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THE POSITIVE AND NEGATIVE IMPACTS OF ARMED NON-STATE ACTORS ON ENVIRONMENT: LEGAL PROBLEMS AND PROSPECTS

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ABSTRACT

There is a dichotomy between the institutional capacity, economic potential, and actual role and relevance of Non-State Actors (NSA) in international legal order. This divergence on one hand amplifies the negative impression of Non-State Actors Armed Groups (NSAGs) to environmental deterioration with impunity to hold them accountable, while overlooks its NSAGs positive contributions to the same. Also, it undermines the uniform application of international law.

This article will analyse the positive contributions of NSAGs to environmental protection, emphasising that there is the need to bring a balance to NSAGs' accountability and legitimacy, arguing that the postmodernist approach towards international legal order should be adopted based on deliberative reasoning, sound arguments, and the equal accommodation of both the states and NSAs. This inclusion could strengthen the legitimacy of international legal order and it will expand the system's capacity in dealing with the contemporary challenges related to environmental protection. It will suggest the legal approaches that can be employed, i.e., bringing the NSAGs within the ambit of international rule of law, engaging with them through non-binding declarations at the face of states' reluctance to engage with them. From a legal point of view, this paper will look into available legal tools, such as UN Charter article 71, the UN Guiding Principles on Business and Human Rights, the

Paris Agreement on Climate Change, and the UN Guidelines for the Protection of the Environment in Relation to Armed Conflict.

Abstract

I. Introduction

The traditional international legal system is based on rules, principles, and norms that regulate the conduct and relations of sovereign states. Within this traditional construct, international law speaks to states only and provides for their rights and obligations. Possession of those obligations and rights are the imminent ingredients for recognition as a subject of the international legal system.¹ According to the International Law Commission (ILC), the practices of actors other than states... "are not practices that contribute to the formation, or expression, of rules of customary international law."²

NSAGs typically do not have full legal personality, nor do NSAGs are signatories to international treaties and conventions.³ Despite NSAGs economic power, cultural and social influences, and the ability to contribute to security and environmental protection, they are objects rather than subjects of international legal order. Being an object of international law breeds opacities on the legal status of NSAGs.⁴ The above-mentioned pattern exonerates NSAGs from the liability against the environmental destruction as well as it overlooks its obligations for environmental protection.⁵ This is where the dichotomy between the potential and role and relevance of NSAGs become evident that highlights the shortcomings of traditional international legal order.⁶

¹ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University press, 2006). Non-State Actors (NSA) according to Andrew Calpham,

"The concept of non-state actors is generally understood as including any entity that is not actually a state, often used to refer to armed groups, terrorists, civil society, religious groups or corporations."

² International Law Commission, *Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee*, UN Doc. A/CN.4/L.872 (2016) *supra* note 3, at 2.

³ Mathias Koenig-Archibugi, and Kate Macdonald, *Accountability and Legitimacy in Global Governance: Assessing the Role of Non-State Actors*. Routledge, 2020.

⁴ Brandeis Institute for International Judges (BIJ), *Toward an International Rule of Law*, 2010 Report.

⁵ Jan Wouters and Cedric Ryngaert, "Non-State Actors in International Law: A Necessity or a Threat?" *International Law Studies*, vol. 96, 2020, pp. 97-121.

⁶ Cedric Ryngaert, "Non-State Actors in International Humanitarian Law." *Leiden Journal of International Law*, vol. 33, no. 2, 2020, pp. 285-305.

The reason for the dichotomy between the economic and institutional potential of NSAGs and their role and relevance in international legal order is due to states' reluctance to share their unique status in international law.⁷ Giving legal recognition to NSAGs will legitimise their actions that are presently the sole prerogative of the states in traditional international legal construct.⁸

In the contemporary world, there is the need with respect to the role and relevance of NSAGs in international legal order that progressive ideas and practices of NSAGs should be brought within the corpus of the international legal system. The International Law Commission suggests that "the formation of [customary] international law now has to be seen in the context of a world of nearly 200 States, and numerous and varied international organizations, both regional and universal."⁹ In the same vein, speaking about the element of state practice, Anthony Carty has observed that "within the history of the discipline itself it may always be possible to recover new parameters for exploring the history of state practice . . . by reverting to a different theory of doctrine."¹⁰ This will provide legal backing to positive activities of NSAGs on one hand as well as it will establish accountability for their acts and omissions violative of international law.¹¹

This work will argue that addressing this dichotomy involves evolving legal frameworks and practices to better integrate NSAGs, balancing their influence with accountability and legitimacy, and ensuring a coherent approach across different international legal contexts. NSAGs can be integrated into international legal framework through multiple ways, such as bringing NSAGs within the ambit of international rule of law and making it party to non-binding declarations. Such as the UN Guiding Principles on Business and Human Rights and the Paris Agreement on climate change that encourages participation from a wide range of stakeholders, including NSAGs.¹² Integrating NSAGs

⁷ Thomas G. Weiss, *What's Wrong with the United Nations and How to Fix It*. 3rd ed., Polity Press, 2021.

