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“Regulating Non-State Actors towards an accountable
world:
from the Refugee Convention to the Ruggie Principles”.

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Abbreviations

AEI	American Enterprise Institution
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
CEAS	Common European Asylum System
CIE	Centri di Identificazione ed Espulsione
CPT	Centri di Permanenza Temporanea
ECtHR	European Court of Human Rights
EU	European Union
EU	European Union
FPO	For Profit Organisation
HRIA	Human Rights Impact Assessment
ICRC	International Committee of the Red Cross
I.e.	Id Est (in example)
IGO	Inter-Governmental Organisation
IMF	International Monetary Fund
IROL	International Rule of Law
MDGs	Millennium Development Goals
MNC	Multinational Corporation
MNE	Multinational Enterprise
NFPO	Not For-Profit Organisation
NGO	Non-Governmental Organisation
NSA	Non-State Actor
PPP	Public Private Partnership
SDGs	Sustainable Development Goals
TNC	Transnational Corporation
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNGP	United Nations Guiding Principle
UNHCR	United Nations High Commissioner for Refugees
WTO	World Trade Organisation

Abstract

This paper wishes to analyse key concerns related to the legal responsibility of Non-State Actors. More specifically, this research will assess issues of accountability related to two different types of Non-State Actors, in the private divide: actors at commercial for-profit scope (Corporations); and not for-profit, non-commercial organisations for humanitarian purposes (Non-Governmental Organisations).

Starting with the premise that all international Non-State Actors must be transparent, regulated and held accountable for their actions¹; this research poses greater focus on the regulative legal framework between Corporations and NGOs, in a comparative parallel.

Following the definition and classification of those organisations, this paper will insist majorly on NGOs, by looking at their relationship with Inter-Governmental organisations, like the United Nations and its Higher Commissioner for Refugees agency.

After evaluating the legal framework both at a national and international level, it will be concluded that, in a world that cries for accountability, even in circumstances where responsibility may not be attributed under positive law, other grounds for responsibility must be considered, to solve the current legal gaps.

Comparing the international obligations originating from the 1951 Refugee Convention, with binding obligations and guidelines governing corporations, such as the Ruggie Principles, this research will consider the need of extending those principles to the realm of non-governmental organisations (NGOs), to overcome the legislative gaps especially in oversea operations for humanitarian aid purposes. Finally, the exemplifying case of Italy, will serve to show the interaction between states and NSAs in its practical application.

¹ Gray, R. (2002), "The social accounting project and accounting organizations and society: privileging engagement, imaginings, new accountings and pragmatism over critique", *Accounting, Organizations and Society*, Vol. 27 No. 7, pp. 687-708.

Introduction

*“We know that **there are alternatives** to a system that privatises the world, exhausts nature and destroys life in the name of profit for a minority. [...] What is **now at issue is the very legitimacy** of a world that reduces the greater part of humanity to the rank of useless masses and does not hesitate to provoke a veritable genocide in order to promote the accumulation and global concentration of capital.”²*

(Houtart, 2001, p. vi)

Inequality is defined by the OECD as *“the difference in how assets, wealth, or income are distributed among individuals and/or populations”*³ and, in a world of scarce resources, constitutes an increasingly important starting point for sustainable economies and human rights protection. As a result of Oxfam’s notorious study,⁴ it has been shown that the richest 1% of the global population is wealthier than the remaining 99%; as controversial as this may sound, since 2000 the situation has not remarkably improved for the best: the poorest people on the planet received only a 1% increase in wealth, as opposed to the top 1% receiving 50%. This contextual scenario demonstrates the urgency of upscaling duties within both entrepreneurs and human rights advocates to protect society and reverse the world’s overall interests, finding alternatives to enhance accountability.

Responsive measures started to be adopted in 2000 with the Millennium Development Goals (MDGs): 189 countries gathered at the United Nations signed the Millennium Declaration⁵ and, by doing so, agreed to commit to achieve eight goals by 2015.

² Houtart, F. (2001) “Alternatives to the neoliberal model”, in Houtart, F. and Polet, F. (eds), *The Other Davos: - The Globalisation of Resistance to the World Economic System*, Zed Books, London, pp. 47-59, (emphasis added by the author).

³ OECD (2017), “Increasing growth and data”, website: <https://www.oecd.org/inclusive-growth/data/>

⁴ OXFAM, “An economy for the 1%”, Report, 210 Oxfam Briefing Paper, 18 January 2016, available at: <https://www.oxfam.org/en/research/economy-1>

⁵ United Nations. New York: United Nations; 2000. Resolution adopted by the General Assembly. 55/2. United Nations Millennium Declaration



*United Nations
Millennium Goals,
2000-2015.*

The eight goals were designed to be realistic and easy to achieve, provided with clear monitoring mechanisms and indicators. The agenda was merely based on reducing poverty in developing countries focusing on different aspects. This caused heavy criticism on the MDGs, despite their innovative idea of gathering countries around global goals and achievable targets.⁶ Other controversies derived from the small number of stakeholders engaged in designing and creating the goals, who failed to adequately involve developing countries and the development objectives agreed⁷, despite the fact that they constituted the main target for which the goals were drafted. This also set the grounds for discussions of the MDGs as a form of modern-day imperialism⁸ and concluded with the unachievable and simplistic nature of their aims. Moreover, MDGs were also criticised for failing to adopt to national needs and lacking the enforcement mechanism that contributes towards the identification of the relevant parties to hold accountable.⁹

Nonetheless, despite the controversies on their limited agenda and narrow goals, the MDGs proved to have positively contributed in changing the situation in many countries

⁶ Fehling, M., Nelson, B.D., and Venkatapuramd, S. (2013) "Limitations of the Millennium Development Goals: a literature review" *Glob Public Health*. 2013 Dec; 8(10): 1109–1122.

⁷ Amin S. (2006), "The millennium development goals – A critique from the South", *Monthly Review-an Independent Socialist Magazine*; Volume 57, Issue 10.

⁸ Fukuda-Parr S., (2010) "Reducing inequality – The missing MDG: A content review of PRSPs and bilateral donor policy statements", *Ids Bulletin-Institute of Development Studies*; Volume 41, Issue 1, pp. 26–35.

⁹ Oya C. (2011), "Africa and the millennium development goals (MDGs): What's right, what's wrong and what's missing". *Revista De Economia Mundial*; 27:19–33.

and “increased the accountability of all relevant actors (in both the North and the South), which contributed to greater results orientation and effectiveness of development policy.”¹⁰

Since 2015, however, further changes have been brought about. Despite the fact that the MDGs helped achieving a general recognition of the issue and improved the overall global situation to a certain extent, by spreading awareness and stimulating discussion, increasing health and wellbeing; nonetheless an extension to those goals was needed to enclose the entire global development framework on the idea of sustainability. Finally, at the Rio+20 summit in 2012, the Sustainable Development Goals (SDGs)¹¹ were drafted with an agenda spanning from 2015 to 2030.



*United Nations,
Sustainable
Development Goals
2015-2030.*

Here we witness the preliminary phase of the global focus on sustainability, to be later combined with the preeminent issue of accountability. The global goals started to shift from seeing poverty as the key element to progress and accountability, to being one of a number of global issues that need to be addressed. As a result, the fear of reducing poverty eradication to a secondary global goal started to emerge; on the other hand, supporters of the SDGs sustained that, differently from the MDGs, the wide range of

¹⁰ Loewe, M. (2012) ” Post 2015: How to Reconcile the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs)?” German Development Institute, Briefing Paper 18/2012, p. 2.
¹¹ UNGA, (2012) ”Draft resolution submitted by the President of the General Assembly Report of the Open Working Group on Sustainable Development Goals established pursuant to General Assembly resolution 66/288” A/68/L.61

fields in which the goals focus constituted their strength, as it enabled them to expand beyond the narrow concept of development, triggering other social, economic and environmental aspects previously left out, allowing them to strive for successful results.¹²

In recent years, SDGs started to assume a widespread role,¹³ impacting on national arrangements and on social action, to the point of becoming a goal and point of inflection also for corporate actions. In fact, this further extension of the SDGs, is now encompassed in the emergent area of responsible businesses and increased demand for reporting and transparency. This set the expectation for contributing towards the successful delivery of the SDGs and for future corporate reporting, as Rob Cameron, Chief Executive of SustainAbility,¹⁴ explained:

*“Corporate transparency is fundamental to the transition to a sustainable economy – allowing stakeholders to hold companies to account for poor performance, and to direct capital towards companies that are working to meet the 2030 Sustainable Development Goals.”*¹⁵

Hence, despite the original quibbles regarding MDGs and SDGs for not being drafted clearly enough, being too wide, simplistic and lacking effective accountability mechanisms, it results that the global picture has, nonetheless, been developing and progressing towards change¹⁶, as a consequence of those recognised values.¹⁷

Moreover, it is important to highlight and invite the reader to bear in mind throughout the course of this research, the similarity in approaching an innovative idea such as the MDGs, later transformed into SDGs, and the ongoing progress achieved and still currently developing that saw the principles increasingly muted into CSR.

¹² Loewe, M. (2012) ” Post 2015: How to Reconcile the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs)?” German Development Institute, Briefing Paper 18/2012, p. 2.

¹³ Griggs, D., M. Stafford Smith, J. Rockström, M. C. Öhman, O. Gaffney, G. Glaser, N. Kanie, I. Noble, W. Steffen, and P. Shyamsundar. 2014. An integrated framework for sustainable development goals. *Ecology and Society* 19(4): 49.

¹⁴ <http://sustainability.com/>

¹⁵ GRI, (2017) ”Insights From The GRI Corporate Leadership Group On Reporting 2025, Future Trends in Sustainability Reporting”, January 2017 Global Reporting Initiative (GRI) in collaboration with SustainAbility.

¹⁶ Al-Htaybat, K., von Alberti-Alhataybat, L. (2017) “Big Data and Corporate Reporting: Impacts and Paradoxes”, *Accounting, Auditing & Accountability Journal*, Volume 30, Issue 4.

¹⁷ Lomazzi, M., Borisch, B., Laaser, U. (2014) ““The Millennium Development Goals: experiences, achievements and what's next” *Global Health Action* 7:10.

In fact, arguably, CSR can be seen as an ultimate extension of the global goals set to achieve by 2030 to remediate to inequality. If, for instance, we take into account SDG 10 specifically: introducing accountability, transparency and reporting to the agenda, translates those into further elements for measuring progress and poverty eradication, as well as fighting and reducing inequality.

This thesis, will illustrate general trends of accountability in the modern corporate and globalised world, by focusing on two main Non- State Actors: NGOs and Corporations. In fact, corporations have been at the centre of discussion in the past decades, being the core actor carrying out disruptive activities, interfering with civil society by contributing to human rights violations, yet going unpunished, especially for oversea actions. As a result, they are now increasingly bound by ethical and social constraints, as well as legal guidelines capable of interfering with their world-wide reputation.

However, although acknowledging the truth behind corporations' evil¹⁸, this research will turn to focus majorly on NGOs, considering all those upon whom their actions may impact, as well as the direct and indirect consequences for which NGOs should be accountable for their work, done in contribution to poverty alleviation and fight against inequality.

Specifically, it will be argued that their power derives from the high levels of trust they retain in society which influences the world's behaviour and civil society's attitude. This constitutes the turning point of this research: considering the lack of academic attention to NGOs' accountability,¹⁹ it purports to add to the empirical understanding of the nature of NGOs' accountability mechanisms the same obligations and monitoring mechanisms adopted to the for-profit sector.

It is essential that all NSAs are bound to the same extent and that, beware of mainstreaming, it is not only for corporations to face accusations and constraints to

¹⁸ see Ite, Uwem E. (2005) "Poverty reduction in resource-rich developing countries: what have multinational corporations got to do with it?" *Journal of International Development*, Volume 17, Issue 7; pp. 913-929; Koenig-Archibugi, M. (2004) "Transnational corporations and public accountability" *Government and Opposition*, Volume 39, Issue 2, pp. 234-259.

¹⁹ Unerman, J., O'Dwyer, B. (2006), "Theorising accountability for NGO advocacy" *Accounting, Auditing & Accountability Journal*, Vol. 19 Issue 3, pp. 350.

tackle inequalities. Instead, an enhanced focus on NGOs would contribute towards ending the ongoing loop of circumventing *accountability*, that sees corporations complaining for being unreasonably and unfairly called to report and meet CSR and accountability standards that are not equally imposed on NGOs.²⁰ Moreover, increased NGO's monitoring would allow for the *transparency* progress to continue, widening the chances for improved performances and *accurate* results in different areas of international development.

Finally, accountability can be deemed the new overall goal for sustainable development.

Defining Accountability

The increased interest on NGO accountability originates from various sources that focus on numerous emerging issues. Controversial as it sounds, we can briefly notice that issues related to holding NSAs accountable begins at the definitional stage.

The first issue, in fact, already emerges by trying to define accountability. Despite the ubiquity of the term and the uncountable results we encounter by searching the term, *"accountability is talked about frequently and is one of the greatest concerns of the UNHCR staff at all levels, however the concept of accountability covers a number of different issues and it is not always clear that there is a shared meaning."*²¹

For instance, following the definition on the Oxford Dictionary, we understand 'accountability' as "the quality of being accountable" yet 'accountable' means "liable to be called to account, or to answer for responsibilities and conduct."²² Immediately, we perceive a sense of responsibility that is extended to the answerability for one's actions. In fact, in the legal field, the term has been narrowly defined as a "*principle which requires public authorities to explain their actions and be subject to scrutiny.*"²³ As a consequence, it may be noted that no distinction between 'corporate accountability' and

²⁰ Unerman, J., O'Dwyer, B., (2006), "Theorising accountability for NGO advocacy" *Accounting, Auditing & Accountability Journal*, Vol. 19 Issue 3, pp. 349-376.

²¹ Wigley, B. "The state of UNHCR's organisation culture: What now?" (UNHCR, January 2006).

²² The Oxford English Dictionary (1989)

²³ A. Le Sueur's definition in *The New Oxford Companion to law* (Oxford: Oxford University Press, 2008).

'corporate liability' has been specified, although it is argued that they differ as the latter involves a legal obligation that the first one excludes.²⁴

Alternatively, Edwards²⁵ argues on the line of accountability being an index to inequality. By asserting that legitimacy is only achieved by means of transparency, accountability and accuracy, he conveys a different weight to the notion of 'accountability' itself. Rather, he sees accountability as a component of a series of elements that give way to the ultimate goal of legitimate conduct. Contrarily, by entering more specifically within the realm of accountability directly related to NGOs, Jordan²⁶ explains that there are three different types of accountability NGOs are answerable to: effectiveness, reliability and legitimacy. Differently from what stated above, we witness a shift between the different components of the notion, to conclude that, legitimacy is an element engaged to achieve accountability, and not vice-versa.

Perhaps, a broader and more conceptual interpretation of the term would fulfil better the purpose of finding a common interpretative ground for this research. The notion of accountability is also seen as "*a social acknowledgement and an insistence that one's actions make a difference to both self and others.*"²⁷ In fact, when tackling the issue of accountability throughout the paper, the starting point is a request to those in charge (ie. managers or activists) to take responsibility for the consequence of their actions and allow the public to subject them to monitoring and scrutiny in order to better assess their values and behaviour in accordance to their missions. Within NGOs, specifically, there is a general trend in believing the duties they bear are merely aimed towards social, ethical and environmental values of the influential stakeholders. A similar approach is limited to a small, wealthy élite of donors and politicians in the western world, though failing to take into account the answerability they hold towards local populations, especially in developing countries.

²⁴ Bernaz, N. (2013) "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?" *Journal of Business Ethics*, 117:493–511

²⁵ Edwards, M. (2000), *NGO Rights and Responsibilities: A New Deal for Global Governance*, The Foreign Policy Centre/NCVO, London,

²⁶ Jordan, L. (2006) "Mechanisms for NGO accountability" *Global Public Policy Institute Research Paper Series No. 3*

²⁷ Roberts, J. (1991) "The possibilities of accountability", *Accounting Organizations and Society*, Volume 16, No. 4, pp. 353-370.

Briefly, “*accountability is a means to honour trust, to prevent the abuse of power, to uphold standards and to enforce norm conforming behaviour,*”²⁸ therefore the same irrevocable accountability imposed towards owners, influential stakeholders and corporations should be applicable and equally adopted to the non-profit sector,²⁹ with the respective obligations.

²⁸ Turk, V. and Eyster, E. (2010) “Strengthening Accountability in UNHCR” *International Journal of Refugee Law*, Vol. 22, No.2, p. 160.

²⁹ Unerman, J., O’Dwyer, B. (2006), “Theorising accountability for NGO advocacy” *Accounting, Auditing & Accountability Journal*, Vol. 19 Issue 3, pp. 349-376.

Chapter 1- Non-State Actors

Academics have argued that nowadays' global public policy is constituted by a network of actors whose actions coordinate international policies and relations on a multi-level scale, with the intent of establishing policy regimes and create international standards.³⁰ This results in negotiations between three main actors, which will be the key protagonists around which this thesis will develop, namely: the State, business and the civil society.³¹ Moving further, this thesis will show the importance of establishing a strong accountability framework for civil society actors (NGOs) for the responsibilities they hold in humanitarian crisis and the important role they play as human rights guardians, similar to that regulating business practices (MNCs and TNCs). In order to do so, this chapter will start by classifying Non-State Actors, by understanding their role, legal obligations and the challenges faced by the notion.

1.1 Definition:

The conceptualisation of NSAs will be relevant for the purposes of this thesis, with regards to the analysis of the major actors that are part of the international arena, in order to be able to ascribe them with impacts and consequences of their actions, establishing their responsibilities and finally succeed in holding them accountable for their wrongdoings.

However, major controversies concerning NSAs, are rooted in the *definitional conundrum* of the term. As it will be better explained throughout the chapter, before persecuting and attempt to hold NSAs accountable for their violations, it is vital to adequately define the term, to successfully classify them within the international legal framework and consequentially be able to establish their legal status and deriving obligations. To do so, would help obtain greater accuracy in international relations and re-define scopes and responsibilities.

³⁰ Held, D., Dunleavy, P., Nag, E.M. (2010) "What is Global policy", Global Policy Journal, Vol. 1, Issue 1.

