

Participation of armed groups in the development of the law applicable to armed conflicts

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Abstract

The topic of participation of armed groups in the development of legal instruments binding them is particularly important and needs to be addressed urgently. Many scholars and organizations have advocated recently for the participation of armed groups in the development of legal instruments binding them, with a view to ensuring their adhesion to the law. However, practical and legal considerations seem to make this participation extremely difficult in practice. Creative solutions have to be found. After reviewing five main reasons why armed groups should be involved in the advancement of the law governing armed conflicts, this article offers a brief overview of selected means by which armed groups should be engaged in the creation of future norms, as well as in the interpretation and contextualization of existing norms.

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A myriad of reasons peripheral to the legal sphere are offered to justify the absence of armed groups in the development of the law applicable to armed conflicts. The assertions that armed groups undermine the state's authority by putting it in a position of inferiority and weakness, or that their influence on the territory and the population constitutes a tacit recognition of their importance and consequently gives them a green light to proceed with their actions despite violations of universal

norms, are all based on one misleading premise: if states ignore armed groups threatening their sovereignty, they will just disappear. This ‘ostrich-like behaviour’¹ of states toward armed groups is in line with the Westphalian international order of discarding armed groups all together because, simply put, they are not states and only states can claim to be subjects of public international law.²

In this article, I will try to evaluate the added value provided by the participation of armed groups in the development of legal norms applicable to armed conflicts by identifying reasons why armed groups should be involved. I will then examine the means and mechanisms that would allow armed groups to participate in the development of such law, in the creation of future norms as well as in the interpretation and contextualization of existing norms.

When discussing the possibility and the opportunity of armed groups to take part in the development of the law applicable to armed conflicts, it is important to first define the entities and subjects examined. Indeed, even though all parties to non-international armed conflicts, whether state actors or armed groups, are bound by the relevant rules of international humanitarian law (IHL), the term ‘armed groups’ is not itself defined in treaty law. ‘Parties’ to an armed conflict indeed vary widely in character. Organized armed groups, in particular, are extremely diverse, as explained by the International Committee of the Red Cross (ICRC):

They range from those that are highly centralized (with a strong hierarchy, effective chain of command, communication capabilities, etc.) to those that are decentralized (with semi-autonomous or splinter factions operating under an ill-defined leadership structure). Groups may also differ in the extent of their territorial control, their capacity to train members, and the disciplinary or punitive measures that are taken against members who violate humanitarian law.³

For the purpose of this article, I will align myself with this broad description of ‘organized armed groups’; to this end, the expressions ‘armed groups’ and ‘non-state armed groups’ will be used interchangeably. It should also be noted that, although transnational armed groups⁴ or private military

1 Marco Sassòli, ‘Taking armed groups seriously: ways to improve their compliance with international humanitarian law’, in *International Humanitarian Legal Studies*, Vol. 1, 2010, p. 50.

2 The international legal order set out in the Peace of Westphalia in the seventeenth century rests on three main pillars: the state as the subject of law, state sovereignty, and reciprocity. Contra: the Peace of Westphalia did not put an end to multi-layered authority in Europe, but simply constituted a case of redistribution of authority within the Holy Roman Empire. See Stéphane Beaulac, ‘The Westphalian model in defining international law: challenging the myth’, in *Australian Journal of Law History*, Vol. 7, 2004, p. 181.

3 Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts*, ICRC, Geneva, February 2008, p. 11, available at: <http://www.icrc.org/eng/resources/documents/publication/p0923.htm> (last visited 11 April 2011).

4 See, in particular, on the issue of transnational groups, Marco Sassòli, *Transnational armed groups and international humanitarian law*, Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, No. 6, Winter 2006, available at: <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf> (last visited 24 February 2012). See also Anne-Marie La Rosa and Carolin Würzner, ‘Armed groups, sanctions and the implementation of international humanitarian law’, in *International Review of the Red Cross*, Vol. 90, No. 870, June 2008, p. 328.

companies⁵ could be considered specific forms of armed groups, this article will not focus on the potential linkage of such armed groups to a state. First, the ICRC's description meets the general requirements of the definition of 'non-state armed groups' as proposed by the United Nations' Office for the Coordination of Humanitarian Affairs (OCHA) in its Manual on Humanitarian Negotiations with Armed Groups.⁶ Second, many state-centric enforcement mechanisms found in IHL, human rights law, or public international law are already in place; although the question of the efficiency and relevance of those mechanisms is very much worth addressing, that is not the purpose of this article.⁷ I will focus on the armed groups themselves, and explore the means at their disposal to engage in a legal order that has not involved them in its inception but has made them accountable for its violations.

Furthermore, reference to 'the law applicable to armed conflicts' should be interpreted liberally, as to include not only international humanitarian treaty law applicable to non-international armed conflict (with the different thresholds set by Common Article 3 of the Four Geneva Conventions and Additional Protocol II) but also customary law, soft law, and even some public international law and human rights law rules. Not all those bodies of law will be addressed in this article, but specifics will be provided throughout the text to distinguish the nature of the legal body referred to, when necessary. Finally, this article explores ways to engage non-state actors in law-making in a broad sense: systematically limiting the analysis to treaty law would impede finding creative solutions to curtail the practical and legal hurdles that are currently making this participation so difficult.

- 5 The International Code of Conduct for Private Security Service Providers (resulting from an active collaboration of members of the private security industry with the Swiss Department of Foreign Affairs, the Geneva Centre for the Democratic Control of Armed Forces, and the Geneva Academy of International Humanitarian Law and Human Rights) has recently been developed. It lays down international industry norms and standards for the provision of private security services. More information on this initiative is available at: <http://www.icoc-ppsp.org/> (last visited 26 April 2011).
- 6 See Gerard McHugh and Manuel Bessler, 'Humanitarian negotiations with armed groups: a manual for practitioners', OCHA, United Nations, January 2006, p. 6, available at: <http://ochaonline.un.org/humanitariannegotiations/index.htm> (last visited 19 April 2011); 'groups that: have the potential to employ arms in the use of force to achieve political, ideological or economic objectives; are not within the formal military structures of States, State-alliances or intergovernmental organizations; and are not under the control of the State(s) in which they operate'.
- 7 For an overview of some enforcement mechanisms set up for states to address violations of the law applicable to armed conflicts (through the lens of a potential individual right to reparation), see Sophie Rondeau, 'Violations du droit international humanitaire et réparation: la place de la victime individuelle', March 2008, available at: <http://www.archipel.uqam.ca/1277/1/M10305.pdf> (last visited 18 April 2011). See also more generally Marco Sassòli, 'State responsibility for violations of international humanitarian law', in *International Review of the Red Cross*, Vol. 84, No. 846, 2002, pp. 401–433; Frits Kalshoven, 'State responsibility for warlike acts of the armed forces', in *Constitutional Law Quarterly*, Vol. 40, No. 1, 1991, p. 827; Emanuela-Chiara Gillard, 'Reparations for violations of international humanitarian law', in *International Review of the Red Cross*, Vol. 85, No. 851, 2003, p. 529; Riccardo Pissillo Mazzeschi, 'Reparation claims by individuals for state breaches of humanitarian law and human rights: an overview', in *Journal of International and Comparative Law*, Vol. 1, 2003, p. 339.

Why should armed groups participate in the development of the law applicable to armed conflicts?

A wide array of stakeholders would benefit from the participation of armed groups in the development of rules of IHL. It will be argued in the next pages that such participation is not only in the interest of the international community as a whole, but is also part of a normal evolution of the international legal order and IHL. Furthermore, such participation would address the needs of both the armed groups themselves and of the victims of violations of IHL.

