

Chapter 13

The Status of Non-State Actors under the International Rule of Law: A Search for Global Justice

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Introduction

In this chapter we examine the position of non-state actors (NSAs) as new players in international law. NSAs possess significant *de facto* economic, financial and institutional power yet the lack any corresponding legal responsibility. This disproportionateness between power and responsibility needs to be recognized and remedied. Traditional international law norms, mechanisms and arrangements, however, are insufficient to deal with the problems posed by this imbalance. In what follows we explore some possible measures to address it.

Speaking generally, we propose that non-state actors should be brought within the framework of the international rule of law (IROL). It should be recognized, however, that the idea of the international rule of law has yet to be conclusively defined. The divide between formal and substantive conceptions of the rule of law is as active internationally as it is at the national level. Here, we argue that internationally the formal conception should be preferred to the substantive which can be read as embracing larger aims such as the achievement of global justice. Within the formal conception, NSAs should be accorded legal personality. They can and should be drawn

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adequately and effectively to legal account. Despite the existence of the divide between formal and substantive conceptions of the rule of law, however, we argue that both must embrace respect for fundamental human rights enshrined in the major international human rights conventions. Consequently, NSAs should properly be drawn to account for any violations of human rights they might commit.

In the first part of this chapter, we examine the legal standing of NSAs. In the second part we tie their legal standing to the wider idea of the international rule of law.

1- Concept, Personality, and Status of Non-State Actors (NSAs)

It has been some decades since the idea of NSAs made its entrance into the sphere of international law. The idea has been the subject of controversy. According to one definition suggested by Andrew Clapham:

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.³

More broadly, Article 6 of the COTONOU Agreement states:

The actors of cooperation will include: a: State (local, national and regional), b: Non-State: - Private Sector; - Economic and social partners, including trade union organizations; - Civil society in all its forms according to national characteristics.⁴

Referring to the dangers that NSA's may pose in the context of war, the UN Security Council has resolved that, the states are required to refrain from providing any goods, services to or supporting NSAs which develop, obtain, construct or transfer or use chemical weapons.⁵

NSAs do not possess official or government authorities and powers and do not have institutional and financial relationships with states.⁶ As such they have not generally been recognized as traditional objects of international law but, instead, as potentially new subjects of it:

NSAs are subject or persons of international law. The conception of NSAs as an object of international law does, however, not sufficiently explain its present day position in the

³ Clapham, A. 'Non-State Actors'. Electronic Copy Available at: <http://ssrn.com/abstract=1339810>

⁴ 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.

⁵ United Nations Security Council, Resolution 1540 (2004), Non-Proliferation of Weapons of Mass Destruction, 28 April 2004.

⁶ There are documents which define these actors directly or draw out their personality implicitly by establishing their responsibilities. This issue will be discussed in next pages.

international law... In the other words, power and influence of NSAs in many cases goes far beyond that of entities to which international law has traditionally accorded to object-states.⁷

Nowadays international law reaches beyond nations, many acts such as certain criminal acts, trade, finance, commercial relationships, environmental issues, human rights and more. Now international law directly touches many individuals.⁸

In parallel the primary focus of international law has also been changing. As the 2010 report of the Brandeis Institute for International Judges noted:

The increasingly prominent place of Human Rights in international legal order has brought with it a shift of focus from states to the individual as a subject of international law.⁹

In order to have legal personality, an entity must possess rights as well as obligations within a legal system. If therefore we are to regard NSAs as having legal personality, it should come to be recognized that international law confers rights and imposes obligations upon them. There are international instruments which have enumerated various rights and obligations for NSAs, depending on the content and intent of the instrument.¹⁰ International law seems, therefore, to be in the process of recognizing the significance of NSAs. That paves the path for recognizing their formal, legal personality. However,

⁷ 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. 5.

⁸ Nichols. P. M. 'Reconceptualizing the Rule of Law as an International Norm'. An early draft article, as a working paper titled 'Reconceptualizing the Rule of Law'.

⁹ Brandeis Institute for International Judges (BIJ), Toward an International Rule of Law, 2010 Report.