³¹ Jordan, L. (2006) "Mechanisms for NGO accountability" Global Public Policy Institute Research Paper Series No. 3

According to the definition of The Dictionary of International Relations,³² non-state actors are “*personalities, organizations and institutions that play a role at present ... [who] should be judged according to their degree of autonomy, rather than the legalistic concept of sovereignty.*” Thus, to argue that all actors exercising autonomous power fall within the realm of NSAs runs the risk of interfering with the notion of State sovereignty. This raises a second definitional challenge, that concerns the relationship between States and NSAs in standard setting and regulatory control. Specifically, contributions and limitations to those different actors with their distinguished forms of powers add further unclarity with regards to the decisional and regulatory powers exercised.³³

In addition, Clapham³⁴ remarks that: “*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.*” A third challenge results from describing Non-State Actors by what they are not, rather than having a clear-cut positive definition what they are.³⁵ He believes it more accurate to limit the definition to a broad one, to establish that all entities that are not the State, are by nature ‘Non-State’, by so doing applying a strictly legalistic approach.

In order to fully understand this notion, it is therefore essential to analyse what is understood as constituting a State. The UN experts Birò and Motoc defined the notion of State to involve: “*the existence of a territory with internationally recognized borders, one single sovereign power controlling the territory, and a population whose members are citizens of the State.*”³⁶ Anything that does not fall within its meaning, constitutes a Non-State actor, by definition. Alston describes this choice as intentional to preserve the traditional international legal analysis approach - referring only to precise and unambiguous terms- as well as avoiding that the international human rights law regime confronts challenging practices of modern day global governance with reference to NSAs, whilst not being originally drafted for it. He concludes that although the State may,

³² Evans, G. and Newnham, J. (1998) “Dictionary of International Relations”, London, Penguin Books.

³³ Hutter, B.M. (2006) The role of non-state actors in regulation. CARR Discussion Papers, DP 37. Centre for Analysis of Risk and Regulation, London School of Economics and Political Science, London, UK.

³⁴ Clapham, A. (2006) “Human Rights Obligations of Non-State Actors” Oxford: Oxford University Press.

³⁵ Alston, P. (2005) “The ‘Not-a-Cat’ Syndrome: Can International Human Rights Regime Accommodate Non-State Actors?”, in Alston, P (ed), NON-State Actors and Human Rights, Oxford: Oxford University Press, 3-36.

³⁶ Birò, G. and Motoc, A.I. (2005) “Working Paper on Human Rights and Non-State Actors”, UN doc-E/CN.4/Sub.2/2005/40, 11 July 2005, para 31.

arguably no longer be the one and only actor, it is yet “*the indispensable and pivotal one around which all other entities revolve.*”³⁷

However, Daphné and Wallace³⁸, carried on this line of thought and argued that independence from the State is not the only essential criteria that distinguishes NSAs. Instead, they focused on the ‘autonomy’ element, as stated in The Dictionary of International Relations, to include entities autonomous from public actors, whose participation and engagement majorly reaches out to transnational networks. In their words, “Non-State Actors include organisations:

- *largely or entirely autonomous from central government funding and control, emanating from civil society, or from [a] market economy, or from political impulses beyond State control and direction;*
- *operating as or participating in networks which extend across the boundaries of two or more States - thus engaging in ‘transnational’ relations, linking political systems, economies, societies, etc.;*
- *acting in ways which affect political outcomes, either within one or more States or within international institutions - either purposefully or semi-purposefully, either as their primary objective or as one part of their activities.”*³⁹

Briefly, even by attempting to formulate a narrower definition, laying down different criteria and sub-categories, defining NSAs, leaves several unanswered questions. Instead, the choice of a broad definition is finalised to give a better idea of “*the diversity and complexity of non-State activity across a border, which now constitutes an international society.*”⁴⁰ Adopting a narrower definition, less comprehensive than the present one, would demonstrate the existence of a further conceptual challenge that gives leeway to immunity from certain recognised and well established international responsibilities.

³⁷ Alston, P. (2005) “The ‘Not-a-Cat’ Syndrome: Can International Human Rights Regime Accommodate Non-State Actors?”, in Alston, P (ed), NON-State Actors and Human Rights, Oxford: Oxford University Press, 3-36.

³⁸ Daphné, J. and Wallace, W. (2001), “Non-state Actors in World Politics: A Framework.” In Non-state Actors in World Politics. Edited by Daphné Josselin and William Wallace, New York: Palgrave, 1–20.

³⁹ Ibid, pp. 3-4.

⁴⁰ Ibid.

It seems unavoidable to conclude that, at this stage, the term 'Non-State Actor' has turned into an umbrella term, encompassing anything from economically incentivised actors, to non-governmental organisations, international organisations with political power and international terrorist organisations. However, in this research, the term will be understood as referring to "*any actor on the international stage other than the sovereign state*,"⁴¹ with exception to intergovernmental organisations, which will be explored in more details in Chapter 3.

Finally, defining NSAs will be crucial for this research and sets the grounds for the evaluation of the impacts of certain non-state entities' actions. To avoid mistakenly associating international organisations with a human rights mandate as undiscussed "good," as opposed to international organisations with a profit-making mandate, as undoubted "evil", the core premise asserts that - all actors, and especially those independent from Government control, must respect norms upholding democracy, human rights and rule of law, without exceptions.⁴²

1.2 Historical Background:

Further to the difficulties in finding a valid conceptualisation of NSAs, it is indispensable to consider the historical background of NSAs, the factors that contributed to their growth and the subsequent expansion of their role, in influencing civil society.

Sovereign states used to be the only actors of the international legal framework, yet following WWI, the first international Non-State Actor was born: The League of Nations. It was created mainly upon geographical borders and territorial jurisdiction, and had very little to do with the notion of international community, as we understand it today.⁴³ After WWII, the role of NSAs started to expand even more, until it acquired the biggest role non-state entities ever assumed. Briefly, the capitalistic economic power started to gain influence and importance, enhancing States' growth and economic boom. To better

⁴¹ Birò, G. and Motoc, A.I. (2005) "Working Paper on Human Rights and Non-State Actors", UN doc- E/CN.4/Sub.2/2005/40, 11 July 2005, para 23.

⁴² Halliday, F.. (2001) "The Romance of Non-state Actors." In *Non-state Actors in World Politics*. Edited by Daphné Josselin and William Wallace, 21–40. New York: Palgrave.

⁴³ Ben-Ari, R.H. (2012) "The Normative Position of International Non-Governmental Organisations under International Law- An analytic framework", Leiden: Martinus Nijhoff Publishers, p. 30.

deal with this change, States outsourced their powers and actions to Non- State Actors, in order to evade constraints- whether political, economic, legal.

Those practices can be seen as an indirect compromise between States and NSAs, or a “*mutually beneficial exchange*”⁴⁴: the first outsources power and legitimacy, conveying power to NSAs and therefore giving up their control; the latter acquires powers and rights that did not use to have, implementing policies and actions that States cannot perform due to their constraints. As a result of the new global economic system, an institutionalised cooperation developed, that contributed to increase power and profit of NSAs, to the extent of compromising States’ sovereignty and questioning the accountability of NSAs.⁴⁵

This constitutes the starting point of the ‘grey area’ this thesis wishes to explore: hardly defined NSAs assuming an interchangeable role to that of States: where do we draw a line?

As Clapham⁴⁶ explains, this transfer of title to circumvent responsibility was made possible by a loophole in the legal framework: non-state actors are generally excluded from the state-centric regime of both international law and international human rights law. This is because of two main concerns: legitimacy and dilution of power and responsibilities.

If we take for instance, the case of armed groups and international organisations, to include them under the international legislative regime, would imply recognising their state-like status and *legitimise* their actions, regardless of their nature. This is highly undesirable as it could lead to granting them permission to become even greater human rights bearers than the State itself. Moreover, to subject NSAs to the same obligations and responsibilities of States, would be *diluting* and undermining the role of state actors. For this reason, it is important to never lose sight of the difference in nature between the

⁴⁴ Bell, S. and Hindmoor, A. (2009), ” Rethinking Governance: The Centrality of the State in Modern Society” Cambridge: Cambridge Univeristy Press

⁴⁵ Malanczuk, P., Akehurst, M. (2003) ”Modern Introduction to International Law” (7th revised edition), London-New York, Routledge, p. 91

⁴⁶ Clapham, A. (2006) “Human Rights Obligations of Non-State Actors” Oxford: Oxford University Press.

State and NSAs, to ensure the latter complement the responsibilities of the first, rather than replacing its obligations.

Yet, at the end of the nineties, with the emergence of globalisation, the State is no longer the only subject of the international legal framework, instead is limited to being one of many actors part of the newly established international community:⁴⁷ a landmark moment in the history of international law. This is supposed to facilitate the protection of individuals' rights, as well as global economic, social and political cooperation and develop a community spirit within a new international legal order that invests more on people and safeguards the international rule of law.

However, Thürer⁴⁸ suggested that despite the de-territorialised State sovereignty acquired by NSAs, the State remains the centre of authority and power, concluding that globalisation actually led to the reinforcement of the role and responsibilities of States. Differently, Hobe argues that with globalisation, Non-State actors and their de-territorialised nature, have contributed towards a new reality. According to him: "*apart from states any other actor may theoretically be legitimized to act on behalf of the community interest*"⁴⁹ therefore bypassing the State and assuming a similar role.

Briefly, if NSAs are not bound by the same regulations and legal constraints of States, nor they owe accountability to the same entities,⁵⁰ who is answerable for the consequences of those transferred actions and how can we appropriately regulate them to deter misconduct?

⁴⁷ Haass, R. (2008) "The Age of Nonpolarity: What Will Follow U.S. Dominance?," Foreign Affairs 87.

⁴⁸ Thürer, D. (1998) "The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State" in Non-State Actors as New Subjects of International Law- International Law: From the Traditional State Order Towards the Law of the Global Community, Proceeding of an International Symposium of the Kiel Walther-Shucking Institute of International Law (ed. R. Hofmann)

⁴⁹ Hobe, S. (1998) "Individuals and Groups as Global Actors: The Denationalization of International Transactions", Non-State Actors as New Subjects of International Law- International Law: From the Traditional State Order Towards the Law of the Global Community, Proceeding of an International Symposium of the Kiel Walther-Shucking Institute of International Law (ed. R. Hofmann), p. 115.

⁵⁰ Stratton, T. (2008) "Power Failure: The Diffusion of State Power in International Relations" Infinity Journal Vol.1, Issue 1

These unclarities, therefore, illustrate the need to establish an effective regulative framework to govern those entities as well as finding strong and inclusive means to implement those norms.

1.3 Governing Legislation for Non-State Actors:

In a context of post-conflict peacebuilding, *“The goal of successful security governance should be the establishment of effective, transparent and democratically accountable state institutions,”*⁵¹ that takes into account the *complementary* and not *substitutive* role of NSAs.

Conforming to the maxim of international human rights law, human rights are universal and indivisible,⁵² and accordingly everyone should be bound by the same international law obligations to respect human rights, protect and implement international human rights instruments and act in good faith. The Universal Declaration on Human Rights should apply equally to individuals, Member States and Non-State Actors, in protection of a common spirit of *brotherhood*⁵³, human rights, dignity and equal treatment.

For instance, The UNOAC Report of the High-Level Group,⁵⁴ fixes expectations on non-state actors to the same extent of that of States, without seeming concerned about the issue of legitimacy and state sovereignty previously discussed. Instead, it affirms that: *“The integrity of these rights rests on their universal and unconditional nature. These rights should therefore be considered inviolable and all states, international organizations, non-state actors, and individuals, under all circumstances, must abide by them.”*

However, the legalistic division between States and NSAs as discussed so far, in conjunction with the fact that NSAs - due to their legal nature - cannot become a party to treaties, makes it harder to: firstly, identify appropriate hard law to rely on and secondly, to establish whether to and how to regulate NSAs in an appropriate way, without interfering with State powers. Moreover, it may seem paradoxical to impose

⁵¹ Holmqvist, C. (2005) “Engaging Armed Non-State Actors in Post-Conflict Settings”, in Bryden, A. & Hänggi, H. (eds), *Security Governance in post-Conflict Peacebuilding*, Münster: LIT Verlag, p. 63.

⁵² The Vienna Declaration and Programme of Action, Part I, paragraph 5.

⁵³ Universal Declaration of Human Rights, 1948, Article 1.

⁵⁴ UN Alliance of Civilisations (UNAOC), “Report of the High Level Group”, 13th November 2006, Para 2.3.

legal obligations to the same actors that were originally established to promote, respect and protect human rights.⁵⁵ Those entrusted entities, in fact, were created to extend governmental powers and undertake actions on behalf of the State, not to be treated as potential violators and therefore be free from international legal responsibility. Yet, the focus of international law has been shifting from states to individuals and human rights started to assume an increasing role in international jurisdiction⁵⁶ and started to acquire legal personality to a certain extent and have certain rights imposed upon them.⁵⁷

This resulted problematic on several grounds: firstly, to recognise NSAs as subjects of international law can be challenging because “*power and influence of NSAs in many cases goes far beyond that of entities to which international law has traditionally accorded.*”⁵⁸ Secondly, as already mentioned, to convey legal personality to them, would undermine State sovereignty and the special status they have acquired under international law.⁵⁹ Hence, the problem lies within finding *other* legal and political regimes to hold those actors accountable in case of norm transgression. Ben-Ari⁶⁰ discusses two possible solutions to facilitate accountability: firstly, a definition that recognises and includes all international actors within the addressees of international legal responsibilities, without exceptions; secondly, the development of legal norms that address all actors on both a domestic and international level.

Differently, in 2004, the UN Security Council resolved, in a very context specific scenario, that in case of Non-State Actors developing, obtaining, constructing, transferring or using chemical weapons, States retain an obligation to refrain from supporting them or

⁵⁵ Birò, G. and Motoc, A.I. (2005) “Working Paper on Human Rights and Non-State Actors”, UN doc- E/CN.4/Sub.2/2005/40, 11 July 2005, para 38.

⁵⁶ Brandeis Institute for International Judges (BIJ), *Toward an International Rule of Law*, 2010 Report

⁵⁷ See: United Nations, CESCR, General Comment no. 12, The Right to Adequate Food, 1999, no. 15, The Right to Water, 2002., no. 14, The Right to Highest Attainable Standard of Health, 2000. United Nations, Committee on the Rights of the Child, General Comment no. 5, General Measures of Implementation of Convention on the Rights of Child (Arts. 4, 42 and 44 Para. 6), 2003. ILO, C29 Forced Labor Convention, 1930. OECD, Convention no. 29 Against Corruption, 1997. International Convention on Civil Liability for Oil Pollution Damage, 1969.

⁵⁸ Nijman, J. E., (2010), “Non-State Actors and the International Rule of Law: Revisiting the “Realist Theory” of International Legal Personality”, *Non-State Actors in International Law, Politics and Governance Series*, p. 5.

⁵⁹ see Antônio Augusto Cançado Trindade (2010) *International Law for Humankind: Towards a New Jus Gentium*, The Hague Academy of International Law, Martinus Nijhoff Publishers. For literature concerning the extension of legal personality to individuals (therefore to civil society and non-state actors) as subjects of International Law.

⁶⁰ Ben-Ari, R.H. (2012) “The Normative Position of International Non-Governmental Organisations under International Law- An analytic framework”, Leiden: Martinus Nijhoff Publishers, p. 30.

supplying any goods or services that may support their actions.⁶¹ Moreover, in 2005 the UN Committee on Economic, Social and Cultural Rights⁶² in its general comments, have been striving to address their human rights recommendations to ‘Actors Other than State Parties’ despite the original state-centric nature of the human rights treaty regime. Nonetheless, the UN treaty monitoring bodies recognised that: *“While only States parties to the Covenant are held accountable for compliance with its provisions, they are nevertheless urged to consider regulating the responsibility resting on the private business sector, private research institutions and other non-State actors to respect the rights.”*⁶³

Briefly, responsibility to prohibit violations on behalf of non-state-actors lays within States’ obligation to protect human rights, and those are just a few examples of legislation that aims at regulating NSAs and the relevant civil society organisations, by using the State as mediating agent to reach the desired NSAs.

More broadly, obligations concerning NSAs can be found in the Cotonou Agreement. It includes Non-State entities within the actors that are part of the agreement (Non-state: — private sector; — economic and social partners, including trade union organisations; — civil society in all its forms according to national characteristics)⁶⁴ and explicitly states roles and responsibilities of those actors as substantial contributors to the development.⁶⁵

Additionally, the Draft Articles on Responsibility of International Organisations (DARIO)⁶⁶ would convey stricter international obligations to NSAs and strengthen the international rule of law. However, the given definition of ‘international organizations’ in Article 2 and its commentary, refers to organisations in question needing to be

⁶¹ United Nations Security Council, Resolution 1540 (2004), Non-Proliferation of Weapons of Mass Destruction, 28 April 2004.

⁶² UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant), November 2005.

⁶³ Ibid, para 55.

⁶⁴ Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of The One Part, and the European Community and its Member States, of the Other Part, Signed in Cotonou, Benin on 23 June 2000, Part 1, Chapter 2, Article 6.

⁶⁵ Ibid, Part 1, Chapter 2, Article 4.

⁶⁶ International Law Commission, “Draft articles on the responsibility of international organizations with commentaries” Yearbook of the International Law Commission, 2011, vol. II, Part Two.

“established by a treaty or other instrument governed by international law and possessing its own international legal personality,” as well as being established by States’ (or its organs’) participation. Therefore, this document is only applicable to inter-governmental organisations, bound by those provisions. Perhaps it is time to consider the DARIO as an important starting point for enhanced accountability of international organisations as it *“may open the door for the establishment of further, equally structured international responsibility regimes in the future.”*⁶⁷ Although, at present, none of its provisions, nor other international legal documents seem to be applicable.

Finally, having established that NSAs do not yet retain legal personality therefore not being able to have their accountability established under international law, they cannot be held responsible for the impacts of their actions. Instead, States are seen as the main intermediaries to compensate for the loopholes in this grey area of law. Namely, as it is States that escape responsibility by conveying it to entities that cannot be held accountable, *“States must bear the principal responsibility for preventing [NSAs] adverse actions given that they retain overarching powers and authorities to criminalise and penalise NSAs’ activities.”*⁶⁸ However, taking into account the hardship of traceability of NSAs’ actions to States’ responsibility- whether direct or indirect- it is even more fundamental to work towards finding alternative legal mechanisms or hold NSAs accountable under the international human rights regime. Failing to do so for fear of diluting State’s powers sounds more like a comfortable excuse: pursuing in this direction, will give leeway to further violations and unpunished actions, it will undermine the highly-respected role of human rights and enhance unfairness in global affairs.

