

# The applicability of international humanitarian law to organized armed groups

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## **Abstract**

*While it is generally accepted today that international humanitarian law (IHL) is binding on organized armed groups, it is less clear why that is so and how the binding force of IHL on organized armed groups is to be construed. A number of explanations for that binding force have been offered. The present contribution critically examines five such explanations, namely that organized armed groups are bound via the state on whose territory they operate; that organized armed groups are bound because their members are bound by IHL as individuals; that norms of IHL are binding on organized armed groups by virtue of the fact that they exercise de facto governmental functions; that customary IHL is applicable to organized armed groups because of the (limited) international legal personality that they possess; and that organized armed groups are bound by IHL because they have consented thereto.*

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It is generally accepted today that international humanitarian law (IHL) is binding on organized armed groups – that is, those armed groups that are sufficiently

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organized to render them a party to an armed conflict.<sup>1</sup> Both conventional and customary IHL make it abundantly clear that IHL applies to ‘each party’ to a non-international armed conflict (NIAC),<sup>2</sup> and that ‘each party to the conflict must respect and ensure respect for international humanitarian law’.<sup>3</sup> However, the question *why* that is so and *how* the binding force of IHL on organized armed groups is to be construed remains controversial.

At first sight, an analysis of that question might be dismissed as being a purely academic exercise. When the law makes it so clear that the law applies, what purpose does it serve to ask why and how? Yet to leave the question unanswered entails a number of practically tangible consequences. The failure to argue convincingly why and how the law applies to organized armed groups will hinder effective strategies to engage them in the quest to ensure better compliance with IHL. If humanitarian organizations were challenged by an organized armed group on the question why the latter should conform with IHL, but such organizations were unable to provide a convincing response, the promotion and strengthening of IHL would be seriously hampered. Another very practical reason why the question needs answering is that different answers will have different implications as to which rules of IHL apply – and which do not – and, in turn, will determine what conduct will entail the collective responsibility of the organized armed group in question, as well as the individual responsibility of its members.<sup>4</sup> A determination of why – and which – rules of IHL apply to an organized armed group will also have a direct bearing on reciprocity on several levels. For instance, if it were to follow from a certain construction of the binding force of IHL on organized armed groups that the latter are only bound by customary IHL,<sup>5</sup> the further question would arise of

- 1 The International Criminal Tribunal for the former Yugoslavia (ICTY) has identified several indicative factors for an armed group to be considered ‘organized’, including the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits, and military training; its ability to plan, co-ordinate, and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords. For an elaboration of the required degree of organization, see e.g. ICTY, *The Prosecutor v. Boškoski and Tarčulovski*, Case No. ICTY-IT-04-82-T, Judgment (Trial Chamber), 10 June 2008, paras. 194–205.
- 2 Common Article 3 to the Four 1949 Geneva Conventions. See also Additional Protocol II, Art. 1(1), which assumes that binding force inasmuch as it ‘develops and supplements Article 3 common to the Geneva Conventions . . . without modifying its existing conditions of application’, albeit with the caveat that Additional Protocol II only applies to a specific type of organized armed groups, namely those that meet the high threshold of exercising control over territory sufficient to enable them to carry out sustained and concerted military operations and to implement the Protocol.
- 3 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Cambridge, 2005, Rule 139, applicable in both international armed conflicts and NIACs.
- 4 While a legal regime for the collective responsibility of organized armed groups remains amorphous, there are clear indications in the practice of both states and inter-governmental organizations, as well as of non-governmental organizations, that organized armed groups can be held accountable *qua* collective entities. See generally, Jann K. Kleffner, ‘The collective accountability of organised armed groups for system crimes’, in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law*, Cambridge University Press, Cambridge, 2009, pp. 238–269.
- 5 For a discussion of that construction see below, pp. 454–456.

whether a state that is an adverse party to an NIAC remains bound by its obligations under international humanitarian treaty law that may go beyond, or depart from, customary IHL.

These reasons suggest a need for a critical analysis of the different explanations why and how IHL is binding on organized armed groups. The most commonly advanced arguments, which we will be addressing in the following sections, are that organized armed groups are bound via the state on whose territory they operate; that organized armed groups are bound because their members are bound by IHL as individuals; that norms of IHL are binding on organized armed groups by virtue of the fact that they exercise *de facto* governmental functions; that customary IHL is applicable to organized armed groups because of the (limited) international legal personality that they possess; and that organized armed groups are bound by IHL because they have consented thereto.

Before proceeding with the analysis of these different explanations, however, the following clarification is in order: the purpose of the present contribution is not to take position as to whether one or other argument is 'better' than the others. Rather, my interest is more modestly limited to submitting each of the explanations to scrutiny and to exposing their respective strengths and weaknesses.

## **Binding force via the state: the doctrine of legislative jurisdiction**

A first explanation of why and how IHL binds organized armed groups, referred to by some as the majority view,<sup>6</sup> holds that IHL applies to them because the 'parent' state has accepted a given rule of IHL. According to this construction, the capacity of a state to legislate for all its nationals entails the right of the state to impose upon them obligations that originate from international law, even if those individuals take up arms to fight that state or (an)other organized armed group(s) within it.<sup>7</sup> In particular, the doctrine of legislative jurisdiction has been put forward to explain the binding nature of conventional IHL. However, a similar line of reasoning could be employed to conceptualize the binding force of customary IHL.

The main strength of this doctrine lies in the fact that it supplies a reason why organized armed groups are bound by all rules of IHL that the territorial state has consented to, despite the fact that the organized armed groups themselves may not have consented to them.<sup>8</sup> It provides the basis for full parity between those rights and obligations under IHL that the state has accepted, on the one hand, and those that are applicable to organized armed groups, on the other hand. A further strength is that the construct is fully compatible with other areas of international law, through which states grant rights to, or impose obligations on, individuals and other legal persons. When a state consents to a given rule of international law that,

6 Lindsay Moir, *The Law of Internal Armed Conflict*, Oxford University Press, Oxford, 2002, pp. 53–54, with references to Pictet, Baxter, Schindler, Elder, Greenspan, and Draper as authors taking that view.

