

International Humanitarian Law Applicable to Non-International Armed Conflicts: The Importance of Taking Armed Groups into Account

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Abstract: International humanitarian law of non-international conflicts has developed and become increasingly similar, by analogy and alleged customary rules, to that applicable to international armed conflicts. This development is beneficial to war victims and may be justified as far as the rules addressed to states are concerned; however, as the same rules apply to armed groups, this article argues that for them this development may make IHL rules less realistic. In any case, the respect for and implementation of IHL by armed groups must be improved, for which different ways of achieving this —particularly by engaging such groups— and the obstacles to such engagement are discussed.

Keywords: Armed non-state actor; international humanitarian law; international armed conflict; non-international armed conflict; implementation; ownership; Geneva Call; realism.

El derecho internacional humanitario aplicable a los conflictos armados no internacionales: la importancia de tener en cuenta a los grupos armados

Resumen: por analogía y presuntas normas consuetudinarias, el derecho internacional humanitario de los conflictos no internacionales ha evolucionado y se ha vuelto cada vez más similar al aplicable a los conflictos armados internacionales. Esta evolución es favorable para las víctimas de la guerra y puede justificarse en lo que respecta a las reglas dirigidas a los Estados. No obstante, como las mismas reglas se aplican a los grupos armados, se argumenta que esa evolución puede hacer que las reglas del DIH sean menos realistas para ellos. En todo caso, se debe mejorar el respeto y la implementación del DIH por parte de los grupos armados y, para este fin, se analizan diferentes formas de lograrlo mediante la participación de estos grupos, en particular, y los obstáculos para su participación.

Palabras clave: actor armado no estatal; derecho internacional humanitario; conflicto armado internacional; conflicto armado no internacional; implementación; propiedad; Llamamiento de Ginebra; realismo.

Introduction

Today, most armed conflicts are non-international armed conflicts (NIACs) and most parties to such conflicts are armed groups, often referred to as armed non-state actors. Compared to other branches of public international law, international humanitarian law (IHL) addressed non-state armed groups very early on. IHL defines non-state armed groups that are parties to a NIAC as the only groups that have a certain degree of organization and further requires that they are engaged in a certain level of violence for IHL of NIACs to be applicable.¹ Common Article 3

¹ See Marco SASSÒLI, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Cheltenham, Edward Elgar, 2019, pp. 181–182, paras. 6.34–6.36 and a detailed study on the first

to the four Geneva Conventions of 1949² (Common Article 3) explicitly addresses non-state armed groups that are parties to a NIAC, and all other rules of IHL of NIACs necessarily address them.³ However, the majority opinion, particularly that of states, does not take into account the practice and *opinio juris* of non-state armed groups when assessing customary IHL of NIACs. In this article, I want first to discuss the rules of IHL of NIACs from the perspective of armed groups, especially the convergence between IHL of NIACs and IHL of international armed conflicts (IACs), its justification, advantages, and disadvantages. My main concern here is how IHL can remain realistic for armed groups; otherwise, it will not be respected. Second, I will explore how the respect for IHL of NIACs can be promoted, increasing the sense of armed groups to ‘own’ IHL, but also the obstacles to such engagement.

1. IHL of NIACs addressed to armed groups

IHL has traditionally consisted of two distinct branches with distinct rules: IHL of IACs and IHL of NIACs. In treaty law, the applicable rules are still nearly separate. Yet, customary law and reasoning by analogy have brought the two branches much closer to each other.

1.1. Difference between treaty law distinct and IHL of IACs

1.1.1. Treaty rules applicable

Common Article 3 offers basic guarantees to civilians who do not or no longer participate directly in hostilities as well as to members of armed forces or non-state armed groups that have laid down their arms or are hors de combat. Although states seriously watered-down Protocol II⁴ when compared to the ICRC’s initial draft and Protocol I,⁵ it offers more details on Common Article 3 fundamental guarantees. Protocol II also contains (very rudimentary) rules on the conduct of hostilities, the protection of children, the protection of medical personnel and units as well as their use of the emblem, relief operations, and the prohibition of forced displacement of civilians. However, it only applies to some NIACs. First, the territorial state must be a party to Protocol II. Second, Protocol II only applies if the state’s governmental armed forces are involved in a conflict occurring on its territory; it does not apply to NIACs between non-state armed groups or to NIACs in which state forces fight an armed group abroad. Third, the non-state armed group must have control over part of the territory. Although humanitarians often

requirement in Tilman RODENHÄUSER, *Organizing Rebellion, Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law*, Oxford, Oxford University Press, 2018, pp. 15–114.

² Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 UNTS 31 (entered into force 21 October 1950); Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), 75 UNTS 85 (entered into force 21 October 1950); Convention III relative to the Treatment of Prisoners of War (1949), 75 UNTS 135 (entered into force 21 October 1950), and Convention IV relative to the Protection of Civilian Persons in Time of War (1949), 75 UNTS 287 (entered into force 21 October 1950).

³ For the customary rules that apply only to IACs, see Jean-Marie HENCKAERTS and Louise DOSWALD-BECK (editors), *Customary International Humanitarian Law*. Volume I: *Rules*, Geneva and Cambridge, ICRC and Cambridge University Press, 2005 (hereinafter, ICRC Customary Law Study), Rules 3, 4, 41, 49, 51, 106–108, 114, 124(A), 128(A), 128(B), 129(A), 130, 145–147, and for those of IHL of NIACs on the implementation that exceptionally binds states only according to the ICRC, see *ibid.*, Rules 141, 143–144, 149–150, 157–158, 161.

⁴ Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977), 1125 UNTS 609 (entered into force 7 December 1978)

⁵ Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UNTS 3 (entered into force 7 December 1978).

criticise the high threshold of applicability of Protocol II, I will explain hereafter why in my view it is preferable not to require that armed groups follow rules they cannot follow.

1.1.2. Reasons for the differentiation

States want to maintain the distinction between IACs and NIACs for several reasons. First, wars among states were considered to be a legitimate form of international relation until recently. Even today, the use of force among states is not prohibited. Conversely, a state's monopoly on the legitimate use of force within its boundaries is inherent in the concept of modern state, and this necessarily precludes non-state armed groups from waging war against other factions or the government.

Second, the protection of victims of IACs must necessarily be guaranteed by rules of international law. States have accepted such rules for a long time, including states that adhere to the most absolutist concept of sovereignty. Even the most sovereignty-obsessed state accepts that enemy soldiers killing its soldiers on the battlefield may not be punished for their mere participation because they have a 'right to participate' in the hostilities,⁶ even on its territory and under its jurisdiction.

On the other hand, IHL of NIACs is more recent. For a long time, states took the position that such conflicts are internal affairs exclusively governed by domestic law. As for combatant and prisoner of war (POW) status, no state accepts that its citizens can wage war against their government; no government would renounce in advance the right to punish its citizens for participating in a rebellion. Applying combatant status and privilege to NIACs is incompatible with the very concept of sovereign states. Conversely, if the international community is ever organised as a world state, all armed conflicts would be 'non-international' in nature, and it would thus be inconceivable for combatants to have the 'right' to participate in hostilities independently of the cause for which they fight. In my view, despite the noble aspirations of humanitarians and the desire of professors to make the study of IHL easier for students, the distinction between IACs and NIACs can only *disappear* in a world state. In the last few decades, the law of NIACs *has nevertheless become much more like* the law of IACs.

1.2. Convergence

1.2.1. Driving factors

The tendency to bring IHL of NIACs closer to IHL of IACs was initiated by the International Criminal Tribunal for the former Yugoslavia (ICTY) and has been consolidated by the ICRC Customary Law Study. It is also driven by the increasing influence of international human rights law (IHRL), which does not differentiate between IACs and NIACs. States included similar crimes for IACs and NIACs in the Rome Statute of the International Criminal Court, although they still preferred to list those crimes separately.⁷ Outside the field of criminal law, recent treaties on the use of weapons and the protection of cultural property apply the same rules to both categories of conflict.⁸ Finally, several states abolished the distinction between IACs and

⁶ Protocol I, Art. 43(2).

⁷ Rome Statute of the International Criminal Court [hereinafter 'Rome Statute'], A/CONF.183/9, 17 July 1998. Compare between Arts. 8(2)(a) and 8(2)(b) on the one hand, and Arts. 8(2)(c) and 8(2)(e) on the other hand.