In sum, defining NSAs contributes limitedly to clarifying the complex issues related to their monitoring and accountability. Having understood the origins of these entities and the way they historically came about, this research concludes arguing in favour of the establishment of a regulatory framework as a first step towards strengthening the

⁶⁷ Möldner, M. (2012) “Responsibility of International Organizations- Introducing the ILC’s DARIO” Max Planck Yearbook of United Nations Law, Vol. 16, p. 327

⁶⁸ Zarei, M.H. and Safari, A. (2015) “The Status of Non-State Actors under the International Rule of Law: A Search for Global Justice” Chapter 11, in C J G Sampford; Spencer Zifcak; Derya Aydın Okur (eds) Rethinking International Law and Justice, Routledge: Ashgate Publishing.

responsibility of those actors. The next section will proceed with the classification of those entities, in the attempt to narrow this immense area of law and find possible solutions.

Chapter 2- The public and private sector divide: questioning the role of non-state identities.

Moving further along into the research, we now deal with the classification of NSAs in private and public. This distinction gives origin to another grey area: the clear-cut identification and distinction between the public and private divide. For the purposes of this paper we will look at two main factors: firstly, the fact that most functions performed by governments are nowadays also exercised by private sector non-state actors, therefore making the two divides overlap and secondly, the accountability issues deriving from this conceptual unclarity, especially in the case of public private partnerships (PPPs).

2.1 Classification of NSAs:

In order to overcome the definitional discrepancies, present within the realm of international law, a working paper released by the IMF⁶⁹ helps us understand and sum up the distinction between the two divides. To do so, it begins by establishing a classification under two criteria: *ownership and control*. The first refers to the owner's exercise of rights, normally protected by law, over the property from which it originates responsibilities. The latter encompasses the distinction between *power and benefits*, which will be explained in greater detail below.

Namely, the public sector is composed by enterprises that are owned by the government, including the government itself; whereas defining the private sector is less straightforward. Briefly, belonging to the private divide are those institutional units, or entities, *owned by the private sector*. Noticeably the definition lacks a thorough explanation and is, instead, limited to the mere repeated use of the word "private". Attempting to exemplify the context, however, we observe two core privately-owned enterprises: corporations and NGOs. Both those non-state actors are independent from

⁶⁹ Lienert, I. (2009) "Where Does the Public Sector End and the Private Sector Begin?" IMF Working Paper, WP/09/122.

government control and represent formally constituted actors whose actions are regulated according to rules incorporated under law.⁷⁰ The key difference between the two, nonetheless, is identified within their scope, objectives and strategies of action: MNCs are made for profit (FPO); and NGOs are not for-profit (NFPO) and, arguably, advocates of the common good of society.⁷¹ Briefly, if the division between private/public and for-profit/not for-profit was to be based merely on ownership, the classification would look as illustrated in the table below.

Table from
IMF, (2009)
WP/09/122.⁷²

Table 1. Conceptual Splitting of Private and Public Sectors

	For Profit	Not For Profit
Privately Owned (private sector)	Private Enterprises	Private Nonprofit Organizations and Households
Publicly Owned (public sector)	Public Enterprises	"Government"

Public Sector

In addition to ownership, there is also the element of control.⁷³ It covers the complementary part of this area of law, bringing further complications with regards to the distinction between *policy control* and *financial control*. For instance, if the Government retains *power* to decide over the general corporate policy of the private actor it collaborates with, then it can be concluded that it holds policy control over it; differently, if it has power to govern the financial policies (of the institutional unit it wishes to control) so as to *benefit* from its activities, then the Government retains financial control.

As shown in the graph below, academics even classified NGOs as belonging to a third and separate category. The table, in fact, demonstrates how the three sectors operate within

⁷⁰ Nowak, M. And Januszewski, K.M. “Non-state actors and human rights”, pp. 113-159 in Math Noortmann, August Reinisch, Cedric Ryngaert, (2015) “Non-state actors in international law”, Bloomsbury: Hart Publishing.

⁷¹ Bendell, J, (2000), “Terms for Endearment: Business, NGOs and Sustainable Development”, Greenleaf Publishing/New Academy of Business, Sheffield, p. 16.

⁷² available at: <http://www.imf.org/external/pubs/ft/wp/2009/wp09122.pdf>, last accessed 23/05/2017.

⁷³ Lienert, I.(2009) “Where Does the Public Sector End and the Private Sector Begin?” IMF Working Paper, WP/09/122.

the sphere of the institutional context, shaped by different dynamic factors and societal forces that enables them to perform their separate roles whilst also interacting with each other and collaborating towards governing society. Yet, for the purposes of this research we will deal with NGOs' as belonging to the private sector, to consider the numerous similarities to corporations, that would enable the applicability of accountability mechanisms equal for both.

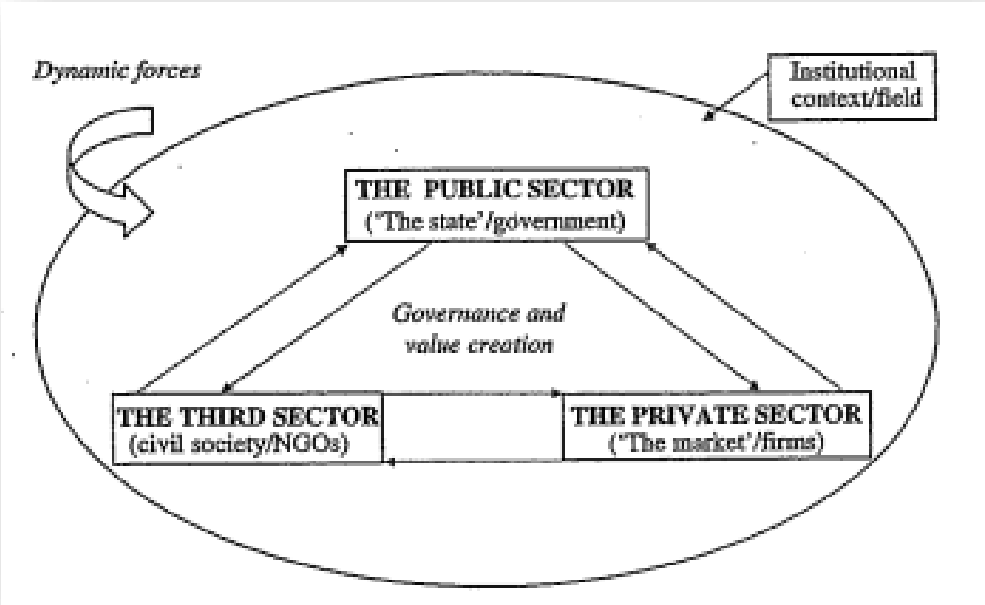


Table from Teegan et al (2004), p. 466.⁷⁴

As a result of the difficult classification, it is hardly possible to enable a clear allocation of legal responsibilities. For instance, in circumstances of express collaboration between the private and public sphere (ie. PPPs) complicated legal issues emerge. In fact, in the case of PPPs, the assignment of ownership, control and subsequent responsibilities is prevented by the fact that, although the investment is generally financed by the private sector (therefore constituting the *legal owner* and holding legal title over the asset), however, the government, rather than the private owner, bears the majority of the risks associated to the ownership. Thus, the government, despite the fact that it is not the

⁷⁴ Teegan, H., Doh, J., Vachani, S. (2004) "The importance of nongovernmental organizations (NGOs) in global governance and value creation: an international business research agenda", *Journal of International Business Studies*, Vol. 35, No. 6, pp. 463-483, <https://link.springer.com/article/10.1057/palgrave.jibs.8400112>, last accessed 23/5/2017.

legal owner, bears rights, duties and responsibilities falling within the realm of the *economic owner*.⁷⁵

Similar overlaps are also reversed in the decision-making and policy formulation process. NGOs' proliferation gave way to national policymaking committees and integrated their plans into national budgets, blurring the distinction even further, especially in developing countries, where the role of the State is becoming increasingly less powerful and NGOs are leading the way.⁷⁶ This generated core questions regarding accountability and centred the role of the law: to which extent may the law be used, in this context, to demarcate the grey zone between public and private divide?

For instance, if we interpret the law as the national law tool that defines legal terms such as 'control', 'institutional unit' and analyses the interaction between the two, then it may work to a limited extent.⁷⁷ But, if the aim is to achieve internationally recognised standards that increase the obligations and enhance accountability of powerful private actors, unfortunately, the present role of the law is very limited: it impedes both defining and implementing obligations, especially when taking into account circumstances in which those institutions retain economic control, but not the legal one.

Let's now take a closer look at the two private actors that are the central focus of this research. The following section aims at evaluating MNCs and NGOs separately, posing the question on identifying further elements that interfere with the legal personality of those NSAs, from which derives the lack of accountability and related issues of responsibility that are the central claim of this thesis.

2.2 Regulating responsibilities: Corporations

Since the 1970s, with the booming of the private sector and MNCs having a higher income than government's GDP, there has been a change in model development that

⁷⁵ Lienert, I. (2009) "Where Does the Public Sector End and the Private Sector Begin?" IMF Working Paper, WP/09/122, p. 18.

⁷⁶ Brass, J. N., (2011) "Blurring Boundaries: The Integration of NGOs into Governance in Kenya" *Governance: An International Journal of Policy, Administration and Institutions*, Volume 25, Issue 2, pp. 209–235

⁷⁷ Lienert, I. (2009) "Where Does the Public Sector End and the Private Sector Begin?" IMF Working Paper, WP/09/122, p. 18.

affirmed the political role of corporations in a globalised world, shifting from mere profit maximisation to real entrepreneurship. This change in paradigm placed the private sector at the centre of the new international economic order and as a consequence, new measures and perspectives started to be adopted. Bearing in mind that “*the price of greatness is responsibility*,”⁷⁸ it began to be clear that, for MNCs to retain power and growth, as well as a respected reputation, greater emphasis needed to be placed on the political engagement of corporations. Briefly, “*accountability is the price we pay for the freedom to exercise power and authority in a democratic society*”⁷⁹ and following the progressive de-regulation of liberal states and the widespread role of MNCs, concerns on the democratic gap and the debatable political legitimisation of corporations started to spread. Finally, from the 1990s we witnessed a blooming expansion of a new area: *Corporate Social Responsibility (CSR)*⁸⁰. This notion can be defined as “corporate choices and behaviours that go beyond firm-specific economic benefit or focus.”⁸¹ It deals with all actions undertaken by corporations that go beyond what is expected from them within the business realm of profit maximisation. Briefly, it is a matter of managing economic, social and environmental impacts of corporations’ activities, by “*protecting and promoting human rights; or ensuring good governance, accountability and public participation in connection with such activities*.”⁸² It led to the achievement of international development goals such as poverty alleviation, responsible consumption and production and health improvements as a result of good management of stakeholders as well as sustainable relations with subsidiaries.⁸³ CSR is held under two main principles: do no harm and proactively do good. It can be divided into *economic responsibility*: aiming at making profit; *legal responsibility*: the enterprise’s behaviour; *ethical responsibility*: fair and just behaviour towards society imposed by norms that are not prescribed by law but still retain moral weight and finally *philanthropic*

⁷⁸ Churchill, W.S. (1943) “The Gift of a Common Tongue” September 6, 1943. Harvard.

⁷⁹ Edwards, M. (2003) “Editorial, Civil society governance and accountability”, @lliance magazine, Volume 8, Issue 4, December 2003.

⁸⁰ Karp, D. J. 2014, *Responsibility for Human Rights: Transnational Corporations in Imperfect States*, Cambridge University Press, Cambridge.

⁸¹ Berry, G. R. (2010), “Improving organisational decision-making: Reframing social, moral and political stakeholder concerns”, *The Journal of Corporate Citizenship*, 38, 33–48.

⁸² Nelson, J. (2007) “The Operation of Non-Governmental Organisations (NGOs) in a World of Corporate and Other Codes of Conduct” *Corporate Social Responsibility Initiative*, Working Paper No.34, Cambridge, p. 14

⁸³ Hejny, H. (2015) “Corporate Social Responsibility & Human Rights. A critical review of the Guiding Principles on Business and Human Rights for implementing the UN “Protect, Respect and Remedy” Framework, *International Law Blog*, March 2015

responsibility:⁸⁴ although responsible and ethical business should be “*the structural measure of a company’s strategy, essential for the survival and development of the enterprise*,”⁸⁵ it is still often reduced to mere corporate philanthropy: consisting of plain charitable donations in terms of money, time and use of facilities given from corporations to NGOs.

Academics have been keeping track of the evolving nature of the relationship between business and human rights, and elaborate relations with social responsibility, environmental protection, and corporate ethics and governance, as well as the types of social and corporate movements adopted to spread those ideas within both MNCs and society.⁸⁶ As a result, in 2016 the Edelman Trust Barometer reported that trust in business increased noticeably in recent years, currently retaining its peak in trust and believed to be the leading institution (amongst governments, media, NGOs and businesses) trusted to keep up with the pace of the new economic globalisation. Several reasons have been found for this: business produces economic growth (59%), it contributes to the greater good (45%), allows citizens to be a productive member of society (40%).⁸⁷

Nonetheless, there are several limitations to CSR and several transparency concerns also started to emerge. The most problematic area of CSR is that of human rights implementation within the realm of international norms concerning corporate NSAs to hold them accountable for their behaviour.⁸⁸ Attempts were made to bring clarity in this area with the UN Global Compact in 2000⁸⁹, which constituted a first step towards greater monitoring. This learning platform, based on ten key points, however, never constituted an accountability mechanism. Instead, the initiative encouraged collaboration, awareness and good practice by means of a yearly report voluntarily submitted by companies to demonstrate the fulfilment of their obligations. Failure to do

⁸⁴ Gallinaro, S. (2012) “Dalla Corporate Social Responsibility alla Corporate Political Accountability” *Impresa Progetto- Electronic Journal of Management* Vol. 2.

⁸⁵ Molteni, M. (2007) “Gli stadi di sviluppo della CSR nella strategia aziendale” *Impresa Progetto- Online Magazine DITEA*, Vol. 2.

⁸⁶ Mirvis, P. and Googins, B., (2006) “Stages of Corporate Citizenship” *California Management Review*, Vol. 48 No. 2, p. 106.

⁸⁷ 2016 Edelman Trust Barometer.

⁸⁸ Clapham, A. (2006) “Human Rights Obligations of Non-State Actors” Oxford: Oxford University Press, p. 9.

⁸⁹ United Nations Global Compact, (2000) “The Ten Principles of the UN Global Compact”.

so, however, had no legal significance nor legal implications deriving from it. Similarly, the OECD Guidelines⁹⁰ were also drafted as implementation mechanisms on States from which derived no legal accountability, nor remedies or compensation, unless the company voluntarily accepted to participate to a friendly settlement with the National Contact Point- whose intimidating and pressuring role was actually limited. Briefly, those guidelines were merely a developing mechanism that allowed civil society to confront corporations with complaints about their behaviour, however lacking legal implications. Moreover, the UN Norms that predated Ruggie in 2003 were also drafted as plain guidelines, though were criticised for adopting a predominantly conceptual approach and failed to be clear in distinguishing between the human rights obligations of States and those of companies, therefore polarising human rights duties of businesses limiting them to the same duties of states. Yet, the UN Norms helped adding historical value to the issue of business and human rights, recognising the need to work further in this direction to obtain and implement effective enforcement and accountability mechanisms in order to protect people from businesses' abuses.⁹¹

2.2.1 The UN Guiding Principles:

Finally, from 2011 we witness a real change in the field: with the elimination of the voluntary element of social responsibility. The "*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*" were proposed by the UN Special Representative John Ruggie⁹² and endorsed by the UN Human Rights Council.⁹³ Following the Framework, his mandate was to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights"⁹⁴ based on three core pillars:

⁹⁰ OECD, "Guidelines for Multinational Enterprises", 1976, 2000, 2011.

⁹¹ Feeney, P. (2009) "Business and human rights: the struggle for accountability in the un and the future direction of the advocacy agenda", Sur. Revista Internacional de Direitos Humanos, Volume 6, No.11

⁹² UN Human Rights Council (2008) 'The "Protect, Respect and Remedy" Framework'

⁹³ Business & Human Rights Resource Centre, available at: <https://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles>

⁹⁴ UN Commission on Human Rights, (2005) "Human rights and transnational corporations and other business enterprises" E/CN.4/RES/2005/69

1. the state duty to protect against human rights abuses by third parties, including business;
2. the corporate responsibility to respect human rights; (including the duty to act with due diligence to avoid human rights abuses and address adverse impacts)
3. greater access by victims to effective remedy, both judicial and non-judicial.

However, despite its developing nature from a voluntary activity to a mandatory corporate behaviour, CSR still retained limitations with regards to the legislative measures - of non-binding nature- governing those practices. Here originates the next discussion: *“does adopting voluntary, non-binding recommendations, with no independent monitoring process, really constitute evidence of ‘success’?”*⁹⁵

According to Ruggie, in order to achieve change, it was necessary to insist on the *cumulative process* identified at the basis of those principles. Namely, the State, Companies and the public are interrelated and governing together. As a result, the first international standards of business and human rights were drafted, with the goal of preventing human rights abuses and remediating to damaging impacts deriving from businesses, without creating new binding regulations claiming to solve legal gaps. Instead, they were conceived as an extension and re-interpretation of already existing international human rights instruments.⁹⁶ For instance, the duty to protect in international law has been deployed multiple times in the context of genocide; to see it imposed upon enterprises, undoubtedly marks a meaningful turning point, although it still lacks remedies and enforcement mechanisms that are granted under criminal law.⁹⁷

When facing criticism of the Principles and their efficiency, Ruggie explained his approach as a *“principled form of pragmatism: an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it*

⁹⁵ Bittle, S. and Snider, L. (2013), “Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?” *Critical Criminology* Volume 21, Issue 2, pp. 177–192

⁹⁶ Ruggie, J.G. (2007) ‘Business and Human Rights – The Evolving International Agenda’, *American Journal of International Law*

⁹⁷ Hejny, H. (2015) “Corporate Social Responsibility & Human Rights. A critical review of the Guiding Principles on Business and Human Rights for implementing the UN “Protect, Respect and Remedy” Framework, *International Law Blog*, March 2015

matters most – in the daily lives of people".⁹⁸ He declares that the principles were always conceived as a starting point for further developments of the law, and never promoted as a definite solution to an ongoing problem. Therefore, rather than identifying the controversies related to their coerciveness and their lack of binding nature as an excuse to question the validity of the whole work, perhaps it would be more appropriate to develop alternative means to combine and enhance corporate responsibility.