⁸ Andrea Bianchi, and Irina Buga. *Non-State Actors and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2021).

⁹ Lisl Brunner, and Danwood Mzikenge Chirwa, *Human Rights and Non-State Actors* (Oxford: Edward Elgar Publishing, 2020).

¹⁰ Anthony Carty, *Doctrine Versus State Practice*, in the *Oxford Handbook of the history of international law*, Eds. Bardo Fassbender & Anne Peters (London: Oxford Publishers, 2012).

¹¹ Jean D' Aspremont, "International Responsibility and Non-State Actors: A Critique of the Attribution Symmetry in International Law." *International Organizations Law Review*, vol. 17, no. 2, 2020, pp. 171-196.

¹² Robert J. Smith, *The Role of Non-State Actors in the Development of International Environmental Law*. PhD thesis, University of Cambridge, 2020. United Nations. *Guiding Principles on Business and Human*

more fully into the international legal system requires careful management to maintain state sovereignty as well as to give NSAGs its due place in international order that could maximise its role in environmental protection.¹³

II. The potential role of NSAGs in environmental protection

Worldwide, a considerable number of people, as much as 160 million, are either directly or indirectly living in the areas that are in control of NSAGs.¹⁴ With respect to environmental protection as well as deterioration, NSAGs have both positive and negative contributions. If NSAGs contribute to the deterioration of the environment on one hand, NSAGs leave positive influences on the environment as well in the regions of armed conflict.

Though damages to environments caused by NSAGs are often amplified, it is ignored that the exploitation of the forests can be kept at bay due to the insecurity created by such NSAGs. NSAGs first contribution could be that of "conservation at gunpoint," as their activities mostly make territories inaccessible for various actors, including national armies, enterprises, settlers and extraction companies. Forest provides safe hideouts for them and therefore they institutionalise the protection of forests and cultivations. NSAGs operating in Mali/Sahel are one such example.¹⁵ Other NSAGs protect the environment and forestation for the purpose of recruitment and to maintain their legitimacy. One such example is the Kurdish Workers Party (PKK) in Turkey and Iraq. Such movements claim that they avoid using weapons that could damage the environment disproportionately, this seems more in compliance with proportionality principle of IHL.

NSAGs also pursue environmental protection as a political vision. For instance, three NSAGs have developed political vision focusing on the protection of the environment. These are the Karen National Union (KNU), the People's Protection Unit (YPG), and the Ogaden National Liberation Front (ONLF). These NSAGs focus on natural resources management, maintain their own forestry and environmental policies and departments, including the creation of large, protected areas, working with civil society organisations for environmental and wildlife protection and conservation, resistance

Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. United Nations, 2011.

¹³ Andrea Bianchi, and Irina Buga. *Non-State Actors and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2021).

¹⁴ According to the International Committee of Red Cross for instance, there exist around 100 conflicts worldwide that involve more than 60 states and some 100 NSAGs. Online accessible at this [link](#).

¹⁵ Nina Wilén and Paul D. Williams, *What Are the International Military Options for the Sahel?* IPI Global Observatory (2022). Accessible at this [link](#).

against oil and gas exploitation. The main motive of the Political programme of ONLF provides that "recognizing that the colonizer implements policies in Ogaden without regard to environmental impact, the ONLF affirm that we shall confront all initiatives, which negatively impact our environment as a matter of national duty to protect our environment for future generations."¹⁶ In both cases, be it the recruitment or the legitimacy, these NSAGs directly as well as indirectly contribute to environmental protection.

In some parts of the world the concept of state is a contested phenomenon.¹⁷ Contemporary developments led to the erosion of states' institutional and conventional arrangements adopted for environmental protection. The MENA region is the leading embodiment of such contemporary developments and its effects.¹⁸ When states are unresponsive to public demands and needs with less or no optimism for their transformation, they lose the connection between states and common masses leading to a disconnect between state, society, and citizens. In contemporary MENA, many NSAGs emerged with the motive to take over from states.¹⁹ This is a natural outcome of the disconnect between states and their masses. If the NSAGs can take over from states in other domains, can it take it from states in environmental protection issues? Or is there the need for collaboration between NSAGs and states?

III. Solution

There are ways in which NSAGs' engagement can breed positive contributions to environmental protection on one hand, as well as hold them accountable for environmental damages. The first could be bringing NSAGs within the ambit of international rule of law and secondly, IHL should equally emphasise on the environmental aspects alongside the anthropocentric aspects of an armed conflict.

