limit the force they can use in 'wars of liberation' (Yildiz, 2010). However, both parts of CA III of the APs have reached the status of customary international law and are applicable even to states that did not sign the Conventions and its protocols (Prosecutor v. Tadić, 1999, Case No. IT-94-1;

Yildiz, 2010).

The PKK/Kongra-Gel has tried to participate in the international system. It has signed Geneva Call's Deed of Commitment on Anti-Personnel Mines, Protection of Children and, the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination (Geneva Call, "Armed Non-State Actors"). This does not change their international legal status as an NSAG.
In 1995, the PKK issued a unilateral statement as per article 96(3) of AP I of the Geneva Conventions, that they would attempt to apply the conventions and AP I. Besides this, they also called upon Turkey to comply with IHL and explained what parties in the conflict they consider legitimate targets of attack (PKK, 1995). Additionally, the PKK has accepted command responsibility, which is defined in AP I, art. 86(2) of the Geneva Conventions:

"The Kurds consist of about 15 million people...but it is one of the only groups of people of such numbers that has not succeeded in the quest for statehood"

"The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." (AP I, 1949, art. 86(2))

However, the PKK was not able to implement this decision, as per article 96(3) of AP I (Abresch, 2005). The Kurds consist of about 15 million people (Ghassemlou, 1993). But it is one of only groups of people of such numbers that has not succeeded in their quest for statehood. This is most likely caused by the fact that the PKK has some issues with developing the link between themselves and the mass of Kurdish people they claim to be the sole representative of (Ghassemlou, 1993, p. 8). The PKK/Kongra-Gel has not signed any international treaties, nor was it granted observer status in the UN. This NSAG, regardless of its organizational structure and efforts made to partake in the international system, has failed to attain a degree of ILP.

Part III: Assessment

Obtaining International Legal Personality

The aforementioned case-studies were all discussed by looking at their organizational structure and international status. The Polisario Front, the PLO and the SWAPO all have the structural elements of the Prosecutor vs Haradinaj et al. case:

> the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accord (Haradinaj, 2008, Case No. IT-04-84-T).

The findings of this case are in accordance to what was found by the Darfur Commission of Inquiry, which stated that "...all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts referred to above"

(Darfur Commission of Inquiry, 2004, para. 172). What can be concluded is that due to their level of organization and the ability to refer to international treaties they have signed, the first three NSAGs have obtained a limited degree of ILP. This means that these NSAGs have/had international rights and duties, but are not capable of creating international law. This capacity is still only granted to states. This statement can still be contested, but it is in accordance with the Dynamic State Approach that was adhered to in this study. The fourth case-study on the PKK/Kongra-Gel has shown that the statement by the Darfur Commission of Inquiry does not always hold. The PKK is well organized, as per the Prosecutor vs Haradinaj et al.-requirements, but still has not obtained ILP as they have not signed any international documents, nor were they granted UN observer status.

The Right to Self-Determination

It seems odd that the PKK/Kongra-Gel has not reached this international status, as they are supposed to represent approximately 15 million Kurds. This is due to the fact that they have internal issues. This problem is directly linked to their capacity to represent the Turkish Kurds in the international legal system through ILP. This problem will be elaborated upon below by means of comparison to the other three case-studies, the case on the Secession of Quebec, and the international decisions made based on the UN Charter. As is stated in the case on the secession of Quebec:

> A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states (Secession of Quebec, 1998).

This view was reaffirmed in the Vienna Declaration and Programme of Action: "...a Government representing the whole people belonging to the territory without distinction of any kind" (Vienna Declaration, A/CONF.157/23, 1993, p. 1).

Hence, the PLO, the Polisario Front, and the SWAPO got a limited degree of ILP. They were all recognized to be the 'sole representative' of a certain people by the UN. This did not occur in the case of the PKK, regardless of their degree of organization and claim to representation. Yet, the UN has stated many times that the right to self-determination is one of the most relevant rights of peoples. In the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations it was stated that:

"By virtue of the principles of equal rights and self-determination of peoples enshrined in the Charter of the United Nations all peoples have the right freely to determine, without external interference their political status and to pursue their economic, social, and cultural development and every State has the duty to respect this right in accordance with the provisions of the Charter." (UNGA, Resolution 2625 (XXV), 1970)

Article 21 of the Universal Declaration on Human Rights, states that "The will of the people shall be the basis of the authority of the government" (UDHR, 217 A (III), 1948). This statement, while in and of itself not an affirmation of the right to self-determination, shows that governments should be based on the will of the people they govern (Hanna, 1999). The principle of self-determination has been elaborated upon in other international documents (of a binding nature), as for instance the ICCPR and ICESCR. The ICCPR and ICESCR are more explicit with regard to this matter. In Article 1(1) of the ICCPR it is stated that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status

and freely pursue their economic, social and cultural development" (ICCPR, 1966, article 1). Article 1(3) of the ICCPR states that

"The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations" (ICCPR, 1966, art 1).