Because it is in the interest of the international community

In a recent report to the United Nations Security Council on the protection of civilians in armed conflict, the Secretary-General identified ‘enhancing compliance by non-state armed groups’ as one of the five core challenges that the Security Council needs to address.⁸ The focus is therefore not on condemning the actions, but on entering into a dialogue with the groups. The Secretary-General made it clear that the ‘name and shame’ mechanism by which the Security Council systematically condemns violations committed by armed groups, demands compliance, and applies targeted measures against leadership⁹ is a means of last resort. When engagement fails and proves futile, only then can sanctions enter the picture.¹⁰

In a 2010 report, the Secretary-General provided an update on progress made in responding to the core challenges, and discussed the need to reach out to armed groups, although very diverse in their motivations and conduct. He re-stated that: ‘Improved compliance with IHL and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-State armed groups’.¹¹ The report went on to mention that engagement is sought with armed groups in Afghanistan, Colombia, the Democratic Republic of the Congo, the occupied Palestinian territories, Pakistan, Somalia, Sudan, Uganda, and Yemen, but it did not specify the nature of the engagement. Even without those specifications, the international community, through its official political organ that is the United Nations, is recognizing the need to engage with armed groups in order to make a ‘tangible difference’ in the protection of victims.¹²

8 Report of the United Nations Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2009/277, 29 May 2009, paras. 38–47. Interestingly, the first core challenge mentioned is ‘enhancing compliance with international humanitarian law in the conduct of hostilities’. One could consider that enhancing compliance by non-state armed groups is a sub-category of the former: it nevertheless seems to be geared more towards engaging member states, United Nations actors, and international and non-governmental organizations in the issue of explosive weapons.

9 *Ibid.*, para. 37.

10 *Ibid.*, para. 46.

11 Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2010/579, 11 November 2010, para. 52.

12 *Ibid.*, para. 3.

Because the international legal order needs it

Armed groups, as non-state actors that compose the ‘invisible layer’ of public international law,¹³ are not only challenging the way war is waged today: their interaction (or lack thereof) with state structures, sheds light on the flaws and the gaps in a state-centric international legal order. Without going as far as endorsing post-Westphalian logic, where the nation-state has lost its usefulness,¹⁴ one needs to acknowledge that the state-centric model has substantially evolved.

Different indexes such as the Global Peace Index,¹⁵ the Failed States Index,¹⁶ the State Fragility Index,¹⁷ and the United Nations’ Human Development Index¹⁸ are all showing that non-state armed groups are more and more present and active in the waging of war.¹⁹ This assessment is not sufficient in itself to totally undermine the relevance of the Westphalian model in the twenty-first century. Indeed, threats posed by armed groups, although real and very challenging, are not necessarily meeting the threshold of disrupting the international legal order, but have merely created regional ripples.²⁰ Still, it cannot be disputed that the increasing threats posed by armed groups seriously challenge the traditional conception of such order. Lavoisier’s formulation, ‘*Rien ne se perd, rien ne se crée, tout se transforme*’ speaks volumes about the fact that states are losing ground.²¹ If states

- 13 This is the conception of public international law as composed of two layers: ‘a traditional layer consisting of the law regulating the co-ordination and the co-operation between the members of the international society... States... and a new layer consisting of the constitutional and administrative law of the international community of 6.5 billion human beings’. Marco Sassòli and Antoine Bouvier, *How does Law Protect in War?* 2nd edn, ICRC, Geneva, 2006, pp. 89–90.
- 14 On the post-Westphalian world order, see Edward Newman, ‘Failed states and international order: constructing a post-Westphalian world’, in *Contemporary Security Policy*, Vol. 30, No. 3, December 2009, p. 425, available at: <http://www.contemporarysecuritypolicy.org/assets/CSP-30-3-Newman.pdf> (last visited 11 April 2011); Russell D. Howard, ‘Post-Westphalian realities: incorporating transnational-non state actors and weapons of mass destruction into the international relations curriculum’, February 2007, p. 5, available at: http://www.allacademic.com/meta/p_mla_apa_research_citation/1/8/0/5/9/pages180592/p180592-1.php (last visited 11 April 2011); Richard A. Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective*, Transnational Publishers, New York, 1999; Stephen D. Krasner, ‘Rethinking the sovereign state model’, in *Review of International Studies*, Vol. 27, No. 5, December 2001, p. 17; Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*, Princeton University Press, Princeton, 1999. See also Allen Buchanan, criticizing John Rawls for basing his theory of justice on Westphalian assumptions that are no longer applicable: Allen Buchanan, ‘Rawls’s law of peoples: rules for a vanished Westphalian world’, in *Ethics*, 2000, Vol. 110, No. 4, pp. 697–721. For a proposition on a reconciliatory ‘new regionalism’ approach, see Cristóbal Kay, *Globalisation, Competitiveness and Human Security*, Frank Cass & Co., London, 1997, p. 84.
- 15 A complete list of the twenty-four peace indicators used by the Global Peace Index is available at: <http://www.visionofhumanity.org/gpi-data/#/2010/CONF> (last visited 11 April 2011).
- 16 A list of the indicators that may be included in the Failed States Index is available at: <http://www.fundforpeace.org/global/?q=fsi> (last visited 5 January 2012).
- 17 A detailed explanation of the State Fragility Index and Matrix in 2009 is available at: <http://www.systempeace.org/SFI/matrix2009c.pdf> (last visited 11 April 2011).
- 18 Further information on the United Nations’ Human Development Index is available at: <http://hdr.undp.org/en/statistics/hdi> (last visited 11 April 2011).
- 19 For a thorough analysis of the interplay of those indexes and their respective limitations in regard to the qualification of a state as ‘weak’, ‘failing’, or ‘failed’, see E. Newman, above note 14.
- 20 *Ibid.*, p. 433.
- 21 ‘Nothing is lost, nothing is created, all is transformed’ (free translation). Antoine Lavoisier, *Traité élémentaire de chimie*, 1864 edn (first published 1789), p. 101, available at: <http://www.lavoisier.cnrs.fr/ice/>

are failing, something or someone else is filling the gap. Without going into a critical analysis of the existing international relations paradigms, approaches, and theories, which is beyond the scope of this article, it is safe to say that the three major schools of thought in this domain – realism, liberalism, and constructivism – are all challenged, although at different levels, by the role and the place of armed groups in the international legal order.²²

Because the law needs it

Inclusion of armed groups in the development of legal instruments binding them could limit the possibility of excuses offered by such groups to justify their disregard of humanitarian law obligations. It would indeed, to a certain extent, ensure their adhesion to the law and generate greater compliance. In that sense, it would limit the potential violations of IHL and strengthen self-enforcement, hence limiting the need to put forward ‘external’ implementation mechanisms. In order to encourage self-enforcement by non-state armed groups, which is one of the mechanisms available to keep humanitarian law realistic and relevant, it is not just education that needs to take place; ownership of the rules of humanitarian law also needs to be fostered.²³

One of the key ideas behind the reinforcement of ownership is that it feeds into something positive and builds on a culture of compliance. Looking at positive experiences such as the one achieved by Geneva Call,²⁴ I optimistically believe that ownership of the rules of humanitarian law by armed groups is attainable through mechanisms outside the traditional state-centric model of the international legal order, which we will briefly examine later in this article. Indeed, the potential of compliance by armed groups with humanitarian rules is enhanced when reciprocal adherence, based on the possibility for the said armed groups to use their judgment and their reasoning to decide if and how they will be bound by rules, is nurtured.

Because armed groups need it

Recent research (discussed below) quoted by the United Nations’ Secretary-General identified the primary incentive for compliance with international norms to protect

[ice_page_detail.php?lang=fr&type=text&bdd=lavosier&table=Lavoisier&bookId=89&typeofbookDes=&pageOrder=101&facsimile=off&search=no](#) (last visited 11 April 2011).