¹⁰ For instance: United Nations, CESG, 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 Right of the Child, General Comment no. 5, General Measures of Implementation of Convention on the Right 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.

there are debates and worries about the consequences of such recognition of legal personality:

There is a fear that one “legitimizes” actors by giving them human rights obligations and implies a power which they may themselves erode, rather than enhancing, human freedom and autonomy.¹¹

One of the significant reasons for not endowing NSAs with legal personality in traditional state-centered international law is that the states would be reluctant to share their powers and authorities with NSAs. Furthermore, there is a fear of legitimizing the NSAs’ unlawful actions by recognizing their legal status and personality. This may in turn lead to the legitimization of their use of violence.¹²

The strength of this argument depends on the nature of the NSA with which one is concerned. For example, one important increasing role of civil society NSAs is their monitoring of human rights treatment by states and government authorities around the world. For instance, in the case of a complaint against the president of Congo, some human rights NSAs applied to the French courts against the president of Congo for committing crimes against humanity. When the case was finally referred to International Criminal Court (ICC), it was decided by the ICC that the alleged crimes against humanity were not substantiated and thus the request was denied¹³. However, the interesting point was that neither the French courts nor the ICC rejected the request of NSAs based on their standing rules of procedure.

The primary objective of international human rights instruments is the protection of individuals and communities against states. Today, there are a vast number of Multi National Corporations (MNCs), NGOs, and other NSAs

¹¹Clapham, A. 2010. Human Rights Obligations of Non-State Actors. Oxford University Press. P.53.

¹² Ibid. P. 46.

¹³ See Banks, A. M. 2003. The Growing Impact of Non-State Actors on the International and European Legal Systems. College of William & Mary Law School. Faculty Publications. 294.

with economic, financial, and institutional powers which can influence political powers, domestically and globally, to alter their institutional behaviour. Such unlimited and unrestricted powers are susceptible to misuse against individuals and groups and thus, must be held accountable in accordance to the terms of international human rights conventions.

Negative Roles of NSAs

In reality NSAs have positive as well as negative functions. The negative role of NSAs can be analyzed from different points of view. First, governments, in particular authoritarian regimes, are aware that the legal status of NSAs in international law is not well established and because of that NSAs cannot be held legally responsible for their actions. Furthermore, since states are unwilling for their legitimacy be questioned in international community. Therefore they may seek to co-opt NSAs for use against individuals, opposition groups and minorities.¹⁴ Such states use NSAs as fig leaves to evade international responsibility.

These negative relationships between NSAs and violating states take different forms. Sometimes, states directly use NSAs as a means to their ends through contract and agency. In some other form, NSAs are used by states indirectly through guidance and management of their operations. NSAs forces and personnel, for example informal militias, have been financed, trained, procured and equipped with weapons by governments. In other circumstances, governments may simply fail to act against human rights violations such as torture, arbitrary arrests and killings of opposition groups and civil movement activists by NSAs which share the same ideology of states.¹⁵

¹⁴ Crawford, J. 'Human Rights and State Responsibility'. 12th Raymond & Beverly Sackler Distinguished Lecture Series. Thomas Jodd Research Center. University of Connecticut. 4-5.

¹⁵ Nicolas Carrillo Santarelli, Non-State Actors Human Rights Obligations and Responsibilities under International Law, 15 *Revista Electronica De Estudios Internacionales*, 2008, pp. 1-10.

In international law, the presumption of innocence of states in such circumstances can hardly be accepted. In fact, the contrary is more accurate, particularly where the government is undemocratic and there has been a previous and constant violation of human rights.¹⁶

Second, in some cases states may not be at fault or manipulate NSAs in wrongful acts but NSAs independently may abuse their positions, institutions, personnel, and powers against certain groups and individuals. In these circumstances, to prove that states have any direct responsibility for such actions may be difficult. International law in these circumstances may not recognize the direct responsibility of NSAs, notwithstanding that in several international human rights documents,¹⁷ the obligations of NSAs have been set down. Based on most cases,¹⁸ the states have been addressed as the main responsible bodies. It seems that the only exception is in international humanitarian law, where, for example, under the Second Protocol of the Geneva Convention, the direct responsibility of rebels, terrorist and armed opposition groups have been admitted.¹⁹ Hence, since NSAs are not covered completely by international law norms, their acts can become a real threat to national and international security. In addition, because they exist in a wide

