KU Leuven
Faculty of Law

# Righting Wrongs

## Non-State Armed Groups and Reparations for Victims of Armed Conflict, with a Case Study of Colombia

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# List of abbreviations

| | |
|---|---|
| ANC | African National Congress |
| ARIO | Articles on the Responsibility of International Organizations |
| ARS | Articles on the Responsibility of States for Internationally Wrongful Acts |
| ATCA | Alien Tort Claims Act |
| ATS | Alien Tort Statute |
| AUC | *Autodefensas Unidas de Colombia* / United Self-Defence Forces of Colombia |
| CEDAW | Committee on the Elimination of Discrimination against Women |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CSIVI-FARC | FARC delegation in the *Comisión de Seguimiento, Impulso y Verificación a la Implementación del Acuerdo Final* / Commission for Monitoring, Promoting and Verifying the Implementation of the Final Agreement |
| DDR | Demobilisation, disarmament and reintegration |
| ECtHR | European Court of Human Rights |
| ELN | National Liberation Army |
| ETCR | *Espacios Territoriales de Capacitación y Reincorporación* / territorial areas for training and reincorporation |
| FALINTIL | Armed Forces for the National Liberation of East Timor |
| FARC | *Fuerza Alternativa Revolucionaria del Común* (political party) |
| FARC-EP | *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* / Revolutionary Armed Forces of Colombia - People's Army |
| FIS | Islamic Salvation Front |
| FMLN | *Frente Farabundo Martí para la Liberación Nacional* |
| FPA | Final Peace Agreement (Colombia) |
| FPLC | *Forces Patriotiques pour la Libération du Congo* |
| HR Committee | United Nations Human Rights Committee |
| IACHR | Inter-American Commission on Human Rights |
| IACtHR | Inter-American Court of Human Rights |
| 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 |
| ICRC | International Committee of the Red Cross |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| IHL | International humanitarian law |
| IHRL | International human rights law |
| ILA | International Law Association |

| | |
|---|---|
| ILC | International Law Commission |
| IMT | International Military Tribunal (Nuremberg) |
| IRA | Irish Republican Army |
| KLA | Kosovo Liberation Army |
| LRA | Lord’s Resistance Army |
| LTTE | Liberation Tigers of Tamil Eelam |
| M-19 | *Movimiento 19 de Abril* |
| MILF | Moro Islamic Liberation Front |
| MRM | Monitoring and Reporting Mechanism |
| NGO | Non-governmental organisation |
| NIAC | Non-international armed conflict |
| NPA | New People’s Army |
| NPFL | National Patriotic Front of Liberia |
| NSAG | Non-state armed group |
| PCA | Permanent Court of Arbitration |
| PCIJ | Permanent Court of International Justice |
| PLO | Palestinian Liberation Organization |
| Real IRA | Real Irish Republican Army |
| RUF | Revolutionary United Front |
| SCSL | Special Court for Sierra Leone |
| SPLA | Sudan People’s Liberation Army |
| TVPA | Torture Victims Protection Act |
| UN | United Nations |
| UNAMA | United Nations Assistance Mission in Afghanistan |
| UNCHR | United Nations Commission on Human Rights |
| UNGA | United Nations General Assembly |
| UNHRC | United Nations Human Rights Council |
| UNOHCHR | United Nations Office of the High Commissioner for Human Rights |
| UNSC | United Nations Security Council |
| UNSG | United Nations Secretary-General |
| URNG | Guatemalan National Revolutionary Unity |
| VCLT | Vienna Convention on the Law of Treaties |

# Introduction

## 1 Setting the scene: non-state armed groups and reparations

This study examines whether and how non-state armed groups (NSAG) might be required to provide reparation for the damages, or harms, caused by their violations of international law committed during situations of non-international armed conflict (NIAC). In examining this subject matter, the study responds to the predominance of such armed conflicts that involve NSAGs as one of their main protagonists besides states and may leave a detrimental impact on society. The question is raised as to whether, like the states that are party to these conflicts, NSAGs should also hold a duty to make reparation for the damage and suffering they have inflicted on their victims under international law.[1]

Although armed conflicts involving NSAGs are not a new phenomenon, their characteristics and prevalence have shifted considerably. In the post-Cold War era, NSAGs have gained increased influence and power to the detriment of states.[2] The International Committee of the Red Cross (ICRC) identified, in its 2019 Challenges Report, the "proliferation of non-State armed groups" as a central feature of "the changing geopolitical landscape of the last decade".[3] In this context, NIACs have become the dominant form of armed conflict, while inter-state conflict has become a rather exceptional occurrence.[4] In response to this development, NSAGs have been firmly placed on the international peace and security agenda.[5]

The realities of these present-day armed conflicts, such as the protracted conflicts in the Central African Republic, Syria and Colombia, which all involve a complex scenario of armed actors, illustrate the devastating impacts that they can have on the civilian population in terms of death, physical and psychological harm, damage to property and displacement.[6] The

[1] Laura Íñigo Álvarez, 'The Obligation to Provide Reparations by Armed Groups: A Norm under Customary International Law?' (2020) 67 Netherlands International Law Review 427, 428.
[2] ILA Committee on Non-State Actors, 'Johannesburg Conference Non State Actors' (2016) para 10.
[3] ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2019) 50.
[4] ICRC, 'The Roots of Restraint in War' (2018) 13; Therése Pettersson, Stina Högbladh and Magnus Öberg, 'Organized Violence, 1989–2018 and Peace Agreements' (2019) 56 Journal of Peace Research 589.
[5] See for instance Hilde D Roskam, 'Crime-Based Targeted Sanctions: Promoting Respect for International Humanitarian Law by the Security Council', *Yearbook of International Humanitarian Law*, vol 19 (2016).
[6] M Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98 The Journal of Criminal Law and Criminology 711; Centro Nacional de Memoria Histórica, '¡Basta Ya! Colombia: Memories of War and Dignity' (2016); Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016) 1–2; Human Rights Watch, 'Central African Republic: Armed Group Kills 46 Civilians' (2019); Amnesty International, '"Nowhere Is Safe for Us": Unlawful

regime of state responsibility is rendered less relevant, practically and legally, in a context in which NSAGs "are less frequently acting as proxies of other states", but rather as independent armed actors.[7]

There has been gradual growth in awareness and recognition of the plight of victims of armed conflict and of the need to provide reparations for the harmful consequences they have endured following violations of international law.[8] Redress of wrongs is a fundamental legal principle, recognised in all legal systems, which developed historically as a means of settling disputes between offenders and victims.[9] Under international law, reparations were initially an inter-state mechanism that followed broadly from the traditional state-centric nature of the international legal system. Yet, an increased concern for individual victims' right to reparation under international law was generated in the responses to the atrocities committed during World War II. Such concerns had a particular influence on legal developments in the human rights field.[10] In addition, besides states, certain non-state actors, including individuals and international organisations, have been required to provide reparations under contemporary international law.[11]

Some further significant advances have been made in the quest for reparations, with prominent examples including: the 1989 landmark ruling *Velásquez Rodríguez v. Honduras* of the Inter-American Court of Human Rights, which set the beginning of the Court's progressive body of case law on reparations; the adoption, by the UN General Assembly in 2005, of the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines); and, the first cases dealing with reparations for international crimes before the International Criminal

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Attacks and Mass Displacement in North-West Syria' (2020); UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (6 May 2020) UN Doc S/2020/366.

[7] Aristoteles Constantinides, 'Direct Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council' (2010) 4 Human Rights & International Legal Discourse 89, 90–91.

[8] Theo van Boven, 'Reparative Justice - Focus on Victims' (2007) 25 Netherlands Quarterly of Human Rights 723; Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (Intersentia 2020) 161.

[9] *Case concerning the Factory at Chorzów (Germany v Poland)* PCIJ (Merits) [1928] PCIJ Rep Series A No 17 29; Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International and Comparative Law Review 157, 157; M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Human Rights Law Review 203, 207.

[10] Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 529. For an historical discussion of reparations for victims of armed conflict see ILA Committee on Compensation for Victims of War, 'Compensation for Victims of War (Background Report)' (2004).

[11] Art 75 ICC Statute; art 31 ILC, Articles on the Responsibility of International Organizations with Commentaries, Yearbook of the International Law Commission (2011) Vol II Part Two (ARIO).

Court.[12] Furthermore, the demand for reparations in conflict and post-conflict situations has been increasingly recognised as an essential component of transitional justice, defined by the UN as:

> the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. They may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[13]

These developments have sparked a discussion on the possibility of holding NSAGs collectively responsible for their wrongful conduct under international law, in turn possibly, resulting in a duty for NSAGs to make reparation. Such an evolution would directly benefit the victims of present-day armed conflicts.[14] Yet, this delicate question remains unsettled in international law. The existing legal scholarship indicates that although it is commonly accepted that NSAGs bear primary obligations under, at least, international humanitarian law (IHL) during situations of NIAC, it remains controversial whether such groups can be held legally responsible when violating these obligations and, particularly, whether this results into a duty to provide reparation as a legal consequence of responsibility.[15] Indeed, there is, at present, no treaty or legal instrument, nor any accompanying forum, that provides a substantive and institutional framework to hold NSAGs legally responsible for violations of their primary obligations under international law. Within this context, international legal scholars have evaluated, in different instances, the possibility of holding NSAGs responsible and to a duty of reparation as "a doctrine in *statu nascendi*", "a question of progressive development of the law", or "*de lege ferenda* rather than *de lege lata*".[16] This state of play

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[12] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by UNGA Res 60/147 on 16 December 2005 (21 March 2006) UN Doc A/RES/60/147 (UN Basic Principles and Guidelines); *Case of Velásquez Rodríguez v Honduras* IACtHR (Judgment Reparations and Costs) Series C No 7 (21 July 1989). At the International Criminal Court, four cases have thus far reached the reparation stage, namely in the *Lubanga*, *Katanga*, *Al Mahdi* and *Ntaganda* cases.

[13] UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies - Report of the Secretary-General' (23 August 2004) UN Doc S/2004/616 para 8.

[14] Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (n 8) 8, 59–61.

[15] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol I: Rules (Cambridge University Press 2005) 536; Veronika Bílková, 'Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law?' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 263–264; Ezequil Heffes and Brian Frenkel, 'The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules' (2017) 8 Goettingen Journal of International Law 39.

[16] ILA Committee on Non-State Actors, 'Washington Conference Non State Actors' (2014) 11; Luke Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State*

suggests that a disconnect exists between the international legal system, which seeks to hold on to its traditional state-centric nature, and the previously discussed prevalence of modern armed conflicts, which have pushed NSAGs onto the international political scene.[17]

For a long time, the development of a regime of responsibility for NSAGs was not deemed practically and legally relevant. It was assumed that a NSAG would either win, by establishing a new government or state which would result in the absorption of its international responsibility into that of the state, or would be defeated, rendering its responsibility irrelevant due to the disappearance of the group.[18] However, the reality of modern armed conflicts has largely debunked these assumptions by displaying that NSAGs may continue to exist for a considerable period of time.[19] Moreover, not all groups necessarily strive to replace the existing state structures. Nevertheless, the temporary existence of NSAGs under international law does pose a significant challenge in the quest to apportion responsibility to such actors, a challenge which differs from states due to their status as rather stable entities.[20]

The seminal monograph of Zegveld of 2002 remains, at present, the primary reference work on the topic.[21] Although other legal scholars have subsequently addressed the possible international responsibility of NSAGs, this scholarship is considerably less in comparison to the significant body of work which considers the obligations of NSAGs under the primary rules of international law.[22] The questions as to whether and how responsible NSAGs should provide reparation has gained some attention in recent scholarship and international practice.

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*Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 346; Paloma Blázquez Rodríguez, 'Does an Armed Group Have an Obligation to Provide Reparations to Its Victims? Construing an Obligation to Provide Reparations for Violations of International Humanitarian Law' in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations* (Brill Nijhof 2018) 427; Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (n 8) 195.

[17] Liesbeth Zegveld, *The Accountability of Armed Opposition Groups* (Cambridge University Press 2002) 224; Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 Journal of International Humanitarian Legal Studies 5, 9–10.

[18] Éric David, *Principes de Droit Des Conflits Armés* (6th edn, Bruylant 2019) 899.

[19] Bílková (n 15) 275–276; Sten Verhoeven, 'International Responsibility of Armed Opposition Groups: Lessons from State Responsibility for Actions of Armed Opposition Groups' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 296.

[20] 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' Yearbook of the International Law Commission (1972) Vol II UN Doc A/CN.4/264 and Add.1 para 154.

[21] Zegveld (n 17).

[22] The primary rules of international law define the content of international obligations, whereas the secondary rules govern the conditions for actors to be considered responsible for violations of such obligations, referred to as internationally wrongful acts, and the legal consequences that flow therefrom. ILC, Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission (2001) Vol II Part Two (ARS) 31 para 1.

However, the topic is largely underexplored, with some aspects remaining unaddressed.[23] To date, a comprehensive international legal study on a possible duty of NSAGs to provide reparation to victims of armed conflict is lacking. This situation conveys a sense of urgency when considering, in the words of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, the "unacceptably large deficits with regard to access to justice, remedies, and reparations" in the accountability framework regarding NSAGs.[24] A study of this nature is not only relevant for international law, but also for the broader field of transitional justice, which has paid insufficient attention to the role that NSAGs could play within processes dealing with the past.[25]

At least three observations can explain the underdeveloped state of the field. First, several authors have noted that there is little practice on the issue.[26] These observers have concluded on distinct occasions that instances of NSAGs being held responsible for international law violations very much constitute "a textbook case", reparation claims against NSAGs remain largely "theoretical", or reparations are "rarely asked" from NSAGs and "rarely awarded" to their victims.[27] Yet, practice has recently emerged in Colombia, where the 2016 peace agreement between the government and the Revolutionary Armed Forces of Colombia - People's Army (FARC-EP) ascribes a role to the NSAG in the reparations process on the basis of the group's responsibility.[28] In this regard, Capone concludes that the "FARC's engagement to satisfy victims' rights and award reparations, both material and symbolic, as a

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[23] Noemi Gal-Or, Math Noortmann and Cedric Ryngaert, 'Introduction' in Noemi Gal-Or, Cedric Ryngaert and Math Noortman (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 17; Blázquez Rodríguez (n 16) 407. Notably, the issue was more recently addressed in two UN reports, which shows that it is gaining some traction see UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (5 June 2018) UN Doc A/HRC/38/44 paras 6, 21, 28, 98; UNGA, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (12 July 2019) UN Doc A/74/147. In addition, an exception is the ongoing research project 'Reparations, Responsibility and Victimhood in Transitional Societies' that partly focuses on the role of NSAGs in contributing to reparation processes (Queens University Belfast, start date 2017). See further <https://reparations.qub.ac.uk/> accessed 4 August 2020.

[24] UNHRC (n 23) para 21.

[25] Ita Connolly and Colm Campbell, 'The Sharp End: Armed Opposition Movement, Transitional Truth Processes and the Rechtsstaat' (2012) 6 International Journal of Transitional Justice 11, 11–12; Ron Dudai and Kieran McEvoy, 'Thinking Critically about Armed Groups and Human Rights Praxis' (2012) 4 Journal of Human Rights Practice 1, 18. However, see Annyssa Bellal, 'Non-State Armed Groups in Transitional Justice Processes: Adapting to New Realities of Conflict' in Roger Duthie and Paul Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017).

[26] Gillard (n 10) 534–535.

[27] Jann K Kleffner, 'The Collective Accountability of Organized Armed Groups for System Crimes' in Andre Nollkaemper and Harmen Gijsbrecht van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 255; Sassòli (n 17) 47; ILA Committee on Non-State Actors (n 16) 11.

[28] Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera (Government of Colombia - FARC-EP) (24 November 2016) (Final Peace Agreement or FPA).

non-State entity represents a significant achievement".[29] It builds on a previously established transitional justice process that is regulated by the Justice and Peace Law of 2005, which is said to represent "the ability of armed groups to be held responsible for reparations on the basis of violating human rights law […] by the organisation as a whole".[30]

Second, Zegveld concluded in 2002 that the "international accountability of armed opposition groups is primitive and the prospects for further development are limited".[31] More than a decade later, Mastorodimos argued that the first part of this conclusion remains largely true, while simultaneously emphasising that increasing debate on the topic has subsequently taken place.[32]

The second observation feeds into the final one, namely that discussions regarding NSAGs' international responsibility, and specifically their duty of reparation as a potential legal consequence of responsibility, have been confronted by several legal, practical and political dilemmas and challenges, which could lead one to conclude that the question of reparation is simply not relevant for NSAGs.

The first of these challenges is that, before addressing any questions relating to responsibility, the international legal personality of NSAGs as distinct legal entities must be determined. As will be discussed further, this process forms a necessary precondition in the traditional law of international responsibility.[33] Moving beyond this preliminary issue, it remains unclear what the character of a future regime of responsibility for such entities should actually be. Such a regime could, for instance, be construed by analogy with the responsibility of states, or individual criminal responsibility, or even as a new type of international responsibility altogether. There is also a need to clarify the regime's relation to the responsibility of other subjects of international law.[34] Moreover, from a procedural perspective, the forum in which reparations could possibly be claimed from a responsible NSAG remains to be determined.[35]

A further practical challenge consists in the fact that NSAGs may not have the capacity or resources to provide reparations. It may also be the case in practice that their organisational structure has dissolved or fragmented, preventing structured engagement in providing

[29] Francesca Capone, 'From the Justice and Peace Law to the Revised Peace Agreement between the Colombian Government and the FARC: Will Victims' Rights Be Satisfied at Last?' (2017) 77 Heidelberg Journal of International Law 125, 159.

[30] Law No 975 of 2005 (Justice and Peace Law) (Colombia); Moffett (n 16) 343.

[31] Zegveld (n 17) 229. Zegveld defines the concept of accountability as including both the substantive obligations of NSAGs and responsibility for breaches of these obligations. ibid 5.

[32] Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability* (Ashgate 2016) 135–136.

[33] Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (n 8) 66.

[34] Bílková (n 15) 278–279, 281–282.

[35] ibid 282; Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (n 8) 158.

redress.[36] Indeed, a NSAG may simply cease to exist in the aftermath of an armed conflict. Ultimately, this may render reparations from such groups infeasible. This is reinforced by the possibility that NSAGs may lack the political willingness to provide or at least contribute to such measures.[37]

NSAGs are also characterised by their structural disparity.[38] Such groups may "range from those that are highly centralized (with a strong hierarchy, effective chain of command, communication capabilities, etc.) to those that are decentralized (with semi-autonomous or splinter factions operating under an ill-defined leadership structure)".[39] This may render the development of a legal regime that uniformly regulates their potential international responsibility more difficult.[40] In this respect, Íñigo Álvarez argues that there is a need to take account of such structural differences for any potential regime to be realistic.[41]

Perhaps the main political hurdle obstructing the development of a regime of international responsibility for NSAGs remains the general reluctance of states, as primary international law subjects, to recognise the legal existence, or rather personality, of such groups in international law. The concerns of states are that any form of recognition could confer some sort of legitimacy upon NSAGs.[42] Instead, states prefer to address the responsibility of the individuals making up the NSAG, rather than the group itself.[43] According to Dudai, such an attitude could be even more pronounced with regard to reparation since it could be viewed as a measure reserved for states.[44] Any analysis of the position of NSAGs in international law needs to take into account that such groups are not ordinary non-state actors. Their defiant nature towards states makes them into one of the most controversial non-state actors on the international stage. As Daboné puts it: "armed groups are not desired or wanted […] their existence is not usual in international law. Armed groups are born to disturb order, in the physical and legal sense".[45]

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[36] ILA Committee on Non-State Actors (n 16) 9–10; Moffett (n 16) 334.

[37] Ron Dudai, 'Closing the Gap: Symbolic Reparations and Armed Groups' (2011) 93 International Review of the Red Cross 783, 785–786; Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (n 8) 158.

[38] See also Section 2.1.

[39] Michelle Mack, 'Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts' (ICRC 2008) 11.

[40] Annyssa Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibility of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 307.

[41] Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (n 8) 67.

[42] Mastorodimos (n 32) 136.

[43] Zegveld (n 17) 223.

[44] Dudai (n 37) 793.

[45] Zakaria Daboné, 'International Law: Armed Groups in a State-Centric System' (2011) 93 International Review of the Red Cross 395, 424.

Despite these unresolved issues, scholars have advanced specific advantages or reasons why NSAGs should be obliged to provide reparation. Mastorodimos and Íñigo Álvarez both argue that the possibility of obtaining reparations increases if the respondent is a collectivity rather than an individual.[46] Bellal notes in this regard that the person who committed the violation with the support of the group might be deceased. This could hamper the possibility of obtaining reparations in an individualised trial. In addition, the group might have significant assets that could be seized if and where responsibility has been established.[47] In her contribution to the debate, Blázquez Rodríguez points to the disparity in legal status between the victims of abuses committed by states and NSAGs, which she considers unsatisfactory from a justice perspective.[48] Furthermore, Moffett explains that attaching responsibility for reparations to perpetrators, whether individual or organisational, provides for an important psychological function for victims in appropriately directing blame and relieving their guilt. From the perspective of the responsible NSAG, taking responsibility for reparation can help symbolise the group's commitment to remedying the past.[49] More generally, the argument has also been made that reparations could enhance better compliance with international law, by taking an important part in enforcement and in deterrence of future violations.[50]

# 2 Definition of the key concepts

Before discussing the specific research focus and design of this study, it is necessary to define some key concepts, in order to set out the conceptual framework.

## 2.1 Non-state armed group

Despite the significant body of legal scholarship on armed groups engaged in situations of armed conflict, a commonly accepted term or definition is lacking when it comes to referring to such actors in scholarly writings and, even more broadly, within international law.[51]

[46] Mastorodimos (n 32) 3; Laura Íñigo Álvarez, 'La Responsabilidad Internacional de Los Grupos Armados: ¿Responsabilidad Individual o Colectiva?' (2018) XVIII Anuario Mexicano de Derecho Internacional 481, 503.
[47] Bellal (n 40) 305–306; Verhoeven (n 19) 286.
[48] Blázquez Rodríguez (n 16) 406.
[49] Moffett (n 16) 324–325.
[50] Gillard (n 10) 530; ILA Committee on Compensation for Victims of War (n 10) 7; Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (n 8) 5–6.
[51] The UN Security Council has, for instance, used over fifteen different terms to refer to armed groups, while not expressly defining many of these terms in its resolutions. Jessica S Burniske, Naz K Modirzadeh and Dustin A Lewis, 'Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly - Briefing Report with Annexes' (Harvard Law School Program on International Law and Armed Conflict 2017) 8–9.

Instead, a variety of terms are used, such as organised armed group,[52] armed opposition group,[53] rebel group,[54] insurrectional movement,[55] paramilitary group or terrorist organisation. The choice to employ certain terminology can depend on the context or type of group one is dealing with.[56] For instance, states may label an armed group that opposes them as terrorists, which may serve a political motivation to justify the use of force over dialogue.[57] Another example is the term paramilitary group, which has been used to identify "irregular combat units that usually act on behalf of, or are at least tolerated by, a given regime".[58] This state of play can, in part, be understood as a consequence of their heterogeneous nature. Even though armed groups are characterised by their common use of armed violence as *modus operandi* and their denomination as outlaws under national law, they are, at the same time, marked by their diversity in terms of a wide array of features, such as: origins, motivations, organisational structures and tactics.[59] Some armed groups are small, or have shaky organisational structures, whilst others resemble the armed forces of a state, or even exercise effective control over territory and the populations living there.[60] Such control can, of itself, take distinct forms and go as far as substituting the state in the provision of particular services and competences, such as: health care, education, tax collection and the administration of justice.[61] Hence, such armed groups appropriate certain state-like characteristics.[62]

For the purpose of this study, the neutral term 'non-state armed group' or, in short, NSAG, is preferred and is defined as encompassing any NSAG that is a party to a NIAC against a state, several states and/or rival NSAGs, in order to reach certain objectives of, for instance, a

[52] For instance, art 3 common to the Geneva Conventions of 1949 broadly refers to "Parties to the conflict", whereas art 1 of Additional Protocol II of 1977 uses the term "organized armed groups". However, no general definition is provided.
[53] See e.g. Zegveld (n 17) 1.
[54] Schneckener refers to rebel or guerrilla groups as those that seek the liberation of a social class or a nation, whilst fighting to overthrow a government, secede from a region or end an occupational or colonial regime. Ulrich Schneckener, 'Fragile Statehood, Armed Non-State Actors and Security Governance' in Alan Bryman and Marina Caparini (eds), *Private Actors and Security Governance* (LIT & DCAF 2006) 25.
[55] See e.g. art 10 ARS.
[56] Jo notes, for instance, that the definition of rebel group is based on the group's goal of opposing the national government, whereas the denomination of terrorist organisation derives from the group's tactics to create fear and intimidation. However, both may also overlap. Hyeran Jo, 'Compliance with International Humanitarian Law by Non-State Armed Groups: How Can It Be Improved?', *Yearbook of International Humanitarian Law*, vol 19 (Asser Press 2016) 67–68.
[57] Nicolas Florquin and Elisabeth Decrey Warner, 'Engaging Non-State Armed Groups or Listing Terrorists? Implications for the Arms Control Community' (2008) 1 Disarmament Forum 17, 18; Bellal (n 25) 247–248.
[58] Bellal (n 25) 237.
[59] DCAF and Geneva Call, 'Armed Non-State Actors: Current Trends & Future Challenges' (2015) 7–8.
[60] Mack (n 39) 11; Vincent Bernard, 'Editorial: Understanding Armed Groups and the Law' (2011) 93 International Review of the Red Cross 261, 261–262.
[61] See for instance Murray (n 6) ch 8; Geneva Call, 'Administration of Justice by Armed Non-State Actors' (2018).
[62] UNHRC (n 23) 3–4; ICRC (n 3) 52.

political, social or economic nature. In accordance with the threshold requirements set by IHL regarding the existence of such armed conflicts, a NSAG needs to have a sufficient level of organisation, regardless of whether or not it exercises control over a territory, and must be engaged in armed hostilities of a certain intensity.[63] Therefore, this study focuses on NSAGs which trigger at least the application of IHL. Only NSAGs that are distinct and operate on an independent basis from states fall within the scope of this study, hence the inclusion of 'non-state' in the adopted term. As a result, this broadly excludes NSAGs that carry out conduct under the direction, control, support or authority of one or more states.

### 2.2 Responsibility

The concept of responsibility takes different meanings within international law. Amongst other utilisations, the word 'responsibility' has been used as a synonym for a legal obligation; to refer to political or moral principles, such as the responsibility to protect; to hold individuals liable in international criminal law; and, to deal with international wrongs committed by states.[64] This study concerns itself broadly with the responsibility of a NSAG as such, as a distinct entity, for a particular act that gives rise to a duty/obligation to provide reparation. Because the concept of collective responsibility concerning NSAGs remains unclear under international law, the manner in which the international responsibility of states is formulated and defined is used as the initial conceptual framework for analysis of the responsibility of NSAGs.[65] This is justified by the character of state responsibility as "the paradigm form of responsibility" in international law, which logically follows from the historical supremacy of states in this body of law.[66] Indeed, this understanding of responsibility has become "a central structuring principle of the international legal system" in and of itself.[67] The majority of legal scholars working on issues relating to NSAGs' international responsibility have followed a similar approach.[68] Nevertheless, this should not

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[63] *Prosecutor v Tadić* ICTY (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 70.

[64] See André Nollkaemper, 'Responsibility' (2017) ACIL Research Paper No 2017-03 <https://ssrn.com/abstract=2914250> accessed 4 August 2020.

[65] See the ARS; James Crawford and Jeremy Watkins, 'International Responsibility' in John Tasioulas and Samantha Besson (eds), *The Philosophy of International Law* (Oxford University Press 2010).

[66] James Crawford and Simon Olleson, 'The Character and Forms of International Responsibility' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 444.

[67] Nollkaemper (n 64) 2. See also Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010).

[68] See e.g. Verhoeven (n 19) 287; Heffes and Frenkel (n 15); Agata Kleczkowska, 'Filling the Gap: The New Regime of Responsibility for Armed Non-State Actors' (2018) 25 Australian International Law Journal 137, 138; Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian*

be understood as implying that the study considers this conceptualisation as being set in stone. Instead, the distinct nature of NSAGs in comparison to states and relating practice may eventually result in a tailor-made approach to responsibility and reparation.

Thus, the starting point for this study is the conceptualisation of responsibility as the general conditions under international law for a NSAG to be considered responsible for internationally wrongful actions or omissions, and the legal consequences that flow therefrom.[69] The latter constitutes the so-called content or substance of international responsibility.[70] More specifically, an internationally wrongful act gives rise to a new legal relationship which places on the responsible actor a duty to make reparation for the harmful consequences flowing from the international wrongful act itself.[71] In other words, responsibility concerns itself with a process of determining the international wrongfulness of a particular act and the legal consequences that arise therefrom for the wrongdoer, which involves a duty of reparation.

Furthermore, responsibility is tied to the concept of accountability: holding an entity that has committed a violation of international law responsible ensures that the wrongdoer accounts for its acts. The idea of responsibility requires a response, *respondere*, or account about the act to another actor.[72] In this sense, international responsibility can be understood as an element of the broader concept of accountability, which encompasses a variety of processes that seek to monitor and scrutinize behaviour, regardless of whether or not these acts can be qualified as violations of international law, and may potentially lead to some sort of sanction.[73]

## 2.3 Reparation

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*Law, Human Rights Law, and International Criminal Law* (Oxford University Press 2018) 307; Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (n 8) 90–91.

[69] By analogy with the ILC Commentary to the ARS 31 para 1. By analogy with the law of state responsibility, an 'internationally wrongful act' consists of an action or omission that is attributable to a NSAG under international law and constitutes a breach of an international obligation of that group. See art 2 ARS.

[70] By analogy with the ILC Commentary to the ARS 86 para 1.

[71] By analogy with the ILC Commentary to the ARS 86-87 para 2; arts 28 and 31 ARS.

[72] *Prosecutor v Thomas Lubanga Dyilo* ICC (Amended Order for Reparations) ICC-01/04-01/06-3129-AnxA (3 March 2015) para 2; Mark Bovens, *The Quest for Responsibility* (Cambridge University Press 1998) 23; George P Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt' (2002) 111 Yale Law Journal 1499, 1555; Moffett (n 16) 324.

[73] Deirdre Curtin and André Nollkaemper, 'Conceptualizing Accountability in International and European Law' (2005) XXXVI Netherlands Yearbook of International Law 3, 8; Kleffner (n 27) 240; Jean d'Aspremont and others, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62 Netherlands International Law Review 49, 52; Bílková (n 15) 265; Katharine Fortin, 'Armed Groups and Procedural Accountability: A Roadmap for Further Thought', *Yearbook of International Humanitarian Law*, vol 19 (TMC Asser Press 2016) 164–165; Nollkaemper (n 64) 1.

A final concept requiring further clarification is that of reparation. The previous discussion has made clear that a close relationship exists between responsibility and reparation. More specifically, the duty to provide reparation is one of the legal consequences which arises from the attribution of responsibility to a wrongdoer.[74] In the words of the Permanent Court of International Justice, it is "a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".[75]

In this study, reparation is defined as encompassing individual and collective measures that are provided by a responsible actor to acknowledge and redress the various types of damage or harm that victims have suffered as a result of violations of international law.[76] Accordingly, reparation takes an important role in recognising the suffering and dignity of the victims and in providing a measure of redress.[77] The concept of reparation can be understood as involving a dual dimension: the duty to provide redress or relief to the victims (the substantive dimension) and the process before a court, an administrative body or another competent mechanism through which arguable claims are decided and substantive redress is afforded (the procedural dimension, which is subsumed in the notion of remedy).[78] Reparations generally seek to restore the situation that existed before the wrong occurred, so-called full reparation or *restitutio in integrum*, by way of a different range of forms.[79] According to the UN Basic Principles and Guidelines, these forms may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[80] The instrument further recognises that reparation should be "adequate, effective and prompt" as well as "proportionate to the gravity of the violations and the harm suffered".[81] Nonetheless, full reparation may not be possible in some instances, due to, for instance, the nature of the

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[74] Art 31 ARS; *Prosecutor v Thomas Lubanga Dyilo* (n 72) para 2; Liesbeth Zegveld, 'Victims' Reparation Claims and International Criminal Courts: Incompatible Values?' (2010) 8 Journal of International Criminal Justice 79, 81; Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 13, 31; Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (n 8) 159.

[75] *Factory at Chorzów Case (Merits)* (n 9) 29; Roht-Arriaza (n 9) 157.

[76] Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 452.

[77] Moffett (n 16) 324–325.

[78] UNOHCHR, 'Rule-of-Law Tools for Post-Conflict States: Reparation Programmes' (2008) 6; Shelton (n 74) 16; International Commission of Jurists, 'The Right to a Remedy and to Reparations for Gross Human Rights Violations' (2018) xiii.

[79] Arts 31, 34 ARS; UN Basic Principles and Guidelines principle 18; *Factory at Chorzów Case (Merits)* (n 9) 47; *Case of Velásquez Rodríguez v Honduras* (n 12) para 26; *Papamichalopoulos v Greece (Article 50)* ECtHR (Judgment) Series A No 330-B (31 October 1995) paras 34, 36; Henckaerts and Doswald-Beck (n 15) Rule 150; Shelton (n 74) 19.

[80] UN Basic Principles and Guidelines principles 18-23.

[81] UN Basic Principles and Guidelines principles 11(b), 15.

violation or the large number of victims.[82] Although reparation generally provides a means for dealing with the past, it may also fulfil a forward-looking function by possibly contributing to victims' reintegration into society, or by providing a step towards a common future, among other possibilities.[83]

Lastly, reparation intends to promote and afford justice to the victims.[84] It has also been understood as a means to ensure that wrongdoers account for their acts.[85] Reparation is recognised as one of the main pillars of transitional justice alongside efforts which seek to provide truth, criminal justice and guarantees of non-repetition.[86] Reparation measures are the only measures which are specifically designed to benefit the victims of armed conflict directly, while acknowledging their suffering and needs and attempting to address the harms they have endured.[87] In other words, "reparations constitute an effort that is explicitly and primarily carried out on behalf of victims" and, in doing so, they go beyond the narrow focus of criminal prosecution.[88]

# 3 Research aim, questions and scope

As the preceding discussion has shown, the responsibility of NSAGs constitutes a grey area in international law: one marked by uncertainty and a clear need for further enquiry.[89] The overall aim of this study is to bring clarity to one of the possible legal consequences which may arise from those violations of international law committed by NSAGs during situations of NIAC. This consequence concerns a possible duty to provide reparation for any injury caused by such violations. This aim is comprised of three specific research objectives:

The first objective is to examine whether and, if so, to what extent NSAGs which are party to a NIAC are recognised as subjects within the international legal system. Under traditional

[82] Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press 2017) 92; ICTJ, 'Getting to Full Restitution' (2017) 2–3.

[83] Naomi Roht-Arriaza, 'Reparations in the Aftermath of Repression and Mass Violence' in Eric Stover and Harvey M Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press 2004) 122.

[84] UN Basic Principles and Guidelines principle 15; Shelton (n 74) 19.

[85] *Prosecutor v Thomas Lubanga Dyilo* (n 72) para 2; Moffett (n 16) 324.

[86] UNHRC, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (9 August 2012) UN Doc A/HRC/21/46.

[87] Lisa Magarrell, 'Reparations in Theory and Practice' (ICTJ 2007) 2.

[88] Pablo de Greiff, 'Repairing the Past: Compensation for Victims of Human Rights Violations' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 2; Jemima García-Godos, 'Victim Reparations in the Peruvian Truth Commission and the Challenge of Historical Interpretation' (2008) 2 International Journal of Transitional Justice 63, 65; Dudai (n 37) 787; UNGA, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence - Note by the Secretary-General' (14 October 2014) UN Doc A/69/518 para 10.

[89] Zegveld (n 17) 220.

international law, responsibility is considered to be "the consequence of international legal personality" or rather one of its "main practical manifestations".[90] As a result, it is a necessary precondition to determine whether NSAGs have international legal personality, before considering any questions relating to their potential responsibility under international law. This requires an examination into whether NSAGs bear certain primary international obligations, as direct and distinct duty bearers. This discussion provides the basis to subsequently analyse whether breaches of these international obligations could result in the responsibility of NSAGs and particularly in a resulting duty to provide reparation for harmful consequences.

The second objective is to analyse whether a duty to provide reparation might constitute one of the legal consequences which arises for NSAGs where they commit violations of international law. Under international law, a duty of reparation is understood to stem from the holding of an entity as responsible. As a result, the study is required, in the first instance, to examine whether NSAGs can incur international responsibility for wrongful acts. To this end, a comprehensive analysis must be carried out regarding NSAGs' place in the current international legal framework governing questions relating to responsibility and reparation for wrongs committed during situations of armed conflict.

The final objective is to explore how a possible duty of NSAGs to provide reparation could be operationalised under international law. This process involves examining how such a duty could be conceptualised and put into practice. Indeed, the discussion in Section 1 has revealed some of the legal, but also practical and political, dilemmas and challenges that need to be addressed as part of this examination. In this respect, it is necessary to obtain an understanding of how the role of NSAGs in reparations has been addressed in international practice and in other legal sources. Moreover, an examination needs to be carried out as to whether the existing legal principles and rules concerning reparation in international law could be applied to NSAGs. It follows that this examination will have to reflect on whether particularities specific to these NSAGs need to be taken into account. Lastly, as previously indicated, important practice has emerged in Colombia, where NSAGs have been required to provide reparations, since 2005, as part of two distinct transitional justice processes. Consequently, the Colombian case may hold considerable insights that could further inform the international legal debate.

[90] Pellet (n 67) 6; Nollkaemper (n 64); Kleczkowska (n 68) 139; Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (n 8) 66.

Based on these objectives, the main research question of this study is as follows: *can NSAGs be under a duty to provide reparation for violations of international law committed in armed conflict, and how could such a duty be operationalised?*

This question is answered by way of the following subsidiary research questions:

- *Do NSAGs have legal personality under international law?*
- *Does a duty on the part of NSAGs to provide reparation exist under international law? If so, to what extent?*
- *How could such a duty of NSAGs to provide reparation be operationalised under international law?*
- *What insights for international law can be drawn from the operationalisation of a duty of NSAGs to provide reparation in Colombia?*

The scope of the study is limited in a number of ways. As was discussed previously, the focus of the research is on NSGAs which operate independently from states and which are party to a NIAC. Thus, the research does not consider armed actors that are involved in other situations of violence, such as riots or civil unrest. Moreover, although Chapter 6 will concern itself with paramilitary groups operating in Colombia, abstraction is made of any legal questions concerning responsibility that may arise due to potential cases of collusion with the State. Furthermore, this study focuses on the duty to repair as a legal consequence of international responsibility. Other aspects of a possible responsibility regime for NSAGs, such as the rules of attribution, are not, or are only indirectly, addressed. In addition, the study does not concern itself with the other side of the responsibility coin, namely whether victims have an enforceable right to reparation with respect to responsible NSAGs under international law and the question as to which specific victimised persons or other actors NSAGs might owe obligations in respect of their responsibility. Victims of violations perpetrated by such groups could broadly include civilians, the territorial state, third states and even other NSAGs. These possibilities are not strictly defined within this study. As a final note, the research considers, to some extent, the practice of NSAGs which is akin to reparations as conceptualised in international law, a practice referred to as *informal reparations*. However, the specific question of whether such practice can contribute to the development of international law is not addressed.

# 4 Structure of the study and applied methodology

The main body of this study is divided into three parts, followed by a concluding section. The first two parts consist of two chapters each, while the third part is comprised of three chapters. In the following outline, the structure of each part will be considered more closely. This includes a discussion of the methodology which has been applied in terms of consulted sources and research methods. In general, the study adopts a traditional doctrinal research approach, which has involved extensive desk-based research into a variety of sources of international law.[91] This has been complemented by analysis of social science literature and qualitative data collected during field research conducted in Colombia.

## 4.1 Part 1

In the first part of this study, the current international legal framework governing a possible duty of NSAGs to provide reparation to victims of armed conflict is examined.

Chapter 1 begins by analysing whether NSAGs have distinct legal personality under international law. The chapter first deals with the concepts of international legal personality and subject within international law, particularly focusing on the legal position of non-state actors in international law. The discussion primarily draws from an analysis of the authoritative case law of the International Court of Justice (ICJ) and legal scholarship. The chapter continues by examining the international legal personality of NSAGs as distinct legal entities under IHL and international human rights law (IHRL). Various primary and secondary legal sources are analysed to this end, including international treaties, the *travaux préparatoires*, the ICRC commentaries concerning the Geneva Conventions of 1949 and the Additional Protocols of 1977, customary IHL, the case law of international courts and tribunals, international practice and legal scholarship.

Chapter 2 scrutinises whether and, if so, to what extent NSAGs hold a duty to provide reparation for violations committed during situations of NIAC under current international law. This involves determining whether these groups can be held internationally responsible, as a duty of reparation would potentially follow from such responsibility. The chapter sheds further light on how this duty of reparation has been conceptualised and put into practice. A

[91] As authoritatively stated in art 38(1) ICJ Statute, the sources of international law comprise of: “a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. […] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. Ian Dobinson and Francis Johns, ‘Qualitative Legal Research’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2010) 18–19.

diversified set of legal sources is studied, including treaty law, customary IHL, domestic and international case law, legal instruments (such as the Articles on the Responsibly of States for Internationally Wrongful Acts (ARS) of the International Law Commission (ILC) and the UN Basic Principles and Guidelines), preparatory works and commentaries, scholarly opinion and expert documents. A considerable body of state and other international practice is also examined. The analysis of state practice is based on primary materials as well as digests and other secondary sources of international law, which either comment on this practice or reproduce excerpts of original documents which are not readily available elsewhere. The chapter also examines UN practice and includes a systematic study of the reports of 25 commissions of inquiry, fact-finding missions and other investigative mechanisms dealing with conflicts in the Central African Republic,[92] Colombia,[93] Côte d'Ivoire,[94] Democratic Republic of the Congo,[95] Iraq,[96] Libya,[97] Mali,[98] Myanmar,[99] Nepal,[100] Nigeria,[101] Palestine/Israel,[102] South Sudan,[103] Sri Lanka,[104] Sudan,[105] Syria,[106] and Yemen[107]. The selection has been made on the basis of the UN Research Guide on International Commissions of Inquiry, Fact-finding Missions and Other Investigations and is focused on mechanisms that have investigated IHL and IHRL violations committed during situations of NIAC.[108] In addition, the practice of seven truth commissions, dealing with conflicts in El

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[92] International Commission of Inquiry to investigate events in the Central African Republic since 1 January 2013 (2013); OHCHR Fact-finding mission to Central African Republic (2013).
[93] OHCHR Inquiry into alleged massacre in the Chocó region of Colombia (2002).
[94] OHCHR Fact-finding mission to Côte d'Ivoire to compile information on the human rights and humanitarian situation (2002); International Independent Commission of Inquiry on the Situation of Human Rights in Côte d'Ivoire (2011).
[95] Mapping exercise of the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 (2008); Team of international experts on the situation in Kasaï (Democratic Republic of the Congo) (2017).
[96] OHCHR Investigation mission to Iraq (2014).
[97] International Commission of Inquiry on Libya (2011); OHCHR Investigative mission to Libya (2015).
[98] OHCHR Fact-finding mission on the situation of human rights in Mali (2013).
[99] Independent international fact-finding mission on Myanmar (2017).
[100] OHCHR Nepal conflict mapping (2009).
[101] OHCHR Fact-finding mission to investigate atrocities committed by the terrorist group Boko Haram and its effects on human rights in the affected States [Cameroon, Chad, the Niger, Nigeria] (2015).
[102] UN Fact-finding mission on the Gaza conflict (2009); UN Independent Commission of Inquiry on the 2014 Gaza Conflict (2014).
[103] OHCHR Assessment mission to improve human rights, accountability, reconciliation and capacity in South Sudan (2015); UN Commission on Human Rights in South Sudan (2016).
[104] Secretary-General's Panel of experts on accountability in Sri Lanka (2010); OHCHR investigation on Sri Lanka (2014).
[105] International Commission of Inquiry on Darfur (2004); OHCHR Fact-finding mission to Darfur (2004); High-level Mission on the situation of human rights in Darfur (2006).
[106] Independent International Commission of Inquiry on the Syrian Arab Republic (2011).
[107] The Group of Eminent International and Regional Experts on Yemen (2017).
[108] 'UN Research Guide on International Commissions of Inquiry, Fact-Finding Missions and Other Investigations' <https://libraryresources.unog.ch/factfinding> accessed 2 October 2020.

Salvador, Guatemala, Liberia, Peru, Sierra Leone, Solomon Islands and Timor-Leste respectively, is analysed.[109] The selection has focused on commissions that dealt with NIACs and which concluded their work with a publicly available final report. It was primarily made on the basis of Hayner's seminal monograph on truth commissions and the US Institute of Peace Truth Commission Digital Collection.[110]

### 4.2 Part 2

The second part of this study explores how a possible duty of NSAGs to provide reparation for internationally wrongful acts could be operationalised under international law. Moving beyond present international law, the overall analysis is conducted from a *de lege ferenda* perspective.

Chapter 3 seeks to determine what the character of a future regime of international responsibility of NSAGs should be, by examining the two existing regimes of international responsibility. As to the first regime of state responsibility, the ARS takes a central place in the analysis, as does the ILC Commentary and preparatory work. This is complemented by a study of treaty law and commentaries, some instances of state practice, international case law, arbitral awards and legal scholarship. The examination of the second regime of individual criminal responsibility primarily draws from treaty law and the founding instruments of criminal courts and tribunals as well as preparatory works and commentaries, case law, UN documents and scholarly writings. The evaluation of practice concerning efforts to hold collective entities criminally responsible predominantly focuses on the Nuremberg International Military Tribunal (IMT), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court. This selection is based on a preceding literature review, which revealed which courts or tribunals dealt with the issue. This was complemented by a study of contemporary international criminal law statutes.

The aim of Chapter 4 is to analyse how a possible duty of reparation for NSAGs could be conceptualised and put into practice under international law. A broad range of primary and secondary sources of general international law, IHRL, IHL and international criminal law is examined. It involves treaty law, a variety of legal instruments dealing with reparations,

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[109] More specifically the Commission on the Truth for El Salvador, Commission for Historical Clarification (Guatemala), Truth and Reconciliation Commission of Liberia, Truth and Reconciliation Commission (Peru), Sierra Leone Truth and Reconciliation Commission, Solomon Islands Truth and Reconciliation Commission and Timor-Leste Commission for Reception, Truth, and Reconciliation.

[110] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2011); US Institute of Peace, 'Truth Commission Digital Collection' <https://www.usip.org/publications/2011/03/truth-commission-digital-collection> accessed 28 July 2020.

including the ILC ARS and Commentary, the UN Basic Principles and Guidelines and the UN Impunity Principles, as well as domestic and international case law on reparations, including the case law of the International Criminal Court, human rights courts and domestic jurisdictions. The practice of states and other actors, such as the UN, truth commissions and the humanitarian NGO Geneva Call, is also examined here. The analysis additionally considers the informal practice of NSAGs concerning reparations, such as codes of conduct and practical examples of measures adopted by such groups that are akin to reparations in international law. Finally, desk-based research into legal and social science scholarship is undertaken.

### 4.3 Part 3

In the final part of the study, an examination is conducted into how the duty of NSAGs to provide reparations has been operationalised within the framework of two distinct transitional justice processes that have been taking place in Colombia. The overall aim is to obtain insights on the basis of this in-depth case study that can further inform the international legal debate on how such a duty could be conceptualised and put into practice under international law. These insights are to be understood as being tentative in nature or, in others words, as possible lessons and approaches that could be learnt from and applied when considering reparations from NSAGs. In this sense, the purpose of these insights is not to formulate normative claims. While the two Colombian processes are addressed to the extent necessary in the preceding parts of this study, a comprehensive analysis is reserved for this third part. Nevertheless, the overall discussion in the previous chapters provides the broader international legal framework against which the case-based insights are considered. Accordingly, the necessary links are drawn where relevant.

The purpose of Chapter 5 is to set the overall framework for the case study by placing the two transitional justice processes and the relevant NSAGs - particularly the paramilitary groups linked to the United Self-Defence Forces of Colombia (AUC) and the FARC-EP - in the broader context of the Colombian armed conflict. The discussion is broadly based on an examination of domestic and international legal norms and case law; historical, social science and legal scholarship; and, the reports of a variety of actors, including the Inter-American Commission on Human Rights, the National Center for Historical Memory and human rights organisations.

The following two chapters constitute the core of the case study on Colombia, which focuses on two successive transitional justice processes: (1) the Justice and Peace Law of 2005, which

focuses particularly on the AUC (Chapter 6); and, (2) the Comprehensive System for Truth, Justice, Reparation and Non-Repetition, that was established on the basis of the 2016 Final Peace Agreement with the FARC-EP (Chapter 7).

There are several reasons that justify the selection of the Colombian case study. Although little practice exists on the subject of this study, Colombia has obtained considerable experience over the years in terms of requiring NSAGs to provide reparations to the victims of the armed conflict. This has been achieved within the frameworks of the aforementioned processes. The Final Peace Agreement with the FARC-EP had only recently been concluded when this study was embarked upon in 2016 and both processes remain underexplored in international legal scholarship from the perspective of a possible duty to repair on the part of NSAGs.[111] In addition, the differences between the NSAGs involved and the processes in which their duty to repair is operationalised enrich the analysis and, therefore, provide for an additional justification for including both processes in the study. While the AUC-linked paramilitary groups operated, for instance, in a decentralised manner, the FARC-EP was characterised by its centralised command structure. Moreover, the Justice and Peace Law enforces their duty of reparation within the framework of criminal justice proceedings, whereas the Final Peace Agreement establishes a comprehensive transitional justice system that goes beyond criminal justice.

The consulted sources and research methods for Chapter 6 and 7 largely overlap. The analysis involves extensive desk-based research into domestic legislation, case law and legal scholarship, which is complemented by reports of international organisations, research institutions and civil society organisations and relevant articles published by international and national news outlets. An analysis of the Justice and Peace Law and related case law is at the centre of Chapter 6, whereas Chapter 7 concerns a close examination of the Final Peace Agreement. Domestic case law has been extensively, but not systematically studied. The FARC-EP case is marked by its evolving nature due to continuous legal and practical developments. For this reason, the analysis of the case follows these developments up until the end of May 2020.

The desk-based research is complemented by qualitative data which was collected on the basis of semi-structured interviews, conducted during field research in Colombia. This field research took place from the beginning of February to the beginning of April 2019. Three objectives guided the in-country research, namely: to obtain a deeper understanding of the

[111] However, see the brief discussions in Moffett (n 16) 340–343; Capone (n 29) 159–160; Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (n 8) 185–186.

transitional justice processes, the context in which they are set and the involved NSAGs; to collect additional information that was not easily accessible; and, to acquire insights into some of the interviewees' personal opinions, perceptions and experiences with regard to these processes and more broadly on topics concerning NSAGs, collective responsibility and reparation. The data collected through the interviews is mainly used as a subsidiary source. It does not hold the purpose of making generalised statements. The contributions made by the participants are understood accordingly as expressions of their personal views. The references to the interviews in the chapters seek to give the discussion more depth by providing, for example, illustrations of a specific discussion or insights into the reflections, personal opinions or experiences of the interviewees regarding a particular issue. Hence, references, by way of a quote or a more general citation, are commonly included where they are deemed to fulfil such a function.

The selection of the interviewees relied first on a mapping exercise and then on snowball sampling or, in other words, on the recommendations of previous interviewees. The methodology of the interviews was based on a semi-structured topic guide that was tailored to the specific expertise or experience of each interviewee.[112] A number of informal or exploratory interviews were carried out, which are not used directly in the research, along with participant observation. In addition, a total of 24 semi-structured interviews were conducted.[113] The interviewees include: Justice and Peace Magistrates; officials of transitional justice and other government institutions; representatives of the political party *Fuerza Alternativa Revolucionaria del Común* (FARC); former FARC-EP members; representatives of victims and their organisations; civil society actors; and, the UN. The topic guide for former FARC-EP members was informed by the work of Bueno on the Justice and Peace Law and was further adjusted to the specific scope and objectives of the present study.[114] In preparation, ethical approval from the Social and Societal Ethics Committee, KU Leuven, was obtained. Interviews commenced by explaining the scope of the study as well as the purpose of the interview, guaranteeing anonymity, unless expressly waived, and obtaining informed consent.[115] For the majority of the interviews, informed consent was obtained in writing. The

[112] Semi-structured interviews "do not follow a fixed script. Instead, the interviewer follows a general framework or outline of the topics to be covered during the interview but is free to follow the flow of the interview in deciding when and how to pursue each thread". Robert M Lawless, Jennifer K Robbennolt and Thomas S Ulen, *Empirical Methods in Law* (Aspen Publishers 2010) 80.

[113] See the Annex to this study for an overview of the interviews.

[114] Isabella Bueno, 'Mass Victimization and Restorative Justice in Colombia: Pathways towards Peace and Reconciliation?' (KU Leuven 2013), Annex 3. This was done with the kind permission of Dr Isabella Bueno.

[115] All the interviews are referred to by the type of interview, a random number, the place where or the means through which the interview was conducted and the date on which it took place. In order to guarantee anonymity,

consent for the interviews with former FARC-EP members was obtained orally, pursuant to the rules of scientific integrity. The interviews were undertaken in person, with the exception of three interviews that were carried out over the telephone or via Skype, one of which was conducted upon return in Europe in May 2019. Most of the interviews were conducted in Spanish. The interviews were transcribed with the assistance of students and a certified Colombian firm. The qualitative data was analysed with NVivo software. The field research was primarily conducted in Bogotá, Cali and Medellin, as well as in three territorial areas for training and reincorporation, the so-called ETCR, located in the departments of Tolima and Caquetá, where FARC-EP fighters were living at the time. Two research stays at the University of Deusto, Spain, facilitated the preparations for the field research, which was carried out at the host institution, la Pontificia Universidad Javeriana, at its campuses in Bogotá and Cali. Due to time constraints, a second research visit was not possible. The author significantly improved her Spanish in order to analyse the vast array of sources and to personally conduct the interviews. The translations of the interviews to English included in the study are her own.

a general reference is made to the character of the interviewee and his or her organisational affiliation, unless otherwise decided with the participant. Interviewees are only named with their express permission and where it is of most importance to the study.

# PART 1

# THE CURRENT INTERNATIONAL LEGAL FRAMEWORK GOVERNING A POSSIBLE DUTY OF NON-STATE ARMED GROUPS TO PROVIDE REPARATION TO VICTIMS OF ARMED CONFLICT

# Chapter 1
# The international legal personality of non-state armed groups

## 1 Introduction

Before examining the responsibility of NSAGs under international law more closely, it is necessary to determine whether and, if so, to what extent such groups are recognised as subjects within the international legal system. The law of international responsibility requires that a NSAG has international legal personality as a precondition to any consideration about the responsibility of such a collective entity under international law.[1] This necessitates that a NSAG is "a legal entity distinct from its members".[2] Or, as put similarly by Schmalenbach, a NSAG's "responsibility requires an entity which is – de facto or *de iure* – distinguishable from its individual members".[3] It follows that the objective of this chapter is to determine whether a NSAG has distinct international legal personality. This necessitates an examination as to whether a NSAG bears, in its own right, certain primary obligations under international law. Such analysis provides the basis to subsequently examine whether possible international responsibility and a duty of reparation could be attributed to a NSAG where it has violated these primary obligations.[4]

The analysis begins by providing a broad introduction to the concepts of international legal personality and subject of international law, while reflecting more generally on the legal

[1] Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 6; Agata Kleczkowska, 'Filling the Gap: The New Regime of Responsibility for Armed Non-State Actors' (2018) 25 Australian International Law Journal 137, 139; Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (Intersentia 2020) 66.

[2] *Advisory Opinion on Western Sahara* ICJ [1975] ICJ Rep 12 para 148. By analogy with the ARIO: ''The legal personality of an organization, which is a precondition of the international responsibility of that organization, needs to be "distinct from that of its member States"". See ILC, Articles on the Responsibility of International Organizations with Commentaries, Yearbook of the International Law Commission (2011) Vol II Part Two (ARIO) art 2, 50 para 10.

[3] Kirsten Schmalenbach, 'International Responsibility for Humanitarian Law Violations by Armed Groups' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press 2015) 499.

[4] This understanding follows the traditional conceptualisation of international responsibility, as provided for in the law of state responsibility, see arts 1-2 ILC, Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission (2001) Vol II Part Two (ARS); James Crawford and Simon Olleson, 'The Character and Forms of International Responsibility' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 444. See also Section 2.2 of the Introduction to this study.

position of non-state actors under international law. This is followed by an enquiry into the international legal personality of NSAGs under IHL and IHRL. Aside from acting as a means to identify whether NSAGs are legal subjects under these bodies of international law, the analysis provides a deeper understanding of the scope of their international legal personality. In the final part of the chapter, several key insights will be drawn from the overall analysis. These will be relevant for further analysis about the international responsibility of NSAGs in the subsequent chapters.

# 2 International legal personality

## 2.1 The concepts of international legal personality and subject of international law

Traditional public international law was construed as a state-centric system, aimed at regulating state behaviour in an increasingly global and interconnected society. A consent-based system developed for and by states and based on the principles of non-interference, sovereignty and equality, amongst others.[5] As a result, states were recognised as the primary and exclusive subjects of international law having international legal personality, while non-state actors were regarded as subjects falling under the exclusive domestic jurisdiction of states. However, as will be shown, the international legal system has gradually opened its door to such actors and has, as a consequence, acquired a more heterogeneous nature.[6]

The concepts of 'international legal personality' and 'subject of international law' take a prominent place in public international law.[7] The primary reason being that these concepts distinguish those actors which are recognised as participants within the international legal system and those which are excluded.[8] Hence, an actor lacking legal personality, or the quality of subject, simply does not legally exist from an international law perspective. Accordingly, the concepts constitute important analytical tools when studying the international legal order. This observation notwithstanding, there is no "centralized law of persons" in international law that can be said to regulate the acquisition, content and

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[5] For a detailed discussion of the nature and development of international law from its early origins, see Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 1–31.

[6] Hersch Lauterpacht, *International Law: Being The Collected Papers of Hersch Lauterpacht*, vol 1 The General Works (Elihu Lauterpacht ed, Cambridge University Press 1970) 136–150; Jan Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors' in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff 2003).

[7] For an in-depth discussion, see Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press 2004); Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010).

[8] Portmann (n 7) 5.

consequences of international legal personality.[9] Indeed, even within legal doctrine, there is no general consensus about the conceptualisation of international legal personality. Moreover, a codified definition remains absent. Consequently, the concept is open to diverse interpretations.

It is generally understood that where an actor has international legal personality, it is a bearer of rights and obligations derived from international law.[10] Such personality has been defined to include the ability to exercise specific capacities, such as the ability to participate in the creation of international law, to seek redress for alleged violations and to participate in international organisations.[11] However, the extent to which an actor should be capable of exercising these various capacities - in order to be considered as having international personality – remains unclear.[12] Notably, the aforementioned examples correspond to the common legal capacities of states. Yet, when actors are required to fulfil such state-based capacities, some may be excluded simply due to their non-state nature. On the other hand, subjects of international law, or international legal persons, can be described as those actors which possess international personality. Hence, they are actors which independently bear direct rights and obligations under international law.[13] Accordingly, these entities constitute the active participants of the international legal order.[14] It is, however, debatable whether all bearers of rights and obligations can be regarded as subjects.[15]

Various conceptualisations of international legal personality can be found in legal scholarship. They depend on one's understanding of the international legal system and are, in this sense, subjective in their nature.[16] The normative implications of these various conceptualisations

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[9] ibid 9.

[10] Dapo Akande, 'International Organizations' in Malcolm Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 281; Shaw (n 5) 155.

[11] Michèle Olivier, 'Exploring Approaches to Accommodating Non-State Actors within Traditional International Law' (2010) 4 Human Rights & International Legal Discourse 15, 26; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016) 46–47; Rebecca MM Wallace and others, *International Law* (8th edn, Sweet and Maxwell 2016) 63; William Thomas Worster, 'Relative International Legal Personality of Non-State Actors' (2016) 42 Brooklyn Journal of International Law 207, 210–211.

[12] Portmann (n 7) 8–9. See also *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations* ICJ [1949] ICJ Rep 174.

[13] Lauterpacht, *International Law: Being The Collected Papers of Hersch Lauterpacht* (n 6) 136; Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press 2002) 42.

[14] Karsten Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law' (1999) 6 Indiana Journal of Global Legal Studies 579, 621.

[15] Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors' (n 6) 352.

[16] Jean d'Aspremont, 'Conclusion: Inclusive Law Making and Law-Enforcement Processes for an Exclusive International System' in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 433; Murray (n 11) 33.

add to the difficulty of coming to a uniform definition.[17] This is reflected in Portmann's monograph on international legal personality, in which he discusses the dominant conceptions that have been developed on the basis of philosophically different understandings of international law. The interpretations he lists are the state-only, recognition, individualistic, formal and actor conceptions of personality.[18] Each considers different entities to be international persons, highlights different mechanisms for an entity to become an international person and attaches different consequences to international personality itself.[19] However, none of these conceptions reflect the current realities of the international legal order in a comprehensive manner. This is primarily due to the fact that each conception fails to acknowledge the presence and influence of the others. An example of such neglect is illustrated by the individualistic conception, which considers the individual as the primary subject of international law, while states are viewed as abstract entities, created by individuals, that can only become *a posteriori* subjects. This conception fails to acknowledge the greater role that states play within the international legal order. Similarly, the state-only conception considers the state as the sole and primary subject in international law, but this view no longer stands in light of recent developments (see *infra*).[20]

The lack of clarity concerning the concepts of international legal personality and subject of international law has led many authors to treat them as synonyms, or even to reject the notion of the subjects doctrine.[21] One may even speak of a general trend in modern international law to treat both concepts as one and the same.[22] As argued by Klabbers: "there is nothing particularly wrong with treating them as such in a pragmatic fashion".[23] For the purposes of this study, this pragmatic and modern approach will be followed. Thus, although both concepts are, strictly speaking, distinct, they will be treated as synonyms. This means that all actors that have international legal personality are considered as subjects of international law

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[17] Veronika Bílková, 'Treat Them as They Deserve!? Three Approaches to Armed Opposition Groups under Current International Law' (2010) 4 Human Rights & International Legal Discourse 111, 115; Shaw (n 5) 155.

[18] The state-only conception reserves international legal personality exclusively for states, while the recognition conception considers states as the primary persons of international law that may then recognise other actors as bearing legal personality. The individualistic conception considers the individual as the primary subject of international law, whereas other actors, such as states, can become international persons when international norms address them. The formal conception considers international law as an open system with no *a priori* legal persons. Lastly, the actor conception considers all effective actors of international relations as being relevant for the international legal system. See Portmann (n 7).

[19] ibid 2.

[20] For a recent discussion of these various conceptions, see Murray (n 11) 29–34.

[21] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 49; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 59–63; Murray (n 11) 25.

[22] Portmann (n 7) 1.

[23] Klabbers, *An Introduction to International Institutional Law* (n 13) 43.

and conversely all subjects are considered as having international legal personality. Nonetheless, as will be discussed, the degree of international legal personality may differ across international subjects.

## 2.2 Non-state actors in international law

Gradual attempts have been made to bridge the traditional dichotomy between state and non-state actors in international law. The 1949 Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* of the ICJ, which deals with the legal personality of the UN as an international organisation, marks an important moment in this development.[24] Notably, it has paved the way to also consider other non-state actors, while revealing more about the general nature of their legal personality in international law.[25] The Court held that:

> The subjects of law in any legal system are *not necessarily identical in their nature or in the extent of their rights*, and their nature depends upon the *needs of the community*. Throughout its history, the development of international law has been influenced by the *requirements of international life*, and the progressive increase in collective activities of States has already given rise to instances of action upon the international plane by *certain entities which are not States*.[26]

The ICJ's Advisory Opinion clarifies that there can be international subjects other than states. In particular, the precise content of the rights and obligations conferred upon such subjects may differ and, accordingly, they may vary amongst themselves.[27] This is a reflection of a more general tendency to reconceptualise international personality as a matter of degree rather than the traditional binary distinction between subjects and non-subjects of international law.[28] Klabbers has held in this regard that "personality is flexible, rather than an all-or-nothing concept: one can have personality in various graduations".[29] Or as Shaw puts it: international legal personality is "a relative phenomenon varying with the circumstances".[30] However, this interpretation is not universally accepted. D'Aspremont, for instance, finds the

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[24] *Advisory Opinion on Reparation* (n 12); Gus Waschefort, 'The Pseudo Legal Personality of Non-State Armed Groups in International Law' (2011) 36 South African Yearbook of International Law 226, 226. In a subsequent advisory opinion, the logic of the Reparation Advisory Opinion was extended to include all other international organisations, see *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict* ICJ [1996] ICJ Rep 66 para 27. For similar reasoning, which was presented in 1920 in relation to the League of Nations, see Lassa Oppenheim, *International Law: A Treatise*, vol 1 (Ronald F Roxburgh ed, 3rd edn, Longmans 1920).

[25] Robert McCorquodale, 'The Individual and The International Legal System' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 309; Olivier (n 11) 26; Portmann (n 7) 100.

[26] *Advisory Opinion on Reparation* (n 12) 178 [emphasis added].

[27] McCorquodale (n 25) 309.

[28] Klabbers, *An Introduction to International Institutional Law* (n 13) 44; Bílková (n 17) 115; Worster (n 11) 211.

[29] Jan Klabbers, 'The Concept of Legal Personality' (2005) II Ius Gentium 35, 47.

[30] Shaw (n 5) 156.

possible acceptance of degrees of legal personality by the ICJ to be "a bewildering argument" and instead speaks of "variations in the *capacities that accompany such a personality*".[31] The Advisory Opinion further clarifies that the concept of legal subject is dynamic in nature and may change with "the needs of the community" and more broadly with "the requirements of international life", however, still conditioned upon the will of states.[32] The ICJ further held that:

> Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization [UN] must *depend upon its purposes and functions* as specified or implied in its constituent documents and developed in practice.[33]

Accordingly, a functional approach is taken in which international personality is based upon the specific purposes and functions of the actor in question.[34]

A final relevant element of the Advisory Opinion reads that the UN "is a subject of international law and *capable of possessing international rights and duties*".[35] Scholars have also recognised the central role of the criterion of capacity to possess international rights and obligations in the acquisition of an actor's international legal personality.[36] As argued by Clapham: "We need to admit that international rights and duties depend on the capacity of the entity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity."[37] In this regard, Green draws the attention to an entity's factual capacity by considering that "if an entity is to possess international rights and duties, it must have the factual capacity to possess those rights and duties".[38] Accordingly,

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[31] d'Aspremont (n 16) 433.

[32] *Advisory Opinion on Reparation* (n 12) 178; McCorquodale (n 25) 309–310; Bílková (n 17) 115; Portmann (n 7) 106–107; Wallace and others (n 11) 63–64.

[33] *Advisory Opinion on Reparation* (n 12) 180 [emphasis added].

[34] Confirmed in the subsequent *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 24) para 25. See also Murray (n 11) 28–29. He speaks of a "subject-specific competence", which entails that an actor's ability to act on the international level is determined on the basis of factors specific to that actor.

[35] *Advisory Opinion on Reparation* (n 12) 179 [emphasis added].

[36] Note that the capacity to possess rights and obligations is not considered sufficient for an entity to attain international legal personality. It is rather a prerequisite to becoming a subject of international law. Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia 2001) 34, 45; Akande (n 10) 281; Worster (n 11) 210–211.

[37] Clapham, *Human Rights Obligations of Non-State Actors* (n 21) 68–69. Clapham gives some examples concerning the rights of states under international law to illustrate this argument, e.g. a state as a fictional legal person could not claim to be subjected to torture under IHRL or that she had been denied the right to marry.

[38] Put differently: "its potential rights and duties would be limited to those which it is realistically capable of bearing". Fergus Green, 'Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality' (2008) 9 Melbourne Journal of International Law 47, 72.

legal capacity should be rooted in factual circumstances and the characteristics of the entity itself.[39] It ultimately ensures that international law is effective.[40] Similarly, Lauterpacht adds:

> whether a person or a body is a subject of international law must be answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from a pre-conceived notion as to who can be subjects of international law.[41]

Four broad conclusions can be drawn from the discussion and form the starting point in terms of considering the legal personality of NSAGs as non-state actors under international law: first, non-state actors may have international legal personality alongside states and therefore may constitute subjects of international law; second, legal subjects may vary in terms of their nature as well as in the extent of their rights and obligations; third, the concept of subject of law is a dynamic one, but states maintain the upper hand; and, lastly, international legal personality should not be determined *in abstracto*, but instead depends on the capacity of the actor to bear certain rights and obligations, the particular context in which the actor operates and the relevant field of law.[42]

# 3 International humanitarian law

## 3.1 Situating the discussion

NIACs taking place between state armed forces and NSAGs or between such groups are regulated by article 3 common to the four Geneva Conventions of 1949 (Common Article 3) and customary IHL.[43] Although Common Article 3 constitutes the keystone provision of IHL applicable to NIACs, it does not include a definition of such conflicts. Such a definition has rather significantly developed within the case law of the ICTY over the course of the 1990s. The definition has subsequently been reaffirmed in the case law of the International Criminal

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[39] Meijknecht (n 36) 35.

[40] Hans Kelsen, *Principles of International Law* (Rinehart & Company 1952) 414; Murray (n 11) 43–44, 49.

[41] Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1947) 63 Law Quarterly Review 438, 444. Or, as formulated similarly when considering individuals' subjectivity under international law, such a question "must be answered pragmatically by reference to the given situation and to the relevant international instrument". Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1948) 64 Law Quarterly Review 97, 97.

[42] In this respect the approach of Rodenhäuser is followed, see Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford University Press 2018) 11.

[43] Geneva Conventions (1949) 75 UNTS 31, 85, 135, 287. See the following ICRC study for a comprehensive discussion of the rules of customary IHL applicable during NIACs Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol I: Rules (Cambridge University Press 2005). See also in this regard Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing Limited 2019) para 6.33.

Tribunal for Rwanda (ICTR) and the International Criminal Court.[44] It has crystallised into a two-fold legal test to determine the existence of a NIAC. The test consists of two requirements relating to: the organisation of the parties to the conflict; and, the intensity of the violence.[45] Both requirements have to be assessed on a case-by-case basis, taking into account the factual context at hand.[46] Importantly, these requirements are a means to distinguish armed conflicts from "internal disturbances and tensions", such as sporadic instances of armed violence or unorganised insurrections, which are not subjected to IHL regulations.[47] Once the threshold for a NIAC has been met, Common Article 3 will become binding, as a minimum, as both treaty and customary law.[48] Additional Protocol II to the Geneva Conventions of 1949 (Additional Protocol II) "develops and supplements" Common Article 3.[49] While the scope of application of the Protocol is more limited than Common Article 3, it extends the primary norms regulating NIACs beyond the basic humanitarian protections enumerated in Common Article 3. The Protocol applies to armed conflicts that take place "in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups".[50] Accordingly, conflicts among NSAGs themselves do not fall within the scope of the Protocol and are limited in their international regulation to Common Article 3. According to Additional Protocol II, NSAGs must be: "under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[51] Thus, the

[44] See for instance *Prosecutor v Akayesu* ICTR (Trial Judgment) ICTR-96-4-T (2 September 1998) paras 619-620; *Prosecutor v Fatmir Limaj Haradin Bala Isak Musliu* ICTY (Trial Judgment) IT-03-66-T (30 November 2005) para 84; *Prosecutor v Thomas Lubanga Dyilo* ICC (Trial Judgment) ICC-01/04-01/06-2842 (14 March 2012) paras 534-538.

[45] *Prosecutor v Tadić* ICTY (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 70; *Prosecutor v Tadić* ICTY (Trial Judgment) IT-94-1-T (7 May 1997) para 562.

[46] *Prosecutor v Boškoski and Tarčulovski* ICTY (Trial Judgment) IT-04-82-T (10 July 2008) para 175.

[47] Art 1(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (1977) 1125 UNTS 609. It is understood that this paragraph also defines the lower threshold of Common Art 3, see ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) paras 386, 431. See also *Tadić Trial Judgment* (n 45) para 562; Michael N Schmitt, 'The Status of Opposition Fighters in a Non-International Armed Conflict' (2012) 88 International Law Studies 119, 121–122.

[48] *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ (Merits Judgment) [1986] ICJ Rep 14 paras 218-219; *Tadić Jurisdiction Decision* (n 45) para 98; *Prosecutor v Akayesu* (n 44) paras 608-609; ICRC, *Commentary on the First Geneva Convention* (n 47) paras 354, 505.

[49] Art 1(1) Additional Protocol II; ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 December 1949* (Martinus Nijhoff 1987) para 4437.

[50] Art 1(1) Additional Protocol II.

[51] Art 1(1) Additional Protocol II.

Protocol adds several requirements to the traditional conditions of application, which result in a higher threshold of applicability.[52]

This international legal framework, governing situations of NIAC, imposes a range of obligations on the parties to such armed conflicts. In this regard, it is necessary to establish whether and, if so, to what extent a NSAG party to a NIAC bears these international obligations in its own right or whether it alternatively derives its subjectivity indirectly from its individual members who are bound by IHL at least by way of their criminal responsibility for war crimes.[53] The latter entails that a NSAG would be bound through those individuals' international obligations, but not in its own right. It is also possible that both the group and its constituent members have separate international legal personality, and are therefore distinct from each other.[54] An analysis of the *travaux préparatoires* concerning Common Article 3 and Additional Protocol II does not provide a definite answer to these questions.[55]

Such an examination forms an essential step in this study since the international legal personality of a NSAG needs to be "distinct from its members" as a precondition for the possible international responsibility of that group.[56] Consequently, the examination has direct implications for how the responsibility of NSAGs could potentially be conceptualised in international law. For instance, if a NSAG were distinguishable in its international legal personality, this would entail that a particular internationally wrongful act could result in a duality of responsibility of both an individual member and the group he or she is part of. In

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[52] Sassòli, *International Humanitarian Law* (n 43) para 6.40.

[53] Jann K Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 International Committee of the Red Cross 443, 449; Andrew Clapham, 'Focusing on Armed Non-State Actors' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 769–770; Sassòli, *International Humanitarian Law* (n 43) para 6.72.

[54] Marko Milanovic, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2011) 9 Journal of International Criminal Justice 25, 42; Sassòli, *International Humanitarian Law* (n 43) 196–199.

[55] For instance, concerning Common Art 3, see the statements of the delegations of the United Kingdom, Australia and Greece in 'Final Record of the Diplomatic Conference of Geneva of 1949' Vol II (B) 47, 94. In relation to Additional Protocol II, see the statements made by the representatives of Belgium, Zaire (currently known as the Democratic Republic of the Congo) and Italy in 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-1977)' Vol VII 76, 104, 122; See also the statements of the representatives of the United Kingdom and the ICRC in 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-1977)' Vol VIII 203 (para 13), 236 (para 37), 239 (para 55); See further the statement made by the delegation of the USSR in 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-1977)' Vol XIV 314. See also Astrid Kjeldgaard-Pedersen, 'A Ghost in the Ivory Tower: Positivism and International Legal Regulation of Armed Opposition Groups' (2017) 7 Journal of International Humanitarian Legal Studies 32, 48, 52.

[56] *Advisory Opinion on Western Sahara* (n 2) para 148. See also Section 1.

contrast, if NSAGs lack a distinct legal existence, this would put into question whether such groups could be held internationally responsible.[57]

## 3.2 The application of Common Article 3 and Additional Protocol II to non-state armed groups

The treaty text of Common Article 3 provides: "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each Party* to the conflict shall be bound to apply, as a minimum, the following provisions" [emphasis added]. The wording of the provision, which differentiates between High Contracting Parties and Parties to the conflict, clearly suggests that it directly binds NSAGs as collective legal entities following from their status as parties to a given NIAC.

Such an interpretation is in accordance with the traditional understanding that the concepts of war, or armed conflict, require at least two collective entities that are engaged in armed hostilities with each other, rather than taking place between individuals.[58] As asserted by Rodenhäuser, being a collective entity is one of the fundamental criteria for qualifying as a party to an armed conflict.[59] This is demonstrated in the authoritative definition of a NIAC provided by the Appeals Chambers of the ICTY in the *Tadić* case: "whenever there is […] protracted armed violence between government authorities and organized armed groups or between such groups within a State".[60] The definition indicates that it is the organisation of a group of individuals and this group's engagement in intense violence of a collective nature that raises a given situation to an armed conflict. This distinguishes such a situation from internal tensions and disturbances.[61] The requirement that a NSAG be organised for it to be considered a party to a NIAC makes a further distinction between violence carried out by isolated or random individuals and violence conducted on the part of a group.[62]

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[57] As held by Murray: "The direct attribution of international rights or obligations is essential to international legal personality: if the attribution of rights or obligations is not direct, but rather occurs exclusively through the medium of another entity, then it is that entity's legal personality that is relevant on the international plane." Murray (n 11) 42. Similarly Marek St Korowicz, 'The Problem of the International Personality of Individuals' (1956) 50 The American Journal of International Law 533, 535.

[58] See Rodenhäuser (n 42) 20–22, 39–40, 72.

[59] ibid 87, 314–315.

[60] *Tadić Jurisdiction Decision* (n 45) para 70.

[61] *Tadić Trial Judgment* (n 45) para 562.

[62] *Prosecutor v Tadić* ICTY (Appeals Judgment) IT-94-1-A (15 July 1999) para 120; *Prosecutor v Ramush Haradinaj Idriz Balaj Lahi Brahimaj* ICTY (Trial Judgment) IT-04-84-T (3 April 2008) para 60; Kleffner (n 53) 450; Yoram Dinstein, 'Concluding Remarks on Non-International Armed Conflicts' (2012) 88 International Law Studies 399, 400–401; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 177; ICRC, 'Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War' (2020) para 463 <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary> accessed 3 August 2020.

Moreover, the application of Common Article 3 to a NSAG as a party to an armed conflict requires that such a group is an identifiable and distinct legal entity.[63] Such an entity will have to be in "such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect".[64] As noted by the ICJ, this expresses "the essential test where a group, whether composed of States, of tribes or of individuals, is claimed to be a legal entity distinct from its members".[65] When applying this logic to NSAGs, scholars have argued that one of the main functions of the organisation requirement to establish the existence of a NIAC is to determine whether a NSAG has achieved a sufficient level of organisation to be treated as a legal entity separate from its constituent members. Sufficient organisation should provide the group with the capacity to ensure its members' compliance with obligations under IHL.[66] From such a perspective, the groups of indicative factors identified in international case law to assess the requisite level of NSAG organisation can be understood as allowing for such an evaluation.[67] The factors signalling, for instance, the ability of a NSAG to implement the basic obligations of Common Article 3 (e.g. the existence of disciplinary rules and internal regulations), the ability of a group to speak with one voice (e.g. its capacity to represent its members in political negotiations, its ability to negotiate and conclude agreements) and the presence of a command structure (e.g. the establishment of a high command, the creation of a chain of military hierarchy) would appear to fulfil such a function.[68]

Indeed, international bodies and scholars have interpreted the words "each Party" in Common Article 3 as referring to NSAGs, besides state armed forces, to confirm that such groups have

[63] As argued by Green: "if an entity is to possess international rights and duties […] [a]s a starting point, the entity must be sufficiently identifiable". He adds to that: "Essentially, this would be a question of internal group composition. There would need to be, for example, some sense of identity and an organisational or representative structure." Green (n 38) 72. Similarly, as put by Meijknecht: "without a face and a voice, an entity does not exist for the outside world as a separate entity. An entity must have a 'face' so that it can be recognised. It is through its 'voice' that it can express its will and be heard. Hence, the organs of a composite entity [i.e. entities consisting of more than one human being] are essential; they constitute its 'face' and 'voice'". Meijknecht (n 36) 41–42.

[64] *Advisory Opinion on Reparation* (n 12) 178.

[65] *Advisory Opinion on Western Sahara* (n 2) para 148 see also 149.

[66] Or in another formulation used by the ICJ, it should provide "an entity capable of availing itself of obligations incumbent upon its Members". *Advisory Opinion on Reparation* (n 12) 178; Murray (n 11) 44.

[67] Schmitt (n 47) 129–131; Rogier Bartels and Katharine Fortin, 'Law, Justice and a Potential Security Gap: The "Organization" Requirement in International Humanitarian Law and International Criminal Law' (2016) 21 Journal of Conflict & Security Law 29, 38. Similarly, Murray argues: "the decisive factor in determining an armed group's capacity to directly possess international obligations […] is the existence of a responsible command. A responsible command is defined by the existence of an organisational structure capable of ensuring internal discipline, and thus capable of ensuring the group's fulfilment of any obligations arising under international law". Murray (n 11) 75. See *Prosecutor v Boškoski and Tarčulovski* (n 46) paras 199-203; *Prosecutor v Vlastimir Dordević* ICTY (Trial Judgment) IT-05-87/1-T (23 February 2011) para 1526; *Prosecutor v Thomas Lubanga Dyilo* (n 44) para 537.

[68] *Prosecutor v Boškoski and Tarčulovski* (n 46) paras 202-203; Schmalenbach (n 3) 499; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 125–134.

certain international obligations once they become parties to a NIAC.[69] Correspondingly, the 2020 ICRC Commentary holds that "it is today accepted that common Article 3 is binding on non-State armed groups, both as treaty and customary law", and expressly relies on the wording of the provision to support this assertion.[70] Further support is found in the *Tablada* case, in which the Inter-American Commission on Human Rights indicated: "Common Article 3's mandatory provisions expressly bind and apply equally to both parties to internal conflicts, i.e., government and dissident forces".[71] Similarly, the Appeals Chamber of the Sierra Leone Special Court stated in 2004:

> it is well-settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws.[72]

Furthermore, there are ample examples of UN bodies, including the UN Security Council, calling on NSAGs, as parties to a NIAC, to respect IHL or condemning NSAG violations of IHL norms, including Common Article 3.[73] Similarly, UN-mandated investigative bodies, such as commissions of inquiry, have investigated violations of Common Article 3 as well as

[69] See regarding scholarly contributions, e.g. Erik Castrén, *Civil War* (Suomalainen Tiedeakatemia 1966) 87; Liesbeth Zegveld, *The Accountability of Armed Opposition Groups* (Cambridge University Press 2002) 9; Annyssa Bellal, 'International Law and Armed Non-State Actors in Afghanistan' (2011) 93 International Review of the Red Cross 47, 55; Clapham, 'Focusing on Armed Non-State Actors' (n 53) 770; Sassòli, *International Humanitarian Law* (n 43) para 6.67.

[70] ICRC, 'Commentary on the Third Geneva Convention' (n 62) paras 539–540, 542. As already noted in Pictet's commentary of 1952: "[t]he words "each Party" mark the great progress which the passage of a few years has sufficed to bring about in international law. For until recently it would have been considered impossible in law for an international Convention to bind a non-signatory Party […] Each of the Parties will thus be required to apply Article 3 by the mere fact of that Party's existence and of the existence of an armed conflict between it and the other Party." Jean Pictet, *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary* (ICRC 1952) 51.

[71] IACHR, 'Report No 55/97 Case No 11.137 Argentina' OEA/Ser/L/V/II.97 Doc 38 (30 October 1997) para 174. See also the *Nicaragua* case in which the ICJ confirmed that Common Art 3 is applicable to NSAGs: "[t]he 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 Case* (n 48) paras 218-219.

[72] *Prosecutor v Sam Hinga Norman* SCSL (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) SCSL-2004-14-AR72(E) (31 May 2004) para 22. The wording of the relevant paragraph clarifies that the Court uses the term 'non-state actor' to refer to NSAGs.

[73] See i.a. UNGA, Res 54/96B (21 December 1999) UN Doc A/RES/54/96A-D Preamble; UNGA, Res 62/6 (13 December 2007) UN Doc A/RES/62/6 para 22; UNSC, Res 2098 (28 March 2013) UN Doc S/RES/2098 Preamble; UNGA, Res 70/234 (9 March 2016) UN Doc A/RES/70/234 Preamble; UNSC, Res 2340 (8 February 2017) UN Doc S/RES/2340 Preamble; UNSC, Res 2461 (27 March 2019) UN Doc S/RES/2461 para 16; UNSC, Res 2502 (19 December 2019) UN Doc S/RES/2502 para 12; UNGA, Res 74/169 (23 January 2020) UN Doc A/RES/74/169 para 13.

Additional Protocol II and customary IHL carried out by NSAGs.[74] As considered by the Group of Eminent International and Regional Experts on Yemen:

> Non-State armed groups are bound by Common Article 3 of the Geneva Conventions and – provided that the necessary requirements as to level of organization and exercise of territorial control are reached – also by Additional Protocol II. The status of party to the conflict applies without distinction to States and non-State actors involved in the conflict, despite the fact that non-State armed groups are by nature not in a position to ratify IHL treaties.[75]

In contrast to Common Article 3, the treaty text of Additional Protocol II is less clear. According to article 1(1), the Protocol applies to NIACs between government armed forces and "dissident armed forces or other organized armed groups". Yet, the drafting delegates deliberately formulated the other articles of the Protocol in a passive tense, without explicitly clarifying to whom they are addressed. Moreover, the deletion of the term 'parties to the conflict' as well as the provision on the equality of obligations in the draft text would appear to suggest that the Protocol is not binding on NSAGs as collective entities.[76] Nevertheless, the ICRC Commentary to Additional Protocol II clarifies that the deletion of the term only affects the drafting of the instrument, but does not change its structure from a legal point of view: "All the rules are based on the existence of *two or more parties* confronting each other. These rules grant the same rights and impose the same duties on both the established government and the *insurgent party*".[77] Furthermore, the organisational requirements in article 1(1) Additional Protocol II indicate that a NSAG should be collective in nature for it to be considered a party to a NIAC within the scope of the Protocol (e.g. the requirement of responsible command).[78] The provision holds that satisfying these requirements should enable the group to implement the Protocol. This strongly suggests that, in order to be capable of complying as a collectivity with the greater body of obligations imposed by Additional Protocol II, the group is required to have a higher degree of organisation than under Common Article 3.[79] This is further supported by the function of Protocol II. It only develops and supplements Common Article 3, which clearly binds NSAGs, "without modifying its existing

[74] See e.g. 'Report of the International Commission of Inquiry on Darfur' (25 January 2005) para 172, see also Section VI(6); UNSC, 'Final Report of the International Commission of Inquiry on the Central African Republic' (22 December 2014) UN Doc S/2014/928 paras 84–85, 110, 170.
[75] UNHRC, 'Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen' (3 September 2019) UN Doc A/HRC/42/CRP.1 paras 45–47, 49.
[76] Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 International and Comparative Law Quarterly 416, 420–421; ICRC, *Commentary on the Additional Protocols of 1977* (n 49) paras 4413–4415.
[77] ICRC, *Commentary on the Additional Protocols of 1977* (n 49) para 4442 see also para 4444 [emphasis added].
[78] Rodenhäuser (n 42) 47–50.
[79] Sivakumaran, *The Law of Non-International Armed Conflict* (n 62) 184–185.

conditions of application".[80] The discussion demonstrates that Additional Protocol II is directed at both states and NSAGs; this is further supported by practice and legal scholarship.[81]

A final aspect that needs to be addressed is the following clause included in Common Article 3: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."[82] The clause responds to the concern of states that the application of the Convention could interfere with a government's lawful suppression of armed activity. To this end, the clause affirms that its application to NSAGs does not confer any legitimacy or authority upon said groups. It clarifies its main objective as being of a purely humanitarian nature. Moreover, the second motivation underpinning the clause is to exclude the recognition of belligerency, which would bring a greater body of international law into effect.[83] In other words, "it merely ensures respect for the essential rules of humanity which all nations consider as valid everywhere, in all circumstances".[84] Common Article 3 would most probably not have been adopted without this clause, which indicates its importance.[85] From a broader perspective, it is a reflection of the ambivalent standpoint of states, which, on the one hand, have the desire to ignore NSAGs as inherently controversial entities and, on the other, are confronted with the pragmatic need to legally regulate the behaviour of such groups.[86]

In a similar vein, Additional Protocol II has a purely humanitarian purpose. Although the Protocol does not include an analogous clause, the deletion of every mention of "parties to the

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[80] Art 1(1) Additional Protocol II. Cassese (n 76) 424–425; Henckaerts and Doswald-Beck (n 43) 497; Murray (n 11) 109; Kjeldgaard-Pedersen (n 55) 52.

[81] See some of the previously cited examples of practice as well as *Prosecutor v Akayesu* (n 44) para 611; UNCHR, 'Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Colombia' (17 February 2004) UN Doc E/CN.4/2004/13 para 41; UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (12 January 2012) UN Doc A/HRC/17/44 para 64; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (5 June 2018) UN Doc A/HRC/38/44 para 25. See also Sivakumaran, *The Law of Non-International Armed Conflict* (n 62) 236; Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability* (Ashgate 2016) 99; Sassòli, *International Humanitarian Law* (n 43) para 6.67.

[82] Common Art 3(4).

[83] Murray (n 11) 36–37.

[84] ICRC, 'Commentary on the Third Geneva Convention' (n 62) paras 900–908.

[85] Frédéric Siordet, 'Les Conventions de Genève et La Guerre Civile' (1950) 32 Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge 104, 119. With regard to Common Art 3, see ICRC, *Commentary on the First Geneva Convention* (n 47) paras 862–863. See, for example, the statements made by the representatives of the United Kingdom and the United States in 'Final Record of the Diplomatic Conference of Geneva of 1949' (n 55) 10, 12. See with regard to Additional Protocol II the statement made by the representative of the Italian delegation in 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-1977)' (n 55) 129 para 30. See also the statement made by the representative of the Republic of Zaire ibid 219 paras 124-127.