7 For a recent defence of the doctrine of legislative jurisdiction, see Sandesh Sivakumaran, 'Binding armed opposition groups', in *International and Comparative Law Quarterly*, Vol. 55, 2006, pp. 381–393.

8 *Ibid.*, p. 382.

for instance, criminalizes a given conduct, the consent of individuals who may be subject to criminal prosecution on the basis of that rule is generally considered to be irrelevant. The same holds true for rights under international law, which states can grant to individuals by accepting a given treaty as binding or by not persistently objecting to a rule of customary international law, regardless of the position taken by individuals who are to benefit from such rights.

However, the lack of consent to rules of IHL by organized armed groups also results in important limitations regarding their propensity to accept the binding force of IHL on the basis of the doctrine. After all, it does not come as a surprise when an organized armed group rejects an explanation that draws on the fact that the very state against whom that organized armed group is fighting has accepted a given rule of IHL.<sup>9</sup> Indeed, the very fact that an organized armed group is a party to an armed conflict against the central government of a state suggests very strongly that it does not recognize even the most basic laws of that state, which seek to perpetuate that central government's monopoly on the use of force by criminalizing any challenge to that monopoly. The equation of members of an organized armed group with 'ordinary citizens', who can reasonably be assumed to be at least receptive to the suggestion that they are bound by the legal rules that the state has accepted or issued, appears to be somewhat strained, if not entirely neglecting the reality of organized armed groups as challengers to the monopoly of force that states arrogate for themselves. To reason via the state, as the doctrine of legislative jurisdiction does, thus bears the danger of undermining rather than strengthening the acceptance of IHL by organized armed groups.

Another argument advanced against the doctrine of legislative jurisdiction is that it fails to distinguish between the binding force of IHL on organized armed groups as a matter of international law and its binding force under domestic law.<sup>10</sup> This counter-argument rests on the assumption that, when states accept a rule of international (humanitarian) law, such a rule becomes part of domestic law, and the subjects of that rule (in this case, individuals who make up an organized armed group) are therefore bound by a rule of domestic, rather than international, law. In other words, the nature of the rule changes, with the consequence that the doctrine of legislative jurisdiction fails to account for the binding force of IHL on organized armed groups as a matter of *international* law.<sup>11</sup> Following this line of reasoning further, it is argued that it is by no means certain that a state will take the necessary legislative measures to render rules of international law applicable in the domestic legal order. Organized armed groups would not incur any obligations in the absence of the necessary implementing legislation.<sup>12</sup>

9 For a pertinent example, see the assertion of the National Liberation Front in Vietnam in the 1960s that 'it was not bound by the international treaties to which others beside itself subscribed', in ICRC, 'External activities: Viet Nam', in *International Review of the Red Cross*, Fifth Year, No. 57, 1965, p. 636.

10 Antonio Cassese, 'The status of rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts', in *International and Comparative Law Quarterly*, Vol. 30, 1981, p. 429.

11 *Ibid.*

12 Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Sir Hersch Lauterpacht Memorial Lectures, Grotius Publications, Cambridge, 1987, p. 39.

This counter-argument is open to two objections, one relating to the conclusion that is being reached, the other to the underlying assumption that, when states accept a rule of international (humanitarian) law, such a rule becomes part of domestic law, and the individuals who make up an organized armed group will therefore be bound by a rule of domestic, rather than international, law.

First, the conclusion that an organized armed group would not incur any obligations in the absence of the necessary implementing legislation only holds true in a dualist conception of the relationship between international and domestic law, which is of course not the only possible conception. As the regulation of the relationship between international and domestic law is a matter to be decided freely by each state, some accept (certain categories of) rules of international law to be directly applicable in their domestic legal order, while others require such rules to be transformed into rules of domestic law. Indeed, in addition to the two classical approaches to the relationship between international and domestic law – monism and dualism – several other approaches and techniques exist.<sup>13</sup> While a detailed discussion of these approaches is beyond the purview of the present article, suffice it to say that dualism is not the only one. The conclusion that organized armed groups do not incur any obligations in the absence of the necessary implementing legislation would only be reached when states adopt a dualist approach, whereas members of organized armed groups may incur obligations under IHL when a monist approach is adopted.

Secondly, the assumption that, when states accept a rule of international (humanitarian) law, such a rule becomes part of domestic law, and that the individuals who make up an organized armed group will be bound by a rule of domestic rather than international law, is by no means self-evident. Much as other areas of international law (such as international human rights law and international criminal law) create rights and/or obligations of individuals directly under international law,<sup>14</sup> so does IHL. Non-transformation of a rule that creates such rights or obligations under international law may have the consequence of forestalling its domestic application in a state that has opted for a dualist approach to the relationship between international and domestic law. As a result, an individual who seeks to invoke a human right before a domestic court may be barred from doing so, or a domestic court may find itself barred from exercising its jurisdiction over someone accused of an international crime. However, such consequences for purposes of domestic proceedings do not affect the fact that the individual in question is the bearer of rights and obligations on the international plane. Indeed, such an individual may nevertheless be able to invoke an international right in an international forum, such as a human rights body, or may be prosecuted before an international criminal tribunal for violating the obligations that international law imposes on him or her. The same applies in the

13 On the relationship between international and national law, see, among others, Janne Nijman and André Nollkaemper, *New Perspectives on the Divide Between National and International Law*, Oxford University Press, Oxford, 2007, 380 pp.

