

THE PENNSYLVANIA STATE UNIVERSITY
SCHREYER HONORS COLLEGE

DEPARTMENT OF HUMANITIES AND SOCIAL SCIENCES

APPLYING THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS TO NON-
STATE ACTORS

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SPRING 2016

A thesis
submitted in partial fulfillment
of the requirements
for a baccalaureate degree
in Political Science
with honors in Political Science

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ABSTRACT

The purpose of this paper is to suggest an approach for applying the Vienna Convention on Diplomatic Relations (VCDR) to non-state actors, entities that now regularly participate in international relations and are governed by international law but are not accounted for in the text of the VCDR. In order to develop an approach, this paper first explores the history of diplomatic relations and the drafting of the VCDR, analyses the rise of non-state actors within the international system and how those actors participate in diplomacy, and outlines how non-state actors are generally treated by international law. It then finally concludes with possible methods and approaches to applying the principles of the VCDR to non-state actors.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	iii
Chapter 1 Introduction	1
Early Diplomatic Law and Drafting the Vienna Convention on Diplomatic Relations...2	
Chapter 2 Vienna Convention Content & State Acceptance	5
Patterns of State Acceptance	12
Chapter 3 Rise of Non-State Actors in the International System	14
Chapter 4 Non-State Actor Diplomacy.....	21
Chapter 5 Non-State Actors and International Law/Relations	23
Chapter 6 Applying the Vienna Convention to Non-State Actors.....	33
Chapter 7 Conclusion.....	39
BIBLIOGRAPHY	41

ACKNOWLEDGEMENTS

I would like to thank Dr. John Gamble and Dr. Robert Speel for all of their help and guidance during the writing of thesis and over the course of the last four years of my undergraduate education.

Chapter 1

Introduction

Signed in April 1961, the Vienna Convention on Diplomatic Relations (VCDR) is the framework instrument through which diplomatic relations are legally defined. The VCDR, in codifying the guidelines and parameters for diplomacy among State actors, represents thousands of years of diplomatic principle, based predominantly upon the customary international law¹ that governed diplomacy before the treaty's entrance into force in April of 1964. But in the 21st century, the Vienna Convention, whose limited scope is a product of the era in which it was written, fails to accommodate many of the entities which now regularly participate in international relations and are governed by international law: non-state actors. Entities like the United Nations, European Union, and African Union are not included in the regime established by the text of the VCDR. This represents a glaring hole in the framework of diplomatic relations. This paper will explore the history of diplomacy and the Vienna Convention, how other key areas of international law have dealt with the rise of non-state actors as legitimate forces in international law and relations, and will conclude with a proposal for reconciling the VCDR's modern-day limitations with the ever-changing international landscape of the 21st century.

¹ International custom is, along with conventions, one of the two primary sources of international law. It refers to general practice that has been accepted as law, established by consistent State practice and *opinio juris*—i.e., a feeling of legal obligation.

Early Diplomatic Law and Drafting the Vienna Convention on Diplomatic Relations

Although the Vienna Convention did not enter into force until the latter half of the 20th century in 1964, civilizations had been following the principles of now-codified diplomatic law for centuries; customary international law governed diplomacy for far longer than the VCDR has.² Adherence to basic guidelines of diplomacy dates back to the Roman Empire, when civilizations throughout the world provided protection for envoys and ambassadors as one early form.³ Custom shaped diplomatic law until the 1800s when States began moving away from customary law and toward bilateral treaties as a way of establishing concrete guidelines for diplomatic law. However, these treaties—often between the United States or European nations and Latin America or nations in Asia—left the specification of privileges and immunities to the law of the nations that were party to the treaties.⁴ Multilateral treaties on diplomatic relations at that time were scarce. The Convention Regarding Diplomatic Officers was one of the only notable early multilateral

² From Christopher Joyner's *International Law in the 21st Century* text: sources of international law include treaties and international conventions, custom, general principles of law, and judicial decisions and scholarly writings. **Conventional** international law consists of the "contract treaty," which is bilateral in nature and concerns problems of particular interest to participating States. The international convention is a multilateral agreement that establishes international rules and norms for States. **Custom** is the second major source, established through widespread adherence and repeated use of certain practices by governments paired with the perception by states of legal obligation to adhere to that practice. **General Principles of Law** is usually drawn from the experience of municipal law. It includes substantive law, which sets forth and explains the rights of actors, and adjectival law, which describes the procedure by which amends might be made when those rights are violated. It is based on the "general principles of law recognized by civilized nations." Finally, **Judicial Decisions and Scholarly Writings** includes judicial decisions of national and international courts and the teachings and writings of the most highly qualified jurists and publicists.

³ Preiser, Wolfgang. "History of International Law, Ancient Times to 1648." *Max Planck Encyclopedia of Public International Law*. 2008. Print.

⁴ Koskenniemi, Martti. "History of International Law, World War I to World War II." *Max Planck Encyclopedia of Public International Law*. 2011. Print.

treaties on the subject of diplomatic law. It was ratified by 14 American nations—but neither the United States nor Canada—after being adopted by the Sixth International American Conference.⁵

In the early 1900s, during its limited existence from 1920 until 1946, the League of Nations had the intention of codifying diplomatic law, although the subject was eventually taken off of its short-lived agenda. Universal codification really began with the United Nations through its International Law Commission (ILC)—created by the UN General Assembly in 1948 to ‘initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification’⁶—was told by the General Assembly to prioritize the subject of intercourse and immunities in its list of 14 topics chosen for codification in the first session in 1949. However, the ILC did not address the subject until 1957, in its ninth session, when it created a provisional draft on the topic and submitted it for observation. After various drafts, revisions, and commentaries by 21 member States, the ILC revised and forwarded the Draft Articles on Diplomatic Intercourse and Immunities to the General Assembly, that convened a conference on the matter in Vienna from March 2nd to April 14th 1961, when the VCDR was opened for signature.

⁵ Convention regarding Diplomatic Officers, adopted by the Sixth International American Conference., 20 February 1928, 155 LNTS 259 (Registered 12 January. 1935, No. 358)

⁶ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html> [accessed 20 November 2014]

The United Nations Conference on Diplomatic Intercourse and Immunities had 82 States in attendance and was presided over by Alfred Verdross⁷. Using the ILC's articles, the conference had created the Vienna Convention on Diplomatic Relations, as well as the Optional Protocol concerning Acquisition of Nationality and the Optional Protocol concerning the Compulsory Settlement of Disputes.⁸

⁷ Verdross, born in 1890 and died in 1980, was a diplomat from Austria, a professor at the University of Vienna, and one of the most important figures in international law history, having contributed to the development of a constitutionalist approach to international law.