[86] Bílková (n 17) 112.

conflict" was deemed sufficient.[87] Importantly, despite this disclaimer, scholars have clarified that it does not affect the conferral by Common Article 3 and Additional Protocol II of a certain measure of international legal personality on NSAGs: to the extent that they become holders of certain obligations under these norms.[88] Instead, as previously noted, the clause was included to address the concerns of states, by excluding the possibility that the application of direct IHL obligations to NSAGs would grant legitimacy or the recognition of belligerency to such groups. The latter implies that NSAGs do not attain the status of full subject of international law.[89]

### 3.3 Theories on how international humanitarian law binds non-state armed groups

The previous sections have established that it is generally accepted that IHL norms applicable to situations of NIAC also bind NSAGs where they are party to such armed conflicts. Importantly, the preceding discussion suggests that NSAGs are bound by such norms as collective entities, distinct from their constituent members. The question whether IHL binds NSAGs directly or, alternatively, indirectly through their members can be considered further through an examination of various theories that have been presented to explain *how* IHL may bind NSAGs as non-signatories to IHL treaty law. Although these theories form the focus of continuing scholarly debate, the discourse has not involved questioning the validity of the obligations imposed on NSAGs.[90] The objective of the analysis is not to determine which theory might be the most satisfactory. Instead, the aim is to evaluate the different ways in which these theories have conceptualised NSAGs as duty bearers under IHL. This provides an advantageous approach to further elucidate the exact identity of the duty bearer. These

[87] ICRC, *Commentary on the Additional Protocols of 1977* (n 49) paras 4415, 4439–4440.
[88] Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002) 65–66; Murray (n 11) 39–41; ICRC, 'Commentary on the Third Geneva Convention' (n 62) para 902 n 853. Some authors have argued that, in fact, such groups attain a limited legal status insofar as they bear certain obligations under IHL. According to Abi-Saab, Common Art 3 still confers "certain objective legal status" in spite of this disclaimer. It is more limited in its legal effects than the recognition of belligerency, while being objective in nature, since it emanates from the Geneva Conventions themselves, in contrast to a discretionary and relative act of recognition of belligerency. Also, Sassòli has argued that the lack of conferral of legal status on NSAGs is only true concerning rules of international law other than those of IHL. See Georges Abi-Saab, 'Non-International Armed Conflicts', *International Dimensions of Humanitarian Law* (Henry Dunant Institute/UNESCO 1988) 223–224; Sassòli, *International Humanitarian Law* (n 43) para 6.68.
[89] Murray (n 11) 35–38.
[90] Siordet (n 85) 105; ICRC, *Commentary on the Additional Protocols of 1977* (n 49) para 4444; Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2014) 20 Journal of Conflict & Security Law 101, 101–102; Kjeldgaard-Pedersen (n 55) 52; Sassòli, *International Humanitarian Law* (n 43) para 6.68-6.70; ICRC, 'Commentary on the Third Geneva Convention' (n 62) paras 541–542.

predominant theories include: (i) the customary law, (ii) territorial control, (iii) third-party consent, and (iv) legislative jurisdiction theories.[91]

The customary law theory holds that NSAGs are bound by IHL as a matter of customary international law. Significantly, the main approach taken to this theory asserts that NSAGs are bound as independent subjects of international law by customary IHL applicable to NIACs.[92] This results from the implicit conferral of international legal personality, necessary to have obligations under this body of law, to NSAGs by states.[93] At the same time, according to this theory, customary IHL provides the basis for the prosecution of individual members for international crimes.[94] As previously demonstrated, the Appeals Chamber of the Special Court for Sierra Leone relied on this theory by arguing that: "Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws."[95] Similarly, the International Commission of Inquiry on Darfur turned to custom to explain the binding force of IHL vis-à-vis NSAGs as distinct legal entities:

> The SLM/A and JEM, like all insurgents that have reached a certain threshold of organization, stability and affective 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. The same is probably true also for the NMRD.[96]

This entails that at least Common Article 3, given its customary nature, applies to NSAGs as groups. However, this does not explain the application of certain provisions of Additional Protocol II which have not attained this status.

According to the second theory, NSAGs are bound by IHL by virtue of exercising control over territory.[97] Kleffner argues that "[s]uch an approach shifts the focus away from the binding force of IHL on the individual to the collective entity of the organized armed group", while Zegveld adds that "[a]rmed opposition groups are then regarded as independent entities

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[91] Note that not all scholars adopt the same categorisation or explain the theories in the same manner. Compare for instance Murray (n 90) 102; Fortin (n 68) 178. Another prominent theory that explains NSAGs being bound as a result of the domestic implementation of treaty law by states is not considered since it addresses the legal personality of NSAGs under domestic rather than international law. See further Cassese (n 76) 429; Fortin (n 68) 185–187.

[92] Kleffner (n 53) 454–455; Murray (n 90) 105–109; Fortin (n 68) 204.

[93] Sassòli, *International Humanitarian Law* (n 43) para 6.68.

[94] *Tadić Jurisdiction Decision* (n 45) paras 128-136; Clapham, 'Focusing on Armed Non-State Actors' (n 53) 779; Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 72.

[95] *Prosecutor v Sam Hinga Norman* (n 72) para 22.

[96] 'Report of the International Commission of Inquiry on Darfur' (n 74) para 172. The Commission included in its final report a list of the customary rules on NIAC applicable to the armed conflict in Darfur, see ibid 166.

[97] Fortin (n 68) 199.

that exist side-by-side with the established authorities".[98] Although the theory conceptualises a NSAG as a distinct duty bearer, it fails to explain the binding force of Common Article 3, which does not require control over territory by a NSAG for its application.[99]

The third approach is the third-party consent theory advanced by Cassese. The theory draws from the customary rules on the binding nature of treaties on third parties as codified in the Vienna Convention on the Law of Treaties (VCLT).[100] In accordance with articles 34-36 VCLT, the theory involves enquiring whether the contracting states had the intent to bind NSAGs as third parties as well as determining whether the concerned third party has accepted the obligations. As clarified by Cassese, the latter requires the consent of the insurgents expressed through, e.g., a unilateral declaration addressed to the government. Although Cassese speaks in terms of 'rebels', such measures would imply that action is taken by the group rather than by individual members on their personal behalf.[101] Accordingly, the theory conceptualises NSAGs as subjects of IHL in their own right.[102]

The legislative jurisdiction theory holds that the individual members of a NSAG are bound as a result of the parent state's acceptance of IHL treaty law. This treaty law would become binding on all nationals within the jurisdiction of the given state due to its capacity to legislate for all its nationals.[103] This entails that IHL only imposes direct obligations on individuals. The question of NSAGs' subjectivity under international law is thus bypassed.[104] As such, contrary to the other theories discussed, the legislative jurisdiction theory does not recognise NSAGs as distinct duty bearers under IHL. Kleffner has referred to this approach as a "fundamental conceptual defect, inasmuch as it derives the binding force of IHL on organized armed groups as collective entities from the binding force on *individual members*".[105]

As Fortin points out, this would imply that NSAGs are not bound by the whole corpus of IHL norms applicable during NIACs. In accordance with the rationale of the legislative jurisdiction theory, the obligations of a NSAG under IHL would be identical to those of its

[98] Zegveld (n 69) 15; Kleffner (n 53) 452.
[99] Kjeldgaard-Pedersen (n 55) 56.
[100] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.
[101] Cassese (n 76) 423–429.
[102] This has been confirmed, more recently, in a detailed analysis of the third-party consent theory conducted by Murray. He conceptualises the third parties as NSAGs and not as their individual members. Murray (n 90) 112, 121.
[103] Moir (n 88) 53–54. The legislative jurisdiction theory was first advanced by a Greek delegate during the drafting discussions on Common Art 3, see 'Final Record of the Diplomatic Conference of Geneva of 1949' (n 55) 94.
[104] Fortin (n 68) 185–186.
[105] Kleffner (n 53) 449.

individual members since the latter form the basis for the law's binding force on the group.[106] This opens a problematic gap, in that it is questionable whether all of the obligations included in Common Article 3 and Additional Protocol II are binding upon individuals.[107] This can be discerned from the language of the provisions in question and the lack of capacity on the part of an individual to carry out particular duties alone. Article 5, concerning the restriction of a person's liberty, and article 6, dealing with penal prosecutions and fair trial rights, of Additional Protocol II are, for example, clearly directed only to NSAGs as duty bearers since they require the group to take collective action in order to be in compliance. The same holds for Common Article 3(1)(d), which states that: "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples". It is clear that an individual member lacks the necessary capacity to perform such a task.[108] This is also reflected in the application requirements included in article 1(1) Additional Protocol II: "*organized armed groups* which, under responsible command, exercise such control over a part of its territory *as to enable them* […] *to implement this Protocol*" [emphasis added]. These examples indicate that the obligations of NSAGs and their members do not always correspond. They further suggest that, contrary to the legislative jurisdiction theory, NSAGs bear obligations under IHL independently from their members as individuals.[109] Zegveld makes a similar observation, contending that individuals and NSAGs should be distinguished as duty bearers. She argues that the obligations of individuals are limited to prohibitions to commit certain international crimes, while Common Article 3 and Additional Protocol II require a greater effort on the part of NSAGs than solely refraining from committing certain acts. Consequently, individuals alone cannot adhere to the obligations under IHL.[110] As a final note, the legislative jurisdiction theory also goes against the fundamental principle of equality of belligerents in IHL, which entails that "each party to the conflict" bears the same rights and obligations as a matter of law.[111] As determined in the

[106] Fortin (n 68) 193–194.
[107] Sassòli, *International Humanitarian Law* (n 37) para 6.73.
[108] However, one could argue that individuals could in fact adhere to this provision by simply refraining from engaging in such activities. Kleffner (n 53) 451; Fortin (n 68) 194. Another example is art 4(3) Additional Protocol II that deals with providing the care and aid that children require during NIACs. See in particular paras (a), (b) and (e).
[109] Fortin (n 68) 194–195.
[110] Zegveld (n 69) 16.
[111] On the equality of obligation, see further Christopher Greenwood, 'The Relationship Between Ius Ad Bellum and Ius in Bello' (1983) 9 Review of International Studies 221, 225–226; Marco Sassòli and Yuval Shany, 'Should the Obligations of States and Armed Groups Under International Humanitarian Law Really Be Equal?'

previous section, the law of NIAC understands such parties as being collective entities and not isolated individuals. Moreover, the very idea behind this principle would be largely set aside if NSAGs would be bound by a more limited set of obligations than state parties to armed conflicts.[112] Taking this all into account, the theory of legislative jurisdiction does not satisfactorily explain the binding force of the full body of IHL. Nevertheless, some prominent commentators have adopted a broader understanding of the theory by including, aside from private individuals, any collectivity, such as NSAGs, present in the domestic jurisdiction of a given state.[113] If one follows this broader approach to the legislative jurisdiction theory, NSAGs would indeed be conceptualised as distinct, collective duty bearers: meaning that all four theories agree on these points.

In sum, the analysis of the various theories that explain how IHL treaty law binds NSAGs has shown that all conceptualise NSAGs engaged in NIACs as distinct duty bearers. Only a restricted understanding of the legislative jurisdiction theory explains the binding force of IHL on NSAGs in an indirect manner by way of the binding force on their constituent members as individuals. However, the theory was rejected, since it does not offer a satisfactory explanation of the binding force of the entire body of IHL norms applicable to situations of NIAC. Moreover, some prominent commentators have adopted a broader understanding of the theory, which does recognise NSAGs as distinct duty bearers. As such, the theories provide further support for the conclusion that NSAGs have direct primary obligations under IHL and that they do not rely on their individual members to explain their subjectivity. Consequently, the international legal personality of NSAGs is separate from that of their members. This satisfies the precondition to consider the possible international responsibility of such groups as collective entities or, rather, as subjects of international law.

## 3.4 The scope of the international legal personality of non-state armed groups

(2011) 93 International Review of the Red Cross 425; Sivakumaran, *The Law of Non-International Armed Conflict* (n 62) 242–244.

[112] Hersch Lauterpacht, ‘The Limits of the Operation of the Law of War’ (1953) 30 British Year Book of International Law 206, 212: "it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefitting from them and the other side would benefit from rules of warfare without being bound by them".

[113] See, for example, Sandesh Sivakumaran, ‘Binding Armed Opposition Groups’ (2006) 55 International and Comparative Law Quarterly 369, 382; Clapham, ‘Focusing on Armed Non-State Actors’ (n 53) 772, 778; Mastorodimos (n 81) 79; Murray (n 11) 106. See also the ICRC Commentary on Additional Protocol II and the ‘extended legislative jurisdiction theory’ introduced by Fortin: ICRC, *Commentary on the Additional Protocols of 1977* (n 49) para 4444; Fortin (n 68) 196–198.

Having concluded that NSAGs which are party to NIACs have a distinct international legal personality under IHL, the discussion now turns to an examination of the scope of this legal personality. A NSAG bears certain obligations under IHL once it becomes party to a NIAC. In other words, the fulfilment of the threshold test to determine the existence of a NIAC can be understood as the tipping point at which a group of individuals matures into an identifiable and distinct subject for the purposes of IHL.[114] It is at this point that a NSAG starts to hold certain primary obligations under, at least, Common Article 3. Hence, as is explained in Pictet's commentary on this provision, Common Article 3 applies to a non-signatory party to the Geneva Conventions "which was not yet in existence and which was not even required to represent a legal entity capable of undertaking international obligations".[115]

Once it is a party to a NIAC, a NSAG may be bound solely by the minimum obligations listed in Common Article 3 and customary IHL or it may also be subject to the complementary and more detailed body of norms included in Additional Protocol II. As clarified, this will be the case where the Protocol's supplementary requirements for applicability are satisfied.[116] In light of this distinction, different NSAGs may be bound by a varying spectrum of international obligations, depending on context and circumstance. As held by Sassòli, the higher threshold of application under Protocol II introduces "a sliding scale of obligations".[117] Only NSAGs that have a greater degree of organisation, which involves the additional requirement of territorial control, are also duty holders under this Protocol. Sivakumaran argues that there is thus "a close nexus between the organization of the armed group and the content of the applicable law".[118] Following this line of reasoning, the nexus suggests that the degree of organisation of a NSAG is used as an indicator to determine the ability of the group to comply with the greater body of international obligations. This function is already reflected in the organisation test under Common Article 3. It emphasises factors relating to, i.a., the presence of a command structure and a disciplinary system to ascertain whether a NSAG has a minimum level of organisation capable of ensuring adherence to the provision by its members.[119] Organisational competence is not only assessed on the basis of, e.g., a NSAG's code of conduct where and when it exists, but also considers the context in which the group

[114] Fortin (n 68) 369.
[115] Pictet (n 70) 51.
[116] Sassòli, *International Humanitarian Law* (n 43) para 6.32-6.33, 6.40.
[117] Marco Sassòli, 'Introducing a Sliding-Scale of Obligations to Address Fundamental Inequality Between Armed Groups and States?' (2011) 93 International Review of the Red Cross 426, 430–431.
[118] Sivakumaran, *The Law of Non-International Armed Conflict* (n 62) 185.
[119] *Prosecutor v Boškoski and Tarčulovski* (n 46) paras 194-203; Fortin (n 68) 134. See also Section 3.2.

operates.[120] These observations are expressed in the argumentation of the Trial Chamber in the *Boškoski* case:

> The difference in the required degree of organisation is logical in view of the more detailed rules of international humanitarian law that apply in Additional Protocol II conflicts […] By contrast, Common Article 3 reflects basic humanitarian protections, and a party to an armed conflict only needs a minimal degree of organisation to ensure their application.[121]

Significantly, this reasoning finds support in the text of article 1(1) Additional Protocol II, which holds that NSAGs should be under a responsible command and in control over a part of the territory "as to enable them […] to implement this Protocol". The ICRC Commentary to this provision clarifies that the ability to implement the Protocol is fundamental in nature and justifies the other listed requirements. It recognises that although the threshold for application seems fairly high, it has a "degree of realism".[122] In this regard, the Commentary submits that in such circumstances it can be reasonably expected that the parties apply "the rules developed in the Protocol" given they have "the minimum infrastructure required therefor".[123] This confirms the conclusion that there exists a close nexus between the higher degree of organisational capacity required of a NSAG and the greater body of applicable law under Additional Protocol II.[124] As a result, the organisation requirements can be understood as having the function of ascertaining a group's ability to fulfil the international obligations imposed upon it. Moreover, this contributes to a more realistic international legal regulation of NIACs.[125]

All in all, the discussion indicates that within the same category of subject of international law, i.e. NSAG party to a NIAC, individual groups can differ amongst themselves in terms of the extent of their international obligations, this being dependent on their organisational capacities.[126] This provides a legal response to the heterogeneous nature of NSAGs active in NIACs. These findings concretise some of the conclusions that were drawn from the ICJ's

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[120] A NSAG may present the manner in which it is organised in, for instance, public statements, codes of conduct or other internal regulations. It will still need to be assessed against the facts on the ground. The latter will prevail in the case of inconsistencies. Moreover, an assessment of the context in which a group operates is particularly important when assessing the degree of organisation of a group which is operating underground, where little is known publicly about its structure. Sivakumaran, *The Law of Non-International Armed Conflict* (n 62) 171–172.

[121] *Prosecutor v Boškoski and Tarčulovski* (n 46) para 197. See in relation to Common Art 3 also para 196: "[t]he leadership of the group must, as a minimum, have the ability to exercise some control over its members so that the basic obligations of Common Article 3 of the Geneva Conventions may be implemented."

[122] ICRC, *Commentary on the Additional Protocols of 1977* (n 49) para 4470.

[123] ibid.

[124] Similarly Fortin (n 68) 134–136, 154–155.

[125] ibid 137; Sassòli, *International Humanitarian Law* (n 43) para 10.232.

[126] This understanding finds support in the conclusion of Fortin that: "international legal personality is a concept that exists along a spectrum", see Fortin (n 68) 152–153. See also Rodenhäuser (n 42) 12–13.

Advisory Opinion in the *Reparation for Injuries* case in Section 2.2, namely that legal subjects may vary in the extent of their obligations (also within the same category) and that their international legal personality should not be determined in an abstract manner, but dependents, in part, on the capacity of the actor to bear certain obligations.

NSAGs enjoy limited international legal personality for the functions they assume as parties to a NIAC.[127] In keeping with the objectives of IHL, there is a functional need to ensure protection of civilians and minimize suffering by holding NSAGs to certain minimum obligations.[128] Moreover, from an international legal perspective, NSAGs only exist as legal entities alongside a NIAC. Indeed, they derive their legal personality from their status as a party to such conflicts.[129] Accordingly, they are recognised in law as long as they meet the organisation requirement, while taking part in armed hostilities of certain intensity.[130] NSAGs are "provisional subjects of international law", this status stands in contrast to states, which are relatively stable and permanent subjects, which continue, unlike NSAGs, to legally exist beyond the conclusion of a NIAC.[131]

# 4 International human rights law

## 4.1 The application of human rights law beyond the state

Since the beginning of the 1990s, the question as to whether NSAGs should bear additional obligations under IHRL during situations of NIAC has become increasingly prominent in both international practice and legal scholarship.[132] The international human rights regime has evolved to a point where it is no longer deemed applicable only during peacetime, but also,

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[127] Veronika Bílková, 'Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law?' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 265; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 81) para 43.

[128] Worster (n 11) 238.

[129] Zegveld (n 69) 151–152; Ezequil Heffes and Brian Frenkel, 'The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules' (2017) 8 Goettingen Journal of International Law 39, 45.

[130] Bílková (n 127) 282. Here a slight nuance can be made. Although a NIAC only exists once there is a sufficient level of organisation of the parties and of the violence, it is generally recognised that IHL can continue to apply even when these levels are no longer met. According to Sassòli, the general close of military operations can serve as a criterion to determine when a NIAC has ended. Sassòli, *International Humanitarian Law* (n 43) para 6.59.

[131] 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' Yearbook of the International Law Commission (1972) Vol II UN Doc A/CN.4/264 and Add.1 para 154.

[132] For a general overview of the academic debate, see Fortin (n 68) 8–15; Andrew Clapham, 'Human Rights Obligations for Non-State Actors: Where Are We Now?' in Fanny Lafontaine and Francois Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia 2018).

alongside IHL, in situations of armed conflict.[133] Nevertheless, the application of IHRL to NSAGs is not without difficulties. Traditionally, IHRL only imposes direct obligations on states, particularly to respect, protect and fulfil the human rights of the persons under their jurisdiction, and is predicated on the responsibility of states.[134] States are required to tackle any possible human rights concerns emanating from NSAGs within this framework, which supposedly renders the regime adequate.[135] The state-centric nature of the human rights regime can be traced back to its historical origins. It developed as a means of curbing an entity's abuse of power over individuals who had been subjected to its public authority.[136] Considering states are the primary entities holding and exercising such public authority, human rights law is first and foremost concerned with states as duty-bearers.[137] Accordingly, IHRL has been designed to regulate the vertical relationship between governments and the persons under their jurisdiction.[138] This is also reflected in the international and regional human rights treaties, which have been concluded by and for states. In such a context, NSAGs have generally not been included as duty bearers.[139] Moreover, it has been argued that bestowing direct human rights obligations on NSAGs could afford them unwarranted legitimacy, which would undermine the authority of the state and potentially dilute the state's human rights responsibilities.[140] Where this traditional conceptualisation is favoured, IHRL

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[133] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* ICJ [1996] ICJ Rep 226 para 25; *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ [2004] ICJ Rep 136 para 106; *Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda)* ICJ (Judgment) [2005] ICJ Rep 168 para 216. For an overview of the historical developments that led to the increasing overlap between IHRL and IHL, see Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310.

[134] Charles R Beitz, *The Idea of Human Rights* (Oxford University Press 2011) 13.

[135] Clapham, *Human Rights Obligations of Non-State Actors* (n 21) 25.

[136] Maya Hertig Randall, 'The History of International Human Rights Law' in Gloria Gaggioli and Robert Kolb (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013) 7.

[137] Nigel S Rodley, 'Can Armed Opposition Groups Violate Human Rights?' in Kathleen E Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff Publishers 1993) 298–299.

[138] Manfred Nowak and Karolina Miriam Januszewski, 'Non-State Actors and Human Rights' in Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015) 116–117; Rodenhäuser (n 42) 121–123.

[139] Arts 2 ICCPR and ICESCR speak, for instance, in terms of "each State Party to the present Covenant". See also HR Committee, 'General Comment No 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant)' (26 May 2004) UN Doc CCPR/C/21/Rev1/Add13 para 8: "The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law"; for a confirmation of this reasoning with an explicit reference to NSAGs, see HR Committee, 'General Comment No 35 (Article 9: Liberty and Security of Person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 7. For two notable exceptions, see art 4 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000) 2173 UNTS 222; art 7(5) African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2009).

[140] Clapham, *Human Rights Obligations of Non-State Actors* (n 21) 25.

only imposes additional obligations on the state party to a NIAC, while a NSAG is only bound by IHL. Indeed, in concert with this traditionalist view, some scholars have questioned the added value of extending the application of IHRL from states to NSAGs engaged in NIACs. Their underlying argument is that Common Article 3 and Additional Protocol II already provide the most essential protections.[141]

However, in taking a contrary position, Fortin convincingly demonstrates the added value of applying IHRL to NSAGs, alongside IHL, in territories under the control of such groups. Recent social science research has shown that, during times of armed conflict, civilians' everyday lives are not solely characterised by a concern for physical security or survival. Their everyday lives may actually persist in the midst of conflict.[142] Consequently, individual rights that may not exhibit a particular nexus to situations of armed conflict retain significant importance (e.g. the freedom of movement, the right to work).[143] However, states are unlikely to have the capacity to guarantee the human rights of the civilian population in rebel-held areas and their ability to effectively exercise due diligence obligations in such areas may also be significantly restricted.[144] Hence, persons living under NSAG control are *de facto* deprived of the protections afforded under IHRL, and are deprived of the recourse to make any sort of meaningful claim in respect of these rights.[145] Although NSAGs are still bound by IHL, these obligations will only cover a number of core human rights in instances that have a certain nexus to the armed conflict.[146]

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[141] See Zegveld (n 69) 52; Jelena Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) n 22.

[142] Katharine Fortin, 'The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control' (2016) 63 Netherlands International Law Review 161, 167–169.

[143] ibid 169–170.

[144] Cedric Ryngaert, 'Human Rights Obligations of Armed Groups' (2008) 41 Belgian Review of International Law 355, 368–369; Rodenhäuser (n 42) 143–144; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 81) para 23.

[145] This is illustrated by an excerpt of the following UN report on Sri Lanka of 2006: "[t]he Government has failed to effectively investigate most political killings. This is due to both the police force's general lack of investigative ability and to other impediments. When I asked police officers why a particular killing had not been resolved, I generally received the same answer: the suspect escaped into an LTTE-controlled area. […] In September 2005, government police entered an LTTE-controlled area in Mannar in pursuit of a suspected paedophile. The police officers were captured by the LTTE, and three are still being held in early January 2006. […] A more prosaic incident was raised by the police in Welinkanda: they had reason to believe that a man had robbed at least five cars, but then escaped into an LTTE-controlled area, ending the investigation." UNCHR, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Sri Lanka' (27 March 2006) UN Doc E/CN.4/2006/53/Add.5 paras 34–35.

[146] Yaël Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 Cornell International Law Journal 21, 23; Fortin (n 142) 172–177.

Applying IHRL to NSAGs which exercise control over territory, alongside states, may mitigate the protection and accountability gaps in the human rights system.[147] In addition, the underlying rationale of IHRL, that being the regulation of the vertical relationship between the governor and the governed, would be *de facto* satisfied.[148] In contrast to assumptions made within legal scholarship, NSAGs are in fact often engaged in governance activities and regularly exercise a considerable degree of control and organisation over the territory and persons they rule.[149] As such, IHRL has a potentially important role to play in this context.

## 4.2 Non-state armed groups as duty bearers

If a NSAG was to be subjected to the obligations of IHRL, it would need to have a certain level of organisation that would allow identifying it as a collective legal entity and distinguishing it, as such, from its constituent members.[150] In addition, the organisational structure would need to provide the group with the reasonable capacity to implement applicable obligations.[151] If this were not the case, the purpose of imposing IHRL obligations on NSAGs would risk being lost from the very start and remaining a legal fiction.[152] However, this approach would not entail that a NSAG must actually respect IHRL in practice or accept its applicability.[153]

Under the IHL framework, it was previously demonstrated that a NSAG is required to have a certain degree of organisation to become a party to a NIAC. Moreover, the evaluation of the organisation requirement, pursuant to the factors identified in the case law of the ICTY, functions as a means of determining the organisational unity of a NSAG, in terms of it being separate from its members. This is based on the understanding that one of the aims of the organisation requirement is to determine whether a NSAG has a sufficient level of organisation to be treated as a distinct legal entity, which is capable of ensuring compliance

[147] Fortin (n 142) 179; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 81) paras 8, 28, 51.
[148] Rodley (n 137) 313; Zegveld (n 69) 148–149; Murray (n 90) 157–158, 274.
[149] Fortin (n 142) 163. See for examples Jeremy M Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge University Press 2009) 69–70, 180, 265, 268–269; Aymenn al-Tamimi, 'The Evolution in Islamic State Administration: The Documentary Evidence' (2015) 9 Perspectives on Terrorism <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/447/html> accessed 4 August 2020; Geneva Call, 'Administration of Justice by Armed Non-State Actors' (2018) 5; 'Islamic State-Controlled Parts of Syria, Iraq Largely Out of Reach: Red Cross' *Reuters* (13 March 2015).
[150] This follows the approach set out in Section 3.2. See in this regard *Advisory Opinion on Western Sahara* (n 2) para 148.
[151] This is in line with the argument that international legal personality should not be determined *in abstracto* (see Section 2.2). Murray (n 11) 75.
[152] Antonio Cassese, *International Law* (2nd ed., Oxford University Press 2005) 12–13.
[153] Kelsen (n 40) 414; Rodenhäuser (n 42) 147. Compare to *Prosecutor v Boškoski and Tarčulovski* (n 46) para 205.

with the imposed obligations. This can be illustrated by way of the factors which signal the presence of a command structure. These include, amongst others, the establishment of a general staff or high command and the existence of internal regulations that create a chain of military hierarchy between the various levels of commanders.[154] In a similar fashion, these factors could also inform the appraisal that would have to be made regarding the distinct existence of a NSAG under an IHRL framework. This is justified on the basis that the same type of NSAG is being examined here in the IHRL context as that examined in the IHL context. This NSAG would acquire human rights obligations alongside its IHL obligations for the duration of the armed conflict.[155]

In Section 3.4, it was argued that there exists a nexus between the organisation requirements under IHL and the content of the obligations imposed on NSAGs. This reasonably ensures that such groups have the capacity to fulfil the obligations to which they are bound. Correspondingly, Additional Protocol II requires a higher degree of organisation on the part of a NSAG than Common Article 3, in light of the greater body of applicable norms. Following this logic, the application of certain human rights obligations to NSAGs may require a higher degree or even a distinct form of organisation from such groups due to the nature and scope of IHRL norms as contrasted to those under the IHL framework. For instance, the fulfilment of the right to health requires the satisfaction of, at the very least, a minimum core of obligations, namely to ensure the rights to: access to health facilities, goods and services; access to basic shelter, housing and sanitation; the provision of appropriate training for health personnel; and, reproductive, maternal and child health care; amongst others.[156] It comes as no surprise that such obligations require considerable financial resources and institutional capacity.[157] Hence, in order to determine whether a NSAG is capable of applying such human rights obligations, it may be necessary to identify and evaluate more distinct organisational factors, as compared to those required under IHL. The latter are largely defined with regard to a NSAG's level of organisation in military terms (see examples *supra*), which is of less relevance to IHRL, which basically regulates a governance relationship between a governing entity and a population within a particular territory. As such, an

[154] *Prosecutor v Boškoski and Tarčulovski* (n 46) para 199. See Section 3.2.
[155] Fortin (n 68) 158–159.
[156] Art 12 ICESCR; CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)' (11 August 2000) UN Doc E/C.12/2000/4 paras 43–44.
[157] For an extensive discussion of the application of the right to health to NSAGs, see Murray (n 11) ch 8.

organisational factor that could be more relevant in the context of IHRL is the group's capacity to administer the territory under its control.[158]

### 4.3 A context-dependent approach to the application of human rights law

Although the debate continues among international law scholars, it is increasingly accepted in both international practice and legal literature that NSAGs may acquire human rights obligations in addition to those established under certain circumstances in the IHL context. UN organs and bodies, including the UN Security Council and the UN General Assembly, as well as the Human Rights Council's Special Procedures and commissions of inquiry have produced a considerable body of resolutions, decisions and reports which recognise the application of IHRL to NSAGs and, hence, put the traditional state-centric nature of this body of law into question.[159] This is particularly deemed to be the case where NSAGs exercise some degree of *de facto* control over a territory and population.[160]

For example, it was held in a 2008 report of the UN High Commissioner for Human Rights on the Occupied Palestinian Territories: "[w]ith respect to Hamas, it is worth recalling that non-State actors that exercise government-like functions and control over a territory are obligated to respect human rights norms when their control affects the human rights of the individuals under their control."[161] Similarly, the Commission of Inquiry on Libya considered: "it is

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[158] Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford University Press 2014) 270–271; Fortin (n 68) 159–160; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 81) para 59.

[159] According to a review of UN Security Council practice conducted by Constantinides, the Council did not address NSAGs in human rights terms up until 1995. By the end of the 1990s, this became a more systematic practice. Aristoteles Constantinides, 'Direct Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council' (2010) 4 Human Rights & International Legal Discourse 89, 98–99. A more recent systematic study identified over 125 UN Security Council resolutions and approx. 65 UN General Assembly resolutions that pertain to what might be conceptualised as possible human rights obligations of certain NSAGs, see Jessica S Burniske, Naz K Modirzadeh and Dustin A Lewis, 'Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly - Briefing Report with Annexes' (Harvard Law School Program on International Law and Armed Conflict 2017). See in relation to UN Human Rights Council practice Annyssa Bellal, 'Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council' (Geneva Academy of International Humanitarian Law and Human Rights 2016).

[160] With regard to scholarship, see Christian Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements' in Horst Fischer and others (eds), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection. Festschrift für Dieter Fleck* (Berliner Wissenschafts-Verlag 2004); Sivakumaran, *The Law of Non-International Armed Conflict* (n 62) 96; Jean-Marie Henckaerts and Cornelius Wiesener, 'Human Rights Obligations of Non-State Armed Groups: A Possible Contribution from Customary International Law?' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013) 159, 161; Murray (n 11) 151; Fortin (n 68) 385.

[161] UNHRC, 'Human Rights Situation in Palestine and Other Occupied Arab Territories' (6 June 2008) UN Doc A/HRC/8/17 para 9 see also para 6. This assertion is supported in n 12 by reference to a joint report on Lebanon and Israel by a group of four Special Rapporteurs, see UNHRC, 'Report of the Special Rapporteur on

increasingly accepted that where non-state groups exercise de facto control over territory, they must respect fundamental human rights of persons in that territory".[162] A further example can be found in General Recommendation No 30 of 2013 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, in which the Committee on the Elimination of Discrimination against Women recognised:

> although non-State actors cannot become parties to the Convention, the Committee notes that under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights.[163]

More recently, in 2018, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions concluded, based on a review of UN practice, that "ANSAs [armed non-state actors] that have displaced the *de jure* government and established (exclusive) territorial control are responsible for the protection (and violations) of human rights in the areas under their control".[164] Moreover, there is also practice which suggests that NSAGs that lack control over territory must still respect certain human rights obligations, such as core human rights norms which are part of *jus cogens*.[165]

Within this framework, the discourse appears to be leaning towards a context-dependent approach to the application of IHRL to NSAGs. The approach takes account of the organisational capacity of a NSAG and the circumstances in which it operates. In particular, the extent to which the group exercises control over a territory and population is central to

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Extrajudicial, Summary or Arbitrary Executions; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Lebanon and Israel' (2 October 2006) UN Doc A/HRC/2/7 para 19.

[162] UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (1 June 2011) UN Doc A/HRC/17/44 para 104. The Commission makes in this regard reference in n 104 to the following report UNSG, 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 188.

[163] CEDAW, 'General Recommendation No 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations' (18 October 2013) UN Doc CEDAW/C/GC/30 para 16.

[164] UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 81) para 19 see also paras 9–18, 20.

[165] The Independent International Commission of Inquiry on the Syrian Arab Republic noted in its 2012 report that: "at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *ius cogens* – for instance, torture or enforced disappearances – can never be justified". UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (22 February 2012) UN Doc A/HRC/19/69 para 106; Tilman Rodenhauser, 'Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example' (2012) 3 Journal of International Humanitarian Legal Studies 263; Giacca (n 158) 257–258.

determining the breadth of obligations applicable in a given context.[166] In practice, this results in the application of human rights obligations in a graduated manner. NSAGs that factually resemble states, e.g. by controlling and exercising quasi-governmental functions over a certain part of the territory, would bear IHRL obligations akin to states, others, lacking a state-like structure but controlling territory, would be bound by a more limited scope of obligations.[167] This necessitates the making of case-by-case assessments of each situation at hand.[168] The aforementioned UN Special Rapporteur proposes such an approach when applying obligations concerning the right to life to NSAGs. It could entail that the negative obligation to not violate individuals' right to life applies to all NSAGs, while certain groups may be also under an obligation to, for instance, deliver some minimum policing functions or justice depending on the sophistication of their governance capacity.[169] As a result, this involves a differentiated rather than an all-or-nothing approach. The latter approach would have implied that only those groups that can ensure the full range of human rights obligations would be bound by them.[170] Significantly, the context-dependent approach responds to concerns raised by some commentators that NSAGs may not have the required capacity to be bound by IHRL.[171] Such concerns are formulated against the backdrop that NSAGs typically do not have the same level of resources and institutional capacity as states. The capabilities of NSAGs may also differ significantly across examples.[172] At one extreme, some groups have a centralised command structure, with a strict hierarchy and discipline, are well financed, and control large portions of the territory; while other groups are characterised by their minimum level of organisation, a lack of resources, and a decentralised organisational structure that

[166] Rodenhäuser evaluates e.g. a NSAG's infrastructure and degree of power exercised over persons under its control as well as the extent to which the *de jure* government continues to provide certain human rights functions in the controlled area. Rodenhäuser (n 42) 210–211.
[167] See Giacca (n 158) 267–271; Annyssa Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibility of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 308–309; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Ben Emmerson' (16 June 2015) UN Doc A/HRC/29/51 paras 30–31; Murray (n 11) 275–276; Andrew Clapham, 'Detention by Armed Groups under International Law' (2017) 91 International Law Studies US Naval War College 1, 27; Fortin (n 68) 162; Clapham, 'Human Rights Obligations for Non-State Actors: Where Are We Now?' (n 132) 1; Rodenhäuser (n 42) 147, 210–211; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 81) para 8.
[168] Rodenhäuser (n 42) 211.
[169] UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 81) paras 67-78 see particularly paras 69, 74.
[170] Fortin (n 68) 161–162; Murray (n 11) 172.
[171] See Moir (n 88) 194; Sandesh Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 European Journal of International Law 219, 255–256.
[172] Rodenhäuser (n 42) 148, 210.

brings together a series of autonomous sub-groups.[173] Correspondingly, the context-dependent approach ensures the effectiveness of the obligations to a greater degree or, put differently, it ensures that the legal framework remains realistic.[174]

As a lesser body of obligations would bind NSAGs with a lesser degree of organisational capacity, this approach overlaps with that taken under IHL.[175] In further similarity to the IHL approach, NSAGs may be bound by a different scope of obligations and the degree of organisation of a group is used as an indicator to reasonably ensure its capacity to implement the imposed obligations.[176] The approach enables stakeholders to deal with the challenges posed by the structural diversity present among NSAGs and in comparison to states. Lastly, it shows sensitivity towards ensuring that the applicable obligations are feasible in practice.

Some scholars have recently argued that NSAGs exercising territorial control may also hold human rights obligations in the absence of an armed conflict. It follows that they recognise that such groups can legally exist at all times.[177] However, there appears to be little international practice, at present, that supports such an argument in contrast to the application of IHRL to NSAGs which are engaged in NIACs.[178] Furthermore, it is questionable as to how the notion of '*armed* group' might apply in non-conflict situations, since the manner in which it has been conceptualised, in legal practice and scholarship, is premised on the involvement of the group in a NIAC.[179] It triggers the question 'what does it mean for an entity to be armed in such circumstances?' As confirmed by Sassòli, "the requirements of organization that an entity must fulfil to qualify as an armed group have thus far exclusively been discussed in relation to IHL of NIACs and they do not make sense absent an armed conflict".[180] Accordingly, the organisation requirement would have to be defined in a distinct manner and be disconnected from situations of armed conflict.[181] This would imply a different approach to that suggested in the previous section. It would further require an explanation as to how such

[173] ICRC, 'Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report' (2015) 33; ICRC, 'The Roots of Restraint in War' (2018) 38, 46.
[174] Murray (n 11) 177–179; Fortin (n 68) 169.
[175] Fortin (n 68) 162.
[176] Murray (n 11) 275; Rodenhäuser (n 42) 211; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 81) paras 50–51.
[177] See Murray (n 11) ch 5; Rodenhäuser (n 42) 118, 181.
[178] For a notable exception, see UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (n 165) para 106; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (16 August 2012) UN Doc A/HRC/21/50 para 12.
[179] See e.g. Schmitt (n 47) 131–132.
[180] Marco Sassòli, 'Two Fascinating Questions: Are All Subjects of a Legal Order Bound by the Same Customary Law and Can Armed Groups Exist in the Absence of Armed Conflict? Book Discussion' (*EJIL: Talk!*, 4 November 2016).
[181] Tom Gal, 'The International Legal Status of Armed Groups: Can One Be Determined Outside the Scope of Armed Conflict? (Book Review Essay)' (2018) 51 Israel Law Review 321, 325, 329.

non-conflict, non-state entities still relate to NSAGs and, correspondingly, how they can be understood as belonging to the same category of legal subjects under international law.

# 5 Conclusions relevant for the international responsibility of non-state armed groups

Several conclusions can be drawn from the analysis of the international legal personality of NSAGs that have subsequent relevance when examining the possible collective responsibility of such groups, and, particularly, their duty to repair, within the international legal system:

First, it has been established that a NSAG party to a NIAC constitutes a distinct subject of international law, with legal personality under IHL and potentially IHRL in certain circumstances. A NSAG begins its legal existence within the international legal system once the threshold requirements to determine the existence of a NIAC are fulfilled. It is at this point that the collectivity transcends the collection of individuals and attains a separate legal existence. The requirements, under both bodies of law, for a NSAG to have a certain degree of organisation allows treating that group as a legal entity distinct from its individual members, which is capable of fulfilling and ensuring compliance with the applicable international obligations. The international legal personality of a NSAG thus satisfies the necessary precondition to subsequently consider the status of such groups in the law of international responsibility.

Second, it has been determined that NSAGs enjoy limited international legal personality. Contrary to states that continue to exist beyond the conclusion of a NIAC, a NSAG is a temporary subject of international law. This conclusion poses significant challenges when seeking to hold a NSAG legally responsible for breaches of its international obligations in the aftermath of an armed conflict. In such a context, the group would have ceased to exist from an international legal perspective. As illustrated by Clapham: "one can not really indict something that does not exist in law".[182] This challenge presents itself starkly with regards to the question of reparations, which are generally dealt with after a conflict has ended.[183]

[182] Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T Kamminge and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer 2000) 157; Frédéric Mégret, 'The Subjects of International Criminal Law' in Philip Kastner (ed), *International Criminal Law in Context* (Routledge 2017) 38.
[183] Heffes and Frenkel (n 129) 71.

Consequently, this must be taken into account when developing a regime of international responsibility of NSAGs (see further Chapter 4).[184]

Third, it has been argued that the international legal personality of NSAGs should not be determined in an abstract manner. Instead, the reasonable capacity of a group to fulfil the concerned international obligations is one of the elements that should be taken into account. The analysis of the IHL and IHRL frameworks has indicated that the degree of organisation of a NSAG is used as an indicator of such normative capacity. This results in an international legal framework which takes a differentiated approach to the regulation of NSAGs which are party to armed conflicts. Hence, a varied range of international obligations may bind NSAGs which exhibit different levels of organisation and control over territory. Such an approach responds to two concerns, namely that NSAGs generally do not have the same capabilities as states and that they also differ amongst themselves. Fundamentally, this approach indicates that international law is capable of accommodating such diversity and is, consequently, capable of surmounting these challenges. Ultimately, it ensures that the international obligations imposed on NSAGs are realistic and effective.

Similar challenges confront the discussion about a possible duty of NSAG to repair under international law.[185] Scholars have indicated that such groups may, in contrast to states, have neither the organisational capacity nor the resources to provide reparations.[186] In addition, the structural disparity among NSAGs could render the development of a uniform legal framework difficult.[187] A similar differentiated approach could inform the development of a potential set of secondary rules of international law concerning reparations applicable to NSAGs. This has the potential to be a viable solution to the concerns expressed by scholars. Indeed, this analysis of the international legal personality of NSAGs has opened the door to considering such an approach and thus warrants further exploration. There is no apparent reason why such considerations could not be extended to the question of international responsibility of NSAGs. These considerations will be further examined in Chapter 4.

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[184] Íñigo Álvarez (n 1) 68.

[185] See the Introduction to this study, Chapter 3 Section 2.2 and Chapter 4 Section 2.

[186] See e.g. Cecily Rose, 'An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors' (2010) 33 Hastings International and Comparative Law Review 307, 309–310; Luke Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 325, 334.

[187] Jann K Kleffner, 'The Collective Accountability of Organized Armed Groups for System Crimes' in Andre Nollkaemper and Harmen Gijsbrecht van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 258; Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution' (n 167) 306–307.

Lastly, the discussion has shown that the position of NSAGs in international law is marked by a tension between the need to regulate the behaviour of these controversial actors and the wishes of states to simply disregard them as not to confer any legitimacy or recognition upon them. This attitude by states has the adverse effect of challenging the development of a regime of international responsibility of NSAGs, which could be considered as an unwarranted step that would treat NSAGs more akin to states. Although the development of such a regime would expand NSAGs' legal personality, at least in terms of additional obligations, it would not be concerned with extending any legitimacy or privilege towards such groups. The overarching objective is, instead, to take NSAGs serious as violators, by attaching legal consequences to their violations of the norms the international legal system seeks to promote.[188] This should not be considered a controversial proposal, since it goes to the very essence of the notion of law itself and, correspondingly, any legal system.[189] In addition, from a justice and accountability perspective, it is an imperative, in the context of the fight against impunity, that responsible NSAGs remedy the harms they have caused during situations of armed conflict.[190] The international community has recognised impunity on various occasions as constituting a serious obstacle to ensuring accountability and consolidating the rule of law.[191] Excluding NSAGs, as international legal entities, from any responsibility would contradict the very objectives which states have collectively sought to promote and achieve. This is further true given the assumption that the law of international

[188] Kleffner (n 187) 269.

[189] As has been argued by Pellet, responsibility is in the international legal order "the necessary corollary of law", "the best proof of its existence and the most credible measure of its effectiveness". "No responsibility, no (international) law". Pellet (n 1) 3–4.

[190] Íñigo Álvarez (n 1) 59–61. For a broad discussion of the fight against impunity from an international legal perspective Federico Andreu-Guzmán, 'International Law and the Fight Against Impunity' (International Commission of Jurists 2015) 7.

[191] UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies - Report of the Secretary-General' (23 August 2004) UN Doc S/2004/616 4; Kleffner (n 187) 259–260; UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies - Report of the Secretary-General' (12 October 2011) UN Doc S/2011/634; UN Security Council, 'The Rule of Law: Retreat from Accountability' (2019) 28.

responsibility contributes, at least in theory, to rendering the legal system effective for the benefit of all subjects, including states towards which NSAGs also owe obligations.[192]

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[192] Bílková (n 127) 277–278; Sten Verhoeven, 'International Responsibility of Armed Opposition Groups: Lessons from State Responsibility for Actions of Armed Opposition Groups' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 303. Regarding this last point, Kleffner makes an important remark: "[a]s in the case of state responsibility or individual criminal responsibility, conceptualising a formal regime for the responsibility of organized armed groups is not the same as effectuating that regime. The challenge to the latter, which emanate from political and other practical constellations, are, and are likely to remain, significant, however sophisticated a formal regime […] might be […] these challenges remind us of the need to understand any system of responsibility of organized armed groups as being embedded into a broader framework of accountability. In this regard, there is not much difference between the responsibility of organized armed groups and the responsibility of other actors in international law." Kleffner (n 187) 158–159.

# Chapter 2

# The duty of non-state armed groups to provide reparation: current status, approaches and building blocks in international law

## 1 Introduction

The overall purpose of this chapter is to examine whether, and if so to what extent, a duty exists within international law, which requires NSAGs to provide reparation where they violate their primary obligations during situations of NIAC. The duty to provide reparation constitutes one of the legal consequences of holding an entity legally responsible under international law. It follows, that the ensuing examination determines whether a NSAG can be held internationally responsible and whether this results in a duty to provide reparation. It builds on the findings of the previous chapter, which identified these groups as distinct subjects of international law, which hold certain primary obligations under IHL and possibly IHRL. The confirmation of independent legal existence was recognised as a necessary precondition to the following, subsequent analysis, which will delve into the position of NSAGs within the law of international responsibility. As part of this examination, the chapter aims to identify, compare and evaluate approaches in respect of how the duty of NSAGs to provide reparations has been conceptualised and how it may have been put into practice when recognised in international law. The analysis of these approaches provides some preliminary building blocks, which might prove useful in the following chapters, as the study explores the manner in which the duty of NSAGs to repair could be operationalised under international law. Over the course of the present chapter, a study will be carried out of various primary and secondary sources of international law, particularly those concerning international humanitarian, human rights and criminal law, as well as the various responses, applied under the auspices of international law, to violations committed by NSAGs during situations of armed conflict. Although an extensive range of international legal materials and practice is studied, the examination does not aim to be exhaustive.

# 2 International responsibility of non-state armed groups resulting in a duty to repair for violations committed in armed conflict?

## 2.1 Reparation for wrongful acts as a fundamental principle of international law

The principle of reparation is generally understood as involving the obligation of a responsible person, or entity, to provide redress for the injury resulting from an unlawful act. Besides constituting a fundamental legal principle in domestic legal systems, reparation has also gained a firm basis in international law.[1] As early as 1927-1928, the Permanent Court of International Justice invoked the principle in the landmark *Factory at Chorzów* case, stating, "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".[2] Therefore, reparation is the "indispensable complement" of the failure to comply with an international obligation, which needs not to be stated in the concerned legal instrument.[3] In this sense, reparation is the natural consequence of the commission of an internationally wrongful act, that gives rise to the responsibility of the wrongdoer under international law.[4] It showcases the intrinsic relation between responsibility and reparation.[5]

This classical framework underlies the approach of the ILC to reparation, as set out in article 31 ARS, which formulates the duty of reparation as "the immediately corollary of a State's

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[1] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International and Comparative Law Review 157, 157; M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Human Rights Law Review 203, 206–211; Liesbeth Zegveld, 'Victims' Reparation Claims and International Criminal Courts: Incompatible Values?' (2010) 8 Journal of International Criminal Justice 79, 81; Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 5, 31. See also the Introduction to this study.

[2] *Case concerning the Factory at Chorzów (Germany v Poland)* PCIJ (Merits) [1928] PCIJ Rep Series A No 17 29.

[3] *Case Concerning the Factory at Chorzów (Germany v Poland)* PCIJ (Jurisdiction) [1927] PCIJ Rep Series A No 9 21; *Factory at Chorzów Case (Merits)* (n 2) 29. This general rule has been reaffirmed in the case law of the ICJ, see *LaGrand (Germany v United States of America)* ICJ (Judgment) [2001] ICJ Rep 466 para 48; *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ [2004] ICJ Rep 136 para 152; *Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda)* ICJ (Judgment) [2005] ICJ Rep 168 para 259. See also *Case of El Amparo v Venezuela* IACtHR (Judgment Reparations and Costs) Series C No 28 (14 September 1996) para 14; *Scordino v Italy (No 1)* ECtHR (Judgment) App No 36813/97 (29 March 2006) para 246; *Case of Dimitrovi v Bulgaria* ECtHR (Judgment) App No 12655/09 (21 October 2016) para 17; African Court on Human and Peoples' Rights, 'Comparative Study on the Law and Practice of Reparations for Human Rights Violations' (2019) 4.

[4] Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 420–421; Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press 2017) 69–70.

[5] Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (Intersentia 2020) 159. See also Chapter 4 Section 3.

responsibility, i.e. as an obligation of the responsible State resulting from the breach".[6] Similarly, Judge Cançado Trindade has conceptualised this framework as follows, "breach and reparation go together, conforming an indissoluble whole: the latter is the indispensable consequence or complement of the former", "so as to cease all the effects of this latter [the breach], and to secure respect for the legal order".[7] As a result, the duty of reparation is fundamental in nature as it is "an imperative of justice".[8] The latter notion is also reflected in the UN Basic Principles and Guidelines, which hold that "reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law", and more broadly in the field of transitional justice.[9] Within this context, the International Criminal Court held in the *Lubanga* case that one of the purposes of reparation, besides remedying the harm, is that they enable the Court to ensure that wrongdoers account for their acts.[10]

The traditional doctrine of reparation in international law developed as an exclusive matter of inter-state responsibility. This is not surprising considering that states were historically considered as the primary and exclusive subjects of international law.[11] Yet, the international legal system has gradually recognised certain non-state actors as bearing rights and obligations.[12] This raises the question whether a broader interpretation of the principle invoked in the *Factory at Chorzów* case could extend its application to these new actors, resulting in a duty to repair as a direct and fundamental consequence of violating international

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[6] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission (2001) Vol II Part Two (ARS) art 31, 91 para 4.

[7] *Separate Opinion of Judge Cançado Trindade in the Case of Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* ICJ [2012] ICJ Rep 324 para 40; *Separate Opinion of Judge Cançado Trindade in the Case of Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* ICJ [2018] ICJ Rep 15 paras 11-12.

[8] *Separate Opinion of Judge Cançado Trindade in the Case of Ahmadou Sadio Diallo* (n 7) paras 32-35, 40, 97.

[9] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by UNGA Res 60/147 on 16 December 2005 (21 March 2006) UN Doc A/RES/60/147 (UN Basic Principles and Guidelines) principle 15; UNGA, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence - Note by the Secretary-General' (14 October 2014) UN Doc A/69/518 paras 9–11.

[10] *Prosecutor v Thomas Lubanga Dyilo* ICC (Amended Order for Reparations) ICC-01/04-01/06-3129-AnxA (3 March 2015) para 2.

[11] Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 529, 535; Richard M Buxbaum, 'A Legal History of International Reparations' (2005) 23 Berkeley Journal of International Law 314; UNGA, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence - Note by the Secretary-General' (n 9) para 14; Emily L Camins, 'Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law' (2016) 10 International Journal of Transitional Justice 126, 136–137.

[12] See Chapter 1.

law obligations.[13] Recent developments in international law, in respect of international organisations and individuals, demonstrate that the principle of reparation is no longer solely reserved to states as duty bearers.[14] The Articles on the Responsibility of International Organizations (ARIO) proscribe that international organisations, which are responsible for an internationally wrongful act, have an obligation to make full reparation, while the International Criminal Court can order reparation against a criminally convicted individual.[15] It could be argued that these developments signal that a duty of reparation is emerging as an attribute of subjectivity, ensuing from the condition of being a subject of rights and a bearer of duties in international law.[16]

On the basis of this discussion, it would appear coherent to include NSAGs, as distinct subjects that hold certain primary obligations, in the domain of international responsibility. This follows from the traditional conceptualisation of reparation in international law, as the indispensable complement of failing to comply with an obligation.[17] Moreover, the aforementioned developments, which have occurred within the international legal system, demonstrate that the duty of reparation is no longer an exclusive matter of state responsibility; indeed, it can be extended to non-state actors. The need to include NSAGs in this recent development is reinforced by the understanding of reparation as an important justice and accountability measure for victims. Finally, NSAGs inclusion in reparations practice would also respond to the present realities of armed conflicts, which predominantly involve such groups as violent actors.

## 2.2 International humanitarian law

In Chapter 1, it was determined that a NSAG bears primary obligations under IHL as a distinct subject of international law. Consequently, it would appear logical, in light of the fundamental principle of international law invoked in the *Factory at Chorzów* case, that the

[13] Heidi Rombouts, Pietro Sardaro and Stef Vandeginste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights' in Koen de Feyter and others (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 363.
[14] Íñigo Álvarez (n 5) 161.
[15] Art 75 ICC Statute; art 31 ILC, Articles on the Responsibility of International Organizations with Commentaries, Yearbook of the International Law Commission (2011) Vol II Part Two (ARIO).
[16] *Separate Opinion of Judge Cançado Trindade in the Case of Ahmadou Sadio Diallo* (n 7) para 32.
[17] Similar arguments have been raised by other legal scholars, see Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 Journal of International Humanitarian Legal Studies 5, 46–47; Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability* (Ashgate 2016) 116–117; Paloma Blázquez Rodríguez, 'Does an Armed Group Have an Obligation to Provide Reparations to Its Victims? Construing an Obligation to Provide Reparations for Violations of International Humanitarian Law' in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations* (Brill Nijhof 2018) 408–410; Íñigo Álvarez (n 5) 34.

group's responsibility and resulting duty of reparation would arise upon breaching an obligation of IHL. Several legal scholars have reached the same preliminary conclusion.[18] Nevertheless, current IHL lacks any secondary norm in treaty law providing for such international responsibility on the part of NSAGs. More broadly, international law does not provide for a legal framework, or instrument, which is similar to those developed in relation to the responsibility of states and international organisations. Additionally, there is no international forum through which victims can seek to establish the collective responsibility of NSAGs with the objective of claiming reparation.[19] Evans concludes that "this illustrates a major lacuna in international humanitarian law", especially considering the contemporary dominance of NIACs involving NSAGs.[20]

The ICRC Commentary of 2020 to Common Article 3 confirms that "[i]nternational law is unclear as to the responsibility of a non-State armed group, as an entity in itself, for acts committed by members of the group".[21] However, the ICRC appears to leave some room with regard to NSAGs that are also bound by Additional Protocol II. More specifically, the ICRC study on customary IHL of 2005 recognises that it could be argued that NSAGs incur responsibility for acts committed by persons forming part of such groups since these groups must respect IHL and operate under a "responsible command" (while explicitly referencing article 1(1) Additional Protocol II).[22] Nevertheless, the same ICRC study indicated that the consequences of such responsibility are not clear.[23] It is particularly "unclear to what extent

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[18] Gillard observes that although "responsibility to make reparation would be a natural consequence of the fact that organized armed groups are bound by international humanitarian law, to date such responsibility has taken the form of individual criminal responsibility of violators". Daboné argues, in his turn, that "an armed group violating rights can be expected to make reparation", which logically follows from the application of the law. See Gillard (n 11) 535; Zakaria Daboné, 'International Law: Armed Groups in a State-Centric System' (2011) 93 International Review of the Red Cross 395, 412; Ezequil Heffes, 'The Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law: Challenging the State-Centric System of International Law' (2013) 4 Journal of International Humanitarian Legal Studies 81, 84; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 277.

[19] The International Humanitarian Fact-Finding Commission is competent to investigate allegations of violations of IHL committed in situations of international armed conflict. Additionally, the Commission has indicated its willingness to extend its activities to IHL violations arising in NIACs, as long as all parties to the conflict agree. This has not occurred thus far. Art 90 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (1977) 1125 UNTS 3; ICRC, 'Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War' (2020) paras 939–940 <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary> accessed 3 August 2020.

[20] Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 31.

[21] ICRC (n 19) para 931.

[22] However, note that these obligations also apply to NSAGs solely falling under Common Art 3, see Rule 139 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol I: Rules (Cambridge University Press 2005); ICRC (n 19) para 938.

[23] Henckaerts and Doswald-Beck (n 22) 536.

armed opposition groups are under an obligation to make full reparation".[24] The latter conclusion has been confirmed by more recent scholarly contributions on the topic.[25]

In this regard, the ICRC study makes reference to the Articles on the Responsibly of States for Internationally Wrongful Acts (ARS). The Commentary of the ILC to this authoritative instrument recalls that it is not concerned with the international responsibility of NSAGs but, at the same time, leaves this issue open: "[a] further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law by its forces."[26] The ILC clarifies that the essential idea of such a movement is reflected in article 1(1) Additional Protocol II: "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[27] Thus, the term 'insurrectional movement' certainly encompasses at least one type of NSAG examined in this study, namely those groups that are also bound by Additional Protocol II. However, since the ILC only refers to Additional Protocol II as a definitional "guide", NSAGs solely bound by Common Article 3 are not necessarily excluded.[28]

Going back to 1972, ILC Special Rapporteur Ago recognised an insurrectional movement as a "separate subject of international law […] perfectly capable of committing internationally wrongful acts", which can involve that subject's responsibility.[29] However, from 1975 onwards, the ILC avoided addressing the international legal personality or status of such movements, "since that was a question outside the scope of the article" concerned.[30] Correspondingly, article 14 paragraph 3 of an older draft of the ARS, which dealt with the "conduct of organs of an insurrectional movement", held that "paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that

[24] ibid 550.

[25] See Jann K Kleffner, 'The Collective Accountability of Organized Armed Groups for System Crimes' in Andre Nollkaemper and Harmen Gijsbrecht van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 255; Sassòli (n 17) 47; ILA Committee on Non-State Actors, 'Washington Conference Non State Actors' (2014) 11; Luke Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 346; Blázquez Rodríguez (n 17).

[26] ILC Commentary to art 10 ARS 52 para 16.

[27] ILC Commentary to art 10 ARS 51 para 9.

[28] ILC Commentary to art 10 ARS 51 para 9; Zakaria Daboné, *Le Droit International Public Relatif Aux Groupes Armés Non Étatiques* (Schulthess 2012) 172–174.

[29] 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' Yearbook of the International Law Commission (1972) Vol II UN Doc A/CN.4/264 and Add.1 129 para 153.

[30] Compare Ago's draft art 12(2) to the reworked art 12ter, see Yearbook of the International Law Commission (1975) Vol I UN Doc A/CN.4/SER.A/1975 42 para 1 and 216 paras 41,43. Daboné (n 28) 172.

movement in any case in which such attribution may be made under international law".[31] The Commentary to this draft article clarifies that the ILC did not intend to take a position on matters of attribution in relation to such movements, but rather sought to provide for the mere possibility in light of existing international practice (see Section 3.1 for a discussion of this practice and its relation to the work of the ILC).[32]

In his first report of 1998, ILC Special Rapporteur Crawford held that the responsibility of insurrectional movements falls beyond the scope of the ARS in light of its focus on state responsibility. He did, however, recognise that such responsibility for IHL breaches "can certainly be envisaged".[33] Eventually, the paragraph was deleted and deferred to the commentary, as demonstrated in the final version of the ARS of 2001 (see *supra*).[34] All in all, the international responsibility of NSAGs, particularly those also bound by Additional Protocol II, for violations of IHL is neither firmly affirmed, nor is it rejected in the work of the ICRC and ILC respectively.[35]

The question, as to whether the international responsibility of a NSAG arises when breaching a primary obligation of IHL, also remains controversial in legal scholarship. Some scholars, such as Sassòli, argue that the international responsibility of NSAGs in IHL has been recognised or even go as far as arguing that this assertion is no longer controversial.[36] For these scholars, the contemporary debate centres, not on whether NSAGs have international responsibility, but on issues such as attribution, content and implementation.[37] Nevertheless, this position is far from universal and the majority of scholars have been more careful in their assertions. Aside from arguing for the necessity of a new regime of responsibility for NSAGs,

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[31] ILC, Draft Articles on State Responsibility with Commentaries provisionally adopted by the ILC on first reading at its forty-eight session (6 May-26 July 1996) Yearbook of the International Law Commission (1996) Vol II UN Doc A/CN.4/SER.A/1996/Add.1 (Part 2) (draft ARS of 1996).

[32] ILC Commentary to draft art 14 ARS (1996) 99 para 31, Yearbook of the International Law Commission (1975) Vol II UN Doc A/CN.4/SER.A/1975/Add.1.

[33] 'First Report on State Responsibility, by Mr James Crawford, Special Rapporteur' (1998) UN Doc A/CN.4/490 and Add.1-7 53 para 272.

[34] Yearbook of the International Law Commission (1998) Vol I UN Doc A/CN.4/SER.1/1998 290 para 86.

[35] Eyassu Gayim, 'Reflections on the Draft Articles of the International Law Commission on State Responsibility: Articles 14; 15; & 19 in the Context of the Contemporary International Law of Self-Determination' (1985) 54 Nordic Journal of international Law 85, 102; Liesbeth Zegveld, 'Accountability of Non-State Actors in International Law', *Proceedings of the Bruges Colloquium: Relevance of International Humanitarian Law to Non-State Actors, Collegium Special Edition* (2003) 157.

[36] For instance, in the *Nicaragua* case, the ICJ implicitly recognised that the *Contras* might potentially be held responsible for their own violations of IHL. The Court took the view that "the *contras* remain responsible for their acts". *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ (Merits Judgment) [1986] ICJ Rep 14 para 116; Veronika Bílková, 'Armed Opposition Groups and Shared Responsibility' (2015) 62 Netherlands International Law Review 69, 77.

[37] Liesbeth Zegveld, *The Accountability of Armed Opposition Groups* (Cambridge University Press 2002) 133–134; Sassòli (n 17) 47; Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing Limited 2019) paras 5.44, 10.255.

this latter group of scholars generally identifies increased support for the idea that NSAGs have international responsibility, whilst, at the same time, concluding that existing practice is too scarce to draw any definite conclusion on the matter.[38]

Contrary to the responsibility gap vis-à-vis NSAGs in IHL, article 91 of Additional Protocol I requires a responsible state party to an international armed conflict to make reparation. It holds, "[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation."[39] Given its scope of application, it also applies to wars of national liberation. Moreover, state practice has established this rule as a norm of customary IHL, a norm which is also applicable to situations of NIAC. However, its application does not extend to NSAGs engaged in such conflicts, hence creating an inequality in the parties' secondary obligations.[40]

The ICRC Commentary to the provision reveals that the underlying justification for the rule was of a preventative nature, more specifically the need to provide an additional measure to avoid violations of the law.[41] It is clear that NSAGs were not as prominent on the international agenda as they are today. Nevertheless, at present, the same concerns relating to compliance can be raised just as easily with regard to NSAGs.[42] More generally, a strong argument can be made that legal consequences must follow from violations, in order to uphold the very norms which the international legal system aims to promote.[43] From a strict

[38] Éric David, *Principes de Droit Des Conflits Armés* (3rd edn, Bruylant 2002) 643; Veronika Bílková, 'Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law?' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 276–277, 284; Kirsten Schmalenbach, 'International Responsibility for Humanitarian Law Violations by Armed Groups' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press 2015) 797; Sten Verhoeven, 'International Responsibility of Armed Opposition Groups: Lessons from State Responsibility for Actions of Armed Opposition Groups' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 303; Íñigo Álvarez (n 5) 3, 181–182, 216–217.

[39] The provision constitutes a literal reproduction of article 3 of the Hague Convention Concerning the Laws and Customs of War on Land of 1907.

[40] Rules 149 and 150 Henckaerts and Doswald-Beck (n 22); Ezequil Heffes and Brian Frenkel, 'The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules' (2017) 8 Goettingen Journal of International Law 39, 42.

[41] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 December 1949* (Martinus Nijhoff 1987) paras 3645–3646.

[42] Daboné (n 28) 188–189.

[43] Annyssa Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibility of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 304.

legal perspective, international responsibility remains one of the most credible measures to render this legal system effective.[44]

## 2.3 International human rights law

The increasing doctrinal and practical acceptance that certain NSAGs hold human rights obligations during situations of armed conflict, renders it essential that this study considers their international responsibility and particularly their duty of reparation under IHRL. Scholarly debate and practice continues to be very much focused on NSAGs primary obligations under IHRL.[45] A recent and notable exception to this tendency is a 2018 report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, which, among other observations, concludes that the binding of NSAGs to IHRL "provides for a legal foundation for access to remedies and reparation for victims of ANSAs [armed non-State actors] violations".[46] An important additional rationale for binding NSAGs to IHRL is that "the current legal framework to hold them accountable has unacceptably large deficits with regard to access to justice, remedies, and reparations".[47] This may provide a tentative sign that this issue may become the next frontier in human rights scholarship on NSAGs and may experience developments in practice. Nevertheless, the sophisticated human rights system of remedies, which is highly developed in comparison to IHL, remains state-centric in its nature. It exhibits neither immediate signs of extending its scope, nor signs of comprehensive development concerning the establishment of a tailored forum, which might deal exclusively with human rights claims filed against NSAGs.[48] Moreover, as long as there is no uniform

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[44] Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 3; Sassòli (n 17) 43.

[45] However, see art 5(2) Res No 2/2010 Reparation for Victims of Armed Conflict (ILA Committee on Reparation for Victims of Armed Conflict 2010); ILA Committee on Reparation for Victims of Armed Conflict, 'The Hague Conference Reparation for Victims of Armed Conflict' (2010) 12; Mastorodimos (n 17) 198–199, 203 (he concludes that NSAG "accountability for human rights violations is in an embryonic stage").

[46] UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (5 June 2018) UN Doc A/HRC/38/44 para 98.

[47] ibid 21.

[48] See for relevant human rights provisions i.a. art 8 Universal Declaration of Human Rights; arts 2(3)(a), 9(5), 14(6) ICCPR; art 6 Convention on the Elimination of All Forms of Racial Discrimination (1966) 660 UNTS 195; art 14 Convention against Torture (1984) 1465 UNTS 85; art 39 Convention on the Rights of the Child (1989) 1577 UNTS 3. At the regional human rights level, see arts 13, 33-34 European Convention on Human Rights (1950) ETS No. 005; arts 25, 33(b), 63 American Convention on Human Rights (1969) OAS Treaty Series No 36 1144 UNTS 123; art 28(h) Protocol on the Statute of the African Court of Justice and Human Rights (2008) <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights> accessed 5 August 2020. See the following statement made by the Inter-American Commission on Human Rights for an illustration of the state centricity of the human rights system: "OAS member States opted deliberately not to give the Commission jurisdiction to investigate or hear individual complaints concerning illicit acts of private persons or groups for which the State is not internationally responsible. If it were to act on such complaints, the Commission would be

consensus on the primary obligations of NSAGs under IHRL, developments regarding their legal responsibility are unlikely to proceed, at least for the time being.[49]

### 2.4 International criminal law

Although international law lacks a regime of responsibility for NSAGs, the International Criminal Court has recently embarked on an innovative course. The ICC not only has a mandate to hold group members criminally responsible for their part in the commission of international crimes, but can also oblige those responsible to repair the harms they have caused.[50] Indeed, one of the essential principles upon which the Court's system of reparations is based, is that an order for reparations must be directed against the convicted person.[51] Accordingly, "reparation orders are intrinsically linked to the *individual* whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence".[52] This clearly follows from the context in which such orders arise at the Court, which is a legal regime concerned with establishing *individual* criminal responsibility for the crimes included in the Rome Statute.[53] This makes it very clear that the Court does not have the jurisdiction to obligate the NSAG, to which the convicted person belonged and in whose service the crimes were committed, to contribute to providing reparations. However, article 75(6), which provides for the convicted person's duty to repair in paragraph 2, holds that such reparation does not prejudice "the rights of victims under national or international law", therefore leaving open the possibility for the development of victims' rights beyond this individual responsibility framework.

In all four reparations orders issued thus far by the ICC, the convicted persons have been declared indigent. The raises a legitimate question as to whether it might be beneficial to provide for a legal basis that would enable the Court, in cooperation with the relevant State

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in flagrant breach of its mandate, and, by according these persons or groups the same treatment and status that a State receives as a party to a complaint, it would infringe the sovereign rights and prerogatives of the State concerned." IACHR, 'Third Report on the Human Rights Situation in Colombia' OEA/SER.L/II.102 Doc 9 rev 1 (26 February 1999) ch IV para 5. However, see UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 46) para 100(e) in which the UN Special Rapporteur recommends to states to explore the establishment of specialized human rights court(s) to prosecute NSAGs.

[49] Íñigo Álvarez (n 5) 174.

[50] Art 75(2) ICC Statute. See also Chapter 3.

[51] *Prosecutor v Thomas Lubanga Dyilo* ICC (Judgment on the Appeals against the "Decision establishing the Principles and Procedures to be applied to Reparations" of 7 August 2012) ICC-01/04-01/06-3129 (3 March 2015) paras 1, 32, 65-70, 87, 99; *Prosecutor v Germain Katanga* ICC (Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728 (24 March 2017) paras 30-31; *Prosecutor v Ahmad Al Faqi Al Mahdi* ICC (Reparations Order) ICC-01/12-01/15-236 (17 August 2017) paras 25-26, 38; *Prosecutor v Bosco Ntaganda* ICC (Reparations Order) ICC-01/04-02/06 (8 March 2021) paras 96-97.

[52] *Prosecutor v Thomas Lubanga Dyilo* (n 51) para 65.

[53] ibid para 65.

Parties, to pursue the illegal assets and property of the NSAG and its other members, where possible.[54] The Rome Statute does not give the Court the power to formally request the cooperation of NSAGs, nor does it require them, as a matter of law, to comply with any requests regarding reparations. Nonetheless, McCarthy argues that this might prove significant when the Court makes a reparations order to victims residing in territories controlled by such groups. It may, for instance, be necessary for the NSAG to grant safe access to communities in order to facilitate the provision of redress.[55] Blázquez Rodríguez adds a practical consideration to the discussion by pointing out that convicted persons may easily move their assets, while the group itself may be able to assist the Court if they know about the location of such assets.[56]

Despite the apparent appeal of such proposals, they can be challenged on at least two grounds: it is unlikely that State Parties would grant such power to the Court, given that it might imply some form of recognition of the NSAG itself, as well as the power it wields; and, it might be considered doubtful that an NSAG would be willing to cooperate without some kind of incentive, especially considering the fact that a criminal conviction of one of its members, possibly a leader or high-level commander, would lie at the basis of proceedings.[57] Beyond these challenges, it is questionable how any request could be enforced where domestic authorities have not been able to restrain the power of a NSAG which holds *de facto* territorial control. Depending on the circumstances of a given case, it might be more effective to request the convicted person to call upon the group to cooperate as a positive contribution to his or her duty to repair. In the *Lubanga case*, the Legal Representatives of Victims V01 observed that the convicted person continues to wield significant political influence in the Ituri province of the Democratic Republic of the Congo. This, it was argued, could impact the implementation of the reparations process by the Trust Fund, and could influence how the participating victims are perceived by their immediate communities, sometimes even by their own families. In a letter from their counsel to the Defence, the victims asked whether Lubanga, as a positive action in favour of the victims, would call on the members of the *Forces Patriotiques pour la Libération du Congo* (FPLC), which he headed, and on the

[54] *Prosecutor v Thomas Lubanga Dyilo* ICC (Decision Establishing the Principles and Procedures to Be Applied to Reparations) ICC-01/04-01/06-2904 (7 August 2012) paras 269, 277; *Prosecutor v Germain Katanga* (n 51) para 327; *Prosecutor v Ahmad Al Faqi Al Mahdi* (n 51) para 113; *Prosecutor v Bosco Ntaganda* (n 51) para 254; Verhoeven (n 38) 285–286; Íñigo Álvarez (n 5) 177–178.

[55] Connor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press 2012) 317, 322–323.

[56] Blázquez Rodríguez (n 17) 426–427.

[57] Geneva Academy of International Humanitarian Law and Human Rights, 'Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors' (2011) 22–24.

population of Ituri to: cooperate with officials of the Trust Fund responsible for implementing the reparations plan; and, refrain from any negativity towards victim-beneficiaries. Yet, it appears that Lubanga, who had failed, to that point in time, to admit responsibility for the crimes for which he was convicted, gave no response to this proposal.[58]

## 2.5 Contemporary responses to violations committed by non-state armed groups

Although the international order lacks a treaty, or other instrument, setting out the secondary rules which might govern the possible international responsibility of NSAGs, international law still responds in several ways to the violation of primary obligations, committed during situations of armed conflict, by these collective entities. Indeed, there are a number of actors and mechanisms that have progressively engaged in monitoring, reporting and even sanctioning such groups. The purpose of this section is to identify the significance and limitations of these efforts from the perspective of international responsibility.

UN bodies, including the Security Council and the General Assembly, have regularly called on NSAGs, in their resolutions, to respect and comply with their primary obligations under international law. Moreover, these bodies have condemned NSAG violations and have called upon such groups to put an end to their commission.[59] This has been done by calling upon all parties and/or by referring to the respective groups by name.[60] Other bodies within the UN human rights machinery have also not shied away from drawing attention to violations committed by NSAGs. A call was made as early as 1990, during a session of the Commission on Human Rights, to pay increased attention to violations committed by NSAGs, on the basis that such violations could have a negative impact on the enjoyment of human rights. This discourse, led to an eventual decision that existing mechanisms should pay particular attention to the atrocities committed by these groups.[61] This example illustrates that the accountability

[58] *Prosecutor v Thomas Lubanga Dyilo* ICC (Public Redacted version of Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals) ICC-01/04-01/06-3223-Conf (19 September 2016) 23–25.

[59] See e.g. the following resolutions of the UN Security Council on Sudan and the Democratic Republic of the Congo respectively: "all parties, including the Sudanese rebel groups such as the Justice and Equality Movement and the Sudanese Liberation Army, must respect human rights and international humanitarian law". UNSC, Res 1574 (19 November 2004) UN Doc S/RES/1574 Preamble. "Strongly condemns all armed groups operating in the region and their violations of international humanitarian law as well as other applicable international law, and abuses of human rights". UNSC, Res 2277 (30 March 2016) UN Doc S/RES/2277 para 16.

[60] For further examples see the following recent database, which contains excerpts of UN Security Council and General Assembly practice concerning NSAGs (covering 1995 to 2017) Jessica S Burniske, Naz K Modirzadeh and Dustin A Lewis, 'Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly - Briefing Report with Annexes' (Harvard Law School Program on International Law and Armed Conflict 2017) 33–77.

[61] David Matas, 'Armed Opposition Groups' (1997) 24 Manitoba Law Journal 621, 621–622.

of NSAGs was already on the UN agenda 30 years ago, even in the face of the traditional state-centricity of the human rights system. Over the years, the Human Rights Council and human rights experts, appointed under its system of Special Procedures, have identified and condemned several violations of both IHL and IHRL perpetrated by NSAGs.[62] Similarly, the Inter-American Commission on Human Rights, a regional human rights body, has proven to be a prominent monitor of NSAGs' compliance with IHL and IHRL.[63]

The UN Security Council, inter-governmental organisations, such as the European Union, and individual states, have all imposed sanctions, such as assets freezes and travel bans, on NSAGs and their members. This has been done in an effort to reduce the danger to peace and security that such groups may pose.[64] For instance, a Sanctions Committee established by the Security Council can impose sanctions on entities, such as NSAGs, that are "involved in planning, directing, or committing acts that violate international human rights law or international humanitarian law".[65] While these measures intend to preserve international peace and security first and foremost, and while they provide for a measure of accountability, they are not designed to deal with issues of the international responsibility of NSAGs.[66]

In 2005, the UN Security Council established a Monitoring and Reporting Mechanism (MRM) to foster accountability in the area of children's rights in armed conflict and the compliance of parties to armed conflicts with international child protection standards and

[62] For instance UNHRC, Res 28/20 (8 April 2015) UN Doc A/HRC/RES/28/20 para 6; UNHRC, Res 31/27 (20 April 2016) UN Doc A/HRC/RES/31/27 para 11; UNGA, 'Interim Report on the Situation of Human Rights in the Sudan Prepared by the Special Rapporteur of the Commission on Human Rights' (16 October 1995) UN Doc A/50/569 paras 72–74; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (15 May 2012) UN Doc A/HRC/20/22/Add.2 paras 40–44; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 46) 5–6.

[63] See e.g. IACHR, 'Country Report Colombia: Truth, Justice and Reparation' OEA/Ser.L/V/II. Doc 49/13 (31 December 2013) para 56. "The Commission also indicated that despite the demobilization of the AUC, violence stemming from the armed conflict persisted, and reports continued of crimes, human rights violations, and violations of IHL against the civilian population being committed by illegal armed groups […] that translated into violations of the rights to life, humane treatment, and personal liberty, and which resulted in continued internal displacement." For a more in-depth discussion, see Zegveld, *The Accountability of Armed Opposition Groups* (n 37) 158–162; Sassòli (n 17) 39–40.

[64] See for instance with regard to the Democratic Republic of the Congo UNSC, Res 2293 (23 June 2016) UN Doc S/RES/2293; UNSC, Res 2424 (29 June 2018) UN Doc S/RES/2424; UNSC, Res 2478 (26 June 2019) UN Doc S/RES/2478. See also Jeremy M Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge University Press 2009) 346–347; Nigel D White, 'Autonomous and Collective Sanctions in the International Legal Order' (2018) 27 The Italian Yearbook of International Law Online 1, 22.

[65] UNSC, Res 2134 (28 January 2014) UN Doc S/RES/2134 para 37(b); Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford University Press 2018) 156–157.

[66] Kleffner (n 25) 252–255; Agata Kleczkowska, 'Filling the Gap: The New Regime of Responsibility for Armed Non-State Actors' (2018) 25 Australian International Law Journal 137, 159; Íñigo Álvarez (n 5) 52.

norms.[67] The Special Representative of the Secretary-General on Children and Armed Conflict serves as the UN focal point for the Security Council-agenda and the implementation of the MRM.[68] The MRM systematically monitors, documents and reports on six, so-called, grave violations against children. These include the killing and maiming of children and the recruitment or use of children as soldiers, whether committed by state or non-state parties to a conflict.[69] NSAGs that engage in such violations can be listed in the annexes of the UN Secretary-General's annual report on children and armed conflict; inclusion in this list of violators may lead to sanctions being imposed against the group by the Security Council.[70] This is further complemented by the possibility for NSAGs to commit themselves to action plans, concerned with the halting of violations.[71] All in all, the MRM plays an important role in this area of international law by contributing to accountability, compliance and the prevention of future violations through naming and shaming, dialogue and sanctions.[72] Yet, the purpose of the mechanism is not to provide a legal tool through which the international responsibility of NSAGs could be assessed; instead, it constitutes a policy instrument.[73]

Finally, mechanisms dealing with truth seeking have frequently addressed violations of IHL and IHRL committed by NSAGs. This is the case for truth-seeking efforts established by the UN in the forms of commissions of inquiry, fact-finding missions or other investigative bodies.[74] Íñigo Álvarez recently completed a comprehensive analysis of the practice of these mechanisms, which focussed on the collective responsibility of NSAGs. She concluded that most of the mechanisms' reports do indeed map NSAGs' violations of primary IHL and IHRL obligations.[75] However, she further concluded that almost all these reports subsequently refer

[67] UNICEF, 'Guidelines: Monitoring and Reporting Mechanism on Grave Violations against Children in Situations of Armed Conflict' (2014) 7.
[68] ibid 10.
[69] UNSC, Res 1612 (26 July 2005) UN Doc S/RES/1612.
[70] ibid 9.
[71] Cedric Ryngaert and Anneleen Van de Meulebroucke, 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms' (2011) 16 Journal of Conflict & Security Law 443, 458–460; Andrew Clapham, 'Focusing on Armed Non-State Actors' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 800–802; Bellal (n 43) 321–322.
[72] UNICEF (n 67) 20.
[73] Íñigo Álvarez (n 5) 51.
[74] These international investigative bodies are increasingly used to respond to situations of serious IHL and IHRL violations, promote accountability for such violations, and counter impunity. The UN Security Council, the General Assembly, the Human Rights Council and its predecessor the Commission on Human Rights, the Secretary-General and the High Commissioner for Human Rights have established such bodies. UNOHCHR, 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' (2015) 2.
[75] See e.g. UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (1 June 2011) UN Doc A/HRC/17/44 paras 261–263; UNSC, 'Final Report of the International Commission of Inquiry on the Central African Republic' (22

to the individual criminal responsibility of group members as the exclusive accountability mechanism through which NSAGs can be dealt with.[76] In contrast, violations committed by states and their agents were considered from the perspectives of both state and individual criminal responsibility.[77] Nevertheless, Bellal argues that such mechanisms may be "useful tools for establishing *as a preliminary step* the responsibility of non-state armed groups during a particular conflict".[78]

Another prominent truth-seeking mechanism is the truth commission. Truth commissions have been identified as mechanisms which, due to their general focus on patterns of past abuses, allow for an understanding of the collective role of NSAGs in armed conflict.[79] Such commissions have similarly reported on international law violations committed by NSAGs, while some have even recognised the direct responsibility of such groups as collective entities.[80] Notably, the Commission on the Truth for El Salvador held that the "FMLN must provide [moral and material] compensation where it is found to have been responsible".[81] This approach converges with the traditional understanding of responsibility in international law.

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December 2014) UN Doc S/2014/928 Annex B; UNHRC, 'Report of the Independent International Fact-Finding Mission on Myanmar' (12 September 2018) UN Doc A/HRC/39/64 paras 54, 66; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2 July 2020) UN Doc A/HRC/44/61.

[76] Two notable exceptions to this dominant approach can be found in the work of the International Commission of Inquiry on Darfur and the Panel of Experts on Accountability in Sri Lanka, which invoke the direct international responsibility of the respective NSAGs. 'Report of the International Commission of Inquiry on Darfur' (25 January 2005) para 175; UNSG, 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 191.

[77] Íñigo Álvarez (n 5) 40–45. Similarly, Zegveld concluded earlier in 2002 that "while international bodies have given due consideration to accountability of individual leaders of armed opposition groups, they have so far largely ignored the accountability of the groups in favour of the accountability of individual members". Zegveld, *The Accountability of Armed Opposition Groups* (n 37) 223.

[78] Annyssa Bellal, 'Non-State Armed Groups in Transitional Justice Processes: Adapting to New Realities of Conflict' in Roger Duthie and Paul Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 238.

[79] Ron Dudai, 'Closing the Gap: Symbolic Reparations and Armed Groups' (2011) 93 International Review of the Red Cross 783, 791; Bellal (n 78) 238–239; Olivia Herman, 'Holding Armed Groups to Account Under International Human Rights Law: An Analysis of the Under-Explored Practice of Truth Commissions' (2019) 13 Human Rights & International Legal Discourse 48, 68.

[80] The Truth and Reconciliation Commission for Sierra Leone found the RUF responsible for the greatest number of violations, while at the same time highlighting the greater degree of responsibility of certain individual RUF commanders. Sierra Leone Truth and Reconciliation Commission, 'Witness to Truth' (2004) Vol 1 ch 5 para 66; Sierra Leone Truth and Reconciliation Commission, 'Witness to Truth' (2004) Vol 2 ch 2 pp 38, 44, 48–49. The Truth and Reconciliation Commission of Liberia held all NSAGs responsible for violations of IHL and IHRL as "group perpetrators". Truth and Reconciliation Commission of Liberia, 'Consolidated Final Report' (2009) Vol II 336. For a further discussion of the practice of truth commissions concerning violations of primary IHL and IHRL obligations by NSAGs, see Herman (n 79); Íñigo Álvarez (n 5) 46–49.

[81] Commission on the Truth for El Salvador, 'From Madness to Hope: The 12-Year War in El Salvador' (1993) UN Doc S/25500 148, 185. See further Section 3.5.

The overall significance of these efforts lies in a recognition of the need to address, at the international level, the collective and detrimental role that NSAGs play in situations of armed conflict. All such efforts contribute to the current accountability framework concerning NSAGs, by monitoring and scrutinizing their behaviour against international law, and by potentially imposing some sort of sanction.[82] While a majority of the mechanisms emphasise violations of primary obligations by NSAGs, some go further by invoking the international responsibility of the group on this basis. However, the mechanisms that have taken the latter step, have not been explicit about the underlying legal framework, or the set of rules and principles used to assess the question of the international responsibility of NSAGs.[83] As Kleffner rightly argues, this is wholly unsatisfactory within an international order which is supposedly governed by the rule of law, which requires certain, predictable and stable rules, legal certainty and transparency, among other requirements.[84] Moreover, the various mechanisms have not provided an avenue for victims to claim reparations from responsible groups.[85] Nonetheless, a more focused examination of this accountability practice, conducted through the prism of a specific aspect of international responsibility, may still prove beneficial. Bellal, for instance, explored how some of the mechanisms have linked internationally wrongful acts to NSAGs in the context of their monitoring activities, with the purpose of identifying possible attribution rules.[86] A similar analysis will be carried out in Sections 3.4 and 3.5, but through the lens of the duty to provide reparation.

## 2.6 A responsibility gap in current international law regulating armed conflict

The prior examination demonstrated that, although NSAGs bear primary obligations under IHL and potentially IHRL, current international law does not include a secondary norm, nor a uniform set of rules and principles, which governs the possible legal responsibility of NSAGs where they violate these obligations.[87] The present situation is not remedied, in a satisfactory manner, by the existing regimes of state responsibility and individual criminal responsibility,

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[82] See Introduction, Section 2.2, for a definition of the concept of accountability versus responsibility.

[83] Other scholars have come to similar conclusions. Kleffer found that "[w]hile it is clear from the foregoing that organized armed groups can and are being held accountable for system crimes, it is striking that a legal framework of responsibility underlying these accountability mechanisms is at best amorphous, and at worst non-existent." Similarly, Íñigo Álvarez concluded that "these accountability instruments are not accompanied by a legal framework against which it would be possible to assess the responsibility of the armed group as a collective entity". Kleffner (n 25) 257; Íñigo Álvarez (n 5) 57.

[84] Kleffner (n 25) 259–260; Íñigo Álvarez (n 5) 58–59.

[85] Kleczkowska (n 66) 150–151.

[86] See Bellal (n 43).

[87] Kleczkowska (n 66) 138.

which only partially cover violations committed by NSAGs. This conclusion is based on several limitations of both regimes that will be briefly outlined (see Chapter 3 for an extensively discussion). As a general rule, a state is not responsible for the wrongful acts committed by a NSAG operating independently in its territory. An exception is when a NSAG is successful in establishing a new government or state. Yet, this leaves the responsibility of unsuccessful groups unaddressed. A state may also incur responsibility for failing to exercise due diligence concerning the wrongful act, but this originates in the state's own conduct and it is practically unlikely that it will be triggered in times of armed conflict. Furthermore, a NSAG can be held indirectly responsible for its violations through the criminal responsibility of individual members. However, this only concerns violations that amount to international crimes, whereas others are not covered.[88]

Consequently, a *responsibility gap* is left in current international law regulating situations of armed conflict.[89] In accordance with the foregoing conclusions, Bílkova finds that such a gap manifests itself at both the theoretical level, by way of the existing asymmetry between the primary and secondary rules applicable to NSAGs, and in practice, because of the *de facto* impunity for certain violations of international law.[90] In order to overcome this gap, several scholars have called for the introduction of the international responsibility of NSAGs, including a proposed duty to provide reparation.[91] The analysis carried out here has not revealed an apparent legal reason or justification for neglecting the international responsibility of NSAGs. While some scholars have reinforced this call by relying on additional justifications, such as the need for an international legal order governed by the rule of law, this study emphasises the importance of such developments for the advancement of victims' efforts to obtain reparations, within the broader context of the fight against impunity.[92] The lack of a legal responsibility framework and an avenue for victims of armed conflict to rely upon, becomes an even more pressing issue when taking into account the fact that NSAGs have become some of the leading protagonists in present-day conflicts.[93]

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[88] As similarly argued by Zegveld, *The Accountability of Armed Opposition Groups* (n 37) 223–224; Bílková (n 38) 275; Schmalenbach (n 38) 495–496; Verhoeven (n 38) 285–286, 303; Íñigo Álvarez (n 5) 54, 56, 70.

[89] Similarly, Zegveld speaks of an "accountability gap" in Zegveld, *The Accountability of Armed Opposition Groups* (n 37). Íñigo Álvarez describes the "responsibility gap" in the following terms: "The existing consensus on the IHL primary rules applicable to armed groups contrasts with the lack of agreement that exists in relation to the application of secondary rules." Íñigo Álvarez (n 5) 54.

[90] Bílková (n 38) 275.

[91] Zegveld, *The Accountability of Armed Opposition Groups* (n 37) 220; Bílková (n 38) 275; Moffett (n 25); Schmalenbach (n 38) 496; Verhoeven (n 38) 303; Blázquez Rodríguez (n 17).

[92] Kleffner (n 25) 259–260; Íñigo Álvarez (n 5) 58–63.

[93] See also Section 2.1.

Indeed, within the framework of this responsibility gap, it is particularly unclear whether a NSAG is subject to a duty to make reparation. However, one could argue that reparation is the natural consequence of an internationally wrongful act.[94] As discussed in Section 2.1, reparation for wrongful conduct constitutes a fundamental principle of international law. Nonetheless, an argument for extending this principle to NSAGs requires further support in state practice or at least an authoritative court or tribunal decision.[95] This will be further considered over the course of the analysis in the subsequent part of this chapter. Moreover, the analysis requires the additional examination of a diverse set of legal sources and materials concerning NSAGs and reparations. Hence, these preliminary findings concerning the possible duty of NSAGs to provide reparation are further explored over the following section.