- 22 For general information on the subject, see the International Relations Theory Knowledge Base available at: <http://www.irtheory.com/know.htm> (last visited 20 April 2011). For the application of different international relations approaches to engagement with armed groups see, Claudia Hofmann and Ulrich Schneckener, ‘Engaging non-state armed actors: options and strategies for engagement’, in this issue.
- 23 For a study on the ownership of humanitarian norms by armed non-state actors, see Geneva Academy of International Humanitarian Law and Human Rights, ‘*Rules of engagement: protecting civilians through dialogue with armed non-state actors*’, available at: <http://www.adh-geneva.ch/docs/publications/Policy%20studies/Rules-of-Engagement-EN.pdf> (last visited 5 January 2012).
- 24 Geneva Call is a ‘neutral and impartial humanitarian organization dedicated to engaging armed non-state actors towards compliance with the norms of international humanitarian law and human rights law. The organization focuses on non-state actors that operate outside effective state control.’ More information is available at: <http://www.genevacall.org/home.htm> (last visited 27 April 2011).

civilians as appearing to be the group's own self-interest, which has military, political, and legal aspects.²⁵ As further stated in the said research, the military arguments for compliance comprise both an element of reciprocity and strategic choices. The political arguments for compliance centre on the desire of many armed non-state actors, and/or the causes they may espouse, to be recognized as legitimate. Armed groups do not benefit from being classified as 'outlaws'. If they were to take part in the development of the rules governing armed hostilities, it would be much harder for the state to consider itself free of any obligation and consequently to apply the most violent measures of repression.²⁶

Furthermore, the legal arguments for compliance are primarily the avoidance of international criminal sanction and other coercive measures, such as arms embargoes, travel bans, and asset freezes. The legal validity of such arguments could be discussed, as was done in the article by René Provost in the previous issue of the *Review*, through the concept of asymmetrical reciprocity and compliance with the laws of war, for instance.²⁷ Beyond that, however, we need to acknowledge and appreciate these arguments as a factual statement of the views of some armed groups waging war these days. From a humanitarian perspective (discussed in the next section), non-state armed groups already have something to gain by answering the 'imperative call of civilization'²⁸ and complying with the law applicable to armed conflicts. If they are involved in the development of such norms, it will psychologically be even easier for individuals to accept them; and it will also increase ownership of the rules governing the way in which war is waged as a whole, and not only of the rules that they helped to create.

Because the victims need it

There are important humanitarian arguments for compliance by armed groups with humanitarian law that relate to the desire of certain armed groups to respect human dignity. This desire should not be underestimated, and may allow for opportunities to go beyond actual international obligations and hold such groups to standards that

25 See UN Doc. S/2010/579, above note 11, para. 54, quoting the Geneva Academy of International Humanitarian Law and Human Rights, 'Armed non-state actors and international norms: towards a better protection of civilians in armed conflicts: summary of initial research and discussions during an expert workshop in Geneva in March 2010', September 2010, p. 4, available at: <http://www.adh-geneva.ch/docs/reports/armednonstateactors.pdf> (last visited 1 May 2011).

26 François Bugnion, 'Jus ad bellum, jus in bello and non-international armed conflicts', in *Yearbook of International Humanitarian Law*, Vol. 6, 2003, pp. 167–198, available at: http://www.icrc.org/eng/assets/files/other/jus_ad_bellum_jus_in_bello_and_non-international_armed_conflictsang.pdf (last visited 19 April 2011).

27 See René Provost, 'The move to substantive equality in international humanitarian law: rejoinder to Marco Sassòli and Yuval Shany', in *International Review of the Red Cross*, Vol. 93, No. 882, June 2011, pp. 437–442.

28 Remarks and Proposals submitted by the International Committee of the Red Cross, Geneva, February 1949, p. 25, as reported in Jean Pictet (ed.), *The Geneva Conventions of August 12 1949: Commentaries*, ICRC, Geneva, 1958, p. 31, available at: <http://www.icrc.org/ihl.nsf/COM/365-570004?OpenDocument> (last visited 14 April 2011).

provide a higher level of protection for civilians than those strictly demanded by international law.²⁹

The genuine desire of some armed groups to behave in a humanitarian way should not be undervalued; indeed, just as with the utmost importance of unilateral application of some key humanitarian norms, it cannot be overstated. For a few core rules that speak directly to the heart of humanity, we can set aside the treaties, the negotiations, and even history, leaving us only with our common sense to honestly recognize their necessity for any human being, in any situation, especially in armed conflicts. What is referred to as ‘the universally recognized imperative call of civilization’ in the ICRC Commentaries to Common Article 1 of the Geneva Conventions also applies to those standard common-sense rules prohibiting the killing of the powerless and the exercise of violence in the form of rape, torture, and mutilation.³⁰ Indeed, when a party to an armed conflict, be it a state or a non-state actor, prevents violations of such a rule, it does so ‘as much because of the respect one has for it oneself as because of the respect for it which one expects from one’s opponent, and perhaps even more for the former reason than for the latter’.³¹

Nonetheless, humanitarian motivation does not exist in a vacuum, especially with respect to armed groups waging war for purposes that they consider to be just and valid. Involving these armed groups in the development of the rules of armed conflict would nurture and cultivate their desire to respect human dignity and achieve an acceptable balance between self-interest and ‘the respect one has for it oneself’. Indeed, such involvement would reinforce the idea behind the distinction between *jus ad bellum* and *jus in bello*, which ‘addresses the reality of a conflict without considering the reasons for or legality of resorting to force’.³²

Furthermore, from the victims’ perspective, engaging with all parties – state and non-state actors alike – involved in the armed conflict increases the likelihood of getting commitments from all of them to respect the limits within which they agree to wage war. Victims of violations of humanitarian norms need to be saved from harm and their perpetrators need to be accountable, independently of which side commits the violations; thus, the protection of victims could increase with the number of commitments.

With non-state actors, the humanitarian argument toward the respect of humanitarian law needs to be fostered and encouraged at all times and every step of the way. If ‘humanitarian action is inconceivable without close and permanent dialogue with the parties to the conflict’,³³ it should also be noted that a close and permanent dialogue with non-state parties to a conflict begins with their

29 See UN Doc. S/2010/579, above note 11, para. 54. See also Geneva Academy, above note 25, p. 5.

30 See J. Pictet, above note 28.

31 *Ibid.*

32 See ICRC, ‘IHL and other legal regimes: jus ad bellum and jus in bello’, 2010, available at: <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm> (last visited 5 January 2012).

33 Frédéric Maurice, ‘Humanitarian Ambition’, in *International Review of the Red Cross*, Vol. 32, No. 289, 1992, p. 371, as quoted in M. Sassòli and A. Bouvier, above note 13, p. 84.

involvement in the development of the rules governing armed conflicts. Victims will be the principal beneficiaries of such a process.

How should armed groups participate in the development of the law applicable to armed conflicts?

In public international law, there is a disconnect between law-making and application of the law. If, for IHL to apply to an armed group, the latter need to be operating *de facto* in the context of an armed conflict (meeting one of the thresholds set up either in the Geneva Conventions or the Additional Protocols), such a requirement is not necessarily needed to participate in the development of the legal norms applicable to such conflict. As a matter of fact, there is no explicit framework around the participation of non-state armed groups in international humanitarian law-making, because non-state entities are systemically hindered from taking part in law-making *per se*.³⁴ Even though some headway has been made on broadening the definition of subjects of international law beyond states depending on ‘the needs of the community’,³⁵ the statist doctrine embodied in the Statute of the International Court of Justice (ICJ)³⁶ in regard to sources of international public law is still quite dominant in practice.³⁷ As mentioned by Anthea Roberts and Sandesh Sivakumaran, ‘[a] link has not generally been made between recognizing non-state entities as having rights, duties and enforcement capacities under international law, on the one hand, and their being able to play a role in international law-making, on the other hand’.³⁸ *A fortiori*, when the non-state entity is an armed group, the likelihood of controversy is even higher than when discussing ‘state empowered bodies’,³⁹ such as the United Nations Security Council or the International Criminal Tribunal for the Former Yugoslavia.

34 For an analysis of the challenges to the traditional doctrine of sources position on the creation of international law by modern positivists and process theorists, see Anthea Roberts and Sandesh Sivakumaran, ‘Hybrid sources of law: armed groups and the creation of international humanitarian law’, in *Yale Journal of International Law*, Vol. 37, 2011, section I.C.

35 See International Court of Justice (ICJ), *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, p. 178. See also Permanent Court of International Justice, *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 3 March 1928 (Ser. B), No. 15, p. 17: ‘Legal persons may bear a broad range of rights and obligations under international law’.