Academics have also discussed the possibility of retaining voluntary approaches and/or aim for a legally binding treaty. However, Ruggie insisted that rather than seeing the *"law as the preeminent and indispensable mechanism for social change"* it must be acknowledged that it can lead to successful results *"in the right quantities and in the right combination with other factors."*⁹⁹

This introduces a third aspect of this research: the extension of CSR and Ruggie principles to all private NSAs, like NGOs, to bring all agents on the same level of duties and obligations. On those grounds, Noh¹⁰⁰ suggests the possibility for a shift from mainstream CSR and its limitations, in favour of an alternative human-rights-based approach that focuses more on the local engagement of corporations and their human rights involvement. This point can be highlighted as a key problem that academics often fail to consider when discussing CSR. Briefly, if rather than being limited to merely delivering services like human rights advocacy, NGOs worked more on empowering and educating communities at a local level, this would extend their duties and improve the situation extraterritorially.¹⁰¹

⁹⁸ Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/2006/97, 2006, para. 81

⁹⁹ Mares, R. (2012) "Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress" in R. Mares (ed.), *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation*, Martinus Nijhoff Publishers, p. 30.

¹⁰⁰ Noh, J.E. (2017) "The role of NGOs in Building CSR Discourse around Human Rights in Developing Countries" *Cosmopolitan Civil Societies: an Interdisciplinary Journal*, Volume 9, Issue 1, pp. 1-19.

¹⁰¹ *Ibid*, p.14.

2.2.2 Extraterritoriality:

Legislation governing extraterritoriality is, however misleading. Article 2(7) of the United Nations Charter¹⁰² declares that States do not owe legal protection outside its jurisdiction, therefore it is hard to establish states' obligations to prevent and punish corporate human rights violations committed abroad, as to do so would be contrary to the principle of non-intervention. Nonetheless, following the Maastricht Principles:

*"All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, (...) such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures."*¹⁰³

there are instances when states can enforce their own domestic law extraterritorially. Briefly, international instruments lacking jurisdiction clause, can be a starting point to enforce extraterritorial jurisdiction towards enhanced accountability - territorial jurisdiction is the rule, extraterritoriality is the exception.

At the same time, a change in approach needs to be adopted with regards to corporations too, profiting of the fact that *"from a legal point of view companies are state creations. Although [...] operated in a purely private manner [...] they need the initial approval of the state to be able to operate at all."*¹⁰⁴ Thus, if we combine extraterritorial civil society action, with an optimisation of the degree of control that States retain at the initial stage of a company's establishment, we can achieve an innovative contribution. It would be an excellent opportunity to include the human rights and all that derives from it from a preliminary stage, *"before [corporations] may be listed on the stock exchange, enter into a procurement contract, or invest overseas"*¹⁰⁵ and monitor actions and responsibilities right from the start, before they acquire power and influence to circumvent those regulations, and especially, before they extra-territorialise their

¹⁰² United Nations, Charter of the United Nations, 24 October 1945,

¹⁰³ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, (2011) Principle 24.

¹⁰⁴ Bernaz, N. (2013) "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?" Journal of Business Ethics, 117, p. 497.

¹⁰⁵ Ibid, p. 497.

activities. Moreover, States hold responsibility over NSAs' actions as part of their due diligence duty. Therefore, States' retain obligations to prevent and punish human rights abuses committed by non-state actors within the territory of the State and if as a consequence of State's negligence (of acts or omissions) corporations' violations are permitted, States can be found guilty for the wrongful actions of corporations, due to their breach of their due diligence obligations.¹⁰⁶

This issue of corporations' regulation oversea is also tackled by the UN Principles, however explaining that: "*At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.*"¹⁰⁷ This demonstrates the volatile nature of the application of the Ruggie principles so far, and introduces a key question: if States were to exercise extraterritorial jurisdiction, would this be the answer to improve the general level of accountability of MNCs?¹⁰⁸

Some academics have expressed their views against extraterritorial jurisdiction, believing that it would only lead to more problems related to the imperialist approach of Western states' jurisdiction, being imposed on weaker governments and legislations, especially in developing countries.¹⁰⁹ Alternatively, suggestions have been put forward for the adoption of an international law instrument that regulates obligations for home States operating abroad and conveying remedies for victims overseas.¹¹⁰ Briefly, to recognise a State's obligation to monitor and prevent violations committed abroad reverses the maxim of law according to which: *states only have human rights obligations within their jurisdictions*¹¹¹ though it may help eventually attributing wrongful actions to a perpetrator and enhancing accountability.

¹⁰⁶ McCorquodale, R. and Simons, P. (2007) "Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", *The Modern Law Review*, Vol. 70, No. 4, pp. 598-625

¹⁰⁷ United Nations. (2011). *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework*, Principle 2.

¹⁰⁸ Bernaz, N. (2013) "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?" *Journal of Business Ethics*, 117:493-511

¹⁰⁹ Lena, J.S. and Mattei, U. (2001) "United States Jurisdiction over conflicts arising outside of the U.S. Some hegemonic implications" in 24 *Hasting International and Company Law Review*, 381.

¹¹⁰ de Schutter, O. (2006) "Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations" *Business & Human Rights Resource Centre*

¹¹¹ Bernaz, N. (2013) "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?" *Journal of Business Ethics*, 117, p. 503.

Further literature has departed from concerns of extraterritoriality, rather asserting that the way forward would be to set aside voluntary and non-binding recommendations, in favour of mandatory and enforceable human rights rules and responsibilities.¹¹² Others support the view of strengthening domestic law¹¹³ to solve the issue of governance gaps and filling in the holes of international governance by means of national laws and internal regulations, even though the literature on the domestic measures with extraterritorial implications applicable by states to enhance corporate accountability is weak and the controversies on the unwillingness or incapacity of nation States to invest in strengthening domestic law are strong.¹¹⁴

Alternatively, De Schutter reinforces the need for a legally-binding international instrument in the area of business and human rights. To do so, he suggests four goals to aim the document should aim to achieve, namely:

- “(i) to clarify and strengthen the states’ duty to protect human rights, including extraterritorially;*
- (ii) to oblige states, through a framework convention, to report on the adoption and implementation of national action plans on business and human rights;*
- (iii) to impose direct human rights obligations on corporations and establish a new mechanism to monitor compliance with such obligations;*
- (iv) to impose duties of mutual legal assistance on states to ensure access to effective remedies for victims harmed by transnational operations of corporations.”¹¹⁵*

He argues that the need to strengthen inter-state co-operation to seek to remediate to human rights violations committed by corporate actors goes hand in hand with ensuring effective access to remedies for victims of transnational corporate crimes. He favours a combination of the first and the last goal and suggests that in order to move forward

¹¹² Steven Bittle and Lauren Snider, (2013), “Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?” *Critical Criminology* Volume 21, Issue 2, p. 189

¹¹³ Bernaz, N. (2013) “Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?” *Journal of Business Ethics*, 117.

¹¹⁴ Zerk, J. A. (2010), “Extraterritorial jurisdiction: Lessons for the business and human rights sphere from six regulatory areas”, *Corporate Social Responsibility Initiative Working Paper No. 59*, Cambridge, MA: John F. Kennedy School of Government, Harvard University.

¹¹⁵ De Schutter, O (2016) “Towards a New Treaty on Business and Human Rights”, *Business and Human Rights Journal*, 1(1), 41-67.

towards greater accountability of private non-state actors, greater investments are needed in reminding States of their extraterritorial duties and the actors they have influence upon outside their national territory.

Finally, although it can be argued that the Guiding Principles give leeway to several alternative solutions, rather than solving the issue *per se*,¹¹⁶ it is indispensable for the development of this area of law to keep encouraging alternatives such as the ones presented in this section, rather than debating above the worthiness of the area in general and question the validity of the work done so far. As evidence has shown, MNCs understanding and participation in corporate social responsibility is growing as an ever-expanding area gaining more exposure and relevance in corporate governance,¹¹⁷ especially since the launch of the EU CSR Directive.¹¹⁸ Perhaps, in order to prevent and redress violations of human rights to a greater and more inclusive extent, it is time that we emphasise the possibility of extending the interpretation of the obligations currently enacted on MNCs solely, to include non-state actors at large, as it will be exposed in the following section focusing on non-governmental organisations.

2.3 NGOs:

The widespread rise and influence of NGOs in recent years has brought, *inter alia* emerging questions concerning their accountability and the rights of those who enquire about it: the corporate, the State and the civil society.¹¹⁹ Civil society is a notion by which is defined “*the arena in which people come together to advance the interests they hold in common, not for profit or political power, but because they care enough about something to take collective action.*”¹²⁰ Briefly, the role of NGOs and their understanding is inescapably related to civil society, which will be the starting point of the discussion.

¹¹⁶ Hejny, H. (2015) “Corporate Social Responsibility & Human Rights. A critical review of the Guiding Principles on Business and Human Rights for implementing the UN “Protect, Respect and Remedy” Framework, International Law Blog, March 2015

¹¹⁷ Brysk, A. and Stohl, M. (2017) ” Expanding Human Rights: 21st Century Norms and Governance” Elgar Studies in Human Rights.

¹¹⁸ European Parliament, Corporate Social Responsibility (CSR) Directive, (2014/95/EU)

¹¹⁹ Gray, R., Bebbington, J., Collison, D. (2006), “NGOs, civil society and accountability: making the people accountable to capital”, Accounting, Auditing & Accountability Journal, Volume 19, Issue 3, p. 320.

¹²⁰ Edwards, M. (2000), NGO Rights and Responsibilities: A New Deal for Global Governance, The Foreign Policy Centre/NCVO, London, p. 7

The term non-governmental organisation was first mentioned in Article 71 in 1945 UN Charter,¹²¹ although lacking definition. Later, it was defined that NGOs represent the organisational and institutionalisation of the core of civil society, constituting “*autonomous, non-profit-making, self-governing and campaigning organisations with a focus on the well-being of others*”.¹²² What distinguishes those NSAs from their private and public counterparts (i.e. market and the State), is their purpose in global governance and value creation, which also reflects that of the civil society at large. NGOs’ work, in fact, aims at promoting and advocating rights and goals for society and the environment, rather obtaining enhanced economic performance, increased profit and political power. On those lines, we find the definition given by the World Bank, highlighting the difference in the purpose of their work. Accordingly, NGOs are private organizations “*characterized primarily by humanitarian or cooperative, rather than commercial, objectives... that pursue activities to relieve suffering, promote the interests of the poor, protect the environment, provide basic social services, or undertake community development*” in developing countries.¹²³

The UN also provided an internationally recognised definition, which, differently from the previous one, expands to listing the different tasks and activities, surrounding the area of practice of NGOs: “[...] *any non-profit, voluntary citizens’ group which is organized on a local, national or international level. Task-oriented and driven by people with a common interest, NGOs perform a variety of services and humanitarian functions, bring citizens’ concerns to Governments, monitor policies and encourage political participation at the community level. They provide analysis and expertise, serve as early warning mechanisms and help monitor and implement international agreements [...]*.”¹²⁴

What remains excluded from this definition, however, is the pivotal role they play in influencing corporate reputation within civil society, the media and the public opinion.

¹²⁵ They act by inferring pressure and push MNCs and the government to demonstrate

¹²¹ United Nations, Charter of the United Nations, 24 October 1945,

¹²² Gray, R., Bebbington, J., Collison, D. (2006), “NGOs, civil society and accountability: making the people accountable to capital”, Accounting, Auditing & Accountability Journal, Volume 19, Issue 3, p. 324.

¹²³ World Bank, (1981) “Involving NGOs in Bank-Supported Activities” Operational Directive 14.70

¹²⁴ United Nations (UN), (2003) “NGO committee concludes 2002 resumed session, with final recommendations on economic and social consultative status”, UN Press Release NGO/494.

¹²⁵ Brass, J.N. (2011) “Blurring Boundaries: The Integration of NGOs into Governance in Kenya” Governance: An International Journal of Policy, Administration and Institutions, Volume 25, Issue 2, pp. 209–235

good corporate governance as well as responsible ethical, social and environmental performance.¹²⁶ As a result, we can argue that the global business is allegedly monitored and regulated by the global civil society which, in turn, lacks regulations. On the other hand, however, NGOs retain such powers only so far as the State and the market allow it: they are limited and controlled in their actions and dependent on them for the authority that confers them jurisdiction over their actions.¹²⁷ This unclarity, therefore, raises concerns over the maxim of law ‘*Quis custodiet ipsos custodes?*’ – who guards the guardians? Specifically, considering the fact that it disposes of a larger budget than they ever used, it raises even greater questions over their financial accountability.¹²⁸

Yet, due to their close relationship with civil society and their role as public rights advocators, NGOs inquisition often escapes serious questioning, as their high rates and widespread levels of trust end up legitimising their actions and limiting their questionability. As demonstrated in the *2006 Edelman Trust Barometer*, NGOs “*have consistently been the most-trusted institution in Europe [and] has steadily increased in the U.S, Canada and Japan*”. Contrarily, business’ trust remained low due to a growing public suspicion on the ‘power of big business’, its ethical standards and corruption. Finally, the 2017 version of the Trust Barometer revealed that, although businesses managed to redeem themselves and reduce the trust-gap with NGOs, there is a general trust crisis affecting the world¹²⁹ that demonstrates the widespread lack of faith, belief and trust in the system, that constitutes the starting point to suggest the need to reframe responsibilities in a different direction, to enhance the levels of accountability.

2.3.1 Accountability:

¹²⁶ Nelson, J. (2007) “The Operation of Non-Governmental Organisations (NGOs) in a World of Corporate and Other Codes of Conduct” Corporate Social Responsibility Initiative, Working Paper No.34, Cambridge, p. 4.

¹²⁷ Gray, R., Bebbington, J., Collison, D. (2006), “NGOs, civil society and accountability: making the people accountable to capital”, *Accounting, Auditing & Accountability Journal*, Volume 19, Issue 3, p. 328.

¹²⁸ Brass, J.N. (2011) “Blurring Boundaries: The Integration of NGOs into Governance in Kenya” *Governance: An International Journal of Policy, Administration and Institutions*, Volume 25, Issue 2, pp. 209–235

¹²⁹ 2017 Edelman Trust Barometer, available at: <http://www.edelman.com/trust2017/>

As a result of what has been discussed above, we started to move in a different direction. The American Enterprise Institute (AEI) openly started to lead strong accusations towards NGOs, their scarce accountability reports, regulatory framework and their role undermining State sovereignty and democracy. This resulted in a general demand on behalf of the media, companies and stakeholders for proof of honesty and transparency “to better account for both the impact and integrity of their own activities”¹³⁰ as well as demanding greater scrutiny, aiming at ending the tendency to blindly trust NGOs’ claimed mandate to ‘act for the public good and do no harm.’¹³¹

Three main accountability-related questions, therefore emerged, (as reported in the table below), for NGOs to respond on the grounds of: effectiveness, reliability and legitimacy.¹³²

What kind of question?	Effectiveness	Reliability	Legitimacy
Who is asking?	Donors	Donors	Political Opponents
	Governments	Sector Associations	Advocacy partners
		Partners	Academics

What Questions, who is asking?

Jordan (2006), p.8¹³³

Firstly, to inquire upon the effectiveness of an NGO equals to questioning the quality and the quantity of the services they offer along with the responsiveness of the NGO in question. Especially with the recent changes in the global public policy that sees NGOs as partners and sometimes even substitutes to governments, accounts on how the money is spent are required. A second type of accountability questions concern the independence and the reliability of the organisation *per se*. Those aspects are related to the internal structure of the organisation and create clarity and horizontal accountability towards

¹³⁰ Nelson, J. (2007) “The Operation of Non-Governmental Organisations (NGOs) in a World of Corporate and Other Codes of Conduct” Corporate Social Responsibility Initiative, Working Paper No.34, Cambridge, p. 5.
¹³¹ Naidoo, K. (2005) “The End of Blind Faith? Civil Society and the Challenge of Accountability, Legitimacy, Transparency” AccountAbility Forum 2; 14-25
¹³² Jordan, L. (2006) “Mechanisms for NGO accountability” Global Public Policy Institute Research Paper Series No.3
¹³³ Available at: www.alnap.org/pool/files/jordan-lisa-05022005.pdf, last accessed 23/5/2017.

other organisations, aiming at enhancing the overall trust of the whole sector. Finally, the third and most controversial aspect, is that of legitimacy. Here are included “*ties to the public, transparency and adherence to the mission [...], representative status, relationship to community served, value base of the NGO, the relationship between NGOs and democracy or value to society*”¹³⁴ with intertwined issues of corruption, illegitimate partnership, and allocation of money to controversial funds.

Moreover, NGOs inquire on accountability and democratic practices of governance of other actors, yet they themselves lack democratic recognition and clearly defined regulations.¹³⁵ As Michael Edwards, from the Foreign Policy Centre in fact commented: “The challenge for NGOs is to show that they can put into practice the [accountability] principles that they campaign for in others.”¹³⁶

Finally, by nature of the activities that they undertake, such as *public management, partnership with corporations, trust-building networking and activism*,¹³⁷ NGOs are often created and mostly supported by international institutions, the State and corporations. They have become *de-facto* partners of States and the profit-seeking sector due to their role “*in the establishment of global norms and standards, negotiating, influencing and proposing policy solutions to social public problems*”¹³⁸ that sometimes it is hard to distinguish them from the State; whilst, at the same time, becoming partners to big companies and implementing policies and that are closer to private corporate strategies than public governmental ones.¹³⁹

This highlights the fine line that separates NGOs from being a partner (PPPs) to those actors, whilst at the same time retaining the trust of civil society whose rights they

¹³⁴ Jordan, L. (2006) “Mechanisms for NGO accountability” Global Public Policy Institute Research Paper Series No.3, p. 7-8.

¹³⁵ Ibid, p. 6.

¹³⁶ Edwards, M. (2000) ‘Victims of their Own Success’ *Guardian Weekly*.

¹³⁷ Kaldor, M., Anheier, H. and Glasius, M. (2003), “Global civil society in an era of regressive globalisation”, in Kaldor, M., Anheier, H. and Glasius, M. (Eds), *Global Civil Society*, Oxford University Press, Oxford, pp. 3-33.

¹³⁸ Jordan, L. (2006) “Mechanisms for NGO accountability” Global Public Policy Institute Research Paper Series No.3, p. 5.

¹³⁹ Kamat, S. (2003), “NGOs and democracy: false saviors of international development”, *Harvard International Review*, Vol. 25 No. 1, p. 67

advocate to be protecting.¹⁴⁰ As a result, we witness the ambiguities that derive from their work, followed by the double burden of responsibility they bear. This has inevitably been moving concerns on behalf of both the corporate and society who cultivated feelings of suspicion and mistrust, but has also moved two separate lines of thought between academics: those in defence of non-profit accountability¹⁴¹ and those who recognise the scope of imposing accountability mechanisms on NGOs as a helpful tool rather than a threat.¹⁴²

A similar twofold discussion has also been subject of debate, concerning the effectiveness of the aid provided by NGOs, the impact of foreign aid and the ability of NGOs to achieve their ultimate goal of social justice and improved development.¹⁴³ However, for the purposes of this research the discussion will be limited to the accountability aspect.