⁸ See Amendment to Article 1 [in particular, paras. 2 and 3] of the 1980 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, in Order to Extend it to Non-International Armed Conflicts (21 December 2001), 2260

NIACs in their national war crime legislation.⁹ As this legislation applies equally based on universal jurisdiction (the exercise of which is permitted by international law only for international crimes), such states must necessarily consider that war crimes defined by international law (and the underlying IHL rules) are the same in IACs and NIACs.¹⁰ An interesting case is Switzerland because it foresees such an equal application ‘unless the nature of the offence requires otherwise.’¹¹

1.2.2. Advantages

From a humanitarian point of view, victims of NIACs should be protected by the same rules as victims of IACs because all victims face similar problems and need the same protection. Furthermore, the fact that different rules for protection apply to IACs and NIACs obliges humanitarian players and victims to classify the conflict before invoking those rules. This can be theoretically difficult and is always politically delicate. Classifying a conflict may involve assessing questions of *jus ad bellum*. For instance, invoking the law of NIACs in a war of secession implies that secession is not (yet) successful, and this is not politically acceptable to secessionist authorities fighting for independence. On the other hand, invoking the law of IACs suggests that secessionists succeeded in constituting a separate state, which is not acceptable to central authorities. Finally, applying in parallel both branches of law, which have different rules, to mixed conflicts raises major difficulties in practice.

1.2.3. The influence of the ICTY

The convergence of IHL of NIACs and IHL of IACs mainly started with the first decision of the ICTY in the *Tadić* case. The tribunal held that the same rules largely apply to IACs and NIACs and that the concept of war crimes is equally applicable to NIACs under customary international law.¹² In its famous *dictum*, the Court noted the following:

[I]n the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same

UNTS 82; Art. 19 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954), 249 UNTS 240, and Art. 22 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999), 2253 UNTS 212.

⁹ See Belgium, Law on Universal Jurisdiction, 2003, Criminal Code, Art. 136(c), unofficial English translation available at: <https://casebook.icrc.org/case-study/belgium-law-universal-jurisdiction> in Marco SASSÒLI, Antoine A. BOUVIER and Anne QUINTIN, *Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Geneva, CICR, 2011; and, to a large extent Germany, International Criminal Code, *Act to Introduce the Code of Crimes against International Law of 26 June 2002*; section 8(1) and (2), while section 8(3) maintains the distinction; available in German at: <http://bundesrecht.juris.de/bundesrecht/vstgb/index.html> and unofficial English translation available at: <https://casebook.icrc.org/case-study/germany-international-criminal-code>

¹⁰ Swiss Criminal Code of 21 December 1937 (Status as of 1 January 2015), Arts. 264c–264j, in *Federal law, Classified compilation*, 311.0.

¹¹ *Ibid.*, Art. 264b.

¹² See ICTY, *The Prosecutor v. Dusko Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 96–136.

protection when armed violence has erupted “only” within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the dichotomy should gradually lose its weight.¹³

In addition, relying on ‘elementary considerations of humanity and common sense’, the Court considered that ‘[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.’¹⁴ States accepted favourably the ICTY’s finding, although it was rather revolutionary.¹⁵

1.2.4. Customary law and analogies: Two sides of the same coin?

It is impossible to understand IHL of NIACs without understanding IHL of IACs, which is older and more detailed. Treaty IHL of NIACs fails to answer many questions that necessarily arise in armed conflicts. Those gaps may be filled in by analogy to IHL of IACs or by customary rules, which are allegedly the same in both types of armed conflict.

The ICRC Customary Law Study, which is based only upon official state practice and not the practice of non-state armed groups, concluded that 136 (possibly even 141) out of the 161 rules of customary IHL are the same for IACs and NIACs, although many of them follow the wording of Protocol I.¹⁶ The main purpose of the ICRC Study (and ICTY jurisprudence on customary IHL) was to fill the gaps in the treaty law of NIACs, specifically in the field of the conduct of hostilities, by finding applicable customary rules.¹⁷

It is not astonishing that the ICRC Study very often achieves the same results as reasoning by analogy in terms of the IHL rules applicable to NIACs.¹⁸ First, only a few states prepare for NIACs in peacetime. Most often, states train their soldiers, devise tactics, and draft military manuals intending to defend the state against outside aggression. This fact makes it less astonishing that the ICRC Study found that official state practice is the same in both IACs and NIACs, especially in the field of the conduct of hostilities, even though states did not want Protocol II to have the same rules in this regard. This refusal admittedly occurred not by votes on each rule; rather, it resulted from a package that answered diffuse concerns of states about their sovereignty through an overall ‘simplification.’¹⁹

¹³ Ibid., para. 97.

¹⁴ Ibid., para. 119.

¹⁵ Eminent UN experts wrote only one year earlier: ‘The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions.’ See “Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),” as annexed to United Nations Security Council (UNSC), “Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council,” UN Doc S/1994/674, 1994, para. 52.

¹⁶ See ICRC Customary IHL Database, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>, updating regularly the ICRC Customary Law Study, note 3 above.

¹⁷ See HENCKAERTS and DOSWALD-BECK, *Customary International Humanitarian Law*, *op. cit.*, pp. xxxiv–xxxv.

¹⁸ See reasoning by analogy in general and our specific question, as well as the limits of reasoning by analogy between IACs and NIACs, SASSÖLI, *International Humanitarian Law*, *op. cit.*, pp. 224–230.

¹⁹ See Rosemary ABI-SAAB, *Droit humanitaire et conflits internes: origines et évolution de la réglementation internationale*, Geneva-Paris, Institut Henry-Dunant y Pédone, 1986, p. 138; Yves SANDOZ, Christophe SWINARSKI and Bruno ZIMMERMANN (editors), *Commentary on the Additional Protocols of 8 June 1977 to the*

Second, it is not surprising that states apply the same solutions that they adopted in treaty law and state practice for IACs to the same problems in NIACs. Reasoning by analogy and applying an existing rule that covers a situation that is like a non-regulated problem is normally how all human beings solve a problem similar to one they have already solved successfully. This will therefore be the practice of their state. As for establishing *opinio juris* in both IACs and NIACs, it is anyway difficult to prove that states adopted certain conduct or instructions out of a sense of legal obligation and not merely for policy reasons.

Finally, as an alternative to solving problems encountered in NIACs in conformity with what they do or are prepared to do in IACs, the military could try to find the solution elsewhere. Obviously, IHRL could offer appropriate solutions but the military is often allergic to that law, does not understand it well, and think that it is unrealistic for warfare as it supposedly makes successful military operations impossible.²⁰ By contrast, the military is much more familiar with IHL of IACs and cannot possibly consider that it is unrealistic because they were heavily involved in the state delegations that adopted the existing IHL treaties and their practice plays an important role in creating customary law.

1.2.5. Disadvantages of the convergence between IHL of IACs and NIACs

Humanitarian concerns originally prompted the idea of either bringing IHL of NIACs closer to IHL of IACs or even applying the latter to what is substantively a NIAC. Two assumptions underlined the effort to bridge the gap. It was assumed that protection would not exist without the application of IHL and that the application of additional IHL rules could only improve the fate of affected persons. Both assumptions have proven to be partially erroneous. Ironically, states and their military are the ones that today want to (selectively) apply IAC rules, particularly its ‘authorizations,’ to NIACs. In fact, there are several drawbacks to applying IHL of IACs to NIACs. If IHL, as the *lex specialis*, is extended by analogy to IHL of IACs, this limits the relevance of IHRL, which would often provide for more protection of armed group members. As for states’ and scholars’ claim that IHL of NIACs authorises the killing and detention of armed group members —just as IHL of IACs does for combatants—, it would logically benefit armed groups but also affect their members. This claim has been thoroughly discussed —and rejected for NIACs— elsewhere.²¹ What deserves a discussion in this article is whether armed groups can comply with IHL of NIACs extended by analogy to IHL of IACs.

1.3. Is IHL of NIACs influenced by IHL of IACs realistic for armed groups?

Law must consider the social reality it seeks to govern. As IACs involve states, IHL of IACs accounted for the social reality of states as belligerents when it was adopted by them. By definition, NIACs are fought by non-state armed groups at least as much as by governmental

Geneva Conventions of 12 August 1949, Geneva, ICRC, Martinus Nijhoff Publishers, 1987, pp. 1333–1334, paras. 4402–4418.

²⁰ See, e.g., Richard EKINS and Tom TUGENDHAT, “Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat,” in *Policy Exchange*, March; see also statements by former UK military leaders in House of Commons Defence Select Committee, “UK Armed Forces Personnel and the Legal Framework for Future Operations,” *Evidence* (House of Commons, 2014) paras. 5, 7, 13, 23, 28, 61, 83, 95, 97–99.