# 3 Recognition that non-state armed groups should provide reparation

Having preliminarily concluded that the existence of a duty of NSAGs to provide reparation remains unclear in current international law, this section will delve deeper into the question. To this end, an examination is carried out of tentative evidence in international practice, soft law instruments and other legal materials that recognise a role for NSAGs in the provision of reparations. The aim of this mapping exercise is twofold. The first objective is to determine whether and, if so, to what extent a duty to repair is recognised for NSAGs on the basis of international law. This involves looking for indications as to whether developments in state practice might contribute to the formation of a customary international norm.[96] Although the 2005 ICRC study on customary IHL found that the duty of NSAGs to provide reparation remained unclear, both previously underexplored and subsequent practice need to be considered.[97] However, the aim is not to carry out an exhaustive study and, as a result, the

[94] As held by the Permanent Court of International Justice, "reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself". *Factory at Chorzów Case (Merits)* (n 2) 29. Gillard also found that "the obligation to make reparation arises *automatically* as a consequence of the unlawful act, without the need for the obligation to be spelled out in conventions". Gillard (n 11) 532.

[95] The following legal scholars have made such an argument with regard to NSAGs: Schmalenbach (n 38) 502; Mastorodimos (n 17) 117.

[96] Art 38(1)(b) ICJ Statute refers to international custom as a source of international law in the following terms: "evidence of a general practice accepted as law". It reflects the two constituent elements for its identification: "general [state] practice" and "accepted as law" (*opinio juris*). See further *North Sea Continental Shelf (Federal Republic of Germany v Netherlands)* ICJ (Judgment) [1969] ICJ Rep 3 para 77; ILC, Draft Conclusions on Identification of Customary International Law with Commentaries (2018) UN Doc A/73/10.

[97] The ICRC found some limited instances of state and other practice to the effect that NSAGs are required to provide reparation for the damage resulting from violations of IHL. Reference is made to the Comprehensive Agreement on Respect for Human rights and International Humanitarian Law in the Philippines (see further

conclusions are necessarily preliminary. The same disclaimer holds for the second objective of this section, which concerns itself with identifying, comparing and evaluating approaches as to how the role of NSAGs in reparations and, in particular NSAGs possible duty of reparation, has been conceptualised and put into practice in these instances. The general conclusions resulting from these research objectives are brought together in Sections 4 and 5 respectively.

## 3.1 Historical precedent in the laws of insurgency and belligerency

Having been largely replaced by the compulsory rules of modern IHL, the laws of belligerency and insurgency are generally considered as being out-dated.[98] Nevertheless, an analysis of these old laws can still contribute to a better understanding of the status of NSAGs within the domain of international responsibility. Indeed, state practice and scholarship both demonstrate that these legal frameworks did not exclude the possibility for states to claim reparations directly from NSAGs in situations of belligerency and insurgency. As a result, they provide something of a historical precedent. An analysis of these frameworks, which remain underexplored from the current perspective, will reveal the particular circumstances in which these claims were presented, while the conclusions drawn will offer perspective in terms of NSAGs' responsibility under contemporary international law. Before commencing this examination however, it is necessary to outline the general legal frameworks of insurgency and belligerency.

### 3.1.1 The general legal frameworks of insurgency and belligerency

During the nineteenth and a large part of the twentieth centuries, there was a general reluctance on the part of states to regulate situations of internal strife by means of international law. States feared that this would enhance the legal status of the NSAG involved, as warfare was considered to be an exclusive privilege of states. Moreover, these situations of violence were deemed to belong to the domestic affairs of states, which preferred to treat such groups as being merely criminal in nature. In this sense, it was both their non-state character and their defiant stance towards the state, which played a particular role in the development of international law in relation to such actors.[99] Because of these factors, such

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Section 3.2.3), a public apology made by a provisional arm of the ELN in Colombia in 2001 and three examples of UN practice (see further Section 3.4). Henckaerts and Doswald-Beck (n 22) 549–550.

[98] See further Konstantinos Mastorodimos, 'Belligerency Recognition: Past, Present and Future' (2014) 29 Connecticut Journal of International Law 301.

[99] Daboné (n 18) 397.

situations were regulated in a somewhat *ad hoc* manner, with states retaining the upper hand.[100] Situations of internal violence could fell into three categories, which were largely based on the intensity of the violence: rebellion, insurgency and belligerency. Rebellion involved violence of a short duration and low level of intensity, that could easily be suppressed by the parent state. It was deemed as belonging to the state's domestic affairs and therefore subjected to domestic regulation.[101] In contrast, states had to recognise a rebel group as an insurgency or belligerency for it to attain a limited international legal personality.

To be recognised as an insurgency, the violence had to have escalated to such an extent that the government was no longer able to adequately suppress it. Third states could be forced to recognise the factual situation in order to protect their own national interests, whilst entering into regular, but provisional, relations with the insurgents regarding shipping and trading matters, among other issues. There was no clear set of criteria that allowed for an objective determination of a situation as an insurgency. On the contrary, the recognising state had a great discretion in this regard. Following from this recognition, NSAGs were considered as bearing certain international rights and obligations of an *ad hoc* nature. Instead of being predetermined, they depended on the terms of the recognition.[102] The act of recognition would not confer any formal status on either party to the conflict.[103]

Those groups that fulfilled certain objective criteria and that were recognised as belligerents acquired certain international rights and obligations, which were normally applicable to states involved in international armed conflicts.[104] Belligerent fighters would, for example, acquire prisoner of war status and immunity for lawful acts of war. Moreover, they could also stop and search vessels and institute blockades.[105] An act of recognition could be granted by the parent state and third states at their discretion. However, it was unlikely for a government to take the step of recognition until it was clear that the rebellion could not be put down quickly or effectively. Recognition granted by third states would trigger the application of the law of neutrality. Consequently, belligerent ships were, e.g., admitted to enter the ports of the

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[100] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 9.
[101] ibid.
[102] ibid 10.
[103] Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002) 4–5.
[104] These objective criteria included, among others: the presence of a general, as opposed to localised, armed conflict; the insurgent party had to control a substantial part of the territory over which it exercised government-like powers; and, the group had to fight in accordance with the laws and customs of war. Yet, in practice, these criteria were interpreted in divergent ways. Sivakumaran (n 100) 11–14; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016) 55.
[105] Sivakumaran (n 100) 16; Mastorodimos (n 98) 307–308.

recognising states.[106] Such an act of recognition came down to recognising a factual situation, i.e. the existence of war, and, in principle, did not constitute a recognition of the insurgent party as the legitimate government of the state.[107] The American Civil War (1861-1865) was the last conflict in which insurgents were recognised as belligerents.[108]

### 3.1.2 A duty to provide reparation by non-state armed groups in situations of belligerency and insurgency

*The law of belligerency*

One of the objective criteria that justified the recognition of belligerency consisted of the NSAG's *de facto* control over a substantial part of the national territory, where it exercised government-like functions. An understanding of the latter part of this requirement is made more concrete by reference to a statement made by US President Grant, in 1875, in relation to the insurrection in Cuba:

> I fail to find in the insurrection the existence of such a substantial political organization, real, palpable, and manifest to the world, having the forms and capable of the ordinary functions of government toward its own people and to other states, with courts for the administration of justice, with local habitation, possessing such organization of force, such material, such occupation of territory, as to take the contest out of the category of a more rebellious insurrection or occasional skirmishes and place it on the terrible footing of war, to which a recognition of belligerency would aim to elevate it.[109]

This passage reveals the high standard of government-like functions that had to be reached by the group. As a result of a recognition of belligerency, the parent state was released from all responsibility towards third states in relation to acts occurring in territory under the control of the belligerents.[110] Instead, the rules of international responsibility, including the duty to make

[106] Yair M Lootsteen, 'The Concept of Belligerency in International Law' (2000) 166 Military Law Review 109, 110.
[107] Moir (n 103) 5–10.
[108] Lootsteen (n 106) 110.
[109] Seventh Annual Message to Congress reprinted in George Grafton Wilson, 'Insurgency and International Maritime Law' (1907) 1 The American Journal of International Law 46, 48; John Y Simon (ed), *The Papers of Ulysses S. Grant: 1875* (Southern Illinois University Press 2003) 393–394.
[110] See, in this respect, the following record of a conversation between British Secretary of State, Earl Russell, and US Ambassador, Adams, who, when referring to the British recognition of Confederate belligerency, observed that "at any rate, there was one compensation, the act had released the Government of the United States from responsibility for any misdeeds of the rebels towards Great Britain. If any of their people should capture or maltreat a British vessel on the ocean, the reclamation must be made only upon those who had authorized the wrong. The United States would not be liable". Reprinted in John Bassett Moore, *A Digest of International Law*, vol I (US Government Printing Office 1906) 185; Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 247–250.

reparation, would become applicable to the belligerent NSAG.[111] Therefore, the group would become responsible for its own wrongful actions, and towards third states for the damages perpetrated against that state's assets and nationals in the areas under belligerent control. In the words of Hall, this followed from "the inability of the state to perform its international obligations in such parts of its dominions as are not under its actual control".[112] This view is confirmed by Whiteman, who explained that "the incapacity of government to protect aliens against injurious acts committed by the insurrectionists will in practically all cases be so clear that no rational ground can exist for exacting an obligation to prevent injuries or losses or to make compensation for such as have been sustained".[113] This reveals that the justification for such international responsibility followed from a NSAG's territorial control in default of a parent state, which had been rendered incapable of exerting its power. This reflected, therefore, a shifting of responsibility from the state to the NSAG.[114] This forced third states to address the NSAG directly for any claims relating to the protection of their assets and nationals present in the area under exclusive control of the group. As pointed out by Fortin, this shift of responsibility was often advantageous for both third states and the parent state, since it allowed for an aligning of the new situation on the ground with the legal framework: third states had a better chance of receiving reparation for damages, by being allowed to engage directly on responsibility matters with the entity holding control on the ground, whereas the parent state was released from responsibility with respect to the areas of territory outside of its control.[115] The ILC Special Rapporteur Ago on state responsibility has drawn further attention to the vital role of the belligerent group's legal personality while citing the work of the Institute of International Law: "if the "insurrectional government" had been recognised as a "belligerent power", and therefore as a separate subject of international law, it was to that government that injured States should address their claims for reparation of

[111] See the following note of 26 November 1861 from the British Secretary of State for Foreign Affairs, Earl Russell, to US Ambassador, Adams, in response to complaints by the United States concerning the relations Great Britain maintained with the Confederate insurgents. Earl Russell justified the need for these relations by, i.a., pointing out that "Her Majesty's Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a state are injured by a *de facto* government, the state so aggrieved has the right to claim from the *de facto* government redress and reparation; and also that in cases of apprehended losses or injury to their subjects states may lawfully enter into communication with *de facto* governments to provide for the temporary security of the persons and property of their subjects." Reprinted in Moore (n 110) 208–209; Hans Kelsen, *Principles of International Law* (Rinehart & Company 1952) 292; Jochen Frowein, *Das de Facto-Regime Im Völkerrecht* (Carl Heymanns Verlag KG 1968) 74 (for a concrete example of a claim for pecuniary compensation see n 23); Roscoe Oglesby, *Internal War and the Search for Normative Order* (Martinus Nijhoff 1971) 73, 76–77; 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' (n 29) 139; Mastorodimos (n 98) 308.

[112] William Edward Hall, *International Law* (Clarendon Press 1880) 26.

[113] Marjorie M Whiteman, *Digest of International Law* (US Government Printing Office 1963) 648.

[114] See in this regard also Frowein (n 111) 84.

[115] Fortin (n 18) 278–279.

injuries sustained".[116] This suggests that NSAGs which were recognised as belligerents could be held responsible for breaches of their obligations as a result of their independent legal personality under international law.[117]

### *The law of insurgency*

There are several examples of state practice which involved situations falling short of belligerency, namely cases of insurgency, which also tend to support an obligation for NSAGs to make reparation. In these cases, the responsible NSAGs held exclusive territorial control. On 9 April 1914, members of the crew of the US vessel *Dolphine* anchored at Tampico in Mexico. They were arrested by a squad of armed men belonging to the forces of General Huerta, who had temporarily seized control of most of the country during the last half of February, March and April 1913, before his power rapidly diminished between January and July 1914.[118] On 11 April, the US admiral requested various forms of reparations, including formal disavowal and apologies, punishment of the officer in command of the squad and a salute to the American flag, hence treating them akin to a state. The Department of State supported this request. It is significant that the United States drew attention to the illegality of the arrest under international law, hence, clearly viewing international law as a basis for the reparations claim. While General Huerta expressed regret and undertook to investigate the responsibility of the officer, consent to the latter part of the demand was declined. This ultimately led to the occupation of Veracruz by US forces on the 21st of April.[119] Similar examples can be found in the Spanish Civil War, which was never recognised as a belligerency, mainly due to political reasons, despite the fact that the Franco rebels held at least two-thirds of continental Spain and practically all of her overseas territories.[120] Several states, including the United States, Norway,[121] Britain, France,[122] and Portugal, directly called

[116] 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' (n 29) 140 para 183 (n 402), 142 para 188. See also Institute of International Law, 'Annuaire de l'Institut de Droit International' (1900) Vol 18 243–244 (art 2 paras 2-3); Institute of International Law, 'Règlement Sur La Responsabilité Des Etats à Raison Des Dommages Soufferts Par Des Étrangers En Cas D'émeute, D'insurrection Ou de Guerre Civile' (1900).

[117] Oglesby (n 111) 78; Fortin (n 18) 282.

[118] *George W Hopkins (USA) v United Mexican States* General Claims Commission between the United States and Mexico (1926) IV RIAA 42 42, 46.

[119] The case is described in Green Haywood Hackworth, *Digest of International Law*, vol 2 (US Government Printing Office 1941) 420–421; Frowein (n 111) 75, 81; 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' (n 29) 139.

[120] UK HC Deb 8 November 1937 vol 328 col 1385; Fortin (n 18) 104.

[121] The Norwegian government claimed monetary compensation from the Nationalist authorities for the damages sustained due to an attack on its cargo ship *Gulnes*, on 7 December 1936, near Seville. See Charles Rousseau, 'La Non-Intervention En Espagne' (1938) 19 Revue de Droit International et de Législation Comparée 473, 508.

upon the Franco rebels, instead of the Spanish government as parent state, for reparation claims relating to damages caused to foreign property and nationals located in the territory under their exclusive control. Similarly, as in the case of belligerency, third states were confronted with the need to protect their interests within the territory over which the incumbent government had lost control. This forced them to initiate dialogue and legal relations with the insurgents.[123] Significantly, this involved correspondence regarding the insurgents' responsibilities to repair the damages caused.[124] The injured British government categorically requested, on three occasions, reparation from the Nationalist government of Franco, located at Burgos or Salamanca. These examples have been described by Ago as "by far the most important cases": they were issued in response to the loss of the destroyer *Hunter*, blown up on 13 May 1937 by a mine laid by the Nationalists, four miles off Almeria (in this case monetary compensation was requested); the destruction of the steamer *Aleyra/L'Alcira*, sunk 20 miles off Barcelona on 4 February 1938 by seaplanes from the Nationalist base in Majorca; and, the attack on the British merchant vessel *Stanwell* by a Nationalist aircraft.[125] A further request for reparation was made for the bombing of the British *steamer Jean Weems*. In response, the Nationalist authorities were prepared "to express their official regret and to give an assurance that orders will be given to their forces to take all possible precautions against further incidents of this nature", while furthermore agreeing that "so far as liability and payment of compensation are concerned, to submit the

[122] According to Rousseau, the relations of the French government and the Franco authorities were manifested within the domain of "international responsibility", when the former addressed a claim for reparation to the Nationalist authorities referred to as "the responsible authority" for the summary execution of one of its nationals. Their refusal was met by a measure of retaliation. See Charles Rousseau, 'La Non-Intervention En Espagne' (1938) 19 Revue de Droit International et de Législation Comparée 217, 273–274 [own translation]; Jean Siotis, 'Le Droit de La Guerre et Les Conflits Armés d'un Caractère Non-International' (Université de Genève 1958) 164.

[123] Records of a debate held in the United Kingdom House of Commons confirm this observation: "In the Government's view the step which they now propose to take is essential for the proper protection of British commercial, industrial and financial interests in that part of Spain which is under the control of General Franco […] there are many million pounds of sterling of British capital invested in this area […] All these interests have inevitably suffered […] This situation inevitably called for direct negotiations with the authorities at Burgos or Salamanca." UK HC Deb 8 November 1937 vol 328 cols 1385–1387. Similar challenges confronted the United States and other states. As explained by Padelford: "Upon the outbreak of the insurrection in mid-July 1936, two major problems immediately confronted the United States in common with other countries: the safety of nationals, and the conservation of property rights and interests. […] Following a long line of practice in times of insurrection in Latin American states [hence showing that this is not an exceptional case], contacts and relations made necessary with the insurgent authorities as a result of dangers or injuries to American life, property or rights by acts of the insurgents, were handled informally by American consuls and Foreign Service Officers resident in territory held by the Nationalist authorities." Norman J Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (The Macmillan Company 1939) 169, 171; Lauterpacht (n 110) 53.

[124] Fortin (n 18) 105.

[125] UK HC Deb 7 February 1938 vol 331 col 648; UK HC Deb 28 February 1938 vol 332 col 729; UK HC Deb 30 March 1938 vol 333 col 1973; Rousseau (n 122) 277–278; Rousseau (n 121) 508–509; 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' (n 29) 139.

case, if necessary, to arbitration and to abide by the result".[126] Although it is not clear from the records whether the United Kingdom considered international law as the basis of these claims, the Nationalist's obligations to repair, which it accepted on several occasions, could be understood as one of the *ad hoc* international obligations that arose between the third state and the insurgents.[127] This supports the argument that it considered the Franco insurgents responsible as a matter of law regardless of the lack of any specific agreement to that end.[128] The United States, in its turn, addressed a note to the insurgent administration of Franco, which provided for a *caveat*, which could be relied upon at a later date, in terms of eliciting protection of their property and compensation for any delinquencies in that respect.[129] According to Rousseau, "the most typical case of international responsibility" concerns a case between the Portuguese government and the Nationalist authorities, relating to a violation of Portuguese territory by "numerous groups of armed Spaniards" in August 1936.[130] While initially presenting its claim for moral and material reparations to the incumbent government, the latter held that the insurgents were responsible "in accordance with international conventions".[131] This indicates that the Spanish government itself considered the Franco insurgents as internationally responsible. Following this response, the Portuguese government presented a note in which it reproduced the claims originally presented to the Spanish government and observed that, in fact, the insurgents exercised sovereignty over the Spanish territories along the common borders with Portugal. The Nationalist authorities accepted the claim because the Spanish government had lost its power to protect its borders and the properties and lives of foreign nationals. As a result, it was responding as "the representative exercising national sovereignty over its entire territory".[132]

### *Conclusions for the responsibility of non-state armed groups in current international law*

[126] UK HC Deb 8 November 1937 vol 328 col 1381; Rousseau (n 121) 509–510.
[127] Lauterpacht (n 110) 53–54.
[128] Fortin (n 18) 106.
[129] See Padelford (n 123) 170; Green Haywood Hackworth, *Digest of International Law*, vol 3 (US Government Printing Office 1942) 655. Indeed, on at least three occasions, protests were lodged for damaged property against the Franco insurgents, who expressed regret and provided guarantees of non-repetition and restitution (in the case of the tanker *Nantucket Chief*, the insurgents released the vessel and the members of the crew upon informal representations made by the US government). See Padelford (n 123) 172–173; Green Haywood Hackworth, *Digest of International Law*, vol 1 (US Government Printing Office 1940) 362–363; Green Haywood Hackworth, *Digest of International Law*, vol 7 (US Government Printing Office 1943) 172–173.
[130] The case is described in Rousseau (n 122) 278 [own translation].
[131] ibid 279 [own translation].
[132] ibid 278–280 [own translation]; Fortin (n 18) 106.

These examples of state practice demonstrate that the insurgents were deemed to have gained sufficient international legal personality to be held responsible for wrongful acts, even in situations falling short of the recognition of belligerency. Such practice was a result of the effective control the relevant NSAGs were deemed to have held over territory and the state's lack of capacity to exert its influence in these areas.[133] Significantly, these considerations have also been identified as constituting the justification for shifting the regime of international responsibility, originally applicable to the parent state, to NSAGs recognised as belligerents. This shows an interesting overlap between the insurgency and belligerency frameworks, which is of importance to the question of responsibility. In a more specific sense, the practice suggests that the capacity of a NSAG to be held responsible for reparation does not follow from a recognition of belligerency, but rather from its exclusive control over territory. Although such an obligation is generally associated with the law of belligerency, in which it was natural for the belligerent party to have effective territorial control, these aspects of past state practice appear to indicate that the duty to repair could also exist outside of this framework.[134] The practice suggests that where a third state wished to pursue a claim for redress, it made both legal and practical sense to call directly on the responsible NSAG. The NSAG was deemed to have gained sufficient international legal personality to answer the claim, while it made little sense to pursue the incumbent government for matters outside of its control.[135] Concerns over recognition, or conferral of unwarranted legitimacy, did not prevent states from making claims, even where armed hostilities were ongoing.

As discussed in Section 2.2 of this chapter, the ILC Commentary to article 14(3) of the draft version of the ARS, which was provisionally adopted in 1996,[136] leaves the international

[133] In the words of Lauterpacht: "In so far as the acts of insurgents in the territory occupied by them amount to such injury to the interests of foreign States or their subjects as would constitute a violation of international law if the insurgents were the government of a recognized State, these States may, of course, hold the insurgent authorities responsible and take appropriate action. They may, if this is practicable, enforce immediate reparation and, generally, apply such means of pressure as are calculated to cause the cessation of the injury. They are justified in disregarding the unsubstantial objection that it is impossible to exact from the insurgents reparation for breaches of international law by which they, not being in any way recognized, are not bound. For such measures of protection are legitimate acts of self-defence which, so long as they are resorted in conformity with the principles of international law applicable to recognized States, are not open to criticism." Lauterpacht (n 110) 278; Rousseau (n 122) 280; Fortin (n 18) 107, 112–113.

[134] Similar conclusions have been presented by Frowein (n 111) 84; Fortin (n 18) 116, 156. Fortin concludes that the "juxtaposition of the analysis of the legal framework of insurgency with the legal framework of belligerency demonstrated that the responsibilities that an armed group accrued by virtue of its control of territory were not dependent on a declaration of belligerency per se. […] during the Spanish Civil War, Franco insurgents were regularly held bound by third States to provide compensation for damages that they suffered to persons or assets."

[135] Frowein (n 111) 79; Fortin (n 18) 112–113, 278–279.

[136] Art 14 of draft ARS of 1996 deals with the 'conduct of organs of an insurrectional movement'. Paragraph 3 holds that "[s]imilarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the

responsibility of insurrectional movements as something of an open question, whilst simultaneously providing some support for the conclusions made in the preceding analysis. The Commentary draws attention to the difference between the injurious conduct of an insurrectional movement that assumes power over a portion of the state's territory and cases of riot or demonstrations by a rebellious mob. It makes the distinction on the basis that in the former example "there is a possibility of holding the movement itself responsible for the wrongful acts of its organs".[137] When such a movement takes shape, "there is in existence […] an organization which has its own machinery and whose organs may act on behalf of the insurrectional movement".[138] The Commentary explains that:

> as soon as they begin their *separate existence on the international scene*, such movements may be capable within certain limits of committing internationally wrongful acts of their own. […] It will rarely be possible to accuse a State of failing its own obligations of vigilance and protection in relation to the conduct of organs of an insurrectional movement because, most of the time, the actions in questions are entirely beyond its control. *Even more rarely will such accusation be levelled against the State in cases where, after the insurrectional movement has succeeded in entrenching its authority over a sufficient portion of the State's territory, third states come to hold the movement itself responsible for internationally wrongful acts of its own organs*.[139]

Thus, the Commentary makes clear that once a NSAG has legal personality under international law, it may be held responsible for violations of its international obligations. In such circumstances, claims would generally be addressed directly to the movement and not to the parent state that has lost control.[140] This Commentary is based on several examples of state practice, including those previously discussed, from the American Civil War, Mexico and the Spanish Civil War. In light of this practice, the ILC wanted to provide, in draft article 14(3), for the possibility that wrongful conduct could be legally attributed to an insurrectional movement. However, it did not take a specific stance on its modalities.[141] It must again be noted, that paragraph 3 was eventually deferred to the ILC Commentary to the ARS of 2001.[142]

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insurrectional movement to that movement in any case in which such attribution may be made under international law."

[137] ILC Commentary to draft art 14 ARS (1996) 98 para 28, Yearbook of the International Law Commission (1975) Vol II UN Doc A/CN.4/SER.A/1975/Add.1 (n 32).

[138] ibid 91 para 3.

[139] ibid 92 para 4 [emphasis added].

[140] Fortin (n 18) 277–278.

[141] Yearbook of the International Law Commission (1975) Vol II UN Doc A/CN.4/SER.A/1975/Add.1 (n 32) 98-99 paras 28, 31.

[142] See ILC Commentary to art 10 ARS 52 para 16.

Turning to current international law, the examination of the law of belligerency and insurgency has revealed that there is historical precedent which suggests that, where a NSAG has exclusive control over part of a state's territory, it might be held internationally responsible for its wrongs. The analysis has also clarified that it made, and therefore arguably makes, both legal and practical sense to directly address a NSAG, wherever it has international legal personality and where its wrongful conduct has been perpetrated beyond the control of the parent state. These observations appear to be especially relevant in respect of NSAGs that are currently bound by Additional Protocol II, according to which a NSAG must exercise territorial control, for the duration of the NIAC. However, the analysis has not uncovered similar evidence in respect of groups that do not exercise territorial control. Hence, it remains unclear whether such groups could hold international responsibility.[143]

The work of the ILC, discussed *supra*, allows us to connect these conclusions regarding the law of belligerency and insurgency in a more direct manner, and at least in a preliminary fashion, to NSAG responsibility under contemporary IHL. First, the ILC considered the possibility of holding insurrectional movements internationally responsible; this was contemplated in light of some of the previously cited state practice concerning belligerency and insurgency. Second, the ILC used the term *insurrectional movement* in its work. As explained in Section 2.2 of this chapter, the ILC has clarified that the essential idea of such movements is reflected in article 1(1) Additional Protocol II. More specifically, "the threshold for the application of the laws of armed conflict contained in […] Protocol II […] may be taken as a guide".[144] It was concluded, on this basis, that the term *insurrectional movements* certainly encompasses NSAGs bound by Additional Protocol II, in addition to Common Article 3. Taken together, the ILC's work suggests that it considered past belligerency and insurgency practice as being generally relevant when considering the responsibility of NSAGs. More specifically, it reinforces the significance of this historical precedent, in terms of considering the possible responsibility of at least those NSAGs which both exercise

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[143] Similarly, Verhoeven notes that "there is some limited state practice [regarding the international responsibility of NSAGs], involving insurgents who have control over part of the State's territory. Under this circumstance insurrectional movements are akin to *de facto* regimes, which have limited international rights and obligations and may be held responsible for breaches of international law. For armed opposition groups that do not exercise territorial control, there is no recorded State practice and it is unclear whether such groups could have international responsibility for breaches of international law". Also, Fortin concludes that "while the armed conflict remains ongoing, an armed groups will generally bear responsibility for the breach of those obligations itself. This is a consequence of the armed groups' independent legal personality under international law […] Support for this notion has been found in the law on belligerency and insurgency". Verhoeven (n 38) 297; Fortin (n 18) 282.

[144] ILC Commentary to art 10 ARS 51 para 9.

exclusive territorial control and satisfy the higher threshold requirements of Additional Protocol II.

The discussion has further shown that the international responsibility of such NSAGs has generally been conceptualised as akin to that of states.[145] Importantly, for the present discussion, such responsibility is understood as giving rise to a duty to make reparation for wrongful acts. The state practice cited indicates that claims for several forms of reparation, normally requested from states, have been made against such groups, namely: restitution, compensation, satisfaction and guarantees of non-repetition. This suggests that they can be relevant for NSAGs in international law. Lastly, these examples show that NSAGs may be willing to address reparation claims and capable of satisfying them.[146]

## 3.2 Contemporary evidence in domestic jurisdictions and state practice[147]

Other than the Justice and Peace Law process in Colombia (discussed in Section 3.2.2 and Chapter 6), this study has identified no examples of international or domestic bodies having held NSAGs judicially responsible to make reparation for their violations of international law.[148] Nevertheless, there are a number of notable instances in which aggrieved parties have attempted to establish, through the national judicial system of the United States, the civil responsibility of NSAGs based on international law. These attempts notwithstanding, the discussion does identify a case in Northern Ireland, in which the collective civil responsibility of a NSAG was successfully established, but on the basis of domestic law. Additionally, a number of agreements concluded between states and NSAGs have recognised a role for these groups in the provision of reparation. All in all, the examination reveals some limited instances of state practice that recognise a duty of NSAGs to provide reparation for violations of international law.

### 3.2.1 The United States

[145] Íñigo Álvarez concluded, on the basis of an examination of the notion of international responsibility and its evolution over time, that "[i]n principle, other entities [than states] that exercise powers over territory or control over people could follow a similar understanding of international responsibility." Íñigo Álvarez (n 5) 70.
[146] Fortin (n 18) 279.
[147] A distinction is made between evidence in domestic jurisdictions and state practice in order to include domestic efforts to obligate responsible NSAGs to make reparation on the basis of national law, on the one hand, and the practice of states founded on international law, on the other.
[148] Similarly, Kleczkowska recently noted that thus far "no international or domestic judicial organ had found ANSAs [armed non-state actors] responsible for violations of international humanitarian law". Kleczkowska (n 66) 138.

Several attempts have been made within the US domestic legal system to bring civil claims directly against NSAGs on the basis of violations of international law. In the *Linder v. Portocarrero* case, the plaintiffs sought damages against four individual defendants and three *Contra* organisations for violations of, i.a., Common Article 3 of the First Geneva Convention, the Second Geneva Convention and the Protocols thereto, customary international law, and other treaties in connection with the death of Mr Linder in the midst of the Nicaraguan civil war.[149] The Court dismissed the tort claim, based on a violation of customary international law against torture, by arguing that torture by a non-state actor is not a violation of international law.[150] The Court also considered the claim resulting from a violation of Common Article 3[151] as non-justifiable, due to the political question doctrine.[152] On the basis of the latter finding, the Court held, in accordance with case law of the US Supreme Court, that domestic tort actions are not appropriate remedies for injuries that occur outside the US during conflicts with belligerents.[153] While the case was not successful, it is significant that the Court did not expressly reject the possibility of holding the NSAGs responsible for international law violations.

Further attempts have been made to bring claims against NSAGs under two domestic acts: the Alien Tort Claims Act (ATCA, also known as the Alien Tort Statute or ATS) and the Torture Victims Protection Act (TVPA).[154] They provide US courts with jurisdiction over civil claims brought by non-US nationals for torts committed in violation of international law. Numerous cases linked to armed conflict have been initiated under both acts.[155]

In the *Klinghoffer v. S.N.C. Achille Lauro* case, which dealt with the liability of the Palestinian Liberation Organization (PLO), the Second Circuit Court of Appeals held that while "unrecognized regimes" are generally precluded from initiating proceedings in US courts without consent of the executive branch, there were no restrictions on such an entity

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[149] *Linder v Portocarrero* US District Court for SD Florida 747 F.Supp. 1452 (17 September 1990) paras 1453-1454.

[150] ibid paras 1460-1462.

[151] The Court didn't consider the Additional Protocols to the 1949 Geneva Conventions, as the United States was not a signatory party.

[152] US courts may refuse to hear a case on the basis of the so-called political question doctrine when they consider that an issue under review presents a politically charged question.

[153] *Linder v Portocarrero* (n 149) paras 1463-1464; *Linder v Portocarrero* US Court of Appeals for 11th Cir 963 F.2d 332 (17 June 1992) para 337.

[154] The landmark *Karadzic* case allowed, for the first time, ATCA claims to be presented against non-state actors: "We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." *Kadic v Karadzic* US Court of Appeals for 2d Cir 70 F.3d 232 (13 October 1995).

[155] Judiciary Act, ch 20, § 9, 1 Stat 73, 76-77 (codified as amended at 28 U.S.C. § 1350 (2006)) 1789 (United States); Gillard (n 11) 547–548.

being sued.[156] The case indicates that there was no principled objection against bringing a civil claim against, at least, such a non-state armed actor. In a more recent case, of 2011, the US Appeals Court for the District of Columbia Circuit had to determine whether the ATCA provided jurisdiction over civil actions for torture committed by a non-state actor such as the PLO.[157] The Court held:

> We do not purport to decide that the ATS can create no actions against private actors. *Sosa* makes clear that the analysis of whether "international law extends the scope of liability…to the perpetrator being sued, if the defendant is a private actor" pertains to the "given norm" being analysed.[158]

It was concluded that at present there was insufficient consensus that torture by private actors violates international law.[159] Nevertheless, the case suggests that a Court could potentially consider the civil responsibility of such an actor, when dealing with an actionable violation of a clearly binding norm of international law.

In the case *Doe v. Islamic Salvation Front*, civil action was initiated against the Islamic Salvation Front (FIS) and a member of the organisation. The US District Court of the District of Columbia found that the crimes allegedly committed by the defendant FIS were in violation of Common Article 3 of the Geneva Conventions, which fulfilled the condition to establish jurisdiction under the ATCA.[160] In *Islamic Salvation Front II* it was observed in a footnote that the "FIS has never been served and indeed may not exist. It was banned by the Algerian government in February 1992".[161] The judicial proceedings primarily dealt with the allegations against the individual defendant and the motions he brought forward. Curiously, it appears that this was not deemed as an obstacle for the continuation of the action against FIS. The case was ultimately dismissed for reasons unrelated to the question whether organisations, such as the FIS, could be sued under the Act. Accordingly, the case provides further support for the assertion that there is no principle barring NSAGs from being held responsible for reparation in such civil proceedings. Nevertheless, it also reveals some of the

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[156] *Klinghoffer v SNC Achille Lauro* US Court of Appeals for 2d Cir 937 F.2d 44 (21 June 1991) para 48; Elihu Lauterpacht and Christopher Greenwood (eds), *International Law Reports*, vol 96 (Cambridge University Press 1994) 70.

[157] *Ali Mahmud Ali Shafi et al v Palestinian Authority and Palestinian Liberation Organization* US Court of Appeals for DC Cir No 10-7024 (14 June 2011) 5–6.

[158] ibid 13. See *Sosa v Alvarez-Machain* US Supreme Court 542 US 692 (29 June 2004).

[159] *Ali Mahmud Ali Shafi et al v Palestinian Authority and Palestinian Liberation Organization* (n 157) 14–16. Reference is made in this regard to *Sosa v Alvarez-Machain* (n 158) n 20.

[160] *Doe v Islamic Salvation Front* US District Court for DC 993 F Supp 3 (3 February 1998) para 8.

[161] *Doe v Islamic Salvation Front* US District Court for DC 257 F Supp 2d 115 (31 March 2003) n 3.

challenges which might accompany such litigation: starting with serving an illegal group, and continuing to enforcement of any potential judgment on reparations.[162]

Moving to the TVPA, the US Supreme Court held in *Mohamad v. Palestinian Authority and Palestinian Liberation Organization* of 2012 that the Statute only imposes liability on natural persons and not the organisations they serve; hence, the decision excludes potential NSAG liability for torture or extrajudicial killing.[163] In an *amici curiae* brief, relating to this case and the linked *Kiobel* case, the Center for Justice and Accountability argued against this limitation while drawing attention to the collective nature of such system crimes, and the resulting necessity of addressing organisational liability and providing effective remedies to that end.[164] This further concretises the important role which the collective responsibility of NSAGs may perform in the context of providing effective redress to victims.

### 3.2.2 Northern Ireland and Colombia

While none of the civil suits brought against NSAGs in the US were successful, the High Court of Justice of Northern Ireland held that the Real Irish Republican Army (Real IRA) was responsible for a bombing carried out in 1998.[165] Although the case was decided on the basis of domestic law, it still recognises that a NSAG could be subjected to a court claim for reparation and could ultimately be held collectively responsible to that end. The case and its significance are further discussed in Chapter 4, Section 5.3.2.

In Colombia, the Constitutional Court brought forward the notion of "solidarity civil responsibility" of NSAGs, which results from criminal conduct carried out within the confines of those groups that are subjected to a special criminal procedure, as regulated by the Justice and Peace Law of 2005.[166] Although criminal responsibility remains individual, civil responsibility flows from the criminal conduct, allowing compensation to be sought not only from the criminally convicted member, but also, in subsidy and by way of the principle of

[162] Kleffner (n 25) 256–257.

[163] *Mohamad v Palestinian Authority* US Supreme Court 132 SCt 1702 (18 April 2012).

[164] "[H]uman rights crimes are not perpetrated by people acting alone. To the contrary, they are designed, orchestrated, financed, and supported by states, organizations, corporations, and other non-natural persons. A decision to exempt these non-natural persons from liability would therefore result in impunity and a license to engage in, and even profit from, these universally-condemned crimes […] human rights abuses are generally conducted in circumstances that make it difficult to identify the person who directly abused them or their loved ones. But victims are often able to identify the organization or entity that armed, supplied, ordered, or claimed responsibility for the abuses". Center for Justice and Accountability, 'Brief of Amici Curiae Dr Juan Romagoza Arce, Cecilia Santos Moran, and Ken Wiwa in Support of Petitioners, Submission in Kiobel v Royal Dutch Petroleum Co and Mohamad v Palestinian Authority Nos 10-1491 & 11-88' (2011) 2–3.

[165] *Mark Christopher Breslin and Others v Seamus McKenna and Others* High Court of Justice in Northern Ireland [2009] NIQB 50.

[166] Law No 975 of 2005 (Justice and Peace Law) (Colombia); *Judgment C-370/06* Constitutional Court of Colombia (18 May 2006) [own translation].

solidarity, from the NSAG to which the perpetrator belonged. Significantly, the civil responsibility of the NSAG arises from serious crimes which have been committed during and on the occasion of the convicted individual's membership in the relevant group, and which, in some cases, are recognised as involving conduct which amounts to serious violations of IHL and IHRL.[167] Thus, it constitutes a notable instance of state practice, which recognises that NSAGs can be held to a duty to provide compensation for violations of international law. This type of NSAG responsibility is legally operationalised by holding the constituent members of the group jointly and severally liable to compensate the damages caused.[168] It provides for an interesting approach to dealing with the responsibility of NSAGs within the surprising setting of a criminal justice procedure. This case is more extensively discussed in Chapter 6.

### 3.2.3 Agreements concluded between states and non-state armed groups

This section examines several peace and other types of agreements concluded between states and NSAGs in the context of an armed conflict. All deal in some manner with the question of reparation. Over the course of the study, several such agreements were identified. They were concluded between 1993 and 2016, in Burundi, Colombia, Guatemala, Nepal, the Philippines, Sierra Leone, Somalia, South Sudan, Sudan and Uganda. The purpose of the examination is to determine how reparations were dealt with in respect of violations committed by the respective NSAGs and, particularly, whether the practice evidences any recognition of a duty of NSAGs to repair under international law. Over the course of the analysis, four general approaches have been identified.

In the first approach, agreements place the obligation to provide reparation exclusively on the parent state. This was the case in the Comprehensive Agreement on Human Rights in Guatemala (1994) and the Lomé Peace Agreement in Sierra Leone (1999).[169]

In the second approach, parties recognise the importance of providing reparation, but do so without explicitly designating the NSAG as a collective duty holder.[170] Although the 2007

[167] See further on these points: Sections 3, 5 and 6.2.1 of Chapter 6. As an example: *Case against Fredy Rendón Herrera* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (16 December 2011) 412–413. Moreover, as noted by Moffett, "[t]he Colombian situation represents the ability of armed groups to be held responsible for reparations on the basis of violating human rights law, not only by individuals, but by the organisation as a whole." Moffett (n 25) 343.

[168] See Chapter 6, Section 6.2.1.

[169] Comprehensive Agreement on Human Rights (Guatemala) (29 March 1994) VIII; Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Peace Agreement) (7 July 1999) XXIX; Agreement between the Government of the Republic of South Sudan (GRSS) and the South Sudan Democratic Movement/Army (SSDM/A) (27 February 2012) para 7(b).

Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army (LRA) has been cited by several authors as recognising a duty for NSGAs to make reparation for IHL violations, a strict reading of the agreement warrants more nuance.[171] While the parties agreed that it is essential to address the suffering of the victims, no explicit obligation was placed on the LRA, as such, to that end. Rather, the terminology used in the agreement suggested that group members were to provide reparations: "[a]lternative penalties and sanctions shall, as relevant […] require perpetrators to make reparations to victims"; and, "[r]eparations, which may be ordered to be paid to a victim as part of penalties and sanctions in accountability proceedings".[172] Article 9.2 of the Agreement arguably left room to further negotiate the collective role of the LRA in the reparation process: "[t]he Parties agree that collective as well as individual reparations should be made to victims through mechanisms to be adopted by the Parties upon further consultation." However, the annexure to the Agreement, which set out the proposed implementation framework, did not provide further clarification to that end.[173] Moreover, the LRA's post-conflict role, in terms of reparations, also remains unclear, as the group had no political ambitions and would have ceased to exist had the agreement come to fruition.[174] Ultimately, the peace process collapsed due to the LRA's failure to sign the final agreement.

The third approach recognises that NSAGs should contribute to providing reparations, at times, expressly as a consequence of international law violations. Significantly, the following agreements, which are illustrative of this approach, cover the five main forms of reparation included within the UN Basic Principles and Guidelines.[175] Additionally, they suggest that at least some NSAGs may exhibit a willingness as well as the required capacity to provide such measures. A first illustration is the Somali Agreement on Implementing the Cease-fire and on Modalities of Disarmament (1993), which provides for a measure of restitution: "[a]ll sides agree in principle that properties unlawfully taken during the fighting shall be returned to the

[170] See Darfur Peace Agreement (5 May 2006) paras 194, 199–200 (para 205[g] does state that the Compensation Commission will take into account the "capacity of the perpetrator or perpetrators to pay monetary compensation", but this appears to involve individuals rather than NSAGs).

[171] E.g. Moffett (n 25) 343–344; Schmalenbach (n 38) 502; Francesca Capone, 'From the Justice and Peace Law to the Revised Peace Agreement between the Colombian Government and the FARC: Will Victims' Rights Be Satisfied at Last?' (2017) 77 Heidelberg Journal of International Law 125, 159.

[172] Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army (29 June 2007) arts 6.4, 8.1, 9.1-9.3.

[173] Annexure to the Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army (19 February 2008) clauses 1, 16-18.

[174] Barney Afako, 'Between Revulsion and Realism: Policies and Dilemmas in Responding to the LRA' (IFIT 2020) 35.

[175] UN Basic Principles and Guidelines principles 18-23.

lawful owners."[176] Another example is the Comprehensive Agreement concluded between the government of the Philippines and the National Democratic Front of the Philippines (1998), which is grounded in IHRL and IHL. It provides that, "[t]he Parties […] shall take concrete steps to stop and prevent the violations of human rights, ensure that those found guilty of such violations are punished, and provide for the indemnification, rehabilitation and restitution of the victims."[177] In 2001, a peace agreement with another NSAG, the Moro Islamic Liberation Front (MILF), was signed in which the parties agreed to "safely return evacuees to their place of origin; provide all the necessary financial/material and technical assistance to start a new life, as well as allow them to be awarded reparations for their properties lost or destroyed by reason of the conflict", while the MILF also committed to "determine, lead and manage rehabilitation and development projects in conflict affected areas".[178] A further example is the Arusha Peace and Reconciliation Agreement for Burundi (2000), in which the parties undertook to implement the following principles and measures relating to reparations for genocide, war crimes and crimes against humanity: the "[e]rection of a national monument in memory of all victims"; the "[i]nstitution of a national day of remembrance for victims" for such crimes; and, the "taking of measures that would facilitate the identification of mass graves and ensure a dignified burial for the victims".[179] More recently, the 2013 Agreement between the Government of Sudan and the Justice and Equality Movement-Sudan holds that "[t]he parties shall expeditiously take measures to commence the payment of compensation to returning IDPs [internationally displaced people], refugees as well as all other victims of the conflict".[180] Lastly, the Final Peace Agreement between the Colombian government and the FARC-EP (2016) recognises the group's duty to contribute to material and symbolic reparations for the damages resulting from violations of international law.[181] While concrete steps have been taken to implement this last agreement, further research is needed to establish the extent to which this is true of the other agreements discussed in this section. Evidence of their implementation would bolster their legal significance.

[176] Somali Agreement on Implementing the Cease-fire and on Modalities of Disarmament (15 January 1993) III.
[177] Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines (16 March 1998) Preamble paras 1 and 6, Part II art 5, Part III arts 2(3) and 10.
[178] Agreement on Peace between the Government of the Republic of the Philippines and the Moro Islamic Liberation Front (22 June 2001) Section B paras 2-3.
[179] Arusha Peace and Reconciliation Agreement for Burundi (28 August 2000) arts 4(2), 6(7)-(8).
[180] Agreement between the Government of Sudan and the Justice and Equality Movement-Sudan on the Basis of the Doha Document for Peace in Darfur (6 April 2013) art 17 para 43.
[181] The peace process between the Colombian government and the FARC-EP will be further examined in Chapter 7.

The last approach includes agreements which embrace certain measures that could theoretically fall within the definition of some of the forms of reparation, but are not characterised as such. Therefore, it is to be assumed that the measures were not designed to be reparative in nature. Nevertheless, such agreements do indicate that it is possible to agree upon such actions with a NSAG, with the group having the capacity to carry them out.[182]

In sum, the discussion has revealed some limited instances of state practice that recognises a duty for NSAGs to provide reparation for harms resulting from their violations of international law committed during armed conflict.[183] Other practice, at least, recognises a role for NSAGs in a reparation process, but without a clear basis in international law. Still, scholars have joined in underscoring the importance of this practice for the further development of this area of international law.[184] In this capacity, Schmalenbach argues that "the existing agreements on reparations cannot be treated as irrelevant; they contribute to the emerging foundations of international obligation of armed groups to make reparation in cases of humanitarian law violations".[185] Similarly, Francioni and Ronzitti conclude that "the practice concerning the obligation incumbent upon armed opposition groups to grant reparation is at an emerging stage".[186]

### 3.3 UN Basic Principles and Guidelines

Some of the previously discussed instances of state practice provide recognition of a duty of NSAGs to make reparation under international law. Further support is found in the 2005 UN Basic Principles and Guidelines, which, as a key international soft law instrument for

[182] For instance, the Government of Nepal and the Communist Party of Nepal (Maoist) agreed "to set up a High-level Truth and Reconciliation Commission through mutual agreement in order to investigate truth about people seriously violating human rights and involved in crimes against humanity"; to pledge to abandon all types of war, attacks and violence; to allow "the people displaced due to the armed conflict to return back voluntarily to their respective ancestral or former residence"; and to "reconstruct the infrastructure destroyed as a result of the conflict". Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist) (21 November 2006) paras 5.2.5, 5.2.6, 5.2.8.

[183] While the legal status of such agreements remains unclear, they can be treated as instances of state practice relevant for the process of customary international law formation. ILA Committee on Non-State Actors (n 25) 7–8; Daniëlla Dam-de Jong, 'Building a Sustainable Peace: How Peace Processes Shape and Are Shaped by the International Legal Framework for the Governance of Natural Resources' (2019) 29 Review of European, Comparative & International Environmental Law 21, 30.

[184] According to Dam-de Jong, "the interaction between peace agreements and international law goes two ways. First, international law provides a normative and interpretative framework for the design and implementation of the arrangements set out in peace agreements. Second, peace agreements can also shape and further develop international law, most notably by providing novel interpretations to existing norms and principles in international law". Dam-de Jong (n 183) 23–24.

[185] Schmalenbach (n 38) 502.

[186] Francesco Francioni and Natalino Ronzitti, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford University Press 2011) 260.

reparations, has been referred to as "an international bill of rights of victims".[187] Principle 15 deals with reparation for gross violations of IHRL and serious violations of IHL.[188] Besides recognising a state's international obligation of reparation, the principle holds:

> In cases where *a person, a legal person, or other entity* is found liable for reparation to a victim, such a party *should* provide reparation to the victim or compensate the State if the State has already provided reparation to the victim [emphasis added].

Hence, the principle explicitly acknowledges that entities of a non-state nature could be obligated to provide reparations for gross or serious violations of IHRL and IHL; this could arguably include NSAGs.[189] However, this preliminary interpretation is subject to debate in legal scholarship. While Moffett argues that the UN Basic Principles clearly outline that NSAGs have an obligation to provide reparation to victims, Dudai and Rose question this, by noting that the instrument does not explicitly address the duty to repair of NSAGs and, more generally, appears to have left this controversial matter open.[190] Instead of operating to clarify the notion of responsibility for reparation, the Basic Principles and Guidelines are primarily centred on the rights of victims.[191]

To provide clarity on the issue, it proved beneficial to conduct an analysis of the drafting process and of the commentaries provided by the former Special Rapporteurs, van Boven and Bassiouni. While reflecting on the drafting process, van Boven identified the question of non-state actors as one "of the main issues that came up in the process of discussion and negotiation":[192]

> While the Principles and Guidelines are drawn up on the basis of State responsibility, the issue of responsibility of non-State actors was also raised in the

[187] Bassiouni (n 1) 203.

[188] Preamble of the UN Basic Principles and Guidelines para 6 states that "the Basic Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law".

[189] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 73.

[190] Moffett (n 25) 331.

[191] Cecily Rose, 'An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors' (2010) 33 Hastings International and Comparative Law Review 307, 320–321; Dudai (n 79) 789–790.

[192] In his 1999 report, Bassiouni identified the following as one of the main issues to be resolved: "who is responsible for providing any of these modalities of redress: the violator in his/her personal capacity, the State, non-State actors, or legal entities under private law?" UNCHR, 'Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Mr M Bassiouni, Submitted Pursuant to Commission on Human Rights Resolution 1998/43' (8 February 1999) UN Doc E/CN.4/1999/65 para 77; UNCHR, 'The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law - Note by the High Commissioner for Human Rights' (27 December 2002) UN Doc E/CN.4/2003/63 para 48; Theo van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Alan Stephens, Mariana Goetz and Carla Ferstman (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff Publishers 2009) 27.

> discussions and negotiations, notably insofar as *movements or groups exercise effective control over a certain territory and people in that territory*, but also with regard to business enterprises exercising economic power. It was *generally felt that non-State actors are to be held responsible for their policies and practices*, allowing victims to seek redress and reparation on the basis of *legal liability* and human solidarity, and not on the basis of State responsibility.
>
> The Principles and Guidelines provide for equal and effective access to justice, *"irrespective of who may ultimately be the bearer of responsibility for the violation"* (principle 3 (c)). In this connection reference is also made to the following provision: "In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim" (principle 15, last sentence). It is a *victim-oriented perspective* that was kept in mind in extending, albeit in a *modest and cautious way*, the scope of the Principles and Guidelines to include the *responsibility and liability of non-State actors*.[193]

These insights into the drafting of the instrument reveal that there was general support for obligating NSAGs, which exercise effective control over territory and people, to make reparation on the basis of their responsibility. However, its scope was only extended in a 'modest and cautious way', which indicates the drafters' hesitance to make any conclusive decision on the matter, while they maintained a victim-centred perspective. Although the preparatory work confirms that a particular focus was placed on the significant levels of victimisation caused by NSAGs with effective control, the final text does not make this focus explicit.[194] This can be explained by the instrument's emphasis on the situation of the victims, regardless of the state or non-state identity of the perpetrator.[195]

[193] Theo van Boven, 'The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' 1, 3 <https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf> accessed 5 August 2020 [emphasis added].

[194] UNCHR, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr Theo van Boven, Special Rapporteur' (2 July 1993) UN Doc E/CN.4/Sub.2/1993/8 56 (see footnote to proposed principle 2: "[w]here these principles refer to States, they also apply, as appropriate to other entities exercising effective power"); UNCHR, 'Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Mr M Bassiouni, Submitted Pursuant to Commission on Human Rights Resolution 1998/43' (n 192) para 20 (this language is absent in the 1996 version); UNCHR, 'The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law - Note by the High Commissioner for Human Rights' (n 192) para 106 (representative of Argentina clarified that it understood 'non-State entities' as including those recognised in Common Art 3 and Additional Protocol II); UNCHR, 'The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law - Note by the High Commissioner for Human Rights' (10 November 2003) UN Doc E/CN.4/2004/57 27–28 and Appendix 1 Preamble para 12 of 2003 version.

[195] UNCHR, 'The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law - Note by the High Commissioner for Human Rights' (n 192) 63 Annex I para 114;

As the Basic Principles contend not to introduce new international legal obligations, but rather to consolidate existing ones, the text has been drafted to reflect this reality. It uses the term 'shall' where a binding norm is in effect and 'should' where a norm is not strictly binding.[196] Accordingly, the formulation of principle 15, which uses the term 'should', indicates an "emerging concept of the responsibility" of NSAGs in international law.[197] The principle recognises that a NSAG *could* be obliged to provide reparation under international law, particularly for serious violations of IHL; however, the application of the principle in IHRL was faced with greater resistance. This is reflected in a conclusion of the Chairperson-Rapporteur, which was itself based on discussions recorded during a consultative meeting between representatives of a large number of Member States, NGOs and international agencies:

> With regard to principle 17, while recognizing that non-State actors, such as armed groups, may indeed commit violations, more clarity in the text was seen as necessary with regard to the responsibility of non-State actors […] in order to correctly reflect differences between human rights law and IHL in their application to non-State actors.[198]

The Basic Principles and Guidelines take a judicial approach to reparations. This is indicated in principle 15, where it suggests that a formal legal judgment is a necessary prerequisite to reparation ("a person, legal person, or other entity is found liable for reparation to a victim").[199] Although this consequently provides a stringent threshold for reparations, van Boven admits that, in reality, non-judicial schemes and programmes also contribute to

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Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 Netherlands Quarterly of Human Rights 641, 646, 650. See also UN Basic Principles and Guidelines principle 3(c).

[196] Preamble of the UN Basic Principles and Guidelines para 7; UNCHR, 'The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law - Note by the High Commissioner for Human Rights' (n 194) paras 10–11.

[197] As observed by the Chairperson-Rapporteur: "The Principles and Guidelines have been built on international law and practice as they have evolved in the course of the development of the Principles; thus, the emerging concept of the responsibility of non-State actors is reflected in the Principles and Guidelines." ibid 13.

[198] Former principle 17 stated, "[i]n cases where the violation is not attributable to the State, the party responsible for the violation should provide reparation to the victim". A further insightful conclusion is the following: "As the concept of the accountability of non-State actors is evolving, care should be taken in the wording […] While everyone recognized non-State accountability under IHL and international criminal law, some delegations held that only States (and their agents) can violate human rights law as such." UNCHR, 'The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms - Final Report of the Special Rapporteur' (18 January 2000) UN Doc E/CN.4/2000/62 Annex para 17; UNCHR, 'The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law - Note by the High Commissioner for Human Rights' (n 192) paras 18, 48. See also ibid 12, 14, 17, 19 and Annex I paras 15, 18, 29, 33, however, see para 38 (response van Boven); UNCHR, 'The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law - Note by the High Commissioner for Human Rights' (n 194) para 15; Bassiouni (n 1) 252–255.

[199] See also UN Basic Principles and Guidelines principle 17.

reparative justice alongside judicial reparations.[200] In addition, the primary focus of the Basic Principles and Guidelines appears to be on the domestic rather than the international level.

As a result of its victim-centred perspective, the concepts of social and human solidarity play a particular role in the Basic Principles and Guidelines.[201] Principle 16 appears to be an expression thereof.[202] It provides for a *subsidiary responsibility* for the state to establish national reparation programmes and other assistance to victims when "the parties liable for the harm suffered are *unable or unwilling to meet their obligations*".[203] This suggests that, although NSAGs would bear a primary duty to repair, reparations should not be solely dependent on such entities. Instead, states play a crucial role in guaranteeing effective redress.

Notably, the UN General Assembly adopted the Basic Principles and Guidelines in 2005 without a vote.[204] As pointed out by the ILC, such resolutions carry significant weight and "offer important evidence of the collective opinion of its Members".[205] At the same time, a resolution adopted by the General Assembly cannot independently create a norm of custom.[206] It can, however, play an important role in the development of customary international law, where it provides inspiration and impetus for the growth of a general practice accepted as law (accompanied by *opinio juris*) conforming to its terms.[207] It is true that this instrument has become a key point of reference for states and other actors to interpret and apply the concept of reparations in international law.[208] Yet, the previous discussion in Section 3.2 did not identify any instance of state practice expressly relying on this basis to recognise a duty for NSAGs to provide reparation.[209] Even if this was implied, only little practice has been identified. This certainly does not satisfy the high threshold for the identification of customary

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[200] Bassiouni (n 1) 266 n 317; van Boven (n 192) 37.

[201] Preamble of the UN Basic Principles and Guidelines para 11; UNCHR, 'The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law - Note by the High Commissioner for Human Rights' (n 194) 26, 28.

[202] Zwanenburg (n 195) 648.

[203] [emphasis added] Moffett (n 25) 331.

[204] When consensus is reached on the text of a draft resolution, the Members States agree to adopt it without taking a vote. It is "the most basic definition of what consensus means". UNGA, Res 60/147 adopted on 16 December 2005 (21 March 2006) UN Doc A/RES/60/147; UN, 'How Decisions Are Made at the UN' <https://www.un.org/en/model-united-nations/how-decisions-are-made-un> accessed 30 September 2020.

[205] The General Assembly is a plenary organ of the UN with virtually universal participation. Hence, resolutions adopted by consensus carry considerable weight in identifying a rule of customary international law. ILC Draft Conclusions on CIL (n 96) Commentary to Draft Conclusion 12 para 2.

[206] ibid Commentary to Draft Conclusion 12(1) para 4.

[207] ibid Commentary to Draft Conclusion 12(2) para 7.

[208] See for examples Clara Sandoval, 'The Legal Standing and Significance of the Basic Principles and Guidelines on the Right to a Remedy and Reparation' (2018) 78 Heidelberg Journal of International Law 565, 567; Íñigo Álvarez (n 5) 166–167.

[209] Following Sandoval, "any discussion whether the Basic Principles reflect current international law should not take place in general terms. Various principles are included in the document […] which would need to be studied, one by one, to arrive at a conclusion about their legal status". Sandoval (n 208) 566.

international law.[210] Thus, although the instrument tentatively recognises an emerging concept of responsibility of NSAGs involving a duty to make reparation for IHL violations, it cannot be concluded that this soft norm has turned hard.[211] However, given the Basic Principles and Guidelines' authoritative character, it also cannot be excluded that this might occur in the future.

### 3.4 UN practice

This section examines whether there are instances of UN practice which recognise a duty of NSAGs to make reparation under international law. The general practice of UN bodies and Special Rapporteurs is considered, while a more systematic study is conducted of the reports of 25 UN-established commissions of inquiry, fact-finding missions and other investigations operative in the Central African Republic, Colombia, Côte d'Ivoire, Democratic Republic of the Congo, Iraq, Libya, Mali, Myanmar, Nepal, Nigeria, Palestine/Israel, South Sudan, Sri Lanka, Sudan, Syria and Yemen. This selection focuses on mechanisms that have investigated IHL and IHRL violations committed during situations of NIAC.[212] These mechanisms are of particular interest because they have investigated violations committed by NSAGs and often deal with question of accountability.[213] This is notable in light of the lack of a dedicated forum to deal with the violations and potential responsibility of NSAGs.

In 2003, the UN Security Council, rather exceptionally, recognised the need for "developing further measures to promote the responsibility of armed groups".[214] However, after examining its efforts to hold NSAGs to account, it does not appear as if the Council has subsequently gone as far as imposing an obligation of reparation on NSAGs which stands on equal footing with that held by states.[215] Other UN bodies have at times addressed the reparative obligations

[210] The identified practice is, for instance, clearly not general, meaning that it must be sufficiently widespread and representative, as well as consistent. ILC Draft Conclusions on CIL (n 96) Draft Conclusion 8(1).

[211] As explained by Chinkin, soft law principles "do not and cannot *per se* be regarded as customary international law for a number of reasons. There must be sufficient evidence of State practice and *opinio juris*". Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850, 857.

[212] For further information on the selection and for an overview of the selected missions, see Introduction, Section 4.1.

[213] See Section 2.5; UNOHCHR (n 74) 12.

[214] Ten-Point Platform on the Protection of Civilians in Armed Conflict (15 December 2003) UN Doc S/PRST/2003/27; UNSC, 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict' (28 May 2004) UN Doc S/2004/431 para 16.

[215] See Section 2.5; Gérard Cahin, 'The Responsibility of Other Entities: Armed Bands and Criminal Groups' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 340. A review of the records of the open debate on transitional justice, held by the UN Security Council in February 2020, did not identify attention by the Member States to a possible duty to repair of NSAGs as part of such processes. However, see UNSC, Res 1071 (30 August 1996) UN Doc S/RES/1071 ("calls

of NSAGs. In relation to the situation in Afghanistan, both the UN Commission on Human Rights and, subsequently, the UN General Assembly urged "all the Afghan parties" to provide "sufficient and effective remedies for the victims of grave violations and abuses of human rights and of accepted humanitarian rules".[216] A similar call was made in a 2019 report of the UN Assistance Mission in Afghanistan (UNAMA) and the UN Office of the High Commissioner for Human Rights (UNOHCHR).[217] Likewise, the UNOHCHR recently called upon all parties to the Libyan conflict, "including those with de facto control of territory", to provide reparations.[218] The UN Secretary-General has made similar statements to the Security Council, in several reports on the protection of civilians in armed conflict, most notably:

> Significant developments in advancing individual criminal responsibility should not distract us from another critical dimension of accountability: the responsibility of parties to conflict to comply with international humanitarian law and human rights law, and the duty to make reparations for violations thereof.[219]

Some independent human rights experts, mandated by the Special Procedures of the UN Human Rights Council, have shown an increased recognition that NSAGs should provide reparation. The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence held in a 2019 report, that "[i]n many contexts, State and non-State actors, including armed groups, are responsible for the atrocities and should contribute to reparations".[220] The assertion is based on scholarship and the 2016 peace agreement concluded between the Colombian government and the FARC-EP as an example of state

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upon the leaders of the factions to ensure the immediate return of looted property"); Henckaerts and Doswald-Beck (n 22) 550.

[216] UNCHR, Res 1998/70 (21 April 1998) UN Doc E/CN.4/RES/1998/70 70; UNGA, Res 53/165 (25 February 1999) UN Doc A/RES/53/165 ("Urges all the Afghan parties: […] To provide efficient and effective remedies to the victims of grave violations and abuses of human rights and of humanitarian law"); Henckaerts and Doswald-Beck (n 22) 550.

[217] UNAMA and UNOHCHR, 'Afghanistan Protection of Civilians in Armed Conflict' (2019) 73. "It is essential that the parties to the conflict […] repair the harm they have caused."

[218] UNHRC, 'Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in Libya' (4 February 2019) UN Doc A/HRC/40/46 13–14; UNHRC, 'Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in Libya' (23 January 2020) UN Doc A/HRC/43/75 15.

[219] UNGA and UNSC, 'The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, Report of the Secretary-General' (13 April 1998) UN Doc A/52/871-S/1998/318 para 50; UNSC, 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict' (30 March 2001) UN Doc S/2001/331 11, 17; UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (29 May 2009) UN Doc S/2009/277 paras 61, 68; UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (11 November 2010) UN Doc S/2010/579 paras 82, 93; UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (7 May 2019) UN Doc S/2019/373 paras 61–62; Henckaerts and Doswald-Beck (n 22) 550.

[220] UNHRC, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (11 July 2019) UN Doc A/HRC/42/45 para 95. See also UNHRC, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (21 August 2017) UN Doc A/HRC/36/50 8–10.

practice. The Rapporteur's subsequent report on public apologies does not limit itself to states, but elaborately discusses apologies issued by NSAGs.[221] This may indicate that the Special Rapporteur will start focusing more systematically on the role of such groups in reparations. The Special Rapporteur on extrajudicial, summary or arbitrary executions also addressed the duty of NSAGs to provide reparation, specifically in relation to violations of the right to life in a report of 2018. The Rapporteur stated that "[w]hen they [NSAGs] are the perpetrators of right to life violations, ANSAs [armed non-State actors] should provide reparations […] ANSAs should also provide public apologies, and contribute to national memorials and commemoration ceremonies."[222] It is further recognised that NSAGs could contribute to disclosing the truth about what happened and publicly acknowledging the harm inflicted on victims within the framework of truth commissions.[223] Aside from symbolic reparations, the Special Rapporteur proposed, in relation to compensation, "the possibility to tie forfeiture of ANSAs assets to peace-process, and/or truth and reconciliation. Otherwise, there would need to be a means of seizing, for example, ANSAs-held bank accounts".[224] All in all, the Special Rapporteur ties NSAGs' duty to repair to their responsibility for violations of the right to life, which can involve obligations to provide compensation and symbolic reparation.[225] A final interesting aspect of the report is the suggestion that transitional justice mechanisms, such as truth commissions, may constitute an important opportunity for new developments relating to the collective responsibility of NSAGs and their duty to repair.[226]

Finally, the examination of the various UN investigative mechanisms identified four inquiries, Darfur, Syria, Libya, and Yemen,[227] that recognise a duty of NSAGs to provide reparation as a consequence of, at least, IHL violations.[228] The three latter inquiries also expressly deemed

[221] UNGA, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (12 July 2019) UN Doc A/74/147.
[222] UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 46) para 94.
[223] ibid.
[224] ibid 91.
[225] Íñigo Álvarez (n 5) 172–173.
[226] UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 46) paras 89–90.
[227] Although the investigative mechanism dealing with the conflict in Sri Lanka did not explicitly recognise a duty to repair for the LTTE, which was militarily defeated, it did propose that "funds acquired by the LTTE […] should be secured for the purpose of making reparations". UNSG (n 76) paras 419, 442.
[228] For the application of IHL to these cases, see 'Report of the International Commission of Inquiry on Darfur' (n 76) paras 75, 157–158, 172; UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (12 January 2012) UN Doc A/HRC/17/44 para 64; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2 February 2017) UN Doc A/HRC/34/64 Annex I para 7; UNHRC, 'Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen' (3 September 2019) UN Doc A/HRC/42/CRP.1 paras 46–47.

IHRL to be applicable where a NSAG exercises *de facto* control over territory; hence, providing for an additional legal basis to consider the duty of reparation.[229] Although not expressed in such strong terms, the International Commission of Inquiry on Darfur also appears to have recognised an obligation of NSAGs to provide compensation for serious violations of IHRL (see *infra*). It is notable that these mechanisms conceptualise the duty of such groups as akin to that of states under international law, while, in some cases, NSAGs and states were treated alike. Moreover, the mechanisms on Darfur and Yemen drew attention to the state-like nature of the groups when considering their duty of reparation.[230]

The report of the International Commission of Inquiry on Darfur held:

> *Serious violations of human rights law and humanitarian law* may amount to international crimes [and …] may entail individual criminal liability […] These violations may also involve the *international responsibility* of the State or of the *international non-state entity* to which those authors belonged as officials (or for which they act as de facto organs), with the consequences that the State or the non-state-entity may have to pay *compensation* to the victims of those violations.[231]

The Commission further clarified that it recognises such international responsibility for both the state and "the state-like entity" on whose behalf the perpetrator was acting.[232] The approach suggests a certain complementarity between collective responsibility resulting in a duty of compensation and individual criminal responsibility. The Commission proposed to fund the compensation measures for victims of rebels (whether or not the perpetrators were identified and punished) through a trust fund to be established on the basis of international voluntary contributions.[233] The UN Security Council ultimately referred the situation in Darfur to the International Criminal Court, but did not take up the recommendation on

[229] UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (n 228) para 62; UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (n 228) para 5; UNHRC, 'Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen' (n 228) paras 82–83.

[230] A notable exception to this conclusion is the report of the Goldstone Commission, which did not include a recommendation for Hamas to provide reparation, despite the fact that it held overall control of the territory and population in Gaza. This would have made it particularly fitting for such a recommendation. However, the Commission did argue that the Gaza authorities are obligated under international law to control the activities of NSAGs operating on the territory under their control. If they fail to take the necessary measures to prevent the groups from endangering the civilian population by conducting hostilities in a manner incompatible with IHL, they would bear responsibility for the damage done to the civilians living in Gaza. UNHRC, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48 paras 280, 304–305, 498, 1953–1954; Dudai (n 79) 791.

[231] 'Report of the International Commission of Inquiry on Darfur' (n 76) para 175 [emphasis added].

[232] ibid 593; Christian Tomuschat, 'Darfur - Compensation for the Victims' (2005) 3 Journal of International Criminal Justice 579, 588.

[233] 'Report of the International Commission of Inquiry on Darfur' (n 76) paras 600, 603.

reparations.[234] A further instance can be found in the work of the International Commission of Inquiry on Libya, which made the same recommendation to both the state and the National Transitional Council: to grant adequate reparations for IHL and IHRL violations and to take all appropriate measures to prevent the recurrence of such violations.[235] Hence, the Commission treated the NSAG and the state in a similar manner. Although not a consistent element in its reports, the Independent International Commission of Inquiry on the Syrian Arab Republic recommended, in 2013, that the relevant NSAGs should provide "effective redress for victims based on international standards", apparently for IHRL and IHL violations.[236] Lastly, the 2019 report of the Group of Eminent International and Regional Experts on Yemen noted that, although logic suggests that NSAGs bear responsibility for IHL violations, it is less clear what the implications of such responsibility entail.[237] The Group of Experts argued, that "there is an increasing acknowledgment that non-State entities must also provide reparations. This is particularly pertinent when these entities are considered to be de facto authorities".[238] When noting this 'increasing acknowledgment', reference was made to a scholarly blog post, which left the assertion poorly substantiated.[239] Interestingly, the recommendation of the Commission to the "de facto authorities, including affiliated armed actors as relevant" went beyond the call to provide reparations, by including recommendations to adopt a comprehensive policy and package of measures regarding the fulfilment of the right to reparation of victims of serious human rights and IHL violations and abuses; ensure compensation is provided for wrongful civilian deaths, injuries and harm; and, to ensure systems are in place for civilians to request such compensation. The exact same recommendation was formulated towards the parent state, hence treating both alike.[240]

To conclude, the preceding examination has revealed several instances of UN practice which recognises a duty of NSAGs to make reparation, resulting from violations of IHL and IHRL. Notably, this responsibility is consistently conceptualised as being akin to states' duty to

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[234] UNSC, Res 1593 (31 March 2005) UN Doc S/RES/1593.

[235] UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (n 228) paras 258(e), 259(c).

[236] UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (5 February 2013) UN Doc A/HRC/22/59 25 para 177(d).

[237] UNHRC, 'Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen' (n 228) para 859(c). The report finds the attribution of responsibility to non-state entities particularly reasonable when such entities are equipped with organs that have the capacity to act on their behalf, similar to a state's structure. ibid 867.

[238] UNHRC, 'Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen' (n 228) para 868.

[239] UNHRC, 'Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen' (n 228) n 1406.

[240] ibid 224–225.

repair under international law. While some instances of practice generally speak of reparation, others refer to specific forms of reparation, including compensation, satisfaction and guarantees of non-repetition. This provides a certain recognition of their adequacy when dealing with NSAGs. Additionally, some practice deems the recovery of assets from NSAGs as being relevant for reparation purposes. The examination has identified several quite recent examples, which could indicate that the role of NSAGs in reparations is gaining some momentum at the UN level. This is particularly true for UN mandate holders and investigative mechanisms. Although their reports do not constitute a traditional source of international law, they could still be considered as "subsidiary means for the determination of rules of law" akin to "judicial decisions" or "the teachings of the most highly qualified publicists of the various nations".[241] The reports attain further authority when produced by reputable impartial experts and endorsed by the UN. Moreover, given the diplomatic context in which these experts present their work, such reports inform discussions on the international level and have the potential of influencing states' views and practice.[242]

### 3.5 The practice of truth commissions

The following section analyses the reports of seven concluded truth commissions, which were established to uncover the truth about the NIACs that took place in El Salvador, Guatemala, Liberia, Peru, Sierra Leone, Solomon Islands and Timor-Leste respectively.[243] As noted in Section 2.5, truth commissions have scrutinised the conduct of NSAGs from an international legal perspective. The objective here is to determine how these commissions dealt with the question of reparations for victims of NSAGs, and, particularly, whether their practice involved recognitions of a duty of NSAGs to provide reparations under international law. Similar to the UN reports discussed in the previous section, the legal significance of this practice can be equated to subsidiary sources of international law that may become more authoritative when endorsed by the parent state or an international organisation such as the UN.

The majority of the truth commissions recommended that the state should bear the primary responsibility for providing reparations to victims of both state and NSAG violations, by way

[241] Art 38(1)(d) ICJ Statute.
[242] Rodenhäuser (n 65) 150–152; Íñigo Álvarez (n 5) 102–105, 171.
[243] See the Introduction to this study, Section 4.1, for further information on the selection of the truth commissions under examination.

of administrative reparations programmes.[244] Some commissions still recognised that NSAGs could make *contributions* to reparations, through the delivery of satisfaction measures and asset recovery. The Guatemalan Commission recommended symbolic measures, including a public apology and recognition of responsibility (both by way of the ex-command), and the defunct group's involvement in the search for the disappeared.[245] In contrast, the Sierra Leonean Commission recommended the tracing of the NSAG's assets, to be recouped and placed in a fund for war victims, and apologies by all conflict actors.[246] Although this practice indicates that a NSAG may play an appropriate contributory role in such reparation measures, and even in a post-conflict setting through its former members, it would not appear that these commissions grounded their recommendations on any internationally binding duty of reparation vis-à-vis the NSAGs. Only the Commission on the Truth for El Salvador truly recognised such a duty, where it recommended that the relevant NSAG should provide moral and material compensation "where it is found to have been responsible" and also stressed the need for the group to provide guarantees of non-repetition in order to prevent similar violations in the future.[247] Notably, these recommendations were not only submitted to the state, but also to the former leadership of the NSAG.[248] This further suggests that there is a role for former NSAG members in post-conflict reparations.[249] Besides IHL, the Commission considered the NSAG to be bound by IHRL, particularly when the group had assumed "government powers in territories under their control [… which] would make them responsible for breaches of those obligations".[250] It is noteworthy that the Commission generally qualified the unlawful conduct as either a violation of IHL or of both IHL and IHRL, which could indicate a certain hesitance to address the responsibility of the group on the mere basis of IHRL.[251]

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[244] Guatemalan Commission for Historical Clarification, 'Memory of Silence: Conclusions and Recommendations' (1999) 49–50; Truth and Reconciliation Commission (Peru), 'Programa Integral de Reparaciones' 142–143 <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20IX/2.2.%20PIR.pdf> accessed 9 March 2020; Sierra Leone Truth and Reconciliation Commission, 'Witness to Truth' (n 80) Vol 2 ch 1 p 20, ch 4 p 231-232; Commission for Reception, Truth, and Reconciliation Timor-Leste, 'Chega! (Executive Summary)' (2005) 200–202; Truth and Reconciliation Commission of Liberia (n 80) 378; Solomon Islands Truth and Reconciliation Commission, 'Final Report: Confronting the Truth for a Better Solomon Islands' (2012) Vol III 752, 754–755; Rose (n 191) 328–332.

[245] Guatemalan Commission for Historical Clarification (n 244) 49, 52.

[246] Sierra Leone Truth and Reconciliation Commission, 'Witness to Truth' (n 80) Vol 2 ch 3 pp 183 and 199 para 518.

[247] Commission on the Truth for El Salvador (n 81) 175, 185.

[248] ibid 188.

[249] See further Chapter 4 Section 5.3.3 on reparations in post-conflict settings.

[250] Commission on the Truth for El Salvador (n 81) 20.

[251] Herman (n 79) 63.

## 3.6 International expert documents

In the following section, several international expert documents are examined. All address a possible duty of NSAGs to provide reparation under international law. As discussed in Section 2.2, the authoritative ILC Commentary to the ARS leaves the international responsibility of NSAGs open.[252] Although no express mention is made of a NSAG duty to repair, recognising an implied duty of this nature would be the logical consequence of following the ARS approach to responsibility. Moreover, Special Rapporteur Ago expressly dealt with such a duty when discussing the challenges that could arise when claiming reparations from NSAGs.[253] This discussion incorporated analysis of several reparation claims that had been presented to such groups.[254]

Another instrument which dealt with the topic is the Chicago Principles on Post-Conflict Justice (2007), which was the result of an extensive process involving scholars, jurists, journalists and others. It presents basic guidelines for designing and implementing policies to address past atrocities.[255] Principle 3.3 holds that "[w]here non-state actors are responsible for violations, they should provide reparations to victims. Where these actors are unable or unwilling to meet their obligations, states should assume this responsibility". Similar to the UN Basic Principles and Guidelines, the instrument provides for a clear primary obligation for non-state actors, potentially NSAGs, and a subsidiary role for states. Yet, use of the term 'should' indicates "a suggested action based on international norms", rather than an obligation which is established in international law.[256]

In the same year, the civil society-led Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation was adopted by women's rights advocates, activists and survivors of sexual violence in situations of conflict. In contrast to the Chicago Principles, the Declaration places the primary responsibility to provide redress with the state, while, at the same time, stating that reparations programmes must address the responsibility of all actors, including NSAGs, based on the "fundamental nature of the struggle against impunity".[257] Hence, the responsibility of NSAGs is not disregarded.

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[252] ILC Commentary to art 10 ARS 52 para 16.

[253] Namely: NSAGs' temporary legal existence; changing extent, size and control over territory; possible lack of property as a means to offer compensation; and, states' fear of conferring implied recognition.

[254] 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' (n 29) paras 154, 180–181. See Section 3.1.2 for a discussion of these reparation claims.

[255] The Chicago Principles on Post-Conflict Justice (International Human Rights Law Institute 2007) v.

[256] ibid 3.

[257] Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation (2007) paras 5–6.

The International Law Association (ILA) Declaration of International Law Principles on Reparation for Victims of Armed Conflict (2010) also recognises NSAGs as a 'responsible party', which should make reparation for violations of international law applicable in armed conflict. The commentary recognises "the possibility that non-State actors are already liable to pay reparation for violations of the law of armed conflict",[258] while also strongly encouraging "the further development of a regime of responsibility for such actors" as mandated by the rule of law.[259] Another ILA Committee on Non-State Actors was more cautious in a 2014 report. While it considered reparations as a desirable consequence of NSAG responsibility, it questioned whether a reparation regime for NSAGs should mirror the existing regimes for states and international organisations. Reparation in the form of compensation, and to that effect an international indemnity fund composed of blocked assets, was at least contemplated. Nevertheless, it was concluded that, from an empirical point of view, the direct responsibility of NSAGs appears to be, at the very best, "a doctrine *in statu nascendi*".[260] The seminal 2005 ICRC study on customary IHL made a similar conclusion, on the basis of an analysis of law and practice up to 2005, that the existence of an obligation for NSAGs to make full reparation, as a result of their international responsibility, is unclear.[261] Although more recent instances of practice have been identified in this chapter, it remains sparse and fragmented.

In sum, some notable expert documents, which are understood as "subsidiary means for the determination of rules of law", suggest, or at least leave open the possibility, that NSAGs should provide reparation to victims when they are found responsible for violations of international law.[262] However, these instruments generally recognise that such an obligation is not firmly established in current international law. Although most appear to follow the classical framework of state responsibility when considering NSAGs, the ILA Committee on Non-State Actors differs by suggesting that this conception of responsibility should be tweaked to fit NSAGs' distinct nature. Moreover, the discussion raises the question as to whether the state should bear a primary or subsidiary responsibility. This discourse is being reinforced by an increasing number of legal scholars, who argue that NSAGs should be under

[258] The term 'non-state actor' would appear to include at least NSAGs, individuals and corporations. The commentary notes that some developments indicate that NSAGs may have a secondary obligation to make reparation, referring to the report of the International Commission of Inquiry on Darfur, principle 15 of the UN Basic Principles and Guidelines, and examples of US case law.

[259] Declaration of International Law Principles for Victims of Armed Conflict (ILA Committee on Reparation for Victims of Armed Conflict 2010) arts 5(2) and 6; ILA Committee on Reparation for Victims of Armed Conflict (n 45) 11–13.

[260] ILA Committee on Non-State Actors (n 25) 10–11.

[261] Henckaerts and Doswald-Beck (n 22) 549–550. See also Section 2.2.

[262] Art 38(1)(d) ICJ Statute.

a duty to provide reparation, and generally use the international responsibility of states as an initial blueprint to frame NSAG responsibility.[263] This issue is further supported or, at least, addressed within the work of prominent NGOs which work in the fields of human rights, IHL and transitional justice.[264]

# 4 The status of non-state armed groups' duty to provide reparation in current international law

The overall discussion in Section 3 concurs with the preliminarily conclusions made in Section 2.6: that the existence of a possible duty of NSAGs to provide reparation under international law remains characterised by uncertainty. The examination neither discerned a secondary norm imposing such an obligation within current treaty law, nor did it observe any such obligation in its analysis of customary international law. Moreover, no explicit support was found for extending the fundamental principle of reparations for wrongful acts to NSAGs under international law. However, as further discussed in Chapter 7, the Colombian State relied on this international legal principle with regard to the responsibility of the FARC-EP concerning reparations. At present, a duty of reparation for NSAGs finds its most authoritative expression in the UN Basic Principles and Guidelines. As an international soft law instrument, it tentatively recognises an emerging concept of international responsibility for NSAGs, which underpins a subsequent duty for them to make reparation for IHL violations.

Although international practice remains sparse, it does contribute to laying the initial foundations for a duty of NSAGs to provide reparations under international law. Some of the most prominent instances of state practice can be found in Colombia, which will be elaborated upon in Part 3 of this study. In addition, historical precedent for holding NSAGs responsible vis-à-vis a duty of reparation was identified in some older instances of state practice,

[263] Kleffner (n 25); Dudai (n 79) 785; Bílková (n 38) 280–281; Moffett (n 25); Verhoeven (n 38) 286; Blázquez Rodríguez (n 17); Íñigo Álvarez (n 5) ch V.

[264] Human Rights Watch, 'Turning a Blind Eye: Impunity for Laws-of-War Violations During the Gaza War' (2010) 47 (Hamas should provide "prompt and adequate compensation to the victims of laws-of-war violations"); Human Rights Watch, 'All Quiet on the Northern Front?' (2010) 6 (the Huthis should "provide redress for the victims' families"); Amnesty International, 'The Battle for Libya' (2011) 33 ("While the question as to whether armed groups are under an obligation to make full reparation for violations of IHL is unsettled, practice indicates that such groups may be required to provide appropriate reparations."); Geneva Call, 'Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination' <https://www.genevacall.org/wp-content/uploads/2019/07/DoC-Prohibiting-sexual-violence-and-gender-discrimination.pdf> accessed 5 August 2020 (signatory NSAGs commit to "encourage and facilitate […] the provision of reparations to victims" of sexual violence). In a recent book published by the International Center for Transitional Justice, a chapter written by Bellal considers reparations provided by NSAGs, see Bellal (n 78). See also ICTJ, 'More Than Words: Apologies as a Form of Reparation' (2015) 16–17.

particularly where such groups exercised effective control over territory. Finally, the preceding analysis also noted increasing support for such a duty among international experts and legal scholars.

It is concluded, when taking all these findings into account, that the duty of NSAGs to provide reparation presents itself as being, predominantly, a matter of *lex ferenda*. At the same time, the issue is considered as being in an incipient state within current international law. This conclusion acknowledges that there is at least some legal precedent and recognition that NSAGs should provide reparation when violating their primary obligations in situations of armed conflict. However, it is simultaneously cognisant of the present lack of an established secondary norm of international law to that end and the need for further clarification.

# 5 Approaches to operationalising a possible duty of non-state armed groups to provide reparation

The examination in Section 3 has sought to determine how a possible duty to repair of NSAGs has been conceptualised and put into practice in those instances in which such a duty was recognised, particularly on the basis of international law. In this section, the approaches identified above are brought together into five broad findings. The purpose is not to argue that they manifest as emerging or established customary rules. Instead, the findings are considered to be useful as initial building blocks for exploring the manner in which ‘a duty of NSAGs to provide reparation’ could be operationalised in international law from a *de lege ferenda* perspective. Even so, the preliminary nature of the findings must be recognised, especially given that the study of practice and legal materials carried out in this chapter does not claim to be exhaustive. Some further points also require clarification. Within this context, some of the materials analysed, such as documents of UN-established investigative mechanisms and truth commissions, have been identified as being akin to subsidiary sources of international law. In addition, they are considered as valuable tools of interpretation concerning the international responsibility of NSAGs, especially in light of: their potential authoritative character; the lack of a dedicated forum dealing with NSAG responsibility within the current international legal system; and, the limited guidance offered by the traditional sources of international law, including the existence of limited state practice on the issue.[265]

[265] Íñigo Álvarez takes a similar approach regarding the work of UN monitoring mechanisms, while giving the following justification: “Due to limitations of traditional sources of international law to provide relevant

The first broad finding is that NSAGs' apparent duty to repair has been generally conceptualised as being akin to the analogous duty of states, as traditionally developed in international law. It has commonly found its legal basis in internationally wrongful acts, involving violations of primary IHL and possibly IHRL obligations. Moreover, the five main forms of reparation listed in the UN Basic Principles and Guidelines have come forward over the course of the examination. This indicates that all should be considered when exploring a possible duty of NSAGs to repair. The discussion thus suggests that the law of state responsibility and, particularly, the rules concerning reparation can function as possible baselines in such an exploration. At the same time, international experts have cautioned against a simple copy-and-paste exercise.

Second, when it comes to considering a possible duty of NSAGs to provide reparation, emphasis has been placed on NSAGs that hold effective control over territory and those that are state-like.[266] This may hint to the existence of greater support for the possible role of such groups in reparations. This is apparent in older instances of state practice concerning the laws of insurgency and belligerency. Aspects of this practice have indicated that it makes practical and legal sense to call upon a group for reparations in light of its territorial control, the state's incapacity and the group's own legal subjectivity. The element of territorial control has continued to appear in, for instance, the work of the ILC and the drafting process concerning the UN Basic Principles and Guidelines. Other relevant examples can be found in UN practice where commissions of inquiry have alluded to state-like groups in this context. Legal scholars such as Heffes and Frenkel have also suggested that "highly organized armed groups exercising long-term control over a territory and having developed State-like institutions would be bound by rules on international responsibility".[267] Similarly, Daboné found that reparation from a NSAG is more credible when "it has existed over an extended period, it has effective and prolonged control over a part of a state's territory, and it has an almost quasi-state dimension".[268]

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information regarding the standards of conduct of armed groups and the necessity to incorporate new realities in contemporary international law, additional sources of international law have been considered for this purpose." The same goes for Bellal, who considered some elements of analysis of the work of UN commissions of inquiry and fact-finding missions, the NGO Geneva Call and the UN Security Council on children in armed conflict as "'lessons learned' in the view of a possible elaboration of formal rules of legal responsibility for non-State actors, should an international judicial forum be established in the future with jurisdiction over collective entities other than States". Bellal (n 43) 310; Íñigo Álvarez (n 5) 103–108.

[266] This element also appears in the case study on Colombia. See Part 3 of this study.

[267] Heffes and Frenkel (n 40) 70.

[268] Daboné (n 18) 412.

Third, the potentials of national and international, as well as judicial and extra-judicial, efforts to hold NSAGs to a duty of reparation have been identified.[269] Thus, all are considered pertinent when examining questions concerning forum. Additionally, the examination of state practice in Sections 3.1.2 and 3.2.3 suggests that some groups may be willing and capable to commit to reparations for their wrongs.

The fourth finding is that NSAGs have been called upon to provide reparations both during and after NIACs. Concerns over granting unwarranted legitimacy during an ongoing conflict seem not to have stopped states, or other actors, calling upon NSAGs to provide reparations. It appears sensible to argue that such groups incur international responsibility for their own wrongful acts as long as they legally exist, i.e. for the duration of the conflict.[270] However, the question of a group's international responsibility appears to remain pertinent in the aftermath of an armed conflict, when the NSAG has legally ceased to exist. The practice of some truth commissions suggests that former members, such as commanders, could still fulfil a role in such contexts.

Finally, the discussion has raised some questions concerning the relationship of the possible international responsibility of a NSAG and that of other subjects of international law. While instruments such as the UN Basic Principles and Guidelines and the Chicago Principles on Post-Conflict Justice suggest that the state should bear a subsidiary responsibility, when a NSAG is unable or unwilling to meet its duty of reparation, several truth commissions, among other examples, have placed the primary responsibility with the state and some seem to have additionally proposed a contributing role for NSAGs. Regardless, all these approaches appear to implicitly acknowledge that reparations cannot be solely dependent on NSAGs. The International Commission of Inquiry on Darfur has further suggested a certain complementarity between the responsibility of NSAGs, involving a duty of compensation, and the criminal responsibility of individual members.

# 6 Conclusions

This chapter has dealt with the question whether, and if so to what extent, a NSAG is under a duty to provide reparation when violating its primary obligations under international law. A

[269] Compare e.g.: domestic efforts in civil and criminal courts; a possible role for NSAGs in truth commissions as argued by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions; and, the provision of reparation through a fund as recommended by the International Commission of Inquiry on Darfur and the Sierra Leone Truth and Reconciliation Commission.
[270] Fortin (n 18) 277.

considerable body of legal sources and international practice was examined, leading to conclusions that the international responsibility of NSAGs continues to be a topic of unsettled debate and, within this context, the possible existence of a NSAG duty to provide reparation remains ambiguous. No firmly established secondary norm was found in either international treaty or customary law. Instead, the UN Basic Principles and Guidelines provide the most authoritative recognition of, at least, an emerging concept of the international responsibility of NSAGs, which involves a duty to make reparation. Moreover, some notable instances of affirmative state and other international practice have been found which support this notion. It includes certain historical precedent for holding at least NSAGs that exercise exclusive territorial control to a duty of reparation. However, these instances are part of an exceptional, rather than general body of practice. The most prominent, and increasing, tendency to emphasise the need to develop a duty for NSAGs to make reparation in international law, manifests amongst international experts and legal scholars, as they seek to counter a responsibility gap in the context of contemporary conflicts.

Taking these findings together, it is concluded that a duty of NSAGs to provide reparation under international law is primarily a question of *lex ferenda*. The adjective 'primarily' is chosen quite deliberately, because, at the same time, the issue finds itself at an incipient stage in current international law since at least some legal precedent and recognition exists. Together, they provide the initial foundations of a duty of NSAGs to provide reparation under international law.

On the basis of the examination, five broad findings, which group together the different existing approaches to operationalising a NSAG duty to repair, were presented. Although there is no claim that these findings manifest established or even emerging rules of international law, they do form an initial layer of preliminary building blocks, which inform the further analysis conducted in Part 2 of this study. First, NSAG duty to repair has generally been conceptualised akin to that of states. This suggests that the classical regime of state responsibility could function as a possible baseline. Second, there appears to be more express support for a possible duty to repair in relation to NSAGs which hold effective territorial control or have state-like characteristics. Third, an exploration of the potential forums in which a duty of reparation for NSAGs could be realised should take a broad perspective. Fourth, the provision of reparation by NSAGs appears to be pertinent both during and in the aftermath of an armed conflict. Finally, some preliminary insights into the potential relationships between NSAGs' international responsibility and the responsibility of other subjects of international law (including states and individual group members) were revealed.