These laws derive from the principle of self-determination as laid down in the Charter of the UN. Article 1(3) of the Charter states that the purpose of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace" (UN Charter, 1945). This view has been reaffirmed in UNGA Resolution 2625 (XXV), that states that:

"Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order: a. To promote friendly relations and co-operation among States; and b. To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned" (UNGA, 2625 (XXV), 1970).

The right to self-determination has an 'erga omnes' status in international law and should be promoted by all states (UNGA, A/HRC/12/48, 2009). This is also recognized by the UN General Assembly, that declared that peoples who are deprived of their right to self-determination have the right to seek support from third parties, and those peoples who take action themselves must comply with IHL (UNGA, A/HRC/12/44, 2009). According to the judgement of the Quebec case:

> [T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination (Secession of Quebec, 1998, p. 135).

This judgement implicitly explains that there are two types of right to self-determination, internal and external. Internal differs from external self-determination because it is "… the right to have a representative government, while external self-determination is the right to secede" (Hanna, 1999). Interesting to note is that the international community has favorably addressed this right in many international documents, but in practice limited the application of the right to self-determination. Because one of the other central principles that the UN adheres to is territorial integrity, the integrity of the states that constitute the UN must be preserved and protected (Hanna, 1999).

This central principle is also mentioned in UNGA resolution 2626 (XXV), which states that "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States…" (UNGA, 2625(XXV), 1970).

What this resolution indicates is that secession of the mother state is legitimate in very limited circumstances, and that a case-

by-case approach is necessary to determine if the right to external self-determination can be invoked (Hanna, 1999).

In the case-studies of the Polisario Front, PLO, and the SWAPO, it became clear that all these territories were former colonies. The territory of the Western Sahara used to be under Spanish colonial rule, the territory of Palestine used to be British Mandatory Palestine, and the territory of what is now called Namibia used to be a German colony and later a mandated territory of the League of Nations (Kaela, 2016; Hilal, 1993; Moniquet, 2005).

The relevance of a history of colonialism for the right to self-determination is also affirmed in resolution 2625 (XXV), section b that states that " the implementation of the principle [self-determination], in order: to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned" (UNGA, 2625(XXV), 1970). Indeed, there are two recognized reasons for the exercise of external self-determination. This is either to undo a past wrong, as for instance in the case of colonization, or in the case of repression of a minority group (Hanna, 1999). The international community has to balance out the state's right to territorial integrity and the protection of minorities when they decide on this matter (Stromseth, 1992; Hanna, 1999).

The Kurdish Question

If colonialism would be one of the deciding factors on which the right to self-determination is based, then it is odd that the PKK has not been able to exercise this right. Kurdistan is a region that was massively affected by colonialism; the Ottoman Empire (Kurdistan's original mother state) was dissolved after World War I, when the Treaty of Sèvres was signed. With this treaty, Mandatory Palestine and the French Mandate for Syria and the Lebanon were established (Treaty of Sèvres, 1920). Article 64 of the treaty also stated that the Kurdistan region should have a referendum to decide between merger with or independence from the new nation-state of Turkey (Treaty of Sèvres, 1920, art. 64). However, Turkey changed the situation in the Turkish war of Independence. After this war, a new treaty was established that did not have any special provisions for the Turkish Kurds (Gunter, 2010). After this, the Turks eliminated anything that would suggest a separate Kurdistan. They abolished the Kurdish language, clothing, names, and so forth (Gunter, 2010). In the Anti-Terrorism law of 1991, the Turkish government stated that academics, journalists, and intellectuals who spoke up in a peaceful manner were engaging in acts of terrorism. Section 312 of the Turkish Penal Code states that "merely written or verbal support for Kurdish rights could lead one to be charged with provoking hatred or animosity between groups of different race, religion, region, or social class" (Gunter, 2010, p. 7).

These measures are discriminatory against the Kurds, and this type of repression would make their case for internal self-determination stronger. However, when an ethnic minority is represented in the state's government, its voice is still heard in the country. This is the case in Turkey, as there are several political parties that aim to change the Turkish-Kurdish divide. For instance, one of the parties that is now in Parliament is called the People's Democratic Party (TBMM, "Grand National Assembly"). This is a left-wing party that has openly held talks with the PKK's imprisoned leader Ocalan, and wants to change the Turkish-Kurdish dichotomy in the country (Haber, 2015). Another party that is very outspoken on its wishes for Kurdish autonomy is the Rights and Freedoms Party. This party wishes to find a peaceful solution to the Turkish-Kurdish conflict that has been going on for decades (Rudaw, 2015). Their existence and presence in Parliament show that the Kurds have a say in the country, and are not denied their right to meaningful access to government,

similar to the reasoning in the Quebec case (Secession of Quebec, 1998). However, the Kurds have not officially been recognized by the state as a minority or a 'people' (Kirişci & Winrow, 1997). If they recognize them as such, they would have to permit the Kurds to have official forms of contact with their kin in Iraq, Iran, and Syria. If they are recognized as a 'people', there would be negative international consequences for Turkey (Kirişci & Winrow, 1997).

