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NON-STATE ACTORS AS QUASI-SUBJECTS OF TRANSNATIONAL ORGANISED CRIME: IMPLICATIONS FOR THE SECURITY OF STATES

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We discuss the legal status of non-state actors in the context of the global fight against transnational organised crime and the security of states. We address the topic from the perspectives of international law (including criminal law), international security and human rights. We conclude that non-state actors such as multinational corporations, private military and security companies, and non-governmental organisations may become quasi-actors of transnational organised crime. Contributing to this probability are their uncertain legal status under international law, certain corporate practices and attitudes, obscure financial flows, and vulnerability of international and national public authorities to corrupt practices, among others.

Keywords: non-state actors; transnational organised crime; state security; strengthening the security of states; multinational corporations; private military and security companies; non-governmental organisations.

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НЕГОСУДАРСТВЕННЫЕ АКТОРЫ КАК КВАЗИСУБЪЕКТЫ ТРАНСНАЦИОНАЛЬНОЙ ОРГАНИЗОВАННОЙ ПРЕСТУПНОСТИ: СОВРЕМЕННЫЕ ПРОБЛЕМЫ ОБЕСПЕЧЕНИЯ БЕЗОПАСНОСТИ ГОСУДАРСТВ

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Исследуются проблемы правового статуса негосударственных субъектов в контексте противодействия транснациональной организованной преступности и обеспечения безопасности государств. Эти проблемы анализируются в рамках международного права, особое внимание уделяется уголовному праву, международной безопасности и правам человека. В ходе исследования автор приходит к выводу, что такие негосударственные субъекты, как транснациональные корпорации, частные военные и охранные компании, неправительственные организации, могут выступать в качестве квазисубъектов транснациональной организованной преступности. Прежде всего это вызвано несоответствием их правового статуса международному праву. Также среди причин можно выделить определенные корпоративные интересы, неконтролируемые финансовые потоки, коррупцию в международных и национальных государственных органах и т. д.

Ключевые слова: негосударственные субъекты; транснациональная организованная преступность; государственная безопасность; обеспечение безопасности государств; транснациональные корпорации; частные военные и охранные компании; неправительственные организации.

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Introduction

In recent years non-state actors have gained prominence in international law in multiple domains, including military affairs, political security, combating international crime and international terrorism, economic relations, sustainable development, human rights and environmental protection, among others.

However, non-state actors also possess a range of characteristics that make them less open to international legal oversight, which is mainly the result of their uncertain status in international law. Objectively, they may benefit from this uncertainty *de-facto* to serve their private or corporate interest. *De-jure*, this uncertainty contravenes the imperatives of international law, especially the principles and provisions in fields such as security and the fight against crime, as laid out in chapter VIII of the UN Charter[1].

By non-state actors, we refer first and foremost to multinational corporations, private military and security companies, and sometimes [international] non-governmental organisations. On the one hand, their activity is governed by art. 2(a) of the Draft articles on the responsibility of international organisations of 2011, whereby states and other entities are entitled to establish international organisations, but the composition thereof is not specified[2]. On the other hand, non-state actors are unlikely to participate in the implementation of chapter VIII of the UN Charter[3] [1, p. 34], although such participation may seem appropriate given the new and emerging threats to the security of states.

Increasingly, the concept of the security of states is expanding. Beyond the threats of interstate and internal conflicts, it now encompasses new aspects such as post-conflict recovery, disarmament, arms control, confidence- and security-building, and other measures to reduce the hypothetical probability of conflicts, and also the fight against transnational crime, international terrorism, non-proliferation of weapons of mass destruction [1, p. 11]. Prevention and management of disasters (accidental and deliberate) is also an essential aspect of the security of states.

Security encompasses threats in the sphere of high technologies and information security, critical infrastructure, finance and banking. Increasingly, such dangers have been coming from cyber-criminals and radicalised groups of cyber-attackers, and have been exacerbated by the global crisis, the COVID-19 pandemic, and new forms of armed conflicts termed "hybrid warfare" [2].

Threats to state security also emanate from the more established forms of criminal activity, such as illegal trafficking in drugs, weapons, human trafficking, illegal migration, etc., and also the activity of armed groups of terrorists, extremists and neo-nazis with ambitions to gain political power and expand their spheres of influence. The latter may often involve attacks on the territorial integrity of states, interference in their internal affairs, and threats to the constitutional order, the rule of law and human rights.

