

# **The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules**

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## Abstract

In the last few decades, the role of non-state armed groups has become an essential topic of analysis and discussion to better understand international humanitarian law dynamics. While their increasing importance is uncontroversial, their place and regulation in specific areas of international law still remains unclear or insufficiently explored. Chief among these is the possible non-state armed groups' international responsibility. Although it is undisputed that some of these entities breach their international law obligations, others seemingly engage with certain rules on the topic. This article addresses some legal consequences of such scenarios. Taking into account the principle of equality of belligerents in non-international armed conflicts, two issues are dealt with: i) the existence of "non-state" organs that could trigger the attribution of violations of international rules to non-state armed groups; ii) possible reparations owed by these non-state entities for their breaches during armed conflicts.

## A. Introduction

In the last few years, non-state armed groups (NSAGs) have become an essential topic of analysis and discussion in order to better understand international humanitarian law (IHL) dynamics. Although certain commentators still consider contemporary public international law to be predominantly State-oriented,<sup>1</sup> it is undeniable that over the last three decades a variety of different NSAGs have played important roles within the international realm.<sup>2</sup> They have emerged to challenge and progressively change the State-centric system of international law, generating many discussions and complex debates – many of which are yet to

<sup>1</sup> On the state-centrism of international law, J. Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors', in J. Petman & J. Klabbers (eds), *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi* (2003), 351, 354-357; B. K., Woodward, *Global Civil Society in International Lawmaking and Global Governance. Theory and Practice* (2010), 2; and H. Thirlway, *The Sources of International Law* (2014), 16-17.

<sup>2</sup> E. Heffes, 'Generating Respect for International Humanitarian Law. The Establishment of Courts by Organized Non-State Armed Groups in Light of the Principle of Equality of Belligerents', in T. Gill (ed.), 18 *Yearbook of International Humanitarian Law* (2015), 181, 181.

be settled.<sup>3</sup> While their increasing importance is uncontroversial, their place and regulation in specific areas of international law, such as in human rights law<sup>4</sup> or with respect to their use of force,<sup>5</sup> remains unclear or insufficiently explored.<sup>6</sup>

In the IHL sphere, however, it seems to be undisputed that in the context of non-international armed conflicts (NIACs) they have equal obligations to those of States,<sup>7</sup> as recognized by Common Article 3 (CA3)<sup>8</sup> of the *Geneva Conventions* of 1949 (GCs)<sup>9</sup> and the 1977 *Additional Protocol II (AP II)*<sup>10</sup> to the GCs. These provisions are of particular relevance because they allow the identification of a direct relationship between IHL rules and the parties to

<sup>3</sup> A. Clapham, 'Focusing on Armed Non-State Actors' in A. Clapham & P. Gaeta (eds), *The Oxford Handbook of International Law of Armed Conflict* (2015), 766, 769 [Clapham, Focusing on Armed Non-State Actors].

<sup>4</sup> Different authors have recently challenged the role of NSAGs in the sphere of international human rights law. See, for instance, D. Murray, *Human Rights Obligations of Non-State Armed Groups* (2016); and K. Mastorodimos, *Armed Non-State Actors in International Humanitarian Law and Human Rights* (2016).

<sup>5</sup> Among many others, see N. Tsagourias, 'Non-State Actors in International Peace and Security. Non-State Actors and the Use of Force', in J. d'Aspremont (ed.), *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law* (2011), 326; and K. Trapp, 'Can Non-State Actors Mount an Armed Attack?', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), 679.

<sup>6</sup> It shall be noted, however, that this paper will focus on IHL. Although the role of NSAGs with respect to international human rights law and the use of force have recently gained some momentum, they are beyond the scope of this article, and therefore will not be explored.

<sup>7</sup> J. Pejić, 'The Protective Scope of Common Article 3: More Than Meets the Eye' 93 *International Review of the Red Cross* (2011) 881, 189, 197-198; L. Moir, *The Law of Internal Armed Conflict* (2002), 52-58; J. Somer, 'Jungle Justice. Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict', 89 *International Review of the Red Cross* (2007) 867, 655, 661; and A.-M. La Rosa & C. Wuerzner, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law', 90 *International Review of the Red Cross* (2008) 870, 327, 327-329.

<sup>8</sup> Moir, *ibid.*, 30-88; Pejić, *ibid.*, 197-198.

<sup>9</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

<sup>10</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Second Protocol)*, 8 June 1977, 1125 UNTS 609.

NIACs, including non-state armed groups. This relationship is the same for all parties and it does not vary if the conflict is between States and groups or exclusively between the latter.

