

# Vulnerability of Special Agreements Signed by Non-State Armed Groups in Non-International Conflicts\*

*Vulnerabilidad de acuerdos especiales firmados por grupos armados no estatales en conflictos armados no internacionales*

*Vulnerabilite des accords speciaux signes par des groupes armes non etatiques dans des conflits armes non internationaux*

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SUMMARY: I. *Introduction*. II. *Non-State Armed Groups and their International Legal Capacity*. III. *Legal Status of Special Agreements in the International Legal System*. IV. *Review of Cases: Implementation of Special Agreements*. V. *Conclusions*. VI. *Bibliography*.

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**ABSTRACT:** International law has recognized the existence and legal force of special agreements signed by non-state armed groups —NSAG— in the context of non-international armed conflicts -NIAC-. Nevertheless, considering the poor development of this area in International Law, praxis evidences that national governments bring a different legal treatment to those instruments. In consequence, there is not a clear path to oblige the parties to fulfill what they internationally have agreed to. This paper aims to establish the vulnerability of special agreements as result of the lack of protection from international law. As main discussion points, it is approached: *a)* the legal capacity of non-state actors, *b)* the legal treatment that international law confers to these legal instruments and *c)* review of some cases.

**Key words:** Special Agreements, Post Conflict Agreements, Non-State Armed Groups, Non-International Armed Conflict, Internal Conflict.

**RESUMEN:** El derecho internacional ha reconocido la existencia y la fuerza legal de acuerdos especiales firmados por actores no estatales (NSAG) en el contexto de conflictos armados no internacionales (NIAC). Sin embargo, considerando el escaso desarrollo de esta área en el derecho internacional, la praxis evidencia que los gobiernos nacionales brindan un tratamiento legal diferente a estos instrumentos. En consecuencia, no existe un camino claro para obligar a las partes a cumplir lo que acordaron internacionalmente. Este documento tiene como objetivo establecer la vulnerabilidad de los acuerdos especiales como resultado de la falta de protección del derecho internacional. Como principales puntos de reflexión, se aborda: *a)* la capacidad legal de los actores no estatales, *b)* el tratamiento legal que el derecho internacional confiere a estos instrumentos, y *c)* revisión de casos.

**Palabras clave:** acuerdos especiales, acuerdos de pos-conflicto, grupos armados no estatales, conflictos armados no internacionales, conflictos internos.

**RÉSUMÉ:** Le droit international a reconnu l'existence et la force juridique des Accords spéciaux signés par des acteurs non étatiques (NSG) dans le contexte des conflits armés non internationaux (NIAC). Cependant, compte tenu du faible développement de ce domaine en droit international, dans la pratique, il s'avère que les gouvernements nationaux accordent chaque fois différents traitements juridiques à ces instruments. Par conséquent, il existe un manque de clarté sur leur effectivité pour obliger les acteurs à se conformer aux compromis internationaux acquis. Cet article vise à établir une analyse de la faiblesse et vulnérabilité des accords spéciaux en raison de l'absence d'une claire et adéquate définition et application dans le système de protection du droit international. Les principaux sujets de réflexion sont les suivants: *a)* la capacité juridique des acteurs non étatiques, *b)* le traitement juridique que le droit international attribue à ces instruments, et *c)* études de cas.

**Mots-clés:** accords spéciaux, post-conflict, groupes armés non étatiques, conflits armés non internationaux, conflits internes.

## I. INTRODUCTION

The concept of subjects of international law has progressively changed over the last century. Previous to 20<sup>th</sup> century, States were the natural subjects of the international system, other participants, such as individuals, were considered as objects with a passive role.<sup>1</sup> Nevertheless, with the dynamic development within the system, nowadays, there are non- state subjects which are independents with their own rights and duties.<sup>2</sup>

In this sense, non-state armed groups —NSAG— are considered subjects in the international law field, not just in international conflicts, but in the context of conflicts carried out within a State.<sup>3</sup> Since the consolidation of the theory related to the international subject hood of non-state armed groups, there have been different cases in which these groups and States have signed legal agreements in the context of a national conflict as the cases of Former Yugoslavia, Sierra Leone, Congo and Sudan.<sup>4</sup> The legal capacity of NSAGs as treaty makers and the term “special agreements” come from different sources of international law, specifically from the *Geneva Conventions* and its common article 3.<sup>5</sup>

This paper aims to argument that even though international law authorizes and legitimates special agreements signed by NSAGs, different cases in the international system evidence that national legislations rule them, especially those referred to peace. The lack of proper regulation coming from international law has given the States the power to decide the treatment given to special agreements, which implies legal uncertainty for the parties.

<sup>1</sup> Grant, John, *International Law Essentials*, Edinburgh, Edinburgh University Press, 2010, Edinburgh Law Essentials, p.35.

<sup>2</sup> *Idem*.

<sup>3</sup> *Ibidem*, p.116.

<sup>4</sup> Sassòli, Marco, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, vol. 1, no. 1, October 2010, pp. 5-51, available at: <https://archive-ouverte.unige.ch/unige:12913>

<sup>5</sup> *Geneva Conventions to the Protection of Civilian Persons in Time of War*, opened for signature 12 Aug 1949, 75 UNTS 287 (entry into force 21 Oct 1950), available at: [http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33\\_GC-IV-EN.pdf](http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33_GC-IV-EN.pdf).

It is worth to mention that the absence of specific regulations related to special agreements obey to the state's sovereign decision to elude this topic.

The lack of proper legal mechanisms to enforce the agreements is not the only reason that explains their breach. It is worth to consider various factors, such as, lack of political will and the ambitious commitments included in these text. For instance, generally peace agreements contain more complex objectives than other special agreements, such as ceasefire treaties. Agreements that aim to end with a conflict generally include rural reforms or the establishment of a transitional criminal justice system. Regardless, the ambiguous legal treatment given by each state to agreements signed with non-state armed groups in the context of non-international armed conflicts contribute to legal uncertainty which conducts to the non-compliance of the agreement.

This research paper will analyse three key aspects: the first one is the international legal capacity of NSAGs as the enabling condition to play a role under international law. Secondly, the concept of "special agreements" conceived by the international humanitarian law throughout the *Geneva Conventions*. The final chapter concludes considering previous cases accepted under international law as special agreements; however, those cases are also example of vulnerability and legal uncertainty.

## II. NON-STATE ARMED GROUPS AND THEIR INTERNATIONAL LEGAL CAPACITY

International legal personality is defined as the legal capacity of international law subjects to carry duties and exercise rights.<sup>6</sup> Initially, this concept was applied exclusively to States,<sup>7</sup> even though, in 1949, the International Court of Justice expressed a different approach in the advisory opinion

<sup>6</sup> Johns, Fleur, *International Legal Personality*, Farnham, United Kingdom, Ashgate, 2010, p. 65.

<sup>7</sup> For a further description of the primary concept of the international system see Brierly, James Leslie, *The Law of Nations: an Introduction to the International Law of Peace*, 6<sup>th</sup> ed., New York, Oxford University Press, 1963, p. 94.