⁸ Hestermeyer, Holger P. "Vienna Convention on Diplomatic Relations (1961)." *Max Planck Encyclopedia of Public International Law*. 2009. Print.

Chapter 2 Vienna Convention Content & State Acceptance

The VCDR consists of 53 articles that establish privileges and immunities for the diplomatic parties exchanged between sending and receiving States. The goals and intentions of the convention are defined in the preamble, which states,

“The States Parties to the present Convention,

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States...”⁹

Eileen Denza, in the United Nation’s Audiovisual Library of International law, summarizes the general way in which the convention does this. She writes,

“It specifies the functions of diplomatic missions, the formal rules regulating appointments, declarations of *persona non grata* of a diplomat who has in some way

⁹ Vienna Convention on Diplomatic Relations, 18 April 1961, 500 U.N.T.S. 95 (Registered 24 Jun. 1964, No. 7310, entered into force 24 April 1964) VCDR.

given offence, and precedence among heads of mission. It sets out the special rules – privileges and immunities – which enable diplomatic missions to act without fear of coercion or harassment through enforcement of local laws and to communicate securely with their sending Governments.”¹⁰

The rules of the VCDR establish two classes of privileges and immunities to achieve its goals. The first is the general functional immunity given to diplomats for their official State work. These immunities relate to acts and transactions while performing official duties. A second class of immunities, personal immunities, makes immune the private activities of the official. The intent of the second class is to preserve official mission work from being disrupted by sheltering the private life of the diplomat.¹¹

Of the 53 articles of the Vienna Convention, several of the most significant articles are as follows:

- Article 3: “The functions of a diplomatic mission consist, inter alia, in:
 - (a) Representing the sending State in the receiving State;
 - (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
 - (c) Negotiating with the Government of the receiving State;
 - (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

¹⁰ Denza, Eileen. "United Nations Audiovisual Library of International Law." *United Nations Audiovisual Library of International Law*. Web. 20 Nov. 2014. <<http://legal.un.org/avl/ha/vcdr/vcdr.html>>.

¹¹ Cassese, Antonio. *International Law*. Oxford: Oxford UP, 2001. Print.

(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.”¹²

- Article 9: “1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the mission.”¹³
- Article 22: “1.The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

¹² Vienna Convention on Diplomatic Relations, 18 April 1961, 500 U.N.T.S. 95 (Registered 24 Jun. 1964, No. 7310, entered into force 24 April 1964) VCDR.

¹³ Ibid.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.”¹⁴

- Article 27: “1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.
- 2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
- 3. The diplomatic bag shall not be opened or detained.
- 4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.
- 5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He

¹⁴ Vienna Convention on Diplomatic Relations, 18 April 1961, 500 U.N.T.S. 95 (Registered 24 Jun. 1964, No. 7310, entered into force 24 April 1964) VCDR.

shall enjoy person inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft. ¹⁵

- Article 29: “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”¹⁶
- Article 37: “1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36.

¹⁵ Vienna Convention on Diplomatic Relations, 18 April 1961, 500 U.N.T.S. 95 (Registered 24 Jun. 1964, No. 7310, entered into force 24 April 1964) VCDR.

¹⁶ Ibid.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in article 36, paragraph 1, in respect of articles imported at the time of first installation.

3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 33.

4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.”¹⁷

¹⁷ Vienna Convention on Diplomatic Relations, 18 April 1961, 500 U.N.T.S. 95 (Registered 24 Jun. 1964, No. 7310, entered into force 24 April 1964) VCDR.

Despite the importance of these articles, however, the most relevant articles for this analysis are the 48th and 50th. Both articles are concerned with which states or entities are able to become a party to the convention. The articles are as follows:

- Article 48: “The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.”¹⁸
- Article 50: “The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in Article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations.”¹⁹

Because of the realities of the international system in 1961, the Vienna Convention’s 48th and 50th articles did not accommodate the now-significant number of international actors that are not categorized as States and are therefore not governed by the articles of the Convention. Although this did not have a great impact in the mid-20th century, by 2016 non-state actors participating in the international system have increased in

¹⁸ Vienna Convention on Diplomatic Relations, 18 April 1961, 500 U.N.T.S. 95 (Registered 24 Jun. 1964, No. 7310, entered into force 24 April 1964) VCDR.

¹⁹ Ibid.

numbers and influence—many wielding power comparable to States—and have thus created a need for the Vienna Convention to extend its authority over them.

Patterns of State Acceptance

Before agreeing to be bound by the convention, twenty-three States introduced reservations²⁰—along with dozens more declarations—to eight different articles of the 53 that make up the VCDR.²¹ The only States that are UN members and have refused to become parties to the convention are Antigua and Barbuda, Republic of Palau, the Solomon Islands, South Sudan and the Republic of Vanuatu.²² Currently 190 States are a party to the Vienna Convention. With the exception of South Sudan, all of the States that have refused to be bound by the VCDR are small island nations located in either the Caribbean or the Western or Southern Pacific Ocean. If States with this characterization are inclined to not become party to the treaty, South Sudan—which became the newest UN member when it gained independence from Sudan in Africa, and is merely a five-year-old nation—may

²⁰ According to the second article of the Vienna Convention on the Law of Treaties, reservation means “a unilateral statement however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” In other words, it is considered a reservation whether or not the State introducing it refers to it as such. The only relevant consideration is whether or not the statement modifies the legal effect of the treaty.

²¹ Vienna Convention on Diplomatic Relations. These states include China, Cuba, Russia, Ukraine, Botswana, Cambodia, Nepal, Sudan, Venezuela, Bahrain, Egypt, Iraq, Kuwait, Libya, Morocco, Qatar, Saudi Arabia, Syria, Yemen, Malta, Vietnam,

²² https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en
The complete list of reservations to the VCDR can be found on the United Nations Treaty Collection Website

become the 191st State to be bound by the VCDR, as it stands as a clear outlier and likely doesn't share the characteristic the other States share, which has stopped them from becoming party to the convention.

The States that introduced reservations to the Vienna Convention on Diplomatic Relations and the States that refused to be bound have distinct characteristics. No States that can be considered industrialized and developed democracies fit into either of the two groups—with Malta being the exception. The reserving and abstaining States included only those that can be classified as current and former communist nations,²³ underdeveloped and in the global south,²⁴ and in the Middle East and North Africa region.²⁵ The Global North largely accepted the VCDR while a significant amount of the rest has abstained completely or added reservations before becoming party to it.