The identified approaches commonly acknowledge that the provision of reparation should not be exclusively dependent on NSAGs.

# PART 2

# OPERATIONALISING A DUTY OF NON-STATE ARMED GROUPS TO PROVIDE REPARATION UNDER INTERNATIONAL LAW

# Chapter 3
# The character of a regime of international responsibility of non-state armed groups

## 1 Introduction

It was concluded in the previous part of this study that the international responsibility of NSAGs remains controversial. Within this context, the existence under international law of a NSAG duty to provide reparation largely constitutes a question of *lex ferenda*. In order to bring the discussion forward, the aim of this chapter is to investigate what the character of a future international responsibility regime for NSAGs should be. This examination will be framed by existing international responsibility regimes, and will consider whether NSAGs' responsibility could be construed by analogy with the existing regimes of either state or individual criminal responsibility, or rather as a new and separate type of responsibility.[1] As a preliminary step, it is necessary to determine to what extent these regimes already address the international responsibility of NSAGs and, if they do, which implications manifest as a result. The conclusion of this chapter's analysis will determine the methodological approach taken in the subsequent chapter: which will explore how the content of a possible responsibility regime vis-à-vis NSAGs, and, particularly, their duty of reparation could be operationalised under international law.

To this end, the two main regimes of international responsibility, these being the law of state responsibility and individual criminal responsibility, are examined to determine their limitations and potential for the possible responsibility of NSAGs under international law.[2] In terms of limitations, an evaluation will be made as to what extent both legal regimes allow, in their present state, for addressing the direct responsibility of NSAGs under international law,

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[1] Veronika Bílková, 'Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law?' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 278–279.

[2] The ILC, Articles on the Responsibility of International Organizations with Commentaries, Yearbook of the International Law Commission (2011) Vol II Part Two (ARIO), which find their basis in the work of the ILC on state responsibility, are based on limited practice, in contrast to the regimes of state responsibility and individual criminal responsibility that are well established in international law. As a result, it has been characterised as mostly an exercise of progressive development rather than codification of recognised principles. The ARIO does not hold the same authority as the ARS, but rather dependents upon the "reception by those to whom they are addressed" (ILC Commentary to the ARIO 46-47 para 5). Considerations arising from the ARIO are included in this chapter when relevant for the discussion, whilst a closer examination is carried out in Chapter 4.

while identifying the limitations of this exercise and considering their implications in the context of framing a specific regime of responsibility for NSAGs. On the other hand, the potential of both regimes for conceptualising such international responsibility will be examined. The perspective of the analysis is different depending on the regime being considered. With regard to the law of state responsibility, the classical form of responsibility in international law, a preliminary examination is carried out of the extent to which its rules and principles concerning reparations could constitute a point of departure for devising the content of a possible responsibility of NSAGs. In contrast, the analysis of criminal responsibility will consider to what extent the responsibility of NSAGs could be integrated into present international criminal law by providing for the collective criminal responsibility of such groups. Following recent developments in this body of law, it could provide a basis to address the civil consequences of NSAGs' criminal conduct.

In terms of the structure of the chapter, the regime of state responsibility will be analysed first, followed by the regime of individual criminal responsibility. On the basis of the outcomes of the overall analysis, a proposal for how NSAGs' international responsibility might be characterised will be presented.

# 2 The law of state responsibility

## 2.1 Non-state armed groups in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts

As the name suggests, the ILC ARS only deals with the responsibility of states and not with that of the responsibility of non-state entities.[3] According to a general principle of the law of state responsibility, states are not responsible for the harmful acts of NSAGs engaged in a struggle against them, both during the fighting and after the group has been defeated.[4] Although a state may incur responsibility when failing to prevent or punish injurious conduct

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[3] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission (2001) Vol II Part Two (ARS) 32 para 4(d).

[4] *Sambiaggio* Italian-Venezuelan Claims Commission (1903) X RIAA 499 513 ("The revolutionists were beyond governmental control, and the Government can not be held responsible for injuries committed by those who have escaped its restrain"); *GL Solis (USA) v United Mexican States* United States-Mexican Claims Commission (1928) IV RIAA 358 361 ("It is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection"); ILC Commentary to art 10 ARS 50 paras 2-3. For a further discussion of affirmative practice, see 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' Yearbook of the International Law Commission (1972) Vol II UN Doc A/CN.4/264 and Add.1 132–141; Gérard Cahin, 'Attribution of Conduct to the State: Insurrectional Movements' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 252–253.

carried out by a NSAG, it does not bring about the state's obligation to take responsibility for the actual conduct itself. Instead, the state's responsibility results from its lack of due diligence, i.e. for its own failure to act.[5] Even so, since the principle of due diligence is predominantly an obligation of means, state responsibility is rarely incurred in situations of armed conflict where NSAGs act completely beyond the state's control.[6] Differently, the state can be held directly responsible for the conduct of entities where it may be attributed to the state at the international level, which involves the conduct of the state's organs or of others who have acted under the direction, instigation or control of those organs.[7]

The ARS recognises that there are a number of exceptions to this general principle of the law of state responsibility, particularly when there is a sufficiently strong link between an armed group and the state.[8] One such exception is article 10 ARS, which is particularly pertinent to the present discussion. It provides a rule of attribution that encompasses the conduct of a NSAG operating independently from the state, which forms the focus of this study. The conduct of such a NSAG is attributed to the state where a new government or state is established by that NSAG. In this sense, there is certain continuity between the group and the responsible state entity. For these reasons, article 10 ARS will be examined more closely.[9]

### 2.1.1 State responsibility in the case of government or state formation

Article 10 ARS reads as follows:

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[5] See art 1 European Convention on Human Rights; art 1(1) American Convention on Human Rights; art 1 African Charter on Human and Peoples' Rights (1981) OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58; HR Committee, 'General Comment No 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant)' (26 May 2004) UN Doc CCPR/C/21/Rev1/Add13 para 8; *Case of Velásquez Rodríguez v Honduras* IACtHR (Judgment Merits) Series C No 4 (29 July 1988) para 172. See art 1 common to the Geneva Conventions in relation to the duty 'to ensure respect' in times of armed conflict, which involves a state's due diligence obligation to prevent and repress violations committed by NSAGs operating on its territory: ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) Commentary to Common Art 1.

[6] 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' (n 4) 130 para 154; Bílková (n 1) 271; Kirsten Schmalenbach, 'International Responsibility for Humanitarian Law Violations by Armed Groups' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press 2015) 496.

[7] ILC Commentary to the ARS 38-39 paras 1-3. See in relation to the conduct of state organs art 4 ARS and particularly the ILC Commentary to art 4 ARS 40 para 2. See also Rule 149 of the ICRC Customary Law Study on the responsibility of a state for IHL violations attributable to it.

[8] See arts 5, 8-11 ARS; Cedric Ryngaert, 'State Responsibility and Non-State Actors' in Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015).

[9] Art 9 ARS is of limited relevance to this study, as it relates to the performance of certain essential public functions by NSAGs, such as taxation or the exercise of policing and judiciary functions, and not the full range of possible harmful acts. Moreover, it would result in the attribution of responsibility to the adversarial state and not to the NSAG itself. See further Katharine Fortin, 'The Relevance of Article 9 of the Articles on State Responsibility for the Internationally Wrongful Acts of Armed Groups' in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations* (Brill 2018).

> 1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
> 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law. […]

The general rule that the conduct of a NSAG is not attributable to a state is premised on the assumption that the structures and organisation of the group remain independent of those of the state. Differently, if a NSAG is successful in achieving its aims and either installs itself as the new government or forms a new state, the new regime or state will incur responsibility for the violations committed by the group in question. As a result, the two scenarios included in article 10 ARS constitute exceptions to this general rule.[10]

The justification for this attribution lies in the organisational continuity of the movement and the new government or state.[11] When a new government is established, the state itself would not cease to exist as a subject of international law despite internal structural changes. Hence, it constitutes the only entity to which responsibility can be attributed. As a result, the acts committed during the struggle for power by the NSAG, as well as the group's acts in its capacity as newly established government, will be attributed to the state in question.[12] Regarding situations where a new state is created, the former ILC Special Rapporteur Ago explains that "an existing subject of international law would merely change category: from a mere embryo State it would become a State proper, without any interruption in its international personality resulting from the change".[13] He further clarifies that "it would not be a question of attributing to a subject of international law the conduct of organs of another subject, but merely of continuing to attribute to the same subject – which would have reached the final stage of its progressive evolution the act of its own organs".[14] Hence, it would only be a normal application of the general rule providing for the attribution of the conduct of its organs to a subject of international law.[15]

[10] ILC Commentary to art 10 ARS 50 para 4; ICRC, 'Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War' (2020) paras 929–930 <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary> accessed 3 August 2020.
[11] ILC Commentary to art 10 ARS 50-51 paras 4-6; Patrick Dumberry, 'New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement' (2006) 17 The European Journal of International Law 605, 611–612.
[12] ILC Commentary to art 10 ARS 50 para 5.
[13] 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' (n 4) 131–132.
[14] ibid 131.
[15] ibid 132 para 159.

Article 10(1) ARS applies to 'insurrectional movements'. Although the ARS does not provide a comprehensive definition of the types of groups encompassed by this term, the ILC Commentary suggests that the threshold for the application of Additional Protocol II to the Geneva Conventions may be taken as a guide. Thus, this would include organised NSAGs that, under responsible command, exercise territorial control, so as to enable them to carry out sustained and concerted military operations and to implement said Protocol.[16] As the threshold only serves as guidance, this arguably does not apply in every situation.[17] What is, instead, of primary importance, is that the NSAG, aiming to become the new government, is successful by way of an armed struggle. As a result, the conduct of NSAGs that only trigger the application of Common Article 3 may still be subject to the attribution of responsibility pursuant to article 10 ARS.[18] Nonetheless, in practice, it is doubtful that NSAGs falling below the threshold of Additional Protocol II will be successful. Paragraph 2 of article 10 ARS broadens the scope to include "insurrectional or other" movements, which reflects the existence of a greater variety of movements, whose actions may result in the formation of a new state, such as national liberation movements.[19]

Although article 10 ARS takes account of NSAGs, it only reduces the existing responsibility gap vis-à-vis such groups in international law to a limited extent. This is due to a number of reasons. Taken together, they provide for a first justification to explore the possibility of establishing a new regime of responsibility for NSAGs in international law.[20]

First of all, the provision does not apply when a government of national reconciliation is formed following an agreement between the existing authorities and the leadership of a

[16] Art 1 Additional Protocol II; ILC Commentary to art 10 ARS 51 para 9.

[17] See also 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' (n 4) 145 para 198: 'the attribution or non-attribution to the State of the acts of insurgents is quite independent of the exercise of de facto power by the insurgents in question'.

[18] Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 International Review of the Red Cross 401, 410; Liesbeth Zegveld, *The Accountability of Armed Opposition Groups* (Cambridge University Press 2002) 157; James Crawford and Simon Olleson, 'The Character and Forms of International Responsibility' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 463; Sten Verhoeven, 'International Responsibility of Armed Opposition Groups: Lessons from State Responsibility for Actions of Armed Opposition Groups' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 288–289, 294; ICRC, 'Commentary on the Third Geneva Convention' (n 10) paras 929–930 ("The responsibility of armed groups for violations of common Article 3 can also be envisaged if the armed group becomes the new government of a State or the government of a new State. In these circumstances, the conduct of the armed group will be considered as an act of that State under international law"). However, see Ezequil Heffes, 'The Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law: Challenging the State-Centric System of International Law' (2013) 4 Journal of International Humanitarian Legal Studies 81, 95.

[19] ILC Commentary to art 10 ARS 51 para 10; Dumberry (n 11) 618–619.

[20] Gérard Cahin, 'The Responsibility of Other Entities: Armed Bands and Criminal Groups' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 337–338; Bílková (n 1) 275; Schmalenbach (n 6) 295–296.

NSAG.[21] The responsibility of the group dissolves and is reduced to the individual member level. The underlying rationale is that questions of responsibility may challenge the conclusion of a negotiated agreement and may, thus, endanger the achievement of peace through negotiations.[22] This exception would serve as an enticement for NSAGs to partake in a negotiated power-sharing solution, rather than seeking to take control of the state by force.[23] This exception is problematic from an accountability perspective as it provides a clear incentive to leave responsibility concerns unaddressed.[24] In addition, it is not substantiated by any practice. Instead, it relies on a policy-based justification which contends that the rule in article 10 should "not be pressed too far", as a state should not be made responsible for the conduct of a NSAG "merely because, in the interests of an overall peace agreement, elements of the opposition are drawn into a reconstructed Government".[25] While not arguing that states should incur responsibility for the actions of NSAGs in such cases, a valid argument can be made that the successor entity of a NSAG in the form of a political party could be held responsible for past wrongful behaviour where there is a sufficient organisational continuity between the NSAG and the new party. It is questionable as to why responsibility should simply disappear where a former NSAG has obtained a seat at the table.[26] A political party could at least inherit the legal consequences of the wrongful conduct of its predecessor, where its existence is the direct result of a collective transformation process by which the NSAG abandoned its weapons to continue its political engagement within the legal and democratic arena.[27] Such an approach would address the responsibility gap, by preventing responsibility from being evaded and safeguarding victims' redress. Otherwise, the successor entity could, at best, agree to assume the consequences of responsibility within, e.g., the peace agreement

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[21] ILC Commentary to art 10 ARS 51 para 7.
[22] However, Ago envisaged that the rule of attribution would also apply "in the case of an agreement between the legitimate government and the insurrectional government under which members of the insurrection are called upon to participate in the government of the State" further nothing that there is "nothing surprising in the attribution to the State of the acts not only of members of its preceding organization but also of members of the organization that grew during the insurrection and is subsequently united with the preceding organization", but he signals that this has occurred very rarely. 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' (n 4) 146 para 199, 149 para 209.
[23] Jean d'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents' (2009) 58 International and Comparative Law Quarterly 427, 436.
[24] See for further critical reflection on the ILC's line of reasoning ibid 436–437; Verhoeven (n 18) 291–292.
[25] ILC Commentary to art 10 ARS 51 para 7; Tatyana Eatwell, 'State Responsibility, "Successful" Insurrectional Movements and Governments of National Reconciliation' in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations* (Brill Nijhof 2018).
[26] Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability* (Ashgate 2016) 134, 136; Eatwell (n 25) 396–397.
[27] Veronique Dudouet, Katrin Planta and Hans J Giessmann, 'The Political Transformation of Armed and Banned Groups' (Berghof Foundation and UNDP 2016) 7.

that provided for the group's political transformation. However, this approach can be challenged on at least two fronts. Firstly, such a political party is not a subject of international, but rather national law. This complicates the argument from an international legal perspective. Secondly, there is little state practice to substantiate the argument.[28]

The second issue regarding article 10 ARS is that although the two positive attribution rules contained within it were applied in several arbitral decisions of the first half of the 20th Century, state practice since that time appears to be scarce or, according to some, even non-existent.[29] Consequently, the relevance of their application to present-day conflicts can be questioned.[30]

Third, article 10 ARS contains rules of attribution of conduct and not of responsibility. As a result, the question of NSAGs' direct responsibility is sidestepped.[31] As discussed in Chapter 2, the ILC Commentary to article 10 ARS mentions the further possibility that NSAGs may themselves be held responsible for their own conduct under international law. However, one is quickly reminded that the responsibility of NSAGs falls outside the scope of the ARS, which are only concerned with the responsibility of states.[32]

Fourth, this type of state responsibility cannot be called upon when a NIAC is ongoing. Consequently, its practical relevance is reduced.[33]

Finally, the rule is limited to successful groups. However, NSAGs may not succeed in their aims, yet may remain active for a considerable period of time. Alternatively, they may simply pursue different goals than those foreseen in article 10 ARS, such as gaining increased autonomy or greater social equality.[34]

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[28] See the following example of state practice Linas-Marcoussis Agreement (23 January 2003) 3) a-, c-, d- and Annex 'Programme of the Government of National Reconciliation' VI- 2), 4).

[29] See *Bolivar Railway Company* Mixed Claims Commission Great Britain-Venezuela (1903) IX RIAA 445 453; *Puerto Cabello and Valencia Railway Company* Mixed Claims Commission Great Britain-Venezuela (1903) IX RIAA 510 513; *Dix Case* Mixed Claims Commission United States-Venezuela (1903) IX RIAA 119 120; *French Company of Venezuelan Railroads* Mixed Claims Commission United States-Venezuela (1905) X RIAA 285 354; *Georges Pinson (France) v United Mexican States* Mixed Claims Commission France-Mexico (1928) V RIAA 327 353. See also ILC Commentary to art 10 ARS 51-52 paras 12-14 and for a more recent example of practice UNHRC, 'Situation of Human Rights in the Central African Republic - Report of the United Nations High Commissioner for Human Rights' (12 September 2013) UN Doc A/HRC/24/59 para 25.

[30] Zegveld (n 18) 156; d'Aspremont (n 23) 431–432; Verhoeven (n 18) 287–288; Ezequil Heffes and Brian Frenkel, 'The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules' (2017) 8 Goettingen Journal of International Law 39, 59.

[31] d'Aspremont (n 23) 431.

[32] ILC Commentary to art 10 ARS 52 para 16.

[33] Annyssa Bellal, 'International Law and Armed Non-State Actors in Afghanistan' (2011) 93 International Review of the Red Cross 47, 70–71.

[34] Francis Kofi Abiew and Noemi Gal-Or, 'International Responsibility of the AOG in International Law: Is There a Case for an African Approach?' in Noemi Gal-Or, Cedric Ryngaert and Math Noortman (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 352–353.

## 2.2 The law of state responsibility as a point of departure

Although the ARS display certain limitations in mitigating the existing responsibility gap concerning NSAGs in international law, the analysis conducted in Chapter 2 has found that it is still relevant to examine to what extent it can function as a point of departure for the development of a new regime of responsibility for NSAGs.[35] The law of state responsibility is the regime of responsibility that is currently developed to the fullest extent. This is not surprising in light of the historical primacy of the state as primary subject in the international legal system. As a result, state responsibility can be considered as "the paradigm form of responsibility on the international plane".[36] Accordingly, several scholars have relied on this framework as a useful starting point when exploring the elaboration of a future responsibility regime for NSAGs, by way of analogical legal reasoning.[37] Importantly, such a perspective could facilitate a more consistent approach to the system of responsibility in international law.[38] Although this kind of technique can be useful for filling legal gaps, it should not be understood as a process of mechanically copying and pasting legal rules and principles. The use of analogies instead constitutes a method of legal reasoning based on an assessment of relevant similarities and differences.[39]

Certain similarities between NSAGs and states can be noted. Both are collective legal entities with at least a minimum level of organisation, which allows them to engage as distinct entities in organised armed violence of a degree of intensity that reaches the threshold of a NIAC. Additionally, some NSAGs control territory, in which they may even exercise government functions akin to those of states. For instance, the Sri Lanka's Liberation Tigers of Tamil Eelam (LTTE) controlled large parts of the territory from the 1990s until May 2009. The group operated as a *de facto* state in the territory it controlled, where it established its own police, court system, immigration department and social services, among other functions. It

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[35] See Chapter 2 Section 5.

[36] Crawford and Olleson (n 18) 443–444.

[37] For example Verhoeven (n 18); Heffes and Frenkel (n 30) 60–65; Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (Intersentia 2020) 81–91.

[38] Alain Pellet, 'International Organizations Are Definitely Not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations* (Martinus Nijhoff Publishers 2013) 53; Íñigo Álvarez (n 37) 91.

[39] As explained by Ahlborn, the use of analogical reasoning generally involves the application of a legal rule covering a specific case to a different case that is unregulated by law but has similar characteristics. Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations An Appraisal of the 'Copy-Paste Approach'' (2012) 9 International Organizations Law Review 53, 55–57; Íñigo Álvarez (n 37) 81–83.

developed a sophisticated military, with ground, air and naval capabilities.[40] A further similarity between states and NSAGs lies in the legal regulation of both entities under the primary rules of international law. More specifically, NSAGs are bound by the same international obligations as states under at least IHL and possibly IHRL.[41]

However, Kleffner correctly notes that any transposition of the rules governing the responsibility of states to NSAGs has to be approached with caution. In contrast to states, NSAGs have neither a right to exist nor presumptive legitimacy in international law.[42] A possible result may be that the underlying rationales for their international responsibility may not only involve rules on, e.g., attribution and reparations, but also on the effective dismantlement of the responsible group.[43] Furthermore, while some groups display state-like features and could potentially be bound by similar rules as states, others are characterised by their loose organisational structures, absence of any territorial control, and limited or lack of resources. The IHL framework already responds to this structural disparity among NSAGs, by imposing a greater range of primary obligations on groups that exceed the minimum requirements of organisation under Common Article 3 and, particularly, exercise control over territory.[44] Similarly, there is a need to take account of this disparity between NSAGs and states, as well as amongst NSAGs themselves, in the secondary rules governing a potential system of international responsibility of NSAGs.[45] With regard to reparations, this issue presents itself as a challenge in terms of the varying degrees of capacity of NSAGs to provide reparations. As will be discussed further in Chapter 4, a NSAG's capacity to provide reparations may differ significantly to other groups, as well as in comparison to states. This is especially true given that the capacity to make reparation correlates with a NSAG's level of organisation and its availability of resources. Accordingly, there is a need to accommodate these differences in organisational capacity to ensure the effectiveness of a future regime of international responsibility. Ultimately, it requires devising abstract rules that can be applied

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[40] UNSG, 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 33; ICRC, 'The Roots of Restraint in War' (2018) 38. For another example of similar NSAGs operating in the Central African Republic, see MINUSCA, 'Report on the Situation of Human Rights in the Central African Republic' (2015) para 14.

[41] See Chapter 1. Íñigo Álvarez (n 37) 84–85.

[42] ibid 86.

[43] Jann K Kleffner, 'The Collective Accountability of Organized Armed Groups for System Crimes' in Andre Nollkaemper and Harmen Gijsbrecht van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 260–261.

[44] See Chapter 1 Section 3.4.

[45] Kleffner (n 43) 261; Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 Journal of International Humanitarian Legal Studies 5, 47; Íñigo Álvarez (n 37) 67, 85–86, 90–91.

generally and which can, at the same time, provide enough flexibility to regulate the entire spectrum of NSAGs.[46]

It follows from this discussion that such an exercise of analogical reasoning should take account of these similarities and respond to the listed particularities of NSAGs. It will be necessary to consider that “the subjects of law […] are not necessarily identical in their nature or in the extent of their rights”,[47] and accordingly develop *sui generis* rules.[48] Consequently, it may very well be that different rules govern the international responsibility of distinct subjects. A similar approach guided the ILC in its work on the responsibility of international organisations. While the ARS was taken as the general model of international responsibility, it did not imply a general presumption that the same principles apply to such organisations. Instead, each principle was considered from the specific perspective of the responsibility of international organisations. This required to take a number of considerations into account: the differences of such organisations in comparison to states; the significant diversity amongst them, in terms of, e.g., powers, functions, size of membership, structure and the primary rules to which they are bound; and, differences in relevant practice.[49]

In Chapter 4, the rules and principles on reparations included within the law of state responsibility will be used as a starting point to frame a possible duty to repair of NSAGs. Still, existing approaches to reparations in respect of other subjects, particularly international organisations and individuals, will provide additional information for analysis. Together, a broad reference framework, which is grounded in international law, is established to guide the examination.

# 3 Individual criminal responsibility

The focus of this section turns to the regime of individual criminal responsibility. In the first instance, the analysis will evaluate whether and, if so, to what extent this regime includes considerations for the responsibility of NSAGs, as such, for international crimes, the limitations which attach to the approach followed and the implications thereof. On the basis of this evaluation, two paths will be proposed as ways forward and will be explored: the first is

[46] Kleffner (n 43) 258, 261.
[47] *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations* ICJ [1949] ICJ Rep 174 178. Similarly, the ARIO are in many respects akin to the ARS, while seeking to give appropriate weight to the specific and different character of international organisations in comparison to states. ILC Commentary to the ARIO 46-47.
[48] Bílková (n 1) 279, 284; Íñigo Álvarez (n 37) 108.
[49] ILC Commentary to the ARIO 46 paras 3-7; Ahlborn (n 39); Pellet (n 38); Íñigo Álvarez (n 37) 81.

the introduction of collective criminal responsibility of NSAGs (Section 3.2); the second is the suggestion of a potential new regime of international responsibility for NSAGs which is not criminal in character (Section 4).

### 3.1 The criminal responsibility of group members and its limitations

It is no longer controversial that individual members of NSAGs can be held criminally responsible for their participation in certain international crimes, such as war crimes, crimes against humanity and genocide. This might involve, for instance, leaders or commanders of a NSAG, who are held responsible for the acts committed by their subordinates, or ordinary members who are responsible in respect of their direct participation in such crimes. This is only a recent development in international law. Its origins date to the 1990s, with the establishment of the ICTY in 1993 and the ICTR in 1994, developments which were followed by the entering into force of the Rome Statute of the International Criminal Court in 2002 and the work of the Special Court for Sierra Leone, amongst others.[50]

Although criminal responsibility under international law does not extend to the NSAG as such, the legal framework and definitions governing these international crimes recognise that such groups can constitute the context or the system in which the criminal acts are carried out. The category of war crimes illustrates this observation. War crimes comprise of serious violations of IHL perpetrated during situations of armed conflict, which involve armed hostilities between parties of a collective nature with a sufficient degree of organisation. Correspondingly, war crimes have been perpetrated with the involvement of NSAGs, which bear obligations under IHL. Put differently, certain violations of IHL, perpetrated by NSAGs, can entail the individual criminal responsibility of their members.[51] An analogous example can be found within the category of crimes against humanity, which are perpetrated as part of "a widespread or systematic attack directed against any civilian population […] pursuant to or

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[50] See i.a. *Prosecutor v Tadić* ICTY (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 134; *Prosecutor v Sesay, Kallon and Gbao* SCSL (Appeals Judgment) SCSL-04-15-A (26 October 2009); *Prosecutor v Thomas Lubanga Dyilo* ICC (Trial Judgment) ICC-01/04-01/06-2842 (14 March 2012); *Prosecutor v Jean-Pierre Bemba Gombo* ICC (Trial Judgment) ICC-01/05-01/08 (21 March 2016) (overturned on appeal); UNSC, 'Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955' (13 February 1995) UN Doc S/1995/134 para 12; William A Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict' (2002) 26 Fordham International Law Journal 907, 922; ICRC, 'Commentary on the Third Geneva Convention' (n 10) paras 909–919.

[51] Art 8(1) ICC Statute provides that the Court has jurisdiction over such crimes, particularly "when committed as part of a plan or policy or as part of a large-scale commission of such crimes". Yet, it also provides for the possibility that a single act performed by an individual could constitute a war crime. ICC, Elements of Crimes, ICC-PIDS-LT-03-002/11 (2011) 13–42; Kleffner (n 43) 247–248; ICRC, 'Commentary on the Third Geneva Convention' (n 10) paras 920–927.

in furtherance of a State or organizational policy to commit such attack".[52] Recent practice has confirmed that such organisational policy may also involve that of a NSAG.[53]

It can be said that the international community has concentrated its efforts on criminalising the acts of individuals during times of NIAC, while largely ignoring the responsibility of the group as the broader collectivity in which the individual authors of these crimes are embedded. The latter notion is reflected in the concept of 'system criminality', which was put forward by Röling when discussing aspects of criminal responsibility for violations of the laws of war. It involves two key aspects:

The first is the organisational or collective context in which the crimes are committed. Röling speaks of governments as 'systems' that order, encourage, tolerate or even permit the commission of crimes. The crime is caused by the structure of the system, rather than personal inclinations. In this sense, the commissions of such crimes "serves the system, and is caused by the system", as opposed to incidental criminality that involves crimes committed by the individual for personal reasons.[54] Nollkaemper builds on Röling's work by extending the notion of system involved in international crimes to non-state actors. Accordingly, system criminality is defined as "a situation where collective entities order or encourage international crimes to be committed, or permit or tolerate the committing of international crimes".[55] This conceptualisation is closely related to Kelman's idea of 'crimes of obedience' as "crimes that take place, not in opposition to the authorities, but under explicit instructions from the authorities to engage in these acts, or in an environment in which such acts are implicitly sponsored, expected, or at least tolerated by the authorities" or, as defined by Kelman and Hamilton, as "an act performed in response to orders from authority that is considered illegal

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[52] Art 7(1) and (2)(a) ICC Statute.

[53] *Prosecutor v Sesay, Kallon and Gbao* SCSL (Trial Judgment) SCSL-04-15-T (2 March 2009) (upheld on appeal); *Prosecutor v Germain Katanga* ICC (Trial Judgment) ICC-01/04-01/07 (7 March 2014); *Prosecutor v Jean-Pierre Bemba Gombo* (n 50). For a recent discussion Tilman Rodenhäuser, 'Beyond State Crimes: Non-State Entities and Crimes against Humanity' (2014) 27 Leiden Journal of International Law 913. See also Neha Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Hart Publishing 2014) 2–3; Frédéric Mégret, 'The Subjects of International Criminal Law' in Philip Kastner (ed), *International Criminal Law in Context* (Routledge 2017); Anna Marie Brennan, 'Prospects for Prosecuting Non-State Armed Groups under International Criminal Law: Perspectives from Complexity Theory' in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge 2019) 137–138.

[54] Bert VA Röling, 'The Significance of the Laws of War' in Antonio Cassese (ed), *Current Problems of International Law: Essays on U.N. Law and on the Law of Armed Conflict* (Giuffrè 1975) 138; Mark A Drumbl, 'Collective Violence and Individual Punishment: Criminality of Mass Atrocity' (2005) 99 Northwestern University Law Review 539, 571.

[55] André Nollkaemper, 'Introduction' in André Nollkaemper and Harmen Van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 16.

or immoral by the larger community".[56] Kleffner further inquires into this notion of system criminality, specifically in respect of NSAGs. He convincingly argues that such groups can be understood as systems, which first of all follows from the organisation requirement that determines whether a group is to be considered a party to a NIAC under IHL. For this requirement to be satisfied, it is necessary that the group is at least to some degree structurally organised, which becomes even more apparent in respect of armed conflicts which fall under Additional Protocol II. Indeed, as was concluded in Chapter 1, the organisational requirement serves as a key tool to determine when a loose collection of individuals matures into a distinct, collective entity. From a socio-psychological perspective, military organisations involved in warfare are generally characterised by their group spirit, loyalties, morals, values and expectations, which replace individual drives. NSAGs may also succeed in creating a climate in which crimes are considered as being in conformity with and justified by the group's values and norms.[57]

The second aspect relating to system criminality is the collective nature of the crimes themselves. As was already demonstrated *supra*, international crimes committed in a context of armed conflict are often not only committed by one person, but rather by a group of individuals gathered *in casu* within the confines of a NSAG, which expresses a form of collective criminality.[58] While the traditional modes of liability, such as direct commission, instigation and aiding and abetting, are not always able to grasp this kind of criminality, joint criminal enterprise and command responsibility can be of more use.[59] These modes of liability allow for the holding of one person responsible for the acts committed by others. The latter mode can, for instance, provide a basis to hold a military commander responsible when failing to take measures to prevent or punish the commission of war crimes by a subordinate.[60] Nevertheless, these modes of liability do not focus on holding a group responsible, as such. Any criminal conviction will still find its fundamental basis in the principle of individual fault

[56] Herbert C Kelman, 'The Policy Context of International Crimes' in André Nollkaemper and Harmen Van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 27; Elies Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 20–21.

[57] Laurel E Fletcher and Harvey M Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 Human Rights Quarterly 573, 606–611; Kleffner (n 43) 242–247.

[58] *Prosecutor v Tadić* ICTY (Appeals Judgment) IT-94-1-A (15 July 1999) para 191; George P Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt' (2002) 111 Yale Law Journal 1499, 1514; Drumbl (n 54) 567–568; Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) 5 Journal of International Criminal Justice 109, 110.

[59] Van Sliedregt (n 56) 21–22.

[60] Joint criminal enterprise provides the possibility of holding all participants in a common plan criminally responsible for agreed upon crimes and also those which were a "natural and foreseeable consequence" of the execution of the plan. *Prosecutor v Kvočka et al* ICTY (Appeals Judgment) IT-98-30/1-A (28 February 2005) para 83; Shane Darcy, *Collective Responsibility and Accountability under International Law* (Brill 2007) 197–198.

and not in that of the collectivity of which the convicted person was a part.[61] As clarified by the Special Court for Sierra Leone: "[t]he trial, officially titled the *Prosecutor v. Sesay, Kallon and Gbao*, has been commonly referred to as the RUF trial due to the fact that the three Accused persons were members of the Revolutionary United Front ("RUF"), The Trial Chamber […] observed that this trial is not a trial of the RUF organisation itself, but rather a trial against three individuals".[62] This shows that although international crimes are characterised by their collective nature, international justice focuses on the role of the individuals involved therein.[63]

Holding individual members of NSAGs criminally responsible for the commission of international crimes undeniably forms a fundamental part of affording justice and is a significant step in the fight against impunity. Along with upholding the key objectives of criminal justice, it may play an important role in providing a measure of retribution and deterrence, as well as facilitating the prevention of future crime.[64] However, criminal trials also have their limits: especially to the extent that they only account for an individual's culpability, whereas the (collective) responsibility of the system, as a whole, is left aside. As a result, a fragmented picture of collective violence is given, in which a NSAG is deconstructed to a limited number of its individual members.[65] In addition, individual criminal responsibility only considers the most serious violations of IHL and IHRL, whereas a range of other harmful abuses, in which NSAGs engage, are left unaddressed. At best, but also unsatisfactorily, this provides for a broad measure of so-called 'indirect responsibility' of individual members for violations perpetrated by NSAGs, where their behaviour overlaps.[66] A fundamental limitation from the perspective of this study is the limited reach of the principle of individual criminal responsibility in respect of reparations.[67] As a result, redress cannot be offered for the full

[61] Even so, both modes of liability continue to cause much discussion amongst international criminal law scholars and practitioners. Darcy contends, for instance, that aspects of joint criminal enterprise and superior responsibility fall short of basic principles of criminal law, including the mental or *mens rea* requirement and causation. Convictions on the basis of these modes of liability may not adequately reflect the personal wrongdoing of the accused. Shane Darcy, 'Imputed Criminal Liability and the Goals of International Justice' 20 Leiden Journal of International Law 377, 403. See for an overview of the main criticisms presented in legal literature James G Stewart, 'The End of "Modes of Liability" for International Crimes' (2012) 25 Leiden Journal of International Law 165, 171–185.

[62] *Prosecutor v Sesay, Kallon and Gbao* (n 53) para 4.

[63] Íñigo Álvarez (n 37) 37–39.

[64] Florian Jessberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities?: Purposes of Punishment in International Criminal Law* (Cambridge University Press 2020).

[65] Zegveld (n 18) 223–224.

[66] Bílková (n 1) 272.

[67] Art 75(2) ICC Statute.

spectrum of violations perpetrated and resulting harms that have taken place at the hands of NSAGs in situations of NIAC.[68]

The current limits of international criminal justice result in at least two possible suggestions to move forward: first, international criminal law should be extended to NSAGs as legal entities and a form of collective criminal responsibility should be established as a consequence (see the following section) or, second, the regime of individual criminal responsibility should be complemented with a new type of responsibility relevant to NSAGs, which should be non-criminal in character (see Section 4).[69]

## 3.2 The collective criminal responsibility of non-state armed groups

### 3.2.1 An appraisal

There are several reasons that justify exploring the possibility of holding NSAGs criminally responsible under international law. It would involve stretching the fundamental principle of individual criminal responsibility to encompass the responsibility of such groups as distinct legal entities. Following from the previous discussion, the notion of collective responsibility would assist in addressing the wrongs of the larger system, or organisation, in which the behaviour of individual authors and participants of international crimes is embedded.[70] It would provide a more comprehensive picture of the reality of international crimes, which, in contrast to common crimes, generally involve collective instead of individual action.[71] As a result, a greater measure of justice could be afforded by ensuring that the larger system or organisation that played a decisive role in the perpetration of international crimes is not let off the hook. Indeed, in contrast, it would become possible to directly target the perpetrating NSAG through prosecution.[72] This would contribute to some of the principal aims of international justice: “to put an end to impunity for the perpetrators” of international crimes as “to contribute to the prevention of such crimes”.[73] Accordingly, the impunity gap could be

[68] Katharine Fortin, ‘Armed Groups and Procedural Accountability: A Roadmap for Further Thought’, *Yearbook of International Humanitarian Law*, vol 19 (TMC Asser Press 2016) 159.

[69] The latter was also recognised by the UN Secretary-General in his 2009 report on the protection of civilians in armed conflict to the UN Security Council: “Significant developments in advancing individual criminal responsibility should not distract us from another critical dimension of accountability: the responsibility of parties to conflict to comply with international humanitarian law and human rights law, and the duty to make reparations for violations thereof.” UNSC, ‘Report of the Secretary-General on the Protection of Civilians in Armed Conflict’ (29 May 2009) UN Doc S/2009/277 para 68.

[70] Nollkaemper (n 55) 1.

[71] Darcy (n 60) 197.

[72] Brennan (n 53) 129–130, 137–138; Ilya Nuzov, ‘Post-Conflict Justice: Extending International Criminal Responsibility to Non-State Entities’ in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020).

[73] Preamble of the ICC Statute.

mitigated, while at the same time furthering the deterrent and preventive functions of criminal law.[74] In sum, at least from a purely legal perspective, such an approach could render the international legal system more effective.

Such a proposal is not necessarily inconceivable in international law, especially when one considers the conclusions of Chapter 1 of this study: which clarified that NSAGs are legal subjects in their own right, with a limited legal personality under, at least, IHL.[75] Crucially, for present purposes, confirmation of collective criminal responsibility could provide a basis to claim reparations from the convicted group. Such an approach would be in line with the recent course set by the International Criminal Court, where a duty to provide reparation attaches to a finding of international criminal responsibility.

Despite these valid arguments, the criminal prosecution of a collective entity sits uneasy with one of criminal law's (national and international) fundamental principles: *nulla poena sine culpa*. The concept of criminal responsibility is premised on this principle of individual fault or culpability, which holds that "nobody may be held criminally responsible for acts or transactions in which he had not personally engaged or in some other way participated".[76] It draws from long-standing Western legal traditions, which consider the individual to be an autonomous agent, with an individual will to act, rather than a passive actor whose responsibility flows from a relation to others.[77] The emergence of individual criminal responsibility as a general principle of law, both domestically and internationally, formed a break from its collective past.[78] In modern criminal law, the notion of collective guilt, which served to hold an entire group responsible for acts performed by a member in his individual capacity, is no longer acceptable. It is considered as being unfair and morally backward.[79] Instead, a concept of individual justice has replaced such form of collective responsibility, which is considered as primitive in nature. One factor behind this development, was the prevention of never-ending revenge taking and retaliatory measures against a group.[80] In this

[74] Brennan (n 53) 130.
[75] ibid 142.
[76] *Tadić Appeals Judgment* (n 58) para 186; ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 December 1949* (Martinus Nijhoff 1987) para 4603.
[77] Mark Osiel, *Making Sense of Mass Atrocity* (Cambridge University Press 2009) 187; Kirsten Campbell, 'Victims and Perpetrators of International Crimes: The Problem of the "Legal Person"' (2011) 2 Journal of International Humanitarian Legal Studies 325, 331–332; Elies Van Sliedregt, 'The Curious Case of International Criminal Liability' (2012) 10 Journal of International Criminal Justice 1171, 1172–1173.
[78] M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Martinus Nijhoff Publishers 2014) 66.
[79] James Crawford and Jeremy Watkins, 'International Responsibility' in John Tasioulas and Samantha Besson (eds), *The Philosophy of International Law* (Oxford University Press 2010) 290.
[80] Albert Levy, 'Criminal Responsibility of Individuals and International Law' (1945) 12 The University of Chicago Law Review 313, 313–314; Francesco Parisi and Giuseppe Dari-Mattiacci, 'The Rise and Fall of

sense, this shift provided a means to break with "the collective cycle of guilt" that group or collective responsibility might perpetuate.[81]

The introduction of this principle to the international legal system can be traced to the criminal justice initiatives established in the aftermath of World War II. As famously declared in the judgment of the Nuremberg IMT: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[82] These origins on the international level were grounded in the need to break with the immunity of state officials, who before this time were able to shelter themselves behind the collective notion of state responsibility, which could not be brought back to its agents.[83] Contrary to state responsibility, criminal law concerns itself with the punishment of an individual's conduct: namely, by violating the law, this individual has committed a crime.[84] Subsequent international justice instruments and initiatives have reiterated the fundamental principle of individual criminal responsibility, which can be considered as being firmly embedded at the core of modern international criminal law.[85]

### 3.2.2 An evaluation of the law and practice of international criminal courts and tribunals

Despite the dominant focus on individual responsibility and fault, the collective nature of international crimes has left its mark on international criminal law, which not only criminalises direct perpetration, but also provides for concepts such as command responsibility and joint criminal enterprise.[86] While this does not go as far as providing for the

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Communal Liability in Ancient Law' (2004) 24 International Review of Law and Economics 489, 490–491; Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008) 33–34; M Cherif Bassiouni, 'Perspectives on International Criminal Justice' (2010) 50 Virginia Journal of International Law 269, 277.

[81] Mark R Reiff, 'Terrorism, Retribution, and Collective Responsibility' (2008) 34 Social Theory and Practice 209, 234–239; Shachar Eldar, 'Exploring International Criminal Law's Reluctance to Resort to Modalities of Group Responsibility' (2013) 11 Journal of International Criminal Justice 331, 337.

[82] 'Trial of the Major War Criminals before the International Military Tribunal' (Nuremberg 1947) Vol I 223; art 6 Charter of the Nuremberg IMT in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (1945) 82 UNTS 279 (Nuremberg IMT Charter).

[83] 'Trial of the Major War Criminals before the International Military Tribunal' (n 82) 223–224; Van Sliedregt (n 56) 18–19.

[84] Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31 California Law Review 530, 532–534.

[85] UNGA, Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal (11 December 1946) UN Doc A/RES/95; art IV Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277; art 7(1), 23(1) ICTY Statute; art 6(1), 22(1) ICTR Statute; art 25 ICC Statute; art 6(1) SCSL Statute; ILC, Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission (1996) Vol II Part Two.

[86] Van Sliedregt (n 56) 19–20.

possibility of holding a group or organisation criminally responsible, there is some limited past practice that did not shy away from dealing with this question and devising responses to deal with it. This practice is retraced and analysed, over the following sections, through the lens of the collective criminal responsibility of NSAGs.

### *Nuremberg International Military Tribunal*

The notion of collective criminal responsibility is marked by its controversial history in international criminal law. Although the Nuremberg IMT propagated the principle of individual responsibility, it was also faced with the challenge of dealing with mass crimes, which resulted from a highly advanced form of system criminality. The Tribunal devised a controversial theory of collective or group criminality, which involved the notion of criminal organisations.[87] This allowed the IMT to declare certain Nazi organisations or groups, such as the Gestapo, the SS and the Nazi party, as criminal in nature.[88] For a criminal organisation of this nature to exist, it must have been "a group bound together and organized by a common purpose" which was "formed or used in connection with the commission of crimes" under consideration.[89] Interestingly, one of the objectives of criminalising these organisations was to control their assets, partly with the purpose of directing them to the provision of reparations.[90] This offered a subsequent basis for national courts to prosecute members of these organisations, as they had been declared as criminal by the Tribunal.[91] Membership was considered as proof of participation in an organisation's crimes. More specifically, individual criminal responsibility was determined on the basis of one's membership within the criminal organisation, provided it was voluntary and that the person had knowledge of its criminal purpose or was personally implicated.[92] The rationale behind this model of criminal

[87] The judges recognised its controversial nature: "[t]his is a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice [...] should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided". 'Trial of the Major War Criminals before the International Military Tribunal' (n 82) 256. See also Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 The International Law Quarterly 153, 165–167 ("these provisions constitute a regrettable regress to the backward technique of collective criminal responsibility"); UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office 1948) 289 ("It grew out of the necessity to meet a new type of criminality which had never before faced human society so directly or on so vast a scale."); Van Sliedregt (n 56) 36.

[88] Art 9 Nuremberg IMT Charter.

[89] 'Trial of the Major War Criminals before the International Military Tribunal' (n 82) 256.

[90] Zegveld (n 18) 55.

[91] Art 10-11 Nuremberg IMT Charter; art II(1)(d), (2)(e) Control Council Law No 10 Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity (20 December 1945) Official Gazette of the Control Council For Germany No 3 Berlin (1946).

[92] 'Trial of the Major War Criminals before the International Military Tribunal' (n 82) 256.

organisations was that the prosecutorial and judicial workload would be significantly reduced and, at the same time, the evasion of justice could be avoided.[93]

The relevance of the IMT's criminal organisations model for the present discussion is limited for at least three reasons. First, it was devised to apply to state-linked organisations, and does not provide any indication that it might be extended to non-state actors, such as NSAGs. When one considers the highly sophisticated and bureaucratic nature of the Nazi regime, it becomes a very open question as to how easily a NSAG, characterised by a loose organisational structure, a fluctuating pool of members, and/or a general lack of information about its workings, might relate to the Nuremberg concept of criminal organisation.[94] Second, it brings forward a precedent for collective criminal responsibility in international criminal law, to the extent that a person could be subjected to a criminal sanction because of the behaviour of other members of the same criminally declared organisation. Yet, the judgment on the criminality of the Nazi organisations was merely declaratory in nature and did not provide the IMT with the power to hold the organisations themselves criminally responsible and to punish them accordingly.[95] Instead, it was a means of holding the individual members responsible.[96] The focus of the present enquiry is different, as it seeks to explore whether NSAGs can be held criminally responsible in their own right.[97] Third, and as will be discussed further below, the concept of criminal organisations was short lived. It did not experience a revival after the post-World War II trials. In this sense, the notion that the Nuremberg model might provide any significance for the present discussion, in terms of precedent, is seriously tempered.

### *The International Criminal Tribunals for the former Yugoslavia and Rwanda*

During the drafting process of the Statute of the ICTY, a committee of French jurists proposed the inclusion of a notion of criminal organisations that was similar to that included in the Nuremberg Charter.[98] However, the controversial proposal did not attract the necessary support and was eventually set aside. Concerns were raised that findings of guilt by association would be fundamentally unjust and unfair, and that the limits of relying on

[93] Darcy (n 60) ch V.
[94] Nina Jørgensen, 'Criminality of Organizations Under International Law' in André Nollkaemper and Harmen Van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 220.
[95] ibid 204.
[96] Cassese (n 80) 34–35.
[97] Zegveld (n 18) 55–56, 58.
[98] Nina Jørgensen, 'A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda' (2001) 12 Criminal Law Forum 371, 375.

membership alone to prove individual guilt were problematic.[99] The UN Secretary-General also questioned the concept in his report on the establishment of the ICTY. He queried "whether a juridical person, such as an association or organization, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal".[100] It was concluded that such a concept should not be retained on the basis that international crimes are carried out by natural persons, who should be subjected to international criminal jurisdiction irrespective of their membership within a particular group.[101] Despite the harmful activities of armed militias and groups in Rwanda, the model of criminal organisations was not reconsidered within the context of the establishment of the ICTR.[102]

### *International Criminal Court*

It is notable that draft article 23 of the Statute of the International Criminal Court, discussed at the Rome Conference in 1998, included the possibility of prosecuting not only natural persons but also *legal persons*, with the exception of states.[103] This despite draft article 23 being a provision on 'individual criminal responsibility'. Under such a provision, the Court would have had jurisdiction "when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives".[104] In accordance with draft article 76(vi), appropriate forms of reparation could have been imposed against convicted legal persons as a possible penalty, besides fines, dissolution and forfeiture of proceeds, property and assets

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[99] Darcy (n 60) 282–283.

[100] UNSC, 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc S/25704 para 51.

[101] ibid 51, 53. Further rejection of the concept of collective criminal responsibility can be found in the first annual report of the ICTY, submitted by its President, the late Antonio Cassese: "If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, "collective responsibility" - a primitive and archaic concept - will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages. The history of the region clearly shows that clinging to feelings of "collective responsibility" easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes." UNGA and UNSC, 'Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' (29 August 1994) UN Doc A/49/342-S/1994/1007 para 16.

[102] Jørgensen, 'A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda' (n 98) 375.

[103] For an in-depth discussion Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T Kamminge and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (Kluwer 2000).

[104] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' in UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) UN Doc A/CONF.183/13 (Vol III) 30–31.

obtained by criminal conduct, among other penalties. In the draft, it was suggested that this concept be further examined in the context of reparation to victims, which is in line with the general rejection of punitive damages in international law.[105] The draft Statute went in fact further than the Nuremberg IMT, as it provided a means to prosecute and punish legal persons, as such. The footnote to draft article 23 clarifies that there was "a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute".[106] Although some delegations strongly favoured the inclusion, and even argued for the addition of organisations lacking legal status (presumably criminal and terrorist organisations when following the account of Clapham), it appears that many strongly opposed the proposal. It was feared that the provision could be used against those struggling for self-determination, amongst others.[107] Some delegations proposed, as a middle ground, to only provide for the "civil or administrative responsibility/liability of legal persons", which was, however, not thoroughly discussed.[108]

At the Rome Conference, a French proposal, based on draft article 23, revived the discussion on the concept of criminal organisations, but this time without the controversial crime of membership. It was proposed that when "a crime was committed by a natural person on behalf or with the assent of a *group or organization of every kind*, the Court may declare that this group or organization is a *criminal organization*" and "[a]ppropriate forms of reparation" could be imposed as a penalty.[109] The proposal was deemed attractive from the perspective of obtaining reparations for victims.[110] Nevertheless, concerns were raised over the definition of 'criminal organisations' or 'legal persons', the exclusive focus of the Statute on individual

[105] ibid 63; Observations of the Trust Fund for Victims on the appeals against Trial Chamber I 's Decision establishing the principles and procedures to be applied to reparations" ICC-01/04-01/06 (8 April 2013) para 106; ILC Commentary to the ARS 99 n 516; Nina Jørgensen, 'A Reappraisal of Punitive Damages in International Law' (1998) 68 The British Yearbook of International Law 247; Rolf Einar Fife, 'Penalties' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 335.

[106] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (n 104) 31 n 71.

[107] Clapham, 'The Question of Jurisdiction Under International Criminal Law over Legal Persons' (n 103) 157.

[108] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (n 104) 31 n 71.

[109] 'Proposal Submitted by France: Article 23 Individual Criminal Responsibility Legal Persons' (16 June 1998) UN Doc A/CONF.183/C.1/L.3 [emphasis added].

[110] Clapham, 'The Question of Jurisdiction Under International Criminal Law over Legal Persons' (n 103) 147; Darcy (n 60) 283–284; Kai Ambos, 'Article 25 - Individual Criminal Responsibility' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Hart 2016) 986.

criminal responsibility, and the absence of the concept in some domestic legal systems of State parties, among other issues.[111]

The concepts of legal persons and, later, criminal organisations were not clearly defined. On the one hand, the concept of legal person could have potentially included NSAGs, given their limited international legal personality under IHL. On the other hand, as was mentioned *supra*, an argument was made to extend the concept of legal persons to include organisations lacking legal status. NSAGs are commonly illegal under domestic law. Consequently, NSAGs can, at the same time, be qualified as organisations with no legal status at the domestic level.[112] A similar argument can be made with regard to international law when following the perspective of scholars who do not recognise NSAGs as international legal persons, or subjects, despite their limited legal personality.[113] This could indicate that draft article 23 may initially have covered NSAGs. However, there are no further indications to that end. This differs from the criminal responsibility of corporations, which was even considered as a separate item during the discussions.[114] Furthermore, the final French proposal substituted the concept of 'legal person' in the draft Statute with 'juridical person', partly because the term 'legal' suggested a degree of inappropriate legitimacy.[115] The term juridical person was understood as being "a corporation whose concrete, real or dominant objective is seeking private profit or benefit".[116] This clearly excluded considerations for NSAGs. Eventually, any references to 'legal person', 'criminal organisation' or 'juridical person' were left out of final article 25 of the Rome Statute, which only provides for the individual criminal responsibility of natural persons.[117]

### *Concluding observations*

[111] 'Summary Records of the Meetings of the Committee of the Whole' in UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) UN Doc A/CONF.183/13 (Vol II) 133–136.
[112] Zegveld (n 18) 56–57.
[113] Brennan (n 53) 142–144.
[114] See for instance 'Summary of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996' (7 May 1996) UN Doc A/AC.249/1 26. The term 'legal persons' also appears in art 46C of the Statute of the African Court of Justice and Human Rights (2008) when referring to the Court's personal jurisdiction: which gives it the power to determine the criminal liability of corporations with no reference to other entities such as NSAGs.
[115] Clapham, 'The Question of Jurisdiction Under International Criminal Law over Legal Persons' (n 103) 152.
[116] 'Working Paper on Article 23, Paragraphs 5 and 6' (3 July 1998) UN Doc A/CONF.183/C.1/WGGP/L.5/Rev.2 para 5(d). Note that, at the outset, the various proposals concerning the prosecution of non-natural persons did not only have corporate entities in mind, but also political parties and even racist groups. Andrew Clapham, 'Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 Journal of International Criminal Justice 899, 919.
[117] Clapham, 'The Question of Jurisdiction Under International Criminal Law over Legal Persons' (n 103) 156–157. However, see art 25(3)(d) ICC Statute.

From the above discussion, it can be clearly concluded that developments in modern international criminal law and practice provide little support for the creation of a notion of collective criminal responsibility for NSAGs. Nevertheless, there have been some occasions, at both the domestic and international levels, when courts, tribunals and non-judicial mechanisms have implicitly relied on the notion that NSAGs can commit international crimes. While this did involve indirect considerations about their responsibility under international criminal norms, it did not result in establishing their criminal responsibility as such. For instance, the International Commission of Inquiry on Darfur seems to suggest that serious violations of IHRL and IHL amounting to international crimes may involve the international responsibility of NSAGs.[118] Another example can be found in the case law of the Special Court of Sierra Leone. When exploring the contextual elements of crimes against humanity, the Trial Chamber identified the RUF on several occasions as the author of attacks carried out against the civilian population.[119] Likewise, in the *Limaj* case, the Trial Chamber of the ICTY considered "the allegation of an attack against a civilian population perpetrated by a non-state actor [i.e. the Kosovo Liberation Army or KLA] with extremely limited resources, personnel and organisation".[120] Similarly, a federal class-action civil lawsuit, brought on behalf of affected Colombian families under the US Alien Tort Statute, was initiated against the corporation Chiquita for complicity in international crimes allegedly committed together with a NSAG. The case depended on proving that the protection money offered by Chiquita facilitated the commission of these crimes by the group, instead of certain named individuals.[121] In other words, the complainants needed to rely on the notion that a NSAG can commit violations of international criminal law as a group.[122]

# 4 A proposal for a new sui generis regime of international responsibility for non-state armed groups

The failure of the law of state responsibility to mitigate the existing responsibility gap, which concerns violations committed by NSAGs in international law, provides a first justification to

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[118] 'Report of the International Commission of Inquiry on Darfur' (25 January 2005) para 175.
[119] *Prosecutor v Sesay, Kallon and Gbao* (n 53) paras 944-945, 947, 953, 955-956.
[120] *Prosecutor v Fatmir Limaj Haradin Bala Isak Musliu* ICTY (Trial Judgment) IT-03-66-T (30 November 2005) para 191. For further implicit practice relating to NSAGs and crimes against humanity, see Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 300–303.
[121] *John Doe et al v Chiquita Brands International* US District Court for DNJ (2007).
[122] For a discussion of further relevant examples under the US Alien Tort Statute, see Andrew Clapham, 'Focusing on Armed Non-State Actors' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 807–808.

explore the possibility of establishing a new regime of international responsibility for NSAGs. This conclusion is reinforced by the findings of the analysis regarding the regime of individual criminal responsibility. Although the collective criminal responsibility of NSAGs could have provided a means to hold such groups responsible for their role in international crimes, and may have provided a potential legal basis to claim reparations, the analysis in this chapter has revealed a clear rejection of this possibility. As shown, the extension of international criminal law to NSAGs is, first, fraught with a variety of legal concerns over fairness, justice and conformity with the foundational principles of criminal law and, second, characterised by a lack of practice which would corroborate such an assertion. Instead of trying to find solace in the area of international criminal law, there is more merit in complementing existing initiatives, which concern the criminal responsibility of individual group members, with a new regime of international responsibility of NSAGs, which is comparable to state responsibility.[123] Such a constellation would correspond to the observation that the remedies which attach to the responsibility of collective entities and individuals are generally different: with the former leading to reparations and the latter to punishment.[124] This conclusion finds further support in the examination of international practice and legal materials, carried out in Chapter 2, and within scholarly opinion, which tend towards a responsibility regime similar to that of states, as opposed to arguing for the criminalisation of a NSAG's wrongful conduct.[125] As concluded in Section 2.2, the elaboration of the content of a future responsibility regime, particularly the duty to repair, can commence from an analogical analysis of the rules and principles concerning reparations as they are expressed in the law of state responsibility. Such an exercise can be further informed by the approaches to reparations applied within the responsibility regimes dealing with international organisations and individuals.[126]

[123] Zegveld (n 18) 58; André Nollkaemper and Harmen Van der Wilt, 'Conclusions and Outlook' in André Nollkaemper and Harmen Van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 345; Mark A Drumbl, 'Accountability for System Criminality' (2010) 8 Santa Clara Journal of International Law 373, 377; Luke Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 330; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016) 67–69; Fortin, *The Accountability of Armed Groups under Human Rights Law* (n 120) 286–307.

[124] Andre Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 International and Comparative Law Quarterly 615, 636.

[125] See Kleffner (n 43) 269; Bílková (n 1) 279; Moffett (n 123) 332; Íñigo Álvarez (n 37) 73–74.

[126] On the contrary, had the examination resulted in an affirmation of the establishment of collective criminal responsibility vis-à-vis NSAGs, it would have required, in the first place, an examination of the reparations standards developed in the field of international criminal law relevant to NSAGs.

NSAG responsibility could be conceptualised as being civil in character due to its reparatory function and by analogy with national legal systems, which generally distinguish civil from criminal responsibility. However, the author instead prefers to characterise it as a *sui generis* responsibility. This is based on two main considerations. First, the legal consequences of this form of responsibility could go beyond an obligation to make reparation. As an example, it could also entail the dismantlement of the responsible NSAG, thereby incorporating a measure of coercion or punishment, which results from the distinct nature of NSAGs. Second, state responsibility forms a unified system in international law: it neither distinguishes between degrees of liability, according to the source of the obligations breached (e.g. crime, tort, contract); nor, embodies the national law classifications of civil or criminal. This explains the characterisation of state responsibility as being "neither civil nor criminal".[127] For this reason, the notion of international responsibility cannot be simply assimilated to notions of domestic law.[128] In addition, the *sui generis* character of NSAG international responsibility is further reflected in the need to accommodate the particularities of these groups within the legal rules and principles that purport to govern such responsibility.

When devising the *sui generis* notion of collective responsibility for NSAGs, the question of perpetuating a form of collective guilt among the members of the group becomes less of a concern. Contrary to criminal justice, the obligation to repair which attaches to NSAG responsibility is not traced back to individual members' contributions to a given crime in terms of personal fault, culpability or blameworthiness. Instead, it finds its basis in the agency of the collectivity or, in other words, in the breaches of the obligations by the collective or group actor. Although members may bear divergent degrees of personal guilt, this approach provides for a measure in which group members collectively share in the remedying of harmful consequences of an internationally wrongful act perpetrated by the group they are, or were, a part of. They may also play a collective role in preventing similar harms from occurring. The distribution of costs of compensation and reconstitution of the victims is not to be equated with the distribution of guilt, and thus says nothing about a person's individual responsibility.[129] Besides their bases, the aims and nature of retributive and reparative forms of justice differ. When it comes to reparative forms of justice, instead of focusing on the punishment and condemnation of blameworthy wrongdoers, the focus lies on reconstituting or

[127] Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 421; Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 12–15.
[128] ILC Commentary to art 1 ARS 33 paras 3, 5; Crawford and Olleson (n 18) 449–452.
[129] Nollkaemper (n 55) 10–11; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn, Basic Books 2015).

remedying the harms that persons or communities have unjustly experienced, as a broader process of healing. This further underscores the distinct role of various forms of responsibility and their complementary nature. From a moral perspective, it also appears fair and right that reparative obligations are jointly incurred when the harms are caused in a group context, regardless of the extent of one's involvement.[130]

This does not nullify the possibility that a certain complementarity could exist between the criminal responsibility of an individual member and the possible international responsibility of the NSAG he or she belongs to. Both forms of responsibility could complement one another: as those bearing personal culpability cannot hide behind the collectivity, while the group or system also needs to answer for its role.[131] This approach responds to two concerns. Firstly, "if all are accountable, no one is accountable" or, as formulated by Lauterpacht, "unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one".[132] Secondly, it satisfies the call to directly address the system, i.e. a NSAG, engaged in violations of international law. This idea of turning to complementarity in the context of dealing with collective entities is not new to international law. Article 58 ARS holds that the "articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State". The ILC Commentary further clarifies that when "crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them".[133] Similarly, article 25(4) of the Rome Statute of the International Criminal Court provides that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The most discussed practical manifestation of such complementarity can be found in the *Bosnian Genocide* case. In the case, the ICJ was requested to decide on the international responsibility of Serbia, for alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide. The Court concluded that the acts of the individuals, who committed the

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[130] Thomas Franck, 'Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?' (2007) 6 Washington University Global Studies Law Review 567; Erin I Kelly, 'Reparative Justice' in Tracy Isaacs and Richard Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011).

[131] Nollkaemper and Van der Wilt (n 123) 345–347.

[132] Hersch Lauterpacht, *International Law: Being The Collected Papers of Hersch Lauterpacht*, vol 2 The Law of Peace, Part 1 International Law in General (Elihu Lauterpacht ed, Cambridge University Press 1975) 520; Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge University Press 2000) 113; Nollkaemper (n 55) 8.

[133] ILC Commentary to art 58 ARS 142 para 3. This is similarly stated with regard to international organisations, see ILC Commentary to art 3 ARIO 53 para 6 and art 66 ARIO.

crime of genocide at Srebrenica, could not be attributed to Serbia.[134] However, it did hold that Serbia "failed to comply both with its obligation to prevent and its obligation to punish genocide", consequently engaging its state responsibility.[135] In response to Serbia's argument that the nature of the Convention excludes state responsibility from its scope, the Court observed that "duality of responsibility continues to be a constant feature of international law", reflected in both the Rome Statute of the International Criminal Court and the ARS (see *supra*).[136] Such an understanding indicates that complementarity between these two forms of responsibility serves different purposes: individual criminal responsibility aims to combat impunity and punish the perpetrator, while state responsibility seeks to restore the international order to its *status quo* and repair the damage caused.[137] The argument that a similar logic can be applied to NSAGs and their individual members finds support in the work of the International Commission of Inquiry on Darfur and the Panel of Experts on Accountability in Sri Lanka, as well as in legal scholarship.[138]

# 5 Conclusions

The aim of this chapter has been to determine what the character of a future regime of international responsibility of NSAGs should be. To this end, the limitations and potential of the existing regimes of state responsibility and individual criminal responsibility have been evaluated. In light of the limitations of these responsibility regimes, it has been concluded that the responsibility of NSAGs warrants a new and separate regime in international law. It has been proposed, on the basis of this discussion, to conceptualise the international responsibility of NSAGs as being both analogous to that of states and *sui generis* in character. The latter observation refers to the new regime's characterisation as being neither civil nor criminal and to the need to accommodate the particularities of NSAGs when conceptualising such international responsibility. Accordingly, it has been determined that the elaboration of this regime of responsibility can make use of analogical legal reasoning that takes the existing

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[134] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ (Judgment) [2007] ICJ Rep 43 202–219, 237.
[135] ibid 226–229.
[136] ibid 115–117. Similarly, the ICTY held that "[u]nder current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers." *Prosecutor v Furundžija* ICTY (Trial Judgment) IT-95-17/1-T (10 December 1998) para 142.
[137] Íñigo Álvarez (n 37) 63–64.
[138] 'Report of the International Commission of Inquiry on Darfur' (n 118) para 175; UNSG (n 40) para 191; Fortin, *The Accountability of Armed Groups under Human Rights Law* (n 120) 378–379; Íñigo Álvarez (n 37) 65.

rules and principles of the law of state responsibility as a starting point, while being additionally informed by the legal rules which govern the responsibility of international organisations and individuals. The exercise of elucidating a possible duty of NSAGs to repair, as one of the legal consequences of international responsibility, will be conducted in the following chapter. The objective is to devise abstract rules that can be applied generally, while, at the same time, providing the necessary flexibility to accommodate the particularities of NSAGs. Finally, it has been argued that a certain complementarity could exist between the possible international responsibility of a NSAG and the individual criminal responsibility of its members. It is conceivable, by way of analogy with state responsibility, that these forms of responsibility could complement each other in dealing with harmful acts: by way of the distinct actors they focus on, the violations they address, and the distinct purposes they serve.

# Chapter 4
# Establishing a duty of non-state armed groups to provide reparation

## 1 Introduction

This chapter examines how a possible duty of NSAGs to provide reparation for internationally wrongful acts could be operationalised as part of a future law of international responsibility. Given that such a duty of reparation remains unsettled in international law, the examination has been carried out with a view to *lex ferenda*. It involves exploring how such a duty could be conceptualised and put into practice. The chapter starts with addressing the feasibility of holding NSAGs to a duty of reparation, while shedding light on some of the concerns that may arise with such an endeavour. This discussion forms the cornerstone of the further analysis in this chapter. The chapter then proceeds by evaluating the possible application of certain reparation standards to NSAGs under international law. Building on the conclusions of Chapter 3, the legal principles and rules on reparations in the law of state responsibility are used to draw parallels to possible standards for NSAGs. The analysis is additionally informed by the existing approaches to reparations vis-à-vis international organisations and individuals in international law and the corresponding scholarly debates. The chapter then reflects on when a NSAG could be called upon to provide reparations. The examination concludes with a consideration as to the kinds of forums within which NSAGs' duty of reparation could potentially be realised. All in all, the chapter present a multifaceted proposal for operationalising a possible duty of NSAGs to provide reparation under international law.

## 2 The feasibility of holding non-state armed groups to a duty of reparation

Although some, but certainly not all, NSAGs have state-like features, such groups do not usually have the equivalent institutional or organisational capacity as states, nor do they typically possess the same amount of resources.[1] As argued by Moffett, the "state is in the

[1] As explained by Verhoeven: "[i]nsurrectional movements will not be as sophisticated and bureaucratically organized as States, but they need a minimal, hierarchical organization, required to fight in a non-international armed conflict." Sten Verhoeven, 'International Responsibility of Armed Opposition Groups: Lessons from State

most appropriate position to carry out reparations as it has the capacity, through its institutions, and the resources to provide effective remedies to victims”.[2] Correspondingly, scholars have pointed out that NSAGs may lack the capacity to provide reparations to those victimised by their internationally wrongful acts.[3] This has also been partly recognised by the International Center for Transitional Justice, which, on the one hand, recommended that the rebel groups active in Darfur should acknowledge responsibility for the violations committed by their forces and ensure that these violations cease and, on the other, held that “it is usually not feasible to hold armed groups, whether pro or anti-government, directly accountable for reparations”.[4] Atrocities committed by these groups during situations of NIAC can result in a vast and complex universe of victims. Such a reality could easily overwhelm the practical capabilities of NSAGs to make reparation, potentially leaving most claims without any prospect of success. Groups may, for instance, be indigent or lack the monetary resources to even contribute in a significant manner to measures of redress. Such concerns are not surprising and are certainly not new. They have also been voiced in the academic debates on the duty of reparation for other non-state actors, i.e. individuals and international organisations.[5] Similarly, the capabilities of states concerning reparations have been taken as a common benchmark.[6]

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Responsibility for Actions of Armed Opposition Groups’ in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 299; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016) 172. See also Chapter 3 Section 2.2.

[2] Luke Moffett, ‘Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda’ in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 325.

[3] Rose argues e.g. that “victims of atrocities committed by rebel groups are typically unable to obtain reparations directly from their perpetrators” because “members of rebel groups are generally not capable of providing their victims with reparations for the harm they have caused”, among other reasons. Cecily Rose, ‘An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors’ (2010) 33 Hastings International and Comparative Law Review 307, 309–310. See also Ron Dudai, ‘Closing the Gap: Symbolic Reparations and Armed Groups’ (2011) 93 International Review of the Red Cross 783, 785–786; Moffett, ‘Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda’ (n 2) 334.

[4] ICTJ, ‘Providing Meaningful Reparations to Victims’ (2009) 2.

[5] Natalia Szablewska, ‘Non-State Actors and Human Rights in Non-International Armed Conflicts’ (2007) 32 African Yearbook of International Law 345, 356.

[6] In relation to individuals, see Octavio Amezcua-Noriega, ‘Reparation Principles under International Law and Their Possible Application by the International Criminal Court: Some Reflections’ (2011) Reparations Unit, Transitional Justice Network, Briefing Paper No 1 8; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 4; Moffett, ‘Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda’ (n 2) 329–330. Concerning international organisations, see art 40 ILC, Articles on the Responsibility of International Organizations with Commentaries, Yearbook of the International Law Commission (2011) Vol II Part Two (ARIO); Alain Pellet, ‘International Organizations Are Definitely Not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations’ in Maurizio Ragazzi (ed), *Responsibility of International Organizations* (Martinus Nijhoff Publishers 2013) 49–53.

The capacity of NSAGs to provide certain measures of reparation, or to collectively engage in a reparation mechanism, may also differ significantly across such groups. These capabilities necessarily tie in with a specific group's level of organisation and resources. NSAGs may "range from hierarchically complex, well-financed armed groups that exercise control over large swathes of territory at one extreme, to minimally organized, poor, and mobile groups at the other".[7] Moreover, a group's level of organisation may also fluctuate over the course of time. As indicated by Íñigo Álvarez, a NSAG can have a more rudimentary organisation at the beginning of an armed conflict and become more sophisticated in later years, or vice versa.[8] Still, a NSAG must retain a minimum organised structure to be considered a party to the armed conflict and, hence, be recognised as a subject of international law.[9] Additionally, the organisational structure of a NSAG may mutate, fragmentise, be absorbed into another group, or even dissolve.[10] The unstable and temporary nature of NSAGs may render it difficult to bring reparation claims against the very group that is responsible.[11] Hence, the overall capacity of a NSAG to fulfil a duty to provide reparation may vary significantly in comparison to other groups, may shift over time and may even be rendered infeasible in practice. Besides questions of organisational and resource capacity, NSAGs may also simply lack the will to provide reparation, which could result in, e.g., hiding or laundering their assets, misusing public apologies as a technique of denial of responsibility, or even a complete lack of engagement.[12]

Although reparations from NSAGs may not be feasible in all cases, Dudai argues that it is wrong to assume that they will simply never be feasible.[13] He convincingly shows, on the basis of an analysis of reparation processes involving the African National Congress (ANC) in

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[7] ICRC, 'Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report' (2015) 33.

[8] Verhoeven (n 1) 299; ICRC, 'The Roots of Restraint in War' (2018) 24.

[9] Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (Intersentia 2020) 87–88. See also Chapter 1.

[10] ILA Committee on Non-State Actors, 'Washington Conference Non State Actors' (2014) 10; Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' (n 2) 334.

[11] Jann K Kleffner, 'The Collective Accountability of Organized Armed Groups for System Crimes' in Andre Nollkaemper and Harmen Gijsbrecht van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 265; Zakaria Daboné, *Le Droit International Public Relatif Aux Groupes Armés Non Étatiques* (Schulthess 2012) 192–193.

[12] Dudai (n 3) 785; Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' (n 2) 334; UNGA, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (12 July 2019) UN Doc A/74/147 para 23.

[13] See also Paloma Blázquez Rodríguez, 'Does an Armed Group Have an Obligation to Provide Reparations to Its Victims? Construing an Obligation to Provide Reparations for Violations of International Humanitarian Law' in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations* (Brill Nijhof 2018) 415.

South Africa and the Irish Republican Army (IRA) in Northern Ireland, that "at least in some cases, and in relation to at least some forms of reparations, it would indeed be feasible to discuss the question of reparations from armed groups".[14] Moffett comes to a similar conclusion on the basis of his study of the state practice of holding NSAGs responsible for reparations in Northern Ireland, Colombia and Uganda. He concludes that while there may be difficulties in ensuring that NSAGs can fulfil their obligation, it is apparent from the case studies that they can still take a significant role in ensuring effective remedies for victims.[15]

All in all, the discussion indicates that there is a need to develop an international legal framework that accommodates the varying degrees of organisational capacity amongst NSAGs, and their differences in comparison to states. To this end, possible secondary rules and principles concerning reparations should be designed in such a way as to ensure that they could be applied to all types of NSAGs and in all situations. Thus, as was concluded in Section 2.2 of Chapter 3, the challenge is to come to abstract rules that allow for this required flexibility.[16] Ultimately, an approach should ensure the concrete application of the imposed obligations and avoid the creation of legal fictions.[17] Put differently, it should render the international legal framework realistic, while preventing the emergence of a schism between the normative framework itself and the facts on the ground.[18] Additionally, victims may not only face difficulties in obtaining reparations from NSAGs due to their limited or lack of capacity, but they may also be faced with a lack of willingness on the part of NSAGs. Both issues call for the incorporation of a mechanism in the proposed legal framework that guarantees, to the greatest extent possible, the provision of redress to the victims.

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[14] Dudai (n 3) 786.

[15] Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' (n 2) 345.

[16] Compare to the approach taken in the ARIO in response to the diversity of international organisations: "[i]nternational organizations within the scope of the present articles are significantly varied in their functions, type and size of membership and resources. However, since the principles and rules set forth in the articles are of a general character, they are intended to apply to all these international organizations, subject to special rules of international law that may relate to one or more international organizations. In the application of these principles and rules, the specific, factual or legal circumstances pertaining to the international organization concerned should be taken into account, where appropriate." See ILC Commentary to art 2 ARIO 51 para 15.

[17] Antonio Cassese, *International Law* (2nd ed., Oxford University Press 2005) 12–13; Salvatore Zappalà, 'Can Legality Trump Effectiveness in Today's International Law?' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 106; Taki Hiroshi, 'Effectiveness' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) para 1.

[18] As put by Íñigo Álvarez: "[a]ny potential system of responsibility will need to take into account these structural differences [between NSAGs] in order for such a framework to be realistic." Íñigo Álvarez (n 9) 67; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 242.

# 3 The need for a cascading regime of responsibility for reparation

A central element of the concept of reparation is the intrinsic relation that exists between responsibility for internationally wrongful acts and the duty of the responsible actor to provide reparation.[19] This finds its expression in a fundamental principle of law that holds that those responsible for causing injury should repair it.[20] This is expressed in the case law of the Permanent Court of International Justice, which conceptualises reparation as the indispensable complement of a failure to comply with an international obligation by affirming that "any breach of an engagement involves an obligation to make reparation", and is also found in myriad other international legal sources.[21] The law of state responsibility follows this understanding, by conceptualising the general obligation of reparations as "the immediate corollary" of a state's responsibility or, in other words, as an obligation of the responsible state resulting from the breach.[22] The ARIO reproduces this approach to reparation.[23] The same intrinsic relationship is also reflected in the reparations orders of the International Criminal Court, which are "intrinsically linked to the *individual* whose criminal liability is established in a conviction".[24] Accordingly, one of the main purposes of reparations is to "oblige those responsible for serious crimes to repair the harm they caused to the victims".[25] More broadly, this is said to ensure that offenders account for their acts.[26] This conception of

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[19] Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' (n 2) 324; Blázquez Rodríguez (n 13) 416–417; Íñigo Álvarez (n 9) 159.

[20] As discussed in Chapter 2 Section 2.1, this constitutes a fundamental legal principle in domestic legal systems and has gained a firm basis in international law. Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 452; UNOHCHR, 'Rule-of-Law Tools for Post-Conflict States: Reparation Programmes' (2008) 6; Liesbeth Zegveld, 'Victims' Reparation Claims and International Criminal Courts: Incompatible Values?' (2010) 8 Journal of International Criminal Justice 79, 81; Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 13; Íñigo Álvarez (n 9) 159, 161.

[21] *Case concerning the Factory at Chorzów (Germany v Poland)* PCIJ (Merits) [1928] PCIJ Rep Series A No 17 29. See also Chapter 2 Section 2.1.

[22] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission (2001) Vol II Part Two (ARS) art 31, 91 para 4. That every internationally wrongful act of a state entails its international responsibility and gives rise to a new international legal relationship, involving an obligation to repair, has been widely recognised both before and since the work of the ILC in this area. While there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act, it appears that this inherent relation between responsibility and reparation was a common feature. ILC Commentary to art 1 ARS 33 para 3; Hans Kelsen, *Principles of International Law* (Rinehart & Company 1952) 22.

[23] Art 31 ARIO holds that "[t]he responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

[24] *Prosecutor v Thomas Lubanga Dyilo* ICC (Judgment on the Appeals against the "Decision establishing the Principles and Procedures to be applied to Reparations" of 7 August 2012) ICC-01/04-01/06-3129 (3 March 2015) para 65.

[25] ibid para 58.

[26] ibid.

the duty to repair, resulting from breaches of international law, has profound historical roots, such as in the natural law principle of *neminem laedere* (to injure no one) and the ancient principles of corrective justice.[27] From this intrinsic relationship between responsibility and the duty to repair, which characterises the concept of reparation, it logically follows that the violator of an international norm, i.e. the responsible actor, should bear the primary duty to provide reparation.

Correspondingly, a strong argument can be made that a NSAG should bear the primary duty to provide reparation for its own wrongful conduct in international law. Such a proposition should not be deemed controversial, since it follows established principles in international law, as has been previously demonstrated.[28] Furthermore, ensuring there is a close and visible link between reparation and responsibility can appropriately redirect blame towards those responsible and relieve the guilt that survivors often feel.[29] Consequently, it can play an important role in a person's healing process. From the perspective of the responsible actor, the act of providing reparation can help symbolise the perpetrator's commitment to apologise, make amends and take responsibility.[30]

That being said, and as previously discussed in Section 2, NSAGs may lack the organisational capacity or resources to provide reparations as a collectivity, may only be capable of fully or partly contributing to certain forms of reparation, or might simply cease to exist. In addition, others may be unwilling to take up responsibility for remedying the past. Consequently, a future regime of responsibility should not make the provision of reparations solely dependent upon such actors or, in other words, upon their practical capabilities or arbitrary willingness.[31] This was also made apparent within some of the legal materials examined in Chapter 2.[32] Such challenges should inform the design of this responsibility regime for NSAGs, with a

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[27] *Separate Opinion of Judge Cançado Trindade in the Case of Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* ICJ [2018] ICJ Rep 15 paras 9-11; David Daiches Raphael, *Concepts of Justice* (Oxford University Press 2001) 49–50; M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Human Rights Law Review 203, 207 (n 13 for historical references); Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in Cheryl Lawther, Luke Moffet and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 378.

[28] See also UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by UNGA Res 60/147 on 16 December 2005 (21 March 2006) UN Doc A/RES/60/147 (UN Basic Principles and Guidelines) principle 15; Bassiouni (n 27) 274–275.

[29] Heidi Rombouts, Pietro Sardaro and Stef Vandeginste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights' in Koen de Feyter and others (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 487.

[30] Brandon Hamber, 'Narrowing The Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 566–567.

[31] Íñigo Álvarez (n 9) 204.

[32] See Section 5 of Chapter 2.

view to ensuring that effective reparation is offered to all victims, regardless of the identity of the perpetrator.[33]

Such considerations are reflected within the legal frameworks which govern the duty of other non-state actors to provide reparation. The ARIO includes, for instance, an obligation for the members of a responsible organisation to enable the organisation to fulfil its obligation to provide reparation.[34] Similarly, the reparations scheme of the International Criminal Court assigns a subsidiary role to the Trust Fund for Victims where the convicted person's resources are insufficient to satisfy the reparations order.[35] To this end, the Trust Fund can, amongst other capabilities, raise funds and gather voluntary contributions.[36] The fact that those convicted by the International Criminal Court (who were all members of NSAGs) have been declared indigent in all reparations orders issued thus far proves the Fund's vital importance for victims' redress.[37] This practically illustrates that reparations cannot be fully dependent upon individual perpetrators alone.[38]

In line with the underlying rationale of these approaches, the UN Basic Principles and Guidelines assign a subsidiary role to the state with a view to mitigating the difficulties that the provision of reparation by a NSAG may experience: i.e., due to the group's lack of capacity or willingness. Principle 15 holds that "where a person, a legal person or other entity

[33] UN Basic Principles and Guidelines principles 3(c)-(d), 8 and 11(b).

[34] Art 40(2) ARIO; Paolo Palchetti, 'Exploring Alternative Routes: The Obligation of Members to Enable the Organization to Make Reparation' in Maurizio Ragazzi (ed), *Responsibility of International Organizations* (Martinus Nijhoff Publishers 2013); Pellet (n 6) 49–53.

[35] The possibility of holding the state responsible for reparations when a convicted individual is indigent did not make it into the final version of the ICC Statute. See Luke Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?' (2017) 21 The International Journal of Human Rights 1204, 1205.

[36] Arts 75(2), 79 ICC Statute; Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, ICC-ASP/1/3/ and Corr.1, part II.A (2002) Rule 98; Christoph Sperfeldt, 'Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court' (2017) 17 International Criminal Law Review 351, 375–376. E.g. in the *Lubanga* case, Trial Chamber II instructed the Trust Fund to contact the government of the Democratic Republic of the Congo to explore how it might contribute to the reparations process, while calling attention to the donation made by the Netherlands to help fund the reparations award in the *Katanga* case, so as to encourage similar initiatives. *Prosecutor v Thomas Lubanga Dyilo* ICC (Corrected Version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable") ICC-01/04-01/06 (21 December 2017) para 299-300.

[37] *Prosecutor v Thomas Lubanga Dyilo* ICC (Decision Establishing the Principles and Procedures to Be Applied to Reparations) ICC-01/04-01/06-2904 (7 August 2012) para 269, 277; *Prosecutor v Germain Katanga* ICC (Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728 (24 March 2017) para 327; *Prosecutor v Ahmad Al Faqi Al Mahdi* ICC (Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 113; *Prosecutor v Bosco Ntaganda* ICC (Reparations Order) ICC-01/04-02/06 (8 March 2021) para 254; Miriam Cohen, *Realizing Reparative Justice for International Crimes: From Theory to Practice* (Cambridge University Press 2020) 138–139, 141, 146–147.

[38] Íñigo Álvarez (n 9) 177. As held by the African Court on Human and Peoples' Rights, "[t]hese two types of potential violators [i.e. states and individuals] have substantially different capacities to provide reparations. […] An individual […] is limited to a more restricted set of reparations". African Court on Human and Peoples' Rights, 'Comparative Study on the Law and Practice of Reparations for Human Rights Violations' (2019) 13.

is found liable for reparation to a victim, such a party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim". Principle 16 adds that "States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations." As concluded by Moffett, this recognises that a NSAG has a duty to provide reparation, whilst the state holds a subsidiary role when the group is unable or unwilling to meet its obligation. It ultimately ensures that victims have access to a remedy either way.[39] A similar approach has been included in other legal materials, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Chicago Principles.[40] Furthermore, this approach is not voided by examples of international practice and enjoys support in legal scholarship.[41]

Following this approach, a territorial state could bear a subsidiary responsibility to provide reparations for the wrongful acts of a given NSAG: as a matter of law[42] or, at least, out of a sense of morality (e.g. social or human solidarity, basic fairness, common good), when the responsible group is unable or unwilling.[43] This could be done by, for instance, creating a special trust fund, administrative reparations programme, or introducing a dedicated line in

[39] Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' (n 2) 331.

[40] "When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation." See UNGA, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by UNGA Res 40/43 of 29 November 1985 (29 November 1985) UN Doc A/RES/40/34 para 12. Principle 3.3 concerning "reparations by non-state actors" of the Chicago Principles on Post-Conflict Justice holds that "(w)here non-state actors are responsible for violations, they should provide reparations to victims. Where these actors are unable or unwilling to meet their obligations, states should assume this responsibility, especially where a state was either partially complicit or failed to take adequate preventative action."

[41] See 'Report of the International Commission of Inquiry on Darfur' (25 January 2005) paras 590–592; Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' (n 2) 335 (he discusses Colombia and Uganda as examples of state practice); Francesca Capone, *Reparations for Child Victims of Armed Conflict* (Intersentia 2017) 102–103 ("whenever such groups are not able to comply with this obligation States should intervene to ensure that victims receive redress"); Blázquez Rodríguez (n 13) 428 ("the state always needs to have a subsidiary role and ensure an effective remedy to the victims"); Joint Statement by Independent United Nations Human Rights Experts* on Human Rights Responsibilities of Armed Non-State Actors (25 February 2021).

[42] It remains unclear, in both practice and legal scholarship, to what extent a state should substitute a possible NSAG duty to repair as a matter of law. See Bassiouni (n 27) 223; Rose (n 3); Konstantinos Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework of Obligations, and Rules on Accountability* (Ashgate 2016) 135; Annyssa Bellal, 'Non-State Armed Groups in Transitional Justice Processes: Adapting to New Realities of Conflict' in Roger Duthie and Paul Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 243.

[43] The term 'territorial state' is used to refer to the state on whose territory the NIAC takes place. Under Common Art 3, a NIAC can take place among NSAGs themselves. Hence, a territorial state is not necessarily the adversarial party in all NIACs. Lisa Magarrell, 'Reparations in Theory and Practice' (ICTJ 2007) 10–11.

the yearly national budget.[44] Such an approach reflects the prevailing reality within the majority of conflict and post-conflict situations, namely that reparations cannot be provided through perpetrators alone: thereby, necessitating the application of a comprehensive approach to reparations in order to address the full range of needs.[45] Additionally, the international community could provide further assistance in particularly weak and resource scarce states through, for instance, an international trust fund for victims of NSAGs' violations.[46] The redress offered by third actors must be accompanied by an acknowledgment of victimhood in order to ensure its reparative nature and to distinguish it from humanitarian assistance, development or other initiatives.[47]

From these observations emerges a *cascading regime of responsibility for reparation*: the responsible NSAG bears the principal duty to provide reparation, possibly complemented by the individual responsibility of group members;[48] the territorial state incurs a subsidiary responsibility, to the extent that the group is unable or unwilling to provide reparation; and, the international community takes a potential additional role. In practice, the subsidiary responsibility of the state may be enlivened as a complement to the partially exercised responsibility of the NSAG. This might be the case when a group has the capacity to contribute to the provision of reparations, but cannot do so fully (see further Section 4.1).

This proposed scheme sheds some clarity on the potential relationships that could exist between the direct responsibility of a NSAG and the responsibility of other actors. Such a cascading regime would ensure that a NSAG does not evade its obligations towards the victims, and that the effective reparation of victims is still guaranteed to a greater extent.

[44] UN Basic Principles and Guidelines principle 16; UNOHCHR (n 20) 32; UNSG, 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) 119, 122; Blázquez Rodríguez (n 13) 424–425.

[45] Luke Moffett and others, 'Alternative Sanctions Before The Special Jurisdiction For Peace: Reflections on International Law and Transitional Justice' (Reparations, Responsibility & Victimhood in Transitional Societies 2019) para 141.

[46] With regard to reparations for violations committed by NSAGs, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions suggested that an option is for the international community to step in, having recognised a victim's right to reparation irrespective of the perpetrator's identity. It was recommended to states, under the auspices of the UN or other international process, to established trust funds to ensure reparations for victims of NSAGs. UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (5 June 2018) UN Doc A/HRC/38/44 paras 92, 100(a).

[47] Rombouts, Sardaro and Vandeginste (n 29) 466.

[48] See Chapter 3 Section 4.

# 4 Conceptualising a duty of non-state armed groups to provide reparation

## 4.1 A proposal for an actor-specific approach

The adequate forms of reparation required in a given case are determined on the basis of the nature of the violation and the resulting harm that was caused, which consequently frame the duty to provide reparation.[49] This exercise does not take the type of responsible entity into consideration.[50] Nevertheless, the ARS do allow some flexibility in how full reparation is to be achieved, by introducing elements of equity and reasonableness. As will be discussed further in Section 4.2, restitution should, for instance, not result in a burden on the wrongdoer which is out of all proportion to the benefit obtained by the injured party.[51] As Ferstman correctly points out, this does not go as far as granting the possibility of restricting the quantum or quality of reparation owed when it merely proves to be difficult for the wrongdoer to comply.[52]

However, it is proposed that the concrete application of a possible duty of reparation to a responsible NSAG could still take account of that group's organisational capacity to deliver the required forms of redress. Although this proposal diverges from the law of state responsibility, it finds support in the current legal regulation of the conduct of NSAGs party to armed conflicts under the primary rules of international law. The examination in Chapter 1 identified several elements that could equally inform the conceptualisation of NSAGs' possible international responsibility. More specifically, it has been shown that the scope and/or content of the primary obligations of a NSAG under IHL and IHRL are not identified in an abstract manner. Instead, these obligations are determined on the basis of an evaluation of the group's level of organisation to ensure its normative capacity. More concretely, a greater body of obligations would bind a NSAG which exercises quasi-governmental authority in a certain part of the territory, compared to a group which holds a minimum level of organisation, sufficient for the sole application of Common Article 3 and potentially some core human rights norms. Consequently, this indicates that a different range of primary obligations may bind NSAGs, even though they belong to the same category of subjects of

[49] *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* ICJ (Judgment) [2004] ICJ Rep 12 para 119; UNGA, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence - Note by the Secretary-General' (14 October 2014) UN Doc A/69/518 para 31; African Court on Human and Peoples' Rights (n 38) 2.

[50] Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press 2017) 68, 84. See e.g. *Prosecutor v Bosco Ntaganda* (n 37) paras 97-98, 223.

[51] ILC Commentary to art 34 ARS 96 para 5.

[52] Ferstman (n 50) 90.

international law. Fundamentally, this international legal framework shows a clear sensitivity towards ensuring the reasonable feasibility of a group to fulfil its imposed obligations.

Building on these findings, a similar approach could be taken to the possible obligations that arise for NSAGs under the secondary rules of international law. More specifically, a proposal is made for *an actor-specific approach* to the application of a duty of reparation to a NSAG in a given case. This entails that a case-specific evaluation is made of the level of organisation and resources of a responsible group, as indicators of its organisational capacity to comply with the imposed duty. The objective of this evaluation is to determine the concrete scope of the NSAG's duty of reparation. It would not require the group to accept the determination as being valid or applicable.