14 Permanent Court of International Justice, *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 3 March 1928, PCIJ, Series B, No. 15, p. 18.

context of IHL: whether or not an individual is bound as a matter of domestic law has no bearing on the binding force of rules of IHL as a matter of international law.<sup>15</sup> Thus, the ‘capacity to legislate for all nationals’, which is the centrepiece of the doctrine of legislative jurisdiction, should not be understood narrowly to refer exclusively to legislation through the adoption of rules of domestic law. Rather, the capacity to legislate also refers to the competence of states to accept rights and obligations under IHL for their nationals on the international plane.

The fact that the foregoing argument against the doctrine of legislative jurisdiction is thus not entirely convincing is not to suggest, however, that the doctrine of legislative jurisdiction is unproblematic in other respects. Besides its likely failure to improve compliance by organized armed groups, to which we have already alluded, the doctrine suffers from a number of defects. The first of these is that the doctrine rests on the argument that ‘the government is competent to legislate for all its *nationals*’.<sup>16</sup> Thus understood, the doctrine would be better called more precisely the doctrine of *active nationality* legislative jurisdiction, as opposed to other jurisdictional bases such as territory or passive nationality, inasmuch as it limits the reach of the rules of IHL to the nationals of the consenting state. In so doing, it fails to explain why IHL treaty rules are binding in a situation in which an organized armed group is (also) composed of foreign nationals from a state that has not ratified the respective treaty. That may not be of particular practical relevance in the case of Common Article 3, as the Geneva Conventions have been ratified by all states. But it remains relevant in the context of Additional Protocol II and other, less widely ratified treaties, such as the Anti-Mines Protocol to the 1980 Convention on Certain Conventional Weapons<sup>17</sup> and the 1954 Hague Convention on Cultural Property and its Second Protocol.<sup>18</sup>

More importantly, however, such a doctrine of active nationality legislative jurisdiction is severely limited if considered in the light of recent developments relating to the concept of ‘nationality’. According to the International Criminal Tribunal for the former Yugoslavia, the concept of nationality cannot be reduced to an exercise in formalism, in particular in armed conflicts with ethnic, religious, or similar connotations that are today the rule rather than the exception: its substantive dimension, namely the allegiance of a given individual (or lack thereof) to a given state or government, also needs to be considered.<sup>19</sup> Put differently, individuals with allegiance to states or entities other than the state whose nationals they are as a

15 S. Sivakumaran, above note 7, pp. 384–385.

16 *Ibid.*, p. 381, emphasis added. S. Sivakumaran further recounts the opinion expressed by the Greek delegate at the Diplomatic Conference of 1974–1977 that also ties the binding nature of IHL on organized armed groups to the fact that their members ‘were obviously nationals of some State, and were thereby bound by the obligations undertaken by the latter’, *ibid.*

17 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention on Certain Conventional Weapons as amended on 3 May 1996).

18 Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999.

19 See ICTY, *The Prosecutor v. Tadić*, Decision (Appeals Chamber), 15 July 1999, para. 166.

matter of formality should not be considered nationals of the former state as a matter of substance. If one transposed such an understanding of ‘nationality’ to the doctrine of active nationality legislative jurisdiction, it would mean that that jurisdiction does not extend to members of organized armed groups because they should not be considered ‘nationals’ of the state against whom they are fighting. After all, being a member of an organized armed group involved in a NIAC against the state is the quintessential expression of a lack of allegiance to that state.

While the foregoing suggests that the explanatory value of the doctrine of legislative jurisdiction would be very limited if one were to rely on active nationality as a basis for that legislative jurisdiction, this would be different if one were to proceed on the basis of territorial jurisdiction. Indeed, some have taken the view that the binding nature of IHL on members of organized armed groups stems from the fact that an international rule accepted by a state is binding on all those ‘within the *national territory* of that State’,<sup>20</sup> rather than the fact that they are nationals of that state. This approach would not be open to the same objection as the doctrine of active nationality legislative jurisdiction, since the competence of states to legislate vis-à-vis everyone within their territory is independent of any allegiance.

Nevertheless, the doctrine of legislative jurisdiction as a whole – whether in the form of active nationality legislative jurisdiction or territorial legislative jurisdiction – suffers from another, fundamental conceptual defect, inasmuch as it derives the binding force of IHL on organized armed groups as collective entities from the binding force on *individual members*. This construct deserves separate analysis in the subsequent section, because its explanatory potential goes beyond the doctrine of legislative jurisdiction with its focus on conventional IHL. In contrast, the reasoning via individuals is based on the assertion that organized armed groups are bound because their members are bound as individuals by both conventional and customary IHL.

## Binding force via the individual

The binding force of IHL on individuals has been recognized for a long time. Since individuals are punished for war crimes it is clear that they bear duties that flow directly from IHL.<sup>21</sup> Such duties apply to all individuals, whether they possess the

20 Sylvie Junod, in Claude Pilloud, Jean Pictet, Yves Sandoz, and Christophe Swinarski, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Dordrecht, 1987, p. 1345, para. 4444, emphasis added. See also the statement of the delegate of the USSR at the Diplomatic Conference of 1974–1977, in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974–1977)*, CDDH/III/SR.32, Vol. XIV, p. 314, para. 22 (‘Any international instrument signed by a Government was binding on all those within its territory’).