²³ China, Cuba, Russia, and Ukraine.

²⁴ Antigua and Barbuda, Botswana, Cambodia, Nepal, Republic of Palau, Republic of Vanuatu, Solomon Islands, South Sudan, Sudan, and Venezuela.

²⁵ Bahrain, Egypt, Iraq, Kuwait, Libya, Morocco, Qatar, Saudi Arabia, Syria, and Yemen.

Chapter 3 Rise of Non-State Actors in the International System

The Peace of Westphalia, which refers to the Treaty of Peace between France and the Holy Roman Empire and the Treaty of Peace between the Holy Roman Empire and Sweden, signed on October 24, 1648, formally ended the Thirty Years' War and marked the beginning of a new modern secular system of sovereign and equal States. The international system was forever altered by the Peace, establishing States as the principal players within a model that would continue for centuries.²⁶ States remained almost unchallenged on the international stage until the emergence of important NGOs in the mid-20th century.

Although there are certainly many ways—both narrow and broad—to define what a non-state actor is, a National Intelligence Council (NIC) report offers a clear and concise explanation that will be used here. According to the NIC report, non-state actors are defined as:

“non-sovereign entities that exercise significant economic, political, or social power and influence at a national, and in some cases international, level. There is no consensus on the members of this category, and some definitions include trade unions, community organizations, religious institutions, ethnic groupings, and universities in addition to the players outlined above.”²⁷

Generally, “non-state actor” refers to intergovernmental organizations, nongovernmental organizations, multinational corporations, and increasingly to individuals with significant

²⁶ Fassbender, Bardo. "Westphalia, Peace of (1648)." *Max Planck Encyclopedia of Public International Law*. 2011. Print.

²⁷ *Nonstate Actors: Impact on International Relations and Implications for the United States*. Rep. National Intelligence Officer for Economics and Global Issues, 23 Aug. 2007. Web. 11 Mar. 2016. <https://fas.org/irp/nic/nonstate_actors_2007.pdf>.

international political influence. The definitions for each of these variations of a non-state actor are as follows:

- **Intergovernmental Organizations (IGO):** “an entity created by treaty, involving two or more nations, to work in good faith, on issues of common interest. In the absence of a treaty an IGO does not exist in the legal sense. For example, the G8 is a group of eight nations that have annual economic and political summits. IGOs that are formed by treaties are more advantageous than a mere grouping of nations because they are subject to international law and have the ability to enter into enforceable agreements among themselves or with states.”²⁸
- **Multinational Corporations (MNC)/Transnational Corporations (TNC):** “enterprises that manage production or deliver services in at least two countries. The traditional multinational is a private company headquartered in one country and with subsidiaries in others, all operating in accordance with a coordinated global strategy to win market share and achieve cost efficiencies. A significant portion of the discussion, however, centered on the relatively recent “multinationalization” of *state-owned enterprises* such as Russia’s arms-export monopoly Rosonboronexport or Chinese oil company CNPC, which as state entities may or may not share the same incentives and goals as their private counterparts.”²⁹
- **Nongovernmental Organizations (NGOs):** “organizations that are private, self-governing, voluntary, non-profit, and task- or interest-oriented advocacy organizations. Within those broad parameters there is a huge degree of diversity in terms of unifying principles; independence from government, big-business, and other outside influences; operating

²⁸ "Intergovernmental Organizations (IGOs) | Harvard Law School." *Harvard Law School Intergovernmental Organizations IGOs Comments*. Web. 07 Apr. 2016.

²⁹ *Nonstate Actors: Impact on International Relations and Implications for the United States*. Rep. National Intelligence Officer for Economics and Global Issues, 23 Aug. 2007. Web. 11 Mar. 2016. <https://fas.org/irp/nic/nonstate_actors_2007.pdf>.

procedures; sources of funding; international reach; and size. They can implement projects, provide services, defend or promote specific causes, or seek to influence policy. Discussion briefly touched on the contradiction-in-terms *Government Operated NGO (GONGO)*, which may be set up by governments to garner aid money or promote government interests.”

- **Super-Empowered Individuals:** “persons who have overcome constraints, conventions, and rules to wield unique political, economic, intellectual, or cultural influence over the course of human events—generated the most wide-ranging discussion. “Archetypes” include industrialists, criminals, financiers, media moguls, celebrity activists, religious leaders, and terrorists. The ways in which they exert their influence (money, moral authority, expertise) are as varied as their fields of endeavor. As bounded by seminar participants, this category excludes political office holders (although some super-empowered individuals eventually attain political office), those with hereditary power, or the merely rich or famous.”³⁰
- **Armed Non-State Actors (terrorists, warlords, etc.):** “armed non-state actors are 1) willing and able to use violence for pursuing their objectives; and 2) not integrated into formalised state institutions such as regular armies, presidential guards, police or special forces. They may, however, be supported by state actors whether in an official or informal manner. There may also be state officials who are directly or indirectly involved in the activities of armed non-state actors – sometimes for political purposes, but often for personal interests (i.e. corruption, clientelism).”³¹The various types of armed non-state actors, which

³⁰ *Nonstate Actors: Impact on International Relations and Implications for the United States*. Rep. National Intelligence Officer for Economics and Global Issues, 23 Aug. 2007. Web. 11 Mar. 2016. <https://fas.org/irp/nic/nonstate_actors_2007.pdf>.

³¹ Schneckener, Ulrich. "Fragile Statehood, Armed Non-State Actors and Security Governance." *DCAF*. Web. 07 Apr. 2016. <<http://www.dcaf.ch/Chapter-Section/Chapter-2-Fragile-Statehood-Armed-Non-State-Actors-and-Security-Governance>>.

can be a difficult categorization to fully understand and define, are included below in

Table 1.