Such an evaluation would consider two interrelated aspects, both of which concern the scope of the NSAG's duty to repair:

The first aspect concerns the range of reparation forms which have been ordered against the responsible group in an effort to accomplish *restitutio in integrum*. Under the proposed approach, an evaluation would help determine which of the ordered forms of reparation could actually be provided for by the NSAG.  For instance, a NSAG which holds a limited degree of organisation and hardly any resources may have been ordered to provide satisfaction and monetary compensation; however, an evaluation made under the actor-specific approach might reveal that, due to its lack of capacity, the NSAG is unable to provide for both. As such, the NSAG might be primarily obliged to provide the ordered measures of satisfaction (e.g. a public apology), as they require less capacity, and their provision is within the NSAGs capabilities. As will be demonstrated, this approach is contingent on the state stepping-in to ensure *restitutio in integrum*.

The second aspect concerns the conduct which is required to deliver a particular form of reparation or, indeed, full reparation. In this regard, when a NSAG it is not capable of fully satisfying the reparation ordered against it, the group could be required to contribute to, or at least facilitate, the provision of reparation by states or other actors. Mégret makes a similar argument with regard to symbolic reparations and guarantees of non-repetition afforded by responsible individuals. He holds that certain forms of symbolic reparation may be beyond the capacity of individuals. However, this does not mean that individuals cannot help in bringing such reparation to fruition. For example, although individuals might not be ordered to search for the whereabouts of the disappeared altogether, they could still assist in that process by sharing information on the matter. The same holds for guarantees of non-repetition; while no individual could be made wholly responsible for non-repetition, an individual could still

contribute to maximising the chances of non-repetition (e.g. a convicted head of state that still retains significant influence with a part of the population).[53] Such reasoning is deemed equally relevant for NSAGs. While a responsible group may not be capable of providing rehabilitative services to victims residing within its area of territorial control, it could at least facilitate the delivery of such services by other actors: for example, by providing service providers access to the territory.[54] A group could also contribute to providing satisfaction to victims by disclosing information on certain violations, which could be instrumental in a truth-seeking process. This is different to ordering the group to conduct such a process in its entirely.[55] All in all, the proposed approach takes account of NSAGs' varying capabilities and thus results in a differentiated application of the duty to repair to such groups.

As briefly raised, the viability of this actor-specific approach proposal is dependent on a crucial condition: that the various forms of reparation ordered, so as to secure full reparation or *restitutio in integrum*, are guaranteed by the subsidiary responsibility of the territorial state. In this conception, the territorial state would be prompted to contribute to the extent that the responsible NSAG lacks capacity (see Section 3). Hence, the fundamental rule of full reparation would be upheld by way of a division of responsibility between the NSAG and the state.[56] The justification for this proposed approach lies in the need to develop a realistic normative framework, that reasonably ensures the effectiveness of the reparation obligations imposed upon a NSAG. This requires accommodating concerns over divergent capabilities of a NSAG, in comparison to states and other groups.[57] Similar to the primary rules of international law, the proposed differentiated approach, based on organisational capacity, allows for a matching of the international legal framework with realities on the ground. It thereby responds to such concerns.[58]

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[53] Frédéric Mégret, 'The International Criminal Court Statute and the Failure to Mention Symbolic Reparation' (2009) 16 International Review of Victimology 127, 137–138.

[54] UN Basic Principles and Guidelines principle 21 states that "[*r*]*ehabilitation* should include medical and psychological care as well as legal and social services." Kleffner and Zegveld make the same argument, see Jann K Kleffner and Liesbeth Zegveld, 'Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law', *Yearbook of International Humanitarian Law*, vol 3 (2000) 400.

[55] UN Basic Principles and Guidelines principle 22(b) states that "[v]erification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations".

[56] See further Section 4.2.

[57] See Section 2

[58] This idea is expressed in the principle of effectiveness, which "ultimately represents the foundation of any legal system since all legal orders presuppose the real ability of their rules to apply concretely". See Zappalà (n 17) 106. According to Sassòli, "[a]ll law has to take into account, as closely as possible, the social reality it seeks to govern. […] we have therefore in my view to check whether an armed group having the necessary will is able to comply with the rule found, without necessarily losing the conflict. If this is not the case for a certain rule, such a rule will not be complied with and it will undermine the credibility and protecting effect of other rules".

The notion that a NSAG's organisational capacity determines the extent to which it is concretely bound to provide reparation raises the question as to which indicia could be used to evaluate such capacity in a given case. The case law of the ICTY has identified a number of indicative factors, which assist in evaluating the organisation requirement under IHL. It is conceivable that some of these could be of use as evaluative indicia. The group of factors which indicate that a group is able to speak with one voice could, for example, indicate a group's capacity to authoritatively provide public apologies or acknowledge collective responsibility.[59] Similarly, factors which signal the presence of a command structure could be indicators of the ability of a group to implement guarantees of non-repetition among its members, e.g., by issuing and disseminating internal regulations.[60] Further research is needed on the specific forms of reparation and the different organisational capacities that are required for a NSAG to provide them. Dudai has, for instance, identified organisational features, such as internal cohesion, discipline and strong leadership, which he views as being vital factors for the feasibility of a NSAG's engagement in measures of truth-recovery and symbolic reparation.[61] Kleffner and Zegveld have argued, in their turn, that credible rather than illusory reparative measures should be ordered against NSAGs. With regard to monetary compensation, this could entail that the economic position of the group is taken into account.[62]

All in all, the proposed actor-specific approach facilitates the development of a legal framework which is capable of governing a possible duty of NSAGs to repair; the framework consists of abstract rules and principles that in their application to a responsible group allow for certain flexibility, which assists in accommodating the specificities of the case at hand. As a result, the entire range of reparation forms, that may be situationally required to deliver full reparation, can be applied to wrongful conduct committed by all types of NSAGs. This approach differs from proposals suggested by other authors, who have emphasised certain forms of reparation that supposedly come closer to the objective capabilities of NSAGs.[63]

As mentioned, the proposed approach accommodates all types of NSAGs, from highly organised groups which exercise control over a territory with state-like institutions, to groups which maintain a minimum level of organisation. As such, the approach differs from the

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Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 Journal of International Humanitarian Legal Studies 5, 15–16.

[59] *Prosecutor v Boškoski and Tarčulovski* ICTY (Trial Judgment) IT-04-82-T (10 July 2008) para 203.

[60] ibid para 199.

[61] Dudai (n 3) 797–798.

[62] Kleffner and Zegveld (n 54) 399.

[63] See e.g. Mastorodimos (n 42) 127; Blázquez Rodríguez (n 13) 417–422.

tendency, within international law, to emphasise the international responsibility of groups with territorial control or state-like characteristics. A broader approach is thus taken in this study.[64] This position is supported by several arguments. In the words of the Permanent Court of International Justice, "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation is therefore the indispensable complement of a failure to apply a convention".[65] From such a strict legal perspective, it would appear illogical that NSAGs lacking territorial control would be exempt from a duty to make reparation when violating their primary obligations under Common Article 3, contrary to those groups that are also bound by Additional Protocol II. Because the door to reparation would potentially be opened in respect of less organised NSAGs, practical capacity concerns could be raised where such groups have only very minimal levels of organisation. Yet, the proposed approach responds directly to these concerns, e.g., by only obliging a NSAG to contribute to a specific selection, or portion, of the ordered forms of reparation, while the subsidiary responsibility of the state is triggered. Furthermore, this broad approach prevents the potential opening of a responsibility gap when a NSAG no longer holds territorial control. Such a situation would otherwise provoke the question 'can such a group still be held to its duty to make reparation or does it no longer fall within the law of international responsibility?' As was discussed in Section 2, a group's level of organisation is not necessarily stable and may considerably fluctuate over the course of an armed conflict. Finally, it is morally unfair to create unequal legal treatment concerning reparation between the victims of different types of NSAGs. The actor-specific approach has the potential to avoid this situation.

### 4.2 The principle of full reparation

As formulated by the ICJ, "it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act".[66] This principle of full reparation or *restitutio in integrum* demands that "reparations must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act

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[64] See Chapter 2 Section 5.
[65] *Case Concerning the Factory at Chorzów (Germany v Poland)* PCIJ (Jurisdiction) [1927] PCIJ Rep Series A No 9 21. See also Chapter 2 Section 2.1.
[66] *Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda)* ICJ (Judgment) [2005] ICJ Rep 168 para 259. See also *Factory at Chorzów Case (Jurisdiction)* (n 65) 21: "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form".

had not been committed".[67] The principle can be found in articles 31 and 34 of the ARS and ARIO respectively, as well as in principle 18 of the UN Basic Principles and Guidelines. Following this standard, the obligation to make full reparation is presented in the law of responsibility as one of the main legal consequences arising from the commission of an internationally wrongful act.[68] However, the principle has been interpreted in different ways. The ARS place the emphasis on restitution and compensation, whereas certain human rights instruments and bodies have taken a broader approach to achieving full reparation.[69]

As the discussion in Section 2 reveals, the application of this core principle to NSAGs may face significant challenges. These arise from differences in capacity between NSAGs and states. A NSAG may lack the necessary capacity to implement the full range of reparation measures required to restore the *status quo ante*. At the same time, similar concerns have been voiced in relation to states. Roht-Arriaza notes that there is "a basic paradox at the heart of reparations", given that the objective of full reparation is impossible to reach in practice: what could replace the loss of a loved one, or a whole family; a generation of friends; the destruction of one's home, culture and community?[70] Accordingly, there is a general recognition among scholars that this standard is difficult to satisfy, even for states, especially where cases concern serious or massive violations.[71] That being said, states will usually be better equipped to provide for reparations in comparison to NSAGs. They have, for instance, the power to raise taxes, the ability to reserve a line in the national budget for reparation and, often, the institutional capacity to set up sophisticated reparation programmes.[72]

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[67] *Factory at Chorzów Case (Merits)* (n 21) 47; *Case of Velásquez Rodríguez v Honduras* IACtHR (Judgment Merits) Series C No 4 (29 July 1988) para 166; *Papamichalopoulos v Greece (Article 50)* ECtHR (Judgment) Series A No 330-B (31 October 1995) para 36; *Scordino v Italy (No 1)* ECtHR (Judgment) App No 36813/97 (29 March 2006) paras 246-247.

[68] ILC Commentary to art 31 ARS 91 paras 1-3. In the ARIO, "the principle of full reparation is not put in question". See ILC Commentary to art 31 ARIO 77 para 3.

[69] Arts 34-37 ARS; UN Basic Principles and Guidelines principles 18-23; *Factory at Chorzów Case (Merits)* (n 21) 47. Compare the comprehensive approach to reparations taken in the Inter-American Human Rights System with the narrower approach of the European Human Rights System Jo Pasqualacci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2013) 188–250; Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) 29 European Journal of International Law 1091, 1099–1100.

[70] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International and Comparative Law Review 157, 158.

[71] See Jemima García-Godos, 'Victim Reparations in the Peruvian Truth Commission and the Challenge of Historical Interpretation' (2008) 2 International Journal of Transitional Justice 63, 66; Evans (n 6) 29; Shelton (n 20) 34.

[72] Pellet has made similar observations when comparing states and international organisations. Such organisations "can cause enormous damages (for example, if the launching by an international organization of a nuclear propulsion rocket fails, or within the framework of a peace-keeping operation) and, in no case, could the organization be in a position, concretely, to make full reparation, out of its own resources, for any injury thus caused". Pellet (n 6) 49–50.

Despite the associated practical difficulties, a lack of capacity does not provide a sufficient justification to exempt a responsible NSAG from the well-established principle of full reparation.[73] Allowing for such an exemption would result in a lower standard for NSAGs and unequal treatment between the victims of these groups and the victims of states. Instead, full reparation should remain the rule. The actor-specific approach, detailed in the previous section, would provide a tool to respond where a NSAG does not hold the capacity to provide the required forms of reparation, or where it can only contribute to a certain extent. Moreover, in such cases, the cascading regime of responsibility for reparation would ensure that the territorial state would complement the efforts of the NSAG, insofar it lacks capacity, in a subsidiary manner; thereby ultimately securing full reparation, at least to a greater extent than would otherwise be possible.[74] At the same time, the provision of certain forms of reparation cannot be substituted by the state. Examples include acknowledgment of the facts and public apologies by the responsible group. As such, the role of the NSAG would prove indispensable in attaining full reparation.[75]

The ILC Commentary to article 34 ARS notes, that concerns have been raised that the principle of full reparation may lead to disproportionate requirements for responsible states. In the ARS, the principle of proportionality is addressed within each form of reparation: e.g. restitution is excluded when it involves a burden out of all proportion to the benefit gained by the injured party, while satisfaction must “not be out of proportion to the injury”.[76] An analogous application of these state-centric considerations in respect of NSAGs, would prevent a duty to provide full reparation from becoming a disproportionate burden. Where a burden is disproportionate, it might discourage groups from engaging in reparation mechanisms.[77] Moreover, disproportionality could potentially go so far as to result in punitive damages, which is a concept not recognised in international law.[78]

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[73] The ILC argued in a similar manner, with regard to international organisations, that “[i]t may be difficult for an international organization to have all the necessary means for making the required reparation. This fact is linked to the inadequacy of the financial resources that are generally available to international organizations for meeting this type of expense. However, that inadequacy cannot exempt a responsible organization from the legal consequences resulting from its responsibility under international law.” ILC Commentary to art 31 ARIO 77 paras 3-4.

[74] See Section 3.

[75] Íñigo Álvarez (n 9) 197.

[76] ILC Commentary to art 34 ARS 96 para 5. The principle of proportionality is also included in principle 15 of the UN Basic Principles and Guidelines, which states that “[r]eparation should be proportional to the gravity of the violations and the harm suffered.”

[77] Moffett, ‘Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda’ (n 2) 335.

[78] “The expression “fair compensation,” used in Article 63 (1) of the Convention [American Convention on Human Rights] to refer to a part of the reparation and to the “injured party,” is compensatory and not punitive. Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or

Finally, the principle included in article 32 ARS provides that a liable state may not invoke the provisions of internal law as a justification for its failure to provide full reparation.[79] This rule could apply analogously to NSAGs. In such a context, internal law could be understood as codes of conduct or similar instruments, which groups may adopt to regulate members' internal behaviour and their relations outside of the group by imposing certain rules and responsibilities.[80]

## 4.3 Forms of reparation

According to the UN Basic Principles and Guidelines, full reparation may include five principal forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, which can be provided individually or in combination.[81] These measures can be directed at individual victims or collectivities, such as communities or groups, which have experienced harm collectively.[82] The UN Basic Principles and Guidelines provide a broader conceptualisation than the ARS, which prioritises restitution over compensation and satisfaction.[83] The first three forms are commonly described as being material in nature, as they generally offer something concrete; the latter two are described as being symbolic or moral forms of reparations, not because they are less significant, but because they involve a

to serve as an example, this principle is not applicable in international law at this time." See *Case of Velásquez Rodríguez v Honduras* IACtHR (Judgment Reparations and Costs) Series C No 7 (21 July 1989) para 38. The same holds for the ECtHR, see *Selçuk and Asker v Turkey* ECtHR (Judgment) Reports 1998-II (24 April 1998) para 119. See also ILC Commentary to the ARS 111 para 5; Rolf Einar Fife, 'Penalties' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 335; Stephan Wittich, 'The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts Adopted on Second Reading' (2002) 15 Leiden Journal of International Law 891, 904.

[79] See for an application of this rule to restitution: ILC Commentary to art 35 ARS 98 para 8.

[80] Similarly, art 32 ARIO provides that an international organisation may not rely on its rules as a justification for a failure to comply with its obligations under international law that result from its responsibility. This principle is based on the parallel principle found in the law of state responsibility. Olivier Bangerter, 'A Collection of Codes of Conduct Issued by Armed Groups' (2011) 93 International Review of the Red Cross 483, 484; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 134–139; Íñigo Álvarez (n 9) 102.

[81] UN Basic Principles and Guidelines principles 18-23.

[82] Magarrell (n 43) 5–6; UNGA, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence - Note by the Secretary-General' (n 49) paras 38–42.

[83] Arts 34-37 ARS. See also *Factory at Chorzów Case (Merits)* (n 21) 47; arts 34-37 ARIO. Such hierarchy among reparation forms is not present in the UN Basic Principles and Guidelines. See Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 Netherlands Quarterly of Human Rights 641, 666. Art 75(1) ICC Statute refers in a non-exhaustive manner to restitution, compensation and rehabilitation (note the term "including"). See *Prosecutor v Thomas Lubanga Dyilo* (n 37) paras 222-241. Reparations in IHL are generally grounded in the approach taken in the law of state responsibility, despite the restricted reference to "compensation" in art 91 Additional Protocol I. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol I: Rules (Cambridge University Press 2005) 545–546; Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing Limited 2019) para 5.60.

more intangible element.[84] However, this distinction should not be overemphasised, as both overlap to a large extent. Material reparations may, for instance, also have a symbolic function by conveying acknowledgment of responsibility or recognition of the victim.

Starting from the conceptualisation of the five main forms in international law, the following analysis examines their application by analogy to NSAGs. This attends to one of the findings of Chapter 2, which suggests that all forms should be considered when examining NSAGs' duty of reparation. Moreover, it provides the opportunity to make the proposed actor-specific approach more concrete. The examples expressed below should be read in conjunction with the practice covering the full range of reparation forms discussed in Chapter 2. Although NSAG practice traditionally lacks legal value in international law, informal NSAG practice concerning reparations is nevertheless considered.[85] It can significantly inform how the operationalisation of the duty to repair could take place and, therefore, assists in solving theoretical and practical challenges.[86]

### 4.3.1 Restitution

Restitution takes a central place in international law, since it has the potential to restore a victim to the original situation they possessed before the wrongful act occurred. This restoration is, however, more difficult in cases of gross or systematic violations. At a conceptual level, the obligation to make restitution can be transposed to NSAGs without too many difficulties. In its simplest form, restitution can involve the release of persons wrongly detained or the return of property wrongly seized during times of NIAC.[87] As an example, a 2014 UN Human Rights Council resolution called on Syrian NSAGs to immediately and unconditionally release human rights defenders and all civilians it had detained.[88] Although restitution and return may appear theoretically straightforward, they can be quite complex

[84] Susan Sharpe, 'The Idea of Reparation' in Gerry Johnstone and Daniel W van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing 2007) 27; Mégret (n 53) 127–128.

[85] As previously discussed in the Introduction to this study, the term *informal reparations* is used to refer to measures provided by NSAGs that are akin to reparations normally required from states in international law. Yet, such measures are not necessarily identified as reparations or based on international norms. For a recent discussion about the legal significance of NSAG practice, in relation to the development of a regime of responsibility in international law, including the duty to repair, see Íñigo Álvarez (n 9) 93–102, 191–192. See also Heleen Hiemstra and Ellen Nohle, 'The Role of Non-State Armed Groups in the Development and Interpretation of International Humanitarian Law', *Yearbook of International Humanitarian Law*, vol 20 (2017).

[86] Sivakumaran (n 80) 3–4; Ezequil Heffes and Brian Frenkel, 'The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules' (2017) 8 Goettingen Journal of International Law 39, 67, 69; Íñigo Álvarez (n 9) 192.

[87] Art 35 ARS, see also ILC Commentary to art 35 ARS 96-97 paras 1, 5; UN Basic Principles and Guidelines principle 19; art 35 ARIO; Íñigo Álvarez (n 9) 201.

[88] UNHRC, Res 27/16 (3 October 2014) UN Doc A/HRC/RES/27/16 paras 12, 15.

endeavours in practice.[89] The mixed administrative-judicial Colombian land restitution programme, for example, showcases some of the legal and practical complexities of restitution processes, which place demanding requirements on the state in terms of time, expertise and resources.[90] Nonetheless, there are cases of NSAGs engaging in restitution processes. An example is the reparations commission set up jointly by the National Liberation Army (ELN) and the FARC-EP in Arauca, Colombia, which received victims' complaints and ordered restitution for the harms suffered. Displaced persons were awarded a parcel of land and productive projects were financed, while farmers who lost their homes received financial support for the construction of new houses.[91]

### 4.3.2 Compensation

Monetary compensation can be provided for any economically assessable damage; however, it is not concerned with, and must be distinguished from, the punishment of the responsible actor.[92] Even if compensation could be applied to resource-rich NSAGs, it comes with inevitable limitations, which can apply equally to states.[93] The implementation of compensation is challenging, especially where it must be provided for all victims, proportionate to the gravity of the violations committed. In the context of armed conflict, victimisation may be so significant that compensation can "actually bankrupt the respondent state or armed opposition group".[94] Moreover, NSAGs may simply lack resources, or may have complicated matters practically, by hiding or laundering their assets.[95] In spite of these considerations, the International Commission of Inquiry on Darfur focused its attention on NSAGs' duty to compensate, while some groups themselves have included such measures within their codes of conduct.[96] Even if resources are limited, they can still be used to contribute, at least symbolically, to compensation, or the financing of other forms of reparation through, for instance, a fund and/or administrative reparations programme, which could also benefit from other financial contributors, such as the state or the international

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[89] Mastorodimos (n 42) 127.

[90] Jemima García-Godos and Henrik Wiig, 'Ideals and Realities of Restitution: The Colombian Land Restitution Programme' (2018) 10 Journal of Human Rights Practice 40.

[91] '¿Juntos Pero No Revueltos?' *El Espectador* (1 September 2013).

[92] Art 36 ARS, see particularly ILC Commentary to art 36 ARS 99 para 4; UN Basic Principles and Guidelines principle 20; art 36 ARIO.

[93] Verhoeven (n 1) 286, 297.

[94] Kleffner and Zegveld (n 54) 399.

[95] Rose (n 3) 309–310.

[96] 'Report of the International Commission of Inquiry on Darfur' (n 41) para 175; Bangerter, 'A Collection of Codes of Conduct Issued by Armed Groups' (n 80) 489, 497.

community.[97] Compensation could also be linked to demobilisation and disarmament, or peace or justice processes, in order to stimulate asset recovery.[98] Although it may be practically challenging to claim compensation from a NSAG through appointed representatives before a court of law,[99] principles from national tort law, such as joint and several liability, could be used to legally construct the group's collective duty to compensate. This would require the identification of all members of the group, which may present its own set of legal and practical challenges.[100]

### 4.3.3 Rehabilitation

Although rehabilitation is not included as a separate form of reparation in the law of state responsibility, it has been recognised as being crucial to ensuring that victims can successfully reintegrate into society.[101] Rehabilitation can involve a variety of services, such as medical and psychological care, as well as legal, social and educational services.[102] It immediately becomes clear from the nature of these services, that a NSAG should have a significant level of institutional capacity, somewhat comparable to that of states.[103] Nevertheless, even states face serious implementation challenges in respect of rehabilitative measures.[104] Despite this reality, NSAGs can still play a role in the provision, or at least the facilitation, of

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[97] See for instance art 177 Law No 1448 of 2011 (Victims' Law) (Colombia); UNGA and UNSC, 'The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, Report of the Secretary-General' (13 April 1998) UN Doc A/52/871-S/1998/318 para 50; Sierra Leone Truth and Reconciliation Commission, 'Witness to Truth' (2004) Vol 2 ch 3 p 183; UNOHCHR (n 20) 32–33; UNGA, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence - Note by the Secretary-General' (n 49) para 57(b). Similar proposals have been made concerning the UN Security Council's sanctions regime: e.g. "the international management of an indemnity fund, composed of blocked funds and assets, is perfectly foreseeable" and "consideration should be given to the potential role of the Council in authorizing the use of assets frozen under sanctions regimes for reparations payments and for supporting national reparations programmes". Gérard Cahin, 'The Responsibility of Other Entities: Armed Bands and Criminal Groups' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 340; UNSC, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (22 May 2012) UN Doc S/2012/376 para 70. See also Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' (n 2) 334–335; Moffett and others (n 45) para 125; Íñigo Álvarez (n 9) 193, 201.

[98] UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 46) para 91.

[99] In relation to the question of representation, see Kleffner and Zegveld (n 54) 398; Jann K Kleffner, 'Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure' (2002) 1 Leiden Journal of International Law 237, 247–248.

[100] See Chapter 6 dealing with the Justice and Peace Law for a practical example of such an approach.

[101] Sassòli (n 83) para 5.70.

[102] UN Basic Principles and Guidelines principle 21; UNHRC, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (11 July 2019) UN Doc A/HRC/42/45 paras 98, 103.

[103] Anne-Marie La Rosa, 'Sanctions as a Means of Obtaining Greater Respect for Humanitarian Law: A Review of Their Effectiveness' (2008) 90 International Review of the Red Cross 221, 236.

[104] UNHRC, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (n 102) paras 99, 106.

rehabilitation.[105] As explained by Dudai, whilst analysing informal reparations provided by the IRA, some rehabilitative measures are not just aimed at the health of the victim, but also at their "civic status": for example, by restoring the good name of victims through public declarations of their innocence.[106] While seemingly inapplicable to NSAGs, the IRA engaged in such a process regarding individuals who were killed by the group after being wrongfully accused of being informants. The relatives and friends of those killed sought such declarations, which involved the restoration of the good name and dignity of their loved ones, directly from the NSAG, and not from the state. Dudai reported that the declarations had positive results vis-à-vis their rehabilitation.[107] Kleffner and Zegveld have additionally argued that a responsible NSAG could, at the least, allow for rehabilitative measures, by giving access to relevant aid organisations that provide such services.[108] On the topic of access to rehabilitation, NSAG signatories to the Geneva Call's Deed of Commitment on sexual violence and gender discrimination, pledge to "encourage and facilitate", among other concerns:

- access to services, including medical, psychological, social and legal services, in cooperation with humanitarian and development organisations where appropriate;
- rehabilitation programmes and actions that facilitate social reintegration of victims.[109]

This shows that NSAG engagement in rehabilitation is not unrealistic.

### 4.3.4 Satisfaction

Even though the remedy of satisfaction takes a rather exceptional place in the ILC ARS, as it only emerges when restitution and compensation do not achieve full reparation, it has been recognised, especially in the human rights field, as bearing significant importance to victims.[110] As explained by the UN OHCHR, "symbolic measures derive their great potential

[105] Íñigo Álvarez (n 9) 201.
[106] UNOHCHR (n 20) 25.
[107] Dudai (n 3) 801–804.
[108] Kleffner and Zegveld (n 54) 400.
[109] Geneva Call, 'Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination' para 4 <https://www.genevacall.org/wp-content/uploads/2019/07/DoC-Prohibiting-sexual-violence-and-gender-discrimination.pdf> accessed 5 August 2020.
[110] Art 37(1) ARS "insofar as"; ILC Commentary to art 37 ARS 105 para 1; art 37 ARIO. The Inter-American Court of Human Rights, known for emphasising non-monetary measures, has, for instance, ordered certain symbolic forms of reparations with the objective being, to "remember the acts that resulted in human rights violations, keep alive the memory of the victims, as well as to raise public awareness in order to prevent and avoid such grave incidents occurring in the future". *Case of Rochac Hernández y Otros v El Salvador* IACtHR (Judgment Merits, Reparations and Costs) Series C No 285 (14 October 2014) para 235 [own translation];

from the fact that they are carriers of meaning, and therefore can help victims in particular and society in general to make sense of the painful events of the past".[111] In contrast to compensation, satisfaction "caters to a broader range of victim concerns, and emphasises their need for recognition, respect, dignity and hope for a safe future".[112] Satisfaction measures have become a key feature of broader responses to accountability and transitional justice.[113] The International Criminal Court has, for instance, ordered symbolic forms of reparations from criminally convicted individuals.[114] Such non-pecuniary reparations can take many forms, including various forms of truth-recovery (e.g. verification of the facts and full and public disclosure of the truth, the search for the whereabouts of the disappeared), acknowledgment of the facts and acceptance of responsibility, public apologies, commemorations, and more general measures that respond to the non-material needs of victims.[115]

Some scholars contend that this form of reparation is a prerogative of states. Tomuschat, for example, argues that apologies presented by non-state actors are "no more than a gesture of courtesy and do not have the same weight as official apologies offered by a State".[116] In contrast, more merit is accorded to giving victims a central role in determining whether such reparations are actually wanted from a NSAG in a given case.[117]

Kleffner, in his turn, questions to what extent article 37(3) ARS can be applied to NSAGs. The article provides that satisfaction "may not take a form humiliating to the responsible State" and, therefore, would imply that the law regulating NSAGs' responsibility should, by analogy, protect the dignity of such groups. He suggests, instead, that the international responsibility of NSAGs could result in the award of punitive damages.[118] Although it is true that NSAGs' distinct nature in international law may affect the extent to which the content of

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Thomas M Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 47 Stanford Journal of International Law 279, 288–289.

[111] UNOHCHR (n 20) 23.

[112] Mégret (n 53) 131.

[113] UNOHCHR (n 20) 23; Dudai (n 3) 788.

[114] For an example, see *Prosecutor v Ahmad Al Faqi Al Mahdi* (n 37) paras 49, 70-71, 90.

[115] Art 37(2) ARS, see also ILC Commentary to art 37 ARS 105-106 paras 2-5; UN Basic Principles and Guidelines principle 22; Dudai (n 3) 787–788.

[116] Christian Tomuschat, 'The Responsibility of Other Entities: Private Individuals' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 320. However, by analogy with state responsibility, art 37 ARIO imposes an obligation on international organisations to give satisfaction for the injury caused, insofar as it cannot be made good by restitution or compensation. The ILC Commentary lists several actions as examples and relies on practice. It recognises that satisfaction can be provided by actors other than states.

[117] See Section 5.3.3.2 for a more concrete discussion on operationalising public apologies by NSAGs while taking account of victims' views and needs. UNHRC, 'Report to the Human Rights Council on the Participation of Victims in Transitional Justice Measures' (27 December 2016) UN Doc A/HRC/34/62 5–6, 14–15.

[118] Kleffner (n 11) 264–265.

state responsibility can be transposed, reparations should remain a victim- rather than a perpetrator-oriented effort. Following present tendencies in international law, reparations should be conceptualised as a compensatory rather than punitive tool, all the while, taking the principle of proportionality into account.[119] At the same time, it is conceivable that a measure of satisfaction may be perceived by a NSAG as being humiliating in practice.

Finally, some argue that non-state actors may lack the capacity to provide some of the measures of satisfaction listed in the UN Basic Principles and Guidelines. Although this could be the case in a given situation, it does not nullify the possibility that NSAGs can, at least, assist in providing some of these measures.[120]

This study follows an increasing number of scholars who argue that the potential of NSAGs to provide measures of satisfaction should not be dismissed. These scholars have referred to a range of formal and informal examples from practice.[121] The IRA in Northern Ireland and the ANC in South Africa have, for instance, engaged in an informal truth-recovery process and other symbolic measures respectively, while other groups have contributed to the work of truth commissions or, alternatively, such commissions have recommended symbolic reparations from NSAGs in their final reports.[122] Their contributions to the search, localisation and recovery of the disappeared, or the clarification of facts can be crucial, especially when they are the only entity holding the necessary information.[123] Moreover, as complex organisations, NSAGs are tied together through, i.a., bonds of loyalty and shared history, common values and objectives. When paired with a sufficiently strong organisational structure, it may provide the opportunity to maximise such relations by mobilising members to collectively crowd source information.[124] In Section 5.3.3.2, official or public apologies by NSAGs are further explored.

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[119] Art 37(3) ARS and ILC Commentary to art 37 ARS 107 para 8. See also Section 4.2.

[120] See Section 4.1.

[121] Kris Brown, 'Commemoration as Symbolic Reparation: New Narratives or Spaces of Conflict?' (2013) 14 Human Rights Review 273, 282–284; Heffes and Frenkel (n 86) 68–69; Íñigo Álvarez (n 9) 201–202.

[122] Sierra Leone Truth and Reconciliation Commission (n 97) ch 3 p 199 para 518; Dudai (n 3); Lauren Dempster, 'The Republican Movement, "Disappearing" and Framing the Past in Northern Ireland' (2016) 10 International Journal of Transitional Justice 250, 255–257; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 46) para 94; Moffett and others (n 45) paras 127–128.

[123] Lars Waldorf, 'Ex-Combatants and Truth Commissions' in Ana Cutter Patel, Pablo de Greiff and Lars Waldorf (eds), *Disarming the Past: Transitional Justice and Ex-combatants* (Social Science Research Council 2009) 120–121; Blázquez Rodríguez (n 13) 419–420.

[124] Isabella Bueno, 'Mass Victimization and Restorative Justice in Colombia: Pathways towards Peace and Reconciliation?' (KU Leuven 2013) 352; Moffett and others (n 45) paras 130, 132; Stephen Oola and Luke Moffett, '"Cul Pi Bal" Reparations for the Northern Ugandan Conflict' (Reparations, Responsibility & Victimhood in Transitional Societies 2020) 52.

### 4.3.5 Guarantees of non-repetition

Guarantees of non-repetition are a somewhat catchall category, conceptualised over time as being closely linked to cessation, satisfaction and/or reparations generally. Common to these various conceptions is their future-oriented perspective, which exhibits an approach to reparation which is less concerned with past violations. Instead, such measures, which are generally collective in nature, respond to wrongful acts by seeking to prevent the recurrence of similar violations.[125] Under the law of state responsibility, the responsible state is under an obligation to offer guarantees of non-repetition, but only if circumstances so require.[126] This qualifying factor marks a different role for guarantees of non-repetition under the law of state responsibility, as compared to the more essential role that such measures take in transitional justice, where they represent the fourth main tool aside from truth, justice and reparations.[127] Although not conceptualised as a form of reparation under the ARS, the document nevertheless recognises guarantees of non-repetition as an aspect of "the restoration and repair of the legal relationship affected by the breach" in that it serves "a preventive function" and is "a positive reinforcement of future performance".[128] While acknowledging some overlap between guarantees of non-repetition and satisfaction, the preventative purpose inherent in the former entails that such measures are not about restoring the victim to the original situation before the violation occurred. They seek instead to change the *status quo*, while focusing on the future and not the past.[129] In contrast to their perceived function within the state responsibility regime, the human rights framework tends to conceptualise guarantees of non-repetition as a separate form of reparations.[130] The recent case law of the International Criminal Court follows this approach.[131]

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[125] Carla Ferstman, 'Reparation As Prevention: Considering the Law and Practice of Orders for Cessation and Guarantees of Non-Repetition in Torture Cases' (2010) 6 Essex Human Rights Review 7, 8; Naomi Roht-Arriaza, 'Measures of Non-Repetition in Transitional Justice: The Missing Link?' in Paul Gready and Simon Robins (eds), *From Transitional to Transformative Justice* (Cambridge University Press 2019) 123–124.

[126] Art 30(b) ARS; ILC Commentary to art 30 ARS 89 para 9 and 91 para 13. See art 30(b) ARIO for an analogical application to international organisations.

[127] UNHRC, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (9 August 2012) UN Doc A/HRC/21/46; Bellal (n 42) 246–247; Roht-Arriaza (n 125) 107.

[128] ILC Commentary to art 30 ARS 88 para 1.

[129] ILC Commentary to art 30 ARS 90 paras 9, 11; Roht-Arriaza (n 125) 112–113.

[130] *Case of Suárez-Rosero v Ecuador* IACtHR (Judgment Merits) Series C No 35 (12 November 1997) para 106; HR Committee, 'General Comment No 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant)' (26 May 2004) UN Doc CCPR/C/21/Rev1/Add13 para 17; UN Basic Principles and Guidelines principle 23; Roht-Arriaza (n 125) 114–117.

[131] *Prosecutor v Thomas Lubanga Dyilo* (n 37) para 240; *Prosecutor v Ahmad Al Faqi Al Mahdi* (n 37) para 67; Francesca Capone, 'An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage' (2018) 16 Journal of International Criminal Justice 645, 649–650.

Regardless of how guarantees of non-repetition are conceptualised, either as a separate legal consequence of international responsibility or as part of the duty to make full reparation, NSAGs could contribute to such measures. By analogy with some of the measures included in the UN Basic Principles and Guidelines, NSAGs could be obligated to pass or modify their internal laws, such as codes of conduct, to ensure and respect international law and to provide training to their members.[132] As an example of this approach in practice, the UN Security Council has called on parties to armed conflict to make and implement commitments to combat sexual violence, which could include, i.a., the issuance of clear orders through chains of command that prohibit sexual violence and the prohibition of such violence in codes of conduct, military field manuals or the equivalent.[133] Moreover, NSAGs can collectively commit to their disarmament, demobilisation and even political transformation, and can give public assurances to never again engage in violence.[134] For example, in its final report, the Commission on the Truth for El Salvador recommended, under the title "eradication of structural causes linked directly to the acts examined", the dismantlement of illegal armed groups as a preventative measure.[135] These observations suggest that NSAGs could provide such measures both during and at the end of a NIAC.[136]

# 5 When could a non-state armed group be called upon to provide reparation?

## 5.1 Reparations during and after armed conflict

[132] UN Basic Principles and Guidelines principle 23(e)(f)(h); Liesbeth Zegveld, *The Accountability of Armed Opposition Groups* (Cambridge University Press 2002) 222; Heffes and Frenkel (n 86) 69; Íñigo Álvarez (n 9) 190–191.
[133] UNSC, Res 1960 (16 December 2010) UN Doc S/RES/1960 para 5. For another example UNSC, Res 2121 (10 October 2013) UN Doc S/RES/2121 para 15: "[d]emands that all armed groups, in particular Seleka elements prevent the recruitment and use of children".
[134] UNCHR, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 principle 37; Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' (n 2) 335; UNHRC, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence' (7 September 2015) UN Doc A/HRC/30/42 para 23; Bellal (n 42) 247.
[135] Commission on the Truth for El Salvador, 'From Madness to Hope: The 12-Year War in El Salvador' (1993) UN Doc S/25500 179–180.
[136] Jeremy Sarkin, 'Refocusing Transitional Justice to Focus Not Only on the Past, But Also to Concentrate on Ongoing Conflicts and Enduring Human Rights Crises' (2018) 7 Journal of International Humanitarian Legal Studies 294, 327–328.

Reparations are not legally restricted in time to an on-going armed conflict or to its aftermath. However, they have generally been claimed and provided after a conflict has ended.[137] In Chapter 2, it was concluded that NSAGs have been called upon to provide reparations both during and after NIACs, indicating that the international responsibility of such actors is relevant in both situations.[138] It seems sensible to argue that a NSAG holds a duty of reparation for its own wrongful conduct at least for the duration of the conflict: when it still legally exists. However, the provision of reparations during an armed conflict can be complicated by legitimacy concerns, conflict dynamics and ongoing victimisation, among others issues, whereas post-conflict reparations face a distinct international legal challenge where provided by NSAGs.[139] As concluded in Chapter 1, NSAGs are temporary subjects of international law. Therefore, it is necessary to develop a regime of international responsibility that provides answers to whether and how NSAGs could still be called upon in a post-conflict setting.[140] Ultimately, a central question arises: 'how can a NSAG carry out a duty to repair when it no longer exists from an international legal perspective?' Put differently, 'upon whom can the victims call?'

## 5.2 Engagement with non-state armed groups on reparation during and at the end of an armed conflict

In this section, engagement with NSAGs, on the question of reparation during and at the end of an armed conflict, will be examined. In the scope of this study, the concept of engagement in relation to reparations is used in two ways: on the one hand, it generally refers to the participation or involvement of NSAGs in the provision of reparations (engagement *in*; see e.g. Section 4.3) and, on the other hand, it concerns engagement *with* NSAGs *on* the issue of reparation.[141] The following discussion deals with the latter notion.

In legal scholarship and practice concerning NSAGs, the concept of engagement generally features in discussions which are concerned with enhancing compliance by such groups, with

[137] Jemima García-Godos and Knut Andreas O Lid, 'Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia' (2010) 42 Journal of Latin American Studies 487, 487–488; Mastorodimos (n 42) 133.
[138] Íñigo Álvarez (n 9) 193.
[139] Gérard Cahin, 'Attribution of Conduct to the State: Insurrectional Movements' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 254–255; UNGA, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence - Note by the Secretary-General' (n 49) para 75; ICRC, 'The Roots of Restraint in War' (n 8).
[140] Kleffner (n 11) 265.
[141] The engagement of a NSAG in reparations, also referred to as collective engagement, does not require all individual members to physically participate in providing reparations: as one or more members could do this on behalf of the collectivity (e.g. a public apology by the leader on behalf of the group).

existing primary obligations of IHL, through a meaningful exchange on IHL matters.[142] Here, the notion is extended to the sphere of secondary norms. The objective is to conceptualise how a similar notion of NSAG engagement could be framed with regard to reparations, and which potential opportunities and challenges could arise. The discussion can draw partly from insights offered by the aforementioned body of existing literature on engagement in IHL.

Following the broad lines of the conceptualisation of engagement offered by Bellal, engagement with a NSAG on reparation would entail that a meaningful contact is established with the group, so as to exchange on the question of reparation, in an effort to promote the delivery of redress.[143] Similar to efforts seeking to improve respect for primary norms, such engagement could take place through voluntary or non-coercive mechanisms, such as the use of dialogue or negotiation, which could even employ certain incentives to promote engagement.[144] In applying the words of Dudai and McEvoy, this would entail a consideration that, at least in some contexts, "armed groups can be part of the solution and not just the problem".[145] Such engagement could take place on the basis of at least two distinct purposes. First of all, from a *de lege ferenda* perspective, it could seek to make a NSAG comply voluntarily with its hard law duty to provide reparation. Depending on the context, this could potentially result in more effective compliance than if it were enforced. Second, it could take place regardless of any question of legal responsibility. Instead, it starts from the assumption that NSAGs themselves can play an important role in reparations, which can be stimulated through engagement. As proposed by Íñigo Álvarez, monitoring and/or reporting systems could accompany voluntary commitments to reparations undertaken by NSAGs.[146]

The first form of engagement could potentially take place between a NSAG and a state as part of a peace, demobilisation or political transformation process. It could result in reaffirming the duty to repair of a NSAG in a special agreement or even in the inclusion of specific

[142] See for instance Cedric Ryngaert and Anneleen Van de Meulebroucke, 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms' (2011) 16 Journal of Conflict & Security Law 443; Annyssa Bellal, 'Welcome on Board: Improving Respect for International Humanitarian Law Through the Engagement of Armed Non-State Actors', *Yearbook of International Humanitarian Law*, vol 19 (TMC Asser Press 2016); Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020) Part IV.

[143] Bellal (n 142) 38.

[144] Compare with engagement efforts to enhance NSAGs' compliance with international primary norms, through i.a. awareness raising, dissemination, persuasion, technical support or capacity building, negotiation, dialogue and advocacy as well as the role of incentives. See UNGA and UNSC, 'Report of the Secretary-General on Children and Armed Conflict' (15 May 2014) UN Doc A/68/878-S/2014/339 para 15; Bellal (n 142) 47–51; UNGA, 'One Humanity: Shared Responsibility, Report of the Secretary-General for the World Humanitarian Summit' (2 February 2016) UN Doc A/70/709 para 51.

[145] Ron Dudai and Kieran McEvoy, 'Thinking Critically about Armed Groups and Human Rights Praxis' (2012) 4 Journal of Human Rights Practice 1, 17, 19.

[146] Íñigo Álvarez (n 9) 194.

obligations in a mutual accord.[147] Instead of confining such groups to the roles of 'passive recipients of sanctions' or 'security threats to be managed', their potential, as positive actors in the reparation process, could be recognised.[148] It could promote a sense of active responsibility on the part of NSAGs to make amends, which would require them to comprehend the consequences of their actions and to form the willingness to repair.[149] Experts tend to agree that NSAGs should be allowed to take ownership, by actively participating in initiatives for dealing with the past or, more broadly, in peace-making efforts, which are "more likely to be sustained if it is owned and driven by all relevant conflicting actors and their constituencies".[150] This involves understanding justice and security as being complementary and not mutually exclusive.[151]

The second form of engagement is more likely to take place with actors beyond the territorial state. During situations of armed conflict, actors such as international organisations or NGOs could focus their efforts on encouraging NSAGs to internalise rules on reparation in their internal codes of conduct or other relevant regulations.[152] This could result in the setting of a useful internal benchmark for responsibility, on which, for instance, civilian communities could rely in their interactions with such groups. Research suggests that such an internalisation process creates a sense of ownership and commitment to ensure respect for the law, which, being normally imposed upon NSAGs, traditionally leaves their views and consent aside.[153] It could stimulate comprehension of the concept of reparation and how it could be appropriately granted, in line with international norms and standards, through, for

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[147] See Chapter 2 Section 3.2.3 for concrete examples of such practice. Common Art 3(3) of the 1949 Geneva Conventions. Compare to Ryngaert and Van de Meulebroucke (n 142) 453–455.

[148] Dudai and McEvoy (n 145) 16–17.

[149] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002) 129; Jennifer Larson Sawin and Howard Zehr, 'The Ideas of Engagement and Empowerment' in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing 2007) 45, 50.

[150] Kieran McEvoy and Peter Shirlow, 'Re-Imagining DDR: Ex-Combatants, Leadership and Moral Agency in Conflict Transformation' (2009) 13 Theoretical Criminology 31; Véronique Dudouet and Hans J Giessmann, 'From Combatants to Peacebuilders: A Case for Inclusive, Participatory and Holistic Security Transitions' (Berghof Foundation 2012) 12, 34; Bellal (n 42) 236, 247; Moffett and others (n 45) para 123. In Northern Ireland, former fighters have contributed to bottom-up processes of restorative justice and dealing with the past. They have been considered as credible authorities for delivering a peace-making message, precisely due to their violent pasts. Another example is the Sudan People's Liberation Army (SPLA), that suggested setting up a Truth and Reconciliation Service within its cantonment camps, with the objectives of increasing truth within the local population and engaging in memorialisation efforts by recording the fighters' testimonies.

[151] Dudouet and Giessmann (n 150) 32.

[152] Caroline Holmqvist, 'Engaging Armed Non-State Actors in Post-Conflict Settings' in Alan Bryden and Heiner Hänggi (eds), *Security Governance in Post-Conflict Peacebuilding* (DCAF 2005) 51–53.

[153] Sassòli (n 58) 29–30; Olivier Bangerter, 'Comment – Persuading Armed Groups to Better Respect International Humanitarian Law' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press 2015) 113; Anne Quintin and Marie-Louise Tougas, 'Generating Respect for the Law by Non-State Armed Groups: The ICRC's Role and Activities' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020) 359–360.

instance, NSAG own administration of justice where they decide to provide reparations on their own accord.[154] This can be illustrated more concretely through the work of Geneva Call, which, as a humanitarian NGO, recognises NSAGs as key actors in solving problems relating to the implementation of IHL in armed conflict. The organisation engages with NSAGs through an innovative tool, its so-called Deed of Commitment, which allows groups to formally commit to respecting and being held accountable to certain humanitarian norms.[155] While reparations do not appear to be a consistent component of such instruments, signatory NSAGs commit themselves in the Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination to encourage and facilitate the provision of reparations to victims.[156]

Another possibility is that measures akin to reparations, normally required from states under international law, already form part of NSAGs' policies or practices, referred to here as informal reparations. Under the FARC-EP's administration of justice, victims were, for instance, entitled to receive compensation for the harm done to them, including moral damages. This often included a community fine, which would be used to cover expenses benefitting the community as a whole (e.g. for the building of a school or repairing of a road).[157] Other examples can be found in the codes of conduct of several NSAGs.[158] In such cases, engagement could ensure that such measures are implemented in compliance with international legal standards.

Several final reflections are relevant regarding both of the forms of engagement. Legal-political challenges emanating from counter-terrorism legislation and the general concern of states of conferring legitimacy on NSAGs could both stand in the way of meaningful engagement.[159] To counter such obstacles, one must be clear about the legal and moral frameworks in which engagement takes place. These could emphasise the role of responsible

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[154] Geneva Academy of International Humanitarian Law and Human Rights, 'Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors' (2011) 35.

[155] See Ezequiel Heffes, 'Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds), *International Humanitarian Law and Non-State Actors* (TMC Asser Press 2020).

[156] Geneva Call, 'Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination' (n 109) para 4.

[157] René Provost, 'FARC Justice: Rebel Rule of Law' (2018) 8 UC Irvine Law Review 227, 251.

[158] The 'Basic Rules' of the New People's Army (NPA) active in the Philippines includes as one of its 'Eight Points of Attention': "compensate all damages". Similarly, the 'Eight Codes of Conduct', which governed the interactions of RUF fighters with civilians in Sierra Leone provided that members "pay for everything that you demand or damage". Finally, the ELN Code of War states that "[e]fforts shall be made to avoid damage to civilian property and installations resulting from military operations and to make reparations [*reparaciones*] where possible." Bangerter, 'A Collection of Codes of Conduct Issued by Armed Groups' (n 80) 489–490, 497; Geneva Call, 'Their Words: Directory of Armed Non-State Actor Humanitarian Commitments' <http://theirwords.org/> accessed 7 August 2020.

[159] Bellal (n 42) 235; Sassòli (n 83) para 10.258; Quintin and Tougas (n 153) 380–382.

NSAGs as duty bearers or the objective of providing redress and relief to victims.[160] Furthermore, in light of the sheer diversity of NSAGs involved in NIACs, research and practice on engagement suggests that a context-specific approach, which takes account of the particularities of the relevant NSAG, is essential.[161] Consequently, it requires obtaining a deep understanding of the specific conflict dynamics and a group's features, in terms of organisational structure, ideology, objectives, values and overall capacity regarding reparations, among other considerations.[162] This provides for a broader framework than just the law under which NSAGs can be engaged.[163] It can, for instance, shed light on which incentives can foster willingness.[164] This may be influenced by considerations regarding NSAGs' self-image; their moral, political and/or religious convictions; or their desire to strengthen their community ties, among other possibilities.[165] NSAGs are not neutral actors. Instead, they may seek to attain their own set of goals through their participation in processes of dealing with the past.[166] Finally, the diverse nature of NSAGs may provide for its own set of challenges. Politically motivated NSAGs, whose struggle is based on grievances, may be hesitant to engage on reparations: as this could be seen as betraying or undermining their efforts or cause.[167] On the other end of the spectrum, there are groups, such as the Islamic State or Boko Haram, whose ideology implies a rejection of basic human rights. Although an inclusive approach should be favoured, NSAGs may simply reject any form of engagement.[168]

[160] A strategy that is used in the humanitarian sector is to focus on the outcomes of an action. Many humanitarian organisations now accept that negotiation with NSAGs is part of their work in fragile contexts. They accept the risk of potentially legitimising such groups by focusing on the outcomes of their intervention, such as getting the aid to those most in need. Ioana Cismas, *Religious Actors and International Law* (Oxford University Press 2014) 75; Aoife McCullough, 'The Legitimacy of States and Armed Non-State Actors: Topic Guide' (GSDRC University of Birmingham 2015) 23.
[161] Michelle Mack, 'Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts' (ICRC 2008) 11.
[162] Holmqvist (n 152) 55–56; Heffes (n 155) 429–430, 434–436.
[163] ICRC, 'The Roots of Restraint in War' (n 8) 9, 65.
[164] UNGA and UNSC (n 144) para 15.
[165] Olivier Bangerter, 'Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not' (2011) 93 International Review of the Red Cross 353, 354, 358–383; Geneva Academy of International Humanitarian Law and Human Rights (n 154) 22–23.
[166] In Colombia, for instance, the FARC-EP and the ELN began a joint initiative to provide reparations in their own territories in an effort to increase community support. Ita Connolly and Colm Campbell, 'The Sharp End: Armed Opposition Movement, Transitional Truth Processes and the Rechtsstaat' (2012) 6 International Journal of Transitional Justice 11; International Crisis Group, 'Left in the Cold? The ELN and Colombia's Peace Talks' (2013) 9; Stuart Casey-Maslen (ed), *The War Report: Armed Conflict in 2013* (Oxford University Press 2014) 576; Dempster (n 122); '¿Juntos Pero No Revueltos?' (n 91).
[167] See, in this regard, the concluding insights on the process with the FARC-EP in Chapter 7. Martien Schotsmans, 'Victims' Expectations, Needs and Perspectives after Gross and Systematic Human Rights Violations' in Koen de Feyter and others (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 122; Dudouet and Giessmann (n 150) 30, 31; Cheryl Lawther, 'The Truth about Loyalty: Emotions, Ex-Combatants and Transitioning from the Past' (2017) 11 International Journal of Transitional Justice 484.
[168] Sassòli (n 83) para 10.257.

Where a NSAG would be legally responsible, reparations claims could, in principle, still be enforced through a court of law or an administrative mechanism, where available, or, alternatively, their responsibility could ultimately trigger the states' subsidiary responsibility in accordance with the responsibility scheme proposed in Section 3.

### 5.3 A duty to repair for non-state armed groups in post-conflict settings

The questions which must be addressed in a post-conflict setting are *whether* and *how* a responsible NSAG could fulfil its duty to provide reparation in this context, when it legally ceases to exist. As discussed in Chapter 3, international law indirectly regulates the responsibility of NSAGs, in cases of government or state formation, following the end of a conflict. Beyond such instances, the challenging questions posed above remain unanswered. This study argues, that it should still be possible to invoke the international responsibility of a NSAG, even where it no longer exists as a legal entity. The focus of the discussion should thus be on how the resulting duty to repair could still be implemented. Importantly, the argument implies that victims could still call on the subsidiary responsibility of the territorial state, as a last resort, in order to obtain reparation where there is no possibility of claiming it from the responsible, now extinct, NSAG.

Several approaches will be explored, which illustrate different ways of operationalising a NSAG's duty to repair in a post-conflict setting, where that group has, e.g., been defeated or dismantled. Yet, these approaches may also be relevant in ongoing conflicts where fragmentation or splintering has occurred within a group, potentially leaving the initial collectivity, which holds responsibility for a violation, no longer intact.[169] These approaches draw largely from domestic and international practice, preliminary proposals made in legal scholarship and insights obtained from social science literature. They are further complemented by research carried out on Colombia. The approaches include: (1) asset tracing and recovery for reparation purposes; (2) a representation order in civil proceedings; and, (3) facilitating reparations provided by actors with representative authority. The first two approaches are particularly relevant when seeking to claim reparations from a defunct NSAG through legal processes. The third approach goes beyond the boundaries of the law and takes

[169] For instance, the Sudanese People's Liberation Movement was divided over the course of the 1985-2003 armed conflict between Northern and Southern Sudan into multiple fractions that fought one another. Kenny Paul, 'Structural Integrity and Cohesion in Insurgent Organizations: Evidence from Protracted Conflicts in Ireland and Burma' (2010) 12 International Studies Review 533, 535; Kathleen Gallagher Cunningham, 'Understanding Fragmentation in Conflict and Its Impact on Prospects for Peace' (Centre for Humanitarian Dialogue 2016) 4.

account of certain socio-political realities, which are pertinent for the issue of post-conflict reparations.

These approaches should be understood as illustrations of how NSAGs' post-conflict duties to repair could potentially be operationalised. The primary aim in emphasising their potential uses is to, at least, theoretically inform the scholarly debate. The overall significance of the approaches lies in the acknowledgment that the engagement of NSAGs in post-conflict reparations should not be discarded without further thought. Even so, it must be noted that the approaches do not reflect emerging norms of custom, nor are they even examples of best practice. There is, at present, simply insufficient practice to sustain such claims. Moreover, the emphasis on these particular approaches does not exclude the possibility that other approaches exist or could be developed.

### 5.3.1 Asset tracing and recovery for reparation purposes

The first approach seeks to tackle the assets which defunct NSAGs have acquired over the course of armed hostilities. These assets could be used to provide restitution and compensation, or even to finance other forms of reparation, such as rehabilitation programmes, the building of memorials, and the rebuilding of damaged or destroyed infrastructure in affected communities. Although the NSAG would have legally ceased to exist, such assets could still be recovered from former members, such as commanders and leaders, and third parties who were enriched by the activities of the group.[170] This could also contribute to guaranteeing non-repetition, by advancing the dismantlement of still existing economic power bases. Recovering assets from former members or third parties is a logical approach, given the fact that, even during a NIAC, it is unlikely that a NSAG would have maintained assets in its own name due to its illegal nature in domestic law.[171] As a result of the link between any enrichment and the unlawful activity of the NSAG in question,

[170] Daboné (n 11) 197. The Sierra Leone Truth and Reconciliation Commission recommended tracing and recovering the material and financial assets of Charles Taylor, the National Patriotic Front of Liberia (NPFL) and the RUF, with the objective that it should become part of the War Reparations Fund and be used for financing the reparations programme recommended by the Commission. The Commission also recognised the role of internal and external actors who profited from the conflict. Their recovered assets should also be placed in this Fund. Sierra Leone Truth and Reconciliation Commission (n 97) ch 3 p 183 and ch 4 para 227(d). Although the LTTE was defeated, the Panel of Experts on Accountability in Sri Lanka still suggested that the "funds acquired by the LTTE from the diaspora and elsewhere, and which still exist, should be secured for the purpose of making reparations". UNSG (n 44) paras 419, 442.

[171] Andrew Clapham, 'Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 Journal of International Criminal Justice 899, 920; Agata Kleczkowska, 'Filling the Gap: The New Regime of Responsibility for Armed Non-State Actors' (2018) 25 Australian International Law Journal 137, 158.

recovered resources could be used to repair the victims of the group. A reparation fund could conceivably manage and distribute the assets for reparation purposes.

A concrete example of a legal tool which could potentially facilitate such a process is civil forfeiture, also known as confiscation *in rem* or non-conviction-based confiscation. Some states have employed it domestically, especially when confronted with organised crime and the financing of terrorism.[172] Civil forfeiture provides a framework by which the proceeds of unlawful activity can be recovered in the absence of criminal proceedings. It involves legal action brought against the property involved in the unlawful activity, and not against a person or, in the present context, a (defunct) NSAG. Such an *in rem* action does not generally require the existence of a preceding civil judgment or criminal conviction in order to confiscate an actor's assets. As a general rule, in civil procedure, it needs only be proven, on the balance of probabilities, that assets derive from illegal activities. Moreover, the owner needs only to establish the legitimate origins of the relevant assets to halt or rebut the action. This sets a, relatively, low standard of proof. Although, this legal approach was initially mainly applied in common law countries, it has been adopted more recently by civil law countries as a means of recovering assets and, most importantly, providing reparation to victims.[173]

### 5.3.2 A representation order in civil proceedings

The second approach draws from the *Omagh bombing* case brought before the High Court of Justice of Northern Ireland. In this case, the Court rendered a judgement in the civil litigation initiated by several victims of a bombing carried out in the town of Omagh. The 1998 bombing was perpetrated by the Real IRA and killed 29 people and injured over 220 others.[174] The case is of particular interest to the present discussion because the victims initiated civil proceedings, not only against a number of named individuals, but also directly against the Real IRA as an organisation. It was alleged that the defendants were responsible in various

[172] Civil forfeiture is prevalent in the United States, which has led the way since the early 1980s, for property connected to, i.a., drug trafficking, white collar criminality, money laundering and, since 2001 under the Patriot Act, property connected to terrorism. Council of Europe, 'Impact Study on Civil Forfeiture' (2013) 16, 58–63; Sharon Cohen Levin and Carolina A Fornos, 'Using Criminal and Civil Forfeiture to Combat Terrorism and Terrorist Financing Terrorist Financing' (2014) 62 United States Attorneys' Bulletin 42; X, 'How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement' (2018) 131 Harvard Law Review 2387.

[173] Nikolay Nikolov, 'General Characteristics of Civil Forfeiture' (2011) 14 Journal of Money Laundering Control 16; Council of Europe (n 172); Stefan Cassella, 'Choose Your Weapon' (2018) 21 Journal of Money Laundering Control 340.

[174] The Real IRA emerged as a separate entity from the provisional IRA when a fracture occurred in 1997. *Mark Christopher Breslin and Others v Seamus McKenna and Others* High Court of Justice in Northern Ireland [2009] NIQB 50 para 80; Stanford University, 'Mapping Militant Organizations: Real Irish Republican Army (Last Modified August 2019)' <https://cisac.fsi.stanford.edu/mappingmilitants/content/mmp-real-irish-republican-army> accessed 7 August 2020.

ways for the planning, production, planting and detonation of the bomb.[175] In other words, the victims sought to establish the civil responsibility of the Real IRA for the organisation's part in the bombing. During the proceedings, the Court was confronted with the lack of legal personality, albeit under domestic law, of the Real IRA. It is thus of interest to examine how the Court addressed this obstacle, and how it was eventually able to maintain the claim in spite of this legal challenge. The main objective of the analysis is to identify insights which are relevant for the international legal debate.

The Court was "satisfied to a very high degree that the Real IRA were responsible for the Omagh bomb in that the directing minds of that organisation were committed to the carrying out of the terrorist campaign in every respect and were part of a concerted enterprise to that end".[176] Nevertheless, it was questioned whether, as a matter of law, it would be possible to maintain an action against the group. In legal terms, it is "an unincorporated association", which cannot be rendered a defendant to an action in its own right.[177] Such an association involves a simple legal structure comprising of a group of people who have joined together in a common purpose. It lacks separate legal personality under the law of Northern Ireland.

The Court determined that Order 15 Rule 12 of the Rules of the Supreme Court, in relation to representative proceedings, could be applied. It provides that "where numerous persons have the same interest in any proceedings the proceedings may be begun and continued against any one or more of them as representing all or as representing all except one or more of them".[178] A judgment rendered under this rule would be binding on all represented persons, but enforcement against any person not a party to the proceedings would require the leave of the court. In a case where such leave is granted, the person may still dispute his or her liability.[179] Concretely, it provided a mechanism to maintain the action, by empowering the court to make a representative order against one or more named members, as representatives of all those who were part of the unincorporated association, *in casu* the Real IRA, provided the persons represented had a common interest in defending the claim.[180]

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[175] *Mark Christopher Breslin and Others v Seamus McKenna and Others* (n 174) para 2.
[176] ibid para 82.
[177] ibid para 83.
[178] Such a representation order procedure was originally a Chancery practice (Courts of Chancery developed in the 15th century as courts of equity to provide remedies not obtainable in the courts of common law). This practice was subsequently extended by rules of court to all divisions. The practice in the Court of Chancery was to require the presence of all parties interested in a matter or suit. When the parties were numerous "you could never come to justice", the rule was relaxed for the sake of convenient administration of justice and a representative suit was allowed. ibid para 86; *Mark Christopher Breslin and Others v John Michael McKevitt and Others* Court of Appeal in Northern Ireland [2011] NICA 33 para 73.
[179] Order 15 Rule 12 Rules of the Supreme Court (Northern Ireland) 1980.
[180] *Mark Christopher Breslin and Others v Seamus McKenna and Others* (n 174) paras 83-84.

However, in the event, the Court declined to make a representation order against any individual to represent all members of the Real IRA. It was argued that those who joined the organisation after the bombing would have a different defence, or interest, than those who had been members at the time of the attack.[181] Although the Court could not identify all of the members that participated in the attack, it could conclude, on the basis of the evidence tendered in the proceedings, that those who were members of the Army Council of the Real IRA at the time of the bombing bore responsibility for directing the attack.[182] On this basis, a representation order in respect of the fourth defendant (Liam Campbell, who was a senior Real IRA leader and a member of this Council at the time of the attack) was made, and Campbell was deemed to represent the other members of the Army Council.[183] He was held civilly responsible for their collective interests, aside from the other defendants who were held personally responsible.

As Moffett concludes, the judgment reflects that the bombing was the result of a concerted effort by the Real IRA; it did so, by not only holding individuals who carried out the bombing responsible, but also those who commanded the organisation.[184] Although legal action could not be taken directly against the group at first, due to its lack of legal personality under domestic law, the rule of representative proceedings nevertheless allowed the victims to set forward their claim seeking compensation from the Real IRA, and allowed them to seek a determination which held the group civilly responsible by way of its leadership.[185] The case shows that establishing the civil responsibility of the group was of importance to the victims.

The *Omagh bombing* case provides for an interesting example of how a forum could potentially deal with the duty to repair of a NSAG that no longer has international legal personality. The case suggests that civil litigation could still be initiated against such a group by way of representative proceedings against one or more named members as representatives

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[181] ibid paras 84-86. Here a comparison is made with a case in which a named defendant was sued as a representative of the organisation Opus Dei. The case against him was dismissed on the basis that different members of the organisation would have had different defences, depending upon whether they were members of the organisation on the date that the payments relevant to the case were made.

[182] The Army Council was the governing or decision-making body of the Real IRA. Colleen Sullivan, 'Real Irish Republican Army' (*Encyclopædia Britannica*) <https://www.britannica.com/topic/Real-Irish-Republican-Army> accessed 31 January 2020.

[183] *Mark Christopher Breslin and Others v Seamus McKenna and Others* (n 174) paras 267, 270; *Mark Christopher Breslin and Others v John Michael McKevitt and Others* (n 178) paras 72-73. According to the rule of representative proceedings, the court may, on the application of the plaintiff, appoint one or more of the defendants as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings. Order 15 Rule 12(2) Rules of the Supreme Court (Northern Ireland) 1980.

[184] Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' (n 2) 338–340.

[185] *Mark Christopher Breslin and Others v Seamus McKenna and Others* (n 174) para 270; Blázquez Rodríguez (n 13) 423; 'Omagh Bomb Families Win Multi-Million Pound Legal Case' *Belfast Telegraph* (8 June 2009).

of some members (e.g. of a directive or military organ that participated in the unlawful act) or even all members of the NSAG, where there is a common defence or interest. It should be noted that the Real IRA was still recognised by the Court as an unincorporated association; although it did not hold separate legal personality, the group still existed in a factual sense. A similar situation could present itself when, e.g., a NSAG was neither entirely defeated, nor did it take full power in the aftermath of a NIAC. Instead, it continues to exist factually, as a non-state actor, while its military structures have become dormant.[186] Even though an equivalent legal structure does not exist in international law, it could still present a possible approach to enforcing reparations from a legally defunct NSAG at the domestic level.[187]

Nonetheless, application of the approach may prove difficult in practice. This is reflected in the reasoning of the Court of Appeal in the *Omagh bombing* case, where it eventually rejected the representation order.[188] This included the consideration that the Real IRA was "a fluctuating body of persons involved in a criminal conspiracy with individual members being parties to distinct separate criminal enterprises, albeit carried out under the umbrella of the RIRA [Real IRA]".[189] Similar reasoning could easily apply to other NSAGs. There also may be evidentiary difficulties associated with the representation order approach. Although membership may provide some evidence that a member of a NSAG was a party to an unlawful act, it is questionable whether it sufficiently proves his or her personal liability, which would still need to be established. As a result, the common interest requirement, which underlies a representation order, may not be satisfied.[190] Nevertheless, the burden of proof remains less severe than in a criminal case, which requires proof beyond reasonable doubt. Given that no criminal charge is at issue, it is not for the court to determine whether a criminal offence has been committed. Instead, its role is to establish whether the defendant was responsible for causing harm and, if so, to determine whether damages are to be paid in respect of that harm.[191]

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[186] See e.g. Dudai (n 3) 808.
[187] Íñigo Álvarez (n 9) 203.
[188] *Mark Christopher Breslin and Others v John Michael McKevitt and Others* (n 178) paras 72-75.
[189] ibid para 74(a).
[190] With respect to the individual members of the Army Council of the Real IRA, the Court of Appeal argued that they did not each have the same interest: "[i]n this tort claim the plaintiffs had to prove that individual persons were liable as tortfeasors for trespass to the person. While membership of the Army Council may be some evidence that a member thereof was a party to the tort (either being involved in the planning or execution of the enterprise) a member of the Army Council who did not participate in the relevant acts, being, for example, absent from a relevant meeting or unaware of the enterprise would have a defence to a claim in tort. Accordingly not all members of the Amy Council as at 15 August 1998 had the same interest for the purposes of Order 15 rule 12." ibid para 74(b),(d).
[191] *Mark Christopher Breslin and Others v Seamus McKenna and Others* (n 174) para 6.

### 5.3.3 Reparation provided by actors with representative authority

In this section, the third and final approach to dealing with post-conflict reparations by NSGAs is discussed. First, a broader understanding is provided with respect to NSAGs as responsible actors in post-conflict settings. This discussion draws from social science literature and examples from practice. This will set the starting point for further exploration into the role that actors who hold representative authority can play in reparations: where they are provided on behalf of a defunct NSAG after a conflict has ended. Lastly, the relevance of this approach for international law is assessed.

#### 5.3.3.1 Understanding non-state armed groups as responsible actors in post-conflict settings

Although a NSAG legally ceases to exist with the end of a NIAC, research has shown that this does not necessarily entail that the defunct group no longer has any political, social or even moral authority and influence on segments of society. This follows from the observation that NSAGs do not come out of the blue, but are rather embedded in pre-existing social structures and ties with communities.[192] An implication thereof is that, in some form or other, NSAGs may actually retain, in certain circumstances, an influential role in post-conflict settings, and may sometimes even have the potential of contributing to victims' redress.[193]

This is concretely demonstrated in Dudai's discussion of the IRA in Northern Ireland, which, following the 1998 Belfast Agreement, provided some measures of truth-recovery and symbolic reparation on behalf of the organisation. Dudai argues that the IRA case shows that although the group ceased its military operations, it did not disappear. The group rather retained political and social authority in the communities that supported it, and its actions and statements still had the potential to affect people's lives. The IRA was neither totally eliminated, nor did it capture full power in the country. It rather remained an influential non-state actor.[194] Importantly, this meant that victims seeking reparation could still call upon the

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[192] Teresa Koloma Beck, 'Staging Society: Sources of Loyalty in the Angolan UNITA' (2009) 30 Contemporary Security Policy 343; Dudai (n 3) 808; Lawther (n 167); David Brenner, 'Authority in Rebel Groups: Identity, Recognition and the Struggle over Legitimacy' (2017) 23 Contemporary Politics 408, 411; Philip A Martin, Giulia Piccolino and Jeremy S Speight, 'Ex-Rebel Authority after Civil War: Theory and Evidence from Côte d'Ivoire' [2020] Journal of Comparative Politics 1.

[193] Dudai (n 3) 807–808.

[194] Since the declaration of a first ceasefire by the IRA in 1994, its command structures remained largely intact during the negotiations leading to the 1998 peace accord and the subsequent peacebuilding process. Even their political opponents accepted implicitly that maintaining a leadership structure was required to oversee the transition and demobilisation of the group, which ultimately helped to support the peace process. Dudouet and Giessmann (n 150) 16.

IRA, as it remained an identifiable actor.[195] Another example is the Colombian *Colectivo Nacional de Desmovilizados AUC*, which is a national collective of demobilised members of the AUC. Although the various paramilitary blocks that were part of this umbrella organisation demobilised more than a decade ago,[196] demobilised members and commanders have convened within this organisation during their National Conferences. The National Collective issued, for instance, a communication in March 2019, in which it expressed its commitment to contribute to the work of the Truth Commission, which was established as part of the peace process with the FARC-EP. Former high-level commanders of the AUC were among those who signed the communication.[197] The example suggests that the social bonds forged during a NIAC do not necessarily disappear in its aftermath. Ex-fighters may actually continue to organise themselves.[198] Moreover, the former leadership can potentially remain an influential post-conflict factor, taking part in a transitional justice process (*in casu*, more than a decade after its demobilisation), while retaining a degree of social and political authority. A further illustrative and recent example can be found in the manner in which the defunct FARC-EP has been carrying out its obligations to repair by way of a successor political entity.[199]

These examples demonstrate that it is a legal fiction that the influence of a NSAG simply disappears with the end of a NIAC. This challenges a common assumption among legal scholars that NSAGs simply cease to exist with the end of a NIAC, with no one left to assume responsibility. The general argument holds that a NSAG either wins and becomes the new government or state, to which (state) responsibility can be attributed under international law, or loses with its complete elimination as a result and therefore leaving its responsibility without practical relevance.[200]

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[195] Dudai (n 3). Dudai further discusses the example of the ANC in South Africa, which offered some limited post-conflict reparations. However, note that the question whether the conflict in the country should be classified as an armed conflict had been the focus of extensive legal debate. See Neil Boister, 'The Ius in Bello in South Africa: A Postscript?' (1991) 24 Comparative and International Law Journal of Southern Africa 72.

[196] See Chapters 5 and 6.

[197] 'Comunicado a La Opinión Pública Del Colectivo Nacional de Desmovilizados AUC' (21 March 2019) <https://www.justiciaypazcolombia.com/comunicado-a-la-opinion-publica-del-colectivo-nacional-de-desmovilizados-auc/> accessed 7 August 2020; 'Desmovilizados de Las AUC Contarán Su Verdad a La Comisión de La Verdad' *Análisis Urban* (23 March 2019). As part of the working group *Narrativas de Excombatientes,* various ex-members of guerrilla groups (such as the FARC-EP, EPL, ELN and M19), as well as of the AUC, among others, convened monthly between February and November 2019 to contribute to the work of the Truth Commission, which led to the adoption of the *Declaración por la vida, la Paz y la Reconciliación* signed on 15 November 2019 [on file with the author].

[198] For further examples see the following sub-section.

[199] See Chapter 7.

[200] 'Fourth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur' Yearbook of the International Law Commission (1972) Vol II UN Doc A/CN.4/264 and Add.1 para 154; Éric David, *Principes de Droit Des Conflits Armés* (3rd edn, Bruylant 2002) 643; Zegveld (n 132) 152; ILA Committee on Non-State

Two preliminary observations can be drawn from the discussion. First, certain persons or entities, which are somehow linked to a defunct NSAG, could, at least in certain circumstances, still contribute to providing redress in a post-conflict situation, and this can possibly be framed as being on behalf of the group. Second, this implies that victims of a NSAG may still have an avenue to seek redress for NSAG violations after the conflict has ended.

These observations find further support in the practice of the truth commissions for El Salvador and Guatemala. Both called on the respective NSAGs' former command structures to provide reparations on behalf of the group. The Commission on the Truth for El Salvador held that the *Frente Farabundo Martí para la Liberación Nacional* (FMLN) must provide "moral and material compensation […] where it is found to have been responsible" and stressed the need for guarantees of non-repetition by the group, now operating as a political entity, in order to prevent similar abuses in the future. Notably, the Commission's recommendations were submitted to both the State and the former commanders of the FMLN.[201] However, there was little support within the FMLN, which had successfully transitioned into a legally recognised political party, for the reparations recommendations made by the Commission.[202] In another instance, the Guatemalan Commission for Historical Clarification recommended the assistance of the "former Guatemalan National Revolutionary Unity" (URNG) in the search for those who were disappeared during the conflict.[203] Furthermore, it recommended, with the primary aim of restoring dignity to the victims, that the "ex-Command" of the group publicly and solemnly ask for forgiveness and assume responsibility for the harmful acts committed by the "ex-guerrillas".[204] Like the FMLN, the URNG registered as a political party in the aftermath of the NIAC.[205] After the publication of the Commission's report, the former leader of the URNG apologised in the name of the

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Actors (n 10) 9; Veronika Bílková, 'Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law?' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 282.

[201] Commission on the Truth for El Salvador (n 135) 175, 185, 188; Veronique Dudouet, Katrin Planta and Hans J Giessmann, 'The Political Transformation of Armed and Banned Groups' (Berghof Foundation and UNDP 2016) 11.

[202] Alexander Segovia, 'The Reparations Proposals of the Truth Commissions in El Salvador and Haiti' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 159–160.

[203] Guatemalan Commission for Historical Clarification, 'Memory of Silence: Conclusions and Recommendations' (1999) 52.

[204] ibid 49.

[205] Michael E Allison, 'The Guatemalan National Revolutionary Unit: The Long Collapse' (2016) 23 Democratization 1042; Dudouet, Planta and Giessmann (n 201) 17, 33.

group: "[w]ith profound pain and humbleness we ask for forgiveness from the memory of the victims, their families and communities for any kind of excesses".[206]

It is evident that the feasibility of such post-conflict reparations will be dependent on the circumstances of a given case and, hence, will not be applicable to all NSAGs. In some cases, reparations by a defunct NSAG may simply remain out of reach. A case in point is the example of the LTTE in Sri Lanka. The group was completely eliminated in the aftermath of the conflict, with no military and political structures remaining.[207]

#### 5.3.3.2 Representative authority of former members, a successor entity or other actors

Although the observations made in the previous section have important implications for the delivery of post-conflict reparations by defunct NSAGs, they result in a challenging exercise when seeking to translate these complex socio-political realities into international legal terms. Under international law, the concept of legal personality takes a central place, since it allows determining the participants within the international legal system. Despite its importance, the concept is characterised by a lack of consensus on its precise meaning and how actors can actually acquire it. This has led some scholars to propose ways to rethink the concept, and has caused others to propose discarding it altogether.[208] The concept of international legal personality is not considered useful when seeking to grasp the complex realities discussed above. Although the premise of the analysis is that certain persons, or entities, somehow linked to a NSAG could play a role in post-conflict reparations on behalf of the group (at least in certain situations), the objective is not to argue that such actors should have defined duties in international law, or that they should even be recognised as legal subjects. Instead, the aim is to develop the contours of a conceptual approach, which allows us to take account of such factual realities and complexities and, most importantly, to better understand the role that NSAGs could still play in post-conflict reparations, by way of other actors. In doing so, the analysis finds its basis in the law, but also crosses its boundaries. In developing this approach, the following discussion will depart from a suggestion made within legal scholarship, deepening this proposal by incorporating insights obtained from social science research.

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[206] 'Guatemala Rebel Apology' *The Associated Press* (14 March 1999); 'Guatemala Rebels Apologize for Abuses During Civil War' *The Miami Herald* (14 March 1999).

[207] Dudai (n 3) 807–808; Mastorodimos (n 42) 134; 'Death of the Tiger' *The New Yorker* (9 January 2011).

[208] In Higgins' words, "(w)e have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint." Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 49–50. See Chapter 1 Section 2.

### *Starting point of the discussion*

In their work on the international responsibility of NSAGs, legal scholars Heffes and Frenkel suggest that stakeholders "assess on a case-by-case basis the feasibility of having the former organs of a NSAG providing for reparatory measures".[209] The potential of their proposal was illustrated by the example of a former NSAG leader, who was still able to provide a public apology to victims, despite his NSAG having dissolved at the conclusion of a NIAC.[210] Their proposal is apt for analysis and expansion, as it is in line with the observations drawn in the previous section of this study. In attempting to build on this suggestion, at least two initial questions arise: first, 'what criteria, features or factors determine which persons could take up such a representative post-conflict role?' and, second, 'is such a role restricted to former members, or could other persons or entities fulfil a similar function?'[211]

### *Insights from official or public apologies*

In seeking to answer these questions, the existing literature on official or public apologies is particularly instructive. The primary reason is that such apologies are carried out on behalf of a larger collectivity, such as a state or other organised entity. As such, they differ from interpersonal apologies. One of the central questions addressed by scholars seeks to ask *who* is to deliver such an apology, and the larger process that comes along with the selection of an apparently legitimate 'apologiser'. As a result, this body of work can tell us more about who can take on a representative role when dealing with past wrongs and on what basis this person is determined. While contributions which have tackled this who-question typically deal with official apologies by states regarding historical injustices, the question appears to be understudied with regard to NSAGs.[212]

The existing literature on official apologies by states remains useful, to the extent that certain analogies can be made when reducing states and NSAGs to a common core feature: namely

[209] Heffes and Frenkel (n 86) 71.

[210] ibid.

[211] Similarly, Kleffner posed the question "whether and under what conditions the responsibility of organized armed groups shifts to successor organizations [..] or individual members of a defunct organized armed group". Kleffner (n 11) 265.

[212] However, there are some notable exceptions. The 2019 report on apologies for gross human rights violations and serious violations of IHL of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence not only focuses on identifying practices and lessons learned in relation to the delivery of apologies by states, but also by NSAGs. See UNGA, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (n 12). In addition, a recent socio-legal research project titled 'Apologies, Abuses & Dealing with the Past', carried out at the Queen's University Belfast, seeks to enquire into the status of apologisers, how NSAGs manage their constituencies and how victims exercise leadership among themselves in response to apologies, among other topics. For further information <https://apologies-abuses-past.org.uk> accessed 7 August 2020.

their collective nature. Moreover, an empirical study of apologies carried out by NSAGs will provide deeper insights. Several practical examples are considered, which are complemented by an enquiry into the role of the FARC-EP in post-conflict reparations, in Chapter 7. Nonetheless, the examination does not aim to be comprehensive.

The notion of an official apology has been defined in a number of ways, with scholars tending to take a narrow or broader approach to its scope. Murphy adopts a narrow definition that involves "an apology offered by an official representative of a state (or some state agency) for past actions committed by a state or under state sanction".[213] Even more restricted, Teitel speaks of the 'transitional apology' as being deliverable only by the head of state, which embodies representative functions, among others.[214] In contrast, Thompson defines such an apology in a broader sense as "an official apology given by a representative of a state, corporation, or other organized group to victims, or descendants of victims, for injustices committed by the group's officials or members".[215] The term 'other organized group' could easily include a NSAG. The recent report on apologies by the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence offers a more explicit reference to such groups. The Rapporteur defines the concept of public apologies as involving a "truthful admission of individual, organizational or collective responsibility".[216] It acknowledges that "representatives of non-State armed groups or the political movements with which they are affiliated" can carry out such apologies for past harms.[217]

While much of the literature on official apologies is focused on the state, the latter two definitions indicate that NSAGs can also effectuate such symbolic actions concerning their collective responsibility for past wrongful conduct. An additional common element can be identified across the definitions, namely that of *representation*. This is evident from the very nature of an official apology, which necessitates a representative to deliver the action on behalf of the group that, as a non-human entity, cannot act by itself. In this sense, such apologies are dependent on representation. Accordingly, the notion of representation also forms the central element in the discussion on post-conflict reparations carried out on behalf, or rather in representation, of a dissolved NSAG.

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[213] Michael Murphy, 'Apology, Recognition, and Reconciliation' (2011) 12 Human Rights Review 47, 49.

[214] Ruti Teitel, 'The Transitional Apology' in Elazar Barkan and Alexander Karn (eds), *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford University Press 2006).

[215] Janna Thompson, 'Apology, Justice and Respect: A Critical Defense of Political Apology' in Mark Gibney and others (eds), *The Age of Apology: Facing Up to the Past* (University of Pennsylvania 2008) 31.

[216] UNGA, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (n 12) 4.

[217] ibid.

Research has shown that who apologises matters, as the status of the speaker will necessarily affect the effectiveness of the apology.[218] A necessary basic condition is that the apologiser is actually recognised as representing the collectivity and, hence, as having the authority to speak on its behalf.[219] Consequently, apologies given by someone without the capacity or authority to represent the entity will suffer. In other words, the speaker relies on his or her authority and status to render the apology legitimate.[220] This translates itself into a notion of *representative authority*.[221] This is not only the case for apologies given by states, but also those offered by NSAGs. One of the main findings of the aforementioned UN Special Rapporteur report on apologies underscores that the person selected to deliver an apology must have the necessary leadership and credibility to effectively represent those who inflicted the harms. Hence, the individual should have the authority to speak on behalf of the responsible NSAG. Otherwise, the apology's delivery, perceived sincerity and effectiveness risk being undermined.[222]

In order to ensure the effectiveness of an apology, it is generally desired that the preparatory process should incorporate the extensive involvement of both the victims and the wrongdoers, or their representatives. It is important that the victims, or at least their representatives, have a central say in who should deliver the apology and that they, accordingly, recognise the authority of the apologiser.[223] Consultations with the NSAG's own constituency are also necessary, in order to avoid subsequent backlash.[224] This would ideally involve a process in which an agreement is reached as to how and under which circumstances the apology will be presented, including clarification of the identity of the speaker.[225] Although a NSAG no longer legally exists in a post-conflict context, a consultation process with former members could still potentially take place. As the previous example regarding the AUC indicates, former members may continue to organise themselves in associations or foundations that

[218] Danielle Celermajer, *The Sins of the Nations and the Ritual of Apologies* (Cambridge University Press 2009) 252; ICTJ, 'More Than Words: Apologies as a Form of Reparation' (2015) 13.
[219] Sanderijn Cels, 'Saying Sorry: Ethical Leadership and the Act of Public Apology' (2017) 28 The Leadership Quarterly 759, 260.
[220] Celermajer (n 218) 256; Mihaela Mihai, 'Apology' (*The Internet Encyclopaedia of Philosophy*) <https://iep.utm.edu/apology/> accessed 7 August 2020.
[221] Hanna F. Pitkin, *The Concept of Representation* (University of California Press 1972) 42–43.
[222] UNGA, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (n 12) 15, 17, 20.
[223] Carlton Waterhouse, 'The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs' (2009) 31 University of Pennsylvania Journal of International Economic Law 257, 259, 267–270; UNGA, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence - Note by the Secretary-General' (n 49) para 77; ICTJ (n 218) 17; UNGA, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (n 12) 5, 15–17, 20.
[224] UNGA, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (n 12) 15, 19–20.
[225] Thompson (n 215) 41–43.

allow them to maintain, to an extent, their social and political bases, and to represent their common interests after the conflict has ended. Other examples can be found in the Colombian context. An example is *La Fundación Aulas de Paz*, which was initiated within a proposal presented by a group of demobilised AUC members, before the Chamber of Justice and Peace, as part of their re-socialisation process. It initially emerged as an initiative of symbolic reparation and as a commitment to non-repetition. At present, the foundation appears to be engaged in reconciliation and peacebuilding work.[226]

Victim representatives indicated in the *El Mozote* case, before the Inter-American Court of Human Rights, that the acknowledgement of responsibility by the El Salvadorian State had to be made by the president, in his capacity as head of state, and in the presence of senior officials in order for it to have true meaning for the victims.[227] This illustrates that the choice of representative is important as it also reflects the degree of recognition and respect the victims are being accorded. As such, the choice of representative may profoundly determine the perceived legitimacy and symbolic weight of the action.[228] By analogy with apologies delivered by states, the most natural link between a NSAG and a public apology would be reflected by apologies made by a former leader, commander-in-chief or any other official who occupied the highest position or rank in the group. It makes the apology official, endows it with formality and solemnity, and signals the full backing of the (defunct) group.[229] For example, Xanana Gusmão, then President of Timor-Leste, apologised before the Commission for Reception, Truth and Reconciliation in his capacity as the former leader of the resistance army the Armed Forces for the National Liberation of East Timor (FALINTIL) for killings and other violence directed at rival groups and civilians.[230] It could also be envisioned that a commander of a NSAG's substructure (e.g. a front) that had a particular link to the violation,

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[226] *Case against Iván Roberto Duque Gaviria and Others* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (11 August 2017) 563–572; 'De La Violencia Paramilitar a Las Aulas de Paz' *Buena Gente Periódico* (21 July 2019). Another example is *La Fundación Semillas de Paz* created by demobilised fighters of the AUC-linked *Bloque Libertadores del Sur*, which was, however, closed due to security concerns. FUCE PAZ (*Fundación Colombiana de Ex Combatientes y Promotores de Paz*) is the FARC-EP's first legal organisation of ex-FARC-EP fighters created for the purpose of promoting their reintegration. 'Fundación de Desmovilizados En Nariño Fue Cerrada Por Inseguridad' *W Radio* (23 July 2007); 'Last Year They Were Enemies. Now FARC Guerrillas and Civilians Are Trying to Pick up the Pieces Together' *De Correspondent* (15 June 2017).

[227] *Case of the Massacres of el Mozote and Nearby Places v El Salvador* IACtHR (Judgment Merits, Reparations and Costs) Series C No 252 (25 October 2012) para 354. See, for other symbolic actions involving high-ranking state officials before the Court, Antkowiak (n 110) 297–298.

[228] Murphy (n 213) 50.

[229] ICTJ (n 218) 13.

[230] Gene Christy, 'Armed Groups and Diplomacy: East Timor's FRETILIN Guerrillas' in Jeffrey H Norwitz (ed), *Armed Groups: Studies in National Security, Counterterrorism and Counterinsurgency* (US Naval War College 2008) 44; ICTJ (n 218) 16; UNGA, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (n 12) 14.

or the territory in which it occurred, could be in a better position to carry out the apology on behalf of the group.[231]

### *Conclusions*

Returning to the first question, regarding what criteria, features or factors determine which persons could provide post-conflict reparations on behalf of a dissolved NSAG, the analysis has made it clear that a key criterion is the person's authority to represent and act on behalf of the defunct group, as opposed to acting in a merely personal capacity. In other words, a person's representative authority, vis-à-vis the group itself, functions as a criterion of capacity. It also becomes clear that the determination of such authority is not necessarily objective. Depending on the context, it could require a participatory process in which a central voice is given to the victims as beneficiaries of the reparatory action. On the other hand, involvement of the constituency of the NSAG is also necessary, in order to ensure support and avoid any subsequent backlash, that could diminish the effectiveness of the measure.

Besides the need to engage both of these key groups of actors, representative authority could also be preliminarily evaluated by carrying out a case-specific assessment: which could take account of certain *actor features* and *contextual factors*. This possibility is informed by the fact that NSAGs and post-conflict contexts can differ significantly from one another. Actor features refer to the features of the scrutinised NSAG (e.g. its organisational structure), as well as the features of the person taking the representative role (e.g. his or her past role in the group and current one; see *supra* example of FALINTIL). When dealing with, for instance, a political-military NSAG, in which the two wings are not merged, the question may arise whether someone from the military or political side of the group should deliver the apology: the question being, 'who would bear the necessary authority to represent the group as a whole?' In the Northern Ireland context, neither the President, nor the Vice-President of Sinn Féin, the political wing of the IRA, had an IRA background. This could have put their authority to deliver a collective apology into question. Such questions may be less pertinent with regard to NSAGs that merge the political and the military. The status of Nelson Mandela as the leader of both the political and military wings of the ANC was, for instance, never in doubt when he responded to the findings of the Skyweyiya Commission, which documented the abuses by the ANC against its own members.[232] Contextual factors relate to the prevailing

[231] Murphy (n 213) 50; ICTJ (n 218) 14–15, 18.
[232] Dudai (n 3) 796; UNGA, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (n 12) 15.

external circumstances that may impact a person's authority, such as the provisions in a peace agreement and the broader post-conflict context in which the actions are set to take place.

The second question that requires answering, is whether such a representative role would be restricted to former members of the group, such as a former group leader, as suggested by Heffes and Frenkel, or whether other persons, or even entities, could fulfil a similar function. There is no specific reason to exclude other persons, or entities, which are somehow linked to a NSAG, from taking a similar representative role. The most natural link would indeed lie with members of the former military leadership of the group. Nevertheless, former mid-level commanders, members of a still existing political wing, or even ex-foot soldiers or third persons empowered to represent the defunct group, could have a representative function depending on the particularities of the case. The same can be argued with regard to a political party or movement into which a NSAG collectively transforms as part of a broader peace process.[233] As will be demonstrated in Chapter 7, with regard to the FARC-EP, such successor entities can form a vehicle for NSAGs to provide post-conflict reparations on that NSAG's behalf. Finally, it is plausible that the military activities of a NSAG could become dormant, resulting in the threshold criteria of a NIAC no longer being satisfied. In such cases, the group could still be called upon as a non-state actor.[234]

A final question that arises from the discussion is: 'for which forms of post-conflict reparation can this approach be useful?' The approach would appear to be most appropriately applicable to symbolic forms of reparation, such as: a public apology on behalf of the group; the recognition of collective responsibility; an official declaration that restores the dignity and reputation of the victim; commemorations and tributes; as well as, the provision of guarantees of non-repetition. It could also be envisioned, that representatives of a defunct NSAG could play a role in material forms of reparations, such as restitution and monetary compensation. A successor entity with representative authority could, for instance, provide compensation on behalf of its predecessor, or play a role in the restitution of property and assets taken over the course of the conflict.