The above developments are changing the status quo for the non-state actors – notably, private military and security companies, multinational corporations and international non-governmental organisations. The famous Prussian military theorist K. von Clausewitz wrote, that "war is the continuation of politics by other means" [3, p. 84]. Paraphrasing his words, we may say that *politics is the continuation of business by military means*. The influence of big business on international policy is not new, as evidenced by multiple examples from the United States and Europe [4]. As the famous author H. de Balzac has said "the secret of great fortunes without apparent cause is a crime forgotten, for it was properly done" [5]. Other non-state actors may be just as influential.

Occasionally, some non-state actors operate as a front for international organised crime rings, bypassing the principles and norms of international and national law to generate lucrative incomes and profits for their masters. More generally, the shift in the balance of interest from public good to private gain – exacerbating during the economic crisis – has led to the unravelling of the 21st century *welfare state*. Increasingly, the "natural state" is taking its place with its overriding principle, *bellum omnium contra omnes*.

Speaking at a meeting of the UN General Assembly dedicated to the 75th anniversary of the founding of the UN, the UN Secretary General A. Guterres noted that "… the world is experiencing now with the COVID-19 pandemic…, we must work together to stop such thievery and exploitation by clamping down on illicit financial flows and tax havens; tackling the vested interests that benefit from secrecy and corruption, and exercising utmost vigilance over how resources are spent nationally"[4] (hereinafter translated by us. – *V. M.*).

[1]UN Charter [Electronic resource]. URL: https://www.un.org/ru/about-us/un-charter/full-text (date of access: 05.01.2022).

[2]Draft articles on responsibility of international organisations, with commentaries [Electronic resource]. URL: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf (date of access: 23.01.2022).

[3]Professor A. Douhan questions this possibility. Because such organisations are not legal persons, they cannot be held responsible for violating the norms of international law. They can only play a supporting role in maintaining international peace and security their involvement occurs indirectly – through subjects of international law who assume responsibility and risks associated with the activities of non-state actors.

[4]Коррупция представляет собой самое подлое предательство общественного доверия [Электронный ресурс]. URL: https://www.un.org/ru/coronavirus/statement-corruption-context-covid-19 (дата обращения: 08.06.2021).

To examine the issue of non-state actors as quasi-subjects of transnational organised crime, we first need to identify the applicable instruments of international law. At present, the main tool in the global fight against transnational organised crime [6, p. 24] is the UN Convention against transnational organised crime of 2000 (UNTOC)[5] and three additional protocols thereto: the Protocol to prevent, suppress and punish trafficking in persons, especially women and children (adopted by the General Assembly Resolution 55/25), Protocol against the smuggling of migrants by land, sea and air (adopted by the General Assembly Resolution 55/25), and Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition (adopted by the General Assembly Resolution 55/255).

The main objective of the mentioned convention is to promote effective cooperation in preventing and combating transnational organised crime (art. 1) and build awareness of the existence, causes and dangers of transnational organised crime (art. 31 (5))[6].

Transnational corporations as quasi-subjects of transnational organised crime

From a historical, legal and practical perspective, the risk of transnational corporations (TNCs') engagement in transnational crime as its quasi-subjects appears real. A uniform legal position on the status of TNCs is still lacking, and instances of their criminal engagement remain largely in the shadows. Yet, in a globalising world, the integrating digital economy, expanding network of high-tech facilities and multiple other systems are at risk of becoming targets of organised criminal attempts.

From the perspective of UNTOC 2000 (art. 2), structured and organised criminal groups (criminal organisations) constitute the foundation of transnational organised crime. They consist of three or more persons (individuals and (or) legal entities), have existed for some time, and act for the purpose of committing one or more serious crimes according to (art. 3 of the UNTOC) to obtain financial or other material benefits, directly or indirectly.

Earlier, in his report at the World ministerial conference on organised transnational crime (Naple) the UN Secretary General used the term "criminal transnational corporations"[7], as actors in international crime. According to multiple experts, many transnational criminal organisations (TCOs) are being run in the same manner as legal transnational corporations, at the country and regional levels, and globally [7, p. 174].