For instance, Grey et al¹⁴⁴ claim that their argument is not based against NGOs' accountability *per se*, but rather on the origin of the demand for accountability. The first claim they make concerns the lack of sufficient evidence on NGOs in the accounting literature. Moreover, they disclaim the charge that "[NGOs] have acquired the high moral ground of public opinion without being subject to the same public scrutiny given to corporations and governments"¹⁴⁵ and instead defend NGOs accountability by taking a debatable approach. Namely they argue that when comparing the scale of resources commanded by corporations with those merely available to NGOs, the gap is so huge that they believe that prior to digging further into the realm of NGOs, the focus should be placed on profit-seeking organisation failing their accounts and disguising in NGOs for convenience. By convenience it is meant that corporations ground their success by

¹⁴⁰ Gray, R., Bebbington, J., Collison, D. (2006), "NGOs, civil society and accountability: making the people accountable to capital", *Accounting, Auditing & Accountability Journal*, Volume 19, Issue 3,

¹⁴¹ See Zadek; Gray.

¹⁴² See Jordan; Unerman and O'Dwyer.

¹⁴³ See Banks, N., & Hulme, D. (2012) *The role of NGOs and civil society in development and poverty reduction*, BWPI Working Paper 171. Manchester: The Brooks World Poverty Institute; Green, Duncan (2012) *From Poverty to Power: How active citizens and effective states can change the world*, 2nd ed. Rugby, UK: Practical Action Publishing and Oxford: Oxfam International.

¹⁴⁴ Gray, R., Bebbington, J., Collison, D. (2006), "NGOs, civil society and accountability: making the people accountable to capital", *Accounting, Auditing & Accountability Journal*, Volume 19, Issue 3,

¹⁴⁵ SustainAbility (2003), *SustainAbility The 21st Century NGO: In the Market for Change*, SustainAbility/The Global Compact/UNEP, London, p. 7.

avoiding and circumventing human relationships and therefore responsibilities. Briefly they argue that: *"the relationship between a company and its other stakeholders is one of distance and complexity [whereas] NGOs are the very essence of closeness"*¹⁴⁶ - what they define as the root to the general struggle between civil society and capital over adequate accountability.

From this they derive the idea that the greater the closeness between the institution and its audience, the lesser the need for formal systems of accountability and that therefore NGOs should be less answerable and discharged from the unnecessary burden of formal accountability. As Zadek explains: *"accountability to intended beneficiaries tends to be informal, and too often weakly (mis)specified in law. Accountability to funders is often far too formal and over-bureaucratic."*¹⁴⁷ They support the view that, instead, civil society organisations hold accountability under different ways: corporations have big financial profit to hold accountability for and be transparent in their managing, whereas NGOs already hold even greater responsibility by providing more evidence for their accountability over non-economic factors such as their means and promises towards society at large, in what they define as *"procedural as opposed to substantial accountability."*¹⁴⁸ Along those lines, accountability mechanisms should be developed so as to specifically suit the organisation in question, rather than arbitrarily applying the same standards to all actors,¹⁴⁹ as this would lack fairness and reliability and would not obtain worthy accounts.¹⁵⁰

However, on the other hand, having established the similarities between NGOs and MNCs and the great extent of influence that NGOs bring about, it would seem disproportionate to limit their degree of accountability to mere trust and non-economic

¹⁴⁶ Gray, R., Bebbington, J., Collison, D. (2006), "NGOs, civil society and accountability: making the people accountable to capital", *Accounting, Auditing & Accountability Journal*, Volume 19, Issue 3, p. 336.

¹⁴⁷ Simon Zadek, (2003) "In defence of non-profit accountability", *Ethical Corporation magazine*, September 2003, p. 34.

¹⁴⁸ Gray, R., Bebbington, J., Collison, D. (2006), "NGOs, civil society and accountability: making the people accountable to capital", *Accounting, Auditing & Accountability Journal*, Volume 19, Issue 3, p.334.

¹⁴⁹ This raises concerns over the notorious distinction between equity and equality in international law: means and tools adopted in order to achieve social justice may well differ, yet the final outcome must be the same.

¹⁵⁰ Unerman, J., O'Dwyer, B. (2006), "Theorising accountability for NGO advocacy" *Accounting, Auditing & Accountability Journal*, Vol. 19 Issue 3, pp. 349-376.

factors: to do so will give leeway to compromising episodes such as Amnesty International's sedition accusations¹⁵¹ and Greenpeace financial scandal.¹⁵²

Unerman and O'Dwyer, in fact, insist on this issue. They argue that, contrarily, from what supported by Gray et al, due to the high level of trust that governs the work of NGOs, they hold "*even greater duties of accountability because these powerful stakeholders are less likely to demand accountability from an NGO which they unquestioningly trust.*"¹⁵³ Moreover, they identify three categories of people to whom accountability is owed: organisations' owners; stakeholders who retain the power to influence the organisation's values; everybody impacted by the organisation's actions. Controversially, they sustain that academic literature has demonstrated that those theoretical positions have been developed and implemented within the corporate world, and that it is time for non-profits to also follow the same guidelines of organisational accountability. Finally, they conclude that greater transparency within NFPOs would help dismiss accusations and reduce the possibility for corporations to refuse to work on their own accountability issues, as "*[corporations] could no longer complain that it is unreasonable for them to be required to meet social responsibility and accountability standards which are not being implemented by NGOs.*"¹⁵⁴ What emerges from this discussion is the ongoing circle of dispute between FPOs and NFPOs on disclaimers and arguments on who should lead the way to enhanced accountability and transparency.

Yet, NGOs hold multiple reasons to embrace accountability debates and give example. Firstly, the scope of accountability mechanisms serves to help setting standards and parameters of comparison, as well as establishing duties and define expectations who will allow the public's evaluation of the organisation. Secondly, this will strengthen the role and the reputation of NGOs as well as, allowing them to set their own standards and

¹⁵¹ Al Jazeera, <http://www.aljazeera.com/news/2016/08/amnesty-international-accused-sedition-india-160818081440628.html>- Please note that Amnesty International has also been subject to t-shirts scandal, according to which some t-shirts used for their campaigns were also fabricated in sweat-shops. At the time of writing articles seem to be no longer available online on this matter.

¹⁵² Vaughan, A.(2014) "Greenpeace losses: leaked documents reveal extent of financial disarray" The Guardian, available at: <https://www.theguardian.com/environment/2014/jun/23/greenpeace-losses-financial-disarray>

¹⁵³ Unerman, J., O'Dwyer, B. (2006), "Theorising accountability for NGO advocacy" Accounting, Auditing & Accountability Journal, Vol. 19 Issue 3, p. 369.

¹⁵⁴ Ibid.

define their own transparency parameters, rather than awaiting the impositions that may succumb from more powerful actors.¹⁵⁵

2.3.2 Regulatory framework:

This section proceeds to evaluate the regulatory framework of NGOs taking into account their established lack of legal personality and questioning the legislation that regulates and monitors their activities. Generally speaking, NGOs are registered entities, some of which pay taxes whilst others are exempt, and on a national level are bound by the laws of the country of registration.¹⁵⁶ However, complications and legislative loopholes arise when their actions extend internationally as, somehow, both international standards and national legislation must be respected.¹⁵⁷

The work of NGOs contributes to the development of international law, by means of judicial application and interpretation as well as enforcement. Specifically, they contribute to the promotion and monitoring of international norms, guaranteeing accountability and democratic legitimacy in decision-making, especially in cases of *deficit* on behalf of States. In order to do so, NGOs participate contributes towards the drafting of treaties and agreements to improve the overall conditions of human rights and social justice, whilst providing tools and processes for complaints. Yet, there is a lack of academic literature on the specificities of binding and non-binding but guiding documents that help them and hold them accountable. This leads the conversation to the next section, where it will be explored the possibility of extending the scope of the Ruggie Principles to NGOs: this constitutes a hypothesis to suggest alternative means to strengthen the responsibility of civil society actors.

¹⁵⁵ Jordan, L. (2006) "Mechanisms for NGO accountability" Global Public Policy Institute Research Paper Series No.3, p. 11.

¹⁵⁶ Birò, G. and Motoc, A.I. (2005) "Working Paper on Human Rights and Non-State Actors", UN doc- E/CN.4/Sub.2/2005/40, 11 July 2005, para 40.

¹⁵⁷ OHCHR, " Report of the Special Rapporteur on the Situation of human rights in the Sudan " E/CN.4/1994/48

2.3.3 Extending the Ruggie Principles:

After assessing the UN Guiding Principles (UNGP) and their impact on businesses, this research draws the attention to the potential applicability of the Ruggie Principles with regards to Non-Governmental Organisations.

Starting with Principle 14 of the UNGPs:

“The responsibility of *business enterprises* to respect human rights applies to *all enterprises regardless of their size, sector, operational context, ownership and structure*. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.”¹⁵⁸

Beginning by looking at the definition of those entities to whom the responsibilities apply, it can be noticed that, although the principles were originally drafted with regards to for-profit enterprises, it seems that nothing withholds the possibility of the same principle to be extended and applicable to NGOs. In fact, by omitting the international element and, instead, including all enterprises regardless of their size and regardless of whether the company is State owned or privately owned with shareholders, it gives leeway to the possibility of also including NGOs and impose on them an express duty to comply with the human rights standards that have been set. Of course, the ways in which small domestic companies and big multinational corporations will have to comply with the requirements, will differ and so will the expectations on their reports. Hence, by acknowledging the fact that although the means of implementation vary, but the level of legal applicability remains the same, regardless of the scope there appear to be no objections under which an extension may not be subject to further discussion.

Secondly, with regards to the first pillar, the State’s duty to protect human rights would apply equally when protecting citizens from NFPOs. Specifically, if we analyse UNGP 4:

“States should take additional steps to protect against human rights abuses by *business enterprises* that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment

¹⁵⁸ United Nations, (2011), Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework, Principle 14, *Emphasis added by the author*.

insurance or guarantee agencies, including, where appropriate, by *requiring human rights due diligence*.”¹⁵⁹

As discussed at the beginning of the chapter, NGOs are often supported by the State and its collaborators in several occasions. This close tie with the government, should suggest the need for State’s even greater scrutiny of NGOs, in order to prove to the international community, the efficiency of its responsibility to protect, applying equally to FPOs and NFPOs. This, would set aside potential concerns of bias, or doubts concerning the reliability of both State actions and NGOs hiding behind government’s support.

Moreover, if we consider that the mere difference between the two NSAs lays within the declared profit seeking of the first and the *pro bono* activities declared by the second, it emerges that the words “business enterprises” in the UNGP could be substituted by “organisations” without changing the scope of the document, but rather extending its application and moving forward towards extending the degree of responsibility. Yet, the evidence found on the exceptional steps taken by States so far to protect people from NGOs is scarce and so are the accounts of human rights due diligence submitted by NGOs.

A third point is found throughout Pillar 2, concerning company’s responsibility to respect human rights and people’s dignity along with it. For instance, the guidelines given in UNGP 13:

“The responsibility to respect human rights requires that *business enterprises*: (a) *Avoid causing or contributing* to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) *Seek to prevent or mitigate* adverse human rights impacts that are *directly linked to their operations*, products or services by their business relationships, even if they have not contributed to those impacts.”¹⁶⁰

The same regulations on the type of involvement of MNCs could apply to the work done by NGOs. This is perhaps the most controversial aspect of the established parallel between those two NSAs: the focus on the involvement is limited to MNCs as they are

¹⁵⁹ United Nations, (2011), Guiding principles on business and human rights: Implementing the United Nations “Protect, Respect and Remedy” framework, Guiding Principle 4, *emphasis added by the author*.

¹⁶⁰ United Nations, (2011), Guiding principles on business and human rights: Implementing the United Nations “Protect, Respect and Remedy” framework, Guiding Principle 13, , *emphasis added by the author*.

associated with the perpetrator of violations, whereas NGOs, presumably acting for the public good, do not need express regulations on those grounds. Contrarily, this paper wishes to give way to more research on the effective levels of involvement that NGOs have, especially overseas, to subject them to Human Rights Impact Assessment (HRIAs) to the same extent of MNCs. As specified in UNGP 18, HRIAs are aimed at obtaining specific knowledge of a company's interaction and involvement in cause, contribution and linkages¹⁶¹ of their actions to the adverse impacts, in order to know best how to manage its engagement and its relations with subsidiaries.

Bittle & Snider, in fact, explain that the focus of the principles should change and their application extended. Instead of attempting to track down merely MNCs and protect individuals and communities from their harmful acts; perhaps international human rights initiatives should start by monitoring more intensively the work done by NGOs in helping communities and protecting their rights. This should play a crucial role in empowering them in loco, in order to become independent and powerful actors, capable of defending themselves in the long term, instead of being constantly depending on external help to protect themselves from corporate exploitation.¹⁶²

This phenomenon is also known as humanitarian "truck and chuck."¹⁶³ Briefly, unloading trucks with goods and needs and providing mere relief and charitable work does not correspond to civil society's expectations of the work done by humanitarian organisations. Namely, is the work done by NGOs to remediate and deal with humanitarian crisis effective in its nature? Evidence has shown that in many instances the work done often results into mere disruptive charitable work whose end goal is not steered towards the self-sustainment and independence of those helped, but rather a limited provision of a charitable service.¹⁶⁴

¹⁶¹ United Nations, (2011), Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework, General Principle 13.

¹⁶² Steven Bittle and Laureen Snider, (2013), "Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?" *Critical Criminology* Volume 21, Issue 2, p. 189

¹⁶³ Steve Archibald and Paul Richards, (2002) "Seeds and Rights: New Approaches to Post-war Agricultural Rehabilitation in Sierra Leone", *Disasters*, Volume 26, Issue 4, Blackwell Publishers Ltd, pp. 356- 367

¹⁶⁴ Ed Schenkenberg van Mierop, (2004) "UNHCR and NGOs: Competitors or Companions in Refugee Protection?" *Migration Policy Institute*, available at: <http://www.migrationpolicy.org/article/unhcr-and-ngos-competitors-or-companions-refugee-protection>

Perhaps the matter is the change of approach rather than the need for strengthened help. For instance, integrating the common law issue of negligence applicable to corporations, would also contribute clarifying NGOs responsibilities, applying duty of care, causality and harm principles. As demonstrated by the *ratio* of the case of *Chandler v Cape*¹⁶⁵: if the foreseeability of the harm is established; proximity between claimant and defendant (in this case NGOs and the communities in question) is close enough and it is deemed fair to impose a duty on the organisation (an NGO for our purposes), then no defence for failed action can be granted. Perhaps, as the long-term goals of the work of NGOs remains questioned, NGOs should “*take advantage of their traditional strengths to build bridges between grassroots organizations and local and national-level structures [...] to strengthen their roles in empowerment and social transformation.*”¹⁶⁶

This could be a turning point to enable legislative reform that truly protects the life, human rights and sustainability of local and indigenous people, from the adverse impacts of corporations, but also NGOs, who, perhaps even more misleadingly, claim to act in their defence, although their actions impact on them negatively.¹⁶⁷ This could be a potential solution to increase the cumulative progress in business and human rights, instituting “*an authoritative focal point around which actors’ expectations could converge*”¹⁶⁸ and end the continuous cycle of blame between corporations and NGOs in discharging their respective responsibilities.

Briefly, this chapter explored the similarities between NGOs and MNCs, as well as the existing differences constituting their governing legal framework. It opens the discussion for new ways of enhancing NGO accountability, such as extending the Guiding Principles drafted by Ruggie. By adopting a regulatory framework the aim is to overcome the existing legal gap and impose equal obligations to all NSAs. The next section will assess the work of humanitarian NGOs in the light of their responsibilities, based on their relationship with the UN High Commissioner for Refugees.

¹⁶⁵ *Chandler v Cape* [2011] EWHC 951 (QB); [2012] EWCA Civ 525

¹⁶⁶ Banks, N., & Hulme, D. (2012) “The role of NGOs and civil society in development and poverty reduction”, BWPI Working Paper 171. Manchester: The Brooks World Poverty Institute

¹⁶⁷ Jamali, D. (2014), ‘CSR in developing countries through an institutional lens’, *Corporate Social Responsibility and Sustainability: Emerging Trends in Developing Economies*, vol.8, pp. 21-44.

¹⁶⁸ Office of the UN High Commissioner for Human Rights (OHCHR) ‘The UN “Protect, Respect and Remedy” Framework for Business and Human Rights’ (OHCHR, September 2010)

Chapter 3- UNHCR and NGOs

The scope of this section is to analyse the role of NGOs' inter- governmental counterpart: The United Nations High Commissioner for Refugees (UNHCR), which can be labelled as the overall regulator and coordinator of NGOs and humanitarian action. The close relationship between UNHCR and NGOs, in fact, constitutes a vital element of humanitarian work and can be divided into two separate partnerships: *implementing partnerships* according to which the UNHCR provides NGOs with money for their programmes, and *operational partnerships*, dealing with the collaboration of the two entities for issues of emergency relief and resettlement, without the financial supported provided by the UNHCR. The choice of partnership is finalised to maximising benefits and cost-effectiveness of the use of resources.¹⁶⁹ Yet, despite the so close proximity, there are several radical differences laying in the difference in nature of the two organisations, that have an impact on both their legal personality and the consequences of their actions. Finally, having established that NGOs are lacking responsibility for the consequences of their actions, this section of the research discusses whether partnering with the UNHCR contributes to improve the refugee protection situation, as well as enhancing transparency and accountability towards an overall improved picture of humanitarian aid.

3.1 Humanitarian aid:

When talking of humanitarian response, we can classify two interrelated pillars: assistance and protection. The first deals with help brought to a population specifically affected by a disaster or a crisis (ie. refugees) whose main priority is to have their life saved; the latter, instead, deals with the protection of refugees' rights in compliance with international human rights and refugee law.¹⁷⁰ In doing so, the UNHCR acts instead of the State, when it is unable to deal with or meet the international obligations for doing

¹⁶⁹ UN High Commissioner for Refugees (UNHCR), NGO Partnerships in Refugee Protection. Questions & Answers, September 2007.

¹⁷⁰ Schenkenberg van Mierop, E. (2004) "UNHCR and NGOs: Competitors or Companions in Refugee Protection?" Migration Policy Institute, available at: <http://www.migrationpolicy.org/article/unhcr-and-ngos-competitors-or-companions-refugee-protection>

so, or when it willingly distances itself from those issues to escape responsibilities and fund other agencies- whether NGOs or Inter- Governmental Organisations (IGOs)- to deliver the service.¹⁷¹

Briefly, the threefold partnership between NGOs, Government and inter-governmental bodies should not be identified as a dependent and unbalanced cooperation. Yet, if it is true that there must be an increased place for NGOs within international affairs, and “NGOs should nor have to earn their place at the table through the development of unholy alliances that depend on NGOs ‘behaving themselves,’”¹⁷² then this must also translate into enhanced credibility and even greater responsibilities for NGOs to be accountable to.