²¹ See Anne QUINTIN, *Permissions, prohibitions and prescriptions: The nature of international humanitarian law – Does international humanitarian law provide permissions to act, or is it only composed of prohibitions and prescriptions?*, Ph.D. dissertation, Geneva, 2019, (to be published, Elgar 2020).

armed forces. Still, states, scholars, and judges sometimes forget that IHL of NIACs also binds armed groups. IHL of NIACs will be less realistic and effective if it only accounts for the needs, difficulties, and aspirations of one side since it derives by analogy from the law accepted for IACs that addresses states only. It is claimed, however, that the application of unrealistic rules will not only result in the violation of such rules, but also undermine the credibility and protective effect of other rules that an armed group can follow. In the following section, I provide examples and discuss some solutions.

1.3.1. Examples of unrealistic rules

When the ICRC Customary Law Study claims that most customary IHL rules, many of which are parallel Protocol I's rules that apply to IACs as a matter of treaty law, apply equally to NIACs, does it bear in mind that it implies that each of these rules is also binding upon armed groups? The increasing integration of IHRL standards into IHL may raise similar doubts. For example, the ICRC contends (mainly based upon the practice of human rights bodies) that customary IHL prohibits arbitrary detention.²² According to the ICRC, this prohibition requires that a basis for internment is previously established by law and that 'a person deprived of liberty [must be provided] an opportunity to challenge the lawfulness of detention.'²³ But did the ICRC realise that its interpretation prevents non-state armed groups from detaining anyone unless they legislate and institute *habeas corpus* proceedings? Is this realistic?

Second, the combination between raising the minimum age to 18 and an enlargement of the concept of (prohibited) involvement of children with armed groups²⁴ results in requirements that make it impossible for armed group members to remain together with their families and to be supported by the entire population on whose behalf they (claim to) fight. The 2000 Optional Protocol on Children in Armed Conflict to the Convention on the Rights of the Child (OPAC) raises the threshold for participation in hostilities and compulsory recruitment to 18.²⁵ As to the permissible age of voluntary recruitment of children, OPAC creates inequality between states and non-state armed groups;²⁶ specifically, OPAC merely obliges state parties to raise the minimum age of voluntary recruitment into their armed forces to 16 with the exception that states may allow the voluntary enrolment of persons aged 15 to 16 into military schools.²⁷ In contrast, it prohibits non-state armed groups from allowing the voluntary recruitment of children under 18 into their forces.²⁸

Third, the usual definition of pillage suggested by those who fight against businesses complicit with armed groups in pillaging natural resources in conflict areas is discriminatory against

²² ICRC Customary Law Study, note 3 above, Rule 99.

²³ HENCKAERTS and DOSWALD-BECK, *Customary International Humanitarian Law*, *op. cit.*, p. 350.

²⁴ See ICC, Prosecutor v. Lubanga, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras. 627-628.

²⁵ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, Arts. 1–2.

²⁶ Cfr. *ibid.*, Arts. 3–4.

²⁷ *Ibid.*, Art 3.

²⁸ *Ibid.*, Art 4.

armed groups.²⁹ One of its elements is the appropriation of private or public property by armed groups without the consent of the owner. As the owner is not defined by international law, it is defined by domestic law. Under the latter, however, the owner of natural resources is the state represented by the government in most countries. Thus, the state's appropriation of natural resources cannot, by definition, constitute pillage. In contrast, armed groups that exploit natural resources commit the war crime of pillage even when they continue exploiting natural resources in a territory they control or perhaps in the territory of the people for which they fight. This remains the case regardless of how such groups use the proceeds therefrom, such as for the benefit of the local population or to continue fighting, as they claim, on behalf of the people. Such a discriminatory result does not further the willingness of armed groups to respect IHL

Fourth, as to international criminal law, the ICTY's conclusion that command responsibility necessarily applies to NIACs³⁰ is logical only as far as state agents are concerned. However, did the judges realise that their pronouncement implies that command responsibility also applies to armed groups in which commanders may not have the legal capacity to punish members who have committed violations as required by IHL of IACs to avoid responsibility for crimes committed by their subordinates?³¹ Do they really require that a commander of an armed group conduct a trial in order to avoid criminal responsibility for war crimes committed by his or her subordinates?

In my view, the perspective of armed groups should be considered before drawing analogies between IHL of IACs and NIACs based on customary law or otherwise. For every existing, claimed, and newly suggested rule as well as when interpreting existing rules, it should be verified whether an armed group willing to do so can stick to the rule in question without necessarily losing the conflict. While states undertake this reality check for themselves as they are the legislators making the rules, they do not necessarily determine whether such rules are realistic for armed groups.

1.3.2. Introducing a sliding scale of obligations?

Unfortunately, too many victims of violence and arbitrariness in NIACs worldwide may certainly applaud the breath-taking identification of customary rules applicable to NIACs, the development of some treaty rules, and the progressive interpretation of both treaty and customary laws by international criminal tribunals. Governmental forces may be perfectly able to respect rules that are largely the same in both NIACs and IACs. Many armed groups, on the other hand, could not possibly respect the full range of rules applicable to IACs. A sliding scale of obligations could therefore apply. An armed group that is better organised and has more stable control over territory would be obliged to adhere to rules in NIACs that are more like the full panoply of rules contained in IHL of IACs. In the Spanish Civil War, for example, both sides could have respected nearly all the rules applicable to IACs because both sides controlled and administered the territory and fought mainly through regular armies. Besides, it is doubtful that an armed group forced to hide on government-controlled territory could implement many

²⁹ James G. STEWART, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, New York, Open Society Foundations, 2010, p. 21. Pillage is prohibited in NIACs by Protocol II, Art. 4(2)(g) and ICRC Customary Law Study, note 3 above, Rule 52.

³⁰ See ICTY, Prosecutor v. Hadžihasanović *et al.*, decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras. 26–27, 29–31.

³¹ See Protocol I, Art. 86(2), last sentence.

of the positive obligations foreseen by IHL. It is true that many of those only arise if a party undertakes certain activities. Every armed group is materially able to respect the customary prohibition of arbitrary detention by simply not detaining anyone; however, such a requirement is unrealistic and likely to lead to summary executions of enemies who surrender.

A sliding scale of obligations already exists for certain rules. Although the high threshold of application of Protocol II discussed above is often criticised, perhaps it is realistic for armed groups. Indeed, only armed groups that control territory, which is one of the heightened conditions for Protocol II to apply, may be able to respect certain rules of Protocol II. Also, many rules of IHL merely impose best efforts obligations that must be fulfilled only when materially possible. Thus, for example, only feasible precautions must be taken to protect the civilian population from the incidental effects of attacks.³² Certain rules on the treatment of those interned or detained in a NIAC must only be respected to the extent of the detaining authority's capability.³³ Other rules could be interpreted similarly by taking into account that international law can never be construed as requiring what is materially impossible.³⁴ Such standards lead to obligations that differ between government forces and non-state armed groups even if the blackletter rules remain the same.

The rules that can and therefore must be respected by a certain group must obviously be enumerated in detail. It cannot depend on the ability of a given armed group to respect certain rules. Instead, they must be determined generally (that is, for certain categories of armed groups) and *in abstracto* and preserve a humanitarian minimum. Otherwise, a weak-armed group would be allowed, for instance, to deliberately target civilians if this constitutes its only realistic means to weaken the government.

If one wants to preserve the equality of belligerents before IHL, the rules resulting from such a sliding scale based upon the non-state armed group's compliance capacity would apply to both sides. This may appear as absurd as it would be easier for governmental forces to respect IHL the weaker their enemies are. However, states are also bound by their human rights obligations, which are not the same for states and armed groups even if one considers that IHRL binds armed groups (in particular if they control territory).³⁵ There is no such thing as a principle of equality of belligerents before IHRL.

The alternative is to abandon the fiction of the equality of belligerents and require that the government fully respect customary and conventional IHL rules while demanding that armed groups respect those rules only according to their respective capacities. This alternative corresponds to the real expectations of contemporary governmental forces fighting armed groups. Do US soldiers in Afghanistan expect (in the sense that they foresee) that the Taliban will respect the same rules that their commander requires them to respect? Informing governments and their soldiers that their enemies are not bound by the same rules also reduces

³² See Protocol I, Art. 57; ICRC Customary Law Study, note 3 above, Rules 15–19.

³³ See Protocol II, Art 5(2).

³⁴ See International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001 and General Assembly resolution 56/83 of 12 December 2001, Art. 23; Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Art. 60.

³⁵ See Andrew CLAPHAM, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press, 2006, pp. 271–316, in particular; Daragh MURRAY, *Human Rights Obligations of Non-State Armed Groups*, Oxford, Hart Publishing, 2016; Katharine FORTIN, *The Accountability of Armed Groups under Human Rights Law*, Oxford, Oxford University Press, 2017; RODENHÄUSER, *Organizing Rebellion, Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law*, *op. cit.*, pp. 115–212.

the risk that violations be committed under the guise of reciprocity, which is largely outlawed by IHL, because of the enemy's perceived IHL violations.