Table 1. Types of armed non-state actors ³²

	Change vs. status quo	Territorial vs. non-territorial	Physical vs. psychological use of violence	Political vs. economic motivation
Rebels, Guerrillas	Change	Territorial	Physical	Political
Militias, Paramilitaries	Status quo	Territorial Non-territorial	Physical Psychological	Political
Clan chiefs, Big men	Status quo	Territorial	Physical	Political
Warlords	Status quo	Territorial	Physical Psychological	Economic
Terrorists	Change	Non-territorial	Psychological	Political
Criminals, Mafia, Gangs	Status quo	Non-territorial	Psychological	Economic
Mercenaries, PMCs/PSCs	Indifferent	Territorial	Physical	Economic
Marauders, 'sobels'	Indifferent	Non-territorial	Psychological	Economic

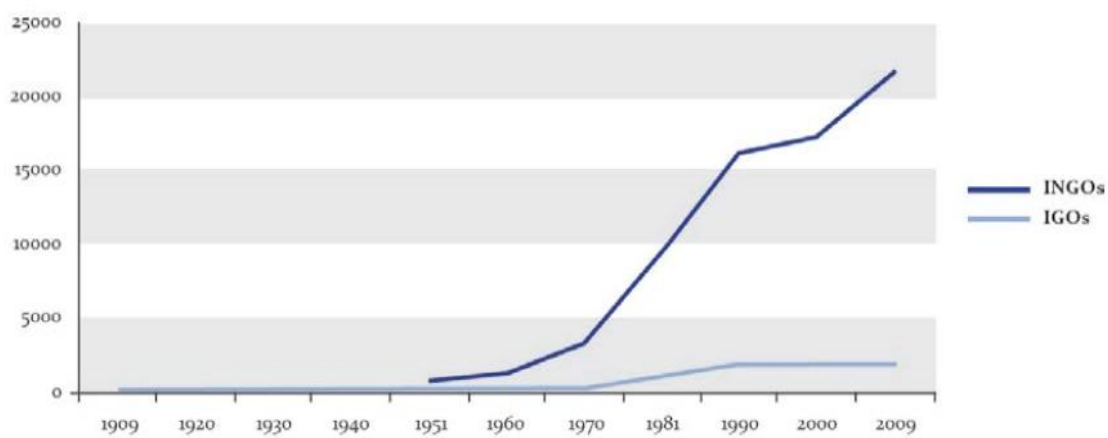
These non-state actors have become integral to the international system, increasingly participating in international relations and law along with their sovereign State counterparts. Each variation is able to do so because of its own unique source of power, even if that power is not directly linked to, or derived from, international law—e.g., multinational corporations and “super-empowered” individuals can wield enough monetary clout to influence the system and affect change in their favor. However, the individual power and influence these non-state actors wield is only a part of the picture. Their strength in, and relevance to, the system stems from the sheer number of these actors that has appeared over the last century. ³³

³² Schneckener, Ulrich. "Fragile Statehood, Armed Non-State Actors and Security Governance." *DCAF*. Web. 07 Apr. 2016. <<http://www.dcaf.ch/Chapter-Section/Chapter-2-Fragile-Statehood-Armed-Non-State-Actors-and-Security-Governance>>.

³³ Non-state actors in the international system are analogous to several large anthills, in that individual ants—like individual actors—can be ignored because they do not possess the size and influence to make a

During the 20th century, over 38,000 intergovernmental organizations and international nongovernmental organizations were founded, 33,000 of which came after 1950.³⁴ The following figure (Figure 1) shows this growth over the course of the 20th century and illustrates the rapid proliferation of these non-state actors.

Figure 2. Number of IGOs and INGOs, 1909-2009³⁵



As is evident from the graph, INGOs—internationally focused NGOs—account for most of the growth. The difference in growth between the two can be seen in Table 2 below, in which the ratio of INGOs to IGOs founded, predominantly in the 20th century, is broken down by decade.

significant disturbance. However, in actuality there exist many large anthills with thousands of ants supporting each other. The many varieties of non-state actors eventually end up compounding their influence and power, much like an anthill compounds the size and strength of ants, to make an impact in the international system.

³⁴ Weiss, Thomas G., D. Conor Seyle, and Kelsey Coolidge. "The Rise of Non-State Actors in Global Governance Opportunities and Limitations." 2013. Web.

³⁵ Ibid.

Table 2. Number and Ratio of INGOs and IGOs Founded by Decade, 1909-2009 ³⁶

	INGOs	IGOs	INGOs :IGOs
1900-09	445	118	3.77
1910-19	492	118	4.17
1920-29	845	215	3.93
1930-39	731	208	3.51
1940-49	1244	317	3.92
1950-59	2580	523	4.93
1960-69	3822	775	4.93
1970-79	5645	1219	4.63
1980-89	7839	924	8.48
1990-99	8988	1299	6.92
2000-09	3505	500	7.01

It should be clear from the numbers alone that States are no longer the sole actors in the international system, nor can we assume they always are the most important. The rise of non-state actors, coupled with the continued participation of States in international law and relations, has led to more than a few complicated interactions among the entities as they work alongside of one another to achieve a mutual goal. The following two examples, drawn from a One Earth Future (OEF) Foundation paper, are clear demonstrations of this modern international reality and further exemplify the importance of non-state actors in the global system:

- “Over the last decade, some 100,000 international peacekeeping soldiers, police officers, and civilian monitors were deployed worldwide each year in war zones. Personnel have come from regional organizations such as the African Union, sub-regional organizations such as the Economic Community of West African States, alliances such as the North Atlantic Treaty Organization, the United Nations, and coalitions of the willing, or some combination thereof. Alongside the states and the IGO-supported troops, a host of not-

³⁶ Weiss, Thomas G., D. Conor Seyle, and Kelsey Coolidge. "The Rise of Non-State Actors in Global Governance Opportunities and Limitations." 2013. Web

for-profit development and humanitarian agencies funded by states, foundations, and direct public donations worked in war-torn areas and fragile states to support economic development and provide the public with health care, education, access to clean water, and more. In addition, local and international for-profit companies operated in countries before, during, and after armed conflicts. In short, some typical duties of a national government—providing security, economic development, and access to public goods—were often facilitated by a partnership between the state, IGOs, NGOs, and TNCs.”³⁷

- “As piracy surged in the waters off the Horn of Africa in the 2000s, stakeholders (including not only states, but various members of the international maritime community) came together to address the problem. Eschewing formal UN structures and the constraints that come with them, the Contact Group for Piracy off the Coast of Somalia (CGPCS) was created as a deliberately informal multi-stakeholder network for the coordination of counter-piracy planning. The CGPCS had active participation not only from naval, intelligence, legal, and other staff from many states and IGOs but also from NGOs and industry associations.”³⁸

³⁷ Weiss, Thomas G., D. Conor Seyle, and Kelsey Coolidge. "The Rise of Non-State Actors in Global Governance Opportunities and Limitations." 2013. Web.