¹⁶ Political programme of the Ogaden National Liberation Front (ONLF) Part I, Declaration Forming The ONLF.

¹⁷ Mohamed Abdelaziz, The Hard Reality of Civil Society in the Arab World, Policy Analysis Fikra Forum, Dec 11, 2017. Online accessible at: <https://www.washingtoninstitute.org/policy-analysis/hard-reality-civil-society-arab-world>

¹⁸ Hafsa Halawa, Nonstate Actors, Geopolitics, and Conflict in the Middle East, in Global Civil Society in a Geopolitical Age: How Civic Activism Is Being Reshaped by Great Power Competition, Ed., Richard Youngs (Washington: Carnegie Endowment for International Peace, 2022) 49-55.

¹⁹ Florence Gaub, State Vacuums and Non-state actors in the middle east and North Africa in The Frailty of Authority: Borders, Non-State Actors and Power Vacuums in a Changing Middle East Ed., Lorenzo Kamel (Rome: Edizioni Nuova Cultura, 2017) 51, citing Robin Wright, "Imagining a Remapped Middle East", in The New York Times, 28 September 2013, <https://nyti.ms/18zCi0k>. Amichai Magen, working paper, International Institute for Counter-Terrorism (ICT) (2012).

International Rule of Law

The international rule of law is a prerequisite for effective application of international law. It requires that all the influential actors globally should act in accordance with international legal rules and may be held accountable in case of violation.²⁰ It is neither political nor a legal ideal, rather this idea has already been attempted to be adopted through international legal regimes. Such as the preamble of UDHR declares the following:

"Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law."²¹

International rule of law has formal and substantive conceptions.²² The formal conception requires relaxed prerequisites in comparison to substantive conception. The proponent of substantive conception agrees on the formal requirements of law with the addition of certain qualitative criteria, i.e., the fundamental rights. Ronald Dworkin is one of the opponents of substantive conception of the international rule of law.²³ This conception relies on the fundamental communal principles that have its roots in positive law.²⁴

²⁰ However, the problem is that there exists no centrality within the international legal system on this subject.

²¹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 8 July 2024].

²² Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (8th Ed.,) (London: Macmillan, 1915).

²³ Ronald Dworkin, 'Political Judges and the Rule of Law.' *Proceedings of the British Academy* (1978) 64. 262. He maintains that:

I shall call the second conception of the rule of law the "rights" conception... It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as a part of the ideal of law, that the rules in the rule book capture and enforce moral rights.

²⁴ The inclusion of human rights makes the substantive conception somewhat bulky and prone to criticism on the grounds of diversities of human communities' founding legal and political principles and values. Especially on subtle issues such as discrimination, homosexuality, abortion, education, death penalty and so on.

Against this backdrop the question needs to be answered is that can the NSAs including NSAGs, be brought within the international rule of law framework, and if so, they can be given the recognition under its formal or substantive conception of international rule of law?²⁵ Further study is required on the potential role and effectiveness of NSAGs in environmental governance in order to understand how their responsibility can be established for environmental deterioration or destruction and how their positive contributions to environmental protection can be provided with legal backing.²⁶ From a legal point of view, the UN Guidelines for the Protection of the Environment in Relation to Armed Conflict" (PERAC) could be a tool that may provide foundation for constructive engagement of NSAGs in environment protection..²⁷

Moreover, at the face of states' reluctance to enter into a treaty relationship with NSAGs, the alternative could be unilateral declarations by NSAGs. In 2015, Polisario Front, a nationalist Arab socialist front aiming for independence of Western Sahara from Morocco control, made a commitment to abide by Geneva Conventions and its protocol I to its armed engagements with Morocco. This declaration was addressed to the Swiss Federal Council, depository of Geneva Conventions. The Swiss Federal Council and all state parties' governments were notified as per the procedure accepted this commitment made through declaration. This was the first occasion where a declaration by a non-state actor was accepted and this is evident of the fact that there can be a room for non-state actors in international legal order.

In the Kadi case it was concluded that the protection of human rights and judicial protections are paramount despite contrary UNSC resolutions. The authority of the Security Council itself will rest on its adherence to values of rule of law, to which human rights is a vital ingredient. Whereas in the Nada case, the European Court of Human Rights held that international rule of law can be applied to international organisations.²⁸

²⁵ In comparison to formal conception, the substantive conception of the rule of law embraces larger aims.

²⁶ The activities and priorities of NSAGs are not uniform with respect to environmental protection. Some have regulations and directives guided at environmental protection, while others have placed environmental protection as the theme line of their political visions. Given the effects of climate change and environmental degradation, the importance of ideologies and politics that include or build on environmental concerns are likely to increase.