¹⁶ See the following references as examples for establishing direct responsibility of States in those situations: Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, *The European Journal of International Law*, Vol. 19, No. 5, pp.989-1014; UN Security Council, Resolution 1373, 2001; Ian Browline, *Principles of International Law*, Clarendon Press, Oxford, p.452

¹⁷ For instance see: General Comment no.31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 29 March 2004. United Nations. CCPR; General Comment 20. 'Prohibition of Torture and Cruel Treatment or Punishment (art.7)'. 10 March 1992. United Nations. CCPR; General Comment no. 17; 'Rights of the Child (Art.24)'. 7 April 1989; United Nations. CCPR; General Comment no. 18. 'Non-Discrimination'. 10 September 1989; General Comment no. 5. 'General Measures of Implementation of the Convention on the Rights of the Child'. (arts. 4, 42, and 44, Para.6)'. 27 November 2003; General Recommendation no.19 (11th session, 1992). 'Violence against Women'.

¹⁸ For instance see: Inter American Court of Human Rights. *Case of Ximenes-Lopes v. Brazil*. 4 July 2006; ECHR. *Lopez Ostra v. Spain*. Application No. 16798/90. 9 Dec.1994; . *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria*. Cited as: Communication No. 155/96. United Nations Committee on The Elimination of Discrimination Against Women; *Case of Sahide Goekce v. Austria*. Communication Number CN.6/2005 . HRC; *Case of Herra Rubior v. Colombia*. Communication no. 161/1983.

¹⁹ Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva. 12 August 1949.

range of forms and establishments, it is very difficult to determine NSAs general responsibilities; it seems that States therefore must bear principal responsibility for preventing their adverse actions given that they possess overarching powers and authorities to criminalize and penalize NSA activities.

1-1- Positive Roles of NSAs

In contemporary international relations, NSAs such as human rights advocacy organizations, perform important positive functions ranging from human rights education to the enforcement and monitoring of human rights standards. Perhaps the most significant role of such NSAs is that they have played an effective role in the international norm making process like their participation in the preparation of the Draft on the UN Convention on the Rights of Persons with Disabilities.²⁰

Sometimes, specialized NSAs in the human rights arena may influence international norm making by participating in consultations on specialist legal matters. They may also act as lobbyists.²¹ Another particularly important area of activity is that of international norm making in the international environmental area.²² Even if not directly participating in processes of norm formation, NSAs may still have an impact through the dissemination of information to the public which promote public awareness and transparency.

²⁰ See Bernstorff, V. J. On the Legality and Legitimacy of NGO Participation in International Law, Non-State Actors in Law Making and in the Shaping of Policy. Conference Draft. November 2007. 17-21.

²¹ See Ryngaert, C. March 2009. 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law'. Working Paper Presented at the Seminar on the FWO Research Community on Non-State Actors in International Law. Leuven.

²² Raustiala, K. 'Non-State Actors in the Global Climate Regime'. UCLA Law School. Public Law and Legal Theory Research Paper Series. Research Paper no. 7-29.

NSAs also have a significant role in peace building processes, such as the role of the Center on Housing Rights and Evictions for the International Protection of Individuals and People of Kosovo.²³

Another positive activity of NSAs concerns the enforcement of international law norms and standards. With regard to binding international laws, NSAs and NGOs have had a positive influence on the application of international laws to national legal systems, in particular, where they have already been consulted or taken part in formulating the applied norms and standards.²⁴ In this way they may reduce the costs of application and enforcement. More significantly, they can minimize the costs of enforcement by engaging in the self-regulation of their activities.

Furthermore, the supervisory function of NSAs cannot be overlooked. This role of NSAs has two aspects: one is their role in supervising the implementation of international norms and standards within their own area, and the other is their role in monitoring states conduct in the light of international conventions. They may, for example, use the media to reveal the state violation of international legal norms, or they may report abuse of powers to relevant monitoring bodies in the domestic system or to relevant international supervisory bodies such as those in the UN human rights arena.

2- The International Rule of Law as an Analytical Framework

As explained in previous section the status of NSAs in traditional international law is problematic. Their roles, functions and impacts have not yet found their place in a state-centered model of international law. In this section the idea of International Rule of Law (IROL) as a framework for analysis of the NSAs' rights and obligations will be examined.