*Reparations for Injuries Suffered in the Employment of the United Nations Case*.<sup>8</sup> The Court stated that even though States are natural subjects of the international legal system, there are other actors that exercise an active role with different kind of duties and rights.<sup>9</sup> The Court expressed “The subjects of law in any legal system are not necessarily identical in their nature or the extent of their rights, and their nature depends upon the needs of the community”.<sup>10</sup>

General provisions of international law accept the legal force of agreements signed by different subjects than States. *Vienna Convention on The Law of Treaties* ratifies this thesis, giving to other entities the capacity to conclude treaties. Article 3 declares that spite the fact that the *Convention* does not apply to treaties concluded by subjects other than states, those agreements are legally binding.<sup>11</sup> It means that there are different actors, such as international organizations which are able to agree about duties and rights in the international law field.<sup>12</sup>

Specifically, in the case of non-state armed groups as subjects in international law, it is necessary to allude to the *Geneva Conventions*. In the context of the Diplomatic Conference of Geneva held in august 12 of 1949, the following conventions were established:

- I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.
- II. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.
- III. Geneva Convention relative to the Treatment of Prisoners of War.

<sup>8</sup> International Court of Justice “Reparation for Injuries Suffered in the Service of the United Nations”, Advisory Opinion, General List No. 4, 1949, available at: <https://www.icj-cij.org/en/case/4>.

<sup>9</sup> *Idem*.

<sup>10</sup> *Ibidem*, p. 8.

<sup>11</sup> *Vienna Convention on The Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

<sup>12</sup> Roberts, Anthea and Sivakumaran, Sandesh, “Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law”, *Yale Journal of International Law*, Yale, 2010, vol. 37, p. 112.

#### IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War.<sup>13</sup>

Furthermore, there are three additional protocols, the first one relating to the protection of victims of international armed conflicts, of June 8 1977; the second, relating to the protection of victims of non-international armed conflicts, of June 8 1977; and the third one, relating to the adoption of an additional distinctive emblem in 8 December 2005.<sup>14</sup>

In each one of the Geneva Conventions, the first group of articles include a set of general and common provisions. Even though, most of international humanitarian law norms are referred to international armed conflicts, common article 3 establishes some guidelines for non-international armed conflicts -NIACs,<sup>15</sup> or technically denominated as “armed conflicts not of an international character”.<sup>16</sup> This article entitles NSAGs of non-international armed conflicts as subjects with obligations under the *law of war*; specifically, it mentions that in cases of internal conflicts “The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention”.<sup>17</sup>

Notwithstanding, the legal capacity of NSAGs is limited.<sup>18</sup> The legal personality exists since the armed conflict comes to life and it finishes when the conflict ends.<sup>19</sup> Attending to its own nature, NSAGs do not exercise positive rights mainly due to these groups that are receptors of obligations determined by other actors, mainly states.<sup>20</sup> The limitation in this case is

<sup>13</sup> International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 28 (entry into force 21 Oct 1950).

<sup>14</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entry into force 7 Dec. 1978).

<sup>15</sup> *Geneva Conventions to the Protection of Civilian Persons in Time of War*, opened for signature 12 Aug 1949, 75 UNTS 287 (entry into force 21 Oct 1950).

<sup>16</sup> Sassòli, Marco, *op. cit.*, p. 11.

<sup>17</sup> Sivakumaran, Sandesh, “Binding Armed Opposition Groups”, *The International and Comparative Law Quarterly*, Oxford University Press, Oxford, 2006, vol. 55, p. 369.

<sup>18</sup> Anthea, Robert y Sivakumaran, Sandesh, *op. cit.*, p. 234.

<sup>19</sup> *Idem.*

<sup>20</sup> Waschefort, Gus, “Pseudo Legal Personality of Non-State Armed Groups in International Law”, *South African Yearbook of International Law*, 2011, vol. 36, p. 234.

focused on the fact that NSAGs do not participate in the creation of that set of norms, this characteristic confers to these groups a pseudo-legal personality.<sup>21</sup> Indeed, some academics as Waschefort argument that exogenous circumstances determine the existence of that legal personality. It means that the decision whether a NSAG is a subject of international law depends upon external situations, such as the existence of an armed conflict and the State recognition of that legal personality through some actions as the signature of peace agreements.<sup>22</sup> This is denominated as “conferred personality” because the condition of *subject* in the international system depends on the will of the State.<sup>23</sup>

In this sense, academy discusses the praxis of the international humanitarian law theory in armed conflicts and the equal application of rules over the parties in dispute.<sup>24</sup> Marco Sassoli asks whether it is possible to give equal treatment to those parties.<sup>25</sup> According to the author, the level of compliance with the obligations and duties vary in each case attending to their different nature. In consequence, the reality of conflicts limits the legal capacity of NSAGs as subjects of international law.<sup>26</sup>

Other perspectives in discussion support the thesis that NSAGs have the legal duty to respect international law due to the imposition of customary international law. The Special Court of Sierra Leone argued that international law of treaties does not bind NASGs with global obligations.<sup>27</sup> Still, the tribunal expressed that customary international law is the source that really binds non-state armed groups with the obligations declared in the common article 3.<sup>28</sup> Customary international law binds not just States but

<sup>21</sup> *Idem*.

<sup>22</sup> *Idem*.

<sup>23</sup> Walter, Christian, “Subjects of International Law”, *Max Planck Encyclopedia of Public International Law*, Oxford University, 2007.

<sup>24</sup> Sassoli, Marco, “Introducing a sliding-scale of obligations to address the fundamental inequality between armed groups and states?”, *International Review of the Red Cross*, vol. 93, no. 882, 2011, p. 427.

<sup>25</sup> *Ibidem*, p. 428.

<sup>26</sup> *Idem*.

<sup>27</sup> Special Court for Sierra Leone, Appeals Chamber “Decision on Challenge to Jurisdiction: Lomé Accord Amnesty”, Case Nos SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), 13 March 2004, p. 22.

<sup>28</sup> *Idem*.

all subjects in the international system, depending on the legal personality of each subject.

The United Nations Security Council has endorsed this thesis through different resolutions during last decades. A recent study of the contributions of the United Nations Security Council Resolutions to the law of non-international armed conflict, analysed council resolutions from 1991 to 2013 referred to NIACs.<sup>29</sup> In this, it was established that in 35% of the data, the Council ordered NSAGs to respect human rights invoking Chapter VII, of the Charter of the United Nations.<sup>30</sup> Furthermore, this research reflects the increasing council practice to impose sanctions to NSAGs, “only four of the sixteen Council sanctions regimes in place in 2017 targeted state actors exclusively; the rest targeted non-state actors exclusively or both state and non-state actors”.<sup>31</sup> With these actions, there is an implicit recognition of NSAGs as subjects part of the international system.

### 1. *Non-State Armed Groups as Treaty Makers*

According to Roberts and Sivakumaran, there is resistance to conceive NSAGs as treaty makers.<sup>32</sup> There is a predominant state-centric theory which has concerns about NSAGs as active subjects in the international system. One of the most alluded arguments is related to the legal status of armed groups. Some academics affirm that there is a considerable risk whether the State gives to NSAGs the position of lawmaker; it is considering that the group would undertake quasi-state functions.<sup>33</sup> Even so, this theory is dismissed due to the fact that the recognition of their legal capacity to sign treaties does not grant them the same rights and duties than States.<sup>34</sup> Additionally, the common article 3 of the *Geneva Conventions* clarifies that “The application of the preceding provisions shall not affect the

<sup>29</sup> Fox, Gregory H. *et al.*, “The Contributions of United Nations Security Council Resolutions to The Law of Non-International Armed Conflict: New Evidence of Customary International Law”, *American University Law Review*, Washington, vol. 67, iss. 3, 2018, p. 649-731.