21 Christopher Greenwood, ‘Historical development and legal basis’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, Oxford, 2008, p. 39, para. 134. For an example epitomizing the long history of war crimes prosecutions, see the Henfield’s case, 11 F. Cas. 1099 (C. C. D. Pa. 1793) (No. 6,360), reproduced in Jordan J. Paust, et al. (eds), *International Criminal Law: Cases and Materials*, 2nd edition, Carolina Academic Press, Durham, NC, 2000, pp. 232–238.

formal status of combatants in an international armed conflict as members of the armed forces of a party to such an armed conflict, whether they are members of armed forces in a NIAC, or whether they are civilians.<sup>22</sup> And yet, IHL clearly distinguishes between two addressees, namely parties to an armed conflict (i.e. the collective entities of states and organized armed groups),<sup>23</sup> on the one hand, and individuals, on the other hand. Indeed, it is the *collective* nature of political violence and the *organization* of a group of individuals engaged in such violence that elevates a given situation to an armed conflict. Parties to an armed conflict are not merely the sum of all its members, who act as atomized individuals. Rather, organized armed groups (just as states parties to an armed conflict) are identifiable entities, with political objectives (broadly conceived) that they pursue by violent means. They possess an organized military force and an authority responsible for its acts,<sup>24</sup> whereas the individual member concerned acts on behalf of an organized armed group. The rudimentary nature of the legal framework governing the collective accountability of organized armed groups, including the uncertainty surrounding the attribution of acts of an individual to an organized armed group,<sup>25</sup> should not distract from the fact that the individual member is engaged in the violence as part of a collective entity. Just as the violation of IHL by an individual may simultaneously entail both his or her individual criminal responsibility and the responsibility of a state to whom his or her acts or omissions can be attributed,<sup>26</sup> so the acts of such an individual may entail both his or her individual criminal responsibility and the accountability of an organized armed group. This is not to

- 22 For combatants, see e.g. the Nuremberg Judgment against members of the German Wehrmacht and Kriegsmarine Wilhelm Keitel, Karl Dönitz, Erich Raeder, and Alfred Jodl, all convicted for war crimes in World War II, International Military Tribunal (Nuremberg), *The Trial of German Major War Criminals*, Judgment, 1 October 1946; Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, 22 August 1946 to 1 October 1946, pp. 492–493, 508–510, 511–512, 516–517. For members of organized armed groups in an NIAC, see e.g. Special Court for Sierra Leone, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Judgment (Trial Chamber), 20 June 2007, and Case No. SCSL-2004-16-A, Judgment (Appeals Chamber), 22 February 2008. For civilians, see e.g. British Military Court for the Trial of War Criminals, *Trial of Erich Heyer and Six Others* (The Essen Lynching Case), Essen, 18–19 and 21–22 December 1945, *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission*, Vol. I, London, HMSO, 1947, Case No. 8, pp. 88–92.
- 23 See Common Article 3 to the Geneva Conventions and J.-M. Henckaerts and L. Doswald-Beck, above note 3, Rule 139. The same assumption seems to underlie Article 10 of the International Law Commission's Articles on State Responsibility, which attributes conduct of an insurrectional movement (rather than its composite individuals) to a state: see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, p. 117, para. 4 (which makes a clear distinction between conduct of the movement as such and conduct of individual members of the movement acting in their own capacity).
- 24 See Jean Pictet, (ed.), *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, Geneva, 1952, p. 49, referring to the two criteria of possessing an organized military force and an authority responsible for its acts among several others, which can serve to indicate the existence of a NIAC in the sense of Common Article 3. For an elaboration of the required degree of organization, see e.g. ICTY, *The Prosecutor v. Boškoski and Tarčulovski*, above note 1, paras. 194–205.
- 25 For a discussion, see J. Kleffner, above note 4, pp. 257–264.
- 26 See generally, André Nollkaemper, 'Concurrence between individual responsibility and state responsibility in international law', in *International and Comparative Law Quarterly*, Vol. 52, 2003, pp. 615–640.



suggest that only members of a party to an armed conflict can commit violations of IHL. What it does suggest, however, is that organized armed groups as such bear duties under IHL independent from the duties of individuals.

This is also clear from a closer look at the rules of IHL. For instance, when Common Article 3 prohibits ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’<sup>27</sup> and Article 6 of the Additional Protocol II further specifies standards for criminal prosecutions, these rules imply that, in order to be compliant with IHL in adjudicating cases, parties to an armed conflict (including organized armed groups) must install judicial mechanisms that satisfy the mentioned requirements. To do so is not the concern of individual members but of the organized armed group as a whole. In similar vein, the obligation in Additional Protocol II to provide for the education of children in keeping with the wishes of their parents or those responsible for their care<sup>28</sup> requires the organized armed group – on a collective level – to take the necessary measures within the territory under its control.<sup>29</sup> The rules regulating the internment and detention of persons deprived of their liberty stipulated in Article 5 of the Additional Protocol II<sup>30</sup> are likewise in the main directed towards the detaining authority as such, and not (only) to individual members of that authority.<sup>31</sup> In light of the foregoing, it is not convincing to construe the binding force of IHL on organized armed groups by reference to its binding force on individuals. That explanation negates the fact that the organized armed group as such is an addressee of distinct obligations under IHL that are independent and separate from those of individuals.

## Binding force because of the exercise of *de facto* governmental functions

The third explanation of the binding force of IHL on organized armed groups draws on the exercise of *de facto* governmental functions by such groups. As Jean Pictet puts it: ‘[I]f the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country’.<sup>32</sup> This approach finds support in the principle of effectiveness<sup>33</sup> as an element of both statehood and the recognition of governments.<sup>34</sup> It is also consistent

27 Common Article 3(1)(d).

28 Additional Protocol II, Art. 4(3)(a).

29 C. Pilloud, *et al.*, above note 20, pp. 1377–1378, especially para. 4546.

30 Additional Protocol II, Art. 5.

31 C. Pilloud, *et al.*, above note 20, p. 1384, paras. 4573–4574.

32 Jean Pictet (ed.), *Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 37. See also L. Moir, above note 6, p. 55.

33 Roger Pinto, ‘Les règles du droit international concernant la guerre civile’, in *Recueil des cours*, Vol. 114, 1965-I, p. 528.