³⁸ Ibid.

Chapter 4 Non-State Actor Diplomacy

In the modern era, diplomacy is no longer limited to State actors, as is the case with much of the rest of international law. Participants in diplomacy today are often experts in fields other than diplomacy—i.e., they are not trained, career diplomats—and do not necessarily hold positions within a State’s foreign policy establishment. New forms of diplomatic representation are emerging from humanitarian, environmental, economic and social crises that prompt intervention from both old and new international actors. The categories of intervention that have given rise to new forms of representation include: immediate crisis, the threat of social and administrative collapse, and regulation.³⁹

Crisis intervention is the most recognizable of the three, as it commonly occurs during an outbreak of armed conflict or violence. It of course includes intra- and inter-state conflict, but also economic crises—e.g., the 1997–98 Asian financial crisis and the 1995 Mexican Peso crisis—and complex humanitarian emergencies, which encompasses such situations as the AIDS epidemic in Africa and environmental catastrophe compounding man-made chaos, as was the case in Somalia.⁴⁰

Social and administrative threats require intervention that revolves around work on “poverty reduction, public health issues, conflict prevention, and a myriad of other important but less media-attractive essentially humanitarian under-takings. “Development” projects, both

³⁹ Langhorne, Richard. "The Diplomacy of Non-State Actors." *Diplomacy and Statecraft* 16.2 (2005). Web.

⁴⁰ Ibid.

traditional and entrepreneurial, such as private–public partnerships, fall into this category.”⁴¹

Regulatory intervention consists of influencing standard setting and maintaining “a voice on the floor or at the table.” This includes, for example, NGO demands for a larger role in the World Bank.⁴²

Intergovernmental organizations, nongovernmental organizations, and multinational corporations engaging in diplomatically representative behavior is becoming increasingly common. The United Nations now with regularity sends a special representative of the Secretary-General or an envoy to represent the organization to any actors involved in a conflict zone or similar situations that require intervention.⁴³ In fact, not only are there Special Representatives on behalf of the UN sent to conflicts like Kosovo or East Timor, but other organizations in the UN system have adopted similar practices: “World Health Organization who, for example, recently appointed the president of the Nippon Foundation as WHO’s special ambassador of its Global Alliance for the Elimination of Hansen’s Disease...”⁴⁴

Nongovernmental organizations with more power and influence, like Amnesty International, have expanded their offices at the United Nations with more professional staff, upgrading their representation. However, most NGOs do not have the resources to establish an office at the UN and it is probably they will find novel forms of representation.⁴⁵ Further, multinational corporations have, in order to protect investments or encourage emerging economies to participate in the global economy, increasingly intervened in crises around the

⁴¹ Langhorne, Richard. "The Diplomacy of Non-State Actors." *Diplomacy and Statecraft* 16.2 (2005). Web.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

world. Large enterprises have begun to create more elaborate collective entities, like the World Business Council for Sustainable Development, as a way to better represent their interests in international governmental dialogues.⁴⁶

While intergovernmental organizations, nongovernmental organizations, and multinational corporations do not participate in the same kind of diplomacy and representation that States are involved in, it is clear that in the modern international system these non-state actors have their own unique brand of diplomatic relations, fulfilling a need that States are unable to meet. As a result, the Vienna Convention's lack of inclusion of non-state actors is clearly a glaring hole in the framework. In the following section, the place of non-state actors in international law and relations will be examined to provide defense for the Vienna Convention's inclusion of non-state actors.

Chapter 5

Non-State Actors and International Law/Relations

To develop an approach that can be used to incorporate non-state actors under the diplomatic principles of the Vienna Convention, other frameworks for dealing with non-state actors in international law and relations will be examined to create and advocate for a possible VCDR method. Specifically, case studies with a focus on the treatment of IGOs, NGOs, MNCs, individuals, state-less ethnic groups, and States without clear international recognition—by

⁴⁶ Langhorne, Richard. "The Diplomacy of Non-State Actors." *Diplomacy and Statecraft* 16.2 (2005). Web.

treaties, IGOs, and States—can act as the source material and template for outlining the new approach.

An examination of the relations between the United Nations and the European Union, two of the most notable intergovernmental organizations, illustrate how a non-state actor, the EU, is treated much like a State by the UN—a starting point for developing a strategy for the Vienna Convention to do the same. Although the issue of the European Union in particular, or IGOs in general, may not be wholly relevant to the Vienna Convention's application to non-state actors—i.e., every member of the EU is a party to the VCDR as well—a general examination of the way the EU is treated as a non-state actor will be helpful to the overall notion that non-state actors should be guided by the principles found in the VCDR treaty. The Lisbon Treaty, which gave the EU a single legal personality and established that it would replace and succeed the European Community, gave the EU the power to sign contracts, be part of an international convention, or become an observer or member of an international organization.⁴⁷

In May 2011, the EU was granted greater opportunity for participation in the UN. The UN General Assembly has since then allowed representatives from the EU to present EU agreed common positions, to make interventions, present proposals and circulate EU communications as official documents at the General Assembly.⁴⁸ While the EU is undoubtedly a non-state actor, its duties as an entity that engages with the UN—paired with the way the UN treats it—help blur the lines between the place of State and non-state actors in the international system and further makes plausible the idea that the Vienna Convention's rules of diplomacy can be applied to non-states.

⁴⁷ "European External Action Service." *European Union*. Web. 08 Apr. 2016.

⁴⁸ *Ibid.*

Moreover, the European Union as a non-state actor has, with regularity, become a party to international agreements, much like the Vienna Convention. By 2007, the EU had become a party to more than 90 international agreements, clearly a possibility for non-state actors.⁴⁹

The categories of international agreements to which the EU has become a party are listed below:

1. “Agreements between the EU and a third State on the participation of that State in an EU operation;
2. Agreements between the EU and a third State on the status or activities of EU forces;
3. Agreements between the EU and a third State in the area of PJCCM;
4. Agreements between the EU and a third State on the exchange of classified information;
5. Agreements between the EU and other international organisations;
6. Agreements between the EU and a third State in the form of an Exchange of Letters;
7. Joint Declarations and Memoranda of Understanding between the European Union and a third State;
8. Agreements concluded by European Union agencies. ^{“50}

The role and treatment of nongovernmental organizations within the United Nations system is a reality that must be accommodated to create an approach for the Vienna Convention and its application to non-state actors. The UN recognizes more than 3,400 NGOs, who have permanent formal participation rights in a General Assembly body, the Human Rights Council,

⁴⁹ Ramses A. Wessel. (2008). The EU as a party to international agreements: shared competences, mixed responsibilities. In: Alan Dashwood and Marc Maresceau (eds.) *Law and Practice of EU External Relations*. pp. 152-187. [Online]. Cambridge: Cambridge University Press. Available from: Cambridge Books Online <<http://dx.doi.org/10.1017/CBO9780511494925.007>> [Accessed 08 April 2016].