A group is recognized under international law as a 'people' when it has certain characteristics. A 'people' needs "1. A distinct language; 2. A different culture or religion; 3. A shared sense of history; 4. A commitment to maintain communal identity; and 5. An association with a defined territory" (Kirişci & Winrow, 1997, 50; Critescu Report, 1981, p. 41). Turkey has only recently been prepared to recognized the Kurds as a 'people,' but they may have underestimated the international implications of this action (Kirişci & Winrow, 1997). The status of a 'people' has a higher status than just 'minority.' In fact, when a minority is recognized as a 'people' by their government, then they can try to exercise their right to self-determination. Another way to exercise their right to external self-determination is when they are recognized by the international community as a 'people' (Kirişci & Winrow, 1997). Minorities do not have the right to self-determination, a right that 'peoples' do have (Hanna, 1999). How this newfound status will affect the Kurdish question cannot be answered yet. This shows that the Kurds have not been allowed full internal self-determination, even though pro-Kurdish parties have been allowed in Parliament. If a people is denied the right to internal self-determination, they can opt for external self-determination (Hanna, 1999).

Taking all of this into account, it seems odd that the right to self-determination of the Kurds in Turkey has not been recognized by the international community. The territory of Kurdistan was divided due to colonialism, and the Kurds have been repressed. This group is eligible for self-determination as it is commonly granted by the international community: "to undo a past wrong, as for instance in the case of (de)colonization, or in the case of repression of a minority group" (Hanna, 1999, p. 231).

The PKK has not been granted the right to self-determination on behalf of the Turkish Kurds due to the fact that the Turkish Kurds do not feel represented by this NSAG. This is due to the fact that the PKK's army branch has not been able to rouse the masses for their own revolutionary national ideology. On the contrary, the increasingly orthodox army branch failed to establish a link between themselves and the passive Kurdish refugees (Ghassemlou, 1993, p. 8). Therefore, the PKK has not been granted international observer status, as they need to be the 'sole representative of the people' to reach this status. This is the difference between the NSAGs that have a limited form of ILP and the PKK, which does not have this status. Being the sole representative of the people is therefore the characteristic that makes the difference in the quest for ILP.

> *"Being the sole representative of the people is...the characteristic that makes the difference in the quest for ILP"*

Part IV: Conclusion

The aim of this study was to find out if there are any legal characteristics that make it more likely that an NSAG will get ILP. This study was purposefully limited to a legal approach, due to the sheer magnitude of the topic. One of the points that was hardly taken into account was the influence of international politics. This is an element that has an enormous influence on the decisions made in the international community and has an influence on the

balancing act between the right to territorial integrity and the right to self-determination. When looking at the question of ILP for the PKK from a political point of view, it can be argued that the status quo is maintained due to several political factors. The situation of the Kurds is very complex. It is not contained to one state, but four. If the Kurds in Turkey would get a say in the international community, the Kurds of Iran, Iraq, and Syria will demand the same. It would force the other three countries to either let the Kurds have their state or suppress the uprising. This would cause chaos in the region (Kirişci & Winrow, 1997). Especially when the quest for statehood is revitalized by this access to the international system, the region will most likely be destabilized and conflict of a more severe nature will ensue. The West would not like this chaos in the region because of the fact that one of their oil supplies can be found near the Kurdish city Kirkuk (Kirişci & Winrow, 1997). The pipeline of this oil field crosses Turkish territory (Butler, 2014). These factors also need to be taken into account in the question of ILP.

A study that focuses on these political issues that underlie the decision of granting ILP would complement the legal arguments that were presented in this study. This would enhance the understanding of this complex matter and is definitely an interesting subject for further research.

Appendix

ANSA: Armed Non-State Actor

AP I & II: Additional Protocols to the Geneva Conventions

AU: African Union

CA II: Common Article II of the Geneva Conventions

CA III: Common Article III of the Geneva Conventions

HAK-PAR: Rights and Freedoms Party (Turkey)

HDP: The People's Democratic Party (Turkey)

HPG: People's Defense Force (PKK)

IAC: International Armed Conflict

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social, and Cultural Rights

ICJ: International Court of Justice

ICTY : International Criminal Tribunal for the Former Yugoslavia

ICRC: International Committee of the Red Cross

IHL: International Humanitarian Law

ILP: International Legal Personality

Kongra-Gel: People's Congress of Kurdistan

MINURSO: Mission des Nations Unies pour l'organisation d'un référendum au Sahara Occidental

NAM: the Movement of Non-Aligned Countries

NIAC: Non-International Armed Conflict

NLM: National Liberation Movement

NSA: Non-State Actor

NSAG: Non-State Armed Group

OAU: Organization of African Union

OIC: Organization of Islamic Conference

PKK: Partiya Karkerên Kurdistanê

PLA: Palestinian Liberation Army

PLAN: People's Liberation Army of Namibia

PNA: Palestine National Authority

PNC: Palestine National Council

SADR: Saharawi Arab Democratic Republic

SPLA: Saharawi Popular Liberation Army

SPLM/A: Sudan People's Liberation Movement

SWAPO: South West African People's Organization

UDHR: Universal Declaration of Human Rights

UNGA: United Nations General Assembly

UNO: United Nations Organization

UNSC: United Nations Security Council

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