34 Volker Epping, ‘Völkerrechtssubjekte’, in K. Ipsen (ed.), *Völkerrecht*, 5th edition, C.H. Beck, Munich, 2004, p. 63, para. 10; Volker Epping, ‘Der Staat im Völkerrecht’, in *ibid.*, p. 273, para. 40.

with the law of state responsibility, inasmuch as that law equates acts committed by an organized armed group that proves successful in its quest to become the new government of an existing state or to establish a new state, with conduct of that existing or new state.<sup>35</sup>

Such an approach certainly shifts the focus away from the binding force of IHL on the individual to the collective entity of the organized armed group. It thereby responds to the weaknesses of the line of argument explained in the previous section. To construe the binding force because of the exercise of *de facto* governmental functions also takes an important step towards understanding organized armed groups as autonomous actors that are distinct from states.<sup>36</sup> Indeed, nowhere is this clearer than in the law of state responsibility, which acknowledges that the conduct of an insurrectional movement is *not* attributable to the state if the movement is unsuccessful. The rules on the responsibility of states for internationally wrongful acts thus make clear that the structures, organization, and conduct of such a movement are independent of those of the state.<sup>37</sup> In furtherance of recognizing this autonomy of organized armed groups, the *de facto* governmental functions argument draws on the factual element of the exercise of governmental functions by an organized armed group, and its aspiration to become the next government of an existing state or the new government of a newly independent state.

At the same time, it is readily apparent that to construe the binding force of IHL on organized armed groups in this way does not disconnect it from the binding force of IHL on the state concerned. The origin of that binding force remains the fact that the state that the organized armed group strives to represent has accepted a given rule of IHL. This acceptance manifests itself in the fact that the state has expressed its consent to be bound by the treaty in question, or in the fact that the state has contributed to the formation of a given rule of customary IHL, or at least that it has not acted as a persistent objector to the customary rule in question. In this way, the *de facto* governmental functions argument remains a state-centric model of explaining the binding force of IHL on organized armed groups. The possibility cannot therefore be entirely excluded that an organized armed group might raise an argument similar to the one in response to the doctrine of legislative jurisdiction, namely that the organized armed group rejects the binding force of those rules that have been accepted by the very state against which the group is fighting. However, there are two important differences.

First, in contrast to the doctrine of legislative jurisdiction, which flows top-down, the argument that organized armed groups are bound because they exercise

35 Articles 10(1) and (2) of the Articles on Responsibility of States for Internationally Wrongful Acts (2001), UNGA Resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4. For a discussion of the theoretical basis for state responsibility in the case of an organized armed group being successful in establishing a new state, see Patrick Dumberry, 'New state responsibility for internationally wrongful acts by an insurrectional movement', in *European Journal of International Law*, Vol. 17, 2006, pp. 605–621.

36 Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 15.

37 J. Crawford, above note 23, p. 117, para. 4.

*de facto* governmental functions proceeds bottom-up. Rather than starting with the state against whom an organized armed group is fighting, it begins with the independent capacity of organized armed groups to act and their aspirations to become the state and replace the current government. Given that organized armed groups that have these aspirations can reasonably be expected to be concerned about their legitimacy in the eyes of other states and the international community at large, they may be susceptible to the argument that they should comply with those rules that are considered to be part and parcel of appearing legitimate. And these rules certainly include 'elementary considerations of humanity'<sup>38</sup> as reflected in IHL.

A second important difference is that the doctrine of legislative jurisdiction is primarily retrospective, inasmuch as it places at its centre the fact that the state concerned has accepted the rules of IHL *in the past*. The *de facto* governmental functions argument instead focuses on the *present* factual circumstances and the position to which an organized armed group aspires in the *future*. In so doing, it makes it more difficult for an organized armed group to reject the binding force of IHL than in the case of the doctrine of legislative jurisdiction, because it calls for the organized armed group to recognize its independent responsibilities as an entity that resembles a government and aspires to represent the state in the future.

Notwithstanding the aforementioned merits, however, the *de facto* governmental functions argument is open to a number of objections. To contemplate a situation in which an organized armed group exercises *de facto* governmental functions implies at least a relatively stable control over part of a state's territory and/or control over persons, in addition to the existence of organs of the organized armed group that replace those of the state in the exercise of public power. Such a situation is likely to resemble closely situations where the high threshold for the applicability of Additional Protocol II is met, which requires that organized armed groups 'exercise such control over a part of [a state's] territory as to enable them to carry out sustained and concerted military operations and to implement [the Second Additional] Protocol'.<sup>39</sup> As is well known, not many of today's NIACs reach that threshold. When that threshold is not reached, the *de facto* governmental functions argument fails to explain why organized armed groups are bound by IHL.<sup>40</sup>

Turning from the factual question of whether or not an organized armed group exercises governmental functions to the issue of the aspirations of organized armed groups, another weakness of the argument flows from the fact that it is by no means certain that all organized armed groups do in fact want to become the next government of a state. Indeed, it has been shown that parties to an armed conflict may at times have an interest *not* to end an armed conflict and become the new government, but instead thrive on the general insecurity in the region where they operate, because that insecurity enables them to retain access to economic

38 International Court of Justice, *Corfu Channel Case*, Merits, Judgment, 9 April 1949, ICJ Reports 1949, p. 22, para. 215.

39 See Additional Protocol II, Art. 1(1).

40 In this vein, see also L. Zegveld, above note 36, p. 15.

resources.<sup>41</sup> In these and other cases where organized armed groups do not (aspire to) become the new government, the *de facto* governmental functions argument fails to convince.

In sum, the argument's strengths are restricted to a limited type of organized armed groups, and cannot explain why all organized armed groups may be presumed to be bound by IHL.