Corroborating this observation, the 5th UN congress on the prevention of crime and the treatment of offenders (Geneva), noted under item 5 of its agenda that crimes committed by corporations and those instigated or accomplished by the crime syndicates have many common features, frequently related to corruption in law enforcement and political structures. In addition these crimes were characterised by a high degree of secrecy and, since they were "invisible crimes", their "disclosure was associated with great difficulties"[8].

The above claims are grounded in the territorial criteria of transnational crime. Art. 3 (2) of the UNTOC stipulates that an offence is transnational in nature if *it is committed in more than one state, it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state, it is committed in one state but involves an organised criminal group that engages in criminal activities in more than one state, or it is committed in one state but has substantial effects in another state.*

The legal definition of transnational economic activity uses the same territorial approach. For example, the UN Draft norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights, define TNC as an "economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whatever in their legal home country or country of activity, and whether taken individually or collectively"[9].

A review of the types of monopolies [TNCs], as defined in formal law and empirically, gives rise to the following conjectures. On the one hand, there appears to be a discrepancy between the economic content, economic essence and the legal form of the TNC, and on the other, the economic cohesiveness of a TNC rests on a plurality of legal forms (legal entities established under local law, branches, etc.), that benefits disproportionately the owners of TNCs [8, p. 119].

Frequently, domestic law is not fully effective in governing the global aspects of TNC operation and its enforcement does not always ensure full control of their illegal activity. At the same time, the TNCs' role as major investors and donors of technology may give them excessive leverage to resist oversight of their compliance with human rights law, environmental

[5]UN Convention against transnational organised crime and the protocols thereto [Electronic resource]. URL: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/united_nations_convention_against_transnational_organized_crime_and_the_protocols_thereto.pdf (date of access: 08.06.2021).

[6]Ibid.

[7]Report of the World ministerial conference on organised transnational crime [Electronic resource]. URL: https://www.imolin.org/imolin/naples.html?print=yes#:~:text=The%20World%20Ministerial%20Conference%20on%20Organized%20Transnational%20Crime%20was%20held,103%20of%2020%20December%201993 (date of access: 20.01.2022).

[8]5th United Nations Congress on the prevention of crime and the treatment of offenders [Electronic resource]. URL: https://unis.unvienna.org/pdf/2010-Crime_Congress/English_Poster_Book.pdf (date of access: 07.06.2022).

[9]UN draft norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights [Electronic resource]. URL: https://digitallibrary.un.org/record/498842 (date of access: 20.01.2022).

requirements and safeguards against illegal activity [9]. For example, the Bank of Credit and Commerce International, was found in 1991 to be a criminal organisation in the United States and Great Britain for corrupt behaviour, involvement in money laundering and terrorist financing [10].

Measures against illegal activity among transnational corporations were specifically addressed at the 6th UN Congress on the prevention of crime and the treatment of offenders in Caracas (hereinafter – the Congress). Its final document, known as the Caracas declaration of 1980[10] laid out the principles of crime prevention and treatment of offenders, covering, inter alia, the key question of the development and planning of criminal justice and crime prevention policies in the context of economic development, political systems, social and cultural values and social transformations. The principles obliged the states parties to undertake such development and planning despite resistance from group or individual interests. Still, the document left many issues unresolved, relegating many of them to the realm of soft law and the national legal systems of individual states. Therefore, the norms of international law regarding public law obligations and responsibilities of commercial companies (legal entities) are advisory and belong to the scope of domestic law [11, p. 65–66].

For example, art. 10 (Liability of legal persons) of the UNTOC reads, "each state party shall adopt such measures as may be necessary, *consistent with its legal principles*, to establish the liability of legal persons for participation in serious crimes involving an organised criminal group and for the offences established in accordance with… this convention". Some other international legal instruments also contain similar provisions, such as the United Nations Convention against corruption of 2003 (art. 26)[11], the International convention on the suppression of the financing of terrorism of 1999 (art. 5)[12], the Directive 2008/99/EC on the protection of the environment through criminal law[13].

States already recognise their obligations towards individuals as an international legal imperative. For example, the International covenant on economic, social and cultural rights of 1966 (art. 12) states that "the states parties recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"[14].

Understandably, corporations have not yet accepted such obligations. Because international law was designed to govern relations between states, the obligations that it creates apply only to states. States are responsible under international law, including for the actions of TNCs.