1.3.3. Abandoning the principle of equality of belligerents?

Equality of belligerents is an important principle of IHL.³⁶ Most authors consider that it also applies to NIACs.³⁷ Admittedly, it results from the strict separation of *jus ad bellum* and *jus in bello*. As no international *jus ad bellum* exists for NIACs and domestic law invariably prohibits the use of force by armed groups, one could doubt whether this principle of equality also applies to NIACs. Insurgents and states are obviously not equal in either the domestic law of the states concerned or in branches of international law other than IHL.³⁸ Besides, as no combatant immunity exists in IHL of NIACs, nothing prevents a state from prosecuting fighters of a non-state armed group under its domestic laws for the mere fact of having participated in hostilities, even if those fighters complied with IHL. Certainly, IHL also does not prohibit a non-state armed group from prosecuting government soldiers for the mere fact of having participated in hostilities. However, due to the principle of legality, it is much more difficult to imagine that such prosecutions may occur, even when one admits that armed groups are not prohibited from conducting trials and legislating. State legislation does not prohibit government soldiers from fighting, and it is unclear why—and appears unfair that—they should be bound by any 'legislation' adopted by the armed group before they fall under its control.

As for possible authorizations resulting from IHL, rules of IHL of NIACs contain, at best, weak permissions³⁹ by opposition to 'authorizations in the strong sense,'⁴⁰ they just tolerate and regulate conduct.⁴¹ In my view, even the judicial guarantees foreseen by IHL of NIACs merely provide armed groups with weak permission to conduct trials. Although such trials do not violate IHL as such,⁴² states are not obliged to recognise such trials or the sentences resulting from them. If the majority opinion according to which IHL of NIACs implies strong permission to intern those who fight for the adversary is correct,⁴³ this authorization would also apply to armed groups according to the principle of equality of belligerents.⁴⁴

³⁶ See Marco SASSÒLI, "Ius ad bellum and ius in bello – The separation between the legality of the use of force and humanitarian rules to be respected in warfare: Crucial or outdated?," in Michael SCHMITT and Jelena PEJIC (editors), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, Leiden/Boston, Nijhoff, 2007, pp. 242–264.

³⁷ François BUGNION, "Jus ad Bellum, Jus in Bello and Non-International Armed Conflict," in *YIHL* 6 (2003), p. 167.

³⁸ See Zakaria DABONÉ, *Le droit international public relative aux groupes armés non étatiques*, Zürich, Schulthess, 2012, pp. 125–252.

³⁹ Ige F. DEKKER and Harry H. G. POST, *On the Foundations and Sources of International Law*, Hague, TMC Asser Press, 2003, p. 18.

⁴⁰ Derek JINKS, "International human rights law in time of armed conflict," in Andrew CLAPHAM and Paola GAETA (editors), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, Oxford University Press, 2014, p. 666.

⁴¹ QUINTIN, *Permissions, prohibitions and prescriptions*, *op. cit.*, pp. 247–318.

⁴² See Case Sweden/Syria, "Can Armed Groups Issue Judgments?," in Marco SASSÒLI, Antoine A. BOUVIER, and Anne QUINTIN, *Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, *op. cit.*

⁴³ See SASSÒLI, *International Humanitarian Law*, *op. cit.*, p. 494, para. 10.17 and pp. 618–619, paras 10.295–10.297.

⁴⁴ See United Kingdom, Court of Justice United Kingdom, Serdar Mohammed v. Ministry of Defence and Others, date 02/05/2014, para. 245; High Court of Justice United Kingdom, Mohammed and others v. Secretary of State for Defence, Rahmatullah v. MoD, date 30/07/2015, para. 178.

Both armed groups and governments are in a dilemma from a policy perspective. Government forces understandably want their enemies to respect the same rules by which they are bound. On the other hand, the idea that an armed group, which states invariably classify as being composed of criminals and most often as ‘terrorists,’ could be equal to a sovereign state in any respect is heresy for governments obsessed by their Westphalian concept of state sovereignty. As for armed groups themselves, they may appreciate the idea of having the same rights as their opponents, but most of them are much less willing—and to a certain extent even unable—to respect the same obligations.

When looking at the reality in the field, most armed groups are perceived—whether rightly or wrongly—as ignoring IHL, both in the sense of not knowing it and of deliberately conducting hostilities in a way contrary to its basic principles, in particular the principle of distinction. Indeed, many armed groups believe that their only chance to militarily and technologically overcome incomparably stronger governmental forces is to attack ‘soft targets,’ such as civilians and the morale of the civilian population, in the hope that they will withdraw their support from the government. To outlaw armed groups and label them as ‘terrorists’ is thus sometimes a self-fulfilling prophecy. Of course, as will be explained below, it has been possible to obtain and monitor the observance of commitments by armed groups to abide by rules on certain well-defined issues, such as the prohibition of landmines. Yet, it is much more difficult to convince particular groups to renounce suicide attacks directed against civilians, hostage-taking or the use of human shields as a usual method of warfare.

One may object that this bleak picture equally applies to the conduct of many governmental armed forces. The degree and extent to which most armed groups disrespect IHL are nevertheless greater than for most governmental forces.

The importance of abandoning the principle of equality of belligerents, however, should not be overstated. Indeed, most human suffering in NIACs is not caused by violations of rules that may be objectively difficult for some non-state armed groups to respect. Rather, suffering largely results from violations, committed by both sides of a conflict, of rules that every human being can respect in every situation, namely, the prohibitions of raping, torturing, or killing those who are in the power of the enemy or otherwise powerless. Adapting some rules to what a party can deliver would simply deprive it of an easy excuse to reject the entire regime. Controversial cases in which both sides claim to be the government should not pose problems as both sides could then be held to the higher ‘state’ standard.

In conclusion, the equality of belligerents may be a fiction in NIACs. Fictions, however, undermine IHL because this body of law deals with the humanitarian consequences of an (undesirable) reality and must take reality into account in all its rules if it wants to have any real impact. But abandoning the fiction risks even further decreasing the willingness of government soldiers to comply with IHL and starting a race to the bottom under which armed groups may argue that they are unable to follow most rules.

2. Implementation of IHL of NIACs by armed groups

Even if nearly all rules of IHL of NIACs are realistic for many armed groups, the challenge remains to devise realistic mechanisms of implementation. Indeed, the mechanisms explicitly foreseen by treaty law are even more limited than substantive rules: the right of initiative of the

ICRC and other impartial humanitarian bodies⁴⁵ and the obligation to disseminate the rules ‘as widely as possible,’⁴⁶ Customary law cannot create mechanisms. Even the ICRC considers that rules on implementation, specifically those concerning criminal prosecution, only bind states in NIACs.⁴⁷ Such an absence of mechanisms is not astonishing. International law is still largely state-centred. Even when its rules apply to non-state actors, often no international forum exists in which individual victims, injured states, third states, intergovernmental organizations or NGOs could invoke the responsibility of a non-state actor and obtain relief.

2.1. The need to increase the sense of ownership by armed groups

As far as armed groups are concerned, it is even more imperative that the implementation of international law catches up with international reality than for other non-state actors. Multi-national enterprises may at least theoretically be dealt with by the domestic law of the territorial state in which they are present. In the case of armed groups, however, this is simply not possible. Their existence is a testament to the fact that they operate beyond the practical reach of the territorial state’s law enforcement systems. *International* law and its mechanisms must therefore engage such groups.

Today it is increasingly accepted that armed groups must be directly engaged to foster their sense of ownership of IHL rules. The ICRC always cultivated a dialogue with both state and non-state actors parties to armed conflicts; it has a ‘Global Affairs and Non-State Armed Groups Unit’ that develops and coordinates approaches to engaging with armed groups⁴⁸ and initiated in 2018 a study analysing the quality of its dialogue with non-state armed groups.⁴⁹ I will discuss hereafter the pioneering work of the NGO Geneva Call. An increasing number of academics analyse the issue.⁵⁰

In a 2009 report on the protection of civilians in armed conflicts, even the UN Secretary-General identifies ‘[e]nhancing compliance by non-State armed groups’ as one of the five core

⁴⁵ Geneva Conventions, Common Art. 3(2).

⁴⁶ Protocol II, Art. 19.

⁴⁷ ICRC Customary Law Study, note 3 above, Rules 141, 143–144, 149–150, 157–158, 161.

⁴⁸ ICRC, *Annual Report*, 2018, vol. I, p. 61.