As explained in chapter 2, the core difficulties in defining non-governmental organisations are rooted in their role as public society protectors, whilst at the same time being a private non-state actor of a similar origin to that of MNCs, yet bearing no express legal obligation. Differently, intergovernmental organisations:¹⁷³

- 1) They are, and act, as surrogates of States.
- 2) Differently from other NSAs they do retain international personality and therefore their status is, not so different from that of States, and quite different from that of non-state actors.
- 3) Their activities are seen as mainly benign and therefore their legitimacy and their role towards human rights is not questioned as much as that of NSAs.
- 4) Their entity is intertwined with human rights and the adherence to international law standards; they differ so much in nature with NSAs such as terrorist organisations and corporations that their inclusion with the term would appear more wrongful than appropriate.

Following the definition, transpires the reason why IGOs were not included in the classification explained in chapter 1, but rather integrated in this section separately. Holding positions and mandates similar to those of States, their legal personality and

¹⁷¹ Pallis, M. (2005) “The operation of UNHCR’s accountability mechanisms” New York University Journal of International Law and Politics Vol. 37 Issue 869.

¹⁷² Lester, E. (2005) “A place at the table: The role of NGOs in refugee protection: International advocacy and policy-making” Refugee Survey Quarterly, Vol. 24, Issue 2.

¹⁷³ Alston, P. (2005) “The ‘Not-a-Cat’ Syndrome: Can International Human Rights Regime Accommodate Non-State Actors?”, in Alston, P (ed), NON-State Actors and Human Rights, Oxford: Oxford University Press, p. 29.

their derived legal consequences move in a different direction to that of NSAs, especially under the accountability point of view. The next section, will, in fact, proceed to illustrate the different critics and ambiguities concerning the UNHCR as an IGO, to clarify the distinction in nature and its relationship with NGOs.

3.2 The UNHCR:

Established in 1950, the UNHCR assumed the original role of guarantor of human rights and protector of the interests of refugees, as charged by the 1951 Convention relating to the Status of Refugees¹⁷⁴ (1951 Convention). However, its role changed with the passing of years, muting into an advocate with similar role to that of states, taking care of those refugees stuck in a loop of statelessness, with no prospect of fully integrating in the host country, nor relocate elsewhere or be sent back. As a result, the UNHCR started to acquire increased power and responsibilities over refugees so as to transform into an organisation that holds similar features to those of states with: *its own territory (refugee camps), citizens (refugees), public services (education, health care, water, sanitation etc.) and even ideology (community participation, gender equality)*.¹⁷⁵ At the same time, the principle of 'state responsibility' - under which the State holds the primary responsibility for the welfare and management of refugees- became less relevant and rather weak.¹⁷⁶

From this allegation, in fact, derives the issue of 'protection' and the legal underpinnings of refugeehood. By definition, the 1951 Convention and the entire system of refugeehood is, in fact, based on the framework of state-centrism. Protection, and the status of refugee can be granted to a person “outside the country of his nationality”, with a “well-founded fear of persecution”, and who is “unable or [...] unwilling to avail himself of the protection that country”.¹⁷⁷ However, under the European Union Asylum law, and more specifically according to Article 7(1) of the Qualification Directive¹⁷⁸ it has recently

¹⁷⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189.

¹⁷⁵ Slaughter, A. and Crisp, J. (2009) “A surrogate state? The role of UNHCR in protracted refugee situations” UNHCR Research Paper No. 168, p. 8.

¹⁷⁶ Ibid.

¹⁷⁷ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, Article I(a) (2)

¹⁷⁸ European Council Qualification Directive, 2004/83/E, OJ 2004/L304/12.

been acknowledged that protection is no longer something to be granted by states exclusively, instead international organisations and other non-state parties can offer it as well. This raises controversial issues with regards to the overall current state of affairs, and the legal entitlement of the so called “non-state actors of protection” (NSAP), to the extent of reversing maxims of refugee law and question whether “*non state actors should now be recognised as providers of protection under international refugee law*”¹⁷⁹. Although allowing NSAs to provide protection seems controversial and in opposition with international refugee law, it has been criticised that to focus, instead, on the legalistic technicalities of state protection turns away the attention from the true issue: the protection of the individual at risk, rather than the capacity of the state of origin and that of arrival to provide protection.¹⁸⁰ The European Court of Justice, also expressed its opinion with regards to the interpretation of the EC Directive. In the case of *Abdulla and ors*¹⁸¹ it was established that the actors of protection in question in article 7 (1) of the EC Directive, “*may comprise international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in that territory*”. No details have been added with regards to the extent and legitimacy of the presence of the multinational force, as for instance the prerequisite of a mandate from the international community as suggested by Advocate General Mazàk in the case of *BVerG 10C 33.07*.¹⁸² Once again, the European legal system missed an occasion to clarify the broad nature of article 7(1) and failed to introduce a new level of accountability for international organisations.¹⁸³

Briefly, some prefer taking the approach of extending NSAS’ legal accountability by redefining their legal personality. The aim is to review the definition of ‘protection’ in favour of a more inclusive notion under international law.¹⁸⁴ However, the controversies related to the above discussed issue, related to the lack of international accountability of

¹⁷⁹ O’Sullivan, M. (2012) “Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?” *International Journal of Refugee Law* Vol. 24 No. 1, p. 87.

¹⁸⁰ G. Goodwin-Gill and J. McAdam, (2007) “The Refugee in International Law” (3rd edition, OUP), at 10.

¹⁸¹ *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: Court of Justice of the European Union, 2 March 2010.

¹⁸² Opinion of Advocate General Mazàk in Joined Cases C-175/08, C-176/08, C-178/08, *Bundesverwaltungsgericht (Federal Administrative Court, Germany)* 10 C 33.07, 7 Feb 2008.

¹⁸³ Maria O’Sullivan, (2012) “Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?” *International Journal of Refugee Law* Vol. 24 No. 1, p. 97.

¹⁸⁴ Nihman, J.E. (2010) “Non-state actors and the international rule of law: revisiting the ‘realist theory’ of international legal personality” *Amsterdam Centre for International Law Research Paper Series*.

NSAs remains unsolved. as much as the wide interpretation conveyed to those NSAs capable of granting protection. Yet, based on the modern practices of humanitarian intervention, it can be concluded that: "certain international organisations, such as the UN, *may* provide such protection, if they are acting as a *stable, state-like authority*, are supported by an international mandate and are acting in an agency relationship, that is in place of a 'failed state' or with the consent of the government in question."¹⁸⁵ Therefore, the legal implications of this result affect the immunity of the UNHCR, falling within the realm of those NSAs, who under the clause of article 7 (1) can afford protection and allegedly act for refugees, despite the fact that they that cannot be hold accountable under international law.

What is that, therefore, renders the UNHCR so special in its role? Differently from the UNHCR and the State, NGOs can only contribute to the protection and welfare of displaced people, although they do not owe a protection mandate themselves: they can merely assist and monitor the actions of States and the UN, becoming almost subcontractors.¹⁸⁶ Furthermore, by nature of the limitations of their role, we may also conclude that they become submissive to the UNHCR's policies,¹⁸⁷ which are, unequivocally limited and regulated by the wishes of governments and all the involved stakeholders. Instead they could campaign even beyond, and extend their role in protection of refugees to those areas where the UNHCR cannot reach due to its diplomatic and, therefore indirectly limited, mediatic role. As a result, further controversies surround the UNHCR, in relation to the fact that, although it classifies as a NSA under European refugee law, it also constitutes a *quasi-* governmental agency from the point of view of its extended cooperation with governments, at times reaching the point of almost substituting its role! Briefly, it may be deemed that the biggest challenge for the agency is to strike a balance between the desires of the multiple stakeholders and the interests of the refugees: this entails getting stuck at times and compromising the true efficiency of the partnership between NGOs and UNHCR, as well as undermining the

¹⁸⁵ Lord Plant of Highfield, at 11, UK House of Lords Select Committee on the European Union, Summary of Conclusions, "Defining Refugee Status and Those in need of International Protection", HL Paper 156, Session 2001-02, 28th Report in Maria O'Sullivan, (2012) "Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?" International Journal of Refugee Law Vol. 24 No. 1, p. 107.

¹⁸⁶ Ed Schenkenberg van Mierop, (2004) "UNHCR and NGOs: Competitors or Companions in Refugee Protection?" Migration Policy Institute.

¹⁸⁷ Eve Lester, (2005) "A place at the table: The role of NGOs in refugee protection: International advocacy and policy-making" Refugee Survey Quarterly, Vol. 24, Issue 2.

overall degree of accountability in the humanitarian sector and the efficacy of the current humanitarian response.

3.3 Criticism to the UNHCR:

Today, the refugee 'crisis' may be deemed to have affected and impacted upon almost all countries in the world. Whether by direct consequences of hosting or producing refugees, or by means of indirect interaction, the present refugee situation is widespread worldwide and led to identifying the UNHCR as the entity holding the preeminent role in humanitarian aid.¹⁸⁸ Yet, as introduced so far, establishing the role of this agency and assessing both its reliability and its responsibilities does not seem an easy task and, on the contrary, raises several issues on multiple grounds. In the following section, this paper will examine four different controversial aspects which question the overall efficacy of both the UNHCR and its partnership with both NGOs and the State.

3.3.1 Legal obligations:

As anticipated previously, the unclarity surrounding the status of the UNHCR, generate concerns on responsibilities and binding legal obligations. Generally speaking, it may be argued that *"an exercise of public power that directly affects the status of individuals should be subject to accountability mechanisms."*¹⁸⁹ Yet, poor decisive conclusions have been reached when determining whether there are any laws effectively binding the UNHCR. However, bearing in mind that the extensive mandate the UNHCR retains, the protection offered has been compared and found equivalent to that provided by States.¹⁹⁰ The implications of those statements, therefore lead to worrying conclusions that see high chances of human rights violations committed on behalf of the agency going unpunished, as well as having counts of transparency and accountability easily circumvented as a result of their unaccountable nature under international law. Specifically, *"the 1951 Convention arguably requires that protection will be provided not*

¹⁸⁸ O'Sullivan, M. (2012) "Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?" *International Journal of Refugee Law* Vol. 24 No. 1, p. 87

¹⁸⁹ Pallis, M. (2005) "The operation of UNHCR's accountability mechanisms" *New York University Journal of International Law and Politics* Vol. 37 Issue 869, pp. 870

¹⁹⁰ Karavias, M. (2015) "Non-State Actors in control of territory as 'Actors of protection' in International Refugee Law" *Amsterdam Law School Legal Studies Research Paper* N. 45.

by some legally unaccountable entity with de facto control, but rather by a government responsible for its actions as a matter of international law."¹⁹¹ The reasons for this are conspicuous: the State constitutes the most international obligations, rights and duties upon whom will depend those of other entities, which cannot be held legally responsible for their human rights transgressions.

More optimistic academics have expressed their reluctance and found misrepresentative to argue that the lack of human rights obligations directly translates into unaccountability,¹⁹² and that as a result, all actions of NSAs are circumscribed to a legal vacuum. In limited cases, customary international law has, in fact recognised that "*all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law*"¹⁹³, however this application is confined to a small number of limited scenarios. Finally, vexation in the sphere of customary human rights obligations is retained, due to the limited number of norms that therefore give advantage to *quasi-governmental* entities to avoid express international legal personality.¹⁹⁴

3.3.2 Protracted refugees:

The UNHCR's impact on refugees is given by its inputs on *refugee status determination* (RSD) and *refugee camp administration*.¹⁹⁵ RSD procedures must take place in compliance with article 14 of the International Covenant on Civil and Political Rights¹⁹⁶, despite the lack of literature establishing the customary international law status of the document, binding on the UNHCR directly, who may however monitor states' procedures as part of its supervisory role.¹⁹⁷ With regards to the administration of

¹⁹¹ Mathew, P., Hathaway, J.C. and Foster, M. (2003) "The Role of State Protection in Refugee Analysis" International Journal of Refugee Law Vol. 15 No. 3, Oxford University Press, p.453.

¹⁹² Karavias, M. (2015) "Non-State Actors in control of territory as 'Actors of protection' in International Refugee Law" Amsterdam Law School Legal Studies Research Paper N. 45.

¹⁹³ Prosecutor v Sam Hinga Norman (Case No SCSL-2004-14-AR72(E) Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, §22.

¹⁹⁴ Ronen, Y. (2013) "Human Rights Obligations of Territorial Non-State Actors", Cornell Journal of International Law, Vol. 46, p.47.

¹⁹⁵ Pallis, M. (2005) "The operation of UNHCR's accountability mechanisms" New York University Journal of International Law and Politics Vol. 37 Issue 869, pp. 877.

¹⁹⁶ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹⁹⁷ Pallis, M. (2005) "The operation of UNHCR's accountability mechanisms" New York University Journal of International Law and Politics Vol. 37 Issue 869, pp. 877

camps, host countries transfer complete control and cede their responsibility to the UNHCR: *"there is no practical difference between the exercise of authority by the UNHCR and that which the host state would exercise if it were capable."*¹⁹⁸

As a result of this 'laissez-faire attitude' enacted by States, UNHCR programmes started to encounter several obstacles. Specifically, from the 1990s a high number of refugees were subject to administration: refugee returns from Cold War exiles, responses to new crisis and a generally increased number of states producing new refugees. States kept acting as *power-wielders, with the UNHCR acting as the trustee who will perform the duties of office faithfully*,¹⁹⁹ however: local organisations and people of concern are not likely to criticise the work of the UNHCR (although limited) as it is their only source of survival, but with limited and often inadequate means and resources available,²⁰⁰ restricted power of governance and control over designated areas, and with more people on the move, new controversies reached the surface, nonetheless.

UNHCR programmes were forced to prioritise and inevitably started to focus less on certain people of concern: less attention was paid to ongoing situations of displaced people moving in no direction and stuck in long-term settlements.²⁰¹ Concerns above protracted refugees are currently ongoing, yet less information is given to the public and individual concerns and complaints of refugees are close to being nil.²⁰² Briefly, refugees play a superficial role of *"recipients of assistance and not as decision makers and judges of it."*²⁰³ Perhaps, to step away from the normalisation of those protracted situations, that further embrace the image of refugees being burdens for host countries, it is indispensable to engage more populations of concern in assessing the effective impacts

¹⁹⁸ Wilde, R. (1998) "Quis Custodiet Ipsos Custodes?:t Why and How UNHCR Governance of "Development" Refugee Camps Should be Subject to International Human Rights Law," Yale Human Rights and Development Journal: Vol. 1 : Iss. 1 , Article 5.

¹⁹⁹ Pallis, M. (2005) "The operation of UNHCR's accountability mechanisms" New York University Journal of International Law and Politics Vol. 37 Issue 869, pp. 877.

²⁰⁰ Turk, V. and Eyster, E. (2010) "Strengthening Accountability in UNHCR" International Journal of Refugee Law, Vol. 22, No.2, p. 164.

²⁰¹ Slaughter, A. and Crisp, J. (2009) "A surrogate state? The role of UNHCR in protracted refugee situations" UNHCR Research Paper No. 168.

²⁰² UN GOAR, Executive Comm. Of the High Commissioner's Programme, Report on UNHCR's oversight activities, § 76, UN Doc A./AC.96/976 (Aug. 5, 2003).

²⁰³ UNHCR, Evaluation and Policy Analysis Unit, A Beneficiary-Based Evaluation of UNHCR's Program in Guinea, West Africa, §99, EPAU/2001/02 (January 2001) by Tania Kaiser.

of UNHCR's programmes²⁰⁴ and move a step closer towards establishing firm accountability. Pallis,²⁰⁵ in fact, insists on this point and claims that in order to make the UNHCR more accountable, it is essential to move from mere evaluation of its actions, – that limit refugees to mere “beneficiaries of assistance” – to concrete accountability mechanisms which recognise refugees as “holders of inalienable rights.” Finally, “*human rights violations may occur even within organisations dedicated to the protection of these very rights,*”²⁰⁶ from direct infliction of inhuman or degrading treatment, to sexual exploitation and numerous human rights restrictions.²⁰⁷ Therefore in order to bring clarity to the legal obligations of IGOs in humanitarian aid, and specifically deal with the loopholes that exist in the administration of camps, refugees must be entitled to have expectations towards the UNHCR, in their respect and protection of welfare.

3.3.3 Compliance with the 1951 Convention:

Finally, the most controversial issue regarding the UNHCR, concerns the nature of the work done and the help provided. The first draft of the 1951 Convention, in protection of refugees was accompanied with the remarkable following statement, by the UN Secretary General: “*This phase [...] will be characterized by the fact that the refugees will lead an independent life in the countries which have given them shelter. [...] the refugees will no longer be maintained by an international organization as they are at present. They will be integrated in the economic system of the countries of asylum and will themselves provide for their own needs and for those of their families.*”²⁰⁸ Yet, sixty-six years later, very little has been accomplished, and instead the current condition of protracted refugee status, raises debates over the effectiveness of the help provided by IGOs that renders refugees still dependent on them.

As Hathaway explains, the problem of the current situation, is not rooted in the Refugee Convention itself, instead core issues arise from the approach that states adopt in its

²⁰⁴ Turk, V. and Eyster, E. (2010) “Strengthening Accountability in UNHCR” *International Journal of Refugee Law*, Vol. 22, No.2.

²⁰⁵ Pallis, M. (2005) “The operation of UNHCR’s accountability mechanisms” *New York University Journal of International Law and Politics* Vol. 37 Issue 869, p. 901.

²⁰⁶ Singer, M. (1995) “Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns, 36 VA. *Journal of International Law*, Volume 53, pp. 97-98.

²⁰⁷ Verdirame, G. and Harrell-Bond, B. (2005) “Rights in Exile: Janus-faced Humanitarianism”, pp. 319-324; 43.

²⁰⁸ UN Doc. E/AC. 32/2 (1950), Memorandum of the Secretary General, at 6, 7.

implementation. In fact, “denying mobility rights to refugees is a strategy that appeals to states that would prefer to avoid their international duty to protect refugees.”²⁰⁹ This allows them to provide an apparent demonstration to the international community of their engagement by building camps, whilst escaping responsibilities and perhaps criticisms.