⁵⁰ Ibid.

and all special conferences. They receive all UN documents, circulate their own statements to government delegates, hold their own meetings for the official proceedings, and can often make their own presentations at diplomatic meetings.⁵¹ Again, non-state entities possess legitimacy and standing within the international system, so much so that one variety—NGOs—are given extensive participatory rights and consideration within the UN. The Vienna Convention likewise can consider NGOs and/or other non-state actors as legitimate international entities over whom it can extend the jurisdiction of its principles.

Nongovernmental organization participation in the United Nations system has existed for decades and includes varying degrees of involvement. For example, Amnesty International, one of the most active and influential NGOs, has focused its efforts at the UN on ratifying and developing treaties for the protection and advancement of global human rights.⁵² Amnesty International began a fight to ban torture in the 1970s, through the United Nations system. The following is an explanation of their work and accomplishments from the *Journal of International Relations and Development*, authored by Kerstin Martens. He writes,

“AI [Amnesty International] started its first worldwide campaign to proclaim a total ban on torture in December 1972 by pressuring governments to enforce Article 5 of the Universal Declaration of Human Rights, which forbids torture. Its secretariat prepared an extensive report about the practice of torture in all regions of the world, and AI sections around the world appealed to the UN to draw up a convention prohibiting torture. When the UN General Assembly

⁵¹ "Global Policy Forum." *The Role of NGOs in Global Governance*. Web. 08 Apr. 2016. <<https://www.globalpolicy.org/ngos/ngos-and-the-un/50787-the-role-of-ngos-in-global-governance.html>>.

⁵² Martens, K. (2006). Institutionalizing societal activism within global governance structures: Amnesty international and the united nations system. *Journal of International Relations and Development*, 9(4), 371-395. doi:<http://dx.doi.org.ezaccess.libraries.psu.edu/10.1057/palgrave.jird.1800104>

adopted a first resolution against torture in November the following year, AI, in response, started its 'Urgent Action' against torture so that cases could be made public and the NGO could hold governments responsible. Partial success was reached when in 1975 the General Assembly adopted the 'Declaration on the Protection of All Persons from being Subject to Torture' in response to the brutality of the regime in Chile. But since the declaration was not binding, AI continued to call for a treaty, which was eventually finalized in 1984 and came into force in 1987.⁵³

However, to best understand the role of NGOs within the United Nations system, a macroscopic view of UN-NGO relations should be understood alongside of the more microscopic analyses—e.g., the aforementioned example of Amnesty International. According to one report, 93 UN offices dealing with NGO concerns exist across 18 cities around the world: nine “service offices” in New York City, Geneva, and Vienna, fifty-four “liaison offices” in the same three cities in addition to Rome and Nairobi, nineteen “specialized agency liaison offices” in Montreal, London, Washington, Paris, and Berne, and six regional UN Environment Programme offices—in addition to five UN regional economic and social commission offices—populating cities in Southeast Asia, the Middle East, and the Caribbean.⁵⁴ Each of the various functions of these 93 UN offices falls under one of the following seven broad categories of administrative work:

- Provide information on UN issues/activities to NGOs
- Collect/provide information and serve as clearinghouse on NGO activity

⁵³ Martens, K. (2006). Institutionalizing societal activism within global governance structures: Amnesty international and the united nations system. *Journal of International Relations and Development*, 9(4), 371-395. doi:<http://dx.doi.org.ezaccess.libraries.psu.edu/10.1057/palgrave.jird.1800104>

⁵⁴ Alger, Chadwick. “The Emerging Roles of Ngos in the UN System: From Article 71 to a People's Millennium Assembly”. *Global Governance* 8.1 (2002): 93–117. Web...

- Support/assist/advise NGO information activity
- Involve NGOs in UN meetings/seminars/symposia
- Promote cooperation/consultation/coordination with NGO programs
- Stimulate/support NGO field activities
- Promote community-based/grassroots approaches ⁵⁵

In terms of codified international law, examples of treaties imposing duties on non-state actors indeed exist, even if there are only a few. For instance, Article 4 of the Convention on the Prevention and Punishment of Genocide allows for the punishment of those committing genocide, regardless of their status as constitutionally responsible rulers, public officials, or private individuals.⁵⁶ Two other examples include Article 137 of the UN Convention on the Law of the Sea, which “prohibits natural or juridical persons (aside from States) from acquiring or exercising rights with respect to ‘the Area’ (i.e., the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction) or from appropriating any part thereof.” and The International Convention on Civil Liability for Bunker Oil Pollution Damage, which “sets out ‘uniform international rules and procedures for determining questions of liability and providing adequate compensation’ in cases of bunker oil pollution damage, and imposes obligations on *any person*, such person being defined as ‘any individual or partnership or any public or private body, whether corporate or not.’”⁵⁷

⁵⁵ Alger, Chadwick. “The Emerging Roles of Ngos in the UN System: From Article 71 to a People's Millennium Assembly”. *Global Governance* 8.1 (2002): 93–117. Web....

⁵⁶ Ryngaert, Cedric. "IMPOSING INTERNATIONAL DUTIES ON NON-STATE ACTORS ND THE LEGITIMACY OF INTERNATIONAL LAW." (2010). Leuven Centre for Global Governance Studies. Web.

⁵⁷ Ibid.

The United Nation's Convention on the Law of the Sea established the International Tribunal for the Law of the Sea, an independent judicial body to adjudicate disputes arising out of the interpretation and application of the Convention, which is open to both State parties to the convention and "entities other than States Parties, i.e., States or intergovernmental organisations which are not parties to the Convention, and to state enterprises and private entities."⁵⁸ The Tribunal and the cases that it hears provide clear examples of the Law of the Sea Convention's application to non-state actors.