#### 5.3.3.3 The relevance for international law

Contrary to the previous two approaches, the representative authority approach is less relevant from a strict international legal perspective. The aim has not been to argue that actors holding

[233] Dudouet, Planta and Giessmann (n 201) 7. Íñigo Álvarez argues that "the provision of reparation on behalf of armed groups is only possible if these groups continue to have a separate existence after the conflict, as another type of association or a political entity". Íñigo Álvarez (n 9) 202.
[234] See the example of the IRA in the previous sub-section.

representative authority should be held internationally responsible on behalf of a defunct NSAG. Instead it presents a conceptual approach that allows for the grasping of actual realities, which are relevant for reparation purposes, but which remain out of reach due to the restrictions inherent in the existing tools of international law. The representative authority approach allows us to better understand the role which defunct groups could still play in post-conflict reparations and how transitional justice measures, or strategies, could be adjusted in recognition of this understanding, to provide space for actions involving what remains of a defunct-NSAG and its representatives.[235] Contrary to common assumptions of international legal scholarship, the discussion has suggested that, at least in some cases, there is still an identifiable actor that could be called upon to make certain forms of reparation on behalf of a NSAG after the conflict has ended. Although this actor may not be held legally responsible, it can still play a valuable role in providing redress. Nevertheless, this will much depend on the consent of the concerned actor, how a conflict has ended and the post-conflict context. If there is some kind of agreement between the parties at the end of the conflict, it could be a first instrument for putting the responsibility of the NSAG into practice.[236] This could involve carving out a space for former commanders/leaders, or a successor entity, to take an active role in the reparation process. It could even be agreed that such an entity takes responsibility for the legal consequences of the wrongful acts committed by its predecessor, even if there is no such rule in present international law.[237]

# 6 In search of a forum

A final question that requires consideration is: ‘in which forum(s) could a possible duty of NSAGs to provide reparations be realised?’ Chapter 2 concluded that the analysis of the question of forum can take a broad perspective. Relevant mechanisms may range from the judicial to the extra-judicial in nature, and may be situated at the national or international levels. Within this broad context, the various possibilities that have presented themselves over the course of the study, especially in Chapter 2 and in the current chapter, will be considered more closely over the following section.

[235] Dudai (n 3) 808.
[236] Mastorodimos (n 42) 134.
[237] See Chapter 3 Section 2.1.1. There are several practical examples that indicate that reparations can be part of bilateral agreements with NSAGs. See Chapter 2 for a discussion of such agreements. Similarly, Íñigo Álvarez argues that it seems more feasible to demand reparations upon the termination of an armed struggle. Íñigo Álvarez (n 9) 215.

The domestic arena seems, in the first instance, to be the best venue for assessing and enforcing a possible NSAG duty of reparation, especially given its proximity to the armed conflict.[238] At the same time, a domestic focus may pose significant challenges for states, especially where conflict has considerably affected the state's financial, technical or human resources, and, as a result, its ability to effectively pursue any claims against NSAGs.[239] Alternatively, a state may simply be unwilling to engage in such efforts due to, e.g., concerns over legitimacy. Nevertheless, national jurisdictions could respond to violations committed by NSAGs in at least three ways, namely through civil or criminal litigation, an administrative reparation programme and/or a reparation fund.[240]

In some domestic legal systems, victims have sought redress directly from a NSAG through litigation. Examples can be found in Northern Ireland, where victims pursued civil litigation against the Real IRA, and in the US, where victims have tried to bring civil claims against NSAGs for violations of international law.[241] In terms of criminal litigation, the Justice and Peace Law, which will be discussed further in Chapter 6, is an interesting example of how the civil responsibility of a NSAG can constitute a subsidiary mechanism in relation to a criminally convicted NSAG member's duty to compensate within the confines of a criminal procedure. The possibility of claiming reparations from a NSAG in a civil court can prove more beneficial, and easier, than the pursuit of reparations in criminal proceedings, that only attach civil claims to a criminal conviction.[242] The success of a private tort claim, which concerns wrongs other than a breach of contract, is not dependent upon any decision on criminal responsibility. Moreover, the degree of evidence and standard of proof for a tort claim is generally lower than for a criminal conviction. Victims can also set such a process in motion directly, whereas criminal acts are prosecuted by the state on behalf of the public.[243]

Courts may experience certain limitations, or may even prove unworkable, especially where they are dealing with a staggering number of reparation claims following mass-scale

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[238] Mastorodimos (n 42) 130; Blázquez Rodríguez (n 13) 422.

[239] Blázquez Rodríguez (n 13) 424; ICRC, 'Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War' (2020) para 916 <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary> accessed 3 August 2020.

[240] See, regarding judicial reparations, principle 17 of the UN Basic Principles and Guidelines: "States shall […] enforce domestic judgements for reparation against […] entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation […]. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements."

[241] See Section 5.3.2 and Chapter 2 Sections 3.2.1 and 3.2.2.

[242] Although civil law systems may merge both criminal and civil proceedings, by giving the victim a role in the criminal proceedings, with the purpose of obtaining reparation, note that common law systems keep both separated. Mark Klamberg, *Evidence in International Criminal Trials* (Martinus Nijhoff Publishers 2013) 60.

[243] Sassòli (n 58) 45.

abuses.[244] Although judicial reparations are important, courts are unlikely to be the main avenue for redress in such circumstances. Large-scale reparations programmes generally offer a better opportunity to respond, comprehensively, to a large universe of victims.[245] Such programmes are generally administrative procedures that obviate some of the difficulties and costs associated with litigation (i.a. relaxed standards of evidence, non-adversarial procedure, faster and higher likelihood of results).[246] NSAGs could financially contribute to such a programme, to the benefit of various reparation forms, or could even participate directly in certain reparatory measures, where the design of a reparations mechanism allows. Reparations can also be financed by establishing a fund for war victims, that could source funding through i.a. the tracing and liquidation of the illegal assets of NSAGs.[247]

Regarding the international level, Chapter 2 has shown that the current international legal system lacks a judicial or quasi-judicial mechanism that is competent to adjudicate claims against NSAGs regarding reparation.[248] Although some actors and mechanisms monitor and scrutinise the behaviour of NSAGs against international law, they can neither accept complaints concerning NSAGs, nor impose any legal obligations on them.[249] Consequently, these efforts do not close the enforcement gap at the international level.[250]

In this context, Zegveld and Kleffner have proposed the establishment of a Humanitarian Law Committee, with the capacity to examine individual reparation claims against NSAGs for alleged IHL violations.[251] In contrast, Sassòli favours a confidential, co-operative and pragmatic approach in the field.[252] However, when seeking voluntary commitments to reparations from NSAGs, there is still a need for a proper enforcement mechanism in terms of, e.g., monitoring and/or reporting procedures.[253] Otherwise, such action could result in the mere collection of empty promises.[254] Alternative proposals have envisaged the establishment

[244] Roht-Arriaza (n 70) 169, 181–182; Sassòli (n 83) para 5.78.
[245] Moffett and others (n 45) para 117.
[246] UNGA, 'Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence - Note by the Secretary-General' (n 49) paras 3–4.
[247] See Sections 4.3.2 and 5.3.1 as well as Chapter 2 Sections 3.4 and 3.5. Further practical examples can be found in Part 3 on Colombia. Íñigo Álvarez (n 9) 203.
[248] Zegveld (n 132) 162; Bílková (n 200) 282.
[249] See Chapter 2 Section 2.5.
[250] Kleczkowska (n 171) 150–151.
[251] Kleffner and Zegveld (n 54). Similarly, the ILA Committee on Compensation for Victims of War discussed the possibility of establishing an International Compensation Commission and a trust fund from which victims could receive compensation in cases where a NSAG did not become a new government or state and dissolved prior to any proceedings. The latter proposal is based on the example set by the International Commission of Inquiry on Darfur (see Chapter 2 Section 3.4). ILA Committee on Compensation for Victims of War, 'Rio de Janeiro Conference Report' (2008) 25–26.
[252] Sassòli (n 58) 40.
[253] See Section 5.2; Íñigo Álvarez (n 9) 202.
[254] Geneva Call, 'Positive Obligations of Armed Non-State Actors: Legal and Policy Issues' (2015) 10.

of an international trust fund, composed of the blocked or seized assets of NSAGs, or even contributions by NSAGs to the reparation regime of the International Criminal Court, where its members have been convicted.[255] International arbitration may provide for another potential forum. An example can be found in the Spanish Civil War, when the Franco-led insurgents proposed that a reparation request concerning their bombing of a British steamer be submitted to arbitration.[256] More recently, the government of Sudan and the Sudan People's Liberation Movement/Army submitted their dispute concerning the Abyei area to the Permanent Court of Arbitration (PCA).[257] Although it did not deal with any question of redress, the example at least shows the potential of this forum to settle disputes between states and NSAGs.

Lastly, some have underscored the potential of transitional justice mechanisms to provide a forum to address a NSAG's possible duty of reparation.[258] A group could, for instance, contribute to the work of a humanitarian and/or extra-judicial body which deals with the recovery of the disappeared, or could provide satisfaction measures within the framework of a truth commission.[259] Yet, this would require moving beyond the traditional focus on state responsibility and individual criminal responsibility in transitional justice literature and practice, while providing space to reflect on whether and how NSAGs could be engaged as transitional justice actors.[260] The process with the FARC-EP, which will be discussed in Chapter 7, provides for a recent example of such a development.

# 7 Conclusions

This chapter has examined how a possible duty of NSAGs to provide reparation for internationally wrongful acts could be operationalised under international law from a *de lege ferenda* perspective. Overall, a multifaceted proposal that seeks to respond to the particularities presented by NSAGs has been put forward. The analysis has revealed that some of the main rules and principles concerning reparations within the law of state responsibility could be transposed into this NSAG framework by analogy, without too many modifications.

[255] See Section 4.3.2 and Chapter 2 Sections 2.4 and 3.6.
[256] See Section 3.1.2 of Chapter 2.
[257] The *Abyei Arbitration* was conducted under the PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State (1993). *Government of Sudan v Sudan People's Liberation Movement/Army* PCA (2009) No GOS-SPLM/A.
[258] Geneva Call, 'Positive Obligations of Armed Non-State Actors: Legal and Policy Issues' (n 254) 10; UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 46) para 89.
[259] UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life' (n 46) paras 90, 94; Íñigo Álvarez (n 9) 202.
[260] Dudai and McEvoy (n 145) 17–18.

It has been deemed possible to apply the principle of full reparation to NSAGs. The same holds for the five main forms of reparation, namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, which are equally applicable within the NSAG context. Accordingly, the examination has found that a duty of reparation for NSAGs can be conceptualised in a similar manner to that of states under international law.

The main difference lies in how these abstract rules and principles are to be put into practice, or rather, concretely applied to a NSAG. As a starting point, the duty to provide reparation is framed by the nature of the violation and the harm done. Such an exercise takes, in principle, little account of the responsible entity. Nonetheless, a proposal has been made to take an actor-specific approach to the concrete application of a duty of reparation imposed on a NSAG. This proposal does not go as far as arguing that the quantum or quality of reparation that is owed should be restricted where it proves to be difficult or beyond the capacity of the responsible group. Instead, the proposed approach involves making a case-specific assessment of the group's level of organisation and resources, as indicators of its organisational capacity to comply with the imposed duty. The aim of this assessment is to determine the concrete scope of the group's duty of reparation: in terms of the reparation forms it is required to grant and the extent of its engagement in the provision of reparatory measures. The subsidiary responsibility of the territorial state is subsequently triggered, as part of the proposed cascading regime of responsibility for reparation, to the extent that a NSAG lacks the capacity to comply with its duty of reparation. Thus, the approach could result in a division of responsibility between the NSAG and the state. This scheme seeks to ensure the provision of full reparation, at least to a greater degree. Moreover, it results in a differentiated approach that allows for taking the diverse organisational capabilities of NSAGs into account. The same subsidiary mechanism is activated when a NSAG would be simply unwilling to comply with its duty of reparation for wrongful acts. Especially in weak and resource scares countries, the international community could serve an important role in providing assistance.

The justification for this proposal can be found in the need to develop a realistic normative framework in international law, which reasonably ensures that the obligations imposed on a NSAG are effective and not mere legal fictions. Here, parallels can be drawn to the regulation of such entities under the primary rules of international law. To this end, the proposal allows for certain flexibility, to take account of the particularities present in a given case. This is necessary to be able to accommodate the considerable differences in capacity that may exist amongst NSAGs and between NSAGs and states. In addition, it is premised on the argument that reparations cannot be solely dependent on a responsible NSAG. The proposed approach

allows for holding all types of NSAGs to the various forms of reparation, with a view to delivering full reparation to the victims, with possible substitution by the state.

The approach can certainly be applied to a NSAG that is held internationally responsible over the course of an armed conflict to which it is a party. When a NSAG ceases to exist, it may result in reparations claims against this entity becoming unfeasible. Nonetheless, the cascading regime of responsibility for reparations would provide for a final safety net for the victims, by ensuring that reparation is still granted by the state on the basis of its subsidiary responsibility. In addition, the discussion has shown that the provision of post-conflict reparations by a legally defunct group should not be simply disregarded. Instead, three approaches have been presented that illustrate possible ways in which such reparations could still be provided in a post-conflict setting. In doing so, they seek to inject new insights into the scholarly debate on this challenging issue.

Finally, the chapter has brought together a series of potential forums in which a duty of NSAGs to provide reparations could be realised. The discussion has focused on the enforcement of such a duty at both the domestic and the international levels. Moreover, possible judicial and extra-judicial forums have been considered, including the potential of transitional justice. In this context, the analysis has also stimulated the reader to think beyond the concept of compelling NSAGs to provide reparations solely by way of court orders. This has involved exploring the potential of engagement with NSAGs on the issue of reparation, through voluntary or non-coercive mechanisms during and at the end of an armed conflict.

# PART 3

# INSIGHTS FROM THE OPERATIONALISATION OF A DUTY TO REPAIR FOR NON-STATE ARMED GROUPS IN COLOMBIA

# Chapter 5
# An introduction to the Colombian armed conflict

## 1 Introduction

This chapter considers the Colombian armed conflict, and places the NSAGs involved and the transitional justice processes examined in Chapters 6 and 7 within this broader context. An introduction will be given to the conflict and its main protagonists, the harmful impact it has left on Colombian society and the transitional justice efforts that have taken place thus far. The conflict will also be classified pursuant to IHL, and applicable rules of the relevant bodies of law will be identified to clarify the international legal framework which forms the basis of the further analysis. The discussion focuses specific attention on two of the main NSAGs that were involved in the armed conflict, these being the paramilitary groups united under the heading of the United Self-Defence Forces of Colombia (*Autodefensas Unidas de Colombia* or AUC) and the Revolutionary Armed Forces of Colombia - People's Army (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* or FARC-EP). The aim here is to provide a better understanding of these NSAGs, by enquiring into their respective origins, objectives, nature, organisational structures and other characteristics. Such an understanding is considered to be an essential precursor to the examinations of the subsequent chapters, which will analyse the roles of each group, in terms of granting reparations in response to their wrongful acts perpetrated during the armed conflict.

## 2 The Colombian armed conflict

### 2.1 The legal classification of the conflict under international humanitarian law

The prolonged armed violence that has held Colombia in a firm grip for over five decades has been taking place, in broad terms, between the Colombian armed forces and various NSAGs, as well as between such groups. Overall, the Colombian conflict can be understood as a set of armed conflicts and peace processes, which have involved a range of NSAGs, over a significant period of time. This study focuses on two specific NSAGs, that, on separate

occasions, collectively submitted themselves to a demobilisation and transitional justice process with the Colombian government: namely, the AUC and the FARC-EP. The analysis concerns itself first with paramilitary groups that identified themselves publicly and collectively as the AUC. This umbrella organisation was established in 1997, and was demobilised under the Justice and Peace Law of 2005. At the other end of the spectrum, an analysis of the FARC-EP, Colombia' oldest leftist guerrilla group, forms the focus of this study.[1] From its inception in 1964, the FARC-EP engaged in an armed conflict against the Colombian armed forces, until its demobilisation that was negotiated as part of a peace agreement concluded in 2016.

Although the Colombian government, at times, denied the existence of an armed conflict in the country, and thus disputed the applicability of IHL, this body of law applies automatically, regardless of the judgment of the parties to the conflict, on the basis of objective criteria.[2] Colombia is a party to the Geneva Conventions of 1949 and their additional protocols. Additional Protocol II was applicable to the Colombian armed conflict from its entry into force in the mid-1990s.[3]

The situation of armed violence between the Colombian State, the FARC-EP and the AUC-linked paramilitary groups, met the threshold requirements of intensity and organisation, therefore confirming its classification as a NIAC. Some factors signalling that the element of intensity was satisfied, can be identified in the duration of the hostilities, the high levels of victimisation, the employment of military means by all actors and the high number of persons partaking in the fighting.[4] As to whether the FARC-EP was sufficiently organised, the chapter will show that the group had a centralised command structure, as well as disciplinary rules and mechanisms, controlled territory and operated in a similar manner to a military entity, among other indicators.[5] The FARC-EP was generally deemed to be bound by Common Article 3, customary IHL, possibly IHRL and, from the mid-1990s, Additional Protocol II in

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[1] UNCHR, 'Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Colombia' (8 February 2001) UN Doc E/CN.4/2001/15 para 26.

[2] *Prosecutor v Akayesu* ICTR (Trial Judgment) ICTR-96-4-T (2 September 1998) para 603; Felicity Szesnat and Annie R Bird, 'Colombia' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 214–215; Marcela Giraldo Muñoz and Jose Serralvo, 'International Humanitarian Law in Colombia: Going a Step Beyond' (2019) 101 International Review of the Red Cross 1117, 1121–1122.

[3] *Judgment C-225/95* Constitutional Court of Colombia (18 May 1995); *Appeals Judgment No 32022* Supreme Court of Justice of Colombia (Criminal Cassation Chamber) (21 September 2009) 173–175.

[4] See Sections 2.2, 3 and 4 for concrete illustrations. *Prosecutor v Ramush Haradinaj Idriz Balaj Lahi Brahimaj* ICTY (Trial Judgment) IT-04-84-T (3 April 2008) para 49.

[5] ibid para 60; The Office of the Prosecutor of the ICC, 'Situation in Colombia - Interim Report' (2012) para 128.

its armed confrontations with the Colombian State.[6] As will be further illustrated in this chapter, the group, under responsible command, exercised such territorial control required to enable it to apply the Protocol and to conduct sustained and concerted military operations. The same holds generally for the paramilitary groups allied as the AUC.[7] However, although the AUC has been identified as a single party to the NIAC, the discussion in this chapter suggests that its national structure may not have represented a military hierarchy that included a chain of command.[8] Indeed, following its decentralised organisational structure, it appears that the chain of command was present only at the lower level of the different paramilitary blocks. Accordingly, and as will be further analysed in Chapter 6, Colombian courts have recognised these AUC-linked paramilitary blocks as individual, organised NSAGs, as per Common Article 3 and article 1 of Additional Protocol II.[9]

The NIAC between the FARC-EP and the AUC, or other NSAGs, only ever amounted to a Common Article 3 conflict, since the application of Additional Protocol II requires the involvement of the State armed forces.[10] However, this is only true to the extent that the AUC operated independently from the Colombian security forces.[11]

Although IHL applied without question to the FARC-EP, the group did not always accept the application of these norms. According to a report of Human Rights Watch, several commanders justified this by arguing that the FARC-EP had not expressly agreed with them and that they represented "elite interests".[12] However, the group still insisted that their military might and territorial control should elevate them to the level of belligerents, thereby

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[6] See Arturo Carrillo-Suárez, 'Hors De Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict' (1999) 15 American University of International Law Review 1, 90, 97; IACHR, 'Third Report on the Human Rights Situation in Colombia' OEA/SER.L/II.102 Doc 9 rev 1 (26 February 1999) ch IV para 20; Human Rights Watch, 'Colombia: Beyond Negotiation International Humanitarian Law and Its Application to the Conduct of FARC-EP' (2001) Vol 13 No 3B 3; Szesnat and Bird (n 2) 227. See also the sources in the following footnote.

[7] However, as the further discussion will indicate, the paramilitaries engaged in armed hostilities also in collusion with the Colombian security forces. Szesnat and Bird (n 2) 212. See concerning the application of IHL *Case against Fredy Rendón Herrera* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (16 December 2011) paras 509-515; Human Rights Watch, 'War Without Quarter: Colombia and International Humanitarian Law' (1998); Carrillo-Suárez (n 6) 112; UNCHR (n 1) para 25; IACHR, 'Report on the Demobilization Process in Colombia' OEA/Ser.L/V/II.120 Doc 60 (13 December 2004) para 45; ICRC, 'Colombia: The ICRC Continues to Support Those Affected by Conflict' (5 May 2005); Constantin von der Groeben, 'The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice' (2011) 16 Journal of Conflict & Security Law 141, 145–147.

[8] See Section 3.2.

[9] Jan Römer, *Killing in a Gray Area between Humanitarian Law and Human Rights* (Springer 2010) 19–20.

[10] See art 1 Additional Protocol II.

[11] As argued by Szesnat and Bird, paramilitary action could, in such instances, be potentially attributed to the Colombian State: for the purposes of the classification of hostilities, to determine the applicable legal framework. Szesnat and Bird (n 2) 223–224, 227. See also Human Rights Watch, 'War Without Quarter' (n 7).

[12] Human Rights Watch, 'Colombia: Beyond Negotiation International Humanitarian Law and Its Application to the Conduct of FARC-EP' (n 6) 6–7.

suggesting that, according to this reasoning, IHL applicable to international armed conflicts might apply.[13] Nonetheless, a more favourable attitude towards IHL is observable over time, particularly when negotiating for peace talks in 2016.[14] On the other hand, the AUC emphasised the importance of IHL in regulating conflict. However, this recognition was in stark contrast to the group's complete disregard for such norms in practice.[15]

## 2.2 An historical overview

The Colombian armed conflict is characterised by its changing dynamics, intensity and territorial locations, as well as by the involvement of a variety of illegal armed actors ranging from organised armed groups, such as left-wing guerrilla and paramilitary groups, to emerging criminal bands and organised crime groups that over time have become deeply involved in the drug-trafficking trade and the extraction of natural resources, adding to the complexity of the conflict. Its causes are commonly said to involve a combination of several wide-ranging factors, including, i.a., unequal land distribution, political exclusion and uneven State presence. These are interwoven with other persistent developments, such as the prevalence of the drug economy, which contribute to the continuities of the war.[16]

The conflict has left a devastating impact on Colombian society.[17] All actors engaged in various forms of serious violations of international law, with the majority of the harms perpetrated against the civilian population.[18] Wrongful actions, such as selective executions, forced disappearances, kidnappings and small massacres, prevailed within the armed violence,

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[13] Carrillo-Suárez (n 6) 57–60.

[14] Hyeran Jo, 'International Humanitarian Law on the Periphery: Case of Non-State Armed Actors' (2020) 11 Journal of International Humanitarian Legal Studies 97, 105–106.

[15] Carrillo-Suárez (n 6) 64.

[16] Nazih Richani, 'The Political Economy of Violence: The War-System in Colombia' (1997) 39 Journal of Inter-American Studies 37, 40–44; Fernán González, 'The Colombian Conflict in Historical Perspective' (2004) 14 Accord 10, 11–12; Stéphanie Lavaux, 'Natural Resources and Conflict in Colombia: Complex Dynamics, Narrow Relationships' (2007) 62 International Journal 19; Francisco Gutiérrez Sanín, '¿Una Historia Simple?' in Comisión Histórica del Conflicto y sus Víctimas (ed), *Contribución al Entendimiento del Conflicto Armado en Colombia* (2015).

[17] Centro Nacional de Memoria Histórica, '¡Basta Ya! Colombia: Memories of War and Dignity' (2016) ch IV; Centro Nacional de Memoria Histórica, 'Subjetos Victimizados y Daños Causados' (2018). See the Sole Register of Victims (*Registro Único de Víctimas – RUV*) of the Unit for the Attention and Integral Reparation of the Victims for updated numbers <http://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394> accessed 6 August 2020.

[18] IACHR, 'Report on the Demobilization Process in Colombia' (n 7) para 45. For a discussion of the complexities involving the delineation of the concept of 'victim' in the Colombian context, see Camilo Eduardo Umaña Hernández, '¿Quiénes Son Las Víctimas de Este Conflicto? Espacios, Problemas y Retrocesos Desde El Acuerdo FARC-Gobierno' in Camilo Eduardo Umaña Hernández (ed), *La Justicia al Encuentro de la Paz en Contextos de Transición* (Universidad Externado de Colombia 2018).

as "strategies of invisibility, concealment and silencing".[19] Moreover, approximately 7.7 million people were victims of forced displacement between 1985 and 2018.[20]

The origins of the conflict are commonly traced to a period known as *La Violencia* (1948-1957), which involved a civil war between the Liberal and Conservative political parties. The period began with the assassination of the Liberal Party leader, Jorge Eliécer Gaitán, in 1948, and left approximately 200.000 people dead.[21] The bipartisan violence led to the formation of armed self-defence militias and bandit-like groups among the rural populations.[22] As a solution to the violence, the parties reached an agreement to alternate power in government through the National Front. Although the violence significantly reduced, the political agreement failed to allow new political parties to enter the system. During this time, armed resistance groups which had allied with the Liberal Party disbanded and returned to civilian life.[23]

In the 1960s, the violence resumed and led to the establishment of several guerrilla groups with a communist agenda, such as the FARC-EP and the ELN, which were later joined by another wave of NSAGs, including the *Movimiento 19 de Abril* (M-19) and the Quintín Lame Movement, which waged an insurgency war against the State.[24] In the mid-1970s, many of these groups became involved in the drug trade as a means to finance their activities. This allowed them to develop their military capacities and expand into new territories. Furthermore, kidnapping and extortion were used as lucrative practices to collect additional funds, while the targeting of territories that enjoyed the presence of natural resources was also a tactic.[25]

As an initial reaction, in 1965, the Colombian State allowed the formation of private defence-groups, or paramilitary groups, as an alternative form of protection against the guerrillas. Such groups enjoyed the backing of traditional elites in economic and political sectors, as well

[19] Centro Nacional de Memoria Histórica, '¡Basta Ya!' (n 17) 48.

[20] UNHCR, 'Colombia: Fact Sheet' (2018) <https://www.refworld.org.es/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5b9adf3c4> accessed 6 August 2020.

[21] Alfredo Molano, 'Fragmentos de La Historia Del Conflicto Armado (1920-2010)' in Comisión Histórica del Conflicto y sus Víctimas (ed), *Contribución al Entendimiento del Conflicto Armado en Colombia* (2015).

[22] Norman Offstein, 'An Historical Review and Analysis of Colombian Guerrilla Movements: FARC, ELN and EPL' [2003] Revista Desarrollo y Sociedad 99, 101–102.

[23] IACHR, 'Third Report on the Human Rights Situation in Colombia' (n 6) paras 9–12; Centro Nacional de Memoria Histórica, '¡Basta Ya!' (n 17) 118, 121; Fabio Andrés Díaz Pabón, 'Conflict and Peace in the Making: Colombia from 1948-2010' in Fabio Andrés Díaz Pabón (ed), *Truth, Justice and Reconciliation in Colombia: Transitioning from Violence* (Routledge 2018) 18–19.

[24] IACHR, 'Third Report on the Human Rights Situation in Colombia' (n 6) paras 13, 24; Daniel Pécaut, 'Réflexion Sur La Naissance Des Guérillas Colombiennes' (2001) 36 Cahiers des Amérique Latines 65; Marco Palacios, *Entre La Legitimidad y La Violencia: Colombia 1875-1994* (2nd edn, Editorial Norma 2003) 262.

[25] Richani (n 16) 44; Ana Arjona, *Rebelocracy: Social Order in the Colombian Civil War* (Cambridge University Press 2016) 89.

as drug lords, who were establishing themselves as local elites.[26] Yet, these groups quickly went from defence to offence and expanded into new territories, while being often tolerated, or even abetted, by State armed forces, which shared a common counter-insurgency motivation in their operations against the guerrillas.[27] Although the Colombian government made the formation of such groups illegal in the late 1980s, they left a significant mark on the conflict and the country (see Section 3).[28]

The 1980s were marked by attempts to broker peace with the FARC-EP and other guerrilla groups. The peace process with the FARC-EP, initiated during the Betancur administration, resulted in the Uribe Accords of 1984, which foresaw the formation of the left-wing political party *Unión Patriótica*. This party would facilitate FARC-EP members' legal participation in politics, as a means to gradually return to civilian life. However, in the years that followed, paramilitary groups and members of the State security forces, often in alliance with drug traffickers, systematically targeted the new party.[29] The peace process eventually failed and the FARC-EP grew sceptical about the possibility of effectively transitioning into a political party.[30] In the late 1980s, the intensity of the NIAC reached unprecedented heights, with the siege, in 1985, of the Palace of Justice in Bogotá (the seat of the Supreme Court) by the M-19.[31] By the second half of the 1990s, the FARC-EP had established itself as the most powerful guerrilla group, marked by its territorial expansion and increased military capacities.[32] Smaller NSAGs, such as the Popular Liberation Army and the M-19, negotiated their demobilisation with the government in the early 1990s.[33] During the same period, paramilitary groups experienced a significant expansion, with several groups forming an umbrella organisation called the AUC in 1997, and, by 2003, the AUC had close to 15.000 fighters (see Section 3.2).[34]

By 2002, Colombia experienced high levels of violence and a great presence of NSAGs, and with the State having lost control of significant parts of the country. Within this context,

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[26] IACHR, 'Report on the Demobilization Process in Colombia' (n 7) paras 36–37.
[27] Arjona (n 25) 90.
[28] IACHR, 'Third Report on the Human Rights Situation in Colombia' (n 6) paras 18–23.
[29] Centro Nacional de Memoria Histórica, '¡Basta Ya!' (n 17) 141–142, 148–149.
[30] Yaneth Mora Hernández, 'The Patriotic Union: Memories for Peace and Democracy' 10 Panorama 27.
[31] '1985 Palace of Justice Siege' *Colombia Reports* (15 December 2016).
[32] As an illustration, the FARC-EP operated on fifteen fronts in 1982, by 1994, this number had increased to 60, and by 1996, up to 66 fronts. Each front consisted of approx. 100 to 200 fighters. Richani (n 16) 41–42; Mario Aguilera Peña, *Guerrilla y Población Civil: Trayectoria de Las FARC 1949-2013* (3rd edn, CNMH 2014) 174.
[33] IACHR, 'Country Report Colombia: Truth, Justice and Reparation' OEA/Ser.L/V/II. Doc 49/13 (31 December 2013) 47.
[34] Ana Arjona and Stathis Kalyvas, 'Recruitment into Armed Groups in Colombia: A Survey of Demobilized Fighters' in Yvan Guichaoua (ed), *Understanding Collective Political Violence* (Palgrave Macmillan UK 2012) 146.

President Pastrana (1998-2002) made an attempt to initiate peace negotiations with the FARC-EP, which ultimately failed.[35] In 2002, Álvaro Uribe won the presidential election, on the basis of a strong stance to seek a military solution to the guerrillas. He eventually served two terms. The resulting military offensive struck significant blows against the FARC-EP.[36] However, although the group was significantly weakened, the government's efforts did not result in its defeat.[37] This period saw more violations committed by State agents, the most prominent being the *falsos positivos* scandal (2002-2008), which involved the Colombian armed forces systematically executing more than 3000 innocent civilians, while presenting them as guerrilla members killed in combat.[38] This period was also marked by the so-called parapolitics scandal, which confirmed that the phenomenon of *paramilitarismo* was not simply a counter-insurgency strategy, but instead involved and coincided with political, social and economic interests.[39] By 2003, the AUC-linked paramilitary groups succeeded in extending their presence to over twenty-five of the country's thirty-two departments, with a drastic increase in their number of fighters.[40]

## 2.3 The transitional justice landscape

Colombia's early peace processes were largely informed by the granting of pardons or amnesties, with a general disregard for the satisfaction of victims' rights to truth, justice and reparation.[41] The adoption of the 2005 Justice and Peace Law, by the Uribe administration, marked a first break with this practice and introduced the transitional justice discourse to Colombia. The law was adopted as part of the collective demobilisation processes of the AUC-linked paramilitary groups. However, it also involved the individual demobilisation of several FARC-EP and ELN members.[42] The Law was criticised by some over its apparent

[35] Aguilera Peña (n 32) 210–212; Arjona (n 25) 91–92.
[36] Centro Nacional de Memoria Histórica, '¡Basta Ya!' (n 17) 186.
[37] Aguilera Peña (n 32) 214–223.
[38] Human Rights Watch, 'On Their Watch: Evidence of Senior Army Officers' Responsibility for False Positive Killings in Colombia' (2015); 'How the Perverse Incentives behind "False Positives" Worked' *La Silla Vacia* (12 November 2018).
[39] See Mauricio Romero (ed), *Parapolítica: La Ruta de La Expansión Paramilitar y Los Acuerdos Políticos* (Corporación Nuevo Arco Iris 2007).
[40] Amnesty International, 'The Paramilitaries in Medellín: Demobilization or Legalization?' (2005) 10.
[41] IACHR, 'Report on the Demobilization Process in Colombia' (n 7) paras 53–60; Felipe Gómez Isa, 'Challenges for Transitional Justice in Contexts of Non-Transition: The Colombian Case' in Amanda Lyons (ed), *Contested Transitions: Dilemmas of Transitional Justice in Colombia and Comparative Experience* (ICTJ 2010) 162; Fernán González, *Poder y Violencia En Colombia* (Odecofi-Cinep 2014) ch 8; Eduardo Pizarro, *Cambiar El Futuro: Historia de Los Procesos de Paz En Colombia (1981-2016)* (Debate 2017).
[42] Law No 975 of 2005 (Justice and Peace Law). See further Chapter 6 on the Justice and Peace Law.

concealed attempts to grant impunity and to institutionalise the paramilitary project.[43] In addition, the transitional justice framework experienced significant challenges due to the ongoing conflict and, at the same time, the contradictory denial of the existence of the NIAC by the government.[44] Ultimately, successor paramilitary groups emerged: some of which are said to be headed by former AUC members, or maintain links with demobilised paramilitary leaders who accepted the terms of the Justice and Peace Law.[45] The Law was later complemented by Law No. 1424 of 2010, which deals with fighters who do not fall into the category of being most responsible for the most serious crimes, and the so-called Victims' Law of 2011, which provides for an innovative and comprehensive administrative programme of reparations and a land restitution programme that contains both administrative and judicial components.[46] Importantly, the latter law formally acknowledged the existence of a NIAC for the first time in over a decade, and, consequently, broke with Uribe's narrative of the State's struggle against a terrorist threat.[47]

In 2012, Congress passed an amendment to the Colombian Constitution, known as the Legal Framework for Peace, which gave transitional justice constitutional status.[48] Contrary to the transitional justice framework foreseen under the Justice and Peace Law, this second framework, or system, takes a new and more comprehensive orientation: by providing for the adoption of prioritisation and selection criteria, as well as the use of extra-judicial mechanisms of transitional justice for the clarification of the truth and the reparation of victims, among other mechanisms.

In the same year, the Santos administration initiated formal peace negotiations with the FARC-EP. Although the proposed transitional justice framework of 2012 was designed to facilitate the talks, the FARC-EP rejected it due to their lack of involvement in its negotiation. The FARC-EP also rejected the application of the transitional justice system established under the Justice and Peace Law because of the perceived harshness of alternative penalties imposed as part of the special criminal procedure. Eventually, the peace process resulted in the creation

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[43] Gómez Isa, 'Challenges for Transitional Justice in Contexts of Non-Transition: The Colombian Case' (n 41) 150–152.

[44] Marco Alberto Velásquez Ruiz, 'The Emergence and Consolidation of Transitional Justice within the Realm of Colombian Peacebuilding' in Fabio Andrés Díaz Pabón (ed), *Truth, Justice and Reconciliation in Colombia* (Routledge 2018) 56–57.

[45] Human Rights Watch, 'Paramilitaries' Heirs: The New Face of Violence in Colombia' (2010); UNGA, 'Report of the Human Rights Committee' (2010) UN Doc A/65/40 (Vol I) 86 para 9; The Office of the Prosecutor of the ICC (n 5) para 130; Human Rights Watch, 'World Report: Colombia' (2018).

[46] Law No 1448 of 2011 (Victims' Law); Silke Pfeiffer, 'Transitional Justice for Rank-and-File Combatants in Colombia: Insights from Law No. 1424' (NOREF 2015).

[47] Art 3 Victims' Law. Previous legislation and government instruments already included references to IHL, while following the Additional Protocol II threshold.

[48] Legislative Act No 01 of 2012.

of a third system of transitional justice: the Comprehensive System for Truth, Justice, Reparation and Non-Repetition.[49]

Because it brought an end to the NIAC with Colombia's largest and longest standing guerrilla group, the Final Peace Agreement, which was concluded with the FARC-EP in 2016, marks an undoubted milestone in Colombia's history. Nevertheless, as signalled by the ICRC at the beginning of 2019, the post-Agreement period has given rise to a complex situation, with at least five NIACs and other situations of violence governed solely by IHRL and domestic law. The power vacuum left by the FARC-EP has led to clashes between armed actors, with battles over the control of vacated territory and lucrative coca crops. FARC-EP dissident forces, which claim the legacy of the extinct group, have emerged and refuse to participate in the peace process.[50] These developments have led to shifting conflict dynamics.[51]

# 3 The paramilitaries

## 3.1 The phenomenon of paramilitarismo

The origin of the paramilitary phenomenon can be traced back to a regulatory framework issued by the State, in the 1960s, in response to the threat posed by newly formed guerrilla groups. In 1965, the government issued Decree No. 3398, which was later converted into permanent legislation. The Decree allowed for the formation of civilian self-defence groups in order to carry out joint counter-insurgency operations with the military. However, groups quickly turned violent, with some seeking to expand to new territories.[52] Such expansion was characterised by high levels of violence against the civilian population.[53] State armed forces tolerated or, in some cases, even abetted their operations, while local political and economic elites increasingly lent their support to the paramilitary project to serve their own interests. As the groups developed, they became profoundly intertwined with the illegal drug trade.[54] Many

[49] Centro Nacional de Memoria Histórica, '¡Basta Ya!' (n 17) 263; Felipe Gómez Isa, 'Justice, Truth and Reparation in the Colombian Peace Process' (NOREF 2013); Hector Olasolo and Joel MF Ramirez Mendoza, 'The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition' (2017) 15 Journal of International Criminal Justice 1011, 1013. See Chapter 7 for an in-depth analysis of the Comprehensive System.

[50] International Crisis Group, 'Colombia's Armed Groups Battle for the Spoils of Peace' (2017); ICRC, 'Colombia: Five Armed Conflicts – What's Happening?' (30 January 2019). For further information consult the Colombian Organized Crime Observatory, coordinated by the InSight Crime Foundation and the Colombian Universidad del Rosario's Faculty of Political Sciences, see <https://insightcrime.org/> accessed 19 March 2021.

[51] UNHRC, 'Situation of Human Rights in Colombia - Report of the United Nations High Commissioner for Human Rights' (4 February 2019) UN Doc A/HRC/40/3/Add.3; UNSC, 'United Nations Verification Mission in Colombia - Report of the Secretary-General' (26 June 2020) UN Doc S/2020/603 paras 43–67.

[52] Arjona (n 25) 96.

[53] Centro Nacional de Memoria Histórica, '¡Basta Ya!' (n 17) 41.

[54] Amnesty International (n 40) 4–6.

paramilitary leaders acquired significant wealth, allowing them to become influential landowners.[55] Due to growing outrage at the situation, President Barco outlawed the use of armed civilians in army operations, while also criminalising the promotion and financing of, and membership within, paramilitary groups in 1989.[56] Nevertheless, a subsequent rise in violence led to the adoption of a new legal framework in 1994, which again facilitated the creation of self-defence groups: the so-called *Convivir* groups. This resulted in the practical legalisation of previously illegal paramilitary groups.[57] Eventually, in 1997, the Colombian Constitutional Court ruled that the *Convivir* structures were unconstitutional. Nevertheless, many of them were simply recycled into the newly established AUC (*infra*).[58] All in all, the paramilitary phenomenon goes beyond a single counter-insurgency strategy; it encompasses a complex set of interests and involves a variety of actors.[59]

### 3.2 The AUC: creation and organisational structure

Initially, the various paramilitary groups which eventually made up the AUC were not formally connected to each other. They operated on an autonomous basis across several parts of the country. This changed with the creation of the AUC, in 1997. In an effort to coordinate their actions nationally and reinforce their common interests, Carlos Castaño, who was the leader of one of the most powerful paramilitary groups in Colombia, brought together several disparate paramilitary groups within the AUC, as an umbrella organisation, with the support of territorial elites and drug traffickers.[60] The group defined itself as a national counter-subversive organisation in arms and, politically, as a civil resistance movement, which sought to represent and defend national rights and interests neglected by the State and affected by guerrilla violence.[61] The paramilitaries successfully gained control over certain areas of the

[55] IACHR, 'Report on the Demobilization Process in Colombia' (n 7) paras 36–37; Francisco Gutiérrez Sanín, 'Telling the Difference: Guerrillas and Paramilitaries in the Colombian War' (2008) 36 Politics & Society 3, 15.
[56] Lisa J Laplante and Kimberly Theidon, 'Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz' (2006) 28 Michigan Journal of International Law 49, 54–56; IACHR, 'Country Report Colombia: Truth, Justice and Reparation' (n 33) 45–46.
[57] Jemima García-Godos and Knut Andreas O Lid, 'Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia' (2010) 42 Journal of Latin American Studies 487, 491–492.
[58] Amnesty International (n 40) 3–9; Centro Nacional de Memoria Histórica, '¡Basta Ya!' (n 17) 163, 165; Félix Vacas Fernández, 'Los Acuerdos Entre El Gobierno De Colombia y Las Autodefensas/Paramilitares: Proceso Negociador, Contenido e Implementación, y Derechos de Las Víctimas' (2014) 8 Revista Electrónica Iberoamericana 8.
[59] Amnesty International (n 40) 10.
[60] Gutiérrez Sanín, 'Telling the Difference: Guerrillas and Paramilitaries in the Colombian War' (n 55) 14.
[61] *Case against Manuel De Jesús Pirabán and Others* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (25 July 2016) para 556.

Colombian territory.[62] By 2003, the AUC had approximately 13.500 members, who were organised in a series of blocks that operated through fronts, and had influence within several government departments and municipalities.[63] Although, the majority of the AUC-linked paramilitary groups partook in the 2005, Justice and Peace Law driven, demobilisation, the process did not manage to effectively dismantle the paramilitary phenomenon.

The AUC portrayed its organisation as an armed contra-insurgency force, with a hierarchical pyramid structure and a responsible national command, the *Estado Mayor Conjunto*, as well as an internal disciplinary statute, and a solid political and ideological formation.[64] Correspondingly, the AUC has been understood and identified as a single party to the NIAC, albeit a party characterised by its complex relations with the State.[65] However, it is commonly agreed that, contrary to its initial aim, the AUC never managed to fully unify and consolidate its structures at the national level. It lacked well-defined rules that regulated the structure of the paramilitary groups, their mechanisms of internal control and their methods of operation. Moreover, these groups were heterogeneous in nature; some were analogous to private armies in the service of drug trafficking, whereas others were driven by a stronger counter-insurgency motivation. Some groups were also more disciplined than others. It has been suggested, that far from being a centralised NSAG, the AUC should instead be viewed as a national confederation of paramilitary structures, which was characterised by its decentralised nature that provided for great autonomy in respect of its constituent paramilitary blocks.[66]

The AUC's narrative, and particularly the nature of its organisational structure, have recently been challenged in light of information which surfaced within the context of Justice and Peace Law cases against paramilitary members.[67] In a judgment of 2017, the Justice and Peace Chamber reflected critically on the AUC's official narrative by carrying out a review of the preceding 44 judgments. A number of arguments were raised which cast doubt over the AUC narrative.[68] On the basis of several findings, it was, for instance, questioned whether there actually was a responsible AUC command, as the concept is understood under international

[62] International Crisis Group, 'Colombia's New Armed Groups' (2007) 3–5; Felipe Gómez Isa, 'Paramilitary Demobilisation in Colombia: Between Peace and Justice' (FRIDE 2008) 12; Arjona (n 25) 99.
[63] Amnesty International (n 40) 10; IACHR, 'Country Report Colombia: Truth, Justice and Reparation' (n 33) para 47.
[64] *Case against Manuel De Jesús Pirabán and Others* (n 61) para 556.
[65] See e.g. Human Rights Watch, 'War Without Quarter' (n 7); Carrillo-Suárez (n 6) 112; US Department of State, 'Country Report on Human Rights Practices 2002 - Colombia' (2003); Szesnat and Bird (n 2).
[66] Gutiérrez Sanín, 'Telling the Difference: Guerrillas and Paramilitaries in the Colombian War' (n 55) 17, 28; Arjona (n 25) 98–100.
[67] Centro Nacional de Memoria Histórica, 'Paramilitarismo: Balance de La Contribución Del CNMH al Esclarecimiento Histórico' (2018) 64–65.
[68] '"Las Auc Fueron Una Alianza Criminal de Ejércitos Privados"' *VerdadAbierta* (10 June 2017).

criminal law and IHL, at the national level. On the basis of the analysis, the Chamber proposed that the AUC should not be identified as a federal criminal organisation, with a responsible national command, but rather as a temporary and unstable alliance of various owners of regional private armies and drug traffickers: actors, which came together to benefit from the opportunities arising from a peace process, which, in principle, offered them a flexible and convenient legal framework to demobilise, hand in their weapons and return to civil life.[69] Similar considerations were formulated in an interview with a Justice and Peace Magistrate:

> [W]e are realising more and more that it was not the great United Self-Defence Forces of Colombia, no, it did not exist, they consisted of blocks independent from one and other […] they were confederated each one with their own commanders and if they needed to join forces for convenience to do an operation, they did, but even so between the same fronts or blocks there were always wars […] they were more independent, more autonomous, there was not the same degree of hierarchy that characterised the FARC-EP, for this reason we cannot speak of the group of Self-Defence Forces of Colombia, but rather of the *Bloque Norte*, *Bloque Central Bolívar*, *Bloque Vencedores de Arauca* and those blocks because there was no dependence of one on the other like in the FARC-EP.[70]

Returning to IHL considerations, a NSAG that operates in a decentralised manner and consists of various sub-groups is not necessarily excluded from meeting the IHL requirement of organisation, and thus from being identified as a single party to a NIAC.[71] The legal implication, where such a group is found to be a single party, is that IHL would regulate all those who are part of this united force. Research has indicated that international law requires more than a *de facto* relationship between sub-groups for such an entity to be identified as a singular party to a conflict. Instead, it appears essential that at least some form of centralised leadership be exercised.[72] Rodenhäuser proposes that a party's leadership should exercise both a degree of operational coordination, which refers to the ability to coordinate military activities and distribute logistics, as well as strategic authority to determine the overall military objectives and the sub-groups' internal rules.[73] From this perspective, it can be questioned whether the AUC could be understood as a single organised group which is party

[69] *Case against Indalecio José Sánchez Jaramillio* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (23 May 2017) 109–142.
[70] Interview No 3 (Colombia, April 2019).
[71] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 173.
[72] ibid 175–176; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 133–134.
[73] Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford University Press 2018) 75–85.

to the conflict. This would imply that a separate examination should be carried out *vis-à-vis* the application of IHL to each group allied under the AUC banner.

In terms of characteristics, the AUC-linked paramilitary groups were paid forces with the mid- and high-level leadership enjoying common access to rents from i.a. trafficking, extortion and kidnapping. A system of economic incentives allowed paramilitary leaders to accumulate significant assets and property, with a majority of them establishing themselves as landowners. Moreover, the military hierarchy and economic ladder tended to overlap. Aside from being intertwined with the illegal drug trade, delinquent groups and networks were also generally admitted to the AUC. In addition, certain latitude was given to the members, especially in respect of their private lives. Becoming a paramilitary fighter was, for instance, not considered as a lifelong commitment, nor did it entail that family ties had to be broken, or that members could not pursue their own economic objectives.[74] Members were subjected to less strict internal discipline than FARC-EP members (see *infra*) and were even allowed to take time off.[75]

# 4 The FARC-EP

## 4.1 Origins, objectives and nature

Although the exact birth and origins of the FARC-EP remain subject to debate, they are commonly traced back to communist and peasant self-defence groups that were established as a reaction to persecution inflicted by the conservatives during *La Violencia*.[76] Subsequent to this period of intense violence, such actors, influenced by communist ideology, formed agrarian movements, which were referred to as 'independent republics'. These republics were based on economic self-management and military self-defence, and constituted enclaves in rural Colombia, where the peasant population, which had taken up arms, was beyond the control of the State.[77] According to the FARC-EP's official version of its history, the group finds its origin in 1964, when the Colombian army launched a large military offensive against the peasant republic of Marquetalia, located in the south of Tolima. The army's action is said

[74] Gutiérrez Sanín, 'Telling the Difference: Guerrillas and Paramilitaries in the Colombian War' (n 55); Francisco Gutiérrez Sanín, 'The Organizational Structure of the Paramilitary and Property Rights in the Colombian Countryside (1982-2007)' (2014) 27 Análisis Político 3.

[75] Arjona (n 25) 99.

[76] Juan Guillermo Ferro Medina and Graciela Uribe Ramón, *El Orden de La Guerra. Las FARC-EP Entre La Organisación y La Política* (Pontificia Universidad Javeriana 2002) 25; Centro Nacional de Memoria Histórica, '¡Basta Ya!' (n 17) 123. For an extensive discussion of the history of the FARC-EP, see Aguilera Peña (n 32); Molano (n 21).

[77] Molano (n 21).

to have been motivated by a fear of the spread of communism, instilled by the ongoing Cold War.[78] According to the FARC-EP narrative, some 45 remaining peasants, including Manuel Marulanda Vélez, who later became the group's supreme leader, were able to flee and take refuge in the mountains. Later that year, it was decided, during the First Guerrilla Conference, to create the *Bloque Sur*, which involved the transformation of the self-defence force into an offensive force, with the objective of fighting for political change.[79] During the Second Guerrilla Conference, held two years later, the group officially organised themselves as the FARC.[80] Only during the Seventh Conference in 1982 was their name completed, with the addition of '*Ejército del Pueblo*', and thus their name became in full: FARC-EP.[81] Even though the FARC-EP began its formal operations in 1966, the group considers the attack on Marquetalia as bearing greater symbolic meaning in terms of its development into a revolutionary guerrilla movement.[82] The group found willing recruits amongst the peasant communities displaced due to the civil war of a decade earlier, and hence emerged from their economic and political grievances.[83]

Although the FARC-EP was a relatively weak NSAG at its outset, it transformed into the largest and most powerful guerrilla group in Colombia, partly due to its gradual involvement in the illicit drug trade in the early 1980s.[84] To give a recent estimate, approximately 13.000 members had submitted themselves to the reintegration process by July 2019: this process was initiated as part of the peace agreement of 2016.[85] Prior to the government's offensive in the early 2000s, the estimated number of fighters was higher, ranging between 17.000 and 22.000.[86] The FARC-EP developed from a peasant defence and resistance force into a political-military organisation that sought to seize state power, in an effort to transform the State and its structures.[87] It was initially closely linked to the Colombian Communist Party.[88] The group identified itself with the principles of Marxism and Leninism, and later

[78] Díaz Pabón (n 23) 18–19.
[79] Palacios (n 24) 264–265.
[80] Offstein (n 22) 103.
[81] Eduardo Pizarro Leongómez, *Una Democracia Asediada: Balance y Perspectivas Del Conflicto Armado En Colombia* (Grupo Editorial Norma 2004) 86–88.
[82] Ferro Medina and Uribe Ramón (n 76) 34.
[83] ibid 29, 36; Gutiérrez Sanín, 'Telling the Difference: Guerrillas and Paramilitaries in the Colombian War' (n 55) 12–13; Aguilera Peña (n 32) 17.
[84] See further Susan Virginia Norman, 'Narcotization as Security Dilemma: The FARC and Drug Trade in Colombia' (2018) 41 Studies in Conflict & Terrorism 638.
[85] Colombian Agency for Reincorporation and Normalization (ARN), 'ARN En Cifras' (2019) available at <http://www.reincorporacion.gov.co/es/agencia/Paginas/ARN-en-cifras.aspx> accessed 19 March 2021.
[86] Gutiérrez Sanín, 'Telling the Difference: Guerrillas and Paramilitaries in the Colombian War' (n 55) 12.
[87] Arts 1-2 FARC-EP Statute (as adopted at the Ninth National Guerrilla Conference) (2007).
[88] Ferro Medina and Uribe Ramón (n 76) 39; Arjona (n 25) 96.

incorporated the *bolivariano* ideology.[89] The distance taken later by the FARC-EP from the Communist Party, and the group's involvement in the drug trade, resulted in a loss of political legitimacy among various sectors of the country. However, some have argued that this did not affect the centrality of the group's political goals.[90]

The historical origins of the FARC-EP shaped the group's self-image and the resulting justification for its rebellion. The group is particularly cognisant of the original state aggression it faced. In this sense, the FARC-EP carried a collective memory, in which its members are portrayed as peasant victims of abusive State power.[91]

## 4.2 Organisational structure and characteristics

The FARC-EP was an army-like NSAG that engaged in guerrilla warfare. It operated primarily in rural areas, but also had urban militias.[92] The guerrilla group was characterised by its highly centralised organisational structure, in terms of a clear, vertical line of command, strict hierarchies and internal rules, and a strong degree of unity and cohesion among its members, that resulted in strong social bonds. The group's organisation was facilitated further, through the adoption of a Statute, Disciplinary Regulations and Internal Norms of Commandment, as well as a shared formation revolving around a common ideology, which was strengthened by, i.a., hymns, a group emblem and common behavioural habits.[93] The group exercised significant control over large areas of the country and implemented a state-like structure where the State was absent.[94] The group managed a wide array of issues, such as tax collection, labour relations and the administration of justice.[95] This explains, in large part, their capacity to apply Additional Protocol II, as well as how the group managed to carry out sustained military operations.[96]

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[89] Art 2 FARC-EP Statute; Ferro Medina and Uribe Ramón (n 76) 126.

[90] International Crisis Group, 'Colombia: Peace at Last?' (2012) 10–11; Centro Nacional de Memoria Histórica, '¡Basta Ya!' (n 17) 197; Aguilera Peña (n 32) 223–224; Norman (n 84).

[91] International Crisis Group, 'Colombia: Peace at Last?' (n 90) 13; Aguilera Peña (n 32) 20, 31, 44.

[92] Guerrilla warfare has been defined as a "type of warfare fought by irregulars in fast-moving, small-scale actions against orthodox military and police forces and, on occasion, against rival insurgent forces, either independently or in conjunction with a larger political-military strategy". Arjona (n 25) 97; Robert Brown Asprey, 'Guerrilla Warfare' (*Encyclopædia Britannica*) <https://www.britannica.com/topic/guerrilla-warfare> accessed 11 December 2020.

[93] ICRC, 'The Roots of Restraint in War' (2018) 24, 38–43.

[94] Carrillo-Suárez (n 6) 94–95; IACHR, 'Third Report on the Human Rights Situation in Colombia' (n 6) para 29.

[95] Mario Aguilera Peña, 'Las Guerrillas Marxistas y La Pena de Muerte a Combatientes. Un Examen de Los Delitos Capitales y Del "Juicio Revolucionario"' (2014) 41 Anuario Colombiano de Historia Social y la Cultura 201; Arjona (n 25); René Provost, 'FARC Justice: Rebel Rule of Law' (2018) 8 UC Irvine Law Review 227.

[96] Carrillo-Suárez (n 6) 95.

The FARC-EP was based on collective, non-financial incentives.[97] Joining the group resulted in significant impacts on the private lives of its members. Membership was, for instance, a lifelong commitment, with severe consequences for deserters, while family contacts were reduced to a minimum, and regular contacts with the civilian population were discouraged. In sum, the structure and climate within the group fostered a strong collective identity, that superseded individual tendencies and interests.[98]

The FARC-EP's organisational structure constituted of political organs, organs of direction (political-military) and military organs. The political organs were the cells, the general assemblies and the National Guerrilla Conference. The political cell converged with the basic military unit of the group (squad), which made members feel as if they were part of both a political and military organisation. Participation in the cells was based on the principle of direct democracy, by which decisions were made by simple majority.[99] The National Guerrilla Conference was in charge of defining the political and military plans and naming the Central High Command.[100] It was also guided by a democratic process, which involved the election of delegates, who represented the various substructures during the Conference. Members of the Central High Command had a general right to participate, due to their position within the organisation. As a political organisation, the FARC-EP did not separate the military from the political leadership, which instead formed an integrated whole.[101] Moreover, the organs of direction and command, such as the Central High Command, the General Command, and the High Commands of the various blocks and fronts, were organs guided by a collective decision-making process.[102] Yet, the existing hierarchies prevailed in military decisions.[103] The Central High Command was the superior organ of direction and command, which nominated its Secretariat, adjusted the plans of the Guerrilla Conference, took financial decisions, and designated the commanders of the High Command of the fronts and blocks.[104] The Secretariat of the Central High Command consisted of several commanders, generally of blocks, as the maximum authority in between the assemblies of the Central High Command. It was in charge of implementing the directives of the Guerrilla Conference, among other tasks. Accordingly, it held great authority and autonomy. Founder Marulanda headed the Secretariat,

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[97] Ferro Medina and Uribe Ramón (n 76) 90.
[98] ibid 163; Gutiérrez Sanín, 'Telling the Difference: Guerrillas and Paramilitaries in the Colombian War' (n 55); Arjona (n 25) 97–98.
[99] Art 2 FARC-EP Statute.
[100] Arts 11-12 ibid.
[101] Arts 1, 10 ibid.
[102] Art 4(o) ibid; International Crisis Group, 'Colombia: Peace at Last?' (n 90) 13.
[103] Fundación Ideas para la Paz, 'Siguiendo El Conflicto: Hechos y Análisis de La Semana' (2005) 2.
[104] Arts 2(5), 3(K), 12 FARC-EP Statute.

as commander-in-chief, until his death in 2008. Timoleón Jiménez, *alias* Timochenko, eventually replaced him, remaining in charge until the group's political transformation in 2017.[105] The high-level commanders of the Central High Command and its Secretariat can be considered as belonging to the leadership of the group, with the commander-in-chief as superior leader. Further important military structures were the blocks (*bloques*), which joined and coordinated several fronts (*frentes*) as regional forces.[106] Although the FARC-EP operated over vast territory, its organisational structure allowed the central command to keep tight control over its units and strategy.[107]

# 5 Conclusions

In this chapter, a general introduction to the Colombian armed conflict has been provided. The discussion has revealed a complex and multifaceted conflict, which originated several decades ago and which continues to be waged in the country, through armed actors beyond those examined in this study. The situation of armed violence between the State armed forces, the AUC-linked paramilitary groups and the FARC-EP has been examined through the lens of IHL. It has been classified as amounting to a NIAC, which was regulated by Common Article 3, customary IHL and Additional Protocol II. Although it is clear that the FARC-EP constituted a single party to the NIAC, a similar conclusion regarding the AUC was put into question. This will be explored further in the coming chapter. This chapter has, furthermore, outlined the present transitional justice landscape, in which the two processes examined in this study are situated. In accordance with the chronological order of these efforts, the Justice and Peace Law process, which involves the AUC-linked paramilitary groups, will be examined first (in Chapter 6). Following this, the Comprehensive System for Truth, Justice, Reparation and Non-Repetition, which addresses the FARC-EP, will be considered (Chapter 7). In sum, the discussion in the current chapter has provided a better understanding of the AUC and the FARC-EP, as NSAGs. The examination has revealed two entities which differ considerably in terms of their origins, objectives, nature, organisational structure and more general characteristics. However, despite such differences, both are bound by the same primary rules of international law. It is to be enquired across the coming chapters, whether some of these differences have affected the manner in which the AUC and FARC-EP's

[105] Ferro Medina and Uribe Ramón (n 76) 110; International Crisis Group, 'Colombia: Peace at Last?' (n 90) 9–10.
[106] Ferro Medina and Uribe Ramón (n 76) 41–55.
[107] Human Rights Watch, 'War Without Quarter' (n 7).

respective duties of reparation have been legally operationalised or, more generally, how each NSAG engaged in their respective reparations processes.

# Chapter 6

# Reparations by the AUC under the Justice and Peace Law

## 1 Introduction

The Justice and Peace Law of 2005 has been extensively scrutinised over the years.[1] It has commonly been analysed from the perspective of victims' rights and state responsibility or, more broadly, it has involved an enquiry into the relationship between transitional justice and demobilisation, or the notion of transitional justice without an actual transition.[2] This chapter revisits the transitional justice process regulated by the Justice and Peace Law, but through the largely uncharted lens of the duty to make reparation by the NSAGs which submitted themselves to the process.[3] The Justice and Peace process deals with both the individual and collective demobilisation of NSAGs.[4] Given the scope of the chapter, the analysis only concerns itself with the collective demobilisations of the paramilitary groups that are linked to the AUC.[5] Furthermore, since this study specifically focuses on NSAGs that operate independently from states, the analysis makes an abstraction of legal questions relating to the potential shared responsibility between the Colombian State and some of the paramilitary groups. However, this should not be understood as a rejection or denial of the state's potential

[1] Law No 975 of 2005 (Justice and Peace Law).
[2] See for instance Lisa J Laplante and Kimberly Theidon, 'Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz' (2006) 28 Michigan Journal of International Law 49; Rodrigo Uprimny Yepes and others, *Justicia Transicional Sin Transición? Verdad, Justicia y Reparación Para Colombia* (Dejusticia 2006); Kimberly Theidon, 'Transitional Subjects: The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia' (2007) 1 International Journal of Transitional Justice 66; Jemima García-Godos and Knut Andreas O Lid, 'Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia' (2010) 42 Journal of Latin American Studies 487; Felipe Gómez Isa, 'Challenges for Transitional Justice in Contexts of Non-Transition: The Colombian Case' in Amanda Lyons (ed), *Contested Transitions: Dilemmas of Transitional Justice in Colombia and Comparative Experience* (ICTJ 2010); Francesca Capone, 'From the Justice and Peace Law to the Revised Peace Agreement between the Colombian Government and the FARC: Will Victims' Rights Be Satisfied at Last?' (2017) 77 Heidelberg Journal of International Law 125.
[3] An exception is the following contribution, in which Moffett considers the issue. Luke Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015).
[4] Arts 1-2, 9-11 Justice and Peace Law.
[5] Within the framework of the Justice and Peace Law, several FARC-EP and ELN members demobilised individually, whereas AUC-linked groups collectively submitted to the process. The term demobilisation refers to the individual or collective act of disarming and leaving a NSAG as part of a government-led process. Art 9 Justice and Peace Law.

responsibility.[6] Indeed, the process itself has been criticised for neglecting efforts to determine state responsibility in relation to the crimes under scrutiny.[7]

The Justice and Peace process was touched upon in Chapters 2 and 4. The discussion there, identified this process as a significant instance of state practice. More specifically, it was indicated that the Colombian Constitutional Court has recognised the 'solidarity civil responsibility' of NSAGs which submitted themselves to the criminal justice process, regulated by the Justice and Peace Law. Even though criminal responsibility for the crimes remains individual, civil responsibility emanates from the criminal conduct, which involves serious violations of IHL and IHRL, and allows victims to seek monetary compensation from the criminally convicted NSAG members, in the first instance, and, thereafter, by virtue of the principle of solidarity, from the specific NSAG to which the perpetrator belonged.[8] These initial findings indicate that this case may hold valuable information on how a duty to repair for NSAGs could be legally operationalised and enforced through a judicial process.

As a result, this chapter conducts a more thorough examination of the Justice and Peace process, by enquiring into the underlying rationales, nature and modalities of this legal responsibility of the NSAGs. It involves enquiring whether, and to what extent, these groups are not only engaged in monetary compensation, but also in other forms of reparation. The main purpose of the analysis is to distil the aspects of the Justice and Peace process, which can inform the legal debate as to how a possible duty of NSAGs to provide reparations could be operationalised under international law. The insights drawn from the case are tentative, in the sense that they display one possible approach to reparations vis-à-vis NSAGs that may not necessarily be feasible or adequate with regard to other situations or groups.

In terms of method, the examination in this chapter follows the approach taken by the Justice and Peace Law and analyses it from the perspective of the duty to repair of the NSAGs. First, an introduction is given to the Justice and Peace Law, by discussing the negotiation process with the paramilitaries and the overall legal framework set by this Law. This is followed by an examination of the Justice and Peace Law's personal scope of application and its underlying rationale. Following this, the discussion considers three forms of reparation, in which the relevant NSAGs appear to have engaged, in one way or another, namely monetary

[6] See *Case of the "Mapiripán Massacre" v Colombia* IACtHR (Judgment Merits, Reparations and Costs) Series C No 134 (15 September 2005); *Case of the Ituango Massacres v Colombia* IACtHR (Judgment Preliminary Objections, Merits, Reparations and Costs) Series C No 148 (1 July 2006); Amnesty International, 'The Paramilitaries in Medellín: Demobilization or Legalization?' (2005) 11; ICTJ, 'From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia' (2015) 15. See also Chapter 5.

[7] Laplante and Theidon (n 2) 90–91.

[8] *Judgment C-370/06* Constitutional Court of Colombia (18 May 2006) para 6.2.4.4.

compensation, satisfaction measures and guarantees of non-repetition. The role of the state is also considered more closely. To conclude the chapter, any insights that can be drawn from this examination, and which are pertinent to the previous parts of the study, will be identified, compared and placed in the context of the prior findings concerning international law.

# 2 The negotiation process with the paramilitaries

Shortly after the presidential election of Uribe in August 2002, the unified command of the AUC announced their intention to negotiate the terms of their demobilisation. In accordance with the precondition set by the Colombian government for such talks, the AUC declared a unilateral ceasefire on the first of December 2002.[9]

The exploratory phase led to the signing of the Santa Fe de Ralito Agreement I, in July 2003, under which the AUC committed itself to the demobilisation of its members, to be completed by the end of 2005. This moment also marked the start of the formal negotiations between the government and the Negotiating High Command of the AUC.[10] In May 2004, the second Santa Fe de Ralito Agreement II was adopted, which provided for the establishment of a 368 $km^2$ territorial zone, in the department of Córdoba, where the AUC members would be concentrated in order to facilitate the consolidation of the agreements.[11]

The government sought to accommodate the negotiation process by adjusting the existing legal framework under Law No. 418 of 1997, which regulated individual and collective demobilisation processes, by adopting Law No. 782 of 2002, and, later, by regulating Decree No. 128 of 2003. Law No. 782 gave a "legal mandate" to initiate the negotiation process with the AUC-linked paramilitary groups, as so-called 'organised armed groups at the margins of the law'.[12] Moreover, article 13 of Decree No. 128 provided for legal benefits, in terms of pardons and amnesties to the paramilitaries, with the exclusion of persons who were being investigated for or who had been convicted of serious crimes.[13] However, these legal instruments were criticised for consolidating impunity and neglecting victims' rights to truth,

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[9] Baltasar Garzón (coord.), 'Diagnóstico de Justicia y Paz En El Marco de Justicia Transicional En Colombia' (OEA and Mapp-OEA 2011) 16.
[10] Acuerdo de Santa Fe de Ralito para Contribir a la Paz de Colombia (Government of Colombia - AUC) (2003).
[11] Acuerdo entre Gobierno Nacional y las Autodefensas Unidas de Colombia para la Zona de Ubicación en Tierralta, Córdoba (Acuerdo de Fátima) (2004); Amnesty International (n 6) 11–12.
[12] See Section 4 for a discussion of this concept. Jemima García-Godos, 'Colombia: Accountability and DDR in the Pursuit of Peace?' in Chandra Lekha Sriram and others (eds), *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-combatants* (Routledge 2013) 222.
[13] Art 50 Law No 418 of 1997 as modified by art 19 Law No 782 of 2002; art 21 Decree No 128 of 2003; IACHR, 'Report on the Demobilization Process in Colombia' OEA/Ser.L/V/II.120 Doc 60 (13 December 2004) para 62.

justice and reparation.[14] Along with not being required to identify illegally obtained assets, none of the paramilitaries who obtained legal benefits were required to provide reparations to their victims.[15]

Under mounting pressure, the government presented various bills before Congress that sought to bring a balance between the demands of peace and justice. The first bill, the so-called Alternative Penalties Law (*Ley de Alternatividad Penal*), proposed an amnesty for all demobilised armed actors based on a restorative understanding of justice. The bill was heavily criticised by national and international human rights organisations, victims' organisations and some political groups, and was subsequently rejected.[16] It was soon replaced by what is now known as the Justice and Peace Law (Law No. 975 of 2005), which brought transitional justice onto the terrain of demobilisation, disarmament and reintegration (DDR).[17] The Law was modified by subsequent decrees and case law, resulting in a complex legal framework. It is only of a residual nature, meaning that it complements and does not supersede the preceding laws that regulate the demobilisation efforts. Consequently, only those who are excluded from the existing amnesty scheme, under Law No. 782 and Decree No. 128, fall under the special criminal justice process regulated by the Justice and Peace Law.[18]

The AUC started to demobilise in great numbers prior to the adoption of this Law. The demobilisation process would eventually take place from 2003 up until 2006. Of the more than 30.000 demobilised paramilitaries, less than 10-percent were to be dealt with under the Justice and Peace Law. This concretely means that the rest were beneficiaries of Law No. 782 and Decree No. 128, which significantly reduces the extent to which victims' rights to truth, justice and reparations could be guaranteed and satisfied.[19]

## 3 An overview of the Justice and Peace Law

The Justice and Peace Law introduced transitional justice in Colombia. It provides for a legal framework that, for the first time, recognises and enforces victims' rights to truth, justice and

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[14] UNCHR, 'Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Colombia' (17 February 2004) UN Doc E/CN.4/2004/13 Annex III para 8; García-Godos and Lid (n 2).

[15] Amnesty International (n 6) 13, 20–21; Laplante and Theidon (n 2) 65.

[16] Rodrigo Uprimny and Maria Paula Saffon, 'Uses and Abuses of Transitional Justice Discourse in Colombia' (PRIO 2007) 9–10; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 211; García-Godos (n 12) 222.

[17] Laplante and Theidon (n 2) 76.

[18] Art 62 Justice and Peace Law.

[19] Comisión Colombiana de Juristas, 'Anotaciones Sobre Ley de Justicia y Paz' (2007) 14.

reparation, which is in stark contrast with previous Colombian peace processes.[20] Unusually, the process was initiated in the midst of the armed conflict, and lacked any clear political transition.[21] Moreover, instead of treating transitional justice and DDR as independent processes, the transitional justice system is directly linked to the DDR process within a single legal framework.[22] Despite the challenges and criticisms it has faced, the Justice and Peace Law marks a milestone in the search for justice and accountability in Colombia.[23]

The Justice and Peace Law regulates a system of special criminal proceedings, dealing with the investigation, prosecution and sanctioning of individuals (so-called *postulados*), who have committed or participated in serious crimes (including i.a. disappearances, massacres and sexual violence), during and on the occasion of their membership in a NSAG which has subjected itself to the collective demobilisation process.[24] These crimes have been recognised as involving conduct which amounts to serious violations of IHL and IHRL.[25]

The Law seeks to strike a balance between the demands for peace and justice. To this end, the NSAGs are encouraged to participate through the granting of judicial benefits, in the form of alternative sanctions, to their members. These benefits, however, are conditioned on the NSAG member's contributions to truth, justice and reparations for victims. Such sanctions involve the suspension of the ordinary criminal sanction, which is replaced by a significantly reduced prison sentence of five to eight years.[26] The Law does not create a special jurisdiction. Instead, the process is part of the ordinary justice system, in which specialised Chambers of Justice and Peace, of the Superior Tribunals of the various judicial districts in Colombia, were established. The Supreme Court of Justice is the court of second instance.[27]

One of the salient features of the Justice and Peace Law is the recognition of victims' right to reparation.[28] From the opposite perspective, convicted individuals who benefit from the Justice and Peace Law have a duty to make reparation on the basis of their criminal

[20] Arts 1, 4-8 Justice and Peace Law; Ana María Gutiérrez Urresty, 'Las Amnistías e Indultos, Un Hábito Social En Colombia' in Camila de Gamboa Tapias (ed), *Justicia Transicional: Teoría y Praxis* (Editorial Universidad del Rosario 2006); Laplante and Theidon (n 2) 59–61.

[21] Uprimny Yepes and others (n 2); Eduardo Pizarro and León Valencia, *Ley de Justicia y Paz* (Grupo Editorial Norma 2009) 35–40.

[22] Laplante and Theidon (n 2) 51–52.

[23] García-Godos (n 12) 220.

[24] Arts 1-2, 9 Justice and Peace Law; arts 1(1), 2(1) Decree No 3391 of 2006; Kai Ambos, *Procedimiento de La Ley de Justicia y Paz (Ley 975 de 2005) y Derecho Penal Internacional* (GTZ GmbH 2010) 21–26.

[25] See Law No 599 of 2000, Título II; *Case against Fredy Rendón Herrera* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (16 December 2011) 412; *Case against Manuel De Jesús Pirabán and Others* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (25 July 2016) para 5.5.2.2; *Case against Iván Roberto Duque Gaviria and Others* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (11 August 2017) para 6.4.1.

[26] Arts 3, 29 Justice and Peace Law; arts 1(2), 2(2) Decree No 3391 of 2006.

[27] Comisión Colombiana de Juristas (n 19) 444.

[28] Art 4 Justice and Peace Law.

responsibility.[29] In line with the UN Basic Principles and Guidelines, this involves a right and corresponding duty in respect of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[30] In addition, the Law makes reference to the need for symbolic as well as collective reparations.[31] There does, however, appear to be some confusion on this matter in article 48, where satisfaction measures and guarantees of non-repetition are treated as one and the same, without distinction of any sort.

The Law lists a variety of actions that can be carried out when providing integral reparation: the handing over of illegally obtained goods; a public declaration that re-establishes the dignity of the victims; a public recognition of responsibility, an apology, and the promise to not engage in such harmful actions in the future; and, collaboration in efforts to localise kidnapped or disappeared persons, as well as the remains of victims.[32] Although the Justice and Peace Law does not expressly base its approach to reparations on international law, the case law of the Justice and Peace Chambers extensively refers to international legal instruments, such as the UN Basic Principles and Guidelines, when laying out the various forms of reparation.[33]

Reparations are based on the individual criminal responsibility of the demobilised person and are judicially determined. As a result, victims can only claim reparations at the end of the criminal proceedings, during a reparations hearing (the so-called *incidente de reparación*).[34] This hearing cannot be held without, or separated from, the criminal proceedings. This suggests that the procedure is a criminal process first and foremost, with the principal interest being the exercise of criminal justice.[35] The scheme has resulted in significant challenges for victims, who are seeking reparations. As a result, additional efforts were made to establish an individual administrative reparations programme as a first step, and later, a comprehensive

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[29] Arts 37 para 38.3, 42(1) Justice and Peace Law.

[30] Arts 8, 44, 46-48 Justice and Peace Law; art 16 Decree No. 3391 of 2006; UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by UNGA Res 60/147 on 16 December 2005 (21 March 2006) UN Doc A/RES/60/147 (UN Basic Principles and Guidelines) principles 18-23.

[31] Arts 8, 49 Justice and Peace Law.

[32] Art 44 Justice and Peace Law.

[33] See, e.g., *Case against Edgar Ignacio Fierro Flores and Others* Superior Tribunal of Barranquilla (Colombia) Justice and Peace Chamber (18 December 2018) 1304–1305; *Case against Iván Roberto Duque Gaviria and Others* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (19 December 2018) 3835, 6852; *Case against Germán Antonio Pineda López* Superior Tribunal of Medellín (Colombia) Justice and Peace Chamber (25 January 2019) 491–492.

[34] Arts 23, 45 Justice and Peace Law. However, see Section 6.3 on anonymous harm.

[35] Claudia López Díaz (coord.), 'Daño y Reparación Judicial En El Ámbito de La Ley de Justicia y Paz' (GTZ 2010) 15.

policy to deal with reparations in a more efficient manner.[36] All in all, the implementation of the judicial path to reparations has experienced considerable criticism, voiced by, among others, civil society organisations and scholars.[37] A 2017 report of the Office of the Comptroller revealed, that by the time of the completion of the report, only 6,4% of the compensation measures ordered, had actually been paid through the proceeds of assets handed over by the *postulados*.[38]

The Justice and Peace Law has undergone at least two significant modifications since its adoption, which have improved the protection of victims' rights and the overall efficiency of the process. The first was the result of the landmark ruling C-370 of 2006, issued by the Constitutional Court.[39] Although the Justice and Peace Law represented an improvement in comparison to past initiatives, it was heavily criticised for failing the rights and needs of victims, by prioritising the interests of DDR and judicial benefits. The Court generally upheld the Law (including the granting of alternative sanctions), but declared certain provisions partially or wholly unconstitutional, placing the emphasis on guaranteeing the protection of victims' rights.[40] A second substantial reform was implemented in 2012, in response to significant delays which had plagued the process.[41] According to one Justice and Peace Magistrate, there was an initial lack of precise knowledge about the magnitude and dimensions of victimisation which had been caused by the phenomenon of *paramilitarismo*, and the complexity of the paramilitary structures that existed in the country.[42] The International Center for Transitional Justice explains that, over time, stakeholders began to understand the distinct nature of the systematic violations, in comparison to common crime, committed by the paramilitary organisations. They also understood that the task of responding

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[36] See further Section 9.

[37] García-Godos (n 12) 226; Camilo Andrés Hernández Barreto, 'Justicia Transicional Para Víctimas En Colombia. Más Allá Del Posconflicto' (2014) 83 Cien Días Vistos por CINEP/PPP 15, 17; Capone (n 2) 140; Nelson Camilo Sanchez and Adriana Rudling, 'Reparations in Colombia: Where To?' (Reparations, Responsibility & Victimhood in Transitional Societies 2019) 29, 48; '15 Años de Justicia y Paz: Avances En Reparación y Deudas En Justicia' *El Colombiano* (4 January 2020).

[38] Contraloría General de la República (Colombia), 'Análisis Sobre Los Resultados y Costos de La Ley de Justicia y Paz' (2017) 29. See also Wilson Alejandro Martínez Sánchez, 'La Extinción de Dominio En El Posconflicto Colombiano: Lecciones Aprendidas de Justicia y Paz' (Ministerio de Justicia y del Derecho - Colombia and UNODC 2016).

[39] *Judgment C-370/06* (n 8).

[40] For an extensive discussion of the criticisms voiced against the Justice and Peace Law, see Laplante and Theidon (n 2); Felipe Gómez Isa, 'Justicia, Verdad y Reparación En El Proceso de Desmovilización Paramilitar En Colombia' in Felipe Gómez Isa (ed), *Colombia en Su Laberinto: Una Mirada al Conflicto* (Libros de la Catarata 2008).

[41] The first judgment was only rendered after five years. See *Case against Edwar Cobos Téllez and Uber Enrique Banquéz M (Mampuján case)* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (29 June 2010).

[42] Interview No 1 (Colombia, February 2019).

to the crimes of the *postulados*, and the resulting reparations claims of victims, necessitated a different set of legal tools, than those typical of the ordinary justice system. The reform introduced by Law No. 1592 responded to these challenges, by providing for the prioritisation of cases, and by making it possible to prosecute crimes together, grouped into patterns of macro-criminality.[43]

# 4 Scope of application: organised armed groups at the margins of the law

The Justice and Peace Law aims to facilitate peace processes and the individual and collective demobilisation of members of so-called "organised armed groups at the margins of the law" (*grupos armados (organizados) al margen de la ley*).[44] Under Colombian national law, this concept refers to:

> a guerrilla or self-defence group, or a significant and integral part of these [groups] such as blocks, fronts or other modalities of those same organisations.[45]

Moreover, in conformity with the requirements of IHL, such groups are described as those that, "under the direction of a responsible command, exercise such control over a part of the territory that allows them to realise sustained and concerted military operations".[46] The definition draws directly from the threshold criteria included in article 1(1) of Additional Protocol II, applicable to NIACs, but adds a further restrictive condition, which relates to the nature of the NSAG: namely the actor should be a guerrilla or self-defence group.[47] Accordingly, the Justice and Peace Law provides for a single legal framework under which ideologically different NSAGs are to be treated equally.[48] On the other hand, criminal organisations or simple bands engaged in common crimes are excluded. The scope of application is directed to armed organisations that have challenged the stability of the country and national peace, therefore requiring special criminal treatment that is different than that applied to common crimes in ordinary times.[49] Law No. 782 modified the original definition, by no longer requiring that the government explicitly recognise a NSAG's political character

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[43] IACHR, 'Country Report Colombia: Truth, Justice and Reparation' OEA/Ser.L/V/II. Doc 49/13 (31 December 2013) paras 41, 358–359; María Camila Moreno, 'Uncovering Colombia's Systems of Macro-Criminality' *openDemocracy* (12 August 2014).
[44] Art 9-11 Justice and Peace Law [own translation].
[45] Art 1 Justice and Peace Law [own translation].
[46] Art 8(1) Law No 418 of 1997; art 3 Law No 782 of 2002 [own translation].
[47] Andrea Forer (coord.), *Manual de Procedimiento Para Ley de Justicia y Paz* (Editorial Milla Ltda 2009) 119–120.
[48] García-Godos and Lid (n 2) 504.
[49] López Díaz (coord.) (n 35) 14.

as a condition for peace talks.[50] Consequently, the legal framework was adjusted to accommodate the process to the paramilitaries, the characteristics of which sowed doubts about whether they could be granted the status of political agents.[51]

As highlighted in the definition, the notion of organised armed group at the margins of the law does not only encompass the armed organisation itself, but also its substructures, such as blocks or fronts. In the words of the Constitutional Court, these are "specific armed groups that realise their criminal activities in a determinate zone of the national territory".[52] Thus, the Justice and Peace Law deals not only with a NSAG that is recognised as a party to the Colombian NIAC, but also with its substructures, which fulfil the Additional Protocol II criteria and are, hence, NSAGs in themselves. This appears to accommodate decentralised NSAGs.

As discussed in Chapter 5, the AUC constituted an umbrella organisation, which brought together several paramilitary blocks and fronts operating with a great degree of autonomy at regional or local levels. Yet, it appears that the AUC never managed to fully consolidate at the national level. It remained a conglomerate of units, which responded to their own commanders and maintained their own distinct internal structures.[53] Although the top commanders would unite when shared interests arose, the group had no centralised and hierarchical command structure comparable to that which characterised the FARC-EP. The paramilitary leaders came together, for example, to demobilise collectively, but in practice this was not done in a united manner, at the level of the AUC. Instead, the paramilitary blocks and their commanders negotiated their respective demobilisations in several parallel talks with the Colombian government.[54] This process stands in stark contrast with the FARC-EP peace negotiations, in which the FARC-EP took part as a single and unified entity. As a result, this study has questioned whether the AUC can be considered as having constituted a single legal entity during the NIAC, by not reaching the threshold of organisation required by IHL. The manner in which the AUC is dealt with in the Justice and Peace process, appears to respond to

[50] Art 8 Law No 418 of 1997 as modified by art 3 Law No 782 of 2002; Laplante and Theidon (n 2) 61. It is generally agreed that the (political) motives of a NSAG are irrelevant when assessing the requirements listed within IHL. Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing Limited 2019) para 6.38.

[51] Manuel Fernando Quiche Ramírez, *Los Estándares de La Corte Internacional y La Ley de Justicia y Paz* (Editorial Universidad del Rosario 2009) 308; Evans (n 16) 208; Centro Nacional de Memoria Histórica, '¡Basta Ya! Colombia: Memories of War and Dignity' (2016) 243, 248, 250.

[52] *Judgment C-370/06* (n 8) para 6.2.4.4.4 [own translation].

[53] Ana Arjona, *Rebelocracy: Social Order in the Colombian Civil War* (Cambridge University Press 2016) 91.

[54] *Case against Indalecio José Sánchez Jaramillio* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (23 May 2017) 136–137, 139; Interview No 3 (Colombia, April 2019).

the particularities of its decentralised nature.[55] The criminal proceedings before the Justice and Peace Chambers, for example, are commonly held against members of a particular AUC-linked paramilitary block or front, which is recognised as constituting a specific organised NSAG pursuant to Common Article 3 and Additional Protocol II, instead of the AUC as such.[56]

## 5 The raison d'être of the Justice and Peace Law

The Justice and Peace process aims to establish individual criminal responsibility for crimes under the consideration of the special criminal proceedings. However, the system's underlying *raison d'être* is not found in its commitment to deal with crimes perpetrated in an individual and isolated manner. It emanates instead from the need to deal with the investigation, prosecution and sanctioning of, and the matter of judicial benefits for, persons linked to armed groups at the margins of the law which have committed themselves to collective demobilisation under the Justice and Peace Law framework. The specific persons concerned are authors of, or participants in, crimes committed *during and on the occasion of their membership in these groups*, and their criminal conviction is based upon these punishable criminal actions. The access to the judicial benefits is explicitly conditioned, from the perspective of the subject, on the person's membership within the NSAG that is participating in the collective demobilisation process and, from a causal point of view, on the punishable actions committed during and on the occasion of one's membership within such a group. Accordingly, the Justice and Peace Law's *raison d'être* is to be found in the relation that exists between the crimes themselves and the activity of the NSAG, that is committed to demobilisation within the scope of the Law. For this reason, crimes committed by paramilitaries, that are unrelated to the activities of the respective group, do not fall within the scope of the Justice and Peace Law and are to be dealt with in the ordinary justice system.[57] This consideration, that the relevant crimes are embedded in a context of collective NSAG violence, is also reflected in the definition of 'victim' under the Justice and Peace Law. According to the legislation, a victim is a person that individually or collectively suffered

[55] Interview No 2 (Skype Interview, March 2019).
[56] See e.g. *Case against José Rubén Peña Tobón and Others* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (1 December 2011) paras 1-2; *Case against Salvatore Mancuso Gómez* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (31 October 2014) paras 699-700. Jan Römer, *Killing in a Gray Area between Humanitarian Law and Human Rights* (Springer 2010) 19–20.
[57] Arts 1, 2, 10, 20 Justice and Peace Law; *Judgment C-370/06* (n 8) para 6.2.4.4.4.-6.2.4.4.7.

harm as a result of the criminal actions “carried out by organised armed groups at the margins of the law”.[58]

This was also underscored by the Supreme Court of Justice, in response to the first judgment against Wilson Salazar Carrascal, *alias* El Loro, which was eventually struck down. The Court held that the objective of the Law is to attend to massive and systematic violations perpetrated within the context of NSAG activity, and not to crimes perpetrated in an individual capacity. Therefore, it is necessary to uncover the larger collective context in which a violation takes place.[59] This requires an exploration of, among other issues, the underlying motives of the organisation, its chain of command and its power structures, “with a view to establishing both the responsibility of the illegal armed group and that of the demobilised”.[60] This process involves examining the phenomena of macro-criminality, and necessitates a contextualisation of the case within the broader activities of the NIAC, while simultaneously identifying the broader patterns of violence and the other actors involved.[61] Within this framework, the crime of conspiracy to commit serious crimes (*concierto para delinquir agravado*) constitutes the foundation to consider other imputed crimes carried out within the context of a NSAG’s activities.[62] Hence, the so-called *delito base* of the Justice and Peace Law provides the necessary basis to legally establish the causal relation, as previously mentioned.[63]

With the reform of Law No. 1592 in 2012, the collective focus was further sharpened by introducing the concept of so-called ‘patterns of macro-criminality’, to guide the criminal investigations. Instead of treating criminal acts as isolated and disjointed occurrences, the concept made it possible to investigate these acts within the broader context of the organised activities of NSAGs, by revealing the contexts, causes and motives of the groups, shedding

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[58] Art 5 Justice and Peace Law [own translation].

[59] Arts 7, 15, 56 Justice and Peace Law.

[60] *Appeals Judgment No 31539* Supreme Court of Justice of Colombia (Criminal Cassation Chamber) (31 July 2009) para 1.1 [own translation].

[61] Catalina Díaz Gómez and Camilo Ernesto Bernal Sarmiento, ‘El Diseno Institucional de Reparaciones En La Ley de Justicia Y Paz: Una Evaluación Preliminary’ in Catalina Díaz Gómez, Nelson Camilo Sánchez and Rodrigo Uprimny Yepes (eds), *Reparar en Colombia: Los Dilemas en Contextos de Conflicto, Pobreza y Exclusión* (ICTJ and Dejusticia 2009) 596–604.

[62] Ambos (n 24) 131. *Concierto para delinquir agravado* presents itself when various persons come together with the objective to commit serious crimes such as genocide, forced displacement of persons, torture and enforced disappearances, among other crimes. ‘Concierto Para Delinquir Simple En El Marco de La Ley 975’ (*Observatorio Legislativo*, 2007); Marco Sassòli, ‘Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law’ (2010) 1 Journal of International Humanitarian Legal Studies 5, 43.