## **Binding force by virtue of customary IHL: organized armed groups as international legal persons**

A further explanation that is occasionally offered for why IHL applies to organized armed groups is that they are bound by customary IHL because of the international legal personality that they possess. The Darfur Commission of Inquiry put it in the following terms: '[A]ll insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts'.<sup>42</sup>

This explanation bears several strengths compared to those already mentioned. As far as the doctrine of legislative jurisdiction is concerned, the international legal personality argument does not flow via the state against which a given organized armed group is fighting. At the same time, it needs to be acknowledged that the argument does not entirely detach the construction of the binding force of IHL on organized armed group from states. The explanation suffers from a weakness that closely resembles the weakness of the *de facto* governmental functions argument, inasmuch as both base themselves on the fact that *states* retain the legislative competence, to some extent shared with international organizations, to create customary IHL through their practice and *opinio juris*. Indeed, the International Committee of the Red Cross (ICRC)'s customary IHL study acknowledges that the practice of organized armed groups 'does not constitute State practice as such' and that the 'legal significance [of the practice of organized armed groups] is unclear'.<sup>43</sup> As long as organized armed groups are thus excluded from the process of customary IHL formation, the binding force is still 'imposed' upon them and their sense of ownership of those rules is still weakened. Nevertheless, by construing the binding force of IHL on the basis of international legal personality and customary international law, one avoids the argument that they are bound only through the state against whom they fight. Instead, it is the international community of states at large that binds them. Customary IHL may thus be seen by them to embody a more universal claim to adherence and may make it more difficult (although not impossible) for an organized armed group to reject that claim.

41 Herfried Münkler, *Die neuen Kriege*, Rowohlt Verlag, Reinbeck, 2002, pp. 159–173.

42 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 172, available at: [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) (last visited 15 June 2011).

43 J.-M. Henckaerts and L. Doswald-Beck, above note 3, p. xxxvi.

Another strength of the explanation that organized armed groups are bound by customary IHL by virtue of their international legal personality is that it takes due account of their collective dimension. It thus does not suffer from the same weakness as the explanation that reasons from the binding nature of IHL on individuals.

However, the idea of construing the binding force of IHL on the basis of the international legal personality bestowed upon organized armed groups is also subject to a number of challenges. First, it cannot provide a basis for the purported binding force of conventional IHL on organized armed groups, irrespective of the latter's consent. In failing to do so, and to the extent that the customary law of NIACs lags behind treaty law,<sup>44</sup> the explanation hence entails some consequences that are prone to create serious challenges to compliance with conventional IHL. While, as a matter of law, non-acceptance of conventional IHL obligations by an organized armed group would not free the state that has ratified a given IHL treaty from the obligations it has thus accepted as binding,<sup>45</sup> such an inequality before the law would be problematic from the viewpoint of reciprocity as a crucial factor promoting compliance, as a matter of fact.<sup>46</sup>

A second possible objection to the construction of the binding nature of IHL on organized armed groups on the basis of the international legal personality, which states may reasonably be expected to raise, is that such international legal personality, even if limited, would bestow legitimacy on organized armed groups. Indeed, this concern was raised during the negotiations of the Geneva Conventions, in relation to Common Article 3, which ultimately led to the inclusion of the provision that its application 'shall not affect the legal status of the Parties to the conflict'.<sup>47</sup> More recent developments in IHL-making confirm that these concerns of states persist.<sup>48</sup> That objection is, however, not convincing because it confuses personality with legitimacy. The fact that a given entity enjoys certain rights under international law and is subject to certain obligations does not necessarily confer legitimacy on that entity. Indeed, even states as the undisputed and only primary subjects of international law are not necessarily legitimate. Those that are illegitimate – for instance because they commit widespread and systematic human rights violations against their own population – nevertheless retain their international legal personality. Conversely, organized armed groups do not automatically lack legitimacy, but that question is divorced from the question of whether they are endowed with international legal personality.

44 An example is the obligation to record the placement of landmines as envisaged in Amended Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW), Geneva, 10 October 1980, Arts. 1(2) and 9, if compared to customary IHL as identified by the ICRC (see J.-M. Henckaerts and L. Doswald-Beck, above note 3, Rule 82 and Summary of the Rule, pp. 284–285).

45 Cf. J.-M. Henckaerts and L. Doswald-Beck, above note 3, Rule 140.

46 See on this point, L. Moir, above note 6, pp. 86, 107–108.

47 J. Pictet, above note 24, pp. 44, 60.

48 See e.g. CCW, above note 44, Art. 1(6), as amended according to the Amendment adopted on 21 December 2001.

Notwithstanding that the aforementioned possible objection fails to convince, the construction of the binding nature of IHL on organized armed groups via the international legal personality of those groups nevertheless suffers from an important logical defect, namely the circularity in construing international legal personality according to the mainstream doctrine. That circularity is epitomized in the mantra that international legal personality is determined on the basis of an entity's possessing rights and obligations under international law,<sup>49</sup> while the determination of such rights and obligations draws on the issue of whether the addressee of those rights and obligations possesses international legal personality. In the present context, organized armed groups were thus regarded as international legal persons because they possess rights and obligations under IHL, whereas they are seen to possess these rights and obligations because they are international legal persons. *Certum est quia impossibile est!*<sup>50</sup>

## Binding force by virtue of consent by organized armed groups

All of the aforementioned explanations are based on the assumption that IHL is being imposed upon organized armed groups regardless of their own will or even against their own will. In stark contrast, another basis for asserting that organized armed groups are bound is that they have expressed their consent to be bound by a relevant rule. Indeed, IHL occasionally reflects a consent-based approach to the binding force of IHL as much as it seems to suggest at other times that such consent is irrelevant. On the one hand, Common Article 3 categorically declares that 'each Party to the conflict shall be bound to apply, as a minimum' the substantive obligations in sections 1 and 2. The consent, or absence thereof, of an organized armed group is considered immaterial. On the other hand, Common Article 3 encourages the parties to a NIAC to conclude 'special agreements' through which all or part of the other provisions of the Geneva Conventions are brought into force. In addition, it is by no means exceptional that organized armed groups unilaterally declare their acceptance of rules of IHL, for instance in the form of 'Deeds of Commitment' made under the auspices of *Geneva Call* to ban anti-personnel mines and to further the protection of children from the effects of armed conflict.<sup>51</sup> And national liberation movements – a distinct sub-species of organized armed groups that has gained express recognition and regulation in Additional Protocol I<sup>52</sup> – only become subject to the rules of that protocol if they express their consent to be bound.<sup>53</sup>

49 International Court of Justice (ICJ), *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, pp. 174, 178.

50 'It is certain, because it is impossible' [translation from Latin].