²³ Hassine, H. 2010. 'Regulating Property Rights in Kosovo and Elsewhere'. Available at: [http://en.wikipedia.org/wiki/state-sponsored terrorism](http://en.wikipedia.org/wiki/state-sponsored_terrorism)

²⁴ Peters, A., Koechin. L. and Zinkernagel G. F. Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion. 2. Available at: https://ius.unibas.ch/uploads/.../20100219154311_4b7ea37fba74.

2-1- Conceptions of the Rule of Law (ROL)

There are several reasons which justify the need for IROL. First, there are the actions of NSAs which have social, economic, political and legal impacts on individuals, groups and communities nationally and internationally, such as violations of various human rights. These are not directly subject to international law because, in part, there are no legal mechanisms through which to make NSAs accountable. One of the fundamental pillars of the idea of the international rule of law, however, must be that influential actors should in accordance with the law and, as a consequence, there must be legal responsibility for any breach of the law. Second, as Laurance R. Helfer explained, the international legal system suffers from decentralization and disaggregation:

In the absence of a centralized, hierarchical authority with the power to coerce behavior, nation states are free to pursue their own interests, with states that possess more material or financial resources often enjoying a decided advantage in their relations with weaker or poorer countries.²⁵

As far as possible the law's differential treatment of rich and poor states should be minimized. Similarly, the IROL should aim to establish international law and order and thereby overcome the problem of the unequal treatment of influential public and private actors. Third, the idea of the ROL is not just a political or legal ideal. It has also been adopted in international instruments such as the Universal Declaration of Human Rights (UDHR). Mary Ann Glendon, for instance, has argued that the ROL has been enmeshed

²⁵ Helfer, L. R. 'Constitutional Analogies in the International Legal System'. *Loy. L. A. L. Review*. 37, 193. Available at: <http://digitalcommons.lmu.edu//llr/vol37/iss37/2>. Despite this multiplicity, Helfer acknowledges that a degree of an order can be found in a set of treaties, organizations and dispute settlement mechanisms which regulate each subject matter like environment, human rights and trade.

to the body of the UDHR from the very beginning.²⁶ She cites the third clause of its preamble which reads as:

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

The ROL has been evolving into a positive condition for the effective application of international law. It constitutes a significant standard of behavior and decision making in the field of international relations. As such it should apply to states and NSAs equally.

However, the concept of the ROL is a vague and contested idea in domestic public law, international law and political theory. Its definition and demarcation ranges from formal to substantive conceptions. These conceptions cannot be elaborated in detail here. It is, however, sufficient to summarize some of its most important features and then a suggested amalgamated conception of ROL and its externalization in international law will be analyzed.

²⁶ Glendon, M. A. 'The Rule of Law in Universal Declaration of Human Rights'. Available at: www.law.northwestern.edu/journals/jihr/v2/5/vol.2. April 2004.

A- Formal Conceptions of the ROL:

According to the categorization suggested by Brian Z. Tamanaha and Paul P. Craig²⁷, theories of the ROL can be divided into two basic categories of formal and substantive conceptions and each version reflects distinct but contrasting perceptions.²⁸ One concept of the ROL is known as “Rule by Law”. This notion of the ROL is considered as a means by which the government is authorized to achieve its objectives. In other words, it has an instrumental function to fulfill any kind of political end such as that which occurred in Third Reich period in Germany or in other authoritarian states. This precept is purely definitional and excludes any substance.²⁹

Another, variation of the formal conception is known as “Formal Legality”. It consists of two sets of two sets of specifications: first, the legal characteristics of a legal system and second, institutional/procedural checks on the exercise of powers. It is claimed that these criteria are value free and neutral and are independent of moral and political values. As a common ground of formal theories:

... (they) do not however seek to pass judgment upon the actual content of the law itself.³⁰

The prominent legal philosopher, Joseph Raz in response to substantive theorists like Ronald Dworkin has argued that:

If the rule of law is the Rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function... The rule of law is a political ideal which a legal system may lack or possess to a greater or lesser degree. That much is common

²⁷ See Craig, P. P. 1997. ‘Formal and Substantive Conception of the Rule of Law: An Analytical Framework. Public Law’. 467-487.

²⁸ Tamanaha, B. Z. 2004. *On The Rule of Law: History, Politics, Theory*. Cambridge University Press. 91-113.

²⁹ Nicholas, P. M. n. 4 above.