36 Statute of the International Court of Justice, 26 June 1945, Art. 38(1).

37 It should be noted that the state-centric approach has been challenged in doctrine. See e.g. Andrew Clapham, *Human Rights Obligations of Non-state Actors*, Academy of European Law/European University Institute/Oxford University Press, Oxford, 2006, available at: <http://graduateinstitute.ch/faculty/clapham/NSAlecture/HR%20obligations%20of%20non-State%20actors.pdf> (last visited 1 May 2011); Robert McCorquodale, ‘The individual and the international legal system’, in Malcolm D. Evans (ed.), *International Law*, 2nd edn, Oxford University Press, Oxford, 2006, p. 309; Robert McCorquodale, ‘An inclusive international legal system’, in *Leiden Journal of International Law*, Vol. 17, 2004, pp. 477–504.

38 A. Roberts and S. Sivakumaran, above note 34, section I.C.

39 This expression is used in A. Roberts and S. Sivakumaran, above note 34, section II.A.2, to describe international bodies created by two or more states and granted authority to make decisions or take actions, such as developing, interpreting, applying, and enforcing international law.

With those considerations in mind, the next pages will be devoted to identifying different ways in which armed groups can be involved in the development of norms governing armed conflicts. In my view, there is already an immense potential in the interpretation and contextualization of existing norms, so a few options in this direction will be examined. First, however, I will look at the possibility of armed groups taking part in the creation of future norms of IHL.

Looking ahead: feeding into the creation of future norms

The fact that formal law-making is still dominated by statist doctrine makes it extremely difficult to involve armed groups as formal participants in the drafting of multilateral treaties. The over-politicization of the treaty-making process, the practical difficulties and potential criminal implications of reaching out to armed groups considered illegal,⁴⁰ the possible enhancement of the status of the armed groups – against the will of the state – from a common criminal to an ‘equal’ interlocutor, the inappropriate legitimizing of armed groups, and the downgrading of humanitarian law protections (by amendment of the law to reflect actual practices that constitute infringement upon humanitarian norms) are just a few potential difficulties identified in recent contributions to the doctrine on the subject.⁴¹ Even beyond those obstacles, the lack of a common denominator across all armed groups makes identifying which groups to involve seem insurmountable: ‘It would be almost impossible to reach agreement over which groups should be invited to participate in the respective diplomatic conferences drafting those treaties’.⁴²

That being said, history tells us a less pessimistic story. Armed groups *did* sit at the negotiation table when key treaties of humanitarian law were drafted. Eleven national liberation movements, including the Palestinian Liberation Organization (PLO) and the Southwest African Peoples Organization (SWAPO), took part, as observers, in the negotiations of the two Additional Protocols to the Geneva Conventions.⁴³ Furthermore, it is documented that some armed groups, such as guerrillas in Colombia, the Farabundo Martí para la Liberación Nacional (FMLN) in El Salvador, and the National Liberal Front in Vietnam, although they supported humanitarian standards in theory, did not accept international

40 M. Sassòli, above note 1, p. 22.

41 A. Roberts and S. Sivakumaran, above note 34, section III. B.

42 M. Sassòli, above note 1, p. 22. See also Jean-Marie Henckaerts, ‘Binding armed opposition groups through humanitarian treaty law and customary law’, in *Proceedings of the Bruges Colloquium: Relevance of International Humanitarian Law to Non-state Actors*, 25 and 26 October 2002, Vol. 27, *Collegium No. 123*, Spring 2003, p. 128.

43 Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentaries to the Additional Protocols of June 8 1977 to the Geneva Conventions of 1949*, ICRC, Geneva, 1987, ‘General introduction’, p. xxix, available at: <http://www.icrc.org/ihl.nsf/COM/470-750001?OpenDocument> (last visited 1 May 2011): ‘All States which were Parties to the Geneva Conventions or Members of the United Nations were invited to attend, in all numbering 155 nations. The number of those participating in the Conference varied from 107 to 124 in the various sessions. In addition, 11 national liberation movements and 51 intergovernmental or non-governmental organizations participated as observers, so that the total number of delegates fluctuated around 700.’

humanitarian treaty law applicable to the conflict they were waging since it was not negotiated directly with them.⁴⁴ Legally speaking, such an argument, which instrumentalizes the law, will never justify violations of humanitarian rules by armed groups since the rules bind all parties to the conflict, whether they agree or not. Nevertheless, the added value of gathering the input of all interested stakeholders, beyond just the states, in the creation of new rules of humanitarian law lies not only in making this body of law more realistic but also in adding a psychological incentive, and limiting the possibility for an armed group to justify violations by invoking their absence at the negotiation table.

For those reasons, I will briefly look into the hybrid treaties ('hybrid' meaning that non-states armed groups are involved) as a source suggested by Roberts and Sivakumaran to 'allow for constructive engagement with armed groups in the creation of international humanitarian standards without treating them as akin to states or downgrading important legal standards'.⁴⁵

Armed groups playing an active role in the conclusion of hybrid treaties?

Roberts and Sivakumaran put forward two possibilities in regard to the role of armed groups in future treaty negotiation: a direct role or an indirect role. In my view, the indirect role intersects with the work of armed groups together with civil society and academia in order to interpret the existing norms, which will be discussed below. For that reason, I will focus on the formal direct role potentially given to armed groups. As proposed by the authors, this possibility leaves considerable room for armed groups to provide input, be active participants in the development and codification of IHL applicable in armed conflict, and interact with states and other armed groups present, but keeps the ultimate decision-making to the states. This mechanism seems to replicate the model of 'observer status without voting rights' adopted at the 1974–1977 Diplomatic Conference to which reference was made above. Apart from the fact that not all entities present are treated equally, one very interesting element here is that the format allows one common denominator to emerge: the conference itself. A diplomatic forum might just give the possibility to step back, re-focus on the humanitarian imperatives, and find common ground. Nevertheless, the ghost of over-politicization is still present, making this option controversial. Keeping in mind that a variety of approaches is needed to address a variety of situations, this approach might still work for some armed groups, although not all. Indeed, one might say that different roles and approaches are possible, even necessary.

44 See 'The law of war and Colombia' (text around note 34) in Human Rights Watch, 'War without quarter: Colombia and international humanitarian law', 1998, as quoted in A. Roberts and S. Sivakumaran, above note 34, notes 133 and 134. For El Salvador, see the statement of the FMLN Political and Diplomatic Commission to the effect that they were entitled to detain an ambulance transporting a wounded man at a crossroad, since there was no agreement or pledge between the parties in regard to the evacuation by road of armed forces wounded: Second Report of the United Nations Observer Mission in El Salvador, UN Doc. A/46/658, 15 November 1991, paras. 64–65.

45 A. Roberts and S. Sivakumaran, above note 34, section IV.

Addressing the realities of armed groups: interpretation and contextualization of existing norms

Although it is challenging to find a common denominator between the different armed groups active in non-international conflicts, when it comes to improving the condition and treatment of people affected by armed conflict, one main element is vital in all situations: compliance with the existing legal framework. If new rules applicable to armed conflicts are to be negotiated and adopted, then the propositions presented above should be considered, to make sure that all the actors, including non-state armed groups, are represented. Strengthening IHL should nevertheless be the main concern.

As Dr. Jakob Kellenberger, President of the ICRC, recently said: '[o]ne can say with some certainty that if all the parties concerned showed perfect regard for humanitarian law, most of the humanitarian issues before us would not exist'.⁴⁶ With this approach in mind, I will now look at the best ways to address the realities of armed groups through the interpretation and contextualization of existing norms.

Feeding into the interpretation of existing norms: working together with civil society and academia

Interpretation and contextualization of existing norms is not the exclusive preserve of states; it could even be argued that it is the bread and butter of academia, which is even less a subject of international law than are armed groups, at least as far as enforcement is concerned. Indeed, engaging armed groups at that level would potentially enhance their compliance with the norms applicable to conflicts without any infringement upon the sovereign rights of states.

Initiatives where factual research is taking place, and where 'emerging issues' and 'contemporary challenges' to IHL are identified, are often led by independent organizations and civil society, providing a favourable opportunity to collect the views of armed groups. It is therefore surprising that they are so seldom invited to participate in such projects.⁴⁷

Of course, academia and armed groups have different motivations and intended outcomes for participating in discussions around the interpretation and contextualization of existing norms: professors and researchers have academic freedom and scientific objectivity to forewarn themselves against biases of political

46 Jakob Kellenberger, 'Strengthening legal protection for victims of armed conflicts', 21 September 2010, available at: <http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm> (last visited 29 April 2011).