⁴⁹ *Ibid.*, p. 72.

⁵⁰ See, e.g., Michelle MACK, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, Geneva, ICRC, 2008; Geneva Academy of International Humanitarian Law and Human Rights, *Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors*, Geneva, 2011; Geneva Academy of International Humanitarian Law and Human Rights, *From Words to Deeds: A Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms*, ongoing research project started in January 2017. See also the various contributions in “Engaging armed groups” in *International Review of the Red Cross (IRRC)*, 93 (2011), pp. 578–808, and “Understanding armed groups and the applicable law,” in *IRRC*, 93 (2011), pp. 258–501. See also Sandesh SIVAKUMARAN, “Binding armed opposition groups,” in *ICLQ*, 55 (2006), p. 369; Sandesh SIVAKUMARAN, *The Law of Non-International Armed Conflict*, Oxford, Oxford University Press, 2012, pp. 513–567; Liesbeth ZEGVELD, *Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press, 2002; CLAPHAM, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 286–299; Andrew CLAPHAM, “Accountability of armed opposition groups in international law,” in Andrew CLAPHAM and Paola GAETA (editors), *The Oxford Handbook of International Law in Armed Conflict*, Oxford, Oxford University Press, 2014, p. 766; Annyssa BELLAL and Stuart CASEY-MASLEN, “Enhancing compliance with international law by armed non-state actors,” in *Göttingen J of Intl L*, 3 (2011), p. 175; Olivier BANGARTER, “Reasons why armed groups chose to respect international humanitarian law or not,” in *IRRC*, 93 (2011), p. 353; Marco SASSÖLI, “Taking armed groups seriously: Ways to improve their compliance with international humanitarian law,” in *The J of Intl Humanitarian Legal Studies*, 1 (2010), p. 5; Ashley JACKSON, “Talking to the Other Side: Humanitarian Engagement with Armed Non-State Actors,” in *Humanitarian Policy Group*, Policy Brief 47 (2012).

challenges and devotes ten out of 78 paragraphs of the report to the need to engage and not only condemn armed groups.⁵¹ He writes, ‘In order to spare civilians the effects of hostilities, obtain access to those in need and ensure that aid workers can operate safely, humanitarian actors must have a consistent and sustained dialogue with all parties to the conflict, State and non-State.’⁵² Each report since 2009 has repeated this point.⁵³ The Secretary-General’s 2017 report recommends that ‘Member States must not impede humanitarian actors’ efforts to interact with all relevant parties, including non-State armed groups, and to operate in areas under their control.’⁵⁴

Similarly, the UN General Assembly stresses that engagement with armed groups is essential to negotiate access and to enhance the protection of civilians. It requires humanitarian actors to treat state and non-state parties to an armed conflict on an equal basis and to respond to the civilian population’s needs without consideration of political or other factors.⁵⁵

Even the UN Security Council affirmed in a presidential statement that it ‘recognizes the need for consistent engagement by humanitarian agencies with all parties to armed conflict for humanitarian purposes, including activities aimed at ensuring respect for international humanitarian law.’⁵⁶

2.2. Ways to increase the sense of ownership by armed groups

2.2.1. Participation in the process of creating new rules

Written rules. The development of IHL applicable to NIACs through hard or soft law should involve all stakeholders, including armed groups.⁵⁷ Indeed, such groups are as central to NIACs as navies are to naval warfare. No one would suggest revising the law of naval warfare without consulting the world’s navies. IHL is, above all, a pragmatic endeavour. Its success depends on its effective application by parties to conflicts. As such, it must be based on a solid understanding of the problems, dilemmas, and aspirations of all parties to armed conflicts. In contrast, criminal law does not need to account for the aspirations of the criminals or be realistic for them. Its enforcement is vertical and hierarchical, while IHL is mainly implemented horizontally by the parties to armed conflicts themselves.

⁵¹ See UNSC, “Report of the Secretary-General on the protection of civilians in armed conflict,” UN Doc S/2009/277, 2009, paras. 38–47.

⁵² *Ibid.*, para. 40.

⁵³ See, e.g., UNSC, “Report of the Secretary-General on the protection of civilians in armed conflict,” UN Doc S/2010/579, 2010, paras. 52, 55–6; UNSC, “Report of the Secretary-General on the protection of civilians in armed conflict,” UN Doc S/2015/453, 2015, paras. 7, 37, 62; UNSC, “Report of the Secretary-General on the protection of civilians in armed conflict,” UN Doc S/2016/447, 2016, para. 29.

⁵⁴ UNSC, “Report of the Secretary-General on the protection of civilians in armed conflict,” UN Doc S/2017/414, 2017, para. 53.

⁵⁵ UNGA, Res 46/182, 1991.

⁵⁶ UNSC, “Statement by the President of the Security Council,” UN Doc S/PRST/2013/2, 2013, para. 4.

⁵⁷ Sophie RONDEAU, “Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts” in *IRRC*, 93 (2011), p. 649. See a theoretical framework based upon the equality of belligerents in Marcos D. KOTLIK and Ezequiel HEFFES, “Grupos armados desfragmentados: La relativización del DIH como régimen autónomo y la búsqueda de visiones alternativas,” in Emiliano J. BUIS and Natalia M. LUTERSTEIN (editors), *La guerra ante la fragmentación del derecho internacional. Interacciones, intercambios, interferencias*, Buenos Aires, Colección Serie Académica Sempithidia, Vol. I., 2016, pp. 78–79.

States, however, will never allow armed groups to officially sit at the negotiation table. Thus, it is more realistic that the ICRC or an NGO, such as Geneva Call, represents their views and problems because of and during negotiations.⁵⁸

Customary law. As IHL of NIACs is equally addressed to armed groups, the question arises whether their practice and *opinio juris* also contribute to customary IHL of NIACs. The International Law Commission (ILC) clearly gives a negative answer.⁵⁹ The ICRC Customary Law Study considers that the legal significance of such practice is unclear.⁶⁰ One of its authors nevertheless advocates taking into account the practice of armed groups at least *de lege ferenda*.⁶¹ The underlying doctrinal question is whether customary law is based upon the consent of states or rather develops from the conduct and *opinio juris* of the rule's addressees in the form of acts, omissions, declarations, accusations or justifications for their conduct.⁶² From a purely practical point of view, it is useless to consider a rule to be 'customary law' if half of the addressees (i.e. non-state armed groups) do not respect it out of a sense of conviction. To ensure that customary rules are realistic for all belligerents and to give non-state armed groups a sense of ownership over customary IHL of NIACs, the practice and statements of armed groups must be taken into account when determining customary rules applicable to NIACs.⁶³

Admittedly, there are several conceptual difficulties in considering the practice of non-state armed groups in the rule-creating process. First, an armed group, contrary to a state, is not meant to be and does not even want to be permanent, but must inevitably disappear by either victory (becoming the government of a state) or by defeat.⁶⁴ Certain stability and continuity of states as well as the possibility for them to repeat practice and to become in the future both a beneficiary and an addressee of a rule are all ingredients of the mysterious customary process that turns what is —practice— into what ought to be —the law—. Some of these factors may not apply in the case of armed groups.

Second, in most cases, an armed group has an IHL practice only towards one state or one adverse armed group, and it considers itself less than states as part of an international society made up of other states (and, in this case, armed groups).

Third, international law presupposes that states have uniform characteristics, and they are indeed much less diverse than armed groups. Should one deduce IHL of NIACs from the practice and *opinio juris* of all armed groups that are parties to NIACs or should one create

⁵⁸ See, e.g., ICRC, *Safeguarding the Provision of Health Care: Operational Practices and Relevant International Humanitarian Law Concerning Armed Groups*, Geneva, CICR, 2015; Geneva Call, *In Their Words: Armed non-State Actors Share their Policies and Practice with Regards to Education in Armed Conflict*, Geneva Call, 2017.

⁵⁹ ILC's Draft Conclusions on the topic entitled Identification of Customary International Law, see ILC, "Report of the International Law Commission on the Work of its 68th Session," UN Doc A/71/10, (2016), Conclusion 4(3) and para. 9 commentary to Conclusion 4. However, the ILC admits that it may provoke State practice, which is obviously a different issue.

⁶⁰ HENCKAERTS and DOSWALD-BECK, *Customary International Humanitarian Law*, *op. cit.*, p. xxxvi.

⁶¹ 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, 25–26 October 2002*, 27 (2003), p. 128.

⁶² For further details, see Marco SASSOLI, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht*, Basel, Helbing & Lichtenhahn, 1990, pp. 32–48.

⁶³ For this purpose, the Geneva Academy of International Humanitarian Law and human Rights has undertaken since 2017 a research project *From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms*, note 50 above.