³⁰ Craig, P. P. n. 21 above.

ground. It is also to be insisted that the rule of law is just one of the virtues by which a legal system may be judged and by which it is to be judged.³¹

With respect to the neutrality of the ROL, Raz acknowledged that:

A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the rule of law better than any of the more enlightened Western democracies³² ... The law may... institute slavery without violating the rule of law.³³

Raz also argues that this account of the ROL aims at establishing law and order and regulating citizens' lives and behaviors. The virtue of the ROL is to enable citizens to guide their own lives in relation to each other and also in relation to state authorities. Since this conception is claimed as value free, its objective is not necessarily to curtail abuse of powers by public officials through institutional arrangements like separation of powers or checks and balances.

The virtue of a formal conception of the ROL consists among other things of legal certainty and predictability. Raz categorized its virtues into two sets of principles: inherent and subordinate.³⁴ The first set of principles is:

- Generality
- Prospectiveness, openness, and clarity
- Relative stability

³¹ Raz, J. 1979. 'The Rule of Law and its Virtues', in Raz, J. *The Authority of Law: Essays on Law and Morality*. Oxford Clarendon Press. 210.

³² Ibid. 211.

³³ Ibid. 221.

³⁴ Ibid. 210-223.

The second set of principles is necessary for the effective implementation of the first set of principles. The foregoing inherent principles cannot be maintained unless some procedural and institutional guarantees are established. The subordinate principles are:

- Independence of the Judiciary
- Principles of procedural justice
- Judicial review power of the courts
- The accessibility to the courts
- Crime preventing agencies should not be corrupted in their functions..³⁵

These virtues of the ROL have been more or less agreed to by other legal and political philosophers like Dicey, Leon Fuller and Hayek, with a slightly different formulation of the requirements of the ROL.³⁶ Fuller and Hayek's theories, however, do not necessarily incorporate the element of judicial review and judicial organization into the conception of the ROL.

Individuals and citizens' autonomy and dignity are protected through the above virtues of the legal system, as pursuant to them, they may make their own decisions as to their individual goals and destination. Another advantage is that the political neutrality of the ROL can not only gain support from different right, left, and center in politics, but also can incorporate diverging substantive values.

As far as the externalization of the ROL into international law is concerned, Tamanaha points out that:

This substantively empty quality has been identified by theorists, and by the World Bank and other development agencies, is what renders it amenable to universal application.³⁷

³⁵ For an analogy of IROL based on this kind of approach see: Nicholas, P. M. n. 4 above.

³⁶ See Tamanaha, B. Z. n. 22 above. 93-94.

³⁷ Ibid. 94.

However, Tamanaha criticizes this conception on two grounds: first, although it requires equal application of legal norms to all and prohibits arbitrary differentiation among individuals and organizations, it requires substantive standards to determine what constitutes arbitrariness. Second, the requirement of the ROL, i.e. equality of all before the law, needs to be supplemented by equality in substantive theories like distributive justice.³⁸ This critique, however, opens the door to the contrary argument made by Raz that substantive standards may open the way to the introduction of an entire social philosophy.³⁹

Another aspect of the ROL which cannot be ignored is its preventive function in regulating the exercise of arbitrary powers or the abuse of discretionary powers. This version was well set out in the 19th century by A.V. Dicey in his book *An Introduction to the Study of the Law of the Constitution*.⁴⁰ He formulated the ROL in three significant facets: first, society should be ruled by law not by discretionary (arbitrary) powers; second, there should be equality before the law, for private individuals as well as government officials; and third, all persons should be subject to the general jurisdiction of ordinary courts which constitute the best source of legal protection.⁴¹

B. Substantive Conceptions of the Rule of Law

The proponents of the substantive conception of the ROL agree on the formal requirements of law, but they go further to incorporate qualitative criteria

³⁸ Ibid.

³⁹ See Nicholas, P. M. n. 4 above.

⁴⁰ London, Macmilan, 1885.