47 As Sassòli noted, it is remarkable that armed groups were completely excluded from the Alabama Process, an informal non-governmental 'post-modern' process aimed at action-oriented research, informal discussions with governments, and possible new interpretations of humanitarian law. M. Sassòli, above note 1, p. 24. See also 'The Alabama Process', co-organized by the Swiss Department of Foreign Affairs and the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), available at: <http://ihl.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=481> (last visited 1 May 2011).

agendas and potential corruption,⁴⁸ which is not the case for armed groups. Nevertheless, that should not altogether discredit armed groups' potential contribution to the discussions and, further down the line, to the evolution of the law applicable to armed conflicts towards a more realistic legal framework. What armed groups bring to the table is a necessary complement to the academic, humanitarian, civil society, and international community contributions. Their views and perspectives are based on their experiences, as parties to armed conflict, and they should be collected and documented as such.

It is of utmost importance to keep a record of the experience of engaging the armed groups and disseminate the non-sensitive information, wherever possible. New technologies now allow wide broadcasting, which could be both a blessing and a curse. To ensure that armed groups do not over-exploit these opportunities, organizations setting up such research initiatives need to make sure that their version of the story is also in the public domain: drafting a public report is a simple yet elegant solution. Even an organization such as the ICRC, which is universally known for relying on confidentiality as an essential operational tool, is very active in its contribution to the development of IHL. It can indeed issue general reports or documents on its interaction with armed groups, which would not constitute a breach of its confidentiality as long as it refrains from attributing instances of practice.

As a matter of fact, the ongoing 'Strengthening Legal Protection for Victims of Armed Conflicts' project, led by the ICRC, has great potential for initiating parallel dialogues with non-state actors in addition to the main bilateral discussions between the ICRC and states. This project initially produced an internal research study (not made public) and led, at the end of 2011, to the adoption by states and National Societies of a resolution bearing the same name at the 31st International Conference of the Red Cross and Red Crescent. This resolution provides a basis for strengthening IHL in two areas where gaps have been identified: the protection of people deprived of their freedom, and mechanisms to ensure compliance with IHL.⁴⁹ Although the project relies mostly on the co-operation and support of states, who are, according to the ICRC, the only ones that 'can influence the evolution of international law',⁵⁰ it provides an important chance to gather the views of armed groups on, for example, opportunities to conclude specific tailored-made agreements or declarations that expressly bind them to IHL, which could then potentially be reflected at future law-making negotiations.

A second example is the initiative 'Towards a Better Protection of Civilians in Armed Conflicts', led by the Geneva Academy of International Humanitarian

48 See *contra* Ed Pilkington, 'The Monitor Group: Gaddafi's PR firm used academics', in *The Guardian*, 4 March 2011, available at: <http://www.guardian.co.uk/world/2011/mar/04/the-monitor-group-gadaffi-pr> (last visited 27 April 2011): 'Ethical problems arise when the distinction between lobbying and academia becomes blurred'.

49 'Resolution 1: strengthening legal protection for victims of armed conflicts', 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November–1 December 2011, available at: <http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm> (last visited 5 January 2012).

50 J. Kellenberger, above note 46.

Law and Human Rights. It provides another very interesting outlook on the capacity and willingness of armed groups to accept and take responsibility for the respect of norms intended to protect civilians. To make a link with the notion of indirect participation of armed groups in the negotiation of hybrid treaties, it is interesting to look at the seventh proposed good practice, addressing the engagement with armed non-state actors:

It is not realistic for armed non-state actors to participate formally in the drafting of multilateral treaties nor that such actors formally adhere to those treaties, but it is possible for their views to be reflected at future law-making negotiations. Armed non-state actors may sometimes argue that they are not bound by international norms as they had no role in their negotiation and adoption. Although this argument should be opposed, it is worth seeking to involve armed non-state actors in international discussions on new norms. Their views could, for example, be discerned by analysing relevant agreements or unilateral declarations. It may be easier to associate former members of armed non-state actors in such processes. In addition, greater efforts can be made to ensure that relevant international treaties address directly the behaviour of armed non-state actors.⁵¹

The outcome of this project was to create tools respectively for armed non-state actors and the international community,⁵² and for humanitarian actors and mediators who work towards strengthening compliance with norms by armed non-state actors.⁵³ Armed groups from different regions attended the meetings leading up to those reports; the areas represented included Colombia, Congo, Darfur, Kosovo Kurdistan, Malaysia, Nepal, Nigeria, Northern Ireland, Palestine, Sierra Leone, and Sri Lanka. One of those participants, the Patani United Liberation Organization (PULO), party to an armed conflict against the Malaysian state, made a public statement about their presence at that ‘international forum’:

This honour has put PULO in line with the liberation movements, recognised its existence among International Organisations, at the same time it has raised Patani liberation struggle to a level that is quite remarkable that has never happened before in the history of the Patani struggle. This shows that the international society has paid serious attention to the Patani liberation struggle and it be listed as one of areas that should be given particular attention and more serious international observation.⁵⁴

51 Geneva Academy, above note 25, p. 8.

52 Geneva Academy of International Humanitarian Law and Human Rights, ‘Armed non-state actors and international norms: towards a better protection of civilians in armed conflicts. Summary of good practice discussed and elaborated during an expert workshop in October 2010’, February 2011, available at: http://www.adh-geneva.ch/docs/projets/NonStateActors/Armed%20Non-State%20Actors%20and%20International%20Norms_Workshop%20Summary_ENG.pdf (last visited 1 May 2011).

53 Geneva Academy, above note 25.

54 ‘PULO towards the international forum’, 11 March 2010, available at: <http://puloinfo.net/Statements.asp?ID=12> (last visited 2 May 2011).

This example of an armed group's publicized participation in an international forum on respect for humanitarian law illustrates well the intricate operation of entering into dialogue with armed groups that aim to find a legitimate place in the 'first layer' of public international law: the content of the declaration made by the PULO may or may not be accurate; whether it creates political precedents on the international scene will be up to states members of the international community to decide. However, beyond that, it shows that this particular armed group publicly recognized its participation in the conference and, to some degree, the value, seriousness, and validity of such an initiative. From a humanitarian perspective, this in itself is a net gain.

One last successful example of engaging with a wide range of interlocutors including armed groups, documenting their views, and reporting on what is viable and feasible in engaging with armed groups is the 'Viewpoints' project of the Centre for Humanitarian Dialogue. This two-volume edited collection brings together first-hand accounts and observations from individuals with diverse connections and experiences, such as researchers, policy advisers, former members of armed groups, academics, NGO directors, mediators and consultants in peace processes, and former diplomats.⁵⁵ The reader will notice that the scope of this undertaking is above and beyond *jus in bello*: it addresses peace processes in a holistic way, by discussing weapons control, violence reduction, disarmament, demobilization, and reintegration. It does not specifically discuss IHL. When an armed conflict is raging, the distinction between *jus ad bellum* and *jus in bello*, and recognition of the autonomy of the two concepts, is fundamental in order to curb violence and better protect victims of non-international armed conflicts.⁵⁶ However, when engaging in an academic exercise aimed at information gathering beyond an operational framework, it might prove successful to address both bodies of law at the same time and allow the key actors to express their views without the legal restrictions necessary in an operational setting. We should not forget that, for some armed groups, the peace process is the end to which the respect or violations of rules of humanitarian law is the means.

Illustrations of formal undertakings of existing norms: special agreements, unilateral declarations, and parallel structures to the 'treaty law' mechanisms

Paragraph 3 of Common Article 3 urges⁵⁷ parties to non-international armed conflict to declare their intention and mutual consent of applying all or part of

55 Cate Buchanan (ed.), *Viewpoints: Negotiating Disarmament*, Vol. 1, Centre for Humanitarian Dialogue, March 2008, available at: <http://www.hdcentre.org/publications/reflections-guns-fighters-and-armed-violence-peace-processes> (last visited 26 April 2011) and Vol. 2, November 2008, available at: <http://www.hdcentre.org/publications/viewpoints-volume-2-negotiating-disarmament> (last visited 26 April 2011).