However, refugees cannot be expected to gain independence and learn to realise themselves and be self-sufficient and contribute towards integration and economy of the hosting state, if they are locked away in segregated and remote areas, with restricted freedom of movement, away from the hub of cities that may allow them to find subsidiary means. As a recent study has demonstrated²¹⁰, there are emerging benefits from facilitating refugee freedom of movement: they can interact with the economy of the hosting country, bringing about beneficial outcomes in form of economic advantages and integration. Moreover, it has also emerged that, contrarily from what is reported by the media and spread within a high proportion of civil society, refugees value self-reliance above any other form of help. In fact, one of the widespread concerns within the refugee society relates to their worry of having to beg for help, issue that they are well aware of and that they themselves despise and use to stigmatise those people of concern who, instead, surrender to the extreme situation and ask for help.²¹¹ One potential answer lies within establishing a balance between giving help and needing help,²¹² and the Refugee Convention itself provides us with answers in this regard. “*It rejects a charity-based model in favor of refugee empowerment*”²¹³ and in the Preamble, we can highlight the recognition that “*the grant of asylum may place unduly heavy burdens on certain countries*”, so the an internationally efficient refugee system of protection “*cannot therefore be achieved without international co-operation.*”²¹⁴

²⁰⁹ Hathaway, J.C. (2016) “A global solution to a global refugee crisis”, openDemocracy, available at:

<https://www.opendemocracy.net/openglobalrights/james-c-hathaway/global-solution-to-global-refugee-crisis>

²¹⁰ Betts, A., Bloom, L., Kaplan, J., Omata, N. (2014) “Refugee Economies Rethinking Popular Assumptions”, Humanitarian Innovation Project, University of Oxford.

²¹¹ Ibid, p. 36.

²¹² Lester, E. (2005) “A place at the table: The role of NGOs in refugee protection: International advocacy and policy-making” Refugee Survey Quarterly, Vol. 24, Issue 2.

²¹³ Hathaway, J.C. (2016) “A global solution to a global refugee crisis”, openDemocracy, available at:

<https://www.opendemocracy.net/openglobalrights/james-c-hathaway/global-solution-to-global-refugee-crisis>

²¹⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, Preamble.

Finally, it is important to highlight one further feature of the misleading response to the refugee crisis. As a consequence of the characteristics and impacts discussed above, humanitarian help has also been heavily criticised for constituting a form of modern-day imperialism.²¹⁵ As Lester argues, perhaps it is time to set aside the archaic view of ‘them’ and ‘us’ and instead extend the view not only to what “we should or should not be doing in *their* countries, but also what insights *they* can give *us* about what should be happening in *our* own countries.”²¹⁶ Only then we can start to talk about effective accountability and sufficient legal personality, to start recognising a strong bond between IGOs, human rights law, *jus cogens* norms and international customary law to track responsibility for humanitarian aid. As the “*UNHCR holds governments to their promises, it is right to expect the UNHCR to be held to its own standards,*”²¹⁷ yet for real change to happen, it is essential to bind the UNHCR to actual international human rights standards, going beyond the mere expectation of it acting in good faith only based on its task of promoting human rights.²¹⁸

This chapter has added intergovernmental organisations to the discussion and analysed their interaction with NGOs when dealing with humanitarian aid. Moreover, it has been acknowledged the similarity between the mandate of IGOs and that of States, for instance when dealing with refugee protection, like in the case of the UNHCR. Accordingly, the following section will move on to look at one last entity NSAs relate to when dealing with humanitarian assistance: the State.

²¹⁵ Mutua, M. (2002), *Human Rights: A Political and Cultural Critique*, University of Pennsylvania Press

²¹⁶ Lester, E. (2005) “A place at the table: The role of NGOs in refugee protection: International advocacy and policy-making” *Refugee Survey Quarterly*, Vol. 24, Issue 2, p. 132, *emphasis added by the author*.

²¹⁷ Pallis, M. (2005) “The operation of UNHCR’s accountability mechanisms” *New York University Journal of International Law and Politics* Vol. 37 Issue 869, p. 875

²¹⁸ Megret, F. and Hoffman, F. (2003) “The UN as Human Rights Violator? Some Reflections of the United Nations Changing Human Rights Responsibilities, 25 *Human Rights Quarterly*, Volume 314, pp. 317-318.

Chapter 4- The State and NSAs

The fourth and final chapter explores the issue of failed responsibility and lack of accountability mechanisms for NSAs, in their specific relationship with the State, when providing humanitarian aid. In particular, the chapter will apply the theoretical framework analysed thus far, to the case of Italy. Italy, in fact, constitutes the entry point to Europe for refugees, and on its territory, it can be witnessed a high level of involvement of NGOs, and an intensive interaction with the State, coordinating and facing challenges as ultimate responsible for human rights protection. Moreover, since the Turco-Napolitano law, Italy has declared to be subjected to an immigration emergency.²¹⁹ Hence, this section will also look at the establishment of temporary reception centres hosting refugees and the legislative measures concerned and understand how those centres are managed and under which legal authority. Finally, the chapter will conclude with an evaluation of the recent scandals of the *Zuccaro case* and Capo Rizzuto hospitality centre, which, at the time of writing, are subject to main discussions in the Italian news.

4.1 State Protection:

As it may be recalled from the first chapter, changes in global governance have demonstrated a decreased power of States, in favour of a stronger role of NSAs and IGOs, acquiring always more independence and being less controlled by States. This transfer of power has been studied and understood as a new type of authority belonging to the 21st Century late modern society, where civil society reshapes its identity from “a passive object of government to be acted upon” to “both an object and a subject of government.”²²⁰ For the purposes of this chapter and the overall goal of this thesis, we will explore the consequences this has had, in the way States currently handle processes of asylum and relieve refugee plights along their ability and willingness to provide protection.

²¹⁹ Bonifazi, C., F. Heins, S. Stozza and M. Vitiello (2008), “The Italian transition from emigration to immigration country”, IDEA Project, December 2008.

²²⁰ Ole Jacob Sending Iver B. Neumann, (2006), “Governance to Governmentality: Analyzing NGOs, States, and Power” *International Studies Quarterly* Vol. 50 Issue 3, pp. 651-672.

As explained by Lord Hope in *Horvath v SSHD*, “*The general purpose of the [Refugee] Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community.*”²²¹ Briefly, other States besides that of origin can provide “surrogate” or “substitute” protection²²² although this is limited to situations in which a person “owing to well-founded fear of being persecuted [...] is outside the country of his nationality and is *unable* or, owing to such fear, is *unwilling* to avail himself of the protection of that country.”²²³

For what concerns the European Union, there has long been the goal of establishing a Common European Asylum System (CEAS).²²⁴ With the introduction of the recast Qualification Directive²²⁵ approved by the Council of the European Union,²²⁶ changes to the previous Qualification Directive²²⁷ were made. The definition of protection was amended and introduced new features: the ‘no well-founded fear’ approach in article 8(1) (a) referring to the denied refugee status on the grounds of no ‘well-founded fear’ or no ‘risk of serious harm’ and a “due-diligence” test, in function of an element of reasonableness in article 8(1)b, referring to the general circumstances of the host countries and those of the applicant²²⁸ meaning that “[A] person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.”²²⁹

²²¹ *Horvath v. Secretary of State for the Home Department*, [2000] UKHL 37, United Kingdom: House of Lords (Judicial Committee), 6 July 2000.

²²² Mathew, P., Hathaway, J., Foster, M., (2003) “The Role of State Protection in Refugee Analysis” *International Journal of Refugee Law* Vol. 15 No. 3, Oxford University Press, p.444.

²²³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, Article 1(A) (2).

²²⁴ Presidency Conclusions, Tampere European Council, 15–16 Oct 1999, Council Document SN 200/99 (Tampere Conclusions).

²²⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011

²²⁶ Press Centre of the European Council, ‘Asylum qualification directive: better, clearer and more harmonised standards for identifying persons in need of international protection’, 17435/11 PRESSE 445, 24 Nov 2011

²²⁷ Qualification Directive 2004/83/EC

²²⁸ UNHCR IPA Position Paper, ‘Relocating Internally as a Reasonable Alternative to Seeking Asylum – (the So-Called “Internal Flight Alternative” or “Relocation Principle”)', Feb 1999, paras 13–17.

²²⁹ UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’, UN doc HCR/1P/4/Eng/Rev.2, para 91

As a consequence, the notion of ‘protection’ in refugee law moves in different directions: it concerns the State of origin’s failure to provide protection from persecution and, on the other hand, regards the hosting country’s duty to protect the rights of arriving refugees seeking help under international law.²³⁰ In *Howarth v SSD*²³¹ the Court upheld the *ratio* in *Smirnov v MCI*²³² and applying the due diligence standard: to establish whether protection had been granted it was necessary to consider whether the state of origin had done all that it could reasonably be expected to do, rather than follow the ‘no well-founded fear’ standard, according to which one must prove that the applicant’s fear of being persecuted has ceased to be well-founded as a result of the state’s protection.²³³

However, taking into account the vagueness of reasonableness analysis and the strictness of the ‘well-founded fear’ approach, we can identify the origin of concerns that turn into doubts regarding the way treaties and international protection may bestow collaboration and harmony among EU member states.²³⁴ For instance, Hathaway et al²³⁵ believe due diligence not to suit the aim of refugee law, and add that it would rather contribute to the risk of accepting that “so long as the government of the home country has formal mechanisms of protection and be shown to be able and willing to use that machinery, the fact that the protective mechanisms do little or nothing to respond [...] is [...] legally irrelevant”.²³⁶ In fact, although the standards set by the recast Qualification Directive must also be present in domestic legislation, there are nonetheless diverging differences within State practice amongst the members of the Union.²³⁷

Another issue regarding the international rule of law and protection mechanisms is that of authority. Allegedly, only those entities bearing legal personality are entitled to offer

²³⁰ Karavias, M. (2015) “Non-State Actors in control of territory as ‘Actors of protection’ in International Refugee Law” Amsterdam Law School Legal Studies Research Paper N. 45, Issue 20.

²³¹ *Horvath v. Secretary of State for the Home Department*, [2000] UKHL 37, United Kingdom: House of Lords (Judicial Committee), 6 July 2000.

²³² *Smirnov v. MCI*, 1995 1 FC 780. (Can. F.C.T.D., Dec. 14, 1994), para 18.

²³³ *Bobrick v MCI*, 1994 85 FTR 13 (Can FCTD, 16 Sept 1994), para 17.

²³⁴ Eaton, J. (2012) “The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive” *Int J Refugee Law* Volume 24, Issue 4: 765-792

²³⁵ Mathew, P., Hathaway, J.C., Foster, M. (2003) “The Role of State Protection in Refugee Analysis” *International Journal of Refugee Law* Vol. 15 No. 3, Oxford University Press,

²³⁶ *Ibid.*

²³⁷ UNHCR, ‘Asylum in the European Union: A Study of the Implantation of the Qualification Directive’, Nov 2008; European Council on Refugees and Exiles, ‘The Impact of the EU Qualification Directive on International Protection’, Oct 2008.

protection, as the only ones, legalistically speaking, capable of being accountable and held responsible under international law.²³⁸ Thus, international law system lacks a clear structure within its norms to set the starting point for legal authority; it also lacks universal applicability and recognition of its norms and it provides no guidelines for NSAs behaviour, therefore failing to provide consistency within its application.²³⁹ Moreover, international courts lack centralisation and although the International Court of Justice may have jurisdiction over UN documents, it is not extended to expressly hearing complaints from individuals and NSAs against States. Nonetheless, NSAs may still hold greater power and influence than governments to the extent of holding positions closely similar to those of States- does this convey them the power to grant protection as well? Although States leave NGOs and IGOs freedom to process refugee practices, manage applications and maintenance needs, legally speaking they are not entitled to offer international protection as in case of wrongdoings, they cannot be held responsible. Finally, protection at national level results problematic from the point of view of its enforcement and interpretation differing from one country to another; and the international regime, also fails to bring clarity and ensure compliance.

4.2 Shared responsibility:

This leads the conversation to the issue of *shared responsibility* between States and non-state actors. So far, along this research, the subject to the key discussion has been the problem of holding NSAs accountable, despite their lack of international legal obligations. Jointly, we must also consider "*harmful actions by non-state actors in conjunction with states, irrespective of whether these actions constitute a breach of international obligation by either one of them.*"²⁴⁰ Consequentially, this broadens the interpretation of the term, beyond its *stricto sensu*, also including *shared accountability* by which we find "*multiple actors [...] accountable for a certain conduct without this conduct necessarily giving rise to responsibility in the formal and breach-based*

²³⁸ Azad Gardi v. Secretary of State for the Home Department, C/2002/0193; EWCA Civ 750, United Kingdom: Court of Appeal (England and Wales), 24 May 2002

²³⁹ Zarei, M.H. and Safari, A. (2015) "The Status of Non-State Actors under the International Rule of Law: A Search for Global Justice" Chapter 11, in C J G Sampford; Spencer Zifcak; Derya Aydın Okur (eds) Rethinking International Law and Justice, Routledge: Ashgate Publishing

²⁴⁰ d'Aspremont, J., Nollkaemper, A., Plakokefalos, I., Ryngaert C., (2015) "Sharing Responsibility Between Non-State Actors and States in International Law: Introduction", Netherlands International Law Review, 62 (1), p.51.

understanding of the term in international law."²⁴¹ In fact, d'Aspremont et al suggest that, due to the poor international and national dispute-settlement mechanisms and the limited framework of responsibility we retain, it may instead be more appropriate to shift the focus from binding international law norms that originate responsibilities, to standards that may also apply to NSAs, but work beyond the law of international responsibility. Briefly this would work out to be something similar to a contractual relationship between States and NSAs, recalling that suggested between States and private security companies, multinational corporations and armed groups, as a more promising way to establish an effective legal ground under which to find responsibility.²⁴²

Alternatively, at present the only document under which we may find guidelines on the responsibility of States towards the acts committed by NSAs, are the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),²⁴³ that ascribe the attribution of NSAs' conduct to States so long as close proximity and direct control elements are found. As a result, the conditions for attribution result rather strict and difficult to meet, this fails to include a high number of situations part of the present state of affairs, often failing to find responsibility and circumvent accountability claims. Instead, standard setting would approach the issue from a broader point of view, enabling regulation (by setting norms, limitations of scope and establishing responsibilities), as well as accountability (defining monitoring and standards compliance as well as protecting the binding nature of the agreement) that leads to extended responsibility.²⁴⁴

One last aspect I would like to face, prior to introducing the specific context-based case of Italy, is that of adjudication of people of concern, before courts. Difficult questions have been raised regarding the grounds under which protection claims may be brought.

²⁴¹ Ibid.

²⁴² MacLeod, S. (2015) "Private security companies and shared responsibility: the turn to multistakeholder standard-setting and monitoring through self-regulation-'plus'", *Netherlands International Law Review*, 62(1), 119-140.

²⁴³ Articles on Responsibility of States for Internationally Wrongful Acts, *The International Law Commission Yearbook* 2001/II(2).

²⁴⁴ d'Aspremont, J., Nollkaemper, A., Plakokefalos, I., Ryngaert C., (2015) "Sharing Responsibility Between Non-State Actors and States in International Law: Introduction", *Netherlands International Law Review*, 62 (1), p.52.

Courts had to face aspiring refugees asking for protection not from their home country, but rather from the 'place of refuge'.²⁴⁵ What remedies are available and what legal grounds are open for refugees seeking for protection from the environmentally and socially challenging context they must deal with in settlements that allegedly claim to be providing shelter and protection? It has been recently found that Courts rarely, and only in exceptional circumstances, may assess those cases. Occasionally, when doing so, they would treat the situation as an individual case, focusing on the single refugee's circumstances, rather than focusing on the overall general concern of protection afforded in camps. By doing so, they fail to open the possibility to thoroughly investigate emerging protection issues and find potential perpetrators, whether these are States or NSAs managing humanitarian aid in the territory.²⁴⁶ As a result, empirical research has progressed in finding new approaches to discover and assess credibility in asylum procedures, as well as opening the dialogue between host States and refugees further.²⁴⁷ This serves to prevent and avoid diffidence towards the judicial system and its decision-making scope, along with widening the notion of refuge and what it entails.

4.3 The case of Italy:

Major concerns regarding Italian asylum procedures and their compliance with the European regime of human rights, have been discussed in the case of *Hirsi Jamaa v Italy* concerning the interception and push back of Somali and Eritrean migrants sailing the Mediterranean on three vessels from Libya. In this case, the European Court of Human Rights (ECtHR) concluded that sending back migrants without fair and effective procedures was a serious breach of the principle of non-refoulement.²⁴⁸ Yet, taking into account the lengthy history of asylum seekers reaching the Italian coast, this may be seen as one of few cases that reached the ECtHR and contributed towards clarifying factual and legal controversies. In fact, national legislation concerning the handling of refugees and legal procedures, has constantly been changing throughout the years, with

²⁴⁵ Ogg, K. (2016) "Protection from 'Refuge': On What Legal Grounds Will a Refugee Be Saved from Camp Life?" *International Journal of Refugee Law*, 28 (3): 384-415.

²⁴⁶ Zambelli, P. (2017) "Hearing Differently: Knowledge-Based Approaches to Assessment of Refugee Narrative" *Int J Refugee Law* eex012

²⁴⁷ Ogg, K. (2016) "Protection from 'Refuge': On What Legal Grounds Will a Refugee Be Saved from Camp Life?" *International Journal of Refugee Law*, 28 (3): 384-415.

²⁴⁸ *Hirsi Jamaa v Italy* App no 27765/09 (ECtHR, 23 Feb 2012)

drastic amendments depending on the political party in charge.²⁴⁹ Article 14 Comma 1 of the Italian Constitution²⁵⁰ establishes that there are conditions to be respected, under which one may not be immediately expelled upon arrival: need to assist the foreigner; need for extra proof concerning identity and/or nationality of the foreigner; need to acquire travelling documents; unavailability of a vector or adequate means of transport to send the foreigner back.

4.4 History of Italian Immigration Laws:

Bearing in mind what discussed in the previous chapters with regards to the legal framework of NGOs, the Italian domestic legislation constitutes a clear demonstration of the urgent need to establish principles that regulate responsibilities of NSAs: especially when covering state duties and alike state roles, there are no binding or guiding provisions monitoring the work done by non-state entities, to ensure remedies nor accountability.

In fact, the roots of the constitutional principle mentioned above, trace back to the 1990s, when the Martinelli law²⁵¹ established that expulsions constituted an ordinary asylum procedure for illegal immigration. It aimed at regulating immigration as well as redefining refugee status and affirm the Italian stance on entering the territory. Later, the Turco-Napolitano law²⁵² followed, that came about to change the law regulating foreign immigration and established administrative detention centres, named “Centri di Permanenza Temporanea” (CPTs)- centres for temporary stay, to host and provide assistance for asylum seekers whose process of expulsion could not be immediately triggered. As a result, it did not take long for criticisms concerning the highly restrictive measures adopted inside the premises to be subject to discussion. The fact that anyone asking for asylum, including minors and immigrants with regular documents, were detained whilst waiting for their asylum request to be processed, was found debatably unconstitutional, as much as the unconstitutional limitation of freedom of movement

²⁴⁹ See for example Legge Turco-Napolitano, as opposed to Legge Bossi-Fini.