²⁷ PERAC strives to compensate for the low precedence formerly conferred upon the environment. Also, it provides the foundation for engaging and materialising NSAGs impact on the environment.

²⁸ Robert McCorquod, Defining international rule of law: Defying gravity? "The International and Comparative Law Quarterly," 65, 2 (2016) 277-304. Accessed at [Jstor](#).

Re-constructing international legal order

Can customary international law bring fundamental changes to the international legal system?²⁹ A postmodernist approach could have the potential to introduce reforms and changes within the international legal framework, where the emphasis should be placed on deliberative reasoning based on sound arguments and claims equally coming from state as well as non-state actors instead of dominant states' collaboration.³⁰ Article 71 of the UN Charter creates a legal basis for non-state actors' relationship with the United Nations through ECOSOC.³¹ Law of the sea is the example of such a contribution by civil society non-state actors. Therefore, this is the time to devise a more advanced understanding of international legal order based on inclusivity of both non-state actors and equal contributions for all states of globe if the system desires universal acceptability and application.³² The concept of customary international law needs to be rethought to include among others, the NSAGs.³³

NSAGs regulation through international rule of law may provide legal backing to its positive contributions aimed at environmental protection, and eliminate or reduce the negatives associated. This inclusion could strengthen the legitimacy of international legal order as it will expand the system's capacity of dealing with the contemporary challenges, achieving and maintaining international global justice through global democratic participation.³⁴

International humanitarian law (IHL): IHL is concerned with the humanitarian aspects of an armed conflict, however, the environmental concern ranks extremely low as IHL is anthropocentric in this regard. This anthropocentric approach on one hand focuses on human protection, however, underestimates environmental protection. To better

²⁹ World Inequality Lab, World Inequality Report (2018), available at <http://wir2018.wid.world/files/download/wir2018-full-report-english.pdf>.

³⁰ In other words, the interests of the humankind should be preferred to those of a few powerful states.

³¹ Article 71 UN Charter reads as follows "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence."

³² Catherine Tinker, the role of non-state actors in international law making during the UN decade of International Law, ASIL Proceedings, April 06, 1995, 177-185.

³³ United Nations, Statute of the International Court of Justice, 18 April 1946, available at: <https://www.refworld.org/docid/3deb4b9c0.html> [accessed 30 August 2023].

³⁴ Within the authority of state practice, this will include the practices of social movements with necessary evidence being identified weighted by relevant forums to determine the emergence of a norm of the International legal system through CIL.

protect the environment, it is imperative that “we increasingly place human need in the wider context of ecological ethics.”³⁵

IV. Conclusion

Non-state actors manifest its potential in many positive as well as negative conducts with enormous institutional, infrastructural, and financial latent. Globally, a huge amount of territory and population are in the control of NSAGs. If NSAGs contribute to environmental deterioration, it also plays a positive role in environmental conservation and protection. The positive contributions of NSAGs to environmental protection are visible in the instance of NSAGs operating in Mali/Sahil, and the Kurdish Workers’ Party. Some NSAGs have created their own environmental policies, such as the Karen National Union, People Protection Unit, and Ogaden National Liberation Front. However, despite its enormous institutional and economic potential, NSAs are objects, rather than subjects of international legal order. This dichotomy radiates negative effects on uniform application of international legal order.

Integration of NSAGs into international legal order can be done through a number of ways, including the employment of international rule of law, or engaging them through non-binding declarations, i.e., UN Guiding Principles on Business and Human Rights, Paris Agreement on Climate Change. Non-state actors can possibly be made the subject of international legal order by bringing them within the international role of law. This recognition should be based within the substantive conception of international rule of law. From a legal point of view, the UN Guidelines for the Protection of the Environment in Relation to Armed Conflict” (PERAC) could be one such legal tool that could be employed.

While introducing changes to the traditional construct of international legal order postmodernist approaches should be adopted, emphasising on deliberative reasoning and sound arguments. Based on the equal accommodation of both, the state and the NSAGs. As for binding engagement, UN Charter article 71 provides the legal basis for NSAGs relationship with the UN through ECOSOC. Moreover, the IHL should be concerned more, or at least equally, on environmental protection alongside being anthropocentric focusing on human protection. Human protection and needs should be widely placed in the context of ecological ethics.

NSAGs integration and regulation through international rule of law will establish its accountability for the acts and omissions of NSAGs causing damage to the

³⁵ Hugo Slim argues that it is important that “we increasingly place human need in the wider context of ecological ethics.

environment and provide legal backing to its positive contributions to the same, thus, bringing a balance to their accountability and legitimacy. This inclusion could also strengthen the legitimacy of international legal order as it will expand the system's capacity of dealing with the contemporary challenges, achieving and maintaining international global justice through global democratic participation. The instances of such inclusion are evident in the cases of Polisario Front, Kadi, Nada.

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