56 See generally F. Bugnion, above note 26.

57 Indeed, the ICRC's commentaries tell us that 'the provision does not merely offer a convenient possibility, but makes an urgent request, points out a duty'. See J. Pictet, above note 28.

the remaining provisions of the Geneva Conventions through the conclusion of special agreements. This mechanism promoted by the ICRC has been used on many occasions,⁵⁸ but it cannot be said to be a common tool. Although Common Article 3 makes it clear that concluding a special agreement in no way affects the legal status of the parties to the conflict, it is true that, politically, entering into a mutually agreed binding document without any legal necessity to do so might grant a certain level of legitimacy to the belligerent. Even the ICRC recognizes that:

in practice, special agreements could be more successfully attempted when a conflict is either seemingly intractable and/or taking place on more or less equal terms between the State and armed group(s), i.e. when an armed group exercises significant territorial control, has an effective chain of command, etc.⁵⁹

The second kind of formal undertaking that armed groups can make is a unilateral declaration (also referred to as a declaration of intention). These are a ‘second-best option’ for armed groups to ratifying or formally becoming party to IHL treaties. Nevertheless, unilateral declarations allow such groups to express their commitment to abide by the rules. Thus they are often used, and in different contexts: by the *Front de Libération Nationale in Algeria* (1956), by the *Farabundo Martí para la Liberación Nacional* (FMLN) in El Salvador (1988), by the National Democratic Front of the Philippines (1991), and by the *Ejército de Liberación Nacional* in Colombia (1995), to name just a few examples.⁶⁰ Politically, being able to show a declaration of intention to the population and to the international community is a viable procedure; however, they can hardly be enforced legally,⁶¹ so there is a risk of instrumentalization.

A third undertaking, not to be confused with the unilateral declarations discussed above, is available only to national liberation movements. Indeed, a declaration made to the depositary pursuant to Article 96(3) of the First Additional Protocol⁶² by such a movement will create reciprocal rights and obligations between parties, which is not the case with declaration of intention.

58 For example, the Yemen civil war (1962), the civil war in Nigeria (1967), and the conflict in the former Yugoslavia (1992). Specific special agreements for the establishment of protected areas achieved by the ICRC include Dacca/Dhakka (1971), Nicosia (1974), Jaffna (1990), Dubrovnik and Osjek (1991), discussed in Michel Veuthey, ‘Implementing international humanitarian law: old and new ways’, in Bertrand G. Ramcharan (ed.), *Human Rights Protection in the Field*, Martinus Nijhoff, Leiden/Boston, 2006, p. 87, available at: <http://evenium.com/uploads/contents/100000796002/File/71498//mvimplementingihlramcharan.pdf>, p. 11 (last visited 26 April 2011). See also M. Mack, above note 3, pp. 16–18.

59 M. Mack, above note 3, p. 17.

60 *Ibid.*, p. 20.

61 It should be pointed out, however, that the binding character of an international obligation assumed by a unilateral declaration is based on good faith. See ICJ *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, p. 268, para. 46: ‘Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected’.

62 Since 1963, the following unilateral declarations have been issued: Declaration of 23 May 1968 in Kampala by the rebel Biafran authorities; Declaration of 16 June 1977 by Joshua Nkomo of the African National Congress and the Zimbabwean African People’s Union (ANC-ZAPU); Declaration of 8 September 1977 by Ndabaningi Sithole of the African National Congress (ANC, Zimbabwe); Declaration of 23 September 1977 by Bishop Muzorewa of the United African National Council (UANC); Declaration of 25 July 1980

Special agreements and unilateral declarations involving armed groups may have limited reach, but armed groups are not monoliths.⁶³ The interaction between the parties to the armed conflict and the ICRC that leads to the conclusion of such formal undertakings can nevertheless provide a basis for humanitarian action, access to victims, and opportunities to disseminate IHL to all actors waging war.

Moreover, the creation of parallel structures mirroring 'treaty law' mechanisms constitutes an interesting avenue for engaging armed groups in the development on humanitarian law by contributing to the existing norms. For instance, some armed groups will manifest their intention to adhere to international humanitarian treaty law directly to Switzerland, as the official depository of the instruments. One example (although not the best, since it considered itself a state at the time) is the Palestinian authorities that adhered to the four Geneva Conventions and the two Additional Protocols (although without a firm acceptance of such adherence by the Swiss Federal Council).⁶⁴ Another example is the Provisional Government of the Algerian Republic that acceded to the Geneva Conventions two years before Algeria gained independence as a state.⁶⁵ To my knowledge, the Swiss Federal Council does not make its correspondence public, so it is impossible to know who else submitted accession documents and, if so, what the content of the documents is. Yet this goes to show that some armed groups that are parties to a non-international conflict are proactively seeking to be engaged in the law applicable to armed conflicts. Of course, the armed groups will always have a political and strategic agenda: it is more often than not the main reason why they are waging war. However, deconstructing the negotiation of international instruments and the conclusion of legally binding documents through the study of egocentric and tactical considerations is not necessarily relevant, when the end result is positive in terms of commitment toward the spirit of IHL. What difference does it make to the civilian population crushed by armed conflict if, by fixing the technical limits for the use of certain projectiles in the St. Petersburg Declaration of 1868, Czar

by the Uniao Nacional para a Independencia Total de Angola (UNITA); Declaration of 28 November 1980 by the African National Congress (ANC, South Africa); Declaration of the South West Africa People's Organization (SWAPO); UNITA (Angola) Declaration of 5 April 1988; Declaration in June 1988 by John Garang (Sudan); Declaration of 6 October 1988 in Geneva by SWAPO; Declaration of the Rwandese Patriotic Front of 22 October 1992. See Churchill Ewumbue-Monono, 'Respect for international humanitarian law by armed non-state actors in Africa', in *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 907.

63 This expression was recently used the United Nations Secretary-General: see UN Doc. S/2009/277, above note 8, para. 46.

64 'On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council "that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto". On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine".' ICRC, 'International humanitarian law: treaties & documents: Palestine', available at: <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=PS> (last visited 27 April 2011).

65 See Michel Veuthey, 'Learning from history: accession to the conventions, special agreements, and unilateral declarations', in *Proceedings of the Bruges Colloquium*, above note 42, p. 143.

Alexander II may not really have wanted to ‘alleviat[e] as much as possible the calamities of war’⁶⁶ but, more probably, knew that he did not have sufficient funds to purchase the explosive projectiles that the Declaration banished? What negative impacts does it have on the civilian population that one of many armed groups who were all parties to a civil war signed the deed of commitment banning anti-personnel mines not just for humanitarian reasons but mostly because all of the other groups had joined before them?

Lastly, one other way of making the voices of armed groups heard on international humanitarian treaty law binding them is to set up an analogous mechanism to the reservation procedure accessible to states. As stated in the Vienna Convention on the Law of Treaties, when a state ratifies (or signs, accepts, approves, or accedes to) an international instrument, it can formulate a reservation to some of the treaty’s provisions in order to protect its sovereign will.⁶⁷ Such reservations modify the provisions in question to the same extent for other parties in relation to the reserving state. Hence, reservations are part of a fundamentally reciprocal mechanism and allow parties clearly to state their intention to apply and respect – or not – the provisions of a treaty. A reservation does not directly impact the treaty as an ‘institution’; rather it provides boundaries for the relationships that the parties build together around the treaty.⁶⁸

Under conventional IHL, reservations that are compatible with the object and purpose of the instruments are not prohibited *per se* by the Geneva Conventions and the Additional Protocols. In fact, twenty-two states parties to the Geneva Conventions⁶⁹ and thirty-five states parties to the Additional Protocols⁷⁰ made reservations upon signature or ratification of those instruments. With that many reservations, relationships between states parties are bound to vary depending on the content of reservations made by each state.⁷¹ Furthermore, it erodes the concept in non-international armed conflicts, since reservations are mechanisms accessible only to states. In fact, by not having the possibility of entering reservations, armed

66 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, 29 November–11 December 1868, Preamble.

67 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 21.

68 *Ibid.*, Art. 21(2).