TNCs are outside the realm of public legal responsibility, *de jure* and *de facto*. Their liability is mostly limited to private legal jurisdiction, such as investor-state disputes [12, p. 156], sometimes putting them in the position to force the particularistic interests of narrow social groups and corporate demands on states.

At the same time, the liability of legal persons is never limited to criminal liability, and the member states have the discretion to apply administrative or civil measures instead [9].

Therefore, there is still a probability for TNCs to engage in criminal behaviour to enhance their competitive position, engaging in practices such as corruption, blackmail, violence, or fraud. The profit-seeking motive is shared by transnational criminal organisations and legitimate businesses. The difference lies mainly in the appetite for risk.

For example, between the 1950s and 1970s, the American Lockheed Martin aircraft company was involved in several corruption scandals with political consequences for Germany, Italy, the Netherlands and Japan. In Japan connections with representatives of criminal organisations, such as the Yakuza, were exposed. Today, the Lockheed Martin corporation is still the world's largest developer and manufacturer of weapons and military equipment in terms of contracts concluded with the US government[15].

The potential of TNCs becoming subjects of transnational crime exists, adding to the *poly-subjectivity*, or multiplicity of actors in international crime, collectively representing the present-day phenomenon of transnational criminal organisations. These may include individuals, legal persons and other non-state actors. For states, such non-state actors can become convenient scapegoats for their failures to meet their international obligations in the field of global security and human rights[16].

[10] 6th United Nations Congress on the prevention of crime and the treatment of offenders [Electronic resource]. URL: https://digitallibrary.un.org/record/30439 (date of access: 20.01.2022).

[11] Convention against corruption [Electronic resource]. URL: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (date of access: 20.01.2022).

[12] International convention for the suppression of the financing of terrorism [Electronic resource]. URL: https://www.un.org/law/cod/finterr.htm (date of access: 20.01.2022).

[13] Commission staff working document evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Environmental crime directive) [Electronic resource]. URL: https://ec.europa.eu/info/sites/default/files/environmental_crime_evaluation_report.pdf (date of access: 20.01.2022).

[14] International covenant on economic, social and cultural rights [Electronic resource]. URL: https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf (date of access: 20/01/2022).

[15] Lockheed Martin Corporation [Electronic resource]. URL: https://www.lockheedmartin.com/ (date of access: 25.12.2021).

[16] In this regard, the statement of the famous American gangster Al Capone that he has been accused of every death except the casualty list of the world war is very unambiguous.

Private military and security companies as quasi-subjects of transnational organised crime

Private military and security companies (PMSCs)[17] are an emerging phenomenon in international law. The collapse of the bipolar system of international relations, the end of the Cold War and the progress of globalisation and integration of the world community are some of the factors that added to its prominence.

The changing nature of modern wars and conflicts also contributed to the rise of private security companies, as evidenced by the proliferation of *local*, *hybrid*, *symmetrical*, *asymmetrical* warfare. Conventional armed forces and states have been overstretched by multiple engagements in military operations, peacekeeping missions, post-conflict activities, rebuilding of the social and economic infrastructure, and support for the national political institutions in post-crisis situations [2].

Regulation of PMSCs is now almost exclusively the province of domestic law. It is often prone to the influence of particularistic and narrow domestic interests. The status of PMSCs in international law is uncertain, and this gap represents a potential threat to international and national security.

As commercially oriented entities with some degree of legal independence from the military-political strategy of states, PMSCs often act as contractors of transnational businesses. Their limited transparency and accountability may bring them to the service of terrorists and extremist organisations, opposition groups and transnational mafia-type formations.

The prevailing legal approaches to the treatment of private military and security companies are conflicting, and reflect the dual legal nature of their work are foolowing:

• private military and security campaigns as a modern version of mercenary activity, considered immoral and criminalised in international law and national jurisdictions [13, p. 4];

• private military and security campaigns were a type of business service, integrated *de facto* in international commerce, regulated de jure only at the national level in a limited number of countries and operating offshore [14, p. 40].

Despite some commonalities with mercenaries – especially in armed conflicts (e.g. involvement in military activity or pecuniary self-interest) – PMSCs still have a fundamental distinction. Despite not having a clear international legal status, from the viewpoint of corporate law, they are legitimate commercial enterprises offering specialist services in the field of security [15, p. 15]. Unlike mercenaries, they possess official registration that gives them legal status. However, many PMSCs are registered in offshore zones, which is a common criticism levelled against them [14, p. 40]. With reason, offshore zones have reputations as "tax havens", where lax financial and regulatory oversight creates an elevated risk of concealment or laundering of proceeds from crime, recognised as criminal activity under international and national criminal laws.