<sup>30</sup> *Ibidem*, p. 654.

<sup>31</sup> *Ibidem*, pp. 671 and 672.

<sup>32</sup> Anthea, Robert and Sivakumaran, Sandesh, *op. cit.*, p. 132.

<sup>33</sup> *Idem*.

<sup>34</sup> *Idem*.



legal status of the Parties to the conflict”.<sup>35</sup> This concern was presented during the drafting process of the Geneva Conventions. According to the ICRC commentary about common article 3, the article explicitly established this observation due to states alarm about the possibility to empower the armed groups.<sup>36</sup> It means that allowing NSAGs to sign special agreements does not imply the recognition of the status of belligerence or unlimited legal subjectivity.<sup>37</sup>

The second concern is the legitimization of NSAGs armed actions. It regards giving NSAGs a path towards advantages in the political arena through that legitimization.<sup>38</sup> Even though, this is a valid position, engaging NSAGs in special agreements brings advantages to the State especially regarding the respect of international humanitarian law.<sup>39</sup> There is a risk of its non-compliance, thereof the existence of special agreements, brings higher possibilities to ensure the respect of IHL on the ground.<sup>40</sup> Furthermore, NSAGs would be introduced into the logic of negotiation, creating some awareness about other ways to behave during the conflict.<sup>41</sup>

The last concern is related with the possibility of degrading regulations established by IHL. This thesis exposes that NSAGs, as active subjects in the law-making process, could stipulate conditions which might violate

<sup>35</sup> *Geneva Conventions to the Protection of Civilian Persons in Time of War*, opened for signature 12 Aug 1949, 75 UNTS 287 (entry into force 21 Oct 1950).

<sup>36</sup> International Committee of the Red Cross, “Commentary Of 2016. Article 3: Conflicts Not of An International Character”, 2016, available at [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#\\_Toc465169951](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169951).

<sup>37</sup> International Committee of the Red Cross, “¿Qué dice el DIH sobre los acuerdos especiales en un contexto de un proceso de paz? (What IHL says about the special agreements within the context of a peace process?)”, January 22, 2016, available at: <https://www.icrc.org/es/document/acuerdos-especiales-acuerdos-de-paz-dih-colombia-comentarios-convenios-de-ginebra>.

<sup>38</sup> Anthea, Robert and Sivakumaran, Sandesh, *op. cit.*, p. 133.

<sup>39</sup> *Idem*.

<sup>40</sup> Hottinger, Julian, “The Engagement to Respect Humanitarian Law and Human Rights: A Prerequisite for Peace Negotiations, or a “Future” Component Within Peace Negotiations?”, Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law, Conference Report - Geneva, 4-5 June 2007, published November 2008, available at: [https://genevacall.org/wp-content/uploads/dlm\\_uploads/2013/11/20070605\\_criteria\\_conditions\\_engaging\\_ansa\\_to\\_hl.pdf](https://genevacall.org/wp-content/uploads/dlm_uploads/2013/11/20070605_criteria_conditions_engaging_ansa_to_hl.pdf).

<sup>41</sup> *Idem*.

minimum standards of human rights.<sup>42</sup> After all, it is necessary to notice that legal agreements shall respect international humanitarian law. It is considering that IHL dispositions are imposed through international treaties, but also, they are considered as norm *ius cogens* and international custom.<sup>43</sup> Indeed, the State would act as guarantor of the IHL and its minimum requirements in the law-making process.

In conclusion, there is a clear distinction in the nature of the different subjects of the international system, such as States and non-state armed groups. Still and all, customary international law, international humanitarian law and the interaction between those actors have progressively conferred legal capacity to NSAGs as treaty makers, implying that agreements signed by them are legally binding. Additionally, it is important to bear in mind the advantages that could bring the involvement of NSAGs, “it is necessary to engage them to obtain a sense of ownership by them”.<sup>44</sup> Including NSAGs in the practice of dialogue and negotiations may conduct to some respect of IHL.

### III. LEGAL STATUS OF SPECIAL AGREEMENTS IN THE INTERNATIONAL LEGAL SYSTEM

The *Geneva Conventions* in its common article 3 allows to NSAGs to sign special agreements related to international humanitarian law.<sup>45</sup> According to Ezequiel Heffes and Marcos D. Kotlik, special agreements are “explicit commitments between two or more parties to a non-international armed conflict to comply with certain rules of IHL, and they may be expressed in a signed document, a joint declaration or any other form. They are essentially public expressions of a concurrent will to abide by IHL”.<sup>46</sup>

<sup>42</sup> Anthea, Robert y Sivakumaran, Sandesh, *op. cit.*, p 134.

<sup>43</sup> *Idem*.

<sup>44</sup> Sassoli, Marco, “The Implementation of International Humanitarian Law: Current and Inherent Challenges”, *Yearbook of International Humanitarian Law*, vol. 10, 2007, p 64.

<sup>45</sup> Waschefort, above n. 2.

<sup>46</sup> Heffes, Ezequiel; Kotlik, Marcos, “Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime”, *International Review of the Red Cross* 1198, 2014, pp. 895-896, available at: <https://>

Drafters of the *Geneva Convention* included common article 3 as an answer to non-regulated aspects in the text in grounds of non-international armed conflicts.<sup>47</sup> In the drafting process, this disposition was intentionally written with a minimum level of specification in order to avoid controversies between States, but also to confer to the parties involved the possibility to self-regulate their obligations.<sup>48</sup> The common article 3, initially indicates that special agreements were conceived to implement IHL regulations. Still, ICRC has mentioned in its 2016 commentary that those instruments may include dispositions of different nature such as peace settlements and reintegration of combatants.<sup>49</sup>

In the academic and legal community, there is no consensus about the inclusion of special agreements as legal instruments part of international law. Mainly, there are three different approaches: the state-centric, a *sui generis* legal theory and the international approach.

The state-centric view indicates that special agreements are part of national law, implying that these settlements are legally valid and enforceable exclusively in the national context.<sup>50</sup> This theory considers States as the exclusive drafters of international law.<sup>51</sup>

However, this position carries some circumstances that are worth to consider. Firstly, admitting special agreements as part of the national law could produce a clash between the existing domestic legal structure and the new dispositions.<sup>52</sup> For instance, actions considered as a war crime un-

[www.icrc.org/en/international-review/article/special-agreements-means-enhancing-compliance-ihl-non-international](http://www.icrc.org/en/international-review/article/special-agreements-means-enhancing-compliance-ihl-non-international).

<sup>47</sup> Fleck, Dieter, “The Law of Non-International Armed Conflict”, in Fleck, Dieter, *The Handbook of International Humanitarian Law*, Oxford, 2013, p. 587.

<sup>48</sup> It is worth to mention additional advantages from including NIACs as treaty makers in the context of a non-international armed conflict. For instance, it is possible to clearly establish the legal status of the conflict or the applicable law. It allows to reaffirm the compliance of the international humanitarian law, but also to include provisions not embraced in this field, as the case of rules from international human rights law. Finally, it conducts to create a system to follow up the compliance of the agreement. For further review see: Mack, Michelle “Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts”, *International Committee of the Red Cross*, Geneva, Switzerland, February 2008, p. 16.