69 Albania, Angola, Australia, Bangladesh, Barbados, China, the Czech Republic, Guinea-Bissau, the Islamic Republic of Iran, Israel, the Democratic Republic of Korea, the Republic of Korea, Kuwait, New Zealand, Pakistan, Portugal, the Russian Federation, Suriname, the United Kingdom, the United States of America, Vietnam, and Yemen all made reservations upon signature or ratification of the Geneva Conventions. See Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Berne, p. 342, available at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited 26 April 2011).

70 Out of the 167 states that ratified Additional Protocol I, Albania, Angola, Argentina, Australia, Austria, Belgium, Canada, China, Denmark, Egypt, Finland, the Former Yugoslav Republic of Macedonia, France, Germany, Greece, the Holy See, Iceland, Ireland, Italy, Japan, the Republic of Korea, Kuwait, Liechtenstein, Malta, Mauritius, Mongolia, the Netherlands, Oman, Portugal, Qatar, Saudi Arabia, Spain, Sweden, the Syrian Arab Republic, the United Arab Emirates, and the United Kingdom, all made reservations upon signature or ratification. See: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (last visited 26 April 2011).

71 On the concept and the impact of immediate reciprocity in IHL, see René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002, p. 147.

groups miss out on the possibility of influencing the application of the rules that they are otherwise requested to observe and respect. In this context, the less inclusive the process is, the less motivation there is to respect the emerging norms. Of course, as was said earlier in this article, legally speaking, lack of motivation will never justify violations of humanitarian rules by armed groups since the rules bind all parties to the conflict, whether they agree or not. Nevertheless, moral and psychological incentives might be lacking.

One would be right in arguing that the impact of the reservation mechanism in international humanitarian treaty law is considerably limited. The ICJ has taught us that a reservation has to be compatible with the object and purpose of the Convention; if not, it could be challenged by another party to the Convention, who will be in their own right to consider that the reserving state is not a party to the Convention.⁷² This allows the ‘contesting’ state to free itself from the conventional bilateral obligations in its relation to the state formulating the reservation. In international humanitarian treaty law, several key sections qualify as *erga omnes* obligations.⁷³ Thus, even if a state party formulates reservations to those non-bilateralizable norms, these cannot be invoked by other state parties to modify their own obligations. Indeed, these obligations formulate basic norms that are owed to all states and to the international community as a whole. Even if a state party were to submit reservations to those key humanitarian obligations, it would have no significant impact. This levels the field between state and non-state armed groups, as neither can substantially modify the content of these humanitarian obligations.⁷⁴ Nevertheless, improved commitment to humanitarian standards could be achieved if a parallel mechanism mirroring the reservation process were available to armed groups.

Brief observations on the crystallization of customary norms

Once again, the application of the statist doctrine on customs as a source of international public law threatens the realistic application of humanitarian law to non-state armed groups. Under this traditional doctrine, customary IHL can be

72 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports 1951, p. 8.

73 Examples of such norms include those contained in Common Article 3; Part II of the Fourth Geneva Convention (which provides for the general protection of populations against certain consequences of war); sections of AP I regarding the treatment of refugees and stateless persons in the power of a party to the conflict (Art. 73) and the fundamental guarantees of all persons in the power of a party to the conflict (Art. 75); and AP II as a whole: *ibid.*, p. 150.

74 On a related note, it should be added that the *clausa si omnes* (the participation clause) originally found in the 1899 Convention with Respect to the Laws and Customs of War, The Hague, 29 July 1899 (reprinted in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts*, 4th edn, Martinus Nijhoff, Leiden/Boston, 2004, p. 69), which allowed states parties to ignore the Conventions if one or more parties to the conflict did not ratify them, can no longer be found in IHL treaty law. As Theodore Meron explains, this clause threatened the integrity of the Nuremberg prosecutions, but the tribunal countered that argument by stating that the rules laid out in the 1907 Hague Convention IV were, by 1939, considered customary, making the general-participation clause fall into desuetude. See Theodore Meron, ‘The humanization of humanitarian law’, in *American Journal of International Law*, Vol. 94, No. 2, April 2000, pp. 247–248.

derived only from states' practices and *opinio juris*. It is more or less along these lines that the ICRC customary law study has been edited, qualifying the legal significance of the practice of armed groups in the crystallization of customary norms as 'unclear'.⁷⁵ As a minimum, it could be argued that the practice of armed groups is at least declaratory of existing customary rules.

Although I acknowledge the need for an expansion from the traditional approach to customary law to consider armed groups' practices as a contribution to customary rules, the complexity of such an endeavour cannot be overlooked: the current intricate system supporting the creation and confirmation of customary norms in public international law is not necessarily designed to take into consideration views and practices of actors other than states. To open the door for input from other stakeholders would necessitate major adjustments in numerous areas. For instance, all the practices of 'mutual interactions of a variety of international actors – states, substate actors, "people" and international organizations'⁷⁶ – might very well be needed in order to determine the existence of a customary rule, while keeping the coherence of the system. As mentioned by Arend, this would lead to the presence of multiple levels of customary norms in international law, as well as differently tailored boundaries of the rules, depending on who is involved.⁷⁷ For example, if an armed group's practice contributes to either the creation or the crystallization of a customary norm of humanitarian law, it could apply to relations between the armed group and any international organization.

However, what I perceive as the major impediment here is not necessarily linked to armed groups themselves or to difficulties of gathering their practices in a reliable and accurate fashion, although this is one of the problems that would need to be addressed; rather, it is related to the difficulty of gathering any kind of 'real life' practices, be it from state or non-state actors. Indeed, the International Criminal Tribunal for the Former Yugoslavia stated in *Tadić* that:

When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the

75 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Cambridge, 2005, p. xxxvi. See also Jean-Marie Henckaerts, 'International humanitarian law as customary international law', in *Refugee Survey Quarterly*, Vol. 21, No. 3, 2002, p. 192: 'The practice of armed opposition groups does not constitute State practice given that armed opposition groups do not possess international legal personality. Such practice may nevertheless contain evidence of the acceptance of certain rules in non-international armed conflicts. Such practice includes codes of conduct, allegations of violations by governmental armed forces, commitments made to observe certain rules of international humanitarian law, whether unilaterally or toward the ICRC'.

76 Anthony C. Arend, *Legal Rules and International Society*, Oxford University Press, Oxford, 1999, p. 177.

77 *Ibid.*

actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.⁷⁸

This trend of avoiding the difficult question of practice by focusing more on *opinio juris* supports the proposition that the problem lies in the customary international legal system itself, not in the armed groups specifically. Indeed, in the *Tadić* decision quoted above, the Tribunal affirmed that the behaviour of insurgents among other actors, has been 'instrumental in bringing about the formation of the customary rules'.⁷⁹

Without going further into an in-depth analysis of this specific issue, suffice to say that I follow in the steps of Arend,⁸⁰ Sassòli,⁸¹ and McCorquodale,⁸² and, to some extent, Roberts and Sivakumaran (with their concept of hybrid custom),⁸³ and agree that armed groups' practice should contribute to new customary rules.⁸⁴

Opening the door to tailored and soft-law solutions

Before concluding this article, a few words are needed on the possibility to develop potential solutions to address the situation of armed groups. It should be noted that this is a field that in itself would necessitate a lengthier analysis than the one allowed here.

To build on ownership of already existing rules, one needs to rely on mechanisms that formalize the commitments of non-state armed groups, and also look for inspiration from analogous branches of international law where non-state actors are active: cyber-law, international sports law, are *lex mercatoria* are all bodies of law challenging the statist doctrine and created to address practical gaps that rendered existing law impractical and unrealistic for those key non-state actors.⁸⁵ The parallel with cyber-law, or *lex electronica*, is an interesting one. Cyberspace has

78 International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defense for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 99. See also Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 22.

79 *Prosecutor v. Tadić*, above note 78, para. 108.

80 A. C. Arend, above note 76, pp. 177–178.

81 M. Sassòli, above note 1, pp. 21–22: 'In my view, customary law is based on the behaviour of the subjects of a rule, in the form of acts and omissions, or in the form of statements, mutual accusations and justifications for their own behaviour. Non-State actors would logically be subject to customary law which they contribute to creating'.