⁴¹ See Beaulac, S. 2009. 'The Rule of Law in International Today'. Available at: <http://papyrs.bib.umontreal.ca/.../international-Rule-Law-Final.pdf>.

such as fundamental rights into the conception of the ROL. Ronald Dworkin justifies his arguments for this version of the ROL as:

I shall call the second conception of the rule of law the “rights” conception... It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as a part of the ideal of law, that the rules in the rule book capture and enforce moral rights.⁴²

The Dworkin’s rights-based conception of the ROL relies on the existence of underlying community values which underpin the background to positive law. It is the duty of judges in complex and contested cases to deliver their decisions based on moral and political principles which best fit the moral rights of the parties. In hard cases, the duty of the judges is to find the right answer by applying presumptive principles of a moral and political nature.

However, Dworkin’s theory is criticized on different grounds: first, communities may be divided on different legal and political principles, in particular with regard to sensitive issues such as abortion, positive discrimination, employments, education, tax, homosexuality, the death penalty etc. Second, it is too simplistic to believe that law makers and decision makers are always motivated to create laws which reflect communities’ values and morality. Third, this theory shifts decision making from elected politicians and gives it to appointed judges which in turn results in greater judicialization of politics and democratic process.⁴³

⁴² Dworkin, R. 1978. ‘Political Judges and the Rule of Law’. Proceedings of the British Academy. 64. 262.

⁴³ Tamanaha, B. Z. n. 22 above. 102-104.

Another substantive theory of the ROL not only adheres to legal formality and individual rights but also incorporates substantive criteria such as welfare and social rights. The International Commission of Jurists conference held in 1959 declared for instance that:

The dynamic concept which the Rule of Law became in the formulation of the Declaration of Delhi does indeed safeguard and advance the civil and political rights of the individual in a free society; but it is also concerned with the establishment by the state of social, economic, educational and cultural conditions under which man's legitimate aspirations and dignity may be realized.⁴⁴

Under this rich version of the ROL, states are required, among other things, to take positive actions in order to create a better life for people and ensure a proper standard of distributive justice. However, incorporating social rights into the notion of the ROL complicates the basic concept and invites more controversy to the debate.⁴⁵

Now the question is what conception of the ROL is amenable to be applied to international law and on what grounds? This chapter argues for a conception which is less contentious among legal and political scholars, lawyers and practitioners, on the one hand, and to base IROL on the most authoritative international instruments and jurisprudence on the other.

2-2- International Rule of Law Considered

In so far as the functions and actions of the NSAs are concerned, and due to the necessity of the establishment of the IROL, as discussed above, it is important to examine how the IROL should be constituted and on what normative basis it should be constituted.

⁴⁴ Declaration of Delhi. January 1959.

⁴⁵ Tamanaha, B. Z. 112-113.

The normative aspect is the most significant aspect of the rule of law but also its weakest form.. It seems that most international lawyers and scholars have propounded the idea of IROL in its formal conception, in particular, as formal legality and equality.⁴⁶ However, this view does not discount the complexities and problematic nature of the IROL. IROL should still find the means to deal with contemporary issues such as the status of NSAs and societal imperfections such as the problems of inequality, discrimination, poverty, environment, and human rights violations which traditional international law cannot easily cope with effectively, at least, on a general scale.

We propose a formal conception of IROL and therefore need to set out the requirements of this version of the idea. The requirements of formal legality for an IROL can be summarized in the following formulation: first, the existence of a principled legal normativity, second, a norm making mechanism to create laws which are applicable equally to all subjects, similar to domestic law-making, and third, a judicial enforcement mechanism in cases of the breach of international norms or for settlement of disputes with an authoritative and binding character.⁴⁷

Regarding the first requirement, some have argued that international law embraces a body of rules and norms which are capable of application to issues, directly or indirectly through the rules and principles of international law.⁴⁸ According to Article 38 (1) of the Statute of International Court of Justice (ICJ) these rules are contained in treaties, customs or non-written sources of international law, and general principles of law which are mostly extracted from domestic legal systems. Furthermore, there are other sources

⁴⁶ For instance see: Brandeis Institute for International Judges (BIJ). 2010. 'Toward an International Rule of Law'.

⁴⁶ Helfer, L. R. n. 19 above. 213-214.

⁴⁷ See Beaulac, S. n. 35 above.