²⁵⁰ Costituzione della Repubblica Italiana (PDF), in Gazzetta Ufficiale, n° 298, Roma, Istituto Poligrafico dello Stato, dicembre 1947, pp. 3801-3816.

²⁵¹ Decreto Legge 28 febbraio 1990, n. 39

²⁵² Decreto Legge 40/1998, Article 12. Now Art. 14 Testo Unico (T.U.) sull’Immigrazione, n. 286.

that was indirectly addressed solely to foreigners (who were not even found guilty of a specific crime), who moreover faced detention for reasons not directly attributable to them, (i.e. lack of papers).²⁵³ The Constitutional Court intervened on those concerns, it however refrained from expressing a clear judgment on the existence of those centres, but nonetheless openly declared them to be prisons.²⁵⁴ To contribute further to the discussion of CPTs and their potential prison status, the Bossi-Fini law ²⁵⁵ came about and with it CPTs were to change both name and competences. Instead, they became “Centri di Identificazione ed Espulsione” (CIEs) - namely, centres for identification and expulsion. The mere name change shows the increased restrictions adopted by the Italian government in those years, under Berlusconi’s government. Along those lines, detention conditions were extended from 30 to 60 days, the permit for those already residing in Italy was changed from a validity of 3 years to needing to be renewed every 2 years. The ultimatum to leave the Italian territory within 5 days was confined to those who had not yet had their permit renewed, for everyone else – including those whose application was still pending or had no possible alternatives- the law foresaw to either take them back to the border or detain them indefinitely. Moreover, it granted more powers to CIEs as self-governing entities: perhaps a way to convey more powers to them as NSAs, making it overall less likely to be able to seek asylum in Italy and more likely for States to escape responsibilities. In fact, it remains unclear to which extent powers and responsibilities are transferred to those centres, as there are no express terms imposed by the State nor governing laws.²⁵⁶

The following government attempted to mitigate the stern measures introduced by the government in 2002, by introducing the Amato-Ferrero law in 2007, which, however, never came about because the Government with Prime Minister Prodi fell and Berlusconi presided again, continuing along the lines of austere procedures, strengthening immigration legal measures to their restrictive peak until 2009, when EU

²⁵³ Ballatore, R. M., Grompone, A., Lucci, L., Passiglia, P., & Sechi, A. (2017). “I Rifugiati E i Richiedenti Asilo in Italia Nel Confronto Europeo”, Banca d’Italia, Occasional Papers, n.377.

²⁵⁴ Sentenza 105/2001

²⁵⁵ Decreto Legge 189/2002

²⁵⁶ Accorinti, M. and Wislocki, A.S. (2016) “*Housing for Asylum Seekers and Refugees in Rome: Non-profit and public sector cooperation in the reception system*”, National Research Council, Institute for Research on Population and Social Policies, n. 86

legislation started to introduce new directives²⁵⁷ and guidelines to redirect Union members.

Finally, in 2015 Italian law has been redesigned along the lines of European directives and introduced acceptance of vulnerable people and both accompanied and unaccompanied minors, as well as relaxing conditions for international protection and time constraints for both appeals and holds.²⁵⁸ Moreover, the latest reforms in 2017 have brought about remarkable changes: new provisions were introduced to speed up processes of international protection and challenge the *prima facie* unlawfulness of undocumented migrants, whilst also extending competences of some Courts, specialised in dealing with immigration practices.²⁵⁹ Additionally, a separate law²⁶⁰ has been drafted with regards to unaccompanied minors aiming at granting enhanced possibilities for those in need and moving towards the direction of reforms on citizenship rights.

This legislative uncertainty that has seen Italy continuously swaying in the past twenty years, and the deriving polarisation of the governments as a result of opposite political ideals, demonstrates the struggles faced by the country. Historically speaking, Italy has always had persistent difficulties related to the administration of the government and its political affairs. The reason for this may be attributable to the limited powers conveyed to the Presidente del Consiglio (President of the Council of Ministers). Following the experience with Benito Mussolini during the Fascist era, the founders of the Italian republic purposefully laid out a weak position, to prevent similar facts from happening again. Yet, this reverses on Italy today, being an outlier with fragmented political parties that interfere with coalition governments and result in protracted instability.²⁶¹ Moreover, to those features, it must be added the fact that, within two decades, Italy shifted from being a notorious country of emigrates to being one of the most remarkably impacted by the current immigration flows.²⁶² It, therefore, lacks suitable integration

²⁵⁷ Directive 2008/115/CE; 2009/50/CE; 2009/52/CE.

²⁵⁸ Decreto Legge 142/2015

²⁵⁹ Decreto Legge 46/2017

²⁶⁰ Decreto Legge 47/2017

²⁶¹ Pasquino, G; Valbruzzi, M., (2010) "Still an outlier: Italy in a Southern European comparative perspective", *Journal of Modern Italian Studies*, Volume 15, Issue 2, pp. 183-199.

²⁶² Bonifazi, C., F. Heins, S. Strozza and M. Vitiello (2008), "The Italian transition from emigration to immigration country", IDEA Project, December 2008.

policies and programmes, that would help manage the country in a more satisfying manner, changing the way refugees are perceived.²⁶³ Instead, the country is majorly divided by substantial stigma concerning asylum seekers, as a result of the legal gaps and political deficits that indirectly depict refugees' applications as an undue burden.

4.4 The Zuccaro case and Capo Rizzuto Scandal:

This section will illustrate two recent examples of non-state practice in humanitarian assistance, giving rise to serious violations of asylum seekers' rights, discussing consequential responsibilities and government's influence.

In December 2016, a Frontex report²⁶⁴ was published, heavily criticising NGOs operating in the Mediterranean and accusing them of being in touch with migrant smugglers and not fully collaborating with European authorities. The widespread concerns of the sea trajectory between Italy and Libya only reached Italy in April 2017, after that the attorney of Catania (Sicily, Italy), Carmelo Zuccaro openly denounced to have evidence to demonstrate that some NGOs operating in the Mediterranean, have direct links with migrant smuggling networks. Additionally, the funds owned and managed by those NGOs for the maintenance of their rescue boats were also questioned.²⁶⁵ He went as far as claiming that he possesses oral evidence of radio communications that, although cannot be brought into the courtroom for assessment, demand for investigations to be opened.²⁶⁶ As a result of such allegations, Italy has been subject to heated discussions both at a national and international level, for the past couple of months.

Hypothesis started to spread, and strong accusations started to be made against numerous NGOs demanding better monitoring of their operations and better supervision of their ethical obedience. The attorney declared that the aim of this collaboration would be directed at manipulating diplomatic relations with the goal of interfering with the overall stability of the country – both social, economic and financial,

²⁶³ Pallis, M. (2005) "The operation of UNHCR's accountability mechanisms" New York University Journal of International Law and Politics Vol. 37 Issue 869, p. 917.

²⁶⁴ Financial Times, "EU border force flags concerns over charities' interaction with migrant smugglers", December 2016, available at: <https://www.ft.com/content/3e6b6450-c1f7-11e6-9bca-2b93a6856354>

²⁶⁵ Il Post, 1st of March 2017, available at: <http://www.ilpost.it/2017/03/01/migranti-ong-frontex/>

²⁶⁶ Camilli, A. "Perché le ong che salvano vite nel Mediterraneo sono sotto attacco", Internazionale, 22 aprile 2017; <http://ricerca.repubblica.it/repubblica/archivio/repubblica/2017/02/17/contatti-con-scafisti-indagine-sulle-ong15.html>

as well as NGOs serving as mediators, merely using humanitarian purposes as an excuse, while instead being interested in power games and speculating on refugees, having beneficial returns from organised crime.²⁶⁷

Yet, analysing this case with what has been argued in this research so far, it is important to focus on the responses given to those accusatory allegations. The Home Secretary, Marco Minniti, and the Minister of Justice, Andrea Orlando, openly reacted by neutralising the accusations on NGOs and declaring that to focus on the potential harm done by the work of those NSAs, is a mere strategy to divert public attention to real issues. They added: *“the real issue, is the unmanaged flow of immigrants and not the operations done by NGOs, whose work we must be thankful for, rather than criticise.”* And the president of the Parliamentary Commission on Migration Inquiries also says:²⁶⁸ *“we must be careful not to discredit activities and operations done by those NGOs, without which it would be impossible to manage this emergency.”*²⁶⁹

As it can be recalled from the analysis done in chapter 2, we are affected by a conventional belief that pushes us to worship the work done by NGOs due to their mandate of protection of both human rights and those in need. In fact, the case has been quickly dismissed and within two weeks the Attorney Zuccaro withdrew his allegations, the case has been closed and no remarkable evidence has been found against NGOs.²⁷⁰ The President of Medici senza Frontiere (Doctors without Borders) took a stance in those accusations, as spokesperson for NGOs, concluding that the high number of deaths we witness every day in the Mediterranean, is not responsibility of humanitarian organisations, but rather of European policies that by failing to take action and assume responsibilities favour smugglers.²⁷¹ Finally, failure to adopt a common European governance and enact an effective plan of action to adequately provide a humanitarian

²⁶⁷ Il Post, 27th of April 2017, available at: <http://www.ilpost.it/2017/04/27/taxi-migranti-ong/>

²⁶⁸ Federico Gelli, Presidente della Commissione parlamentare di inchiesta sul sistema di accoglienza, di identificazione ed espulsione, nonché sulle condizioni di trattenimento dei migranti e sulle risorse pubbliche impregnate.

²⁶⁹ Gallori, P. La Repubblica, 28 Aprile 2017, available at: http://www.repubblica.it/cronaca/2017/04/28/news/collusioni_con_trafficienti_di_maio_regole_d_ingaggio_per_ong-164077266/

²⁷⁰ Il Post, 17th of May 2017, available at: <http://www.ilpost.it/2017/05/17/caso-ong-chiuso/>

²⁷¹ Medici Senza Frontiere, 2nd of May 2017, available at: http://www.medicisenzafrontiere.it/notizie/news/msf-accusa-sono-le-politiche-europee-non-le-ong-favorire-i-trafficienti?codiceCampagna=17.ZZW.SP.I.SEMGOOGRT&codiceCausale=643&gclid=Cj0KEQjwrsDIBRDx3JCunOrr_YYBEiQAifH1FsgRL_lfE8kXBrQ6pSFuwqAEhHIem7HdyjRW82u4L84aAjyy8P8HAQ

response, can be seen not as an indirect consequence of inadequate policies, but rather as a deliberate choice of non-intervention on behalf of EU states, to rescue those in danger.

Once again, we have NSAs' at the centre of discussion for their disputed behaviour, yet with limited legal consequences. If the case was to proceed further, it would have been a landmark moment for the Italian legislation, and perhaps an interesting precedent for international law too. From the point of view of shared responsibility perhaps, as the NGOs were operating in the Italian territory it amounted to sufficient ownership and control on behalf of the State to share the responsibility with the operating organisations. There are no clear-cut answers to the issue and bearing in mind that no solutions will ever be fully undisputed, any theoretical account has the potential to contribute to changing the current system. Perhaps a contractual relationship between the State and its operating counterparts in similar case scenarios, would bring about clarity and enhanced accountability.²⁷²

Yet, another scandal has recently reached the Italian news, within a few weeks from the Zuccaro case. This time, it concerned the non-monitored nature of CIEs in Italy. Briefly, those temporary hospitality centres for asylum seekers, have unclear and limited guidelines they are legally bound to. Article 14 Comma 2²⁷³ demands the treatment of foreigners in CIEs to "*assure the necessary assistance and the full respect of his/her dignity.*" However, there have long been episodes of unhealthy and abusive conditions, going unpunished due to the lack of facilities and alternatives.²⁷⁴ To adopt a similar approach and persevere in front of similar situations is disruptive for both the State, the operating entity, like CIEs in this case, and the refugees. Perhaps the lack of alternatives is presented as an excuse to hide bigger issues laying behind the administrative measures of those centres: the Mafia has been found to make millions in profit from

²⁷² d'Aspremont, J., Nollkaemper, A., Plakokefalos, I., Ryngaert C., (2015) "Sharing Responsibility Between Non-State Actors and States in International Law: Introduction", *Netherlands International Law Review*, 62 (1), p.51.

²⁷³ Decreto Legge 286/1998; Decreto Legge 189/2002

²⁷⁴ Accorinti, M. and Wislocki, A.S. (2016) "*Housing for Asylum Seekers and Refugees in Rome: Non-profit and public sector cooperation in the reception system*", National Research Council, Institute for Research on Population and Social Policies, n. 86.

engaging with NSAs with the same degree of control as CIEs.²⁷⁵ How those facts related to the discourse of State responsibility for NSAs' disruptive activity and questions on whether the State acts in due diligence in prevention of those situations is an ongoing debate, subject to endless discussions concerning Italy, that goes beyond the scope of this research.

In fact, in May 2017, one of the biggest reception centres in Europe, on the Isola of Capo Rizzuto (Crotone, Italy) was found to be effectively managed by a family belonging to the local clan of organised crime. Allegedly, they have been profiting of money and resources of the structures at the expense of those in detention since 2009: refugees were found crammed in the facilities in scarce hygiene conditions, food supplies were sufficient for half of the people hosted and, most of all, their application procedures could not advance, thus being stuck in a broken bureaucratic machine turning the facilities into something more than a temporary reception centre.²⁷⁶ On the light of what discussed in chapter 3, the management of these centres under alike conditions fail to maintain their purpose and put to question the concept of aid in its entirety, along with the actual bona fide nature of the entities in charge: NGOs and CIEs. Briefly, do those conditions effectively amount to help? And if so, considering the lengthy amount of time they spend in the premises, is this protracted humanitarian assistance helpful in practice and compliant with the idea of working towards refugees' independence, as required by the 1951 Convention?

Already back in 2014, the Italian government attempted to enact a national plan "*in order to give an answer to the many critiques regarding the fragmentation and dysfunction of the Italian reception system*",²⁷⁷ but little has changed since, and more efforts are required to find a comprehensive and coherent way to improve the conditions of asylum seekers' reception and management. The Italian case clearly exemplifies the lack of legislative regulation of NGOs and humanitarian NSAs, yet demonstrating the need for this to change as human rights violations on behalf of those entities are rather frequent than rare. Having assessed domestic legislation in the area

²⁷⁵ Catalano, C. (2016), "Talking About Global Migration: Implications for Language Teaching", Eds First, Publisher.

²⁷⁶ Longo, G. LaStampa, 15th of May 2017, available at:

<http://www.lastampa.it/2017/05/15/italia/cronache/smantellata-la-cosca-arena-controllava-la-gestione-del-centro-per-migranti-di-isola-capo-rizzuto-hTLDLUq0Nr5byBFpRUoTaO/pagina.html>

²⁷⁷ Commissione straordinaria per la tutela e la promozione dei diritti umani, (2014) "Rapporto sui Centri di identificazione ed espulsione in Italia", XVII legislatura.

and outweighed its effect with the adverse impacts deriving from it, it can be concluded that urgent action is needed.

Perhaps it is the overall attitude that must change: whether shifting away from binding provisions, in favour of contractual relationships with governments²⁷⁸ or drafting harsher measures and stricter monitoring systems. Or perhaps, as explained in chapter 2, extending the application of the Ruggie Principles to those entities, would allow to identify core issues that are currently silenced by legal gaps, working towards preventing further misconduct of humanitarian organisations, and aiming at the long-term eradication of serious human rights abuses. Only greater collaboration between States, towards a global governance of asylum procedures would enhance responsibilities of both States and NSAs, leaving behind for definite, this global tendency to continuously pass the blame without effectively holding accountable those responsible.

²⁷⁸ d'Aspremont, J., Nollkaemper, A., Plakokefalos, I., Ryngaert C., (2015) "Sharing Responsibility Between Non-State Actors and States in International Law: Introduction", *Netherlands International Law Review*, 62 (1).

Conclusions

This research has applied a broad approach to the study of non-state actors and analysed their influence in modern-day global governance. Starting with the classification of non-state entities and defining their role in both business practices and humanitarian aid it has been concluded that little substantial differences separate corporations from non-governmental organisations, understanding that the legal obligations imposed on those entities should apply equally and in all their parts, to both actors.

We acknowledge and praise the new conditions introduced in the past decade, to monitor accountability always further, thanks to innovative instruments like the Ruggie Principles. However, incongruences and complications concerning the application and the binding nature of those documents, demonstrate that despite the lessons learnt, there is still a long way to go, moving forward to obtain universal systems of accountability, without exceptions nor possibility of circumvention. In a world that cries for accountability, with corporations earning more than governments and millions of people constantly forced to flee their country to escape persecution and survive under protracted humanitarian assistance, it is indispensable for the actors engaged, to constantly change their approaches, adopting dynamic policies that reflect the instability of the present world order, by understanding its needs and work around them.

By choosing to focus on the intricate relationship between States and NGOs this thesis aimed at questioning the purpose of humanitarian assistance, the concept of aid and its challenges. In practice, nowadays humanitarian aid may be seen as a mere form of modern imperialism: it constitutes charitable assistance that fails to provide help that aims at the protection, independence and self-realisation of people of concern, therefore being conceptually in conflict with what established under the 1951 Refugee Convention. After evaluating concrete UNHCR operations, along with context-based cases taking place in Italy, it has been concluded that too often NGOs' and NSAs' work fails to meet its purported mission, masking unethical, inconclusive and debatably beneficial behaviour behind their benevolent mandate, yet going unpunished and seldom adequately monitored.

Briefly, core issues raised in this paper can be summarised as follows: first, there is a need to understand and respect the classification of NSAs, to reform the way NGOs are answerable for their actions; secondly, it must be asked whether the problem lies within overcoming problems by means of strengthening the humanitarian help provided or change the approach adopted and remediate to legal gaps. From the analysis done throughout the research, it emerges that in order to limit humanitarian assistance from constituting both aid as well as a disruptive activity, new policies and operations must be adopted.

Perhaps, a universal and equal application of the Guiding Principles to both for-profit and not for-profit organisations would represent a step further towards global accountability. Moreover, greater engagement with local entities, and perhaps the stipulation of defined contractual relationships between the State and its agents, would also contribute to enhancing responsibilities of NSAs. To do so would limit the chances of abusive behaviour going unpunished, and ensure the identification and traceability of perpetrators for their actions.

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