<sup>49</sup> International Committee of the Red Cross, “Commentary Of 2016...”, *op. cit.*

<sup>50</sup> Heffes, Ezequiel; Kotlik, Marcos, *op. cit.*, p. 1211.

<sup>51</sup> *Idem.*

<sup>52</sup> Heffes, Ezequiel; Kotlik, Marcos, *op. cit.*, p. 1212.

der international humanitarian law, may be classified differently under national regulations or *vice versa*.<sup>53</sup> Second, there are specific situations that the national regime does not regulate. That is the case of the intervention of a third party in the conflict, as another State.<sup>54</sup> And the most important argument, whether or not the national law regulates special agreements, there is always the possibility that one of the parties can deny the treaty. This applies specially to States due to the asymmetrical relation between the subjects.<sup>55</sup>

The second approach argues that a *sui generis* legal regime regulates special agreements.<sup>56</sup> According to this view, this set of instruments creates a new legal regime exclusively for NSAGs, neither an international or national system.<sup>57</sup> Although, this has difficulties and restrictions. The first one is that a special regime would be based on temporary subjects of international law, implying the limited existence of that set of norms.<sup>58</sup> Additionally, one of the main incentives to NSAGs for signing special agreements is their legitimation through political recognition; without that motivation, the negotiation of agreements would be more complex.<sup>59</sup> NSAGs would not be part of an specific legal sphere which conducts to the reduction of their political power and influence.

Roberts and Sivakumaran defend another middle ground position describing special agreements as “hybrid treaties” due to the different condition of the signatory parties in terms of international capacity.<sup>60</sup> According to the authors, even though those instruments are in that mixed category, it does not imply a diminishment in their legal force.<sup>61</sup>

<sup>53</sup> Some actions which are considered under international humanitarian law as war crimes generally receive other treatment in national law systems. Peace agreements are an excellent example due to the inclusion of amnesty laws and special treatments to combatants. *Idem*.

<sup>54</sup> *Ibidem*, 1212.

<sup>55</sup> *Idem*.

<sup>56</sup> Sassòli, Marco, “Taking Armed Groups...”, *op. cit.*, p. 30.

<sup>57</sup> *Idem*.

<sup>58</sup> *Idem*.

<sup>59</sup> International Committee of the Red Cross, Report: “Improving Compliance with International Humanitarian Law ICRC Expert Seminars”, Geneva, 2003, available at: [https://www.icrc.org/eng/assets/files/other/improving\\_compliance\\_with\\_international\\_report\\_eng\\_2003.pdf](https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_report_eng_2003.pdf).

<sup>60</sup> Anthea, Robert y Sivakumaran, Sandesh, *op. cit.*, p 144.

<sup>61</sup> *Idem*.

The last theory affirms that international law regulates special agreements.<sup>62</sup> Embracing this approach brings advantages to both sides in the conflict. One of the strongest arguments is the symmetrical relation between the parties.<sup>63</sup> Even though in the national context the State has a preponderant status over NSAGs, when those subjects are located on an international level, both get a similar status.<sup>64</sup> It is recognized an equal capacity to negotiate in content. Both parties get duties and obligations that shall be accomplished. This thesis considers the international legal subjectivity as the conclusive characteristic needed to include special agreements as part of international law.<sup>65</sup> It means whether the parties are considered subjects of international law and the instrument meets the requirements; the resulting document might be considered as part of the international legal system.<sup>66</sup> Understanding special agreements as part of the international legal system implies that commitments included would be enforceable to the parties before international law institutions.<sup>67</sup>

The general opinion of international courts, international organizations and academy, sustain that NSAGs are able to hold obligations in the international legal system through treaties, custom, unilateral positions or general principles of law.<sup>68</sup> Notwithstanding, there is not a consensus about how NSAGs acquire those obligations.<sup>69</sup> It is possible to get an idea with the *lex specialis* of different areas of international law. That is the case of the international humanitarian law or international human rights law, fields where it is easier to apply the concept.<sup>70</sup> Regardless, this approach commonly presents difficulties before traditional theories of international relations and inter-

<sup>62</sup> Heffes, Ezequiel; Kotlik, Marcos, *op. cit.*, p 1216.

<sup>63</sup> *Idem.*

<sup>64</sup> *Idem.*

<sup>65</sup> *Idem.*

<sup>66</sup> *Idem.*

<sup>67</sup> Another point of discussion would be ¿which institution would act as guarantor of the special agreements in the international law system? ¿would it be possible to stablish liability about the unfulfillment of special agreements?

<sup>68</sup> Tzeng, Peter, “Non-State Actors as Respondents before International Judicial Bodies”, *LSA J. Int’l & Comp. L*, 2018, p. 404, available at: <https://heinonline-org.ezp.lib.unimelb.edu.au/HOL/Print?collection=journals&handle=hein.journals/ilsaic24&jd=432>.

<sup>69</sup> *Ibidem*, p. 405.

<sup>70</sup> *Ibidem*, p. 406.

national law. This is due to the intervention of NSAG and their relevant role in the creation of law and regulations.<sup>71</sup>

In conclusion, from a pragmatic point of view, it is possible to understand special agreements as instruments which imply both legal levels, the national and the international. The international system enables the subjects and brings the legal support to the agreement. The national sphere is the context where dispositions would be carried out (implying the intervention of national institutions, civil society, and so on). Considering special agreements as international treaties would arise multiple complexities for the international system.<sup>72</sup> That is the reason why it is necessary to reinforce the protection with other mechanisms from international law in order to ensure their proper compliance.

#### IV. REVIEW OF CASES: IMPLEMENTATION OF SPECIAL AGREEMENTS

The legal concept of “special agreements” includes a set of different instruments.<sup>73</sup> The most alluded in theory are cease-fire agreements, peace agreements, and unilateral declarations, among others.<sup>74</sup> According to common article 3, those documents should contain substantial commitments from both sides related to IHL norms.<sup>75</sup> After the Second World War Two, there has been a proliferation of peace agreements in the world.<sup>76</sup> It is affirmed that after 1990, 50% of civil wars around the world have ended with a peace settlement.<sup>77</sup> The implementation of special agreements relies on multi-

<sup>71</sup> *Idem.*

<sup>72</sup> Heffes, Ezequiel; Kotlik, Marcos, *op. cit.*, p. 1217.

<sup>73</sup> International Committee of the Red Cross, “¿Qué dice el DIH sobre los acuerdos especiales en un contexto de un proceso de paz? (What IHL says about the special agreements within the context of a peace process?)”, *cit.*

<sup>74</sup> *Idem.*

<sup>75</sup> *Geneva Conventions to the Protection of Civilian Persons in Time of War*, Common Article 3, opened for signature 12 Aug 1949, 75 UNTS 287 (entry into force 21 Oct 1950).

<sup>76</sup> Bell, Christine, “Peace Agreements: Their Nature and Legal Status”, *The American Journal of International Law* 373, 2006, p. 373.