To date, 25 contentious cases have been heard before the Tribunal, one of which involved a non-state actor: *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*. In April of 2000, the European Communities (EC) "requested consultations with Chile regarding the prohibition on unloading of swordfish in Chilean ports established on the basis of Article 165 of the Chilean Fishery Law."⁵⁹ The EC claimed that its fishing vessels in the South East Pacific weren't allowed under Chilean law to unload their swordfish in Chilean ports either to land them for warehousing or to trans-ship them onto other vessels and, as a result, Chile made transit through its ports impossible for swordfish. The EC claimed that this was inconsistent with the GATT 1994—particularly Articles V and XI. A decade later, however, the parties withdrew and terminated the case.⁶⁰

A very recent example of the application and enforcement of the aforementioned Geneva Convention on a non-state actor is the conviction, by the International Criminal Tribunal in The

⁵⁸ "The Tribunal." *International Tribunal for the Law of the Sea*. Web. 08 Apr. 2016.

<<https://www.itlos.org/the-tribunal/>>.

⁵⁹ "Chile — Measures Affecting the Transit and Importing of Swordfish." *WTO*. Web. 08 Apr. 2016.

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm>.

⁶⁰ *Ibid*.

Hague, of Radovan Karadzic. In March 2016, Karadzic—president of the Serb Republic in Bosnia from 1992-1995—was found guilty of five counts of crimes against humanity for such crimes as murder, deportation and forced population transfers—as well as for four other counts of violating the customary laws of war as set down in the Geneva Conventions.⁶¹ Karadzic was instrumental in coordinating and carrying out the slaughter of 8,000 Muslim boys and men in the town of Srebrenica, Bosnia.

Another specific example of the application of international law to non-state actors includes the case of Dusko Tadic and the similar issue of war crimes against Bosnian Muslims. Tadic—a Bosnian Serb politician who served in the 1990s during the breakup of, and subsequent civil war occurring in, former Yugoslavia—was convicted by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) of persecutions, inhuman acts and cruel treatment in May of 1997.⁶² Two years later, in June of 1999, the Appeals Chamber altered the Tadic decision, convicting him of willful killing, torture or inhuman treatment, and murder—eventually sentencing him to 20 years of imprisonment.⁶³ The Trial Chamber of the ICTY ruled that crimes against humanity required a governmental, organizational or group policy rather than the narrower State policy, which prevents individuals like Tadic from hiding their actions behind the fact that they did not occur at the State level. As a part of it's ruling, the Trial Chamber stated,

⁶¹ "Two Decades After The War, A Genocide Conviction For Radovan Karadzic." *NPR*. NPR. Web. 08 Apr. 2016. <<http://www.npr.org/sections/parallels/2016/03/24/471762393/two-decades-after-the-war-a-genocide-conviction-for-radovan-karadzic>>.

⁶² "Tadić, Duško." *The Hague Justice Portal*. Web. 08 Apr. 2016. <<http://www.haguejusticeportal.net/index.php?id=6077>>.

⁶³Ibid.

“In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory. The Prosecution in its pre-trial brief argues that under international law, crimes against humanity can be committed on behalf of entities exercising *de facto* control over a particular territory but without international recognition or formal status of a “*de jure*” State, or by a terrorist group or organization. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity.”⁶⁴

Other international precedent exists for applying treaties to non-state actors, even though they are in fact non-states and the treaties were not intended for them. In fact, nongovernmental organizations whose primary aim is to make such things possible exist and are incredibly influential. One example is Geneva Call, a “neutral and impartial humanitarian organisation dedicated to engaging armed non-State actors towards compliance with the norms of international humanitarian law and human rights law.”⁶⁵ The organization has, as of 2009, arranged for 39 armed non-state actor groups to sign “Deeds of Commitment” which signify that those actors are agreeing to be bound by international conventions that were intended for States. For example, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 1997—commonly known as the Ottawa Treaty—was created by and for States, but Geneva Call has accommodated non-state actor’s desire to be bound by this treaty by creating and providing for them a Deed of Commitment for

⁶⁴ Schabas, William A. "Punishment of Non-State Actors in Non-International Armed Conflict." *Fordham International Law Journal* 26.4 (2004). Web.

⁶⁵ Higgins, Noelle. "The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements." *Human Rights Brief* 17, no. 1 (2009): 12-18.

Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action. This is one method for helping those actors to signify that they adhere to the principles even if they cannot formally be bound by the guidelines and principles of the anti-personnel mine framework.⁶⁶

⁶⁶ Higgins, Noelle. "The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements." Human Rights Brief 17, no. 1 (2009): 12-18.

Chapter 6

Applying the Vienna Convention to Non-State Actors

Based on the information included in this paper up until this point, it is clear that the international system has shifted in such a way that non-state actors are treated by intergovernmental organizations—such as the United Nations and European Union—by each other, by nongovernmental organizations, and by treaties in a manner that is often similar to States, or that would at least justify the application of the Vienna Convention’s principles to non-state actors in a way that they are applied to States. Further, it is also clear that non-state actors engage in their own modern forms of diplomacy and that they would benefit from a standard set of principles and guidelines to govern their actions and make clear how they are to engage in this new diplomacy.

To apply the Vienna Convention on Diplomatic Relations to non-State actors, non-traditional methods of international law creation have to be employed. There is no way for non-state actors simply to become party to the treaty, as they are not capable of such action and, even if they were, the Vienna Convention’s 48th and 50th articles make clear which entities can become party to the treaty and none are IGOs, NGOs, MNCs, or armed non-state actor groups.

Further, the Vienna Convention on the Law of Treaties establishes in Article 2 and Article 3 that treaties are an international agreement for States only. Article 2 makes clear that the relevant actors, those that the Vienna Convention on the Law of Treaties recognizes as being able to be bound by a treaty, are States. Article 2 states,

“For the purposes of the present Convention: (a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; (b) 'ratification', 'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty; (c) 'full powers' means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty; (d) 'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State; (e) 'negotiating State' means a State which took part in the drawing up and adoption of the text of the treaty; (f) 'contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force; (g) 'party' means a State which has consented to be bound by the treaty and for which the treaty is in force; (h) 'third State' means a State not a party to the treaty; (i) 'international organization' means an intergovernmental organization.”⁶⁷

Article 3 establishes, “The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

⁶⁷ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (Registered 27 Jan. 1980, No. 18232, entered into force 27 January 1980) 333

(a) the legal force of such agreements; (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention; (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.”⁶⁸

One possible method to apply the principles of the Vienna Convention to non-state actors would be to amend the treaty itself to allow it to, much like the previously mentioned International Convention on Civil Liability for Bunker Oil Pollution Damage imposes obligations on any person rather than just State parties to the treaty. The 40th article of the Vienna Convention on the Law of Treaties allows for the amendment of treaties, it states:

1. “Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
 - a. the decision as to the action to be taken in regard to such proposal;
 - b. the negotiation and conclusion of any agreement for the amendment of the treaty.
3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.