⁶⁴ DABONE, *Le droit international public relative aux groupes armés non étatiques*, *op. cit.*, pp. 87–88.

categories of groups (for example, according to whether they control territory or want to become the government of a state) and deduce different rules applicable to each category from the practice and *opinio juris* of groups of that category? In the first case, only very rudimentary rules will result, while the second alternative would lead to further fragmentation of IHL. The second alternative would also raise the question of whether states should also be bound by different rules depending on the category of the armed group they are fighting.

Fourth, the question arises whether the law deduced from the practice and *opinio juris* of armed groups is binding upon them only or whether customary IHL of NIACs for states and armed groups should be based upon the practice and *opinio juris* of both. This issue of the equality of belligerents has been discussed above.

Despite all these open questions, some scholars suggest that armed groups can play a role in the development of new rules without ‘downgrading’ current international protections by considering the result of their practice and *opinio juris* as ‘quasi-custom.’⁶⁵ In my opinion, this theory merits further reflection.

2.2.2. Dissemination

IHL must be disseminated among those responsible for applying it. Ideally, dissemination already takes place before an armed conflict breaks out. While it is possible to train governmental forces given their possible future involvement in a NIAC, it is politically delicate to engage potential armed groups before they are involved in armed conflict. Perhaps the most promising preventive action is to ensure that the whole population has a basic understanding of IHL. Thus, activists, journalists, students, schoolchildren, or anyone else who may become a member or supporter of an armed group must understand both the obligations to which everyone’s actions are subject and the rights each may claim in armed conflicts. This is precisely why IHL of NIACs requires that it ‘shall be disseminated as widely as possible.’⁶⁶

During an armed conflict, the question then arises as to how IHL should be disseminated among armed groups while taking their specificities into account. In the case of armed groups, it is sometimes unrealistic to apply the standard procedure of focusing training efforts on the leaders of armed groups because many armed groups do not have a formal training structure. In addition, leaders of armed groups have, for reasons of secrecy, much less direct contact with their actual fighters in comparison to leaders of regular armed forces. Non-state armed groups also leave the choice of means and methods of warfare to those fighting in the field to a greater extent than commanders of regular forces. Nevertheless, it is still possible to at least suggest some realistic ways in which such people can be trained to respect IHL, and modern means of communication provide some opportunities in this regard.⁶⁷

In this regard, Geneva Call contributes to the training of armed groups on humanitarian rules, including such innovative means as quizzes that can be downloaded on portable phones.⁶⁸ As always, efficient training cannot merely consist of teaching prohibitions; rather, it must

⁶⁵ Anthea ROBERTS and Sandesh SIVAKUMARAN, “Lawmaking by nonstate actors: Engaging armed groups in the creation of international humanitarian law,” in *Yale J of Intl L*, 37 (2011), pp. 141–152.

⁶⁶ Protocol II, Art. 19. See also ICRC Customary Law Study, note 3 above, Rule 142.

⁶⁷ See, e.g., the course created by the ICRC, “Online training on the Law of Armed Conflict for non-State actors,” 2017, available at: <https://www.icrc.org/en/document/law-armed-conflict-essentials>, last accessed on 22 August 2019.

⁶⁸ For tools developed by Geneva Call, see “Fighter Not Killer,” available at: <http://fighternotkiller.org>, last accessed on 22 August 2019.

demonstrate how real-life situations may be solved while respecting IHL. The training of fighters should show them that IHL contains solutions to situations they will encounter. However, few states would tolerate training that teaches armed groups they combat how to fight a more efficient war. Likewise, many states view the basic message of the principle of distinction with scepticism if it is addressed to fighters of armed groups because it implies that fighters may target members of the state armed forces.

2.2.3. Obtaining commitments

Although IHL already binds armed groups, it is worthwhile to obtain commitments from them to respect IHL, and such groups indeed commit themselves in a great variety of ways to adhere to humanitarian rules.⁶⁹ This not only helps close the ownership gap but also creates a constituency of leaders and other members who then become advocates of IHL within the group. General commitments to respect IHL —such as declarations to comply with ‘the Geneva Conventions and Additional Protocols’— may be sceptically viewed as mere propaganda. Instead, a two-page code of conduct addressing the genuine humanitarian issues that arise for a given armed group in the field is often preferable.

How to obtain commitments? The ICRC, some UN mechanisms, and Geneva Call, a Swiss-based NGO, try to obtain commitments from armed groups to play by certain IHL rules. The ICRC does so in its bilateral and confidential dialogue with all parties to an armed conflict and normally does not make them public. Such a confidential approach not only corresponds to its usual working methods but also avoids antagonising governments with whom it must work and that do not appreciate such contacts which they fear will legitimise ‘terrorists.’ Such confidentiality nevertheless decreases the sense of ownership by armed groups with their commitments.

At the UN level, the Security Council established a monitoring and reporting mechanism to combat six grave violations committed against children in armed conflict. The mechanism operates by formally listing parties responsible for the six violations and then requests them to formulate action plans that lead to compliance with international law. Such an action plan constitutes a unilateral commitment by an armed group. The mechanism then follows up on such commitments and monitors their fulfilment. A group is ‘delisted’ and thereby removed from scrutiny only after the Council verifies that activities listed in the action plan have been fully implemented.⁷⁰

The NGO Geneva Call is an institution traditionally focused on armed groups only. Among other things, it tries to obtain concrete commitments from armed groups to respect humanitarian rules (which is a term broader than IHL) and tries to ensure their fulfilment through persuasion and dialogue.⁷¹ It started its work with the ban on antipersonnel landmines because the Ottawa Convention on Landmines neither addresses non-state armed groups nor allows them to undertake to respect it. Since then, Geneva Call has added the protection of children in armed conflict and the prohibition of sexual violence as well as gender discrimination to its work. It plans to add other humanitarian issues to its work programme in the future, such as the provision

⁶⁹ For a comprehensive database, see Geneva Call, “Their Words: Directory of Armed Non-State Actor Humanitarian Commitments,” Geneva Call, 2012–2019, last accessed on 22 August 2019.

⁷⁰ For more information, consult the website of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, at <https://childrenandarmedconflict.un.org/our-work/monitoring-and-reporting>, last accessed on 22 August 2019.

⁷¹ See Geneva Call’s website: <http://www.genevacall.org>, last accessed on 22 August 2019.

of medical care and forced displacement. However, it must be careful to ensure that it only accepts commitments whose fulfilment it can monitor. I can only hope that Geneva Call continues to pursue its approach described hereafter, which is different from, but complementary to, that of the ICRC and which makes it a unique organization, rather than just some other humanitarian organization working in the field.

Geneva Call's original idea, which is the most relevant one for the present discussion, was to obtain formal 'Deeds of Commitment' from armed groups that are most often signed in Geneva by a group's high-level military and political leaders.⁷² Such deeds are the result of negotiations that include an armed group's military leaders in which Geneva Call not only explains existing IHL prohibitions but also listens to the group's humanitarian problems and aspirations as well as the challenges it faces. The Deed is then signed in the prestigious 'Alabama Room' in Geneva in the presence of a representative of the Canton (Swiss federated State) of Geneva in whose archives the Deed is deposited. It is part of Switzerland's humanitarian foreign policy to allow and facilitate the entry of both the leaders of the armed groups willing to sign a Deed of Commitment on its territory and of all those attending meetings in Geneva. Those meetings are organised every four to five years. They include all signatories of Deeds of Commitment as well as certain other armed groups with which Geneva Call works.

When leaders of an armed group return to the fighting after the signing ceremony, they have the impression that they are no longer mere criminals (as the government against which they are fighting would argue) but rather serious parties to an armed conflict with obligations under IHL. Such feeling of legitimation through participation in the 'rules of the game' is a social reality, although all Deeds of Commitment stress, as Common Article 3 does, that they do not affect the group's legal status. Nevertheless, leaders of the group will make sure that their group does not make them lose face by violating their Deeds. Geneva Call assists groups in respecting their Deed, monitors its observance, conducts missions of enquiry in cases of alleged violations (this often requires, for purely practical reasons, the territorial state's consent, which is often denied),⁷³ and could issue a public statement if the Deed is not respected.

Currently, 52 non-state armed groups have signed the Deed of Commitment banning anti-personnel landmines, 26 have signed the Deed protecting children and 24 have signed the Deed prohibiting sexual violence and gender discrimination. Admittedly, the greatest violators are not among the signatories. However, many groups *are* signatories, including some, such as the Kurdish PKK, that are considered to be terrorist organizations by the state against which they are fighting or even by international organizations. At least for the Deed of Commitment on the ban on anti-personnel landmines, such signatory groups have not yet been found to have committed violations, while the experience with Deeds of Commitment on other issues is too recent to draw conclusions.