<sup>77</sup> *Idem.*

ple factors such as, state capacity and political will.<sup>78</sup> Indeed, cases as ceasefire agreements and unilateral declarations count with better predictions in their implementation due to the lower level of complexity in comparison to peace agreements. In cases as those analysed subsequently, it is inevitable to notice the ambitious objectives included in those instruments. Generally, ceasefire obligations are only one section in addition to aspects such as rural reforms, reintegration of combatants, transitional justice, among others. With this kind of structural changes, peace agreement implementation requires the full capacity and political will of states.<sup>79</sup>

Not the less, the legal treatment given from international law to special agreements in general, conducts to its legal vulnerability due to that there is not a clear path to make them enforceable as international obligations. Indeed, States determine the legal status conferred to special agreements, which implies that in some cases, these are left without a proper legal guarantee. The lack of protection has contributed to the underestimation and unfulfillment of those agreements, conducting to gaps in the praxis and their legal development.

As exposed previously, it is possible to identify three different legal treatments in the international community. The first one, national legislations ruling special agreements. Second, in a restricted number of situations, special agreements accepted and formalized as international agreements. Finally, the third group where it is not clear whether they belong to national or international legal system. This chapter will review specific cases where there has been a breach of the rules agreed between the parties.

## 1. *Sudan and South Sudan*

Several chapters of civil and ethnic violence has marked North-south Sudan's recent history, in addition to frontier disputes, political instability and massive transgression of basic human rights.<sup>80</sup> This conflict left more

<sup>78</sup> DeRouen, Karl *et al.*, "Civil War Peace Agreement Implementation and State Capacity", *Journal of Peace Research*, núm 47(3), 2010, 333-346.

<sup>79</sup> *Idem.*

<sup>80</sup> Bona, Malwal, *Sudan and South Sudan: from one to two*, Basingstoke, Hampshire, New York: Palgrave Macmillan, in association with St Antony's College, Oxford, 2015, p.16.

than two million deaths, four million displacement cases and 600,000 Sudanese seeking asylum overseas.<sup>81</sup> In this context, there has been different agreements between the parties, but the most important is the Comprehensive Peace Agreement —CPA— (2005) which led to the independence of South Sudan.<sup>82</sup>

This legal instrument signed in Sudan in 2005 is one example of special agreement under the disposition of the common article 3 of the *Geneva Convention*. The agreement signed between the Sudanese government and the Sudan's People Liberation Movement/Army —SPLM/A— was the end of more than 21 years of war.<sup>83</sup> This legal instrument is conformed by six different protocols which include IHL dispositions and meaningful aspects such as the right of self-determination of South Sudan, the reform of the state's administrative structure and power sharing rules.<sup>84</sup>

There are multiple reasons that explain why the Comprehensive peace agreement, signed between a non-state armed group and the Sudanese Government is considered as a special agreement and might be enforceable before international law.<sup>85</sup> First of all, it is possible to deduce the intent of the parties to be bound with the agreement due to some words and expressions such as: "Shall", "obligations" and "equally authoritative".<sup>86</sup> It establishes "all

<sup>81</sup> Brosche, Johan and Duursma, Allard, "Hurdles to peace: a level-of-analysis approach to resolving Sudan's civil wars", *Third World Quarterly*, vol. 39, no. 3, p. 6.

<sup>82</sup> *Idem*.

<sup>83</sup> United Nations Mission in Sudan, "The background to Sudan's Comprehensive Peace Agreement" 28 August 2016, available at: <https://unmis.unmissions.org/background-0>.

<sup>84</sup> The first one is the Protocol of Machakos (2002) which is focused on structural issues as the transitional process, the principle of governance, the recognition of the self-determination of South Sudan and the state structure. Five additional agreements are added to this protocol. The protocol on security arrangements (2003), The Protocol on wealth-sharing (2004), The Protocol on Power-sharing (2004), The Protocol on the resolution of conflict in southern Kordofan/Nuba Mountains and the Blue Nile States (2004), and The Protocol on the resolution of conflict in Abyie (2004).

<sup>85</sup> Another peace agreement which recognizes the right to self-determination was signed between the Communist Party of Nepal (Maoist) [CPN (M)] and the Government of Nepal in 2006. The objective of this agreement was the cessation of hostilities. The People's Liberation Army [PLA] and the governmental armed forces were committed to deposit their weapons in stipulated cantonments. See: Sheeran, Scott, "International Law, Peace Agreements and Self-Determination: The Case of the Sudan", *International and Comparative Law Quarterly*, no. 2, 2011, p. 428.

<sup>86</sup> *Ibidem*, p. 434.



the obligations and commitments specified in the CPA shall be binding in accordance with the provisions thereof”.<sup>87</sup> In addition, there is a deep intervention from the international community as guarantors and facilitators during the peace negotiations, the signing of the agreement and its implementation.<sup>88</sup> There was a deep involvement from some States and international organizations in its negotiation process, as the East African Regional Organization and the company of the international community.<sup>89</sup> Finally, it is worth to mention the inclusion of the right to self-determination in the text inducing an *erga omnes* and *jus cogens* character.<sup>90</sup> The CPA included the possibility to led the creation of South Sudan as independent State.<sup>91</sup>

Notwithstanding, there are flaws in the implementation of this agreement. The CPA stated the realization of a referendum for the people of Abyei Region on whether to become part of the South or to stay part in the north with its special status.<sup>92</sup> It had to be hold in 2011; however, this commitment is still pending due to political reasons and the parties’ lack of willingness.<sup>93</sup> South Sudan is experiencing a similar case. After its independence, since 2013 South Sudan has been immersed into a civil war between government forces and opposition rebels, including Sudan’s People Liberation Movement-In Opposition —SPLM-IO—, dissident from the original SPLM.<sup>94</sup> It has created “one of the world’s biggest humanitarian crisis” due

<sup>87</sup> Comprehensive Peace Agreement between the Government of the Republic of The Sudan and The Sudan’s People Liberation Movement/ The Sudan’s People Liberation Army, p. 16, available at: [https://peacemaker.un.org/sites/peacemaker.un.org/files/SD\\_060000\\_The%20Comprehensive%20Peace%20Agreement.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_060000_The%20Comprehensive%20Peace%20Agreement.pdf).

<sup>88</sup> Sheeran, Scott, *op. cit.*, p. 442.

<sup>89</sup> Woodrow Wilson International Centre for Scholars, “Implementing Sudan’s Comprehensive Peace Agreement: Prospects and Challenges”, May 2008, available at: <https://www.ciaonet.org/attachments/1347/uploads/5>.

<sup>90</sup> *Ibidem*, p. 446.

<sup>91</sup> *Idem*.

<sup>92</sup> The Carter Center, “Observing the 2011 Referendum on the Self-Determination of Southern Sudan: Final Report”, p. 6, available at: [https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/finalreport-sudan-2011-self-determination-referendum.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/finalreport-sudan-2011-self-determination-referendum.pdf).

<sup>93</sup> *Idem*.