[63] *Appeals Judgment No 31539* (n 60) paras 1.1-1.7; Comisión Colombiana de Juristas, ‘La Justicia Se Acerca a Las Víctimas: La Corte Suprema de Justicia Anuló La Primera Sentencia de La Ley 975 En El Caso Del Paramilitar Alias “El Loro”’ (2009) Boletín No 38: Serie sobre los Derechos de las Víctimas y la Aplicación de la Ley 975.

light on the macro-victimisation they caused, and allowing prosecutors to bring forward collective indictments, while concentrating efforts on the most responsible.[64] The examination and clarification of the broader contexts of the crimes, is aimed at learning the truth about what happened, preventing its repetition, and using an interesting scheme for dual criminal indictment, formulated in a preliminary manner against the NSAG and later against the *postulado(s)*.[65] However, these efforts do not seek to establish the collective criminal responsibility of the NSAG. The determination of the patterns of macro-criminality is not a goal in itself, but rather a means to uncover the truth about what happened during the armed conflict and to determine the degree of individual responsibility of the members of NSAGs and their collaborators.[66]

# 6 The obligation to provide monetary compensation

## 6.1 The collective duty to hand over illegally obtained goods

In cases of collective demobilisation, the Justice and Peace Law imposes a duty to hand over all goods, which were *illegally obtained* over the course of the NIAC, as a condition of eligibility, and to have access to the judicial benefits.[67] The Fund for the Reparation of the Victims (Reparations Fund) administers and liquidates these goods in order to carry out judicially ordered compensation measures.[68] Hence, there is a direct co-relation between the duty to hand over the illegally obtained goods, as a condition for access to the judicial benefits, and the compensation measures.[69] Besides these goods, the convicted members, or the NSAGs themselves by virtue of the principle of solidarity, may be obligated by judicial order to hand over *legally obtained goods* to fully satisfy their duty to provide compensation (see the following section).[70]

The duty to hand over all illegally obtained goods can be understood as resulting in obligations for both the members and the NSAGs themselves. As stated in article 54(2) of the

[64] Art 13 Law No 1592 of 2012 that introduced new art 16A to the Justice and Peace Law; arts 15-17, 25 Decree No 3011 of 2013; IACHR (n 43) 155–157.
[65] Art 22 Decree No 3011 of 2013; Directiva No 0001 of 4 October 2012 (Fiscalía General de la Nación - Colombia); IACHR (n 43) 162.
[66] Art 16 Decree No 3011 of 2013; *Appeals Judgment No 45547* Supreme Court of Justice of Colombia (Criminal Cassation Chamber) (16 December 2015) 105–107; *Case against Iván Roberto Duque Gaviria and Others* (n 25) 140–143.
[67] Art 10.2 Justice and Peace Law.
[68] Art 54-55 Justice and Peace Law. See further Section 6.4.
[69] Art 45.1 Justice and Peace Law identifies the delivery of the illegally obtained goods to the State for the provision of reparations to the victims as an action of integral reparation.
[70] *Judgment C-370/06* (n 8) para 6.2.4.1.18.

Justice and Peace Law, the Reparations Fund is made up of the goods or assets handed in by "the persons or illegally organised armed groups" that fall within the purview of the Law.[71] Moreover, the goods handed over by any member of a NSAG in accordance with article 10.2 of the Justice and Peace Law, which sets this eligibility condition in the case of collective demobilisation, are "to be understood as being carried out in the name of the respective group".[72] In other words, they are considered as collective goods, or rather goods that the group illegally obtained, in the framework of its criminal activities during the NIAC. As further discussed in Section 6.4, these goods are the first to be affected for compensation purposes. Ultimately, the totality of the illegal goods collected, which may have been handed over both individually and collectively, are destined to compensate those victims that are recognised as having suffered harm due to activities of a NSAG, where specific demobilised members of that NSAG have been held criminally responsible for the activities. This approach fits with the logic that the objective of the law is not to affect the goods in an individual manner, but rather at the level of the organisation.[73]

The illegal goods can be considered as belonging to a specific NSAG for the purposes of the Justice and Peace Law, where they were acquired during and on the occasion of the group's activities, over the course of the NIAC. However, the actual management of these assets by the AUC-linked paramilitary structures was more complex in practice. As discussed in Chapter 5, paramilitary leaders and mid-ranking figures accumulated significant assets and property over the course of the conflict. Gutiérrez Sanín explains that the driving logic was, "the higher you are in the hierarchical ladder, the more territory and rents you have access to".[74] Accordingly, these goods and assets did not necessarily go to the organisation itself. This is in sharp contrast to the manner in which the FARC-EP managed the assets it acquired over the course of its activities. These goods were considered as collective property of the

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[71] [own translation] art 18(1) Decree No 3391 of 2006; Fondo para la Reparación de las Víctimas - Unidad para la Atención y la Reparación Integral a las Víctimas, 'Informe Ejecutivo (Fecha de Corte de La Información Reportada: 30 de Septiembre de 2016)' (2016) 2.

[72] Art 14 para Decree No 3391 of 2006 [own translation].

[73] For example, the judgment rendered against members of the *Bloque Centauros* and *Bloque Héroes del Llano y del Guaviare* lists a number of goods that were handed over during the collective demobilisation of both blocks in April 2006. In addition, some *postulados* individually delivered various goods intended for reparations, whereas others declared that they did not possess any goods that could be used to that end. When evaluating the eligibility condition in art 10.2 Justice and Peace Law, the court confirmed that the *postulados* handed over the illegally obtained goods in both an individual and collective manner in the framework of their demobilisation and over the course of the Justice and Peace process to contribute to reparation. Hence, the eligibility condition was deemed satisfied. *Case against Manuel De Jesús Pirabán and Others* (n 25) 27–34, 53–54. For another example, see *Case against Iván Roberto Duque Gaviria and Others* (n 25) 44–48. Interview No 3 (Colombia, April 2019).

[74] Francisco Gutiérrez Sanín, 'Telling the Difference: Guerrillas and Paramilitaries in the Colombian War' (2008) 36 Politics & Society 3, 16.

movement, and keeping them for personal benefit was considered to be stealing from the movement.[75]

The duty to hand over all illegally obtained goods is a condition for individual NSAG members to gain access to the judicial benefits. This implies that those who fail to comply with this obligation should lose the afforded benefits.[76] This should, in principle, have resulted in a significant incentive to act in accordance with the requirements. In addition, it should have contributed to the process of effectively dismantling paramilitary structures, by targeting their considerable wealth.[77] However, the surrender of assets quickly became one of the main challenges confronting the Justice and Peace process.[78] As reported, "the former paramilitary chiefs are reluctant to surrender assets and resort to grey areas of the law or legal tricks, corruption of officials and violent acts of intimidation, all of which dampen expectations and instil fear in victims who resort to litigation to get their property returned to them".[79] Consequently, the major share of compensation orders have been financed through public money, rather than by the paramilitaries.[80] While few assets were actually seized, others significantly decreased in their value, due to mismanagement. Other assets found their way to poor conditions, or remote areas.[81] All in all, the duty appears to have remained largely ineffective in practice, despite its strict legal character. In addition, the Justice and Peace experience, of attempting to recover and seize assets from NSAGs, exposes the significant challenges that come along with such an endeavour.

## 6.2 Ruling C-370/06: introducing a cascading responsibility scheme

With the introduction of the Justice and Peace Law, a debate unravelled on various aspects relating to the question of responsibility for reparations.[82] Eventually, the Constitutional Court was seized on the question and put forward an interesting cascading responsibility scheme in

[75] Art 13 FARC-EP Statute (as adopted at the Ninth National Guerrilla Conference) (2007); arts 3(l), 4(3) Reglamento de Régimen Disciplinario de las FARC-EP (as adopted at the Ninth National Guerrilla Conference) (2007); Gutiérrez Sanín (n 74) 13–16.
[76] An explicit exclusion ground was only provided in 2012 with the passing of Law No 1592. See arts 5 and 8 Law No 1592 that introduce new arts 11A(3) and 11D respectively to the Justice and Peace Law; art 34(3) Decree No 3011 of 2013. Compare to art 12 Decree No 3391 of 2006.
[77] Felipe Gómez Isa, 'Paramilitary Demobilisation in Colombia: Between Peace and Justice' (FRIDE 2008) 12.
[78] Martínez Sánchez (n 38) 35–36.
[79] IACHR (n 43) 141.
[80] Fondo para la Reparación de las Víctimas - Unidad para la Atención y la Reparación Integral a las Víctimas (n 71) 7–8; Martínez Sánchez (n 38) 43; Contraloría General de la República (Colombia) (n 38) 29.
[81] Sanchez and Rudling (n 37) 48, 59.
[82] Nelson Camilo Sánchez, '¿Perder Es Ganar Un Poco? Avances y Frustraciones de La Discusión Del Estatuto de Víctimas En Colombia' in Catalina Díaz Gómez, Nelson Camilo Sánchez and Rodrigo Uprimny Yepes (eds), *Reparar en Colombia: Los Dilemas en Contextos de Conflicto, Pobreza y Exclusión* (ICTJ and Dejusticia 2009) 647–748; Sanchez and Rudling (n 37) 6.

its landmark ruling C-370 of 2006. This ruling was significant in recognising the civil responsibility of the NSAGs to which the *postulados* belonged.[83]

The Constitutional Court made its first pronouncements regarding this responsibility scheme when it determined whether persons held criminally responsible should provide reparations, not only through their illegally obtained assets, but also through their *legally attained resources*. The Court questioned whether it would be justified, within transitional justice processes, to drift away from a core general principle of law, that 'those who are responsible for causing harm or damage are obligated to repairing it', by shifting this duty from the perpetrator to the State. Here also played the consideration that the prospect of having one's personal assets completely depleted, in the face of repairing mass victimisation, could present itself as a disincentive for NSAG members to submit themselves to the peace process.[84] Rather than yielding to this argument, the Court identified its several weaknesses and concluded that the provisions of the Justice and Peace Law, which confined the source of reparations only to illegally obtained assets, were unconstitutional.[85]

As for the first concern, the Court held that there was no constitutional reason which would allow an exception to the general principle of law, that 'those who are responsible for causing harm or damage are obligated to repairing it'. It explained that compensation provided through the perpetrator's personal assets is considered a necessary condition to both guarantee the rights of victims and promote the fight against impunity. The complete exemption of the responsible person's duty to repair would result in a sort of blanket amnesty for civil responsibility. In this light, the Court considered it justified that such persons should answer the duty to provide reparations with their personal assets, while setting the possibility of a decent livelihood as a proportional limit. On this basis, the Constitutional Court confirmed that the *postulados*, who were held criminally responsible in the Justice and Peace process, are the actors who bear the primary responsibility to provide reparations, with their entire patrimony, to the victims who experienced harm due to their criminal actions.[86]

The Constitutional Court went a step further, by holding that it is not only those who were held criminally responsible that should provide compensation, but also the NSAGs to which they belonged. The Court explicitly recognised the solidarity civil responsibility held by NSAGs, which it based on the aforementioned legal principle regarding reparation for

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[83] See *Judgment C-370/06* (n 8) para 6.2.4.

[84] Julian Guerrero Orozco and Mariana Goetz, 'Reparations for Victims in Colombia: Colombia's Law on Justice and Peace' in Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nijhoff Publishers 2009) 446.

[85] *Judgment C-370/06* (n 8) paras 6.2.4.1.7-6.2.4.1.11.

[86] ibid paras 6.2.4.1.11-6.2.4.1.16.

wrongful conduct linked to the underlying rationale of the Justice and Peace Law.[87] This civil responsibility of the NSAG is subsidiary to the primary responsibility of the convicted member: meaning that it is triggered when the legally obtained assets of the convicted NSAG member are not sufficient to cover the compensation order.[88] Accordingly, the civil responsibility of the NSAG forms the second step in the responsibility scheme.[89]

The Constitutional Court was left to decide on the precise role of the Colombian State in the question of reparations for victims of NSAGs. While some argued that public resources should not be used, others asserted that the State, and not the perpetrators, should take the principal role in ensuring reparations in a transitional justice system seeking to deal with serious violations, which have resulted in an immense universe of victims.[90] The Court held that responsibility could not be entirely shifted to the State, as such a shift would, in practice, result in placing the reparative burden upon Colombian citizens.[91] Instead, the Court held that the State only takes a residual role in safeguarding victims' rights. Concretely, this means that the State assumes a subsidiary responsibility, only where the convicted person, or the NSAG to which he or she belonged, fail to fulfil their obligations.[92] The Victims' Law makes clear that it does not imply any recognition of the State's direct responsibility for the wrongful conduct.[93] Instead, the duty to provide residual reparations is based on the State's duty to guarantee human rights, in conformity with international and constitutional law.[94] The complete negation of state responsibility is, however, problematic in cases where paramilitaries may have operated with the support or acquiescence of the Colombian State.[95] Yet, from the perspective of the responsibility of non-state actors, it forms an important recognition that reparations cannot be solely dependent on the responsible individual and NSAG. Instead, the State should play an important role in safeguarding victims' right to reparation.

This responsibility scheme falls partly in line with the UN Basic Principles and Guidelines, which hold that persons or other entities should provide reparations to victims for which they

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[87] *Concepto No 2362* Council of State of Colombia (Sala de Consulta y Servicio Civil) (20 March 2018) Section 3 of Part II.

[88] *Judgment C-370/06* (n 8) para 6.2.4.4.

[89] Nelson Camilo Sánchez León and Clara Sandoval-Villalba, 'Go Big or Go Home? Lessons Learned from the Colombian Victims' Reparation System' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill 2020) 551.

[90] Sánchez (n 82) 648.

[91] *Judgment C-370/06* (n 8) para 6.2.4.1.13.

[92] ibid paras 6.2.4.1.12-13, 6.2.4.4.11.

[93] Art 10 Law No 1448 of 2011 (Victims' Law).

[94] *Judgment C-160/16* Constitutional Court of Colombia (6 April 2016). See also art 6(1) Justice and Peace Law.

[95] See Section 1 and Chapter 5.

have been found liable, with the state taking a subsidiary role. The Colombian scheme does, however, not foresee an obligation, on the part of the responsible actor, to compensate the State where the State has already provided reparation to the victim. As will be discussed further, in Section 9, State responsibility has been strengthened by way of administrative programmes that seek to guarantee the right to reparation, where the actors responsible for the harm are unable, or unwilling, to meet their resulting obligations.[96]

In sum, ruling C-370 is fundamental in understanding the complex responsibility scheme, which forms the basis of the duty, under the Justice and Peace Law system, to provide monetary compensation with legally obtained assets.[97] In particular, the decision results in a cascading scheme of responsibility, which operates in the following manner:

1. The primary responsibility of the demobilised member, who was held criminally responsible for committing serious crimes, during and on the occasion of his or her membership within a NSAG;
2. In subsidiarity, the solidarity civil responsibility of the NSAG, to which the convicted individual belonged;
3. In a residual manner, the subsidiary responsibility of the State, limited by article 10 of the Victims' Law,[98] which does not result in the recognition of its direct responsibility for the wrongful conduct.[99]

The scheme legally implies that victims have rights in respect of three actors for the harms they have experienced as a result of paramilitary violence. However, these rights can only be exercised in a gradual manner, following the hierarchy of responsibility mentioned above.[100]

### 6.2.1 Solidarity civil responsibility of non-state armed groups

As was discussed in Section 5, the Justice and Peace Law concerns itself with the relation that exists between the criminal activity of the demobilised individuals and their membership within a specific NSAG, in the service, or activities, of which their crimes were carried out. This generates a so-called nexus of causality between the activity of this group and the harms that have been inflicted by it.[101] In ruling C-370/06, the Constitutional Court recognised the

[96] UN Basic Principles and Guidelines principles 15-17.

[97] This is further confirmed in *Judgment C-575/06* Constitutional Court of Colombia (25 July 2006).

[98] In contrast to what was initially determined, the State cannot limit its responsibility to the constraints of the National Budget. However, see art 10 Victims' Law, that confines it to the amount of individual compensation that can be obtained through the administrative path. *Judgment C-370/06* (n 8) para 6.2.4.3.1.

[99] Arts 15, 18 Decree No 3391 of 2006.

[100] Laplante and Theidon (n 2) 105.

[101] This nexus of causality is also expressly referred to in art 42(2) Justice and Peace Law, which deals with anonymous harm (see Section 6.3).

solidarity civil responsibility of NSAGs based on this nexus,[102] and used this reasoning to justify the extension of civil responsibility beyond the convicted individual. It noted that, although criminal liability remains individual in nature, the civil responsibility which derives from the criminal act, allows for an element of solidarity: not only between those held criminally responsible, but also with regard to all identified members of the NSAG under consideration.[103]

Furthermore, the Constitutional Court coupled the enjoyment of judicial benefits to the question of responsibility. It argued that, if judicial benefits are granted to a NSAG which has made a commitment to collectively demobilise, or rather to its members due to their membership in this group, this necessitates a corresponding civil responsibility, on the condition that: (1) the real, concrete and specific harm is established; (2) the harm's causal relationship to the activity of the NSAG is demonstrated; and, (3) the membership of the demobilised persons within that group has been judicially determined.[104] The Court further held that limiting the right of victims to reparations, to the extent that the convicted person has sufficient resources to cover the compensation order, would disproportionately impair this right. An interpretation to the contrary would be manifestly unconstitutional in a context in which the demobilisation of NSAGs is incentivised by the granting of judicial benefits. Accordingly, an important justification for extending a subsidiary responsibility to NSAGs can be found in this necessity to safeguard victims' right to reparation.[105]

The civil responsibility of the NSAGs is legally construed on the basis of the principle of solidarity. This results in holding all judicially determined members of the NSAG, to which the convicted member belonged, jointly and severally liable to repair the damages caused by the wrongful act.[106] The Colombian legal tradition is no stranger to solidarity in civil liability, or its extension to persons other than those held criminally responsible. According to this tradition, the damages caused must be repaired by those held criminally responsible, jointly and severally, and by those who are obligated to respond pursuant to a substantive law.[107] The Justice and Peace Law, as modified in accordance with the constitutionally sound interpretation given by the Constitutional Court, thus provides the legal basis for such an

[102] *Concepto No 2362* (n 87) Section 3 of Part II.
[103] *Judgment C-370/06* (n 8) para 6.2.4.4.7.
[104] Art 15(2) Decree No 3391 of 2006; *Judgment C-370/06* (n 8) para 6.2.4.4.10.
[105] *Judgment C-370/06* (n 8) paras 6.2.4.4.10-6.2.4.4.12.
[106] ibid paras 6.2.4.4.7, 6.2.4.4.12; Gómez Isa, 'Justicia, Verdad y Reparación En El Proceso de Desmovilización Paramilitar En Colombia' (n 40) 133; López Díaz (coord.) (n 35) 251; Republic of Colombia, 'Justice and Peace Law: An Experience of Truth, Justice and Reparation' Review Conference of the Rome Statute RC/ST/PJ/M.1 (1 June 2010) 7.
[107] Art 96 Law No 599 of 2000.

exceptional responsibility in the case of NSAGs.[108] By extending the responsibility of solidarity beyond those members that were held criminally responsible, the Law adopts a form of vicarious liability.[109]

When addressing the responsibility of the NSAGs, the Court explicitly clarified that these groups are to be understood as paramilitary blocks or fronts.[110] This is also stated in implementing Decree No. 3391 of 2006, which holds that, in this case, the organised armed groups at the margins of the law are "understood as the respective block or front".[111] Thus, instead of holding the AUC civilly responsible, the AUC-linked paramilitary blocks and fronts, which satisfy the criteria set by article 1 Additional Protocol II as NSAGs in themselves, are deemed to hold solidarity civil responsibility as separate NSAGs.

Certain paramilitary structures did not participate in the collective demobilisations.[112] This could have complicated the extent to which the AUC, as such, could have been held responsible: as one could have argued that the collectivity did not subscribe to the process. However, this question does not arise in practice, as responsibility is considered at the sublevels of the AUC: namely, the individual AUC-linked paramilitary blocks and fronts.[113]

In many of the judgements rendered in the Justice and Peace process, magistrates have had to rely on the civil responsibility of solidarity.[114] This suggests that it has been unfeasible, in practice, to place the obligation to provide compensation solely on the convicted perpetrator in a situation of mass victimisation. This is true even when taking into account the fact that some paramilitary leaders accumulated significant wealth over the course of the armed conflict.[115]

Overall, the concept of the civil responsibility of NSAGs, operationalised on the basis of the principle of solidarity, provides for an interesting approach to dealing, in the confines of a criminal justice procedure, with the harmful consequences of crimes perpetrated within the

[108] *Judgment C-370/06* (n 8) paras 6.2.4.4.8-6.2.4.4.9; López Díaz (coord.) (n 35) 254.

[109] Laplante and Theidon (n 2) 105; Shane Darcy, *Collective Responsibility and Accountability under International Law* (Brill 2007) xix.

[110] *Judgment C-370/06* (n 8) paras 6.2.4.4.7, 6.2.4.4.11.

[111] Art 15 Decree No 3391 of 2006 [own translation].

[112] *Case against Iván Roberto Duque Gaviria* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (11 June 2010) 4–5; Garzón (coord.) (n 9) 18.

[113] Interview No 3 (Colombia, April 2019).

[114] See for instance *Mampuján case* (n 41) 205; *Case against Orlando Villa Zapata and Others* Superior Tribunal of Bogotá (Colombia) Justice and Peace Chamber (24 February 2015) 1046; *Case against Edilberto de Jesús Cañas Chavarriaga and others* Superior Tribunal of Medellín (Colombia) Justice and Peace Chamber (24 September 2015) para 833; *Appeals Judgment No 45463* Supreme Court of Justice of Colombia (Criminal Cassation Chamber) (25 November 2015) 124; *Case against Iván Roberto Duque Gaviria and Others* (n 25) 1913; *Case against Edgar Ignacio Fierro Flores and Others* (n 33) 1753–1754; *Case against Iván Roberto Duque Gaviria and Others* (n 33) 6924.

[115] *Judgment C-370/06* (n 8) para 6.2.4.1.14; Human Rights Watch, 'Smoke and Mirrors: Colombia's Demobilization of Paramilitary Groups' (2005) 13–22.

context of a NSAG's activities. Furthermore, it circumvents the challenges that could have arisen, when seeking to enforce responsibility directly against a NSAG, and not by way of its constituent members; for instance, the group itself would have ceased to legally exist with its collective disarmament and demobilisation. From the perspective of the victims, it provides for an additional layer which safeguards, at least theoretically, their right to compensation.

### 6.3 Anonymous harm

Generally, the reparations hearing is the moment during the criminal procedure, in which the appropriate measures to redress harms suffered by victims can be claimed, and the distinct forms to achieve integral reparation are to be determined.[116] However, in cases in which it is not possible to identify the active subject that caused the harm (i.e. the material author), so-called anonymous harm results. To combat anonymous harm, article 42(2) of the Justice and Peace Law allows for the possibility of holding an exceptional reparations hearing. This provides victims with the possibility to still claim reparations where the harm, and the nexus of causality with the activities of a NSAG (which benefits from the Law), can be proven.[117] In such cases, the court either orders compensation directly, or by way of referral by the Unit of the Public Prosecutor, through the Reparations Fund, which consists of the goods handed over by demobilised members and NSAGs, among other contributors (see further Section 6.4).[118]
According to article 5(3) Justice and Peace Law, the status of victim is acquired regardless of whether the author of the harmful conduct was identified, apprehended or convicted.[119] Accordingly, victims are not required to identify a specific individual perpetrator when registering with the Office of the Public Prosecutor, instead they can limit themselves to identifying the NSAG to which the perpetrator belonged.[120] This addresses a specific hurdle inherent in criminal proceedings: since, in principle, a concrete crime must be linked to an identifiable author or participant, and otherwise the harmful act remains outside of the criminal process. The Constitutional Court has held that anonymous harms cannot remain unaddressed. Where the necessary conditions are satisfied, the victim can still rely on the mechanisms provided in the Justice and Peace Law.[121] This alternate route to reparation should not be underestimated in terms of its importance, as the impossibility of

[116] Art 23 Justice and Peace Law; Gabriel Arias Hernández, 'Representación Judicial de Las Víctimas En Justicia y Paz' (Defensoría del Pueblo - Colombia 2009) 137.
[117] *Judgment C-370/06* (n 8) para 6.2.4.4.10.
[118] Art 18 Decree No 3391 of 2006; Hernández (n 116) 139–141.
[119] ibid 139, 141.
[120] Fiscalía General de la Nación (Colombia), 'Formato Registro de Hechos Atribuibles a Grupos Armados Organizados al Margen de La Ley' (Version 02 of 2018); García-Godos (n 12) 226.
[121] Art 15 Decree No 3391 of 2006; *Judgment C-370/06* (n 8) paras 6.2.4.4.10-6.2.4.4.11.

individualising the offender is not exceptional in the Colombian case.[122] Moreover, it could be the case that the direct perpetrators have died, or did not submit themselves to the Justice and Peace process.[123] This is a significant advancement for victims in terms of the exercise of their right to reparation.

The Supreme Court of Justice listed the specific conditions that have to be met in order to open the reparation hearing on the basis of article 42(2) Justice and Peace Law, while clarifying that the status of victim of the armed conflict is not sufficient in itself.

The specific conditions are as follows:

(1) The identification or individualisation of the NSAG (block or front);
(2) The establishment of the causal relation between the harm and the activity of the group (conspiracy among its members);
(3) The group has demobilised and the members have submitted themselves to the Justice and Peace Law; and
(4) The Office of the Public Prosecutor has exhausted all possible ways to identify the individual perpetrator, or is able to state that this was not possible.[124]

The conditions reaffirm that the Justice and Peace process occupies itself with macro-criminality rather than ordinary and individual crime.[125] Where the conditions are met, the NSAG collectively satisfies the payment of the ordered compensation, through the Reparations Fund.[126] However, to the knowledge of an experienced Justice and Peace Magistrate, it has never been impossible, in practice, to attribute a criminal act to one of the individual *postulados*, on the basis of the chain of command that existed within the group. As a result, this person is obligated to respond for the harms caused by the criminal act.[127]

Besides the judicial path to claim reparations, victims can also rely on the administrative programme established under the Victims' Law of 2011. In accordance with article 3 of this Law, victims are considered as persons that have individually or collectively suffered harm

[122] Gómez Isa, 'Justicia, Verdad y Reparación En El Proceso de Desmovilización Paramilitar En Colombia' (n 40) 134; López Díaz (coord.) (n 35) 171.

[123] Interview No 1 (Colombia, February 2019); Interview No 3 (Colombia, April 2019).

[124] *Appeals Judgment No 28769* Supreme Court of Justice of Colombia (Criminal Cassation Chamber) (11 December 2007); *Appeals Judgment No 29240* Supreme Court of Justice of Colombia (Criminal Cassation Chamber) (21 April 2008); *Appeals Judgment No 29642* Supreme Court of Justice of Colombia (Criminal Cassation Chamber) (23 May 2008); *Appeals Judgment No 31320* Supreme Court of Justice of Colombia (Criminal Cassation Chamber) (21 March 2009); García-Godos and Lid (n 2) 510.

[125] Interview No 3 (Colombia, April 2019).

[126] López Díaz (coord.) (n 35) 172, 332.

[127] Interview No 3 (Colombia, April 2019). However, the following publication, of 2011, mentions that more than 500 victims filed a petition on the basis of art 42(2) Justice and Peace Law. All were rejected because of, i.a., the impossibility of determining a causal nexus between the act and the demobilised NSAG. Garzón (coord.) (n 9) 74–76.

due to actions that constitute infractions of IHL, or grave and manifest violations of IHRL, which occurred on the occasion of the NIAC. This broad conceptualisation does not require the victim to identify the author of the harmful act. However, it is indispensable to prove the link between the harmful act and the armed conflict.

### 6.4 The Fund for the Reparation of the Victims: the order of affection

The Justice and Peace Law created the Fund for the Reparation of the Victims, which is in charge of implementing the judicial decisions concerning monetary compensation. It has been managed, since the passing of the Victims' Law, by the newly created Victims' Unit.[128] The Reparations Fund consists of assets and goods that come from several sources. Besides the resources coming from the national budget and donations, the primary source is the illegal goods handed over in accordance with article 10.2 of the Justice and Peace Law (see Section 6.1). This includes goods that were linked to relevant criminal investigations and were consequently seized.[129] Moreover, legally obtained goods may find their way into the Fund, when judicially ordered to secure the full satisfaction of compensation measures. Such an order is directed against criminally convicted NSAG members, or even against other members of the same block or front, on the basis of its solidarity civil responsibility (see Section 6.2).[130] The Victims' Unit has to take into account an order of affection, with regard to the goods and assets that are in the Fund, when implementing the compensation orders. In accordance with the cascading responsibility scheme, the Constitutional Court held that the perpetrators of the crimes are the first actors obligated to repair and, joining them in subsidy, and by virtue of the principle of solidarity, the specific group to which the perpetrators belonged. As such, before resorting to the national budget, the perpetrators and the respective block or front should be called upon to respond with their own legally obtained goods or assets. The State only takes a residual role when the preceding resources are insufficient.[131] This process is implemented in the following manner by Decree No. 3391 of 2006:

1) The first stage in the order of affection concerns the *illegally obtained goods and assets of the respective block or front that collectively demobilised*. From the

[128] Art 168(8) Victims' Law. See also implementing Decree No 4802 of 2011.
[129] Art 54 Justice and Peace Law. See also art 177 Victims' Law, for an overview of the additional resources that are included in the Fund.
[130] Art 18 Decree No 3391 of 2006; *Judgment C-370/06* (n 8) para 6.2.4.1.
[131] ibid para 6.2.4.4.11; *Judgment C-575/06* (n 97).

liquidation of these goods, the compensation ordered against the convicted members will be paid. The same goes for cases of anonymous harm.

2) When these illegal resources do not suffice to cover the amount of the ordered compensation, the further payment will be carried out using the *legal goods or assets*, which were the object of precautionary measures or were handed in by the *convicted demobilised members*.
3) When the legal resources of the persons held criminally responsible are not sufficient, the payment will be carried out using *the legal assets of the other members* of the block or front to which the convicted members belonged. This block or front has to have been judicially declared as bearing a *civil responsibility of solidarity*. Hence, they also have to respond to the reparatory obligation that resulted from the criminal conviction.
4) As a last resort, the national budget may be allocated with a limit set in article 10 of the Victims' Law.[132]

The overview indicates that the totality of the assets and goods handed over, both individually and collectively, are destined to compensate specific victims, which have been recognised as having suffered harm due to the activities of a particular NSAG, for which certain demobilised members have been held criminally responsible. Put differently, the goods of block or front A cannot be used to repair the victims of block or front B. A contrary approach would break the nexus of causality between the illegal activity of the group and the harms that it caused, which fundamentally underpins its civil responsibility. Accordingly, it would constitute an unconstitutional and illegal action. Furthermore, it would disproportionately impair the rights of the victims of group A, given that they would be left unprotected in the face of scarce resources.[133]

# 7 Satisfaction

Satisfaction constitutes another form of reparation, which has been ordered pursuant to the Justice and Peace Law.[134] It is broadly defined as including actions that seek to re-establish the dignity of victims and spread the truth about what happened.[135] Satisfaction measures have regularly been ordered against the criminally convicted members of NSAGs. Even so, in

[132] Art 18 Decree No 3391 of 2006.
[133] *Concepto No 2362* (n 87).
[134] Arts 44, 48 Justice and Peace Law.
[135] Art 8(5) Justice and Peace Law.

some cases, ordered measures appear to have also reflected the collective responsibility of the NSAG, to which the individual perpetrator(s) belonged. Such measures include the following: apology and recognition of responsibility, the building of a monument, and the rebuilding of a health centre.

### 7.1 Apology and recognition of responsibility

Convicted paramilitary members have been required to publicly apologise and recognise their individual responsibility for the crimes they committed.[136] Although the Justice and Peace Law seeks to deal with system criminality, it does not expressly foresee measures which would require a former member to provide a public apology, or recognition of collective responsibility, on behalf of the NSAG.[137] Nevertheless, in at least one case, of 2019, against a former member of the *Bloque Suroeste Antioqueño*, the *postulado* was ordered to publicly recognise the responsibility of the block for its involvement in acts of sexual and gender-based violence.[138] Furthermore, according to a Justice and Peace Magistrate, an apology by a *postulado* may reflect both the person's individual responsibility, as well as the responsibility of the block or front, within the activities of which he or she committed the crimes. This would depended on the role that the *postulado* had in the concerned NSAG: "if he is a commander he will carry it out personally and on behalf of the block, if he is a low-level member he will carry it out individually because he did not have command, he did not organise anything, he fulfilled his orders and - let us say - that he caused harm at an individual level".[139] This explanation tentatively suggests that particularly high-level members could possibly bear a certain degree of authority to represent the group in such symbolic measures of satisfaction.[140]

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[136] See e.g. *Case against Fredy Rendón Herrera* (n 25) 387; *Case against Ramiro Banoy Murillo and Others* Superior Tribunal of Medellín (Colombia) Justice and Peace Chamber (28 June 2018) 2386. The International Center for Transitional Justice defines official public apologies as including an acknowledgement of some or all responsibility for what happened, besides the recognition of the violation it addresses and the harm it has caused to the victims. Still, as explained by Moffett and others, apologies can be distinguished from acknowledgements of responsibility by the remorseful framing and gestures of such acts. ICTJ, 'More Than Words: Apologies as a Form of Reparation' (2015) 1–2; Luke Moffett and others, 'Alternative Sanctions Before The Special Jurisdiction For Peace: Reflections on International Law and Transitional Justice' (Reparations, Responsibility & Victimhood in Transitional Societies 2019) para 127. See also UN Basic Principles and Guidelines principle 22(e), which provides that a public apology should include "an acceptance of responsibility".

[137] See arts 44 and 48 Justice and Peace Law.

[138] *Case against Germán Antonio Pineda López* (n 33) 717–718, 757.

[139] Interview No 3 (Colombia, April 2019).

[140] See for an example '"Hoy Queremos Decir: Nunca Más": Ex "Paras" Del Bloque Central Bolívar' *VerdadAbierta* (29 January 2015).

## 7.2 The building of a monument

The former commanders of the AUC-linked *Bloque Montes de María* and the *Frente Canal del Dique* both proposed, during a reparations hearing before the Justice and Peace Chamber, to build a monument in commemoration of victims, as a form of symbolic reparation for the harms caused by a paramilitary attack against the community of Mampuján, in 2000.[141] Besides financing the construction of the monument, they were, quite exceptionally, allowed to actively engage in the construction of the monument upon the request of the victims. This resulted in a coordinated process, led by the Victims' Unit, which allowed the community to determine the design of the monument and the location, among other details.[142] While the symbolic measure was realised in the perpetrators' personal capacities, it was, according to a Justice and Peace Magistrate, also carried out in the name of the group, given the perpetrators' representative position as former commanders.[143] This example adds to the discussion of the previous section.

## 7.3 The rebuilding of a health centre

In a case against several demobilised members of the *Bloque Vencedores de Arauca*, of the AUC, it was determined that the paramilitary group violated IHL, by converting a health centre into a command post, which served as a place for acts of torture and sexual violence, among other violations.[144] As part of the measures of satisfaction, the court ordered the reconstruction of the health centre to provide satisfaction to the victims and the affected community.[145] Although such measures are not uncommon in Justice and Peace judgments,[146] it was unusual that the reconstruction was ordered directly against "the members of the demobilised *Bloque Vencedores de Arauca*".[147] Thus, the members of the group were collectively called upon to carry out the measure. It appears that the court sought to tackle the harmful impact left by the collective perpetration by the NSAG. As clarified by a Magistrate who was involved in this specific case, the measure did not actually require the demobilised

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[141] CITpax, 'Relatoría Del Primer Incidente de Reparación Integral a Las Víctimas En El Marco Del Proceso de Justicia y Paz Contra Alias "Diego Vecino" y Alias "Juancho Dique"' (2010) 9.

[142] *Mampuján case* (n 41) para 360; *Appeals Judgment No 34547* Supreme Court of Justice of Colombia (Criminal Cassation Chamber) (27 April 2011) 340; CITpax, 'Sexto Informe' (2013) 83; 'Romper El Círculo Del Odio En Los Montes de María' *El Espectador* (21 March 2018); Interview No 5 (Colombia, February 2019).

[143] Interview No 3 (Colombia, April 2019).

[144] *Case against José Rubén Peña Tobón and Others* (n 56) paras 70, 292.

[145] ibid paras 360, 376, 384.

[146] Other examples include the reconstruction of cultural or sport centres, churches and schools. For an example, see *Case against Iván Roberto Duque Gaviria and Others* (n 33) 6873, 6875–6876, 6888.

[147] *Case against José Rubén Peña Tobón and Others* (n 56) 104, 408 [emphasis added] [own translation].

members to rebuild the health centre with their own hands. Instead, the liquidated goods they had handed over to the Reparations Fund would be allocated to this end. The Victims' Unit, which administers the Fund, was required to coordinate the completion of the measure, along with the relevant state institutions.[148] It is unclear to what extent the group was in fact capable of financing this measure, besides the ordered compensation.[149]

The explicit involvement of the entire NSAG in this type of reparatory measure has not escaped criticism, and appears to not have been included in subsequent judgements. One Justice and Peace Magistrate expressed the concern that a similar approach could lead to the perpetuation of the perception that paramilitary groups are social actors or agents of change. During the conflict, paramilitaries were, in some cases, not considered as an armed enemy by local communities, but rather as agents that would build and repair roads, schools and infrastructure in the place of the State. Where victims explicitly request that a court orders a specific NSAG to rebuild, this could imply that this image of the NSAG as a state-like service provider has not been broken. Moreover, it could lead to confusion, on the part of communities, about which actor is generating welfare. The Magistrate contended that one of the lessons learnt is that such measures can only be carried out by the State, and that the transitional jurisdiction should ensure that the NSAG does not continue to mutate into the role of the State.[150]

Contrary to this position, one could argue that this is exactly the role of a court: to ensure that its judgment, or order, clearly indicates that the given measure of reparation has been imposed as a form of redress for the harm caused by wrongful conduct, rather than as an action out of good will, or as a favour towards the community. A fitting example is displayed in the case against Fredy Rendón Herrera; a case which involved the illegal enlistment of child soldiers. The court noted that, during the hearing, several of the minors indicated that they continued to see the *postulado* as a sort of father figure, to whom they were grateful for many of the things that he had done for them. Moreover, several minors retained feelings of obedience and subordination to the former commander. In consideration of the Paris Principles, it was held that the first guarantee of non-repetition should consist in breaking, or preventing, the reproduction of these hierarchical structures beyond the armed conflict, and ensuring that the victims would not continue to identify their former commander as a superior or a

[148] Interview No 3 (Colombia, April 2019).
[149] 'Incumplen Promesas a Las Víctimas de Arauca' *VerdadAbierta* (28 September 2013).
[150] Interview No 1 (Colombia, February 2019).

benefactor.[151] The court held that the necessity to break with these former structures does not mean that the participation of the perpetrator is not necessary, rather that the facts should be evaluated on a case-by-case and request-by-request basis, while always ensuring that the State retains the direction over the reparation measure. These observations were taken into account when evaluating the proposal made by the *postulado* and the victim representatives, that the *postulado* would assume the responsibility of paying for the construction of various monuments in public spaces, as a measure of symbolic reparation. This proposal was eventually rejected. With respect to a possible public apology, the participation of the former commander was considered as being important to achieve the objective of reparation, but this process had to be directed by the State.[152]

# 8 Guarantees of non-repetition

For a NSAG to have access to the judicial benefits under the Justice and Peace Law, the group must have demobilised and dismantled.[153] Demobilisation entails collectively handing over weapons and abandoning the NSAG.[154] Besides constituting a condition of eligibility, demobilisation is also recognised as a guarantee of non-repetition, which can be understood as being provided by the NSAG concerned.[155] In other words, each group has provided a guarantee that it will refrain from perpetrating violations into the future, by disarming and dismantling its structures. Gómez Isa argues that the effective dismantlement of the paramilitary phenomenon is absolutely essential for the establishment of guarantees of non-repetition.[156] However, as previously discussed in Chapter 5, the Justice and Peace process did not succeed in preventing the emergence of successor groups after the demobilisation of the paramilitaries.[157] It appears from the Justice and Peace judgments that this measure, guaranteed at the level of the group, was not sufficient. Individual *postulados* have been requested by victim representatives, and subsequently ordered by magistrates, to provide

[151] UNICEF, 'The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups' (2007).
[152] *Case against Fredy Rendón Herrera* (n 25) 383–387.
[153] Art 10(1) Justice and Peace Law.
[154] Art 9 Justice and Peace Law.
[155] Art 8(6) Justice and Peace Law.
[156] Gómez Isa, 'Justicia, Verdad y Reparación En El Proceso de Desmovilización Paramilitar En Colombia' (n 40) 139.
[157] See also International Crisis Group, 'Colombia: Peace at Last?' (2012) 21–23; UNHRC, 'Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia' (31 January 2012) UN Doc A/HRC/19/21/Add.3 9; Human Rights Watch, 'World Report: Colombia' (2018).

personal guarantees that they will no longer engage in harmful conduct.[158] Justice and Peace Magistrates have observed, in this regard, that the norm of non-repetition involves both the personal commitment of the *postulado* and that of the group to which the person belonged.[159] This suggests that such personal and collective guarantees could reinforce one another.

# 9 State responsibility and efforts to strengthen victims' rights

The Justice and Peace Law deals with the criminal responsibility of demobilised members of NSAGs, and the resulting duties to provide reparation. Yet, the process strongly indicates that reparation cannot be solely dependent upon the convicted perpetrator and the NSAG to which he or she belonged. Instead, it requires the State to play an active role in safeguarding the satisfaction of victims' right to reparation. This already follows, in a general manner, from article 6 Justice and Peace Law, which provides that the State has a duty to guarantee victims' access to effective resources for the reparation of harms inflicted. This assertion is further strengthened by the residual role assigned to the State with regard to monetary compensation, in accordance with the Constitutional Court's landmark ruling C-370.

A further, clear indication of the pivotal role that the State should play in dealing with mass victimisation, is the existence of administrative reparations programmes, which were established by Decree No. 1290 of 2008, and later replaced by the Victims' Law of 2011, which seeks to deal with victims' rights in a more ambitious and comprehensive manner. These subsequent programmes were established against the backdrop of the inefficiencies and challenges that the Justice and Peace process faced with regard to reparation.[160] However, the initiatives do not involve the acceptance, or recognition, of state responsibility for harms caused.[161] They can be understood as a subsidiary measure, through which the State expresses its solidarity with victims.[162] The need for an additional administrative path to obtain reparations (besides the judicial path), as well as the need for a comprehensive state policy to deal with reparations, displays the significant limits of concentrating all efforts on a criminal justice procedure, which aims to provide both criminal and reparative justice for mass perpetration and the resulting mass victimisation.

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[158] See for instance *Case against Salvatore Mancuso Gómez* (n 56) 802; *Case against Manuel De Jesús Pirabán and Others* (n 25) paras 2028, 2876, 2885; *Case against Iván Roberto Duque Gaviria and Others* (n 25) 1866, 1893.
[159] Interview No 2 (Skype Interview, March 2019); Interview No 3 (Colombia, April 2019).
[160] Sanchez and Rudling (n 37) 29, 31–37.
[161] Preamble and arts 2, 3, 5, 12 Decree No 1290 of 2008; arts 9-10 Victims' Law.
[162] ICTJ (n 6) 25–26.

# 10 Concluding insights for international law

The analysis has revealed an insightful case of state practice for international law. More specifically, the approach taken in the transitional justice process adds to the discussion on how a possible duty of NSAGs to provide reparation could be legally operationalised under international law. It confirms some of the international legal tendencies and arguments (which have been discussed in the preceding two parts of this study), while, at the same time, presenting new insights that invite further reflection. However, as was previously noted, the insights that can be drawn from the case, for international law, are tentative: in the sense that they are based on one possible example of how NSAGs' duty of reparation could be conceptualised and enforced through a judicial process. Moreover, the approach may not be appropriate for every situation or group. The Justice and Peace process places, for instance, a clear obligation on the NSAGs to contribute to monetary compensation. Yet, this may not be feasible in other cases, which deal with groups that have little to no resources.

Broadly speaking, the Justice and Peace process provides insights into what kind of forms of reparation could be required from NSAGs, and into some of the underlying reasons or advantages of extending such mechanisms to these groups and how they could be applied. The discussion has shown that at least monetary compensation and guarantees of non-repetition, which are commonly ordered from states under international law, could also be sought from NSAGs. In terms of satisfaction, the analysis is too preliminary to draw a similar conclusion. Yet, some more tentative insights can be identified. The process sheds further light on the relationships that could exist between the responsibility of a NSAG and that of individual NSAG members and the territorial state. In addition, the Justice and Peace process confirms some of the tendencies in international law regarding the characteristics of NSAGs that could possibly be held responsible, while also stimulating further reflection on how the organisational structure of a NSAG and the question of reparation could interrelate. Lastly, criminal justice proceedings represent a somewhat surprising setting in which NSAGs' duty to repair is addressed, which is instructive for the overall question of forum. These findings are considered more closely over the following sub-sections.

### *Operationalising an obligation of non-state armed groups to provide monetary compensation*

The Justice and Peace process provides for a concrete example of how NSAGs could contribute to monetary compensation, and how their relating obligations could be

operationalised in a judicial process. It also sheds light on some of the opportunities and challenges that may accompany such an effort. From this perspective, it can serve as a tentative proposal for broader, international application.

The examination has shown that the forfeiture of a NSAG's illegal assets can be tied to its members' access to certain judicial benefits granted by the state. This demonstrates the potential of offering incentives to NSAGs, in return for access to their assets, which can subsequently go to the funding of reparations. Indeed, the case has indicated that these illegal assets can be used directly to provide compensation to victims of the NSAG. At the same time, the forfeiture of assets can contribute to the dismantling of the NSAG, as its resources dwindle. Despite the apparent potential of the approach, the Justice and Peace experience has also exposed the significant challenges that may come along with such an endeavour. The discussion has, furthermore, indicated the need for effective enforcement mechanisms for situations where a NSAG fails to surrender its assets.

Furthermore, the NSAG holds an obligation to provide monetary compensation with its legally obtained assets, which occurs where one of its members has been convicted in relation to the activities of the group. This innovative approach to responsibility is referred to as the *solidarity civil responsibility* of the NSAG, and entails that all judicially determined members of the specific NSAG are jointly and severally liable to compensate damages caused by the wrongful act. Thus, the group is, in essence, held responsible by way of its constituent members. This represents an interesting approach, as it avoids some of the practical and legal difficulties which could conceivably arise when bringing reparations proceedings directly against a NSAG. One such difficulty could be the legal, and even *de facto,* extinction of the group. As demonstrated in this study, a NSAG ceases to legally exist post-NIAC. The Colombian approach, thus, offers something of a response in such circumstances: whereby the responsibility of a NSAG could still be invoked for reparation purposes, but implemented at the level of its members. This supplements the discussion on post-conflict reparations contained within Chapter 4.

The civil responsibility of the NSAGs is based on the general principle of domestic law, which requires those causing harm to repair it. As discussed in Chapter 2, this principle has also gained a firm basis in international law, with respect to, at least, states. More specifically, this special form of NSAG civil responsibility arises from the nexus of causality that exists between the activity of the specific group, as the context in which the crimes were carried out, and the harm that it caused. It illustrates that the NSAG is the broader system that facilitated

the perpetration of the crimes by its members. Importantly, the Justice and Peace process strongly indicates that this system should not be left unaddressed.

### *A rearranged cascading regime of responsibility for monetary compensation*

The Justice and Peace Law did not establish an accountability mechanism to primarily or exclusively deal with the responsibility of NSAGs, as such. Instead, it is centred on the individual responsibility of the members of NSAGs, while the responsibility of these groups takes a subsidiary position. The resulting responsibility scheme, which is applicable to monetary compensation awards, partly overlaps with the proposal for the *cascading regime of responsibility for reparation* as set out in Chapter 4. At the same time, the Colombian approach provides new insights.

Both approaches depart from the same argument, namely that the actor responsible for harms should bear the principal duty to provide reparation. In the Justice and Peace process, this actor is the *postulado*. Both approaches are also equally informed by an acknowledgment that reparations for gross violations cannot solely depend on non-state actors. In doing so, both support the argument that there is a need to safeguard effective reparation through subsidiary responsibility mechanisms. In the Justice and Peace system, this entails the subsidiary responsibility of the NSAG and the subsequent residual responsibility of the territorial state. This underscores the importance of the final safety net, to be provided by the territorial state.

Although some of the core considerations overlap with those presented in Chapter 4, the two responsibility schemes start from different perspectives. The analysis in Chapter 4 is conducted from the perspective of the responsibility of the NSAG, whereas the Justice and Peace process starts from the responsibility of the individual member. As a result, a somewhat rearranged cascading regime of responsibility emerges, that is, however, based on similar arguments. It provides new insights into the role that the responsibility of a NSAG could take in relation to that of its members and the state. In addition, it concretises some of the reasons why it might be advantageous to hold a NSAG to a duty of reparation. The overall justification lies in the need to better safeguard the right of victims to reparation. This safeguard is particularly necessary when the convicted member is indigent, but also where the identity of the perpetrator remains unknown, or where the perpetrator has died. Such concerns are certainly not uncommon in situations of armed conflict.

### *Engagement in satisfaction measures and guarantees of non-repetition*

Besides monetary compensation, the discussion has examined some measures of satisfaction, which appear to reflect the collective responsibility of the NSAG to which the convicted perpetrator belonged. The analysis has tentatively suggested that former high-level members of a NSAG, such as commanders, could potentially bear a degree of authority to represent the group in satisfaction measures. These preliminary observations are instructive for the discussion in Chapter 4, which considered the potential role that former members with representative authority could take in post-conflict reparations. In addition, the analysis has shed light on some of the challenges that may arise when engaging NSAGs in reparations, such as perpetuations of the image of such groups as state-like social actors, or their hierarchical structures. The discussion has further indicated that a NSAG can provide a guarantee of non-repetition, as part of a collective demobilisation process. Moreover, it has been suggested that such collective guarantees, and the personal guarantees provided by individual members, can fulfil a complementary function.

### *Non-state armed groups as responsible actors*

The Justice and Peace Law is concerned with NSAGs that satisfy the requirements of article 1 Additional Protocol II, which involves the condition of territorial control. This converges with one of the international legal tendencies identified in Chapter 2, which emphasised the possible international responsibility of NSAGs which exercise control over part of a territory. In addition, the approach taken in the Justice and Peace process, suggests that the organisational structure of a NSAG could direct the manner in which its responsibility and resulting duty to make reparations could be attributed and operationalised. This observation constitutes a novel finding that, thus far, has not been explored. The process deals with organised armed groups at the margins of the law, which are NSAGs, as such, or a significant and integral part of these groups, such as blocks or fronts, which satisfy the additional requirements set by Additional Protocol II. This would appear to accommodate NSAGs that operate in a decentralised manner and are made up of several sub-groups, which are themselves recognised as organised NSAGs. Indeed, the criminal proceedings in Colombia have commonly been brought against the members of specific paramilitary blocks, or fronts, as distinct actors, and, at the same time, their relation to the AUC has been recognised. By focusing on the responsibility of the AUC-linked blocks and fronts, rather than the AUC as such, the approach counters challenges arising from fragmentation, which could have resulted in questioning to what extent the collectivity actually subscribed to the process. In addition, it has directed the manner in which the solidarity civil responsibility of the NSAGs has been

operationalised. The civil responsibility of a paramilitary block is based on the nexus of causality that exists between the block's illegal activity and the harms that it caused. It follows from this, for example, that the assets handed over by a specific paramilitary block cannot be used to provide reparations to all the victims of the AUC, but only to those of that particular paramilitary block.

### *Special criminal proceedings as a forum for reparations from non-state armed groups*

The Justice and Peace case indicates that criminal litigation can constitute a judicial forum in which reparations can be claimed from a NSAG: the condition being, that the criminally convicted individual was a member of the group, who was acting in that capacity when committing the relevant crime. At the same time, the discussion has shown some of the limitations of a criminal justice forum. With the exception of cases of anonymous harm, the question of reparation is, in principle, dependent on the establishment of the criminal responsibility of a group's individual members. As a result, reparation can only be dealt with in the final stages of the criminal procedure. In addition, the case illustrates some of the challenges judicial reparations claims may face when dealing with gross and systematic violations, committed during situations of armed conflict. In the Colombian example, the administrative reparations programme established by the Victims' Law responded to the need for a more expeditious and comprehensive policy to deal with mass reparations. Similar issues are likely to develop in analogous mass violation contexts. With respect to guarantees of non-repetition, the examination suggests that such measures could be granted by a NSAG prior to the criminal proceedings, as part of a group's demobilisation process.

# Chapter 7
# Reparations by the FARC-EP under the Comprehensive System for Truth, Justice, Reparation and Non-Repetition

## 1 Introduction

In 2012, the Colombian government and the FARC-EP initiated peace negotiations to end one of the longest-running NIACs in the Western Hemisphere. This process resulted in the adoption of the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Final Peace Agreement or FPA), in November 2016.[1] In the FPA, the parties agreed to establish a comprehensive transitional justice system, the so-called Comprehensive System for Truth, Justice, Reparation and Non-Repetition (Comprehensive System). Within this framework, the FARC-EP committed itself, on the basis of international law, to contribute to reparations for the victims of the armed conflict. The present chapter examines the manner in which the international responsibility of the FARC-EP and, particularly, its duty of reparation are conceptualised in the FPA, and how the group has been carrying out this duty in practice. The main purpose of this examination is to draw insights that can inform the broader international legal discussion on how a possible duty of NSAGs to make reparation could be operationalised within a future regime of international responsibility for such entities. The FARC-EP case is significant to this discussion; as was previously indicated in Chapter 2, it constitutes a recent and prominent instance of state practice, which recognises a duty to repair for a NSAG, as a matter of international law. The continuing implementation process offers an additional opportunity to obtain insights into the manner in which a NSAG can be engaged in a reparations process: including the challenges and opportunities that may come along with that. At the same time, the case is characterised by its own particularities, which may not be present in others contexts. Although this may limit the extent to which certain insights can be generalised, or transferred to other cases, it does not take away the fact that the FARC-EP

[1] Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera (Government of Colombia - FARC-EP) (24 November 2016) (Final Peace Agreement or FPA). The analysis in this chapter is conducted on the basis of the official Spanish version of the FPA.

case can significantly add to our understanding of the role that NSAGs can play in the provision of reparations.

The examination follows a similar method to that applied in the previous chapter. It first analyses the approach taken to the FARC-EP's duty to repair within the peace process, before reflecting on its significance for international law. In order to set the stage, the examination introduces the Comprehensive System, in particular its reparations component, and places the System within the broader context of the peace process. Following this, the analysis turns to a consideration of the manner in which the FARC-EP's duty of reparation is conceptualised: in terms of its legal basis, scope, character, and relationship to the respective responsibility of the constituent members of the group and the Colombian State. The subsequent sections aim at examining how the FARC-EP engages as a responsible actor in the reparations component of the Comprehensive System, pursuant to its reparations obligations. Before analysing the group's engagement in reparations, the discussion seeks to provide an understanding of the FARC-EP as a responsible actor, both before and after the end of the armed conflict. The concluding section of the chapter brings together several insights, with the purpose of informing international law and linking them to the international legal discussions contained in the previous parts of this study, including to the analysis conducted in Chapter 6 on the Justice and Peace Law.

## 2 Final Peace Agreement: a comprehensive transitional justice system with a reparations component

A broad legal framework based on domestic and international legal standards guided the peace negotiations between the Colombian government and the FARC-EP.[2] The resulting FPA consists of six interconnected sub-agreements, which deal, respectively, with: comprehensive rural reform; political participation; end of the conflict; solution to the problem of illicit drugs; victims of the conflict; and, mechanisms for implementation and verification.[3] They are interconnected in the sense that one cannot be understood, or fully and correctly implemented, without the others. In this way, the parties sought to deal with the NIAC in a comprehensive manner. The question of reparations is a key component of the sub-

[2] These included i.a. the Colombian Constitution, the principles of international law, IHRL, IHL, the ICC Statute, and the decisions of the Inter-American Court of Human Rights. FPA 1-2; Fabio Andrés Díaz Pabón, 'Transitional Justice and the "Colombian Peace Process"' in Fabio Andrés Díaz Pabón (ed), *Truth, Justice and Reconciliation in Colombia* (Routledge 2018) 5.

[3] FPA 7-9. See also General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace (Government of Colombia - FARC-EP) (26 August 2012).

Agreement on the Victims of the Conflict, and is further intertwined with the other sub-agreements. These documents seek to contribute, in sum, to the satisfaction of victims' rights to truth, justice and reparations, amongst other objectives.[4]

The Agreement on the Victims of the Conflict aims to address, in a comprehensive manner, the harms suffered by those affected by the armed conflict.[5] The negotiations, and the later implementation process, were guided by a set of principles, the so-called Declaration of Principles, which were agreed upon in June 2014.[6] The Declaration reflects the parties' commitment to the victims, and ensured that the satisfaction of their rights to truth, justice, reparation and non-repetition would be at the centre of any final agreement.[7] The Declaration includes the parties' commitments to recognise responsibility, the reparation of the victims and guarantees of non-repetition.[8] With these principles as a backbone, the parties agreed to establish a transitional justice system to deal with the legacies of the conflict: the Comprehensive System for Truth, Justice, Reparation and Non-Repetition.

The Comprehensive System is marked by several particularities, which are important to bear in mind over the course of the analysis. First of all, it is the product of a negotiated peace deal, which did not involve the defeat of the, albeit significantly weakened, FARC-EP.[9] Consequently, both parties, and not only the FARC-EP, submitted themselves to the terms. Moreover, the Comprehensive System is part of a larger peace agreement that seeks to bring an end to the conflict and to establish a stable peace. As a result, the transitional justice system had to be devised in such a way that it allowed the process to strike a delicate balance between redressing and re-vindicating the rights of the victims, whilst also carving out space for the FARC-EP to transform into a political movement or party. As a final note, it is not the first time that a peace agreement has recognised the direct responsibility of a NSAG and its commitment to provide reparations.[10] However, the process is marked by an unprecedented engagement on the part of the FARC-EP, as a NSAG, alongside the Colombian State in both

[4] FPA 2.
[5] FPA 124.
[6] These principles are complemented by the transversal principles included in the sub-agreement dealing with implementation and verification (e.g. a rights-based approach, respect for equality and non-discrimination, a gender-based approach, 'building on what has already been built', and territorial integration). FPA 193-195.
[7] FPA 126.
[8] FPA 124-125.
[9] FPA 143.
[10] See Chapter 2 Section 3.2.3.

the design of the Comprehensive System and its implementation.[11] The group's participation in the Comprehensive System was made dependent upon its disarmament.[12]

The Comprehensive System combines a judicial mechanism, the so-called Special Jurisdiction for Peace, which investigates and sanctions serious violations of international law, with various extra-judicial mechanisms and measures. These include: a Truth Commission, which contributes to the clarification of the truth about the conflict; the Special Unit for the Search for Persons Deemed as Missing, which facilitates the search for the disappeared; comprehensive reparation measures for peacebuilding, which seek to repair harms caused; and, guarantees of non-repetition.[13] As such, the Comprehensive System comprises of several components that deal with the four-pillars of transitional justice: criminal justice, truth, reparations and guarantees of non-repetition, respectively. The System is guided by the principles of speciality and non-duplication, meaning that each component has its own principal function, without duplicating the roles of the others.[14] The mechanisms seek to contribute to several common objectives, i.a., the satisfaction of victims' rights and accountability through the establishment of responsibilities, which requires that all those who directly or indirectly participated in the conflict need to assume responsibility for the serious violations perpetrated therein.[15]

As its name suggests, the transitional justice system is comprehensive in nature, insofar as it seeks to achieve, to the greatest extent, justice and accountability, as well as give an integral response to victims by way of the combination of judicial and extra-judicial mechanisms.[16] The various mechanisms cannot be understood in isolation; they are interconnected by relations of conditionality and incentives, which allow responsible actors to gain access to, and maintain, any so-called 'special treatment'. The latter term refers to the judicial benefits that are afforded under the system's criminal justice component.[17] Consequently, the System is tied into itself by design, which makes it impossible to separate its components. The same

[11] Francesca Capone, 'From the Justice and Peace Law to the Revised Peace Agreement between the Colombian Government and the FARC: Will Victims' Rights Be Satisfied at Last?' (2017) 77 Heidelberg Journal of International Law 125, 159–160.
[12] FPA 151.
[13] FPA 127.
[14] FPA 129-130.
[15] Art 1 Legislative Act No 01 of 2017; FPA 128-129. Legislative acts or *actos legislativos* are domestic legal norms that amend the Constitution of Colombia.
[16] FPA 127.
[17] Such benefits basically encompass more lenient sentences that do not necessarily involve effective deprivation of liberty and depart from a restorative approach to justice. FPA 146.

is true of the FPA's sub-agreements, which, in turn, renders the Comprehensive System as an integral and interconnected part of the larger peace agreement.[18]

As indicated, the Comprehensive System includes a reparations component as one of its main pillars, which seeks to provide so-called integral or comprehensive reparation (*la reparación integral*).[19] Indeed, since the beginning of the peace talks, it was agreed that providing redress to victims would be at the centre of any agreement.[20] The reparations component is largely based on two main premises: first, all those who directly or indirectly participated in the armed conflict must contribute to repairing the damages caused and, second, the FPA offers the opportunity to strengthen and adjust the existing administrative reparations programme, established by the Victims' Law of 2011.[21] The component fulfils a distinct and essential role within the Comprehensive System, and the broader peace process, in the sense that it focuses most directly and explicitly on the victims and the harms they have endured.[22]

The Comprehensive System seeks to guarantee integral or comprehensive reparation in accordance with the progressive jurisprudence of the Inter-American Court of Human Rights. The same approach has been consistently followed in both the Justice and Peace Law and the Victims' Law.[23] Understanding reparations from an integral perspective seeks to grasp the full complexity of the harms incurred by armed violence.[24] It involves going beyond a sole focus on monetary compensation, by including other forms of reparations, in their individual and collective, as well as material and symbolic dimensions, which seek to re-establish, to the extent possible, the *status quo ante*.[25] Accordingly, the FPA includes the five main forms of reparation, as described in the UN Basic Principles and Guidelines, which should be

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[18] FPA 6, 130.

[19] FPA 129-130.

[20] General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace; FPA 8, 127. This is also reaffirmed in the Declaration of Principles.

[21] Law No 1448 of 2011 (Victims' Law); FPA 129-130; Nelson Camilo Sanchez and Adriana Rudling, 'Reparations in Colombia: Where To?' (Reparations, Responsibility & Victimhood in Transitional Societies 2019) 64.

[22] Lisa Magarrell, 'Reparations in Theory and Practice' (ICTJ 2007) 2.

[23] Art 23 of Law No 975 of 2005 (Justice and Peace Law); art 25 Victims' Law; art 18 Legislative Act No 01 of 2017; arts 7, 39 Law No 1957 of 2019; FPA 129-130.

[24] *Judgment T-130/16* Constitutional Court of Colombia (14 March 2016) para 2.5.3.2; Dina Donoso, 'Inter-American Court of Human Rights' Reparation Judgments. Strengths and Challenges for a Comprehensive Approach' 49 Revista IIDH 29, 29.

[25] Carlos Martín Beristain, *Diálogos Sobre La Reparación: Qué Reparar En Los Casos de Violaciones de Derechos Humanos* (IIDH 2010) 123; Thomas M Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 47 Stanford Journal of International Law 279; Jo Pasqualacci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2013) 191; Capone (n 11) 132–133.

coherently applied in combination with each other and with the other initiatives of the Comprehensive System aimed at truth, justice and non-repetition.[26]

## 3 The recognition of a duty of the FARC-EP to contribute to reparations

During the peace negotiations, the Colombian State understood that, as guarantor of the safety and well-being of all the inhabitants of its territory, it had a subsidiary responsibility to make reparations to the victims of all parties to the armed conflict. At the same time, it demanded that the FARC-EP, being responsible for causing serious harm to the civilian population, contribute to providing reparations.[27] The government considered the issue of reparations as being governed, both domestically and internationally, by the principle that all parties responsible for damages are obliged to repair them.[28] Thus, the practice by the Colombian government of holding the FARC-EP to a duty of reparation can be understood as arising from "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it": i.e. as evidence of *opinio juris*.[29]

From the side of the FARC-EP, it appears that the NSAG insisted on a collective, rather than an individual, approach to responsibility.[30] In the interviews conducted with several former FARC-EP members and representatives of its successor political party, which initially took the name *Fuerza Alternativa Revolucionaria del Común* or FARC,[31] the respondents generally explained the notion of collective responsibility by relating it to the collective nature

[26] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by UNGA Res 60/147 on 16 December 2005 (21 March 2006) UN Doc A/RES/60/147 (UN Basic Principles and Guidelines) principles 18-23; arts 11-12 Victims' Law; art 1 Legislative Act No 01 of 2017; *Judgment C-715/12* Constitutional Court of Colombia (13 September 2012) para 4.3; FPA 130; Carlos Martín Beristain, *Diálogos Sobre La Reparación: Experiencias En El Sistema Interamericano de Derechos Humanos*, vol 2 (IIDH 2008) 14–15.

[27] Institute for Integrated Transitions, 'The Colombian Peace Talks: Practical Lessons for Negotiators Worldwide' (2018) 19; Mark Freeman and Iván Orozco, *Negotiating Transitional Justice: Firsthand Lessons from Colombia and Beyond* (Cambridge University Press 2020) 153–154.

[28] Freeman and Orozco (n 27) 155.

[29] *North Sea Continental Shelf (Federal Republic of Germany v Netherlands)* ICJ (Judgment) [1969] ICJ Rep 3 para 77; *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ (Merits Judgment) [1986] ICJ Rep 14 para 207.

[30] Marina Aksenova, 'Achieving Justice Through Restorative Means in Colombia: New Developments in Implementing the Peace Deal' (*EJIL: Talk!*, 3 May 2017); Freeman and Orozco (n 27) 138–139; Interview No 5 (Colombia, February 2019).

[31] The term 'FARC-EP' is used to refer to the NSAG, while 'FARC' is the name of the successor political party that emerged as a result of the terms of the FPA. However, note that the FARC party recently changed its name to Comunes. For a further discussion of the political transformation of the FARC-EP, see Section 4.2.

of the armed hostilities and the characteristics of the group's organisational structure.[32] In the words of a representative of the FARC:

> why collective responsibility? because we are talking about an organisation, that is to say, the FARC-EP always acted as an armed rebel organisation, as an organisation that always claimed the right to rebellion. Thus, its action has to be seen from that perspective, in terms of an organisation that acquired the characteristics of an army […] it is important to take into account that it is an organisation in which its members did not act freely, in fact the FARC-EP had an internal regulation and a manual related to the civilian population.[33]

Eventually, under the Comprehensive System, all those who participated in the armed conflict are required to contribute to reparations, through their recognition of responsibility for the damages caused and the duty to provide concrete actions of symbolic and material reparation.[34] With respect to the FARC-EP, responsibility involves, not only a duty of reparation for its individual members, but also for the NSAG, as such.[35] This suggests that both forms of responsibility can be understood as fulfilling a complementary function within the transitional justice system.

The duty of the FARC-EP to provide reparations finds its basis in the group's perpetration of serious violations of IHRL and breaches of IHL committed during the armed conflict.[36] This is in accordance with the breach-based understanding of responsibility in international law.[37] It suggests that the FARC-EP is considered as having been able to violate human rights law, and that, consequently, the victims are entitled to reparations and the NSAG is obligated to repair. Although the FPA does not specify what wrongful conduct would amount to such serious infringements, they include, at least, within the framework of the Special Jurisdiction for Peace genocide, crimes against humanity, serious war crimes and kidnapping or other severe deprivation of physical liberty, among others.[38] On the other hand, the concept of serious violations/breaches can be compared to the broad approach taken in the UN Basic Principles and Guidelines, which deals with gross and serious violations of IHRL and IHL.

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[32] Interview No 8 (Colombia, February 2019); Interview No 9 (Colombia, April 2019); Group Interview No 11 (Colombia, March 2019); Interview No 13 (Colombia, March 2019); Interview No 17 (Colombia, March 2019). For a discussion of the FARC-EP's organisational structure, see Chapter 5.

[33] Interview No 9 (Colombia, April 2019).

[34] Art 1 Legislative Act No 01 of 2017; FPA 127-128, 178-186; Sanchez and Rudling (n 21) 64.

[35] Art 39 Law No 1957 of 2019; *Judgment C-071/18* Constitutional Court of Colombia (4 July 2018) para 126; FPA 144, 146, 178.

[36] Art 1 Legislative Act No 01 of 2017; *Judgment No 00463* Council of State of Colombia (7 May 2018) Section 6 and specifically para 6.4.5; FPA 127-128.

[37] See ILC, Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission (2001) Vol II Part Two (ARS).

[38] Art 42 Law No 1957 of 2019; FPA 145 para 9, 151 para 40.

The FPA suggests that the FARC-EP can, as a NSAG, make valuable contributions to the integral reparation of victims, through symbolic and material reparations.[39] However, the reparative actions carried out by the FARC-EP, as the actor responsible for the wrongful conduct, are nevertheless complemented by the administrative reparation programme regulated by the Victims' Law, which forms one of the key ingredients of the reparations component of the Comprehensive System.[40] As is the case under the Justice and Peace process, this complementary system involves a subsidiary undertaking on the part of the State, which does not constitute an acknowledgment of state responsibility for the violations suffered by the victims.[41] The scheme indicates that reparations are not solely dependent on the FARC-EP. Instead, it emphasises the subsidiary role of the State in guaranteeing the right to reparations of victims of the group.[42]

Further insights into the FARC-EP's responsibility under the FPA are provided by the Council of State, the highest Court in Colombia for acts or omissions committed by the State, which addressed this form of responsibility in a case dealing with state responsibility for a kidnapping carried out by the group. The Court recalled that the negotiating parties recognised their respective responsibilities with regard to the victims of the conflict as one of the guiding principles of the sub-agreement on victims of the FPA.[43] The Court held that the FPA, in other words, recognises the FARC-EP as a collectivity or organisation that transcends the individuality of its constituent members. As a consequence of this, the Court considered that responsibility could not only be attributed to these individuals, through the Special Jurisdiction for Peace, but also to the FARC-EP, as a collective subject that acted as 'an organised apparatus of irregular power' during the conflict.[44] This is the case to the extent that the violent actions, perpetrated by members of the organisation, were carried out pursuant to plans set by its commanders or leaders, in the furtherance of their common objectives through an armed struggle.[45] The Court held that such collective responsibility finds its normative basis in IHRL and IHL, instead of criminal law. Accordingly, the declaration of civil or

[39] Art 39 Law No 1957 of 2019; FPA 178-180, 186.

[40] *Judgment C-071/18* (n 35) paras 121-123, 126-127; FPA 184-185; Sanchez and Rudling (n 21) 64.

[41] Art 9 Victims' Law; ICTJ, 'From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia' (2015) 25; Sanchez and Rudling (n 21) 31. See also Chapter 6 Section 9.

[42] Art 18 Legislative Act No 01 of 2017; arts 1, 28 Law No 1957 of 2019; Freeman and Orozco (n 27) 153–154.

[43] *Judgment No 00463* (n 36) para 6.3.1; FPA 124.

[44] This concept has been used to tackle system criminality in national and international criminal law with the objective of holding the indirect perpetrator responsible for the organisational wrongdoing. Hence, it holds on to the principle of personal culpability as one of its cornerstones. It broadly involves understanding NSAGs as independent organisations based on hierarchical relationships that operate outside of the law. See further Kai Ambos, 'The Fujimori Judgment' (2011) 9 Journal of International Criminal Justice 137; Claus Roxin, 'Crimes as Part of Organized Power Structures' (2011) 9 Journal of International Criminal Justice 193.

[45] *Judgment No 00463* (n 36) para 6.3.7-6.3.8, see also para 6.3.11.

administrative responsibility is not followed by the imposition of a sanction, but rather results in a duty to repair that is not punitive in character. This entails that the death of an individual member, which would cause a criminal action to halt, does not impede holding the organisation, within which the harmful act was consented to, planned or executed, responsible. Hence, the collectivity continues to bear the duty to repair the victims.[46]

However, the FPA neither creates a mechanism that is mandated to legally determine the responsibility of the FARC-EP, nor does it provide for a legal framework that regulates such an exercise. Although the Truth Commission is tasked with uncovering and contributing to the recognition of the collective responsibility of the FARC-EP, it lacks the capacity to demand reparations from the group, or to receive corresponding legal claims from victims.[47] In response, the Council of State urged the government to create the legal instruments, administrative and/or judicial, which would allow victims to obtain reparations from the FARC-EP, where it is responsible for serious violations of IHRL and IHL. The Court contemporaneously recalled the State's underlying duty to combat impunity.[48] However, no steps seem to have been taken to that end.

It appears that the implementation of the FARC-EP's commitments to reparations, made in the FPA, rest on good faith and reciprocity between the parties to the agreement.[49] This is reinforced by the obligation of the ex-guerrilla commanders, now members of the directive organs of the political party FARC, to guarantee the proper execution and stability of the FPA.[50] The implementation of the FPA is verified by a political, rather than a judicial, mechanism, composed of representatives of the government and the FARC-EP, and, subsequently, its successor political party.[51] The condition-based access of the group's individual members to judicial benefits, granted by the Special Jurisdiction for Peace, could arguably function as an additional incentive to carry out its collective commitments.[52] Moreover, the status of the FPA, as a special agreement under Common Article 3, may remain relevant to compliance, as it may raise the reputation costs of noncompliance and encourage the parties to take their obligations more seriously.[53]

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[46] ibid paras 6.3.10-6.3.11.
[47] FPA 131, 134.
[48] *Judgment No 00463* (n 36) paras 6.1, 6.3.14, 6.4.
[49] FPA 196.
[50] FPA 77.
[51] See the sub-Agreement on Implementation, Verification and Public Endorsement of the FPA.
[52] The regime of conditionality requires that FARC-EP members contribute to providing truth, reparations and guarantees of non-repetition, as a condition to have and maintain access to any form of special treatment. Arts 20(iii) and para 1, 39 Law No 1957 of 2019; FPA 130, 146.
[53] FPA 277-278; Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 American Society of International Law 373, 384, 386–387; Marcela Giraldo Muñoz and Jose Serralvo, 'International

An exception to this scheme is the obligation of the FARC-EP to surrender its assets to be used for material reparations.[54] This obligation is strict in its nature, with clear legal consequences. According to Decree No. 903 of 2017, the formal delivery of the FARC-EP's inventory of assets to the government is understood as marking the end of the group's disarmament, which was a condition for the FARC-EP to gain access to the Comprehensive System, and the termination of all the activities and conduct related to the conflict.[55] Non-declared assets do not have repercussions for the FARC-EP itself, which ceased to exist. Instead, individual members who failed to declare such assets could lose their judicial benefits, and could be redirected to the ordinary justice system.[56] Thus, by enforcing the collective obligation of the FARC-EP at the level of the individual members, the approach gives teeth to this obligation and counters the group's subsequent lack of legal existence.

# 4 Understanding the FARC-EP as a responsible actor

## 4.1 The provision of reparations by the FARC-EP before the end of the armed conflict

Under Colombian national law, the FARC-EP constitutes a so-called 'organised armed group at the margins of the law', which is a concept used when regulating the demobilisation and submission to transitional justice of NSAGs. In Chapter 6, it was explained that such groups are defined, in conformity with article 1 Additional Protocol II, as those that "under the direction of a responsible command, exercise such control over a part of the territory that allows them to realise sustained and concerted military operations".[57] Indeed, as was discussed in Chapter 5, the FARC-EP was characterised by a high level of organisation, with a centralised command structure, strong disciplinary mechanisms and territorial control, which enabled it to conduct such military operations during the NIAC. Accordingly, the group has generally been deemed to be bound by Additional Protocol II, in addition to Common Article 3. The highly organised nature of the FARC-EP has arguably provided the group with the capacity to provide certain reparation measures as part of the peace process and prior to

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Humanitarian Law in Colombia: Going a Step Beyond' (2019) 101 International Review of the Red Cross 1117, 1135.

[54] FPA 186.

[55] Art 2 of Decree No 903 of 2017; art 20 Law No 1957 of 2019; FPA 151.

[56] Art 5 Legislative Act No 01 of 2017; art 20(iii) and para 1 Law No 1957 of 2019; *Judgment C-071/18* (n 35) para 127; CINEP/PPP-CERAC, 'Informe De Verificación Del Primer Año De Implementación Del Acuerdo Final De Paz En Colombia' (2018) 9; Sanchez and Rudling (n 21) 64.

[57] Art 3 Law No 782 of 2002 [own translation]; art 5 Legislative Act No 1 of 2017; art 63 Law No 1957 of 2019; FPA 148.

the end of the NIAC. It is probable that some of the organisational factors that characterised the FARC-EP, such as the leadership's authority and the group's internal cohesion and discipline, provided the conditions for the leadership to engage in, for example, actions of public apology and acknowledgement of collective responsibility on behalf of the group. It may have equally facilitated the collective engagement of the FARC-EP's members in the search for the disappeared as an early measure of reparation.[58]

### 4.2 The FARC-EP as a post-conflict actor

Even though the FARC-EP constituted an identifiable legal entity during the armed conflict, it legally ceased to exist with the end of the conflict, due to the group's temporary international legal personality.[59] This fact challenges whether the FARC-EP, as such, can carry out its commitments to reparations in a post-conflict setting. It also raises the question as to which person, or entity, one could call upon where these commitments are not being complied with. In this section, an analysis is made as to how this issue is dealt with within the scope of the FPA.

#### 4.2.1 The political transformation of the FARC-EP

The transformation of the FARC-EP, from a NSAG into a new political party, forms a central aspect of the FPA.[60] During the Tenth, and last, National Guerrilla Conference, which was held in September 2016, it was collectively decided that the group would leave its armed struggle behind and convert into a legal political party.[61] There was a clear, collective

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[58] See Section 5 for a further discussion of the FARC-EP's engagement in these reparation measures. Compare to Ron Dudai, 'Closing the Gap: Symbolic Reparations and Armed Groups' (2011) 93 International Review of the Red Cross 783, 797.

[59] The signing of the (revised) FPA in November 2016 did not mark the end of the NIAC, but rather the start of the disarmament process. In accordance with art 2 Decree No 903 of 2017, the formal handing over of the inventory of collective goods and assets, by the FARC-EP to the Colombian government, in August 2017, marked: the complete termination of the process of the handing in of weapons, the end of the FARC-EP as an armed actor, and of all the activities and conduct related to the conflict. On the first of September 2017, the FARC-EP officially transitioned into the political party FARC. Art 1 Legislative Act No 3 of 2017; FPA 67, 69; FARC-EP, 'Segunda y Definitiva Entrega de Información Del Listado de Bienes y Valores de Economía de Guerra de Las FARC-EP' (15 August 2017) <https://static.iris.net.co/semana/upload/documents/15.08.2017-carta-para-incluir-bienes-fiscalia--esr-1.pdf> accessed 11 August 2020; Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing Limited 2019) para 6.59; Liliana Zambrano Quintero, 'La Reincorporación Colectiva de Las FARC-EP: Una Apuesta Estratégica En Un Entorno Adverso' (2019) 121 Revista CIDOB d'Afers Internacionals 45, 46, 51.

[60] See sub-Agreement on the End of the Conflict that specifically deals with the FARC-EP's political reincorporation.

[61] Juan Guillermo Ferro Medina and Graciela Uribe Ramón, *El Orden de La Guerra. Las FARC-EP Entre La Organisación y La Política* (Pontificia Universidad Javeriana 2002) 43; Liliana Zambrano Quintero, 'Desarmar La Política Para Fortalecer La Democracia' (University of Deusto 2018) 158.

commitment of the group's constituency to the FPA, and to their political transformation. As a result, a successor entity with legal personality under national law emerged: namely, the political party FARC, headed by the group's former commander-in-chief.[62] Besides constituting a direct result of the FPA, the successive nature of the party is also apparent from, i.a., the initial decision to keep the same acronym and a similar name, as a way of retaining a link with the group's past.[63] Moreover, the political party's Statute expressly provides that former FARC-EP members who decide to be part of the political party are so-called militants and are required to observe, comply and defend what was agreed upon in the FPA.[64]

The degree of organisational continuity that exists between both actors can be better understood when considering it from the perspective of the broader reintegration process, in which the FARC-EP engaged. Instead of the traditional model of DDR, that is commonly designed as an individual process that seeks to dismantle the collectivity in its entirety, the government agreed to a collective reincorporation process, which allowed for maintaining some of the group's cohesive elements, and facilitated the formulation of a collective political identity.[65] The FARC-EP wanted a disarmament process that would not create the perception that it had been military defeated, since it had voluntarily decided to hand in its weapons and to transition into a legal entity.[66] By tying the group's political transformation in with the members' collective social and economic reincorporation, the FARC-EP strategically sought to maintain its initial cohesion and unity, which would constitute one of the group's main strengths during the transformation process.[67]

Along with this, a change in the usual DDR terminology was advocated by the FARC-EP. This terminological change emphasised that the group's disarmament only involved dismantling its military structures, but that it continued to exist as a political organisation, which now seeks to attain its objectives by legal and non-violent means.[68] According to this interpretation, the NSAG did not 'disarm', as such, but 'laid down its weapons', in order to continue the fight with democratic and non-violent means. The group did not 'demobilise';

[62] Art 1 Legislative Act No 3 of 2017; FPA 69-70; 'Esta Es La Dirección Del Nuevo Partido Político de Las Farc' *El Espectador* (3 September 2017).
[63] This is further exhibited by the explicit reference to the FARC-EP's founders in the Statute of the FARC. Arts 1-2, 5 Estatutos del Partido Fuerza Alternativa Revolucionaria del Común - FARC (2017) (FARC Statute); Zambrano Quintero (n 59) 60. However, the political party recently changed its name from FARC to Comunes.
[64] Arts 8, 13(o) FARC Statute; art 3(o) Código Ético-Disciplinario Del Partido Político Fuerza Alternativa Revolucionaria Del Común - FARC (2017).
[65] 'The Integrated DDR Standards' (*UN DDR Resource Centre*, 2006) <https://www.unddr.org/the-iddrs/> accessed 11 August 2020; Veronique Dudouet, Katrin Planta and Hans J Giessmann, 'The Political Transformation of Armed and Banned Groups' (Berghof Foundation and UNDP 2016) 22–23.
[66] Institute for Integrated Transitions (n 27) 21.
[67] Zambrano Quintero (n 59) 46–47; Interview No 5 (Colombia, February 2019).
[68] Zambrano Quintero (n 59) 47.

only the military structures were dismantled, while the collectivity remained intact.[69] Finally, instead of individually 'reintegrating' into society, the FARC-EP 'reincorporated' itself collectively into civilian life and the political system.[70] Accordingly, one of the objectives of the reincorporation process was to maintain a collective sense of organisation.[71] In the words of a former FARC-EP member:

> We are not ex-combatants, we are ex-guerrillas because the fight continues, with words, with mobilisation, with the organisation of the masses. We continue in combat, no longer with arms, but with the word in a moderate manner.[72]

The discussion clearly shows that the FARC-EP did not consider the reincorporation process as bringing an end to the collectivity, which rather continues to exist in a different form.

To undergo the collective reincorporation process, it was agreed that the FARC-EP members would reside in various territorial areas for training and reincorporation, so-called ETCR, which were scattered around the country.[73] Although not obligatory, approximately 3500 reincorporating members decided to reside in these areas in 2019.[74] When deciding to be a member of the political party, FARC, the person becomes, as a militant, part of a so-called *comuna*, which is the basic unit of the political party.[75] By integrating them directly into the party's organisational structure, it appears that an attempt is made to keep the collectivity intact.[76] In this regard, a former fighter argued that "[t]here is no other [political] party that has communities all over the country."[77]

### 4.2.2 The representative authority of the political party and former high-level commanders

The FPA neither regulates the manner in which the FARC-EP responds before the Comprehensive System with regard to its reparation obligations once it ceased to exist, nor

[69] For instance, according to a former FARC-EP member, "we continue the same party [the Clandestine Colombian Communist Party], but legally. With the same level of organisation and everything, the only thing that has changed is the way to call it. At least before, the basic unit that is called a *comuna* [this is the basic unit of the political party], was not called *comuna* but [political] cell. It was the cell of the party, now it's the *comuna*, and it's the same but we changed the name". Interview No 10 (Colombia, March 2019).
[70] Zambrano Quintero (n 59) 46; Interview No 10 (Colombia, March 2019); Interview No 13 (Colombia, March 2019) .
[71] Fundación Ideas para la Paz, 'Trayectorias y Dinámicas Territoriales de Las Disidencias de Las FARC' (2018) 37; Renate Segura and Sabrina Stein, 'The Colombian Peace Process with the FARC: A Mapping of Vulnerabilities' (Conflict Prevention and Peace Forum 2018) 22; Zambrano Quintero (n 59) 56.
[72] Group Interview No 11 (Colombia, March 2019).
[73] Art 3 Decree No 1274 of 2017; Decree No 2026 of 2017; FPA 62.
[74] Fundación Ideas para la Paz, 'La Reincorporación de Los Excombatientes de Las FARC' (2019); UNSC, 'UN Verification Mission in Colombia - Report of the Secretary-General' (27 June 2019) UN Doc S/2019/530 5.
[75] Arts 8, 15 FARC Statute. For more information on the organisational structure of the FARC, see arts 15-24 FARC Statute; Zambrano Quintero (n 61) 169–170.
[76] The same holds for those militants who reside outside of these territorial areas. Zambrano Quintero (n 59) 47.
[77] Interview No 17 (Colombia, March 2019).

does it clarify the successive role of the political party FARC within the scheme.[78] Nonetheless, an analysis of several post-conflict reparations delivered on behalf of the defunct FARC-EP, suggests that the political party had, at that time, at least the *de facto* authority, as successor entity, to represent the group in the implementation of the FPA. It appears, in particular, that former high-level commanders, who were then part of the political leadership, had such representative authority and, thus, not just any former member. The central role of these persons in the post-conflict phase follows more generally from the FPA, which provides that former guerrilla commanders, who are members of the directive organs of the new political party that emerged from the transition of the FARC-EP to legality, are obligated to ensure the proper implementation and stability of the FPA.[79]

An interesting example is the reconciliation process that has taken place between the FARC-EP and the victims of the bombing of Bogotá's El Nogal club, which was carried out by the group in 2003. It is of interest since it was initiated when the NSAG still existed and continued after its disarmament and political transformation. The efforts of one of the victims, Bertha Lucía Fries, in searching for the truth about the attack, provided her with the opportunity to hold private meetings with members of the FARC-EP leadership during the 2016 peace negotiations. This resulted in the adoption of an unprecedented Agreement on Truth, Forgiveness and Reconciliation, between the Secretariat of the FARC-EP and Bertha Lucía Fries, as victim representative, in March 2017.[80] In this seven-point agreement, the FARC-EP committed itself to engage in the Comprehensive System, with the purpose of contributing to the clarification of the truth about this attack and the provision of certain symbolic reparations, among other commitments.[81] Indeed, in February 2018, the group engaged in a public act of forgiveness and acknowledgement of responsibility, which was carried out by a former member of the Secretariat, who, at that time, belonged to the political leadership of the newly established FARC. It was explicitly carried out in the name of the defunct FARC-EP, as illustrated by the following passage: "the former commanders and ex-combatants of the FARC-EP, we accept the responsibilities for this unjustifiable act,

[78] However, the FARC does succeed more clearly in some of the other obligations, or roles, of the defunct FARC-EP within the framework of the FPA. See, e.g., art 141 Law No 1957 of 2019 [adds "o sus sucesoras"] and FPA 173 with regard to the Special Jurisdiction for Peace and FPA 47 and 195 concerning FARC representatives as members of some of the key mechanisms established by the FPA.

[79] FPA 77. More broadly, the FPA indicates that the entire Colombian society has a role to play in the implementation of the FPA, which includes the movement that emerged from the FARC-EP's political transition. FPA 196.

[80] The FARC-EP was still a NSAG at that time.

[81] Acuerdo sobre la Verdad, el Perdón y la Reconciliación con Víctimas del Atentado al Club El Nogal de Bogotá (FARC-EP - Bertha Lucía Fries) (2017).

convinced that this reparatory action will pave the way that will permit reconciliation”.[82] Bertha Lucía Fries explains that she understands such actions on two levels: firstly, as collective actions, which are in accordance with what is described in the FPA as ‘early acts of acknowledgement of collective responsibility’, carried out by the high-level leadership on behalf of the FARC-EP collectivity (see further Section 5) and, secondly, as personal actions, with regard to those individuals who carry out the measures.[83]

There are other examples that confirm these observations. In September 2017, a former FARC-EP leader, who was then a member of the FARC, asked for forgiveness for the harms caused by the extinct FARC-EP in the department of Antioquia.[84] In April 2019, the FARC asked, in a communiqué, for forgiveness from the persons who suffered during the conflict, due to the actions of the FARC-EP, and guaranteed that it would comply with the commitments to reparations included in the FPA.[85] During an event held in June 2019, a FARC member, who was formerly part of the Central High Command, stated the following, “I take advantage of this moment to […] apologise for the victimising actions that we have been able to carry out as an organisation.”[86] A further example relates to the FARC-EP’s commitment to the search and recovery of the disappeared in the FPA, which led the FARC to coordinate, under the direction of a former high-ranking commander, collective efforts by former members to that end.[87] These efforts have resulted in the collection and delivery of information concerning a considerable number of cases.[88] Finally, in 2020, former members of the FARC-EP Secretariat, who were then members of the FARC, publicly apologised for the kidnappings carried out by the extinct NSAG.[89]

However, the unity of the reincorporation of FARC-EP members under the FARC banner, has come under pressure, due to mounting instances of dissidence by those members who rejected the peace process or who rearmed. This has led to the emergence of myriad ‘FARC-EP

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[82] Own translation, see *Judgment No 00451* Council of State of Colombia (16 August 2018) para 3.5.1; ‘FARC Piden Perdón Por El Atentado Contra El Club El Nogal En Bogotá’ *El País* (13 February 2018).

[83] Interview No 20 (Skype Interview, May 2019).

[84] ‘Granada Perdona, Pero No Olvida’ *VerdadAbierta* (26 September 2017).

[85] ‘FARC Pidió Perdón a Las Víctimas Del Conflicto Armado’ *El Espectador* (10 April 2019).

[86] ‘El Pedido de Perdón Del Excomandante de Las Farc “Solis Almeida” En Valledupar’ *El Espectador* (13 June 2019) [own translation].

[87] FPA 142, 179.

[88] ‘Video: FARC Anuncia Que Entregará Información De 182 Cuerpos De Desaparecidos’ *El Espectador* (28 September 2018); ‘La Comisión de Farc Que Busca a Los Desaparecidos’ *El Espectador* (12 March 2019). See further Section 5.3.3.