With some reservations, we are inclined to view the modern PMSCs as a form of corporate commercial activity in the military security sector, performed on the basis of outsourcing [16, p. 149–165]. It appears to be an expanding and lucrative market. From a low-returns sector in the late 20th century, private military security companies have evolved into a highly profitable business, with annual profits far exceeding 100 bln US dollars [17, p. 575]. On the other hand, much of the demand for their services is generated by political interests and lobbying for the use of PMSCs in regional armed conflicts that are too sensitive for governments and national armed forces [18], or in operations such as supplying weapons to one of the belligerents when an overt demonstration of the national interests may destabilise international relations. At present, up to 90 % of all demand comes from governments and (or) special services[18]. Today, there are more than 700 registered PMSCs worldwide, mostly in the USA (about 50 %) and the UK (about 25 %).

There still is no specific instrument of international law on PMSCs. This issue is partially addressed by the instruments concerning mercenary activity: *Hague conventions of 1899, 1907, the Geneva convention relative to the treatment of prisoners of war of 1949, Protocol I is a 1977 amendment protocol to the Geneva convention relating to the protection of victims of international conflicts, Protocol II is a 1977 amendment protocol to the Geneva convention relating to the protection of victims of non-international armed conflicts, International convention against the recruitment, use, financing and training of mercenaries of 1989*.

An attempt to clarify the legal status of PMSCs and their personnel during armed conflicts was undertaken at the initiative of the government of Switzerland and the International Committee of the Red Cross at several intergovernmental expert meetings leading to the Montreux document on relevant international legal obligations and best practices of states concerning the functioning of private military and security companies during armed conflict (17 September 2008). However,

[17]Письмо Постоянного представителя Швейцарии при Организации Объединенных Наций от 2 октября 2008 года на имя Генерального секретаря [Электронный ресурс]. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/537/12/PDF/N0853712.pdf?OpenElement (дата обращения: 13.12.2021).

[18]Not surprisingly, the website of the PMSC (Sandline international), which ceased its activities on 16 April 2004, gave the following reason for the termination of its activities: "The general lack of governmental support for private military companies willing to help end armed conflicts in places like Africa, in the absence of effective international intervention, is the reason for this decision. Without such support, the ability of Sandline to make a positive difference in countries where there is widespread brutality and genocidal behaviour is materially diminished". See: Sandline International [Electronic resource]. URL: http://www.sandline.com/ (date of access: 20.01.2022).

the Montreaux document has not fulfilled its purpose because it is non-binding and only 17 states have agreed to it[19].

Another document designed to provide international regulation of PMSCs was the International code of conduct for private security service providers 2010 (hereinafter – the Code)[20]. The Code claims to establish the general principles of organisation and activity for PMSCs, particularly with regard to international humanitarian law and human rights law. However, it is not legally binding even on the companies that have signed it. Still, endorsement of the code is a mandatory requirement for the hiring of PMSCs by UN agencies[21].

The Code has been widely criticised as an instrument for "rebranding and legitimising the PMSC industry" and a way for the states to evade their obligations on human rights [19]. Furthermore, the global database on PMSCs and current and former employees thereof proposed by the Code and open to all interested persons and bodies, this practice may create a "grey" information resource for criminal organisations seeking to recruit PMSCs and their employees.

Resolution 2005/2 of 7 April 2005 of the UN Commission on human rights established a UN working group for the drafting of the Convention on the regulation of private military and security companies[22]. Art. 21 of the draft proposes to establish universal jurisdiction of states in respect of persons who have committed crimes within the framework of the activities of PMSCs. We find this solution progressive and sensible.

In this regard changes are to be expected in the national criminal laws of the states to establish their jurisdiction over crimes committed by PMSC employees in the course of performing their professional duties, and to ensure its exercise in relation to such crimes by the courts of the offender's country of citizenship and those of the country in which they committed the crime.

Combined with the national and international procedures for the extradition of criminals and the transfer of criminal proceedings from one state to another, the above changes could significantly reduce the zone of "judicial immunity" for PMSC employees, especially in armed conflicts and transnational business activity.