<sup>94</sup> United Nations Mission in the Republic of South Sudan (UNMISS), “*Conflict in South Sudan: A Human Rights Report*”, May 8 2014, available at: [https://unmiss.unmissions.org/sites/default/files/unmiss\\_conflict\\_in\\_south\\_sudan\\_-\\_a\\_human\\_rights\\_report.pdf](https://unmiss.unmissions.org/sites/default/files/unmiss_conflict_in_south_sudan_-_a_human_rights_report.pdf).

to massive violation of basic human rights.<sup>95</sup> In this context, there have been different attempts to restore the peace in the country through different peace agreements. The most feasible occasion was the first peace agreement in 2015, where the transitional government was established and specific commitments to include all the parties in the political and State power.<sup>96</sup>

The growing cynicism towards the peace process (2015) also underscores the unwieldy politics of South Sudan and the many interrelated factors (including corruption, military factionalism and economic instability) complicating efforts to structure the peace process. South Sudan, in other words, is not simply the product of hundreds of years of bloodletting and tribal savagery. Rather, it is a country whose political elite continues to steal from the people and the land, fight with one another and operate with impunity.<sup>97</sup>

In October 2018, the South Sudan Government and the rebels signed a new peace agreement.<sup>98</sup> The international community is deeply involved, considering the number of States which have participated in the negotiation process, such as Sudan and Uganda which have the role of guarantors.<sup>99</sup> Nevertheless, there is a clear scepticism about the parties' real willingness to execute the treaty and its obligations.<sup>100</sup>

As it is possible to observe, Sudanese comprehensive peace agreement is one of the most ambitious settlements in recent history. It looked to intro-

<sup>95</sup> Brosché, Johan, Höglund, Kristine, "Crisis of Governance in South Sudan: Electoral Politics and Violence in the World's Newest Nation", *Journal of Modern African Studies*, no. 1, 2016, p. 22.

<sup>96</sup> Roach, Steven C. "South Sudan: A Volatile Dynamic of Accountability and Peace." *International Affairs*, vol. 92, no. 6, Nov. 2016, p. 1343.

<sup>97</sup> *Idem*.

<sup>98</sup> Hauenstein, Matthew and Joshi, Madhav, "What are the prospects for South Sudan's new peace agreement? Here are the critical next steps", *The Washington Post*, October, 2019, available at: [https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/29/what-are-the-prospects-for-south-sudans-new-peace-agreement-here-are-the-critical-next-steps/?noredirect=on&utm\\_term=.76c5b34b937a](https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/29/what-are-the-prospects-for-south-sudans-new-peace-agreement-here-are-the-critical-next-steps/?noredirect=on&utm_term=.76c5b34b937a).

<sup>99</sup> *The Guardian*, "South Sudan celebrates new peace accord amid joy – and scepticism", October, 2018, available at: <https://www.theguardian.com/global-development/2018/oct/31/south-sudan-celebrates-new-peace-accord-amid-joy-and-scepticism>.

<sup>100</sup> *Idem*.

ducing deep structural changes in the political, social and economic organization in Sudan. In consequence, it demands a huge effort not just from the parties in conflict, but from the entire society. Indeed, during its negotiation process, some observers expressed a common concern whether the parties were going to be able to implement the agreement.<sup>101</sup>

In addition to the intricated matters covered in the agreement, and the lack of political willingness, one of the main reasons that explains why there is a recurrent pattern of non-compliance of special agreements in Sudan is closely linked with the concept of identity.<sup>102</sup> It goes beyond tangible or negotiable goods in the society, such as power or wealth; and it is more related to aspects as historical and cultural interpretations, different conceptions of social values, and ethnic differences. Commonly this kind of aspects are more complex to negotiate, considering that those are part of people's personal beliefs and concept of individuality.<sup>103</sup>

Bearing in mind this background and Sudan's recent history, the recognition from international law, as a binding treaty with international obligations, would bring better predictions for the future implementation of this peace agreement. Besides, the parties in the conflict would count with more efficient mechanisms to oblige to put it into practice and denounce its breach. In the same way, the international community would count with a legitimation to call for its implementation.

## 2. Colombia

According to the International Committee of the Red Cross, during the Colombian conflict, there has been a set of special agreements between the parties.<sup>104</sup> The first one was concluded in 2001 during the period of former president Andrés Pastrana Arango (1998-2002) between the FARC

<sup>101</sup> Woodrow Wilson, *op. cit.*, p. 7.

<sup>102</sup> Silva Freitas, Jeane and Loyolla, Paulo, "La naturaleza de la disputa entre el Norte y el Sur y las implicaciones del Tratado General de Paz para el proceso de formación de Sudán del Sur" (The nature of the dispute between the North and the South and the implications of the General Peace Agreement for the formation process of South Sudan), *Relaciones Internacionales*, no. 29, June-December 2015, pp. 153-178.

<sup>103</sup> *Idem.*

<sup>104</sup> "¿Qué dice el DIH sobre...?", *International Committee of the Red Cross, cit.*

and the Colombian government.<sup>105</sup> The subjects agreed on a humanitarian exchange of prisoners which allowed the liberation of 358 kidnaped soldiers in exchange of 14 subversives.<sup>106</sup> However, the guerrilla breached its commitments and the government ended the negotiation process.<sup>107</sup>

The most important special agreement in Colombian history, is the deal signed between the government and the FARC in 2016.<sup>108</sup> After 4 years of negotiations, the *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace* became a reality.<sup>109</sup> It includes 5 main sections: 1) rural reform; 2) political participation; 3) definitive ceasefire and abandonment of arms; 4) illicit drugs; 5) victims and transitional justice.<sup>110</sup> This agreement has contributed to the diminishment of the statistics about murderers in

<sup>105</sup> International Crisis Group, “Rehenes por prisioneros: ¿un camino hacia la paz en Colombia?” (Hostages for Prisoners: Is It a Way to Get Peace in Colombia?), *Boletín Informativo Sobre América Latina*, available at: [http://www.acnur.org/t3/uploads/media/COI\\_766.pdf?view=1](http://www.acnur.org/t3/uploads/media/COI_766.pdf?view=1).

<sup>106</sup> Heyck, Ana Caterina, “Análisis del acuerdo humanitario como alternativa de negociación para lograr la libertad de los secuestrados políticos en Colombia” (Analysis of the humanitarian agreement as an alternative to negotiation in order to achieve the freedom of the kidnapped politicians in Colombia), *Revista Paz y Conflicto*, España, núm. 2, 2009, p. 92.

<sup>107</sup> It is necessary to bear in mind the fact that the Colombian conflict involves multiple sides. The FARC was the most robust group. However, there are other illegal organizations, such as the National Liberation Army —ELN— and paramilitary groups, which are still part of the conflict. See: National Center of Historical Memory, General Report “*Bata Ya*”, Colombia, 2012, pp. 111-194, available at: [http://centrodememoriahistorica.gov.co/descargas/informes2013/bataYa/capitulos/bata-ya-cap2\\_110-195.pdf](http://centrodememoriahistorica.gov.co/descargas/informes2013/bataYa/capitulos/bata-ya-cap2_110-195.pdf).

<sup>108</sup> It is important to mention, that the FARC and the Colombian government signed two different agreements. The first one was sealed in Cuba on June 23 2016. Subsequently, the president Juan Manuel Santos decided to submit the final text to popular endorsement holding a national plebiscite. It was an astonishment surprise when the “No” turned out to be the winning option of the elections, which evidenced the Colombian people displeasure about the pact. In consequence, the government took some proposal from the opposition and decided to modify specific points of the deal. The last text was signed in a more discreet ceremony in Bogotá on November 24 2016. See: Torrijos, Vicente and Arévalo, Walter, “Del plebiscito a la reforma: movimientos políticos y cambios fundamentales a los Acuerdos de Paz en Colombia tras la victoria del No en el Plebiscito de 2016 (From the Plebiscite to The Reform: Political Movements and Fundamental Changes to Peace Agreements in Colombia After the Victory of No in The Plebiscite Of 2016 )”, *Revista Política y Estrategia*, no. 129, 2017, p. 132, available at: <https://dialnet.unirioja.es/servlet/articulo?codigo=6123849>.