51 See generally <http://www.genevacall.org/> (last visited 15 June 2011) and the list of signatories of Deeds of Commitment available at: <http://www.genevacall.org/resources/list-of-signatories/list-of-signatories.htm> (last visited 15 June 2011).

52 See Additional Protocol I, Art. 1(4).

53 See Additional Protocol I, Art. 96(3).

The multiple distinct bases for the binding force of IHL vis-à-vis organized armed groups are also reflected in some of the instances at which international bodies have expressed their view on the matter. Besides drawing on the international legal personality of organized armed groups, the Darfur Commission of Inquiry, for instance, added that

implied acceptance of general international principles and rules on humanitarian law . . . by rebel groups . . . can be inferred from the provisions of some of the Agreements [between the government of Sudan and the organized armed groups SLM/A and the JEM]. . . . In addition, the SLM/A and the JEM possess under customary international law the power to enter into binding international agreements (so called *jus contrahendum*), have entered various internationally binding Agreements with the Government. In these Agreements the rebels have undertaken, among other things, to comply with humanitarian law.<sup>54</sup>

In other words, the Darfur Commission of Inquiry combined the argument that IHL is being imposed upon organized armed groups by virtue of their international legal personality with the argument that organized armed groups are bound because they have consented to the rules in question.

It is at times asserted that, in the realm of conventional IHL, support for the argument that organized armed groups are bound if and when they consent to IHL can be found in the *pacta tertiis* rule as embodied in the Vienna Convention on the Law of Treaties.<sup>55</sup> According to that rule, '[a] treaty does not create either obligations or rights for a third State without its consent'.<sup>56</sup> As an exception to the same rule, '[a]n obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'.<sup>57</sup> As far as rights for a third state that flow from a treaty are concerned, an exception applies

if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.<sup>58</sup>

An analogous application of that regime to the relation between states and organized armed groups as parties to a NIAC would mean that organized armed groups would only be bound by conventional IHL if they express their consent to the obligations – and do not reject the rights – embodied therein.<sup>59</sup>

54 Report of the International Commission of Inquiry on Darfur, above note 42, paras. 173–174.

55 See A. Cassese, above note 10, pp. 423–430.

56 Vienna Convention on the Law of Treaties, entered into force 27 January 1980, 1155 UNTS 331, 8 ILM 679, Art. 34.

57 *Ibid.*, Art. 35.

58 *Ibid.*, Art. 36.

59 A. Cassese, above note 10, p. 428.

However, to base the requirement for consent to rules of IHL of an organized armed group on the regime governing rights and obligations of third states as embodied in the law of treaties is open to a number of challenges. It is at least debatable whether and to what extent that regime, designed to govern the relation between states, can be transposed to the relationship between states and organized armed groups.<sup>60</sup> One also fails to see why such an extension would have to stop with organized armed groups. Could it not be argued that the same analogy has to be drawn with respect to individuals, for instance? That, however, would have the consequence that their bearing rights (for instance under international human rights and humanitarian law) and obligations (under international humanitarian and international criminal law) would be subject to the requirement that they assent thereto, either expressly (as far as obligations are concerned) or implicitly (as far as rights are concerned). That consequence, in turn, is clearly incompatible with the widely accepted view that the consent of individuals is not required.<sup>61</sup> In sum, the law of treaties pertaining to *pacta tertiis* does not provide a convincing argument that the consent of organized armed groups is required in order for conventional IHL to be applicable to them.

In addition, to require consent would also have consequences that might be seen to militate against it as a basis for the binding nature of IHL on organized armed groups. On a very practical level, it may at times be difficult to establish who in a given organized armed group is competent to express the consent of that group to be bound. This is especially relevant with respect to more amorphous or heterogeneous armed groups or in the situation where different factions of an organized armed group split up because of internal differences or shifting alliances.<sup>62</sup>

A further consequence of requiring consent is that it raises the issue of reciprocity in an even more fundamental way than that observed when we considered the international legal personality of organized armed groups and customary IHL as a possible explanation for the binding force of IHL.<sup>63</sup> For, if consent of the organized armed group is required, the question looms large whether the law applicable in a given NIAC is limited to those rules that *both* parties have accepted, thus mirroring the law of international armed conflict,<sup>64</sup> or whether the relationship between states and organized armed groups has to be conceptualized in such a way that reciprocity is not required as a matter of law, in which case

60 In this vein, see also S. Sivakumaran, above note 7, p. 377.

61 See, for example, the express stipulation in the Geneva Conventions that protected persons may not renounce their rights: GC I, Art. 7; GC II, Art. 7; GC III, Art.7; GC IV, Art. 8.

62 In that respect, the ICTY has developed, as one factor for determining whether the degree of organization of an armed group meets the required threshold for it to be an organized armed group in the sense of IHL, its *ability* to speak with one voice (see e.g. *The Prosecutor v. Boškoski and Tarčulovski*, above note 1, para. 203). However, the Tribunal emphasized that this factor, together with others, is *indicative* and is taken into account, rather than being determinative and in itself ‘essential to establish whether the “organization” criterion is fulfilled’ (*ibid.*, para. 198).