The specificities of the market and the undefined status of PMSCs in international law underlines another aspect of *instrumentality* [15, p. 15]: the probability of recruitment by terrorists, extremists, states in armed conflicts or opposition groups, with the subsequent risk of becoming independent quasi-subjects (actors) in transnational organised crime [20, p. 102], usually in the form of complicity.

In the calculus of some SPMCs, this transformation may give them a better combination of benefits and risks because of high potential demand and relatively low likelihood of exposure (e. g. due to customers' greater reluctance to acknowledge their presence). Further research on this matter, however, is constrained by the poor availability of data and the need for more accurate definitions.

Non-government organisations and transnational organised crime

In recent years non-governmental organisations (NGOs) have proliferated and gained prominence on the international scene. They operate outside the policy framework of any one state, are non-profit, and, as a rule, preoccupy themselves with humanitarian, social, or environmental causes, health and development, financing and implementation of projects[23].

Depending on the level and scope of their activities, a distinction is made between national, regional and international NGOs. By organisational structure, NGOs may be divided into four groups:

- unincorporated and (or) voluntary association;
- trusts, charities and foundations;
- not-for-profit companies;
- entities formed or registered under special NGO or nonprofit law [21, p. 13–14].

Globalisation has strengthened the role and importance of international NGOs. Chapter 10 of art. 71 of the UN Charter grants consultative status to organisations that are neither governments nor member states. At the regional level, the European convention on the recognition of the legal personality of international non-governmental organisations (Strasbourg, 1986), developed by the Council of Europe, constitutes the legal framework for all European NGOs.

However well-intentioned, the tasks and specific activities pursued by international NGOs (humanitarian missions, assistance to poor and developing

[19]Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General [Electronic resource]. URL: https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/droi_090209_33/droi_090209_33en.pdf (date of access: 30.10.2020).

[20]International code of conduct for private security service provider [Electronic resource]. URL: https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/international-code-conduct.html (date of access: 30.10.2020).

[21]United Nations security management system: security management operations manual. Guidelines on the use of armed security services from private security companies [Electronic resource]. URL: http://psm.du.edu/media/documents/international_regulation/united_nations/internal_controls/un_unsms-operation-manual_guidance-on-using-pmsc_2012.pdf (date of access: 30.10.2020).

[22]UN experts are finalising a draft convention on private military companies exporting their services abroad [Electronic resource]. URL: https://news.un.org/ru/story/2010/04/1161711 (date of access: 10.01.2022).

[23]A practical for NGO participants [Electronic resource]. URL: https://www.ohchr.org/en/publications/policy-and-methodological-publications/united-nations-human-rights-council-practical (date of access: 10.01.2022).

countries, search and rescue operations, etc.), their impartiality is often questioned. Critics suspect NGOs of being vehicles of the foreign policy of powerful states, being open to particularistic (and sometimes destructive) corporate interests [4]. Some grassroots organisations – such as ISIS – act as violent non-state actors [22].

It is important to note in this regard that we apply the term "organisation" to legal entities, and also to officially unregistered (unrecognised) public structures. In the latter case, organisation is a distinct attribute of the commission of a crime (sui generis) associated with long-term activity, participation in a criminal organisation, complex connections between accomplices, conspiracy and a degree of autonomy of the individual actors.

The generic approach to dealing with organisational involvement in criminal activity is laid out in instruments such as the UNTOC. Under art. 10 of the said convention (liability of legal entities), each state party to the convention is obliged to take such measures as may be necessary, taking into account its legal principles, for the liability of legal entities for participation in serious crimes involving a criminal organised group and for crimes recognised as such in accordance with art. 5 (criminalisation of participation in an organised criminal group).

In Art. 10 (2) of the UNTOC, the participating states are also invited to choose the types of liability of legal entities, among which criminal liability is also provided, along with civil and administrative penalties. The convention puts forth two conditions: that such liability is in compliance with the legal principles of the state party (the provisions of national legislation) and without prejudice to the criminal liability of individuals who have committed crimes.