<sup>109</sup> Colombian Government, “*Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*”, November 24 2016, available at: <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf>.

<sup>110</sup> *Idem*.

combat, landmine victims and children recruited for war.<sup>111</sup> However, the implementation is questionable considering the lack of government and guerrillas' willingness to fulfil their commitments. Most of the measures foresaw in the agreement are still pending such as, programs of reinstatement of combatants, rural reform and proper implementation of the transitional justice.<sup>112</sup> In different scenarios, national and international subjects have expressed their concern about the possibility to return to worldlike conflict.<sup>113</sup>

The legal treatment given to special agreements in Colombia has changed during the years. In the constitutional ruling C – 225 of 1995, the Colombian Constitutional Court adopted the thesis that special agreements cannot be considered as international treaties due to NIAGs are not subjects in the international law system.<sup>114</sup> Notwithstanding, with the peace agreement in 2016 there was the initiative to recognize the deal as special agreement. The legislative act 01 Of July 7 of 2016 stated in its article 4:

The Final Agreement for the Termination of the Conflict and the Building of a Stable and Lasting Peace constitutes a Special Agreement under the terms of common Article 3 to the Geneva Conventions of 1949. In order to offer guarantees of compliance with the Final Agreement, once it has been signed and entered into force will enter.<sup>115</sup>

<sup>111</sup> Technical Secretariat of the International Verification Component. CINEP / PPP-CER-AC, "Third report verifying the implementation of the Final Agreement of Peace in Colombia for International Verifiers", Colombia, August, 2018, p. 11, available at: <https://www.cinep.org.co/images/csivi/Tercer-Informe-Trimestral-Secretaria-Tcnica.pdf>.

<sup>112</sup> *Ibidem*, pp. 1-369.

<sup>113</sup> United Nations Verification Mission in Colombia, "Comunicado Tercer Informe del Secretario General al Consejo de Seguridad Sobre la Misión de Verificación de la ONU en Colombia" (Press Release Third Report of The Secretary General to The Security Council on The UN Verification Mission in Colombia), Colombia, July 25 2018, available at: <https://colombia.unmissions.org/co-municado-tercer-informe-del-secretario-general-al-consejo-de-seguridad-sobre-la-misi%C3%B3n-de>.

<sup>114</sup> Constitutional Court of Colombia, Ruling C-225/95, Reporting Judge: Alejandro Martínez Caballero, Colombia, 18 May 1995, available at: <http://www.corteconstitucional.gov.co/relatoria/1995/C-295-95.htm>.

<sup>115</sup> The Congress of the Republic of Colombia, "Legislative Act 01", July 27 of 2016, available at: <https://www.comisionprimeras Senado.com/actos-legislativo/1074-acto-legislativo-01-del-7-de-julio-de-2016/file>.

Furthermore, in the same article, the Colombian Congress inserted the agreement into the block of constitutionality, trying to bring constitutional force and guarantees to its implementation.<sup>116</sup>

After the plebiscite that made evident the disapproval of the Colombian people towards the agreement, the Government derogated article 4 ending with the recognition of the text as special agreement.<sup>117</sup> For all that, this is a controversial issue in the legal field in the country. The characteristics of this agreement, in addition to the subjects and the procedure itself; bring enough arguments to consider this as special agreement.

In the Colombian case, the polarization experienced in politics and in the society is one of the main reasons that has prevented the proper implementation of the peace agreement. After the period of former president Juan Manuel Santos, the opposition political party assumed the command of the executive branch with the democratically elected president Ivan Duque Marquez. The “Democratic Centre”, the president’s political party, has been the strongest opposition to the peace process with the FARC. In many opportunities its members have expressed the necessity to “shatter” the settlement.<sup>118</sup> Although, during its presidential period, Duque has not endorsed the party’s radical position, however, he has drove reforms initiatives in aspects such as transitional justice and the political participation of ex-combatants.<sup>119</sup> These initiatives have not succeeded yet, notwithstanding, it has slowed the agreement implementation course. In the same way, some ex-members of the FARC have continued committing criminal acts

<sup>116</sup> *Idem*.

<sup>117</sup> Amaya-Villareal, Alvaro and Guzman-Duarte, Valeria, “La Naturaleza Jurídico-Internacional de los Acuerdos de Paz y Sus Consecuencias en la Implementación” (International Legal Nature of Peace Agreements and its Consequences on their Implementation in Colombia), *Colombian Journal of International Law*, Colombia, No. 30, June 2017 p. 52.

<sup>118</sup> “«Hacer trizas» el acuerdo con las FARC: ¿es posible?” («Shattering» the agreement with the FARC: is it possible?), *Revista Semana*, August, 2017, available at: <https://www.semana.com/nacion/articulo/uribismo-hara-trizas-acuerdo-acuerdo-con-farc-esta-blindado/524529>.

<sup>119</sup> “Las cuatro reformas que el gobierno Duque quiere hacerle al Acuerdo con las Farc” (The four reforms that the Duque government wants to make to the Agreement with the Farc), *El Espectador*, August, 2018, available at: <https://www.elespectador.com/colombia2020/politica/las-cuatro-reformas-que-el-gobierno-duque-quiere-hacerle-al-acuerdo-con-las-farc-articulo-857074>.

and abandoning the peace process.<sup>120</sup> There is a generalized distrust in the process, which has conducted to the rearmament of guerrilla cells.

In the Colombian case, in addition to the issues related to its implementation, there is a clear intention in modifying the agreement dispositions. In consequence, it is necessary to give legal protection to the agreements signed between NSAGs and states in the context of non-international armed conflicts. This would not close the possibility of future amendments or changes agreed between the parties according to the *Vienna Convention on the Law of treaties*. So far, recognizing the existence of international obligations inserted in special agreements would bring certain legal stability and legal guarantees to the signing parties for any future modification process. In conclusion, it will help to diminish the current legal vulnerability present in multiple post-conflict processes.

### 3. Guatemala

Guatemala is an example of non-compliance with what was agreed between non-state armed groups and the government in the framework of a peace agreement. In 1996, after 36 years of war, the Guatemalan State and the Guatemalan National Revolutionary Front -URNG- signed the “Accord for a Firm and Lasting Peace”.<sup>121</sup> With more than three decades of confrontations, according to the Commission for Historical Clarification, It was registered 42,275 victims, 83% were mayas and 7% were ladinos.<sup>122</sup>

<sup>120</sup> Rios Escobar, Federico, “Colombia Struck a Peace Deal With Guerrillas, but Many Return to Arms”, *New York Times*, Sept. 2018, available at: <https://www.nytimes.com/2018/09/18/world/americas/colombia-farc-peace.html>

<sup>121</sup> This final agreement is the closure of precedent deals sealed between the parties in the Salvadorian conflict. Some of them were: Agreement on the Establishment of the Commission for the Historical Clarification of violations of human rights and acts of violence that have caused suffering to the Guatemalan population (Oslo, Norway, June 23, 1994), Agreement on the Definitive Ceasefire (Oslo, Norway December 4, 1996), Agreement on Constitutional Reforms and Electoral Regime (Stockholm, Sweden 7 December, 1996) and so on. See: Secretariat of Peace Presidency of the Republic, “Peace Agreements in Guatemala” (Los Acuerdos de Paz en Guatemala), available at: <https://www.sepaz.gob.gt/images/Descargas/Acuerdos-de-Paz.pdf>.