⁴⁸ Ibid. 205.

of international normativity such as the Vienna Convention on the Law of Treaties which is ratified by more than 108 states. There are also other treaties and international instruments such as Universal Declaration of Human Rights and the two Covenants on Civil and Political Rights, and Social, Economic and Cultural Rights, and also the European Convention on Human Rights, European and WTO treaties which can control behavior of states, individuals and NSAs with respect to various trade issues.⁴⁹ It is also said that there is a set of rules recognized as *jus cogens* or preventive measures which function as a set of higher laws from which no deviation is allowed like unauthorized uses of force, the most serious violations of human rights like slavery, genocide, torture etc.⁵⁰

However, this normative aspect of the contemporary IROL may justifiably be criticized in particular with regard to NSAs. This is because, first, as compared to domestic constitutional law, there is no hierarchical order of norms whereby higher norms legitimize lower norms, whereby constitutional law lays the foundation for domestic legislation. Second, existing international norms have not yet attained universal applicability. Even if there are some effective international instruments such as the Universal Declaration of Human Rights, complete coverage of the conduct and behavior of states and NSAs has not yet been achieved. In addition, there is often significant controversy as to their interpretation. Third, with respect to NSAs, there are no general rules which address directly their legal status and behaviors. Fourth, the lack of consistency among international needs to be addressed. Every international instrument deals with its particular subject and with its special set of institutions and enforcement mechanisms. As yet there is no legal or procedural solution to the need for the harmonization of the overlapping and contradictory provisions of relevant international norms and rules.

⁴⁹ Nicholas, P. M. n. 4 above.

⁵⁰ Helfer, L. R. n. 19 above. 213-214.

Regarding the second requirement of the IROL, i.e. law making institutions similar to domestic legislative bodies, it would be beneficial if eventually there were some centralized authority on the international plane to function as a global parliament. Some authors have tried to suggest that the UN Security Council, General Assembly and International Court of Justice act as executive, legislature and judiciary in this way. But their powers and influence are very strictly limited.

It is worth mentioning that according to formal theorists of the ROL, such as Raz, Dicey, Fuller and Hayek the existence of a centralized law making institution and the existence of a rigid model of separation of powers is not a necessary element of the ROL.⁵¹ They have tended to focus on the independence of the judiciary and the presence of judicial review.

Nevertheless, the above analogy seems inaccurate, because the General Assembly is limited to recommendatory powers only. Further, by comparison, there are several international rule making organizations such as WTO which have more effective rule making powers with more authority and more powerful enforcement mechanisms.

Regarding normative and institutional hierarchies, Helfer puts the current status of international law in this way:

The international legal system too contains normative and institutional hierarchies that seem to offer a tool for resolving the difficulties that decentralization and disaggregation may engender. However, these hierarchies do not provide a blueprint for resolving questions of governance in a manner analogous to the hierarchies enshrined in domestic constitution.⁵²

⁵¹ For an analogical description of International law and constitutionalism including the idea of international separation of powers see: Dunoff, J. L., and Trachtman, J. P. (Eds.). (2009) 'Ruling the World? Constitutionalism, International Law, and Global Governance'. Excerpt from Cambridge University Press, www.cambridge.org.

⁵² Helfer, L. R. n. 19 above. 213.

With the emergence of global governance and the emerging power of NSAs in standard setting in fields as diverse as human rights protection, trade, environment, socio-cultural matters, the need for a broader conception and application of an IROL has become ever more pressing.

The third requirement of an IROL is that there should be a judicial enforcement mechanism to ensure that states and NSA's act in accordance with the principles and rules of international law. Without judicial review to rule on the legality of public and private actions and activities, there is always the possibility that agencies and authorities may abuse their powers. An international judiciary should ensure that the law is implemented in accordance to the legislator's will and that peoples are assured that there will be no arbitrary use of power and no distortion of legislative enactments whether in the public or private spheres.

Some have argued that the ICJ performs as the judicial enforcement apparatus of international law and also may exercise the judicial review power over the other organs of the UN. To provide the ICJ with jurisdiction over disputes arising from UN instruments and over disputes between states is plausible. However, its jurisdiction is limited does not yet have a general jurisdiction to review the actions, decisions, or regulations made organs of the UN such as the Security Council or to hear and determine complaints from individuals, groups, and NSAs against states or other NSAs.