⁶⁸ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (Registered 27 Jan. 1980, No. 18232, entered into force 27 January 1980) 333

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
 - a. be considered as a party to the treaty as amended; and
 - b. be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement”⁶⁹

However, while this is one possible method, it is likely not the most efficient, nor is it the most practical. The principles within the Vienna Convention on Diplomatic Relations were designed for sovereign States who occupy a territory and the articles reflect that. It would not make sense to simply apply it to non-state actors because their diplomacy is different from that of States and the articles would need to be altered at least slightly to fit. That is also why a Deed of Commitment, much like the one Geneva Call encourages armed non-state actor forces to sign for the Ottawa Treaty, would not make sense in this case: non-state actors are different enough from States when it comes to diplomacy and representation that a simple sweeping application of its principles to non-state actors would not logically apply.

In order to apply the Vienna Convention framework to non-state actors, the best course of action would likely be to create an additional Protocol for the treaty that would outline principles for non-state actors as a part of the convention and pass a United Nation’s General Assembly Resolution establishing those same principles. While the resolution would be non-binding, it could act as a formally established set of guidelines—which have been debated upon

⁶⁹ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (Registered 27 Jan. 1980, No. 18232, entered into force 27 January 1980) 333

and fleshed out by one of the UN's principal organs—that can help inform the way non-state actors approach diplomatic relations.⁷⁰

According to the UN Treaty Collection website, two kinds of instruments labeled as “protocol” exist that would be useful in this situation:

- “A Protocol based on a Framework Treaty is an instrument with specific substantive obligations that implements the general objectives of a previous framework or umbrella convention. Such protocols ensure a more simplified and accelerated treaty-making process and have been used particularly in the field of international environmental law. An example is the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer adopted on the basis of Arts.2 and 8 of the 1985 Vienna Convention for the Protection of the Ozone Layer.”⁷¹
- “A Protocol as a supplementary treaty is an instrument which contains supplementary provisions to a previous treaty, e.g. the 1967 Protocol relating to the Status of Refugees to the 1951 Convention relating to the Status of Refugees.”⁷²

In the case of the Protocol based on a Framework Treaty, the articles that can apply to non-state actors from within the Vienna Convention can be singled out and paired with additional ones in the protocol, as a way of extending it over the non-state actors. Similarly, a Protocol as a supplementary treaty can add supplementary provisions that allow the Vienna Convention to better apply to non-state actors.

⁷⁰ "Dag Hammarskjöld Library Ask DAG!" *Are UN Resolutions Binding?* Web. 08 Apr. 2016. <<http://ask.un.org/faq/15010>>.

⁷¹ "Definitions." *UNTC*. Web. 08 Apr. 2016.

<https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml#protocols>

⁷² *Ibid.*

Although a seemingly infinite number of non-state actors exist between NGOs, IGOs, MNC, individuals participating in the international system, and armed non-state actor groups, only a small percentage of those are actually engaging in a form of diplomatic relations. These actors can work closely with their own appointed representatives in order to create the protocol and/or resolution that will shape their activities, just as States worked with one another to create the VCDR. The United Nations would be wise to call a conference, just like the one in Vienna in 1961, in order to assemble the actors and create the addition to the treaty.

The principles codified within whichever protocol is created, or whichever resolution is passed, should be formed to reflect those in the body of the Vienna Convention. Whenever possible, articles from the Convention that can apply to non-state actors should be pulled and included—i.e., articles about the general procedure of diplomatic missions, the inviolability of the members of the missions and their families, establishment of an inviolable location for the mission like an embassy, etc. Traditional rules of diplomacy can be applied to IGOs and NGOs, like the United Nations Special Representative of the Secretary-General, sending representatives to conflict zones, as that falls in line with the behavior of State diplomats. However, intervention into economic crises or regulatory intervention or other atypical scenarios that States would not be charged with dealing with would are not typical forms of diplomacy and are not accounted for in the text of the VCDR.⁷³

⁷³ Vienna Convention on Diplomatic Relations, 18 April 1961, 500 U.N.T.S. 95 (Registered 24 Jun. 1964, No. 7310, entered into force 24 April 1964) VCDR.

Chapter 7 Conclusion

In the modern age of the international system, non-state actors have become increasingly important alongside of States and, therefore, should be bound by the same sort of rules and laws as States are in the international playing field. Diplomacy is a field where every procedure and act is regulated by the Vienna Convention on Diplomatic Relations and thousands of years of customary international law. If non-state actors are going to continue to engage in diplomacy and wield influence and power that is comparable to States, they must agree to be bound by the rules of international law. However, the forces within the international law system have made this a difficult task. As was previously mentioned, the Vienna Convention on Law of Treaties (VCLOT)—the framework instrument through which the creation of treaties is governed—applies the creation and application of treaties exclusively to states.

After the United Nations Conference on the Law of Treaties failed to reintroduce treaties concluded by international organizations into the VCLOT, the Conference recommended that the General Assembly assign the International Law Commission the task of preparing a separate set of draft articles, which the Commission submitted in 1982 and the General Assembly adopted into a convention in 1986. This convention became the Vienna Convention on the Law of Treaties between States and International Organizations or

between International Organizations.⁷⁴ The first 72 articles of it are functionally similar to the text of the relevant articles of the 1969 Vienna Convention on the Law of Treaties. However, the new Convention addresses the issue of the source of an organization's treaty-making capacity, using the approach from the International Court of Justice's Advisory Opinion *Certain Expenses of the United Nations*. It states in the preamble: "international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and fulfillment of their purposes."⁷⁵

While the Convention is not yet in force—it needs 35 ratifications or accessions by States, who are the only entities that count for purposes of the Convention's entry into force, but has only 28—"as happens with other codified international legal rules, the Convention is, regardless of its formal status, generally accepted as the applicable law and is widely used as a handy written guide in practice."⁷⁶ Therefore, its provisions may be able to act as useful guidelines for the creation of a convention for extending diplomatic principles to non-state actors. However, it is important to note that its failure to enter into force demonstrates that the international system at large is not fully supportive of its intentions.

⁷⁴ "Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations - Main Page." *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations - Main Page*. Web. 08 Apr. 2016.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

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