[89] Anna Myriam Roccatello, ‘What Does a Heart-Felt Apology From FARC Mean for Colombia?’ (ICTJ 2020); ‘Colombian Ex-Farc Rebels “Ashamed” of Kidnappings’ *BBC* (15 September 2020). See Section 5 for further examples.

dissident groups', as they are often called.[90] This development could potentially challenge the extent to which the FARC, as successor entity, retains the authority to act on behalf of the FARC-EP. In 2019, for example, a dissident group which had rearmed, and which included some former FARC-EP leaders, announced the rebirth of the FARC-EP as a guerrilla group.[91] However, from both a domestic and international legal perspective, these dissident groups are generally not considered as constituting a direct continuation of the FARC-EP. Instead, they are evaluated as new actors falling within the law enforcement or armed conflict frameworks.[92] Another challenge results from internal disagreements and divisions within the political party, which has led some to revoke their memberships. For instance, a group of former FARC-EP members, many of them mid-level commanders, have organised themselves into a separate organisation, which is said to represent more than 2000 ex-fighters, who do not feel represented by the FARC. Besides reincorporating separately, the group is also said to be seeking representation in the mechanisms created by the FPA and to advance reparations for their part in the violations of the conflict. This shows some of the challenges which the group has faced in maintaining the collective life and organisation that they had in arms; it also illustrates challenges facing the government, in terms of it dealing with several counterparts in the implementation process of the FPA.[93]

### 4.2.3 The nature of the successor entity's responsibility

The discussion has revealed, that there have been three simultaneous processes at play, which have, on the one hand, brought an end to the legal and practical existence of the FARC-EP, as a NSAG, and, on the other hand, allowed the defunct group to continue carrying out its commitments to reparations in a post-conflict setting. Following the international legal process, the FARC-EP ceased to legally exist with the end of the armed conflict. This was accompanied by a DDR process, which facilitated the disarmament of the group, but did not lead to its complete dismantlement. The political transformation process allowed the group to retain some of the positive cohesive elements of the collectivity, to enable it to successfully

[90] International Crisis Group, 'Colombia's Armed Groups Battle for the Spoils of Peace' (2017) 3–6.
[91] 'Los Mensajes de Iván Márquez al Volver a Liderar Una Guerrilla' *La Silla Vacia* (29 August 2019); 'Colombian Transition Gets Confusing with a Disarmed FARC and an Armed One' *JusticeInfo.net* (9 September 2019).
[92] ICRC, 'Estos Son Los Grupos Que Hacen Parte Del Conflicto Armado En Colombia' (24 September 2018); Juan Pappier and Kyle Johnson, 'Does the FARC Still Exist? Challenges in Assessing Colombia's "Post Conflict" Under International Humanitarian Law' (*EJIL: Talk!*, 22 October 2020). See art 63 Law No 1957 of 2019 for how they are dealt with under the Comprehensive System.
[93] 'La Reincorporación Ya Tiene Otra Cara Distinta a Farc' *La Silla Vacia Sur* (16 December 2019); 'La Farc Se Fragmenta' *La Semana* (26 January 2020).

transform into a legal political party, which is, itself, characterised by a certain organisational continuity with the defunct FARC-EP. As a result, a successor entity, with legal personality under national law, emerged; in other words, a new identifiable subject was constituted. The analysis suggests that this new entity has been a vehicle for the defunct group to remain an influential post-conflict actor, and has, in particular, allowed it to collectively participate in the Comprehensive System.

From this observation, the question arises as to whether the political party assumes the defunct FARC-EP's legal duty to repair, as recognised in the FPA, or, even more broadly, the responsibility for the legal consequences of the violations committed by the NSAG during the armed conflict. Under international law, there is no rule which holds that a non-state successor of a NSAG would succeed in the responsibility of its predecessor. Oddly, the FPA does not explicitly address this important issue. At best, it holds that former commanders, who now belong to the FARC's political leadership, should ensure the proper implementation and stability of the FPA.[94] The Council of State held, in its interpretation of the FPA, that the political transformation of the FARC-EP does not result in the attribution of responsibility to the State for the organisation's wrongful acts, which is in accordance with the international legal standards on the matter.[95] At the same time, the Court argued that it also does not legally disconnect the organisation from its past actions and violations, given that the FPA, under no circumstance, seeks to grant impunity. Although the Council clearly held that the FARC-EP's responsibility does not simply disappear, it concluded by calling upon the State to regulate this lacuna left by the FPA.[96]

Following the lack of any express conferral of legal responsibility upon the FARC in the FPA or any other related instrument, it seems that the negotiating parties did not intend for such a transposition. As a result, such responsibility would remain with the FARC-EP, which no longer legally exists, and the former members who subscribed to the FPA. Instead, it could be argued that the FARC bears at least a moral and political responsibility to ensure, to the extent possible, the correct and full implementation of the FPA, in light of its successive nature.

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[94] FPA 77.

[95] See Chapter 3 Section 2.

[96] *Judgment No 00463* (n 36) paras 6.4.2-6.4.4.

# 5 The engagement of the FARC-EP in the comprehensive reparation measures for peacebuilding

## 5.1 Introductory remarks

In this section, a closer examination is carried out in respect of some of the obligations of the FARC-EP, as such, to contribute to symbolic and material reparations, within the context of the comprehensive reparation measures for peacebuilding or, in other words, the reparations component of the Comprehensive System. Besides discussing what these obligations entail, the analysis goes further, at times, by assessing their implementation in practice. The reparations component of the Comprehensive System is made up of seven groups of measures for comprehensive or integral reparation. These are: (1) early acts of acknowledgement of collective responsibility; (2) concrete actions of contribution to reparation; (3) collective reparation at the end of the conflict; (4) psychosocial rehabilitation; (5) collective processes of return of displaced persons and reparations of victims abroad; (6) land restitution measures; and, (7) the participatory adjustment and strengthening of the policy of caring for, and comprehensive reparation of, victims in the context of the end of the conflict, i.e. the Victims' Law, and the contribution to material reparation for the victims.[97] The following examination focuses on the reparation measures that most expressly involve the engagement of the FARC-EP as a collective responsible actor, namely measures (1), (2) and (7).[98]

Although the reparation obligations of the FARC-EP situate themselves primarily within the reparations component, the FPA recognises that the group's participation in the other components of the Comprehensive System, and their respective mechanisms, can, on some occasions, also contribute to reparations. For instance, the FARC-EP engagement in the truth-seeking process led by the Truth Commission, is understood as advancing the right to truth and, at the same time, contributing to reparations.[99] Although the right of victims to guarantees of non-repetition is recognised as an aspect of the reparations component, such guarantees, in themselves, also constitute one of the main, separate components of the Comprehensive System.[100] This component fulfils an overarching function, insofar as it is the result of: firstly, the coordinated implementation of the different measures and mechanisms of the Comprehensive System, as well as the other parts of the FPA; and, secondly, the

[97] See FPA 178-186.
[98] The land restitution measures, which come with their own set of particularities and complexities, fall beyond the scope of this study.
[99] FPA 131-132, 136, 138; UN Basic Principles and Guidelines principle 22.
[100] FPA 129-130. See also UN Basic Principles and Guidelines principle 23, which recognises guarantees of non-repetition as a form of reparation.

implementation of the additional measures of non-repetition included in the sub-agreement dealing with the end of the conflict.[101] Accordingly, the FARC-EP can be broadly understood as contributing to non-repetition by participating in the peace process itself. More specifically, the reincorporation of the FARC-EP into civilian life is, for instance, recognised as a concrete commitment of the group to non-repetition.[102]

## 5.2 Early acts of acknowledgement of collective responsibility

At the end of 2015, a FARC-EP delegation, headed by a member of the Secretariat, travelled to Bojayá, in the department of Chocó, to ask forgiveness from the victims of a 2002 massacre, which left 79 dead and over a hundred injured.[103] This constitutes an example of an act carried out pursuant to the first group of reparation measures. These measures include the early acts of acknowledgement of collective responsibility for the harms caused and acts of public apology offered by the FARC-EP as an expression of the group's willingness to contribute to a definite *Nunca Más*.[104] These acts can be identified as measures of both satisfaction and guarantees of non-repetition, which are carried out on behalf of the FARC-EP as a collectivity.[105] Although the FPA leaves room for similar acts to be carried out by individuals, the emphasis is placed on the collective form of these symbolic acts. The early acts may further include manifestations of commitments to contribute, with concrete actions, to the integral reparation of the victims (see Section 5.3), coexistence, non-repetition, and the peacebuilding process in general.[106] Even if the aspect of acknowledgement has been identified as a key concern for victims, it has also been argued that the engagement of the

[101] FPA 125, 128, 130, 186-188.
[102] FPA 8, 68; Freeman and Orozco (n 27) 140.
[103] Rosa Emilia Salamanca González and Ricardo Mendoza, 'Imagining Peace and Building Paths to Inclusive Reconciliation in Colombia' [2016] Accord Insight 23, 24; 'Las FARC Piden Perdón En Bojayá Por Su Peor Masacre' *El País* (9 December 2015). Note that the sub-Agreement on the Victims of the Conflict was already concluded in 2015.
[104] The aspect of acknowledgement of collective responsibility also forms a component of the national plans of collective reparation, which are part of the third group of comprehensive reparation measures. More specifically, the acknowledgement of the responsibility of the State, the FARC-EP, the paramilitaries and any other group, organisation or institution that has caused harm during the conflict will be fostered within the framework of these plans. See FPA 181.
[105] UN Basic Principles and Guidelines principles 22(e), 23; Camila de Gamboa Tapias and Fabio Andrés Díaz Pabón, 'The Transitional Justice Framework Agreed Between the Colombian Government and the FARC-EP' in Fabio Andrés Díaz Pabón (ed), *Truth, Justice and Reconciliation in Colombia* (Routledge 2018) 81 n 13.
[106] FPA 178.

FARC-EP in reparations cannot be limited to such public acts.[107] Otherwise, they may very well lose their potential for redress and reconciliation.[108]

The early acts of acknowledgement were to be carried out in the early stages of the peace process, both before and shortly after the signing of the FPA. They were designed to constitute the opening phase of the larger process and, therefore, to form the initial step in the recognition and dignification of the victims.[109] As such, they mark a symbolic turning point.[110] It was believed that such acts could create a favourable context for the building of peace, by reflecting the commitments of the parties to the process and the satisfaction of victims' rights.[111] As explained by a former governmental official, involved in the peace negotiations, it created an opportunity for the FARC-EP to do this as a group.[112]

In terms of requirements, the collective acts have to be formal, public and solemn. Governmental actors and others, such as the *Conferencia Episcopal Colombiana*, have coordinated the acts in dialogue with victims' and human rights organisations, among other groups.[113] According to the FPA, the coordinators must ensure that the acts meet the expectations of the victims and communities, avoid re-victimisation and empower the victims.[114] Since the Truth Commission started its work in 2018, it has been in charge of coordinating these acts.[115] The process appears to show a clear concern for the centrality of

[107] 'Las FARC Piden Perdón En Bojayá Por Su Peor Masacre' (n 103); '"No Queremos Perdón de Las Farc Para Llorar, Sino Para Dignificar": Líder de Víctimas de La Chinita' *El Espectador* (30 September 2016).

[108] Kroc Institute for International Peace Studies, 'Segundo Informe Sobre El Estado Efectivo De Implementación Del Acuerdo De Paz En Colombia: Diciembre 2016 – Mayo 2018' (2018) 211; UNGA, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (12 July 2019) UN Doc A/74/147 17–19.

[109] Freeman and Orozco (n 27) 152.

[110] ICTJ, 'More Than Words: Apologies as a Form of Reparation' (2015) 4; UNGA (n 108) 13.

[111] FPA 178.

[112] Interview No 5 (Colombia, February 2019).

[113] CINEP/PPP-CERAC, 'Cuarto Informe de Verificación de La Implementación Del Acuerdo Final de Paz En Colombia' (2018) 209.

[114] FPA 178; Kroc Institute for International Peace Studies, 'Informe Sobre El Estado Efectivo de Implementación Del Acuerdo de Paz En Colombia' (2017) 63; Kroc Institute for International Peace Studies, 'Segundo Informe' (n 108) 210.

[115] Kroc Institute for International Peace Studies, 'Segundo Informe' (n 108) 211; Kroc Institute for International Peace Studies, 'Estado Efectivo de Implementación Del Acuerdo de Paz de Colombia 2 Años de Implementación: Informe 3 (Diciembre 2016 - Diciembre 2018)' (2019) 141. See also Colombian Truth Commission, 'Lineamientos Metodológicos: Escuchar, Reconocer, y Comprender Para Transformar' (2019) 15–18.

the victims, while seeking to render the acts effective and meaningful.[116] It seems that some of the early acts have emerged at the initiative of the victims, and/or the FARC-EP itself.[117]

## 5.3 Concrete actions of contribution to reparation

### 5.3.1 The general framework

The concrete actions of contribution to reparation constitute the second group of reparation measures in which the FARC-EP is directly engaged. The group commits itself, during the process of reincorporation into civilian life, and as part of this process, to realise actions that contribute to repairing harms caused by the group. The actions do not pretend to be sufficient by themselves, but are rather devised as useful contributions to reparations. These concrete actions can include:

- infrastructure-rebuilding work in the most affected areas;
- programmes to clear areas of anti-personnel mines and other explosive devices;
- programmes to substitute illicit crops;
- efforts to contribute to the search, localisation, identification and recuperation of persons who have died or disappeared in the context and on the occasion of the conflict; and
- programmes of reparation of environmental damage (e.g. reforestation).[118]

As such, these actions involve a form of collective reparations to be granted by the FARC-EP. Individual members are incentivised to participate in these actions, as the Special Jurisdiction for Peace may take their participation into account as a contribution to reparation, with a view to granting special treatment to the person concerned.[119] To this end, it appears that the FARC has taken an overarching role in managing and systematising the activities realised by former members.[120]

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[116] Luke Moffett and others, 'Alternative Sanctions Before The Special Jurisdiction For Peace: Reflections on International Law and Transitional Justice' (Reparations, Responsibility & Victimhood in Transitional Societies 2019) para 127.

[117] Kroc Institute for International Peace Studies, 'Segundo Informe' (n 108) 210; 'Las FARC Piden Perdón En Bojayá Por Su Peor Masacre' (n 103). See also Section 4.2.2 on the reconciliation process between the FARC-EP and the victims of the El Nogal bombing.

[118] FPA 179.

[119] FPA 178. See further in this regard Art 141 Law No 1957 of 2019; FPA 172-174; Special Jurisdiction for Peace, 'Lineamientos En Materia de Sanción Propia y Trabajos, Obras y Actividades Con Contenido Reparador - Restaurador' (2020) 6, 9–12.

[120] CINEP/PPP-CERAC, 'Quinto Informe de Verificación de La Implementación Del Acuerdo Final de Paz En Colombia' (2019) 169; CINEP/PPP-CERAC, 'Sexto Informe de Verificación de La Implementación Del Acuerdo Final de Paz En Colombia' (2019) 204; Interview No 8 (Colombia, February 2019).

Actions relating to, for instance, mine clearance and the search for the disappeared have the potential to greatly benefit from the engagement of the FARC-EP in light of the intimate knowledge it holds regarding its own activities during the conflict. The group's profound knowledge of the regions and local communities in which it was active, especially where these areas were remote and marked by a general lack of state presence, could also assist in facilitating some of the other actions.[121] The FARC-EP have engaged in several concrete actions of contribution to reparation, such as infrastructure-rebuilding work, including the paving of roads and maintenance of public works in the communities which surround some of the ETCR.[122] Since the FARC-EP is in charge of actively carrying out the concrete actions, it may stimulate a sense of agency and ownership over the process of dealing with the past. It may also encourage a better understanding of the harms the group caused over the course of the conflict, and may stimulate active engagement to right the wrongs.[123] Nevertheless, it is unclear how the actions attain reparative value and whether they actually deliver such value to victimised communities.

The concrete actions undertaken by the FARC-EP are expressly linked to the group's reincorporation process. This interrelation is notable given that DDR processes are traditionally security-driven, rather than being intertwined with transitional justice.[124] The combined approach to redress and DDR may be beneficial for the provision of reparations; it allows for the delivery of reparations early on in the transition, when the context may be more conducive to their constructive reception. Indeed, providing reparations in a timely manner could maximise their reparative impact.[125] This differs from the approach taken under the Justice and Peace Law, which made reparations dependent upon a lengthy judicial process. The requirement for members of NSAGs to provide reparations as part of a DDR process is not unprecedented. However, the Colombian approach stands out, since it does not only focus

[121] 'Will Colombia's Farc Be Allowed to Clear Mines to Repair Their Victims?' *JusticeInfo.net* (2 March 2020); Interview No 3 (Colombia, April 2019).

[122] Kroc Institute for International Peace Studies, 'Segundo Informe' (n 108) 211. It also came up in several interviews with former FARC-EP members and the political party FARC: Interview No 8 (Colombia, February 2019); Interview No 10 (Colombia, March 2019); Group Interview No 11 (Colombia, March 2019); Interview No 17 (Colombia, March 2019)

[123] Jennifer Larson Sawin and Howard Zehr, 'The Ideas of Engagement and Empowerment' in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing 2007) 45.

[124] Annyssa Bellal, 'Non-State Armed Groups in Transitional Justice Processes: Adapting to New Realities of Conflict' in Roger Duthie and Paul Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 247.

[125] Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 529, 530; Brandon Hamber, 'The Dilemma of Reparations: In Search of a Process-Driven Approach' in Koen de Feyter and others (eds), *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 146–147.

on engaging these individuals, but also on engaging the FARC-EP as a collective entity.[126] Such an approach corresponds to the collective nature of the reincorporation process.

### 5.3.2 Humanitarian demining

A first concrete action that is examined more closely, is the active engagement of the FARC-EP in humanitarian demining, as a contribution to reparation. Under the FPA, mine action is a crosscutting issue, in the sense that it touches upon several of the agreement's components. It is recognised as a vehicle for providing reparations and for the socio-economic reincorporation of former fighters, as well as as an important long-term measure for rural development.[127] Involving demobilised fighters in mine action is not an uncommon practice. It acknowledges their potential to contribute to the peacebuilding process.[128]

As early as during the peace negotiations, the FARC-EP and the Colombian government jointly participated in several humanitarian measures, as part of a confidence-building process. This involved humanitarian demining, as well as the search for the disappeared. These actors concluded a specific humanitarian agreement on the matter in 2015, with the purposes of advancing the construction of confidence, contributing to the improvement of the security conditions for inhabitants of the targeted zones, and providing guarantees of non-repetition to communities through mine action.[129] While the agreement does not explicitly identify the mine clearance activities as a measure that contributes to reparations, it does involve some notable aspects that can be deemed relevant to that end. Of itself, it constitutes a form of positive engagement of the FARC-EP. The group's engagement can be understood as being implicitly based on the recognition of its responsibility to have unlawfully handled such devices during the conflict.[130] By committing to demining, it provides the group with an opportunity to face its past and to contribute to rectifying it. In this sense, they are not just considered as having contributed to the problem, but are, instead, also part of the solution.[131] Importantly, the action had to be carried out in a continuous dialogue with the affected communities, which acknowledges their key role in matching the action with victims' needs.

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[126] Dudai (n 58) 792.

[127] FPA 67, 75, 106, 179.

[128] Dahlia Simangan and Rebecca Gidley, 'Exploring the Link Between Mine Action and Transitional Justice in Cambodia' (2019) 31 Global Change, Peace & Security 221, 241.

[129] Colombian government and FARC-EP, 'Comunicado Conjunto: Acuerdo Sobre Limpieza y Descontaminación Del Territorio de La Presencia de Minas Antipersonal (MAP), Artefactos Explosivos Improvisados (AEI) y Municiones Sin Explotar (MUSE) o Restos Explosivos de Guerra (REG) En General' (7 March 2015) 1.

[130] Nicolás Carrillo-Santarelli, 'Colombian Government and FARC Armed Group Reach a Mine Clearance Agreement' (*Armed Groups and International Law*, 11 March 2015); Sanchez and Rudling (n 21) 65.

[131] Simangan and Gidley (n 128) 239.

In addition, the decontaminated land had to be formally handed over to the communities and the national and local authorities, which of itself may constitute an important symbolic measure.[132] Lastly, the FARC-EP provided guarantees of non-repetition to the communities, by committing to maintain the areas in a clean and decontaminated state.[133] At a later stage, *Humanicemos DH* was established; it is a civil organisation of former FARC-EP fighters, who are involved in humanitarian demining. The organisation was established as an initiative to facilitate their collective economic and social reincorporation. In addition, their activities have been characterised as serving a reparatory goal.[134] In the words of an ex-FARC-EP member involved in the programme, "the vision is that as we were part of the conflict, we help make up for the pain that we caused during it".[135]

Humanitarian demining has the potential to contribute to collective reparations. This could be achieved in several ways. Mine action could, for instance, form a commitment to non-repetition, with a strong preventative component.[136] It could also be identified as a form of restitution, where it provides the conditions for the return of displaced persons to their place of residence, for restoration of employment, or for return of property.[137] Moreover, the delivery of information on the location of mines, or the acknowledgement of the facts and acceptance of responsibility for the damages caused by them, could provide measures of satisfaction.[138]

Nonetheless, it is not clarified how the activities of *Humanicemos DH* and the concrete actions involving humanitarian demining more generally attain their reparative value.[139] The engagement of the responsible actor is not sufficient in itself. Instead, it appears vital that the action is directed at acknowledging and remedying the harms caused by the use of mines during the conflict, and that it is part of a broader participatory process, run in consultation

[132] Colombian government and FARC-EP (n 129) 2.
[133] ibid 3.
[134] Kroc Institute for International Peace Studies, 'Informe Sobre El Estado Efectivo de Implementación' (n 114) 53–54; Kroc Institute for International Peace Studies, 'Segundo Informe' (n 108) 111; 'Will Colombia's Farc Be Allowed to Clear Mines to Repair Their Victims?' (n 121).
[135] Interview No 12 (Telephone Interview, March 2019).
[136] CINEP/PPP-CERAC, 'Primer Informe' (n 56) 131.
[137] UARIV, '"El Desminado Es Una Garantía de No Repetición Para Las Víctimas y Favorece Su Reparación"' (4 April 2018) <https://www.unidadvictimas.gov.co/es/reparacion/el-desminado-es-una-garantia-de-no-repeticion-para-las-victimas-y-favorece-su-reparacion> accessed 13 August 2020.
[138] UN Basic Principles and Guidelines principles 19, 22(b)(e), 23. A former FARC-EP member who is part of *Humanicemos DH* explained their work as a contribution to reparation in the following words: "by restoring people's peace of mind, because where there are explosive devices there is anxiety as people cannot move freely within the territory. Already when we leave the areas completely clear of the suspected presence of mines, it will be possible to cultivate and the farmer will be able to return [...] To repair is to say: 'I made a mistake, I am going to do this to repair'". Interview No 12 (Telephone Interview, March 2019).
[139] Kroc Institute for International Peace Studies, 'Segundo Informe' (n 108) 130; 'Will Colombia's Farc Be Allowed to Clear Mines to Repair Their Victims?' (n 121).

with affected communities.[140] The following explanation, provided by an official of the Special Jurisdiction for Peace, gives further insights into how the respective standards of humanitarian demining and reparation processes differ from one another, but also how mine action could contribute to providing reparations:

> [I]n the case of humanitarian demining, for example, […] it is not about how many meters were cleared, how many meters are free from the suspected presence of anti-personnel mines, but what is the impact of demining on the lives of the communities where the mine action was realised, how the land is being re-used, whether schools are being re-opened and whether teachers are working or not […] whether or not places for cultural activities are activated. The most traditional standard of a demining process is the amount of meters that have been cleared, which is completely different from a rights-based approach that implies the participation of victims, the valorisation of that process […].[141]

It appears necessary to have a set of guidelines, which allow for determinations as to how mine action could attain its reparative value and, subsequently, how demining operations could be designed in accordance with these observations. In 2020, the Special Jurisdiction for Peace published guidelines that outline the requirements with which mining actions must comply, in order to be taken into account for the granting of any special judicial treatments, in respect of former-FARC-EP members who directly participate in such collective mine action. One such requirement is that a given action must have a restorative-reparative character, which is evaluated according to certain parameters.[142] As further discussed in Section 5.3.4, these parameters provide more clarity, regarding which elements could determine the reparative value of humanitarian demining, as a concrete action of contribution to reparation.

### 5.3.3 The search for the disappeared

The second concrete action as a contribution to reparation that is considered more closely, is the involvement of the FARC-EP in the search, localisation, identification and recuperation of persons who have died or who disappeared in the context and on the occasion of the armed conflict. This is in accordance with the UN Basic Principles and Guidelines, which identifies such actions as measures of satisfaction.[143] The FPA conceptualises 'disappearances' in a broader manner than traditional IHRL, by including actions carried out by the FARC-EP, as a non-state actor.[144] According to Dempster, state and non-state disappearances are connected

[140] Moffett and others (n 116) para 159.
[141] Interview No 6 (Colombia, April 2019).
[142] Special Jurisdiction for Peace (n 119) 10.
[143] UN Basic Principles and Guidelines principle 22(c).
[144] Art 2 International Convention for the Protection of All Persons from Enforced Disappearance (2006) 2716 UNTS 3; UNCHR, 'Report Submitted by Mr Manfred Nowak, Independent Expert Charged with Examining the

by both their impact on those who are left behind and the imperative to meet their needs within a transitional justice context.[145]

There exists an overlap between the reparations, truth and criminal justice components of the Comprehensive System, insofar as the efforts concerning the search for the disappeared: are recognised as concrete actions of contribution to reparation; are directed and coordinated by the Special Unit for the Search for Persons Deemed as Missing, which is a humanitarian and extrajudicial mechanism; and, can be taken into consideration by the Special Jurisdiction for Peace, in order to grant special treatment to participating individuals. In the context of the truth component, the FARC-EP undertakes to provide the Special Unit with all the relevant information at its disposal, which is understood as contributing to the satisfaction of victims' rights to truth and reparation.[146] The FPA also takes note of the immediate humanitarian measures relating to the search for the disappeared, which were jointly undertaken by the Colombian government and the FARC-EP, as part of a confidence-building process during the peace negotiations.[147] The ICRC and the National Institute of Legal Medicine accompanied these efforts carried out by the FARC-EP.[148] The political party FARC seems to have taken part in the subsequent delivery of information gathered within this framework to the Special Unit.[149]

Within this framework, the FARC-EP established, in 2016, the National Committee for the Search of Disappeared Persons to advance its efforts to collect information on disappearances from its members, as a reparation measure for the victims.[150] These efforts are coordinated at the national level, but also benefit, at the local level, from the work of small teams of former fighters in every ETCR.[151] The first results collected by the group provided information on the location of 33 disappeared persons.[152] In 2017, the FARC started participating in a special process to collect humanitarian information, which included the engagement of, i.a., victims'

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Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, Pursuant to Paragraph 11 of Commission Resolution 2001/46' (8 January 2002) UN Doc. E/CN.4/2002/71 31.

[145] Lauren Dempster, 'The Republican Movement, "Disappearing" and Framing the Past in Northern Ireland' (2016) 10 International Journal of Transitional Justice 250, 254.

[146] Decree No 589 of 2017; FPA 139, 142, 178-179.

[147] FPA 126, 143. These activities find their basis in Colombian government and FARC-EP, 'Comunicado Conjunto No. 62' (17 October 2015).

[148] CINEP/PPP-CERAC, 'Segundo Informe de Verificación de La Implementación Del Acuerdo Final de Paz En Colombia' (2018) 137–138, 140; Kroc Institute for International Peace Studies, 'Segundo Informe' (n 108) 194–195.

[149] CINEP/PPP-CERAC, 'Sexto Informe' (n 120) 192–193; ICMP, 'Mapeo De Organizaciones De Familiares De Personas Desaparecidas Y De Otras Organizaciones De La Sociedad Civil: Colombia' (2020) 77–78.

[150] CINEP/PPP-CERAC, 'Sexto Informe' (n 120) 191; ICMP (n 149) 26.

[151] ICMP (n 149) 75.

[152] 'La Comisión de Farc Que Busca a Los Desaparecidos' (n 88).

organisations, the ICRC and the Ministry of Defence. The process involved the participation of more than 70 delegates of the FARC, who focused on collecting information from ex-fighters within the ETCRs. In 2019, the FARC formally delivered information on 276 cases to the Special Unit, as a result of the process.[153] It forms a concrete example of how a coordinated approach, led by the FARC, has the potential to maximise the ability of former FARC-EP members to collectively crowd-source information on the disappeared, as a contribution to reparation.[154]

### 5.3.4 Some challenges

Although the concrete actions of contribution to reparation form an innovative way of engaging the FARC-EP, as a NSAG, in reparations, at least two challenges can be identified. First, victimised communities may not experience the concrete actions, such as the repairing of infrastructure affected by the conflict, as reparations. Instead, they may consider these actions as measures to which they have a right as citizens, and for which the Colombian government bears the primary responsibility of provision. Consequently, it is necessary to directly match the actions with the harms that they aim to address; in this context, a participatory process involving victims appears to be required. This could involve providing the victims a central role in the identification of the harms and resulting needs, the design of the measures and/or the implementation process.[155] Such a process should additionally include the acknowledgement of the wrong and responsibility, which serve as important elements to distinguish reparations from development or assistance measures.[156]

A second fundamental challenge relates to the question concerning, 'what determines the reparatory value, or character, of the concrete actions carried out by the FARC-EP?' The FPA does not provide the necessary information to answer this question. However, the issue is deemed of significant importance, since it clarifies how concrete actions are to be designed and carried out, with the view of fulfilling their reparatory goal. Moreover, it is otherwise conceivable that former fighters might gain the wrong impression that they are actively contributing to reparations, through actions that, in practice, do not attain that function.

[153] ICMP (n 149) 78–79; 'La Farc Da La Cara a Los Desaparecidos, Pero Les Falta Mucho' *La Silla Vacía* (20 August 2019); 'Las FARC Entregan Información De 276 Desaparecidos' *El País* (22 August 2019).

[154] Moffett and others (n 116) para 132.

[155] UNOHCHR, 'Rule-of-Law Tools for Post-Conflict States: Reparation Programmes' (2008) 15–16; Mijke de Waardt and Sanne Weber, 'Beyond Victims' Mere Presence: An Empirical Analysis of Victim Participation in Transitional Justice in Colombia' (2019) 11 Journal of Human Rights Practice 209.

[156] Luke Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 325.

Indeed, some interviews carried out with former FARC-EP members revealed, at times, a rather literal understanding of the concept of reparations on their part. One former member explained, for instance, that, "when a community needs that a road which is in a bad shape is fixed, we go. The communities see that we are working and this is a form of reparation".[157] Similarly, another member argued that their productive projects could be considered as being reparative in nature, since they bring economic prosperity to the communities surrounding the ETCRs.[158] However, members of the higher echelons of the political party FARC have provided more developed explanations of reparatory value during interviews, by indicating, e.g., that the actions have to re-establish a right of victims, and that the action itself has to be accompanied by a participatory process with the victims.[159]

Attention should be paid to ensure that the concept of reparation is not stretched to fit any type of action that seems to have some sort of positive impact in terms of development. This could risks robbing the concept of its specificity and significance. Minimum requirements that could, for instance, help determine whether a concrete action has a reparatory character, might include: the acknowledgement of responsibility for the wrong and the harm caused; the establishment of a direct relation between the action and the harm that resulted from the violation of a right; and, the inclusion and effective participation of the victims in the process.[160] Indeed, as mentioned in Section 5.3.2, the Special Jurisdiction for Peace published guidelines that include a non-exhaustive list of parameters to evaluate the restorative-reparative character of such concrete actions. Specifically, the actions: must guarantee the effective participation of the victims; must attend to the damages caused; cannot infringe upon the rights of the victims; must contribute to the reconstruction of social ties, or to a transformation of society that allows for actors to overcome the effects of the conflict; and, must contribute to the reintegration of the appearing party.[161] While the final two elements more clearly relate to the concept of restorative justice, they generally indicate the elements through which the concrete actions could attain their reparative value or character.

## 5.4 Collective goods and assets for material reparation

During the peace negotiations, the question of how the FARC-EP was going to repair the victims, with its own assets, was of a highly contentious nature. It was imperative for the

[157] Group Interview No 11 (Colombia, March 2019).
[158] Interview No 17 (Colombia, March 2019).
[159] Interview No 8 (Colombia, February 2019); Interview No 9 (Colombia, April 2019).
[160] Fundación Ideas para la Paz - FIP et al., 'Comunicado Sobre La Reincorporación de Las FARC' (9 November 2017) <http://www.ideaspaz.org/publications/posts/1603> accessed 13 August 2020.
[161] Special Jurisdiction for Peace (n 119) 10.

government that the NSAG would contribute to reparations, not only symbolically or through their labour, but also by using their wealth. Eventually, in the aftermath of the negative plebiscite vis-à-vis the original FPA, the measure found its way into the revised version of the agreement, as one of the main and most important additions to the reparations component of the Comprehensive System.[162] Considering the significant wealth that the FARC-EP acquired over the course of the NIAC, it certainly represents one of the central accountability measures in respect of the group in the FPA. It can also be understood as a symbolic commitment, on the part of the FARC-EP, to share in the significant costs of reparations borne by the State to all victims.[163]

As stated in the FPA, "the FARC-EP as insurgent organisation that acted in the framework of rebellion" has to contribute to material reparation as part of the final group of reparation measures.[164] To this end, the FARC-EP is required to hand over an inventory of all types of goods and assets that it acquired over the course of the armed conflict and, subsequently, to deliver them to the State.[165] Correspondingly, they are considered as "collective goods of the members of the FARC-EP" or so-called "resources for war".[166] As a result, "[t]he ex-combatants of the FARC-EP bear a collective obligation to hand over the goods for reparations", which are to be placed in a newly created Fund for Victims.[167] As was discussed in Section 3, this constitutes a strict obligation on the part of the FARC-EP. In cases of non-compliance, FARC-EP members may lose their judicial benefits and may be redirected to the ordinary justice system.

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[162] The original peace agreement between the Colombian government and the FARC-EP was rejected in a plebiscite vote held in October 2016. A revised version of the agreement was adopted the following month. Capone (n 11) 127–128, 156; de Gamboa Tapias and Díaz Pabón (n 105) 72–73; Freeman and Orozco (n 27) 155; 'Colombian Government and Farc Reach New Peace Deal' *The Guardian* (13 November 2016).

[163] Kroc Institute for International Peace Studies, 'Informe 3' (n 115) 152; Moffett and others (n 116) para 125; UNHRC, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (11 July 2019) UN Doc A/HRC/42/45 para 92.

[164] Art 39 Law No 1957 of 2019; FPA 186 [own translation]. However, it is not clear from the FPA what is understood under material reparation

[165] Art 1 Decree No 205 of 2020. The Constitutional Court held that these assets can only be used for material reparation and not to finance the group's reincorporation programmes. See *Judgment C-071/18* (n 35) para 138. The value of the assets included in the inventory provided by the FARC-EP has been given an initial estimate of COP 1 trillion. The actual value that can be used for reparations is likely to be much lower, as this estimate includes the value of the surrendered weapons, which have been destroyed, and the rightful owners of certain of these assets, such as land, are still to be determined. Examples of the declared goods and assets include, i.a., real estate, weaponry, vehicles and gold. Sanchez and Rudling (n 21) 64; 'Exclusivo: El Listado Completo De Los Bienes De Las Farc' *La Semana* (27 August 2017); 'The FARC's Riches: List of Assets Fails to Reveal Guerrillas' Total Wealth' *InSight Crime* (29 August 2017).

[166] Arts 1-2 Decree No 903 of 2017 [own translation]; FPA 186 [own translation].

[167] Art 3 Decree No 903 of 2017; *Judgment C-071/18* (n 35); *Judgment C-080/18* Constitutional Court of Colombia (15 August 2018) para 4.1.7.4 [own translation].

Partly as a result of this collective obligation, individual members of the FARC-EP are exempted from their obligation to provide monetary compensation. Instead, the Colombian State will be in charge of providing individual compensation through the administrative reparations programme regulated by the Victims' Law. Although the limitation partially reduces members' individual responsibility and the right of victims to integral reparations, the Constitutional Court held that these restrictions are not contrary to the Constitution. In its reasoning, the Court made two initial observations. First, the balance of all the components of the Comprehensive System seeks to provide an integrated response to the victims. Consequently, the System has to be evaluated in its entirety, with a view to determine whether the response of the State is consistent and proportionate to the harms suffered. Second, the traditional model of individual reparations is not tenable in situations of massive and systematic violations of rights, and should instead be adjusted to the particularities of this context. Taking these observations into account, the Court held that the restriction does not result in a complete exemption of responsibility vis-à-vis the victimiser. This was concluded on the basis of the following three elements: (1) the measure is preceded by the handing over of the assets of the FARC-EP, to be used for reparation; (2) the legal limitation only extends to the personal assets of the members, while hidden collective assets can still be judicially pursued to provide reparation; (3) it only relates to the monetary component of reparations, whereas members' contributions to the other (non-compensatory) components will need to applied with more rigour.[168] Interestingly, the assets of the FARC-EP and the correlating obligations of the group, take a central place in the reasoning of the Court. The decision suggests that the respective responsibilities of the group and its constituent members, in terms of their duty to repair, can interrelate. However, the scheme does not imply that the members can hide behind the collectivity, since they still need to contribute to the other forms of reparations.

# 6 Concluding insights for international law

The examination in this chapter has unpacked the duty of the FARC-EP to provide reparations for violations of international law, to be carried out in the framework of a comprehensive transitional justice system. It has shed light on how this duty has been conceptualised and implemented in practice. Overall, the analysis has unveiled an unprecedented case, in which a

[168] *Judgment C-674/17* Constitutional Court of Colombia (14 November 2017) paras 5.5.1.9-5.5.1.10; *Judgment C-080/18* (n 167) para 4.1.7.4; Comisión Colombiana de Juristas, 'Colombia: Jurisdicción Especial Para La Paz, Análisis a Un Año y Medio de Su Entrada En Funcionamento' (2019) 40.

NSAG has been actively engaged in a reparations process for wrongs committed during armed conflict. Before considering some of the more specific insights, which can be drawn from the case and hold relevance for the discussion on how a possible duty of NSAGs to repair could be operationalised in international law, it is necessary to address the Comprehensive System's points of significance and limitations more broadly.

From an international legal perspective, the FARC-EP case is significant for at least four reasons. First, it constitutes a recent and unprecedented example of state practice and *opinio juris*, which recognises a NSAG's international responsibility and its resulting duty of reparation, as a distinct subject. Thus, the case can be viewed as contributing to the possible formation of a norm of customary international law on the matter.[169] In this regard, some of the international rules and principles that are traditionally applicable to states are followed. For instance, the NSAG's responsibility finds its basis in internationally wrongful acts and is not punitive in character. The group is also required to provide certain forms of reparation that are normally requested from states under international law. Overall, the case challenges international lawyers' traditional understanding of reparations, as being limited to the realm of states. Second, despite the similarities to concepts from the law of state responsibility, the case has also provided new insights into how the application of a reparations duty vis-à-vis NSAGs could accommodate their distinct nature in comparison to states. These insights also shed light on some potential challenges and opportunities in respect of the relationship between reparations and NSAGs. Third, the case has demonstrated that, at least in some instances, it is feasible to engage on the question of reparation with a NSAG. This suggests that states' concerns over conferring some type of legitimacy on NSAGs can be overcome, while a politically motivated NSAG can be willing to contribute to reparations.[170] This could, arguably, have been facilitated through both actors choosing to place redress for victims at the centre of the peace negotiations, from the very beginning.[171] In addition, the case has shown that at least some NSAGs can have the capacity to provide reparation. The fourth and final point of significance is the fact that the innovative Comprehensive System has received significant attention and support from the international community. This adds to its potential to serve as an example of practice for processes elsewhere. More specifically, it provides for

[169] Besides the FARC-EP, other 'organised armed groups', defined pursuant to the requirements set by art 1 Additional Protocol II, were given the possibility to collectively submit to justice, pursuant to the special procedure set out in Law No 1908 of 2018. This required such groups to provide information to the Colombian government about the assets they obtained during their illegal activities, as well as a reparations plan for the victims, among other requirements. See arts 2 and 35(6),(12) Law No 1908 of 2018.

[170] These observations inform the discussion in Chapter 4 Section 5.2.

[171] Freeman and Orozco (n 27) 106.

an example of how a NSAG could be engaged as a responsible actor in a diverse set of reparations measures, following international legal standards. It may encourage greater attention to a possible role for NSAGs in reparations by states and international actors. Therefore, the case is also significant from a policy perspective.

The FARC-EP case is also marked by some particularities regarding the context in which the reparation process has been taking place and the relevant NSAG. This can limit the extent to which lessons of a more generalised nature can be drawn for other contexts and NSAGs. The discussion adds to the particularities that have already been pointed out in Section 2. In terms of context, the question of reparation was negotiated as part of a broader peace process. This is reflected in the approach that is taken to the matter, by not only being guided by legal standards, but also by political considerations and societal demands as part of the broader transition. In such a context, reparations may not only aim to restore the situation that existed before, insofar as this is possible in cases of gross or systematic violations, but may also aim, for instance, to foster community reintegration in respect of the demobilised fighters. In addition, the Colombian State did not experience a complete breakdown as a result of the armed conflict. Instead, it has been capable of establishing an institutionally and legally complex transitional justice system, in which the responsibility of the FARC-EP is addressed. Conducting a similar effort may not be feasible for other states emerging from conflict.

The FARC-EP is also marked by some particularities that are specific to the group itself. In light of the heterogeneous nature of NSAGs engaged in contemporary armed conflicts around the world, other groups may share some of these particularities or may be completely distinct. These particularities can be better addressed by considering the group from the perspective of the three broad roles that it has taken, namely, as a NSAG, a responsible actor, and a post-conflict actor. Considerations for their relation to the issue of reparation are discussed later in this section. As a NSAG, the discussion in Chapter 5 has revealed the FARC-EP was characterised by certain maximalist features, such as its highly organised structure, centralised command, disciplined force, territorial control and considerable wealth. At least Common Article 3 and Additional Protocol II were applicable to the FARC-EP over the course of the armed conflict. As a responsible actor, the analysis has shown that the FARC-EP is characterised by a strong collective identity and conscience, which is reflected in its submission to the transitional justice system as a collectivity. The discussion has suggested that this could be understood as following from how the NSAG operated during the conflict, particularly as an organised armed force with a strong degree of unity and cohesion. The NSAG was also not defeated at the end of the conflict, but voluntarily laid down its weapons.

The FPA carved out a space for the FARC-EP, as a politically motivated NSAG, to allow it to transform into a political party. Consequently, a new identifiable and collective subject of law emerged as a post-conflict successor entity. The political transformation of the NSAG took place as part of a distinct reincorporation process, which, from the perspective of the FARC-EP, emphasised its continued existence as a collectivity that had not been defeated.

Although these particularities surely challenge the extent to which general conclusions can be drawn for international law, the following discussion will demonstrate that it is still possible to identify a number of issues of broader relevance to the international legal debate. It simultaneously reinforces the argument, voiced in Chapters 3 and 4, for the development of abstract rules and principles to govern a future duty of NSAGs to provide reparation, but applied on an actor-specific basis in order to deal with inevitable differences between cases.

In the following discussion, the findings of the examination are presented pursuant to three overarching topics, these being: NSAGs as responsible actors; NSAGs' international responsibility and resulting duty to repair; and, the question of forum. Lastly, the significance of the dual examination of the Justice and Peace Law process and the FARC-EP case, in terms of its relevance for the topic of this study, is briefly addressed.

### *Non-state armed groups as responsible actors*

Similar to the Justice and Peace process, the case provides support for the tendency in international law to emphasise the possible international responsibility of NSAGs that hold control over parts of the territory during an armed conflict.[172] In contrast to the approach taken to the responsibility of the AUC, the duty of reparation has been attributed to the FARC-EP, as such, and not to its substructures in terms of, e.g., blocks or fronts. This approach follows the centralised organisational structure that characterised the FARC-EP as a NSAG. A concrete example of this difference can be found in the manner in which the assets of both NSAGs are dealt with for the purposes of reparation. The legal frameworks regulating the respective processes reflect the organisational differences between these NSAGs. While each AUC-linked paramilitary group was required to hand over its assets, to be used for the provision of reparations to its own specific victims, the FARC-EP delivered its collective assets as a unified entity. This further adds to the observation made in Chapter 6 that the organisational structure of a NSAG could play a role in the operationalisation of a duty to repair for NSAGs.

[172] See Chapter 2 Section 5.

The FARC-EP case is particularly interesting, when seeking to obtain a better understanding of the roles a successor entity and the former members of a NSAG could take in the provision of post-conflict reparations, on behalf of a defunct group. It also outlines some of the related challenges that could arise. The analysis has made use of the notion of representative authority, which was developed in Chapter 4. This assessment has involved taking account of certain contextual factors, such as the nature of the conflict's settlement, the political and justice provisions of the agreement, and the post-war context including i.a. instances of dissidence, as well as actor features, such as the former and current roles of ex-members and the relationship between the NSAG and its successor entity. The analysis has shown how the proposed notion can be used as a conceptual lens to study a concrete case. In the examination, the successor political party has been identified as a vehicle for the extinct NSAG to carry out its collective commitments to reparations. In this framework, former high-ranking commanders, who are now part of the political leadership, appear to have taken an important role. However, the examination has also identified challenges to the successor entity's capacity to represent or act on behalf of the extinct group. They suggest that the representative authority of an entity is not static, but rather susceptible to the changing realities in a volatile post-conflict context. Overall, the analysis has indicated that a NSAG could continue to take part in a reparations process after it ceases to exist, by way of other entities that are somehow linked to it. However, it seems beneficial to expressly stipulate the nature, legal or otherwise, of the successor entity's responsibility within the agreement, or other instrument, that regulates the issue of reparation, so as to avoid any uncertainty once the NSAG no longer exists. In respect of the successor entity FARC, the FPA neglects to provide more clarity on the nature of its responsibility vis-à-vis the reparation obligations of the defunct FARC-EP. The analysis has suggested that its nature is political and moral, rather than legal. As a result, the case does not provide support for the suggestion, made in Chapter 3, that a successor entity could inherit the legal responsibility of its predecessor, where there is a certain element of organisational continuity.[173] Instead, the analysis has displayed some of the challenges that could come along with such an exercise, such as the fragmentation of a successor entity.

As previously mentioned, the FARC-EP case indicates that, at least in some instances, it is feasible to engage on the question of reparation with a politically motivated NSAG whose struggle is based on grievances. In Chapter 4, it was suggested that such groups might be hesitant to take part in these efforts, as it could be understood as betraying or undermining

[173] Even though the discussion in Chapter 3 is held regarding governments of national reconciliation, the argumentation could also be applied more broadly to political transformation processes.

their efforts or cause. Indeed, similar concerns are reflected in the present case. The final terms of the FPA reflect a significant departure from the original attitude of the FARC-EP, which involved, i.a., the group's initial opposition to the mention of transitional justice, its self-portrayal as a victim, rather than perpetrator, and its placement of the primary responsibility for the conflict on the Colombian State.[174] In this sense, the final agreement, and the FARC-EP's willingness to engage on reparations, can be better understood as the result of a larger process.

### *The international responsibility of non-state armed groups and a resulting duty of reparation*

The analysis has demonstrated that the collective responsibility of the FARC-EP, as one of main participants in the armed conflict, forms a central aspect of the transitional justice process. It indicates that it was of importance to the transition to address the responsibility of the NSAG as such, which could not simply be reduced to its constituent members. Put differently, it was not sufficient to only address the responsibility of these individuals. Instead, both the FARC-EP and its members bear a resulting duty to provide reparation as distinct subjects. In this sense, their respective responsibility can be understood as fulfilling a complementary function. A further form of complementarity can be found between the individual criminal responsibility of the members, to be determined by the Special Jurisdiction for Peace, and the responsibility of the FARC-EP, which is not punitive in character. The scheme provides support for the conclusions presented in Chapter 3 on what the character of a possible international responsibility of NSAGs should be. In addition, the examination has shown that, at times, there is an interrelation between the obligations of the NSAG and its members, which provides new insights into the possible relationships that could exist between the respective responsibilities of both actors. For instance, the obligation of the FARC-EP to hand over its assets as a contribution to reparation is enforced at the level of the members when the NSAG has already ceased to exist. The fulfilment of this obligation is also one of the factors that underpin the individual members' exemption from their personal obligation to provide monetary compensation.

The FARC-EP case provides support for the argument made in the second part of this study, that the possible international responsibility of NSAGs, and particularly their resulting duty to provide reparation, could be conceptualised in a manner that is analogous to that of states.

[174] International Crisis Group, 'Left in the Cold? The ELN and Colombia's Peace Talks' (2013) 21–22; Freeman and Orozco (n 27) 105, 123, 138–139. See also Hyeran Jo, 'International Humanitarian Law on the Periphery: Case of Non-State Armed Actors' (2020) 11 Journal of International Humanitarian Legal Studies 97, 105–106.

Indeed, the FARC-EP's duty of reparation finds its basis in internationally wrongful acts, which give rise to the responsibility of the group. Both the manner in which responsibility arises, and the character of the responsibility itself, are comparable to that of states. Significantly, the Colombian State considered that the fundamental principle of international law, regarding the obligation to make reparation for wrongful acts, applies to the FARC-EP. As concluded in Chapter 2, this constitutes the only instance of such state practice, identified in this study, which supports extending this principle to NSAGs.

The FARC-EP is required to contribute to the integral reparation of victims through symbolic and material reparations. In this regard, the examination has shown that an emphasis is placed on the provision of collective reparations, which appears to be more apt in terms of dealing with a significant number of victims, than the traditional approach favouring individualised reparations. When linking the discussion back to the five reparation forms included in the UN Basic Principles and Guidelines, the engagement of the FARC-EP in reparations centres itself primarily in the forms of satisfaction, guarantees of non-repetition and restitution. Although the FPA remains silent on the question of monetary compensation, the assets handed over by the group could be used to finance such measures.[175] The same holds for rehabilitation services. The central function assigned to these collective assets in the reparations scheme, corresponds to one of the particularities of the FARC-EP, namely the considerable wealth it acquired over the course of the conflict. Consequently, a similar approach could not be easily reproduced with regard to every NSAG. The FARC-EP takes a central role in symbolic reparations, by carrying out acts acknowledging its responsibility, and through public apologies. Both carry significant value in the peace process and within the transitional justice system more specifically. This indicates the potential of NSAGs to provide symbolic reparations.

All in all, the case suggests that a NSAG could contribute to some of the main forms of reparation, which are normally required from states under international law. At the same time, it provides new insights into how reparation measures could accommodate the specific capabilities of a NSAG, by capitalising on the group's collective efforts, skills and knowledge in certain areas. This is apparent in the FPA's concept of concrete actions of contribution to reparation, which, to some extent, can be understood as a form of community service through which the NSAG actively contributes to providing collective reparations. At the same time,

[175] The FPA recognises victims' right to 'indemnification', but does not explicitly clarify how this is to be achieved. Moreover, compensation to the victims is not specifically referred to in any of the reparation measures. FPA 130.

the actions seek to contribute to the reincorporation of the ex-fighters who are taking part. However, attempts to think outside the box need to remain true to the legal concept of reparation. Otherwise, the concept risks being robbed of its specificity and significance.

The scope of the FARC-EP's duty of reparation does not extend to delivering full reparation to the victims, which is generally deemed as being unattainable in cases of gross violations. Instead, the group's duty can be understood as one of contribution, which adds to the efforts of the other reparation measures and mechanisms that combine within the Comprehensive System. More specifically, the Colombian State takes a subsidiary role in this System, by way of an administrative reparations programme. In doing so, the case supports the argument made in Chapter 4, that reparations cannot be solely dependent on a NSAG, even where the relevant NSAG is highly organised and wealthy. Instead, as argued in this chapter, the territorial state should retain a role in subsidy, as guarantor of victims' right to reparation. As such, the FARC-EP case lends support for a cascading regime of responsibility for reparation.

With respect to the discussion of an actor-specific approach (see Chapter 4), the question was raised with regards to which indicia might be applicable when evaluating the organisational capacity of a NSAG to provide reparations. As mentioned earlier, the FARC-EP can be understood as a more traditional NSAG, which is characterised by maximalist features. It sets a high standard in terms of its level of organisation and wealth. As a result, the organisational capacity of the group to engage in reparations can be considered as being high. The examination has suggested that factors, such as the authority that the leadership enjoyed, the group's internal cohesion, the disciplined nature of the armed force, and its wealth, could have facilitated its ability to provide redress. Consequently, some of the elements of the FARC-EP case may be difficult to transfer to other NSAGs, where they enjoy a low degree of organisation and/or limited resources.

### *A comprehensive transitional justice system as a forum for reparations provided by non-state armed groups*

The inclusion of the FARC-EP's commitments to reparations within the FPA, constitutes the result of the peace negotiations between the Colombian government and that group. It constitutes a concrete example of the first form of engagement with a NSAG on reparations as discussed in Chapter 4, Section 5.2. The extent of the FARC-EP's engagement is unprecedented, in the sense that the group was not only involved in the design of the reparation measures and mechanisms that form part of the Comprehensive System, but that it also plays an active role in the transitional justice process, in the first instance, as a NSAG

(the FARC-EP) and, later, as a successor political party (FARC). As a result, the group can be described as a transitional justice actor.

Indeed, it is a comprehensive transitional justice system that constitutes the forum in which the FARC-EP is to provide reparations. The case has provided for a different perspective on the question of forum than that offered in the context of the Justice and Peace Law, which regulates a system of special criminal proceedings as the forum for reparations. On the contrary, the FARC-EP carries out its reparation obligations through several extra-judicial measures and mechanisms of the transitional justice system. By making reparation not dependent upon a lengthy judicial process, the opportunity is created to provide reparations early on in the process. At the same time, the case has provided for an interesting example of how a NSAG can participate in the work of other transitional justice mechanisms, e.g. a truth commission and a body in charge of the search for the disappeared, as a contribution to the right of victims to reparation. Finally, the analysis has shown that certain reparations, such as symbolic measures or guarantees of non-repetition, could already be provided by a NSAG during peace negotiations and the demobilisation process.

### *The Colombian case study in retrospect*

Although Chapter 6 (Justice and Peace Law) and Chapter 7 (Comprehensive System) both deal with reparations from NSAGs in Colombia, the examination has revealed two transitional justice processes that approach the operationalisation of NSAGs' duty to provide reparation in a somewhat different manner. Over the course of the analysis, differences and similarities have been drawn between the cases. For instance, while the approaches are dealing with NSAGs which are regulated by the same primary rules of international law, the two groups (i.e. the AUC and the FARC-EP) differ significantly in terms of their nature and organisational structures. In addition, the responsibility of the AUC-linked paramilitary groups is addressed as part of a criminal justice process, whereas the FARC-EP is required to contribute to reparations within a comprehensive transitional justice system. The FARC-EP case complements the discussion of the Justice and Peace Law, by providing insights into how a NSAG could contribute to other forms of reparations, beyond monetary compensation. In both cases, however, the Colombian State takes a subsidiary role in guaranteeing the right of victims to reparation. It shows that reparations cannot be solely dependent upon a NSAG. These examples indicate that both cases complement one another, by generating a greater understanding as to how a duty of NSAGs to make reparation could be conceptualised and put

into practice under international law. In doing so, they enrich the international legal debate on these questions.

# Conclusion and final remarks

The overall aim of this study has been to bring clarity to a possible duty of NSAGs to provide reparation as a consequence of their violations of international law committed during situations of armed conflict. In doing so, the research has sought to respond to the present reality of armed conflict which predominantly takes the form of a NIAC and involves NSAGs as one of the main participants, besides states. Such conflicts may leave a devastating impact on society. Although it appears logical to argue, from a legal perspective, that reparation needs to be made by the actor responsible for causing any damage or harm, the study has shown that this issue is both delicate and complex where NSAGs are concerned as the wrongdoer.

The following main research question was formulated: *can NSAGs be under a duty to provide reparation for violations of international law committed in armed conflict, and how could such a duty be operationalised?* In order to answer this question, several subsidiary research questions have guided the study:

- *Do NSAGs have legal personality under international law?*
- *Does a duty on the part of NSAGs to provide reparation exist under international law? If so, to what extent?*
- *How could such a duty of NSAGs to provide reparation be operationalised under international law?*
- *What insights for international law can be drawn from the operationalisation of a duty of NSAGs to provide reparation in Colombia?*

In this concluding part, the main research findings of the study are summarised, a number of areas for further research are identified and some final remarks are formulated. The study contributes to the academic debate among international legal scholars on the role of NSAGs in reparations. The findings further contribute to the broader field of transitional justice, and to scholarly research on Colombia. The various legal, political and practical dilemmas, and challenges, that were listed in the Introduction to this study, such as NSAGs' international legal personality, potential lack of willingness to provide reparations, and structural disparity, have all been addressed. The study has shed light on certain aspects that have remained underexplored in legal scholarship, such as post-conflict reparations by NSAGs, whilst introducing new concepts and observations which invite further reflection. Moreover, an

effort has been made to go beyond a study of the research topic's state of play by also exploring how a duty of reparation for NSAGs could be operationalised under international law. Finally, the significance of the research has been reinforced by not only considering the law in the books, but also by reserving considerable space for analysis of relevant practice by way of, i.a., an in-depth case study on Colombia.

# 1 A duty to provide reparation by non-state armed groups at an incipient stage in international law

In the first part of this study, the current international legal framework governing a possible duty of NSAGs to provide reparation was examined. Under international law, the duty of reparation is one of the legal consequences which arises where an entity is held responsible for its internationally wrongful acts. When dealing with the responsibility of a NSAG, as such, it is necessary to first determine whether such a collective entity has international legal personality, distinct from its individual members. The concept of international legal personality allows for the identification of entities that have an independent legal existence in international law, as bearers of certain rights and obligations. The analysis in Chapter 1 has demonstrated that a NSAG has a distinct, but limited, legal personality under international law. More specifically, such an entity holds certain international obligations under the primary rules of IHL, and possibly IHRL, over the course of the NIAC which it is a party to. Thus, violations of these primary obligations under international law committed by a NSAG could potentially result in the entity's international responsibility.

It has been determined that IHL imposes international obligations on the parties to a NIAC. The examination has found that being a collective entity, which holds a certain degree of organisation, constitutes one of the fundamental requirements to qualify as a party to a NIAC. Consequently, this encompasses a NSAG and the armed forces of a state. In addition, the argument has been made, that one of the main functions of the organisation requirement, which is used to determine the existence of a NIAC, is to establish whether a group has attained a sufficient level of organisation to be treated as a legal entity, distinct from its members, which is capable of fulfilling and ensuring compliance with imposed IHL obligations. It has been further shown that the direct application of IHL to NSAGs finds broad support in the ICRC commentaries, international practice, legal literature, and the different theories which have been put forward to explain how IHL may bind NSAGs as non-signatories to IHL treaty law.

While the limited legal personality of NSAGs under IHL is generally not deemed controversial, the direct application of international human rights obligations to such entities has been identified as a continuing topic of discussion. However, the concept is increasingly gaining support in international practice and scholarship. Within the scope of this study, it has been recognised that a valid argument can be made to, at least, extend the human rights framework to a NSAG, engaged in a NIAC, with control over territory and persons: to the extent that this renders a state unable to guarantee the human rights of these persons and effectively exercise its due diligence obligations in these areas of the national territory. When it comes to subjecting a NSAG to human rights obligations, it has been advanced that such a group should have a certain level of organisation that allows for identifying it as a legal entity and distinguishing it, as such, from its individual members, while also providing it with the reasonable capacity to implement these obligations. It has been proposed that the indicative factors which were developed to evaluate the organisation requirement under IHL could inform such an analogous assessment in respect of IHRL; after all, we are dealing with the same type of entity. However, certain human rights norms, which may differ in nature or in scope, might require a higher or distinct form of NSAG organisation to ensure such normative capacity.

Based on the conclusion that a NSAG, as a collective legal entity, bears certain primary obligations under international law, it seems logical that such an entity would incur legal responsibility, giving rise to a duty of reparation where it breaches any of its obligations. This concept finds its expression in the maxim '*ubi responsabilitas, ibi jus*', which, as explained by Pellet, holds: "where, in a normative system, the violation of rules results in foreseeable consequences, there can be no doubt that the system can be qualified as a 'legal' one".[1] In this sense, the question of responsibility can be considered as going to the very essence of the international legal system. Moreover, it would, at least theoretically, contribute to its effectiveness.[2] Furthermore, it would be in accordance with the fundamental principle of international law that any wrongful act requires reparation. Nonetheless, an examination of treaty and customary international law, as well as international practice, has not identified an established secondary norm or a uniform set of rules and principles that specify the new legal relations which would arise from the commission of an internationally wrongful act by an

[1] Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 4.

[2] As put by Bellal, "An effective legal system implies there are consequences to violations of norms it seeks to promote". Annyssa Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution' in Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibility of the Non-State Actor in Armed Conflict and the Market Place* (Brill Nijhof 2015) 304.

NSAG. The international legal system also does not provide for a forum which is mandated to examine possible claims arising from such wrongful acts. Although some mechanisms have dealt with the international responsibility of NSAGs, including the issue of reparation, a uniform legal framework underlying such efforts is lacking. In addition, these mechanisms have generally not provided an avenue for victims to claim reparations from the NSAGs concerned. This situation gives rise to the existence of a problematic responsibility gap in current international law. It manifests itself, theoretically, through the asymmetry between the primary and secondary rules applicable to NSAGs and, practically, due to the *de facto* impunity for violations that are not covered by the existing regimes of state responsibility and individual criminal responsibility in international law. All in all, Chapter 2 concluded that the international responsibility of NSAGs remains controversial. However, it can be said that the most potential for development lies in the IHL regime: in which, it is generally accepted that NSAGs enjoy limited international legal personality. In contrast, the discussion on the application of IHRL to NSAGs continues to mainly centre on the primary rules of this body of law. Moreover, Chapter 3 found little support, in present international criminal law, for the collective criminal responsibility of NSAGs, as a way of holding such groups to account and possibly to a duty of reparation.

Within this framework, the study has determined that a possible duty of NSAGs to provide reparation is marked by uncertainty in international law. No sound legal basis for such a duty was found in current treaty or customary law. Moreover, other than the FARC-EP case in Colombia, no express support was found for the idea of applying the fundamental principle of law, concerning reparation for wrongful acts, to NSAGs under international law. At present, a possible duty of reparation by NSAGs finds its most authoritative basis in principle 15 of the UN Basic Principles and Guidelines, which were adopted by the UN General Assembly without a vote. This pivotal soft law instrument, which concerns reparations in international law, tentatively recognises an emerging concept of the international responsibility of NSAGs which involves a duty to make reparation for, at least, serious violations of IHL. Despite its authoritative character, it has not generated the necessary state practice to lift this soft legal norm into the domain of hard law. This conclusion notwithstanding, some limited instances of state practice, which recognise such a duty for NSAGs in international law, have been identified. The most prominent present case is the peace process in Colombia which concerns the responsibility of the FARC-EP. Besides contemporary state practice, this study has found historical precedent, within the somewhat antiquated laws of belligerency and insurgency, which concerns NSAGs that held effective control over territory. In these examples, it was

determined that circumstance made it legally and practically sensible for states to engage directly with a NSAG on responsibility matters during an ongoing conflict. These circumstances arose when the NSAG had international legal personality and where the NSAG's wrongful conduct occurred beyond the control of the parent state. With a view to current international law, the analysis has suggested that this historical precedent is particularly significant when it comes to making determinations of possible responsibility for, at least, those NSAGs with exclusive territorial control that satisfy the higher threshold of Additional Protocol II. Further recognition that NSAGs should provide reparation for violations of international law was found in several instances of UN practice and, in a more limited manner, in the reports of some truth commissions. All in all, the examination in Chapter 2 concluded that this body of practice remains minimal. Nonetheless, it has still been identified as contributing to the initial foundations of a possible duty of reparation. In addition, increasing support for such a duty has been found among international experts and legal scholars, who have the capacity to bring this discussion forward.

In taking these various findings into consideration, the study has concluded, in Chapter 2, that the duty of NSAGs to provide reparation continues to present itself, primarily, as a matter of *lex ferenda*. At present, international law lacks an established secondary norm that provides a sound legal basis for such a duty. Moreover, there is a clear need for further clarification of the possible rules and principles which could regulate the new legal relationship that would arise from the commission of an internationally wrongful act by a NSAG, in terms of its obligation to provide reparation for injury done. In addition to its primary status as *lex ferenda*, the duty of a NSAG to provide reparation, simultaneously, finds itself at an incipient stage in international law. This conclusion acknowledges the existence of at least some legal precedent and recognition that such entities should provide reparation when breaching their primary obligations under IHL, and possibly IHRL, during situations of NIAC.

Over the course of this study, several reasons for imposing a possible duty to repair on NSAGs have emerged. They complement and further concretise the discussion on the necessity of such a duty held in the Introduction to this study. First of all, the examination has indicated that reparation for wrongful acts has been understood as facilitating compliance with the law during armed conflict. Additionally, reparation has been identified as an important justice and accountability measure for victims that cannot be neglected in the face of the fight against impunity. Thus, the possibility of claiming reparations from NSAGs, on the basis of international law, could fulfil an important function from both a compliance and accountability perspective. This is especially important, when one considers that NSAGs are

party to the majority of present-day armed conflicts. Furthermore, the Colombian case study has indicated that the circumstances of armed conflict can make it difficult for victims to identify the specific person who committed an abuse. In contrast, it may be easier to pinpoint the NSAG to which this person belonged. In addition, an individual perpetrator may have died, or may not have submitted him or herself to a given process. Even if the person can be identified, it could still be beneficial to pursue the assets of a well-financed NSAG. The case law of the International Criminal Court and the Justice and Peace Chambers respectively have indicated that a NSAG member may be indigent or not capable of providing adequate reparation to all of their victims. In response, the Justice and Peace process has shown how the subsidiary responsibility of the NSAG, to which the convicted person belonged, could provide a potential means of safeguarding, at least to a greater extent, victims' right to reparation. Lastly, the FARC-EP case has demonstrated how the collective effort of a NSAG has the potential to maximise its contribution to reparations. This is, for instance, illustrated by the NSAG's engagement in the search for the disappeared as a form of satisfaction.

## 2 A multifaceted proposal for operationalising a duty of non-state armed groups to provide reparation under international law

In moving beyond the current state of affairs in international law, a multifaceted proposal, suggesting how a possible duty of NSAGs to repair could be operationalised under international law, was presented in the second part of this study. It draws from a *de lege ferenda* analysis of a broad reference framework, with a basis in both international law and practice.

As a starting point, the study proposed, in Chapter 3, that the possible legal responsibility of NSAGs requires a new and separate regime in international law that is akin in character to that of state responsibility. The conclusion resulted from the limitations of the existing regimes of state responsibility and individual criminal responsibility, in terms of their inability to address the violations committed by NSAGs in a satisfactory manner. This proposal found further support in both international practice and legal scholarship. The argument was put forward that the international responsibility of NSAGs could be conceptualised similar to state responsibility, and as being *sui generis* in character rather than assimilating it to notions of domestic law. The *sui generis* character would additionally reflect that the rules and principles governing the responsibility of NSAGs should give appropriate weight to the particularities of

these entities, especially in comparison to states. This differs from taking a copy-paste approach to the existing standards in the law of state responsibility. Moreover, the suggestion was made that the responsibility of NSAGs could be understood as being complementary to the individual criminal responsibility of group members, by analogy with the responsibility of states and their agents.

This conclusion is significant for two reasons: it clarifies what character a future regime of NSAG responsibility could take in international law; and, it sets the methodological framework for exploring how the rules and principles which could comprise this regime could be operationalised under international law. Correspondingly, the study proceeded, in Chapter 4, by using the reparation standards from the law of state responsibility as a blueprint to examine their analogical application to NSAGs. This examination took additional account of the international legal approaches to, and debates on, reparations provided by international organisations and individuals. Within the framework of this analysis, it proved essential to first understand the particularities that characterise NSAGs, especially in comparison to states, as well as those that are of specific importance to the question of reparation. First, the analysis found that considerable differences can exist in terms of the organisational capacity of NSAGs to provide reparations; this was found to be true between different NSAGs, and between NSAGS and states. As a result, it was determined that there is a need for abstract legal rules which can be applied generally, but which can also provide the necessary flexibility to effectively respond to such disparities: to ensure that the regulatory framework is realistic in practice. Second, it was determined that there is a need to devise a mechanism that guarantees, to the greatest extent possible, the provision of redress to victims where a NSAG has a limited or lack of capacity, or is simply unwilling to grant reparation. The same holds for situations in which a group ceases to legally exist or when it is, for instance, no longer possible to identify the original group that is internationally responsible due to changing conflict dynamics. On this basis, the research found that reparations cannot be solely dependent upon a NSAG. This argument is also reflected in certain international legal instruments and practice. Moreover, it manifests in legal scholarship and, similarly, in the reparation practices concerning other non-state actors. The preliminary suggestions for dealing with these two main concerns were further developed on the basis of current international law and practice and, ultimately, lay at the basis of the proposal presented in this study.

Overall, the research has shown that a duty of NSAGs to provide reparations for internationally wrongful acts could be conceptualised in a manner similar to that of states

under international law. Although a NSAG may face difficulties when making reparation, it has been argued that this does not provide for a sufficient justification to exclude a responsible group from the well-established principle of full reparation. It has also been deemed possible to apply, to NSAGS, the five main forms of reparation listed in the UN Basic Principles and Guidelines. These include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Thus, some of the main reparation rules and principles governing the international responsibility of states could be transposed without too many modifications to NSAGs. One such modification is, as an example, the restriction which prevents a responsible entity from relying on internal law as justification for a failure to provide full reparation. The notion of internal law used in this principle can be reinterpreted as referring to the internal regulations of a transgressing NSAG.

In contrast to the law of state responsibility, a proposal was made to adopt an actor-specific approach to the application of a particular NSAG's duty to make reparation. This approach injects flexibility into the abstract rules and principles governing such a duty, which allows for responses to the particularities of a given case. In more specific terms, the approach does not entail that the responsible entity would dictate the quantum or quality of reparation. The duty of reparation itself is still framed by the nature of the violation and the harm done, while paying little attention to the entity responsible for the wrongdoing. However, the approach proposes that when applying this duty to a NSAG, a case-specific assessment is made of that group's level of organisation and resources. These elements are understood as important indicators of the group's organisational capacity to actually be able to comply with the imposed duty of reparation. Ultimately, this assessment aims to determine the concrete scope of the group's duty in terms of the forms of reparation it is required to grant, and the extent to which it will be engaged in the provision of the reparation measures. Hence, it results in a differentiated approach that responds to disparities in the organisational capacities of NSAGs. Moreover, it seeks to ensure that the reparations obligations imposed on a given NSAG are feasible in practice. Although the approach deviates from the law of state responsibility, it finds support in the legal regulation of NSAGs under the primary rules of international law. Similarly, considerations for capacity, feasibility and context take an important role therein.

The study has proposed that, to the extent that a NSAG would lack the required capacity to comply with its duty of reparation, the proposed cascading regime of responsibility for reparation would come into play. It draws from approaches taken in practice, some international law instruments and legal scholarship. Under this mechanism, the territorial state would have a subsidiary responsibility to provide the required reparations for the wrongful

acts of the NSAG, insofar as the group lacks capacity. Depending on the case at hand, this could generate a division of responsibility between the NSAG and the state, for instance when a group is able to contribute but not fully provide the required reparations. In addition, it has been suggested that the international community could potentially take a supplementary role, particularly in weak and resource scare countries. It was further proposed, that the same subsidiary mechanism would be triggered when a responsible NSAG is unwilling to provide reparation. The main objective is to guarantee, to the greatest extent possible, the required redress for victims. All in all, the multifaceted proposal would allow for the targeting of all types of NSAGs, not only those that resemble states or hold control over territory. This is ultimately facilitated through the possibility of the limited substitution of NSAG responsibility by the state.

The study also sought to bring clarity to the question as to when a NSAG might be called upon to provide reparation. An argument was presented that it should be possible to invoke the international responsibility of a NSAG both during and after an armed conflict. Over the course of a conflict, it appears sensible to argue that a NSAG holds the duty to provide reparation for its own wrongful conduct, as it exists as a distinct entity that has (limited) international legal personality. The actor-specific approach could certainly be applied. However, it does not exclude that possible political and practical challenges could still complicate the provision of reparation by these entities. Concerning the provision of reparations by NSAGs during and at the end of an armed conflict, the study has paid particular attention to exploring the possibility of engaging with NSAGs on reparation through voluntary mechanisms. In doing so, the notion of engagement was extended from its original purpose, of enhancing compliance by NSAGs with their primary obligations under IHL, to the sphere of secondary norms: particularly reparations. The idea of engagement involves the establishment of meaningful contact with a group to then facilitate exchanges on the question of reparation, with the overall aim of promoting its delivery. It was proposed that engagement could serve two distinct purposes: to make a NSAG voluntarily comply with its *lex ferenda* duty to repair; or, to involve a group in reparations regardless of any questions of legal responsibility. The discussion formed a new contribution to scholarly debate which invites further reflection. The FARC-EP case forms a concrete example of the first form of engagement, and concerns the involvement of the group in both the design and implementation of reparation measures and mechanisms.

In the aftermath of an armed conflict, the provision of reparation by a NSAG becomes more complicated as the group no longer exists as an entity in international law. Nonetheless, the

proposal presented in this study implies that victims could still call upon the subsidiary responsibility of the state, on the basis of the cascading regime of responsibility for reparation. This would provide a response to the vacuum that has been left. In addition, the research has suggested that the provision of post-conflict reparations by a legally defunct group should not be dismissed, merely due to this legal challenge. The study sought to explore how this could take place, by way of three illustrative approaches. In doing so, the discussion explored an important issue which has remained largely unaddressed in present legal scholarship. The first approach focused on the possibility of recovering assets from former members and third parties, who were enriched by the activities of the NSAG, in order to use such assets for reparation purposes. The second approach drew from the *Omagh bombing* case, heard at the High Court of Justice of Northern Ireland. The case suggests that reparations could be claimed from a legally extinct NSAG that still factually exists, by way of representative proceedings against members of the group as an unincorporated association. It was argued that this could provide a tentative proposal for enforcement of reparations at the domestic level. The final approach conceptualised a notion of representative authority of former members, a successor entity or other actors, who could potentially provide reparations on behalf of a defunct group. Two additional points can be added to this discussion. First, in Chapter 3, it was suggested that a NSAG which transforms into a political party at the end of an armed conflict could, at least, inherit the legal consequences of the wrongful conduct of its predecessor. Hence, there would be a successor entity that could still be called upon for reparations. However, the discussion in Chapter 7, concerning the FARC-EP, revealed some of the challenges that may come along with such an approach in practice, such as the fragmentation of the successor party. Moreover, little support exists in state practice for the proposal. Second, Chapter 6 provided another example of how the temporary legal existence of a NSAG could be countered, by holding the group responsible by way of its constituent members.

Lastly, the study discussed several forums in which a possible duty of NSAGs to provide reparation could be realised. Given its proximity to a given armed conflict, the domestic level has been identified as constituting the most appropriate venue for enforcement. Nonetheless, international mechanisms may gain in importance when a conflict has, for instance, affected a state's ability to pursue any claims against NSAGs, or when a state is simply unwilling to take initiative. The potential of civil and criminal litigation in domestic courts, administrative reparation programmes and reparations funds were examined. At the international level, the study has shown that the legal system lacks, at present, a judicial or quasi-judicial mechanism

that could decide on reparations claims against NSAGs. The analysis went beyond this state of play by considering proposals for an individual complaint procedure, a co-operative approach, an international trust fund, and the reparation regime of the International Criminal Court. Finally, the potential of international arbitration and the field of transitional justice were examined. In sum, this study identified a series of potential forums that could take up such a role.

# 3 Insights from the case study on Colombia

The final part of this study carried out an in-depth examination of the duty of NSAGs to provide reparations for wrongful conduct, within the context of two transitional justice processes in Colombia: the Justice and Peace Law process and the Comprehensive System for Truth, Justice, Reparation and Non-Repetition. Although both processes were considered in the previous parts of the research, a comprehensive analysis was reserved for the final three chapters. The discussion revealed two insightful processes that contribute, in an important manner, to the broader discussion on how a possible duty of NSAGs to repair could be conceptualised and put into practice under international law. Overall, the case study on Colombia has provided support for some of the main arguments formulated earlier in the study and has deepened them by contextualising the discussion. At the same time, new and different perspectives were revealed, and these invite further reflection. The case generally puts the traditional view of reparations for victims of armed conflict, that being their perceived status as a prerogative of state provision, into question. Instead, the analysis encouraged understanding NSAGs not only as perpetrators, but also as responsible actors that need to contribute to reparations in response to their wrongful conduct.

This section brings together the main international legal insights that were drawn from the Colombian transitional justice processes. Instead of simply repeating what was concluded in Chapters 6 and 7, the present discussion will consider the processes alongside each other, while noting and elaborating upon some of their similarities, differences and complementarities in term of addressing the role of NSAGs in reparations. In doing so, the Colombian case study is further valorised, in terms of its significance for the international legal debate on the operationalisation of a possible NSAG duty of reparation.

It is important to recall in this regard that the purpose of the analysis was not to make normative claims on the basis of the case study. Although certain aspects allow for more generalised conclusions, the insights identified are generally tentative in nature. They

constitute possible lessons or approaches that could be taken to the matter, but are not necessarily feasible or adequate with regard to every NSAG or situation. For instance, while the emphasis in Colombia was placed on the contribution by the NSAGs to reparations by way of their wealth, such an approach may not be feasible with regard to a poorly financed group. Another example concerns the possibility of engaging a defunct NSAG in post-conflict reparations; this may be dependent on certain context-specific factors, such as the terms of a peace agreement or the existence of a successor entity. Additionally, the discussion considered the possible forums in which NSAGs' reparations obligations have been enforced in Colombia. The extent to which a similar approach could be taken in another case is most probably contingent on the specific context at hand.

Regardless of the limits of making generalisations on the basis of the examination, the Colombian case study remains of considerable interest to the discussion on reparations made by NSAGs under international law. This is the case, in the first instance, due to the minimal practice which exists on the matter. Moreover, both the Justice and Peace process and the Comprehensive System constitute notable instances of state practice, which recognise NSAGs' duty to provide reparation for violations of international law. Significantly, in the latter process, involving the FARC-EP, positive evidence of *opinio juris* on the part of the Colombian State was identified. As Freeman and Orozco, who were principal advisors to the Colombian government during the peace negotiations, have indicated, the government considered the issue of reparation to be governed both domestically and internationally by the principle that all parties responsible for damages are obligated to repair them: this includes the FARC-EP.[3] Thus, the processes can add to the possible development of a relating norm of customary international law. Furthermore, the two transitional justice processes took, in some respects, different approaches to the operationalisation of the duty to repair of the NSAGs concerned; moreover, the NSAGs themselves were also organisationally distinct. This has enriched the analysis and the insights which can be drawn from it.

The case study has shed light on the importance of addressing the collective responsibility of NSAGs and their resulting duty of reparation. The examination indicated that the NSAGs could not simply be reduced to their individual members when dealing with the collective violence perpetrated during the armed conflict. Instead, the requirement to address the NSAGs' duty to repair is understood as a demand of the law, because it arises from the application of a fundamental principle in both domestic and international law: which holds

[3] Mark Freeman and Iván Orozco, *Negotiating Transitional Justice: Firsthand Lessons from Colombia and Beyond* (Cambridge University Press 2020) 155.

that all those responsible for causing damages, as a consequence of unlawful acts, are obligated to provide reparations. The analysis also revealed concrete advantages of, or reasons for, calling upon a NSAG to contribute to reparation in cases where there is, for instance, anonymous harm, insolvency on the part of group members or the presence of a wealthy NSAG. In such circumstances, the responsibility of a NSAG could also form a subsidiary mechanism to guarantee, at least to a greater extent, the satisfaction of victims' right to reparation for wrongs committed within the context of the entity. On a more fundamental level, the responsibility of NSAGs in the Colombian case fulfils an important accountability function that fits in the larger picture of the fight against impunity.

The examination demonstrated that the possible concerns of states regarding the possibility of conferring some form of legitimacy on a NSAG, which may, indeed, be even more pronounced with regard to reparation where it is understood as a measure reserved for states, are certainly not insurmountable.[4] From the perspective of NSAGs, it has been shown that at least some groups may be willing to contribute to reparations and may have the organisational capacity to do so. Otherwise, it could still prove possible, depending on the specific circumstances, to, at a minimum, locate and seize the assets of a NSAG for reparation purposes.

The Colombian case deals with the responsibility of NSAGs that satisfy the application requirements of Additional Protocol II, which includes the requirement to exercise control over a part of a territory. As such, it has reinforced the tendency in international law to emphasise the possible international responsibility of NSAGs, where they exercise territorial control over the course of an armed conflict.

Although the case study deals with the responsibility of two NSAGs which were bound by the same primary rules of international law, they are, at the same time, marked by their distinct organisational structures. The FARC-EP was characterised by its centralised structure, whereas the AUC-linked paramilitary groups operated in a decentralised manner. It was questioned in this study, whether the AUC can actually be identified as a single NSAG which satisfied the IHL requirement of organisation. Regardless of this question, the approach taken in the Justice and Peace process allows the duty to repair on the part of the different paramilitary blocks, as sub-structures of the AUC which are themselves organised NSAGs, to be dealt with in a separate manner, while, at the same time, maintaining a recognition of the relation of the various groups to the AUC. As a result, the concern regarding the AUC's

[4] Ron Dudai, 'Closing the Gap: Symbolic Reparations and Armed Groups' (2011) 93 International Review of the Red Cross 783, 793.

actual status as a single entity did not present itself directly. Instead, the Justice and Peace approach appears to have accommodated a decentralised organisation. In contrast, the FARC-EP has been called upon to contribute to reparations as a unified entity, which converges with the group's centralised organisational structure. Following from this discussion, the research has suggested that the organisational structure of a NSAG could direct the manner in which responsibility and the resulting duty of reparation could be attributed and operationalised. This constitutes a novel finding which has not been addressed before in legal scholarship and which warrants further examination.

The responsibility of the NSAGs addressed in both the Justice and Peace process and the Comprehensive System was conceptualised in an analogous manner to the responsibility of states under international law; this is evident in the fact that the approach is not punitive in character, and that it results in a duty to make reparation for the damages arising from wrongful conduct. Moreover, both processes appear to have followed the approach of the UN Basic Principles and Guidelines, regarding the five main forms which go to the provision of full and effective reparation, and which are normally requested from responsible states. Accordingly, they provide concrete examples of how NSAGs have been required to provide restitution, compensation, satisfaction and guarantees of non-repetition in a similar manner to states. Although the role of NSAGs in rehabilitation did not arise, the examination suggested that the assets seized from a group could still be used to finance such services. Each process has provided further insights into how some of these specific forms could be operationalised in practice. For instance, the Justice and Peace process serves as a tentative proposal for how a NSAG could contribute to monetary compensation within a judicial process, while the FARC-EP case has indicated the potential of NSAGs to provide collective and symbolic reparations. Nevertheless, other NSAGs operating in different contexts may not hold the organisational capacity to provide all, or some, of these forms of reparations. This reinforces the argument, made in the study, in favour of an actor-specific approach to their application. All in all, the Colombian case study has concretely shown how some of the international rules and principles governing reparations in respect of responsible states could be applied by analogy to NSAGs.

At the same time, the examination was stimulated to reflect beyond a state-centric approach to reparations. The FARC-EP case suggested that, when circumstances permit, reparation measures could accommodate the specific capabilities of a NSAG, by recognising the potential of the group's collective efforts, skills and knowledge in certain areas. This is apparent in the concrete actions of contribution to reparation which included, among other

measures, the engagement of the group in the search for the disappeared as a form of satisfaction. This approach could also involve requiring other measures from NSAGs, beyond those which are listed, non-exhaustively, in the UN Basic Principles and Guidelines, such as humanitarian demining or infrastructure rebuilding work which is performed with a reparatory goal in mind.[5] Yet, the discussion stressed the importance of guarding the legal concept of reparation in such cases; as the concept should not be stretched to any action that contributes to some form of development.

Additionally, the analysis has shown that the engagement of a NSAG in reparations is not necessarily without challenges. These may result from, for instance, the potential perpetuation of certain conflict and actor dynamics, the political nature of a NSAG, or the unwillingness of a group and its members to comply with their obligations. At the same time, the case has suggested that NSAGs members' access to judicial benefits could be used as an incentive for the NSAG itself to comply with its obligations in respect of reparation.

Both transitional justice processes deal, for a large part, with the duty of NSAGs to provide repair in a post-conflict setting. This underscores the need for further legal research on the provision of post-conflict reparations by such entities. The examination has provided deeper insights into some of the aspects that are of relevance to this discussion, such as the use of tort law figures to construe and enforce the collective responsibility of a defunct NSAG, and the role of persons or entities with representative authority in post-conflict reparations. With regard to this last aspect, the FARC-EP case was particularly insightful and offered a greater understanding as to how a successor entity, in the form of a political party which includes former high-level members, could provide reparations on behalf of an extinct NSAG.

The case study on Colombia has strongly confirmed that reparations cannot be solely dependent upon NSAGs, even when dealing with highly organised and wealthy groups. Although the examination recognised that a NSAG can make important contributions to reparation, the case has indicated that the territorial state could still guarantee the subsidiary satisfaction of victims' right to reparation where a group is unwilling or unable. Consequently, both processes corroborated the proposal for a cascading regime of responsibility for reparation. The different perspective taken by the Justice and Peace Law added to this discussion by showing that the responsibility of a NSAG could, of itself, form an important subsidiary mechanism in such a scheme. In addition, the case study provided further insights into the possible relationships which could exist between the respective

[5] Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 Netherlands Quarterly of Human Rights 641, 666.

responsibilities of a NSAG and its individual members: in terms of complementarity and interrelation.
The final point of this section relates to the possible forum in which reparations by NSAGs could be provided. The Colombian case study provided two distinct examples in this regard. On the one hand, the examination of the Justice and Peace process provided insights into how judicial reparations could be claimed from a NSAG within the context of criminal justice proceedings. It also shed light on possible challenges which could arise in the context of such an effort. On the other hand, the FARC-EP case provided an example of how a NSAG could deliver predominantly collective, instead of individualised, reparations earlier on in a process, through extra-judicial measures and mechanisms which are part of a comprehensive transitional justice system. However, in this process, the victims have not been given the possibility to exercise their right to obtain reparation from the NSAG before a mandated body. Finally, the case study suggested that certain forms of reparations, such as symbolic reparations and guarantees of non-repetition, could already be provided during peace negotiations or the demobilisation process of a NSAG.

# 4 Final remarks

Despite the prevalence of NIACs, the question concerning NSAGs' duty to make reparation, for the harmful consequences of their violations committed during such conflicts, remains marked by controversy in the international legal system. The ambivalent attitude of states can be identified as constituting one of the principal obstacles for establishing a regime of responsibility of NSAGs in current international law, which could potentially include a duty of reparation. Accountability and the fight against impunity are high on the international agenda; moreover, concerns for victims of armed conflict are increasingly being heard. Nonetheless, there is a general reluctance to legally address the larger collectivity alongside individual group members. The potential of conferring any measure of legitimacy or recognition has been identified as one of the main concerns in this regard. Given the controversial character of NSAGs, such concerns will most likely continue to restrict any attempt to establish a responsibility regime in respect of NSAGs. Nonetheless, the recent transitional justice process in Colombia, with the FARC-EP, has certain potential in shifting such perspectives. The process has attracted the considerable attention and support of the international community, and has even been hailed as an example for future processes in other contexts. A crucial element of this process is the collective role that the FARC-EP has taken

in the reparations scheme as a responsible actor. In this regard, the research has suggested that concerns for the victims of the conflict seem to have trumped those concerning the legitimacy or recognition of the NSAG. This prominent case of state practice could encourage greater attention to the role of NSAGs in reparations by states and other international actors which are involved in peace and transitional justice initiatives. In addition, the research has identified some recent examples of UN practice which go in this direction, and which could leave a further mark on states' views and practice, due to their authoritative character. Nevertheless, it appears too optimistic to argue that such efforts have the potential to elicit international legal developments through the practice of states in the near future. Instead, there might be more merit in recognising that the issue has the potential to become one of the new frontiers in legal scholarship and broader international practice. This could open the door to an exercise concerned with the progressive development of international law, which is geared to developing this new type of responsibility for NSAGs.[6] The ILC could take up the task of advancing the law on the matter. However, if it proved unwilling to do so, the exercise could instead take the form of an initiative geared at drafting rules and principles of soft law, or even guidelines, which could benefit from a broad participatory process involving international experts and stakeholders.

[6] The 'progressive development of international law' is defined as the drafting of legal rules which have not yet been regulated by international law, or sufficiently addressed in the practice of states. Art 15 Statute of the ILC adopted by UNGA Res 174 (II) of 21 November 1947 as amended by Res 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981; Paloma Blázquez Rodríguez, 'Does an Armed Group Have an Obligation to Provide Reparations to Its Victims? Construing an Obligation to Provide Reparations for Violations of International Humanitarian Law' in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations* (Brill Nijhof 2018) 427; Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (Intersentia 2020) 196.

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# Annex 1. List of interviews

| Interviewee | Reference |
|---|---|
| **Justice and Peace Law** | |
| Justice and Peace Magistrate | Interview No 1 (Colombia, February 2019) |
| Former Justice and Peace Magistrate | Interview No 2 (Skype Interview, March 2019) |
| Justice and Peace Magistrate | Interview No 3 (Colombia, April 2019) |
| **Transitional justice and other government institutions** | |
| Reparations expert of the *Centro Nacional de Memoria Histórica* | Interview No 4 (Colombia, February 2019) |
| Former Director of the Unit for the Assistance and Integral Reparation of the Victims | Interview No 5 (Colombia, February 2019) |
| Official of the Special Jurisdiction for Peace | Interview No 6 (Colombia, April 2019) |
| Official of the Agency for Reincorporation and Normalization | Interview No 7 (Colombia, March 2019) |
| **Political party FARC and former FARC-EP members** | |
| Advisor of the political party FARC | Interview No 8 (Colombia, February 2019) |
| Delegate of the CSIVI-FARC | Interview No 9 (Colombia, April 2019) |
| Former FARC-EP member | Interview No 10 (Colombia, March 2019) |
| Two former FARC-EP members | Group Interview No 11 (Colombia, March 2019) |
| Former FARC-EP member | Interview No 12 (Telephone Interview, March 2019) |
| Former FARC-EP member | Interview No 13 (Colombia, March 2019) |
| Two former FARC-EP members | Group Interview No 14 (Colombia, March 2019) |
| Former FARC-EP member | Interview No 15 (Colombia, March 2019) |

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|---|---|
| Former FARC-EP member | Interview No 16 (Colombia, March 2019) |
| Former FARC-EP member | Interview No 17 (Colombia, March 2019) |
| **Victims’ organisations and representatives** | |
| Head of a victims’ organisation | Interview No 18 (Colombia, March 2019) |
| Head of a victims’ organisation | Interview No 19 (Colombia, March 2019) |
| Victim representative, Bertha Lucía Fries | Interview No 20 (Skype Interview, May 2019) |
| **National and international non-governmental organisations** | |
| In-house NGO lawyer | Interview No 21 (Colombia, February 2019) |
| NGO researcher | Interview No 22 (Colombia, March 2019) |
| Transitional justice practitioner | Interview No 23 (Colombia, February 2019) |
| **International organisations** | |
| Official of the UN | Interview No 24 (Colombia, February 2019) |