Common Article 3, which gives impartial humanitarian bodies a right to offer their services to parties to NIACs, including armed groups, provides the legal basis for Geneva Call's work. Engaging a non-state armed group therefore does not constitute an interference into the

⁷² See the following Deeds of Commitment available: "Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action," 2000; "Deed of Commitment for the Protection of Children from the Effects of Armed Conflict," 2010; "Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination," 2012, at <https://genevacall.org/how-we-work/deed-of-commitment>, last accessed on 22 August 2019.

⁷³ See Pascal BONGARD and Jonathan SOMER, "Monitoring armed non-state actor compliance with humanitarian norms: A look at international mechanisms and the Geneva Call Deed of Commitment," in *IRRC*, 93 (2011), pp. 692–701.

territorial state's internal affairs. A state would violate Common Article 3 if it criminalised Geneva Call's engagement as support to terrorism, even if the armed group party to a NIAC it engaged is labelled as a terrorist group.

The binding nature of commitments by non-state armed groups. Common Article 3 encourages parties to NIACs to conclude ad hoc agreements to make all or parts of IHL of IACs applicable. In contrast, IHL does not refer to unilateral commitments.⁷⁴ The question thus arises whether and why unilateral commitments are legally binding. To be bound, armed groups must possess the necessary international legal personality. In my view, when rules of IHL of NIACs are created by agreement or custom, states implicitly confer on non-state armed groups involved in such conflicts the international legal personality necessary to have rights and obligations under those rules;⁷⁵ otherwise, their legislative effort would not have the desired effect. Such an interpretation would be contrary to the *effet utile* principle. At the same time, states explicitly affirmed that the application of IHL by and to 'rebels' would not confer on the latter a legal status.⁷⁶ I think, however, this is only true concerning rules of international law other than those of IHL.

If one considers that non-state armed groups have a functional legal personality in the field of IHL, it is tempting to apply by analogy the ILC's *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations* (Guiding Principles)⁷⁷ to their commitments. The problem is that those Guiding Principles base the binding nature of such declarations upon the principle of good faith.⁷⁸ Still, states, generally do not rely on declarations of non-state armed groups and often reject them. Nevertheless, in my opinion, what is determinative is not whether the adversary trusts such declarations but whether it can rely on them. Besides, others, such as the affected population or NGOs, do rely on such declarations. Grotius and Gentili argued centuries ago that good faith is indeed the basis of all law-of-war obligations between enemies.⁷⁹

The principle of effectiveness may provide another explanation for the binding nature of such commitments. Whenever a non-state armed group can fulfil its commitments, it is bound by them.⁸⁰ Finally, one may consider that the binding nature of promises constitutes a general principle of law that exists in all legal systems.⁸¹

All aforementioned explanations for the binding nature of commitments require that those committing themselves have the will to do so and commit themselves in a field in which they

⁷⁴ However, for the special case of national liberation movements, see Protocol I, Art. 96(3).

⁷⁵ See also KOTLIK and HEFFES, "Grupos armados desfragmentados," *op. cit.*, pp. 76–78.

⁷⁶ See Geneva Conventions, Common Art. 3(4).

⁷⁷ ILC, "Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations," in *Yearbook of the International Law Commission*, II (2006), pp. 161–166.

⁷⁸ This is also the majority opinion expressed in scholarly writings. See Robert KOLB, *La bonne foi en droit international public*, Paris, PUF, 2000, pp. 328–332.

⁷⁹ Alberico GENTILI, *De Jure Belli Libri Tres*, translated by J. C. Rolfe, Manau, 1585, pp. 191–223; Hugo GROTIUS, *De Jure Belli ac Pacis Libri Tres*, translated by F. W. Kelsy, 1625, pp. 792–800.

⁸⁰ See Denise PLATTNER, "La portée juridique des déclarations de respect du droit international humanitaire qui émanent de mouvements en lutte dans un conflit armé," in *Revue belge de droit international*, 18 (1984–85), pp. 314–318.

⁸¹ Thus (for states), see Giorgio BALLADORE PALLIERI, *Diritto internazionale pubblico*, Milan, Giuffrè, 1962, p. 324 ; Wilhelm WENGLER, *Völkerrecht*, Berlin, Springer, 1964, p. 304 ; Alfred VERDROSS, *Völkerrecht*, 5th ed., Berlin, Springer, 1964, p. 157 ; Paul de VISSCHER, "Cours général de droit international public," in *Recueil des Cours*, 136 (1972), p. 120. For a critical view, see Robert KOLB, *La bonne foi en droit international public*, *op. cit.*, p. 333.

have legal personality.⁸² A lack of such intent to commit themselves could render commitments non-binding. This intent to commit themselves towards others is often not present in internal codes of conduct. Nonetheless, the requisite intent could be derived from the fact that an instrument was elaborated following a suggestion by an intergovernmental organization or NGO or that external actors or the local population were informed about its contents.

2.2.4. Rewarding respect

In an IAC, POW status and combatant immunity incentivise combatants to comply with IHL. A combatant who falls into the power of the enemy becomes a POW and has combatant immunity from prosecution for merely having participated in hostilities. If said combatant, however, commits war crimes, he or she must be punished. In contrast, this incentive to comply with IHL does not exist in NIACs. A fighter in a NIAC who only kills government soldiers will nevertheless be prosecuted for murder once captured by governmental forces. Even that fighter's perfect respect for IHL does not bar his or her prosecution under domestic law. Although this fundamental difference between IACs and NIACs is inherent in the current Westphalian international system, some incentives and rewards should be provided by IHL, international criminal law, international refugee law, and international anti-terrorism law to promote compliance with IHL. This is one of the major reasons why acts committed in an armed conflict that comply with IHL should not fall under any definition of terrorism.⁸³

2.3. Providing advice

Armed groups should also have access to advice on how to comply with IHL. Compliance is much more difficult for them than it is for governments as the latter have formal structures and institutions in place. How does a clandestine, illegal group ensure compliance with IHL? How does it punish members who do not comply with it?⁸⁴ Can it punish or provide a fair trial without legislation?⁸⁵ We must help groups address these questions assuming that many of them genuinely wish to respect IHL, which may prove to be untrue. That it is also often untrue in the case of states, which does not prevent the ICRC from providing them advisory services.⁸⁶

2.4. Monitoring respect

2.4.1. Self-reporting by armed groups

The most traditional and least intrusive mechanism to monitor the respect for international obligations, which is well established by IHRL, consists in requiring states to periodically report to an international monitoring body on their respect and implementation.⁸⁷ While such reporting obligations were formerly envisaged for IHL concerning, for example, national measures of

⁸² Dionisio ANZILOTTI, *Corso di diritto internazionale*, Athenaeum, 1928, p. 305.

⁸³ Jelena PEJIC, "Terrorist Acts and Groups: A Role for International Law?," in *BYBIL*, 75(2004), p. 75.

⁸⁴ Anne-Marie LA ROSA and Carolin WUERZNER, "Armed groups, Sanctions and the Implementation of international Humanitarian Law," in *IRRC*, 90(2008), p. 327.

⁸⁵ Jonathan SOMER, "Jungle justice: Passing sentence on the equality of belligerents in non-international armed conflict," in *IRRC* 89(2007), p. 655.

⁸⁶ See the ICRC's Advisory services *Annual Report*, 2018, note 48 above, pp. 71-72. Armed groups are not mentioned in this context.

⁸⁷ For an overview, see Elisabeth KORNBLUM, "A comparison of self-evaluating state reporting mechanisms," in *IRRC* 35(1995), p. 39.

implementation, states never accepted them.⁸⁸ If non-state armed groups have obligations under IHL, they could also be encouraged to report on their compliance. Geneva Call periodically requests armed groups that have signed a Deed of Commitment to report on their compliance and the measures taken to implement the Deed. The mere responsibility for writing such reports and collecting the necessary data could increase the awareness of IHL among some segments of the armed group and add to their sense of ownership of these laws.

2.4.2. Third-party monitoring

The respect for the law also must be monitored, yet mechanisms to engage with armed groups in this regard remain few and far between. Under Common Article 3, the ICRC and other impartial humanitarian bodies may offer their services to an armed group. If the latter accepts, the ICRC monitors the group's respect in the same way it monitors the activities of states involved in IACs. On the same basis, Geneva Call monitors whether a group's commitments correspond to reality on the ground. However, sovereignty-obsessed states do not always appreciate such activities.