<sup>122</sup> It is necessary to bear in mind the deep discrimination culture present in this country. The peace agreement was foreseen as a path towards a more inclusive Guatemalan society.

Whether it is added the causalities of political violence, it is estimated that the conflict left more than two thousand victims.<sup>123</sup>

In order to guarantee social equality, the peace agreement included dispositions related to substantial alterations in the constitution which would modify the state's structure in aspects such as, electoral mechanisms, indigenous rights, reinstatement of combatants and agrarian reform.<sup>124</sup> Still, its implementation has been questioned as well as the cases of South Sudan and Colombia. Even though, there were successful measures as ending with the forced recruitment and the demobilization of combatants, other relevant aspects are still waiting to be modified or implemented.<sup>125</sup> The first one that is worth to mention is the reform of the Guatemalan Constitution in order to introduce the peace agreement into the national legal system.<sup>126</sup> After a long and intricaded process of drafting the new articles, when the text was submitted to popular approval, the Guatemalan people rejected the constitutional draft. There is still a debate trying to explain, ¿why did it win the "NO" option? Some critics allude to the actions of the opposition groups. Others refer to the fact that after a very participative drafting process, when the text arrived to the National Congress, the articles were modified by the legislators, fact that brought people's rejection.<sup>127</sup> With this, the social society noted the lack of willingness from the State about this process and protested demanding the agreement implementation. 5 years later, peace agreements were included in the national law through decree. The main repercussion derived from this instability was its partial implementation; "As a consequence of the unsuccessful implementation of the peace

*See:* Guatemalan Studies Centre, "Proceso de paz en Guatemala: un estudio de caso sobre la negociación y el proceso de diálogo nacional en Guatemala" (Peace process in Guatemala: a case study on the negotiation and the process of national dialogue in Guatemala), Guatemala, 2016, available at: [https://www.swisspeace.ch/fileadmin/user\\_upload/pdf/Mediation/Estudio\\_de\\_caso\\_sobre\\_Proceso\\_de\\_paz\\_en\\_Guatemala.pdf](https://www.swisspeace.ch/fileadmin/user_upload/pdf/Mediation/Estudio_de_caso_sobre_Proceso_de_paz_en_Guatemala.pdf).

<sup>123</sup> *Ibidem*, p. 23.

<sup>124</sup> Alvarez, Enrique and Palencia, Tania, "Guatemala's peaceprocess: context, analysis and evaluation", 2002, p. 42, available at: [https://www.c-r.org/downloads/Accord%2013\\_7Guatemala's%20peace%20process\\_2002\\_ENG.pdf](https://www.c-r.org/downloads/Accord%2013_7Guatemala's%20peace%20process_2002_ENG.pdf).

<sup>125</sup> Centro de Estudios de Guatemala, *op. cit.*, p. 21.

<sup>126</sup> Saati, Abrak, "Guatemala: Twenty Years After the Signing of the Peace Accords", *Peace Agreements in the 1990s – what are the outcomes 20Years Later?*, Sweden, 2015, p. 11, available at: <http://uu.diva-portal.org/smash/get/diva2:1022571/FULLTEXT01.pdf>.

<sup>127</sup> *Idem*.



accord due to the rejected constitutional draft, deep social inequalities persist in Guatemala, as does a high level of impunity for crimes committed, both by members of URNG and the military, during the war, as does very high levels of violence”.<sup>128</sup>

Main issues, such as the modification of the electoral system and the reform of the branches of public power (judiciary, legislative and executive) were cornerstones to improve the social inclusion, democratization and social inequality deeply present in this State. Up to now, that set of changes would have implied redistribution of power affecting the current elite in power. In consequence, changes in this area, and others such as land distribution, have been slow without significant achievements.<sup>129</sup> In the same sense, the implementation of the tax reform failed as well as the changes in the education system.<sup>130</sup> The government, as party in the agreement, did not conceive the binding character of its clauses. In effect, in the collective imaginary of those on power there were no repercussions over the unfulfillment.

In addition to the complex aspects and ambitious objectives included in the final settlement, the implementation process of this peace agreement reflects the lack of political willingness to fulfil the dispositions agreed. The legal vulnerability is evidenced in the hierarchical position given to the agreement in the legal structure of the country. After the rejection of the Guatemalan society, specific sections could have been modified in order to guarantee a proper application in the constitution as it was established in the agreement.

## V. CONCLUSION

In conclusion, NSAGs have been taking part as subjects in the international law system. Even though, there are reluctant sectors of allowing NSAGs act as treaty-makers, system's dynamic shows the increasing trend to elevate

<sup>128</sup> *Idem.*

<sup>129</sup> *Idem.*

<sup>130</sup> Gomez, Sori, “Implications of the 1996 Peace Agreements of Guatemala in the Trade Balance” (Implicaciones de los Acuerdos de Paz de 1996 de Guatemala en la balanza comercial), *Journal of International Relations, Strategy and Security*, 2010, available at: [http://www.scielo.org.co/scielo.php?script=sci\\_arttext&pid=S1909-30632012000200008](http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S1909-30632012000200008).

special agreements, signed in the context of non-international armed conflicts, to the international field.

The cases are becoming more frequent in the international scenario. Multiple deals such as, the Dayton Accord (reached in Bosnia and Herzegovina), Chapultepec Peace Agreement (signed between the Salvadorian Government and the Farabundo Martí Liberation Front), Nepal's Peace Agreement (subscribed between the Government of Nepal and the Communist Party of Nepal), and so on; can be object of study in order to analyse the level of compliance with the terms of the agreement.

Some of the reasons that explain the breach of special agreements are common in the conflicts studied above. Some of them are referred to the high level of complexity of the issues covered, the ambitious objectives proposed and the lack of political willingness in the state. Other cases, as Sudan, reflect own social characteristics as the ethnic and identity concept and differences. Prior to, special agreements such as those signed in South Sudan, Colombia and Guatemala evidence the need to create legal mechanisms to enforce compliance and diminish their legal vulnerable condition. Whether special agreements are recognized as international treaties with international obligations for the parties, it would bring more efficient instruments to demand their implementation before international courts or the community of states.

The breach of special agreements, such as peace agreements, represent risks for the State to return to war, but also the possibility to deepen the initial war causes as social inequality, monopoly of power, ethnic and religious discrimination. In addition, it could lead to disregard the norms established by the international humanitarian law. In consequence, with an accurate legal disposition it would be possible to establish liability for failure to comply with the treaty in both sides of the settlement.

From the academic perspective, there are multiple issues to consider that are part of the discussion on this topic. For instance, praxis has shown that current special agreements go beyond the established in the common article 3. Current instruments include not just IHL dispositions, but others related with multiple aspects different to the rules of war, such as, wealth and power distribution; rural reforms and political participation. This fact constitutes another argument to reinforce the legal institution of "special agreements" considering that, as it is conceived in the Geneva Conventions, it does not reflect the contemporary practice inside states.

In conclusion, international community, including states and international organizations; must attend to this topic in the international law field. Even though it is an intricate area which may cause alarms, especially to states, it is necessary to clarify the legal status of special agreements in order to give legal stability and a homogenous legal treatment.

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