Although there are no centralized and coordinated international courts or tribunals analogous to domestic courts, there are various international tribunals which possess important and individual jurisdictions. These include the ICJ, the International Criminal Court, the WTO panel for the settlement of disputes, the International Tribunals for the former Yugoslavia and Rwanda, the European Court of Human Rights (ECHR), the European Court of Justice (ECJ) etc. Some of these courts and tribunals decide on the complaints referred to by both states and NSAs alike such as ECHR, but most of them

would receive complaints only from states parties to the relevant treaties like the WTO panel of dispute settlement.⁵³

The present system of international courts and tribunals does not yet satisfy the third requirement of the IROL because: first, there is no centralized and hierarchical international judiciary; second, these judicial bodies have very limited scope of jurisdiction; third, individuals and NSAs have no access to most of these courts and tribunals; fourth, those courts and tribunals which do satisfy this requirement lack authoritative enforcement mechanisms. In case of non compliance by the defendant party, there is no legal guarantee for the implementation of the relevant decrees and judgments within domestic law and jurisdictions. This latter obstacle is due to the fact that the enabling international treaties are voluntary and consent-based.

Although this third element of IROL is problematic, in contrast to early decades after the Second World War and also the cold war period, the current status of international courts and tribunals and their roles in resolving disputes, prosecuting crimes and atrocities, convicting human rights violations represent a very significant improvement. Generally speaking, these facts show that we are closer to an IROL than at any time before. According to the BIIJ 2010 report on the IROL:

Participants also concurred in a general way that there already exists a rule of law at the international level, at least in an emergent form.⁵⁴

It was also reaffirmed that:

⁵³ Regarding the enforcement mechanism, Helfer argues that within WTO trade dispute settlement system, the crucial compliance force is reciprocity. He says that: "This enforcement mechanism is properly used in trade context. But in cases of Human Rights violations by a state is not thinkable and morally unjustified." Helfer, L. R. n. 19 above. 222.

⁵⁴ BIIJ, 'Toward an International Rule of Law'. n. 40 above. 9.

The impacts of international courts and tribunals may include successfully preventing armed conflict, securing a peaceful settlement of boundaries, deterring serious violations of the law, achieving the overall objectives of an international treaty, and obtaining compliance with specific judgments.⁵⁵

⁵⁵ *Ibid.* 27.

Concluding Remarks

Thus far, the IROL has been used in an umbrella sense to encompass certain fundamental values and principles while, at the same time its usage has remained contested. In parallel, however, domestic public law and the traditional model of the ROL has been simultaneously assimilating into the practice of global governance. So, for example, the domestic legal treatment of NSAs, through the medium of good governance and non-state regulatory regimes is progressively being replicated at international level in the economic, trade, legal and political spheres

The emergence of participatory regulation and new regulatory regimes show that national states, in particular market centered economies, are more and more attuned to and influenced by the participation of NSAs. In a constructive way, the concept of sovereignty is not only diminishing externally through global governance, trade relaxation, and international human rights and humanitarian laws, etc., but also weakening internally, through good governance, privatization of economy, participatory democracy, decentralization of government authority, and outsourcing government functions to NSAs.

With respect to the substantive version of the ROL, there have been many attempts to include social justice and welfare rights in the notion of the IROL. However, we believe that this conception is more problematic than the formal version of the ROL. This is because it is contentious not simply from the normative perspective, but also because of the realities of international law and relations. States and international organizations remain very divided as to such matters as global resource allocation, positive governmental obligations to citizens and the nature of social justice. A formal conception of the rule of law, therefore, is preferable, as its focus is primarily upon the formal and therefore neutral aspects of the law rather than on its substantive and therefore contested bases.

Notwithstanding this, however, there is one element of a substantive conception that we believe should complement the formal one. In the international sphere, the existence of fundamental human rights is sufficiently widely recognized and its content sufficiently certain and defined that human rights standards may now properly be regarded as a crucial constituent of an international rule of law. The reasons are: first, international human rights measures have already been absorbed to the body of positive international laws through international norms such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights, the European Convention on Human Rights and the other International human rights conventions. Formal theorists do not now tend to reject the centrality of human rights to the content and operation of the rule of law and nor should they. Human rights laws and standards are now more than any time before, addressed, interpreted, judged and enforced at a global level.

As explained in this article, NSAs have both negative and positive functions. To benefit from the emergence of NSAs and to avoid their negative impacts, IROL principles should regulate NSA behavior just as traditional international laws have governed the operation of states.