2.5. Responsibility for violations

As with states, there must be the responsibility for violations committed by armed groups. International criminal law addresses members of armed groups as much as members of armed forces. In international private law, the possibility of construing and sanctioning an IHL violation as a tort must be explored and implemented in domestic civil courts. In this field, the US has been a pioneer with its Alien Tort Claims Act.⁸⁹ Furthermore, the UN Security Council has also addressed the international responsibility of armed groups by imposing sanctions on certain groups.⁹⁰ How humanitarian organizations react to IHL violations by armed groups is another area that deserves further exploration. On the one hand, the fact that these organizations want to assist and protect persons who are in the hands of armed groups necessitates that they continue to cooperate with such groups. On the other hand, reacting to violations is crucial, and humanitarian organizations must not sacrifice criticising violations, at least bilaterally and confidentially, to ensure access.

2.6. Obstacles to respect

Some armed groups have a deliberate policy to violate IHL and they publish pictures of their violations on social media. Other groups regard IHL as a set of rules made by others, and more specifically by states, and often interpret them liberally in their favour. Consequently, those groups will usually see such rules as irrelevant or not binding upon them. This is reinforced by the perceived double standards in some rules, the best example of which being the legal framework protecting children during armed conflict and in particular the age below which children cannot be recruited into armed forces.

⁸⁸ *Ibid.*, p. 43; ICRC, *Report on the Protection of War Victims, Prepared by the ICRC*, Geneva, ICRC, 1993, in Online Casebook, note 9 above, Case ICRC, Protection of War Victims, Section 2.2.

⁸⁹ 28 US Code Annotated Section 1350 (West).

⁹⁰ See, e.g., UNSC Res 2424 (2018) and UNSC Res 2293 (2016) (concerning sanctions against armed groups in the Democratic Republic of the Congo); UNSC Res 2253 (2015) (imposing asset freezes, arms embargos and travel bans on the Islamic State and its members); UNSC Res 1988 (2011) (imposing sanctions against the Taliban); UNSC Res 1989 (2011) (reaffirming sanctions against Al-Qaeda); UNSC Res 1127 (1997), UNSC Res 1173 (1998); UNSC Res 1221 (1999) (concerning the National Union for the Total Independence of Angola (UNITA)); UNSC Res 942 (1994) (concerning the Republika Srpska); UNSC Res 1171 (1998) (concerning rebels in Sierra Leone), and, to a certain extent, UNSC Res 792 (1992) (concerning the Khmer Rouge).

Also, compliance is limited by the frequent lack of knowledge and training. Even when the rules are known, non-state armed groups feel that respecting IHL has no advantage for them. Even when they comply with IHL, their conduct remains illegal under domestic law; they are considered criminals, if not terrorists.

Another challenge faced by armed groups is a lack of command and control. While an efficient command and control structure is essential for the respect for IHL, it is often the first aim of states to destroy that of an armed group (and this is not contrary to IHL). At any rate, illegality generally leads to the compartmentalization of the group's structure into small cells. A fighter in an illegal armed group often does not even know who his or her commander is, or what the overall plan is.

Their technological inferiority is also a factor: they either have limited, old or self-made technology or when they possess more sophisticated technology, they cannot use it responsibly.

When it comes to the law itself and its adaptation to non-state armed groups, several problems have already been mentioned. Besides, while IHL applicable to NIACs was developed for situations like that of the Spanish Civil War, today's armed groups do not always aim to control territory. This can of course never be seen as an argument to disregard Common Article 3 applicable to all NIACs, including when an armed group does not control territory. However, the principle that the only legitimate aim of warfare is to weaken the adversary's military potential appears to be beside the point. Several contemporary armed groups will never have the military capacity to defeat the states they are fighting against, *inter alia* because of efficient measures of force protection on the opposing side. In addition, weakening the enemy's military potential may sometimes not even be the aim of the group; rather, they may have a wide variety of end goals, such as hindering the state's construction of a dam in the area where the population they are defending lives.

Finally, an important obstacle to obtaining better respect for IHL from armed groups is that such engagement is not welcome, if not even criminalised by states. There are three main reasons why states, parts of the public, and some academics object to engaging armed groups. First, many state that engagement by international actors encourages armed groups to continue employing violence, which inevitably contributes to human suffering. A world without armed groups would be preferable, just as a world without armed conflicts. Nevertheless, armed groups and armed conflicts are a reality that will not disappear if the international community ignores them.

Second, more moderate opponents accept engaging some, but not all, armed groups. In my view, we must attempt to engage all groups and leave it to them to reject such engagement. From a humanitarian point of view, distinctions between 'good' and 'bad' armed groups would mean that those civilians in greatest need for protection would be deprived of it because they are in the hands of a group whose methods or ideology are utterly rejected by the international community. Engaging all groups would also avoid a diplomatic problem. If we refused, for example, to engage Hezbollah in Lebanon or the Taliban in Afghanistan, how could we have justified engaging the Revolutionary Armed Forces of Colombia (FARC) to the government of Colombia? Therefore, the only reasonable limitation to engagement is to require that the group

constitutes a genuine armed group fulfilling the organization requirements of IHL,⁹¹ engaged in a NIAC.

Third, the most recent and important obstacle to engaging armed groups is linked to the fight against terrorism.⁹² The US, for instance, has criminalised providing any support to 68 groups currently on its ‘terror’ list,⁹³ which includes some armed groups involved in NIACs. Furthermore, the US considers that mere training in IHL qualifies as providing ‘support’ to armed groups.⁹⁴ This view, however, is incompatible with Common Article 3, which grants impartial humanitarian bodies the right to offer their services to armed groups and, if their offer is accepted, to provide such services to the groups. The criminalization of providing support to terrorist groups by the US and many other states is often justified by UN Security Council resolutions.⁹⁵ Under Article 103 of the UN Charter, such resolutions could indeed prevail over Common Article 3. Still, in my view, they should be interpreted in conformity with Common Article 3 so that they do not affect the right of initiative of impartial humanitarian bodies.

Conclusion

IHL becomes increasingly irrelevant if it is not also respected by armed groups in NIACs. It is, however, too rarely analysed from the point of view of armed groups, both on its substance and concerning its implementation. The considerable development of IHL of NIACs during the last 30 years, which mainly occurred through alleged customary rules, has brought it much closer to IHL of IACs. There are also many good reasons for such an analogy. Yet, armed groups and their reality are often forgotten in this development. Many rules are nevertheless realistic for them, others may be interpreted realistically, but some may need to be applied according to a sliding scale adapted to the capacity of the group, thus possibly abandoning the principle of equality of belligerents before IHL. In any case, such IHL rules must be better implemented by, with, and against armed groups. This presupposes a dialogue, which should never be criminalised, to increase their sense of ownership of IHL. The conclusion of ad hoc agreements or unilateral declarations may help overcome this ownership gap. Deeds of Commitment suggested to armed groups by the NGO Geneva Call play a pioneering role in this respect.

Non-state armed groups should have a say in the drafting of rules applicable to NIACs and be assisted in implementing their obligations, including by training their members. Their respect for IHL should be monitored and rewarded, and they should be encouraged to report on their implementation of IHL. Individual group members are at least responsible for war crimes, and non-state armed groups themselves arguably also bear international responsibility for violations. Although IHL explicitly provides otherwise,⁹⁶ the fear of states that engaging with non-state armed groups legitimises them is the main obstacle to the necessary engagement of such groups by humanitarian organizations. In addition, both international and domestic anti-terrorism laws may classify such engagement as supporting terrorism. Indeed, all non-state

⁹¹ RODENHÄUSER, *Organizing Rebellion, Non-State Armed Groups under International Humanitarian Law, Human Rights Law and International Criminal Law*, *op. cit.*, pp. 61–114.

⁹² For concern expressed on the trend criminalizing humanitarian organizations’ engagement with non-State armed groups, see UNSC, “Report of the Secretary General on the protection of civilians in armed conflict,” 2012, para. 46.

⁹³ This figure is current as of 22 August 2019. See US Department of State, “Foreign Terrorist Organizations” at <http://www.state.gov/j/ct/rls/other/des/123085.htm>, last accessed on 22 August 2019.

⁹⁴ See, 18 US Code Annotated Section 2239B(a)(1) (West); see also Supreme Court of the United States, *Holder v. Humanitarian Law Project*, 561 U.S. (2010), Nos 08-1498 and 09-89.

⁹⁵ See UNSC Res 1373, 2001.

⁹⁶ See Common Art. 3(4) of the GCs.

armed groups are considered, at least by the state against which they are fighting, to be terrorist organizations. Then again, criminalising the engagement of an armed group involved in a NIAC violates IHL irrespective of whether the group is classified as a terrorist organization.

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