In this regard, let us consider the possibility of criminalising assistance (directly or indirectly) in the search and rescue (SAR) operations in the Mediterranean conducted by some international NGOs because they complement the activity of transnational criminal groups on illegal migration and people smuggling across the Mediterranean. Arguably, unauthorised SAR operations in this region could constitute a de facto link in the "business model" of people smugglers. In the argument of the opponents of SARs, when the trafficking attempt fails, SAR crews act as a stand-by resource, increasing the chances of the illegal migrants reaching the EU countries.

According to the Protocol against the smuggling of migrants by land, sea and air, supplementing the UNTOC (art. 6 (2)), it is permissible to criminalise attempts to commit any crime recognised as such under para 1 of art. 6 of the mentioned protocol (smuggling of migrants, performing activities to create conditions for the smuggling of migrants, production of a forged entry or exit document or identity card, etc.), as well as aiding and abetting, including participation as an accomplice (paras 2 (a), 2 (b), 2 (c) of the art. 6)[24].

Although, to date, no concrete facts of interaction between representatives of NGOs and transnational criminal groups engaged in human smuggling have been established, nevertheless, the possibility of bringing to criminal responsibility the NGOs and their crews onboard the vessel "for actions in tacit agreement with smugglers" is open [6, p. 29].

This conjecture is based on the current EU migration legislation pursuant to the UN protocol, namely, the "package of intermediaries" Council Directive 2002/90/EC of 28 November 2002, defining the facilitation of unauthorised entry, transit and residence[25] and the Council's framework decision 2002/946/JHA of 28 November 2002 on strengthening the criminal legal framework for preventing the facilitation of unauthorised entry, transit and residence[26].

Moreover, the Council directive 2002/90/EC makes a distinction between *intentional assistance* (requiring the intent "to obtain, directly or indirectly, financial or other material benefits", as in the Protocol) and *direct assistance* to the illegal entry of migrants, not requiring the intent to obtain a benefit, or not mediated by criminal conspiracy. This makes SAR humanitarian missions potentially vulnerable to criminal persecution [6, p. 29].

As a partial solution to this controversy, the Council directive 2002/90/EC, includes a provision whereby the member states may if they wish, exclude criminal liability in the case of humanitarian assistance missions.

At the same time, EU migration legislation goes beyond the minimum requirements for criminalisation (art. 6) of the Protocol and allows the criminalisation of stimulating behaviour that is not based on any conspiracy and is not committed with the intention of obtaining financial or other material benefits. In our opinion, this is the result of greater weight being given to concerns about national security and the protection of the sovereignty of [EU countries], than to the provision of human rights in the humanitarian and migration sphere.

[24]A practical for NGO participants [Electronic resource]. URL: https://www.ohchr.org/en/publications/policy-and-methodological-publications/united-nations-human-rights-council-practical (date of access: 10.01.2022).

[25]Council directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [Electronic resource]. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0090&from=EN (date of access: 26.08.2021).

[26]Council framework decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA) [Electronic resource]. URL: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002F0946> (date of access: 26.08.2021).

Conclusion

Non-state actors are in pursuit of multiple directions of development, reflecting the lack of a uniform and universally recognised approach to determining their international legal status. This evolution exceeds and sometimes equals the pace of domestic legal changes.

Concerns still exist about the impacts of this situation on the effectiveness of the international effort to maintain peace and security, cooperation among states in criminal law enforcement and combating of transnational organised crime, and on human rights. Non-state actors may become actors in transnational crime when their functionality and human potential are used to promote egocentric corporate interests, obtaining unfair financial, material and other advantages.

In a globalising world, fully legitimate actors who choose not to follow the formula "it is better to be than to seem" contribute to such well-known phenomena in modern conditions of globalisation as hybrid wars, grey zones, the DarkNet and the shadow economy.

Under these conditions, the integrative role of international law is particularly important. International action can clarify the status of organisations, and maintain effective debate on coordination and delineation of the boundaries of national jurisdictions in conducting anti-crime and counter-terrorism operations, and sanctioning unscrupulous entities. This can help mount effective national responses to the emerging security threats and find joint, universally acceptable solutions to topical human rights issues for countries with different historical and cultural values, and religious and legal traditions.

References

1. Douhan A. *Mezhdunarodnye organizatsii i podderzhanie mezhdunarodnogo mira i bezopasnosti* [International organisations and the maintenance of international peace and security]. Minsk: MITSO; 2016. 262 p. Russian.