82 R. McCorquodale, 'An inclusive international legal system', above note 37, pp. 498–499.

83 A. Roberts and S. Sivakumaran, above note 34, Section IV.B.

84 See generally on the topic, Hui Han Lie, 'The influence of armed opposition groups on the formation of customary rules of international humanitarian law', Masters thesis, University of Amsterdam, November 2003, available at: <http://www.southsouthnetwork.com/scriptie.doc> (last visited 1 May 2011).

85 For a few comments on a potential new *lex armatorum*, see M. Sassòli, above note 1, p. 23.

its programming on one side and its interconnectivity on the other; war has its regulations on means and methods of warfare on one side and the protection of those who are not taking part in hostilities on the other, which makes them both a technical and a social construction where law almost comes as an afterthought. Technical imperatives and social norms have as much influence as, if not more than, legal obligations, for both the content creators in cyberspace and the parties in an armed conflict.⁸⁶ That being said, a major hurdle lies in the very nature of armed groups and the lack of a common vision for all. As Sassòli noted, ‘the greater difficulty is that armed groups... are not repeat players and are illegal under their domestic legislation... and do not fight worldwide against each other’.⁸⁷

Another example for potentially analogous applications is provided by soft-law solutions. Developing non-binding normative standards is, of course, a complementary solution to building ownership around the existing compulsory norms, but it does allow for the establishment of some sort of dialogue between the armed groups and the states, circumventing, to a certain extent, the concerns mentioned earlier⁸⁸ about involving armed groups in international law-making without challenging the current statist legal order. The Guiding Principles on Business and Human Rights submitted by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises⁸⁹ provide a good example of an analogous soft-law document. It would also be worth looking for inspiration in the Organization for Economic Co-operation and Development’s Guidelines for Multinational Enterprises.⁹⁰ These Guidelines are ‘recommendations addressed by governments to multinational enterprises operating in or from adhering countries’.⁹¹ The main difference – and it is a fundamental one – between multinational businesses and armed groups is that the latter are illegal under their domestic jurisdiction, so that the OECD model could not be replicated without major changes. It is not realistic to have states discuss the positive contribution of armed groups, but it could be feasible

86 See Pierre Trudel, ‘La lex electronica’, p. 8, available at: <http://www.chairelrwilson.ca/cours/drt3808/LexelectronicaTrudel.pdf> (last visited 5 January 2012): ‘Le cyberspace est à la fois construction technique et construction sociale. Le sujet de droit y agit et interagit en respectant des règles, en organisant sa conduite de manière à se conformer à des impératifs techniques et à des exigences sociales. Mais dans le cyberspace, la capacité de contourner les règles ou tout simplement de s’exclure de leur application demeure toujours disponible et paraît plus aisée que pour les activités se déroulant sur le territoire d’un État.’

87 M. Sassòli, above note 1, p. 23.

88 Namely, the over-politicization of the treaty-making process, the practical difficulties and potential criminal implications of reaching out to armed groups considered illegal, the possible enhancement of the status of the armed groups, the inappropriate legitimizing of armed groups, and the downgrading of humanitarian law protections.

89 Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN General Assembly, Human Rights Council, UN Doc. A/HRC/17/3, 21 March 2011, available at: <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> (last visited 5 January 2012).

90 OECD Guidelines for Multinational Enterprises, Revision 2011, available at: http://www.oecd.org/document/18/0,3746,en_2649_34889_2397532_1_1_1_1,00.html (last visited 5 January 2012).

91 *Ibid.*, Foreword.

to have them reinforce the humanitarian imperatives in an updated and more relevant language to the realities of today's armed conflicts, or to provide a blueprint for armed groups on how to know and show that they are respecting international humanitarian norms. In the end, if a number of non-binding statements, because of their strong persuasive character (and maybe perhaps because of their limited enforceability), influence the actions of states and non-state actors, it is a win-win situation, as long as it is in line with the spirit of humanitarian law.

Conclusion

Contemporary non-international armed conflicts are more often than not waged asymmetrically between two groups with significantly different capabilities. The asymmetries, whether in the form of military power or general resources, are almost always in favour of the state. Terrorist attacks, namely acts used to frighten the population and influence the behaviour of a government or organization, provide an example of how armed groups attempt to overcome this imbalance by using unconventional methods for maximum impact when faced with a significantly larger state arsenal. In this situation (which should not be perceived as a new phenomenon of the twenty-first century⁹²), there are examples where state military forces are reacting by stepping further away from the practices enforced in symmetrical warfare,⁹³ although it could be assertively argued that theories on counter-insurgency advocate 'winning the hearts and minds' and the need to respect the law. In this latter case, the end would justify the means, as all parties to an armed conflict, states included, need to 'walk the talk' of humanitarian norms. This is an important element in order for armed groups to line up with the advocates of humanitarian ideas, even beyond the realm of conventional legal norms and treaty law. In order to build a culture of compliance toward international humanitarian norms, all parties to a conflict need to hear the 'imperative call of civilization' and act upon it. State actors must also actively contribute to this culture, given their privileged position in the international legal order.

One of the main purposes of this article was to show that it was possible and opportune to move away from the Westphalian model to include armed groups

92 See Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', in *International Review of the Red Cross*, Vol. 87, No. 857, 2005, pp. 150–151.

93 See *ibid.*, p. 163, note 37, where the existence of a new American organization, called the Strategic Support Branch, is mentioned. This organization is designed to operate without detection and under the Secretary of Defense's direct control, and deploys small teams of case officers, linguists, interrogators, and technical specialists alongside newly empowered special operations forces. See also Barton Gellman, 'The secret unit expands Rumsfeld's domain', in *Washington Post*, 23 January 2005, available at: <http://www.washingtonpost.com/ac2/wp-dyn/A29414-2005Jan22?language=printer> (last visited 1 May 2011); see *contra* 'Statement From Pentagon spokesman Lawrence DiRita on intelligence activities of the Defense Department', US Department of Defense's Release No. 062-0523, 23 January 2005, available at: <http://www.au.af.mil/au/awc/awcgate/dod/nr20050123-2000.htm> (last visited 5 January 2012), although Pfanner, in January 2005, referred to the same statement, but hosted at another address that is no longer valid, and stated that 'the creation of a new unit was confirmed in a statement from Pentagon spokesman Lawrence DiRita (on intelligence activities of the Defense Department)', 23 January 2005.

in the development of the law governing armed conflicts, without going as far as to give them state-like law-making prerogatives. Even today, states are the main actors in, subject of, and at the origins of the sources of public international law. However, with those prerogatives come duties as well. In order to halt violence against victims of armed conflicts, states need to do what only they have the power to do: their policies and legislations should never result in harm to the civilian population even if measures of economic isolation of certain armed groups are taken; they should adopt strategies for the protection of civilians in order to strengthen the normative framework, the operational response, and the national capacity; they should support more systematic data collection and analysis of the human costs of the use of explosive weapons; and finally, they should consider the potential humanitarian consequences of their legal and policy initiatives to avoid introducing measures⁹⁴ that have the effect of inhibiting humanitarian actors in their efforts to engage armed groups for humanitarian purposes.⁹⁵ If they do all of that, then perhaps the urgency of engaging armed groups in the development of the law applicable to armed conflicts will be a little bit less pressing.

94 An American example of such a measure could be the prohibition, through the *USA Patriot Act* (18 U.S.C. §2339B), of material support, which includes ‘training’, ‘expert advice or assistance’, ‘service’, and ‘personnel’, to groups designated as terrorists. See *Holder, Attorney General, et al. v. Humanitarian Law Project et al.*, 561 U.S. 25, 21 June 2010. See also Naz Modirzadeh, Dustin Lewis and Claude Bruderlein, ‘Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape’, in this issue. Also, on the problem of institutionalization of ‘terrorist blacklists’ at international and national levels, see Nicolas Florquin and Elisabeth Decrey Warner, ‘Engaging non-state armed groups or listing terrorists? Implications for the arms control community’, in *Disarmament Forum*, Vol. 1, 2008, p. 17, available at: <http://www.unidir.org/pdf/articles/pdf-art2708.pdf> (last visited 5 January 2012).

95 These are taken from some of the United Nations Secretary-General’s recommendations to member states in his Report from 2010, UN Doc. S/2010/579, above note 11.