63 See above notes 45 and 46 and accompanying text.

64 See Common Article 2 to the Geneva Conventions, according to which the conventions apply to all cases of declared war or of any other armed conflict which may arise ‘between two or more of the High Contracting Parties’. See also Additional Protocol I, Art. 1(3).



reciprocity as a matter of fact would however remain as an important factor inducing compliance by the parties to the armed conflict.

However, the most fundamental consequence of requiring consent is that, taken to its logical conclusion, such a requirement would mean that no rule of conventional IHL applies to an organized armed group that has failed to accept being bound by the rule in question. Yet that consequence needs to be put into perspective. An outright, complete rejection of all rules and principles of IHL by an organized armed group is the exception rather than the rule. The wealth of 'other practice' collected in the ICRC customary IHL study<sup>65</sup> and other ICRC documentation<sup>66</sup> exemplifies the fact that organized armed groups have expressed their acceptance of rules of IHL on numerous occasions. Similarly, no less than forty-one organized armed groups have expressed their acceptance of rules in the area of anti-personnel mines and child soldiers by signing 'Deeds of Commitment' under the auspices of *Geneva Call* since 2001.<sup>67</sup> Admittedly, there is no automatic acceptance, and an organized armed group *may* reject all rules of IHL. However, in such a case one has to reflect realistically on the measure of success that can reasonably be expected from arguments that would seek to impose IHL rules and principles through other explanations. It appears plausible that the more promising strategy in such a situation is to concentrate efforts on gradually increasing the acceptance of the rules of IHL by such an organized armed group. A similar approach would stand to reason in the more likely situation where an organized armed group decides to express its consent only selectively to some of the rules of IHL applicable in NIACs. This would entail the result that not all the rules of IHL would apply whose applicability can be construed through reliance on some of the abovementioned explanations, most notably the doctrine of legislative jurisdiction. Here, the pull of compliance emanating from the express acceptance of some of the rules of IHL by an organized armed group may very well be undermined by arguments that dismiss such consent as irrelevant in pursuit of the aim of imposing on an organized armed group even those rules of IHL that it expressly rejects. In fact, it is this pull of compliance that is the most significant strength of a consent-based construct of the binding nature of IHL on organized armed groups.<sup>68</sup> If an organized armed group takes ownership of the process of acceptance, the norms of IHL will be endowed with a greater degree of legitimacy from the perspective of the group in question. That legitimacy in turn makes a process of norm-internalization into the practice of an organized armed group more likely.<sup>69</sup> Of course, the express

65 J.-M. Henckaerts and L. Doswald-Beck (eds), above note 3, *Vol. II: Practice*, Parts 1 and 2.

66 See e.g. ICRC, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*, ICRC, Geneva, 2008, pp. 17–18, 20.

67 See above note 51.

68 See further, Marco Sassòli, 'Taking armed groups seriously: ways to improve their compliance with international humanitarian law', in *International Humanitarian Legal Studies* 1, 2010, pp. 5–51, 29–32.

69 For the parallel argument that legitimacy of a norm furthers its compliance by states, see, in particular, Thomas M. Franck, 'Legitimacy in the international legal system', in *American Journal of International Law*, Vol. 82, No. 4, 1988, pp. 709–710; Thomas M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, New York 1990; Thomas M. Franck, *Fairness in International Law and Institutions*, Clarendon Press, Oxford, 1995, pp. 25–46.

commitment to a given rule of IHL is as little *guarantee* of actual compliance as it is when states accept a given rule. However, it makes it more difficult for an organized armed group to reject a given rule as binding and facilitates follow-up action to address violations of the law, and provides a basis for disseminating the law and for processes of engagement and relationship-building by humanitarian organizations, such as the ICRC.<sup>70</sup> Furthermore, to allow an organized armed group to consent or to withhold consent to a given rule of IHL also bears the potential for the group to identify those rules that it considers to be realistic for it.<sup>71</sup>

## Concluding observations

Whether it is an advisable choice to rely on any one, or indeed more than one, of the explanations why and how IHL is applicable to organized armed groups will very much depend on the context in which the issue of that applicability arises. Institutions that have to face alleged violations by (members of) organized armed groups retrospectively, such as international criminal tribunals, are faced with the challenge of applying a body of law that clearly presupposes that primary norms of IHL that a given state (or, as far as customary IHL is concerned, the community of states) has accepted, translate into secondary norms that govern the individual responsibility of members of organized armed groups. The natural choice of such bodies can hence reasonably be expected to be an explanation that provides the basis for that applicability: the doctrine of legislative jurisdiction. Indeed, beyond international criminal tribunals, that doctrine avoids the discomfiting consequences of many of the other explanations, namely the result that not all of the IHL accepted by a given state may be applicable in an armed conflict between itself and an organized armed group.

On the other hand, institutions and organizations that are less concerned with effecting retrospective sanctions, but instead pursue as their primary objective the improvement of compliance with IHL by an organized armed group in an ongoing armed conflict, will in all likelihood be more inclined to engage organized armed groups directly. In that engagement, they may be better advised to rely on the exercise of *de facto* governmental functions, the international legal personality of a given organized armed group, and its consent, as a basis for the applicability of IHL.

What remains is that none of the explanations for the binding force of IHL on organized armed groups is without its weaknesses. That imperfection epitomizes the fact that IHL remains deeply engrained in a state-centric paradigm of norm generation and acceptance. While significant developments have taken place in the regulation of NIACs, organized armed groups remain largely excluded from these developments. Admittedly, their inclusion into the process of

<sup>70</sup> See ICRC, above note 66, p. 27.

<sup>71</sup> In this vein, see M. Sassòli, above note 68, pp. 20–21.

articulating norms bears a number of risks and will not be a quick fix to all the challenges that we face in the realm of compliance with IHL. However, the reality – in military as much as in humanitarian terms – of organized armed groups suggests that they need to be understood as executors of a law that is also their own.