2. Hoffman FG. *Conflict in the 21st century: the rise of hybrid wars.* Arlington: Potomac Institute for Policy Studies; 2007. p. 17–35.

3. von Clausewitz C. *On war.* Howard ME, Paret P, translators. New Jersey: Princeton University Press; 1984. 752 p.

4. Turley J. Big money behind war: military-industrial complex. *Aljazeera* [Internet]. 2014 [cited 2021 January 2]. Available from: https://www.aljazeera.com/opinions/2014/1/11/big-money-behind-war-the-military-industrial-complex.

5. de Balzac H. Le Père Goriot. In: *Œuvres complètes de H. de Balzac*. Paris: A. Houssiaux; 1855. p. 303–531.

6. Kruessmann T. Human rights in combating organised crime and the problem of "illegal" migration in Europe. *Journal of the Belarusian State University. Law.* 2020;3:24–29.

7. Shelley L. The threat to world order. In: Torr JD, editor. *Organised crime*. San Diego: Greenhaven Press; 1999. p. 173–181. (Contemporary issues companion).

8. Boguslavskii MM. *Mezhdunarodnoe chastnoe pravo* [Private international law]. Moscow: Mezhdunarodnye otnosheniya; 1994. 416 p. Russian.

9. Woters J, Chané AL. Multinational corporations in international law [Internet]. 2013 [cited 2021 January 2]. Available from: https://www.researchgate.net/publication/272241501_Multinational_Corporations_in_International_Law. (KU Leuven Working Paper; No. 129). DOI: 10.2139/ssrn.2371216.

10. Tait N. Costs settlement brings to an end record-breaking BCCI litigation 12-year action. *Financial Times.* 2006 June 8.

11. Westra L. *The supranational corporation: beyond the multinationals.* Boston: Brill; 2013. 220 p. (Studies in Critical Social Sciences; volume 53).

12. Ruvinskii RZ. *Pravoporyadok v period global'nogo krizisa: transformatsii, tendentsii, ugrozy* [Legal order in times of global crisis: transformations, trends, threats]. Saint Petersburg: Aleteiya; 2020. 350 p. Russian.

13. Coady CAJ. Mercenary morality. In: Bradney AGD, editor. *International law and armed conflict: 16th annual conference; 1990 April 5–7; Leicester, Great Britain.* Stuttgart: Franz Steiner; 1992. p. 55–71.

14. Singer PW. *Corporate warriors: the rise of the privatised military industry.* New York: Cornell University Press; 2007. 351 p.

15. Moller D. *Privatisation of conflict, security and war.* Copenhagen: Danish Institute for International Studies [Internet]. 2005 [cited 2021 January 2]. 41 p. (DIIS Working paper; No. 2005/2). Available from: https://www.jstor.org/stable/resrep13435.

16. Gielink D, Buitenhuis M, Moelker R. No contractors on the battlefield: the Dutch military's reluctance to outsource. In: Jäger T, Kümmel G. *Private military and security companies: chances, problems, pitfalls and prospects*. Wiesbaden: Springer VS; 2007. p. 149–165. DOI: 10.1007/978-3-531-90313-2_10.

17. Cameron L. Private military companies: their status under international humanitarian law and its impact on their regulation. *International Review of the Red Cross.* 2006;88(863):573–598.

18. MacLeod S. Private security companies and shared responsibility: the turn to multistakeholder standard-setting and monitoring through self-regulation-"plus". *Netherlands International Law Review*. 2015;62:119–140. DOI: 10.1007/s40802-015-0017-y.

19. Mitchell S. Becoming legitimate: how PMSCs are seeking legitimacy in the international system [Internet]. 2018 [cited 2021 December 25]. Available from: http://scholarcommons.usf.edu/etd/7197.

20. Mandel R. *Armies without states: the privatisation of security.* London: Lynne Reinner Publishers; 2002. 169 p.

21. Stillman GB. *Global standard NGOs: the essential elements of good practice.* Geneva: Grant B. Stillman; 2007. 92 p.

22. Hager EB, Mazzetti M. Emirates secretly sends Colombian mercenaries to Yemen fight. *New York Times* [Internet]. 2015 November 25 [cited 2022 January 20]. Available from: https://www.nytimes.com/2015/11/26/world/middleeast/emirates-secretly-sends-colombian-mercenaries-to-fight-in-yemen.html.

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