Interestingly, although with respect to IHL NSAGs might be on equal footing with States' armed forces, parties to the conflict are not equal, and possible consequences for their violations to their international obligations have been addressed differently. In this respect, all existing international courts and tribunals with jurisdiction over its violations only allow claims against States and individuals.<sup>11</sup> While some of them will be able to solve legal disputes between States, others focus their attention on the criminal responsibility of individuals. Thus, to put it in simple terms, although NSAGs are expected to comply with certain rules, their breach would not entail any legal consequence for the group. Every effective legal regime, however, implies that there must be certain consequences for the violation of the rules "[...] it seeks to promote."<sup>12</sup> In a world in which different non-state actors are constantly evolving at the national and international levels, these systems of individual and State responsibility imply that *a priori* NSAGs' international responsibility seems far from real. Considering that their actions are normally illegal from a State law perspective, their engagement with humanitarian rules is often dismissed or even rejected. Some commentators, indeed, insist that publicly dealing with these non-state entities could legitimize their goals and aims. As Cismas has correctly suggested with respect to their subjectivity, "legitimation may indeed take place; however, one needs to understand and emphasize that the resulting legitimation is that of the actor as rights-holder and duty bearer, not of its goals and conduct".<sup>13</sup>

By taking into account the principle of equality of belligerents for the creation of customary rules, this article attempts to show that, contrary to conventional thinking that NSAGs are violent and disrespectful of any given legal regime, some groups are not only aware of international law,<sup>14</sup> but even sometimes adopt measures embracing their possible international responsibility. Addressing these as positive steps may serve as a powerful incentive to change

<sup>11</sup> Clapham, *supra* note 3, 771; L. Condorelli & C. Kress, 'The Rules of Attribution: General Considerations' in J. Crawford, A. Pellet & S. Olleson (eds), *The Law of International Responsibility* (2010), 221, 233-234.

<sup>12</sup> A. Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution' in N. Gal-Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (2015), 304.

<sup>13</sup> I. Cismas, *Religious Actors and International Law* (2014), 75.

<sup>14</sup> H. Jo, *Compliant Rebels. Rebel Groups and International Law in World Politics* (2015), 48.

behavior by both NSAGs and States. As Sivakumaran has recently explained, “[the] key point is that armed groups should have some sort of role in the creation, translation and enforcement of humanitarian norms in order to foster a sense of ownership and therefore improve levels of compliance.”<sup>15</sup>

## B. Some Preliminary Definitions: What is a Non-State Armed Group?

“Relatively little is known about [...] [‘non-state armed groups’] [...]” in the international realm.<sup>16</sup> International law, neither defines what they are nor includes the notion of these entities as parties to armed conflicts. This can be explained by the reluctance of States to address the mere existence of NSAGs. Some specific treaty provisions, however, do refer to certain conditions that should be fulfilled by an entity in order to be considered as a non-state armed group. CA3 and *AP II* refer to non-state entities when defining their scope of application. While the former is addressed to “[...] each Party to the conflict [...]” of a non-international character, *AP II*, as expressed in its Article 1 (1) is intended to be applied only in NIACs that take place between the armed forces of a State and “[...] dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

Several organizations and international tribunals have attempted to tackle this issue in order to elucidate which groups are bound by IHL. Geneva Call, a non-governmental organization engaging with NSAGs to increase their respect of humanitarian rules, uses instead the term “armed non-state actors”. It refers to “[...] organized armed entities that are primarily motivated by political goals, operate outside effective state control, and lack legal capacity to become

<sup>15</sup> S. Sivakumaran, ‘Implementing Humanitarian Norms Through Non-State Armed Groups’, in H. Krieger (ed.) *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region* (2015), 125, 145-146 [Sivakumaran, Implementing Humanitarian Norms]. The notion of ownership is being used in this article to cover the capacity and willingness of NSAGs “[...] to set, and/or take responsibility for the respect of, norms intended to protect civilians as well as other humanitarian norms applicable in armed conflict”. See in this sense Geneva Academy of International Humanitarian Law and Human Rights, *Rules of Engagement. Protecting Civilians through Dialogue with Armed Non-State Actors* (2011), 6, fn. 11.

<sup>16</sup> S. Sivakumaran, *The Law of Non-International Armed Conflict* (2012), 3 [Sivakumaran, Law of NIAC].

party to relevant international treaties.”<sup>17</sup> According to this organization, this includes “[...] armed groups, *de facto* governing authorities, national liberation movements, and non- or partially internationally recognized states.”<sup>18</sup>

The International Committee of the Red Cross (ICRC), in its Interpretative Guidance on the notion of direct participation of hostilities under IHL, has explained that:

“Organized armed groups belonging to a non-State party to an armed conflict include both dissident armed forces and other organized armed groups. Dissident armed forces essentially constitute part of a State’s armed forces that have turned against the government. Other organized armed groups recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as armed forces.”<sup>19</sup>

Certainly, it is clear that NIACs covered by CA3 imply the participation of at least one non-state armed group,<sup>20</sup> but the conditions set forth in that provision deserve further analysis. The ICTY has understood since its *Tadić* decision that these actors should have a minimum degree of organization.<sup>21</sup> The relevance of this element is also evidenced in decisions by the International

<sup>17</sup> P. Bongard & J. Somer, ‘Monitoring Armed Non-State Actor Compliance With Humanitarian Norms. A Look at International Mechanisms and the Geneva Call *Deed of Commitment*’, 93 *International Review of the Red Cross* (2011) 883, 673, 674, fn 3.

<sup>18</sup> *Ibid.*

<sup>19</sup> ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), 31-32.

<sup>20</sup> The ICTY has affirmed in this sense that there is a NIAC in the sense of CA3 “whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. *Prosecutor v. Dusko Tadić a/k/a “Dule”*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, IT-94-1-T, T.Ch. II, 10 August 1995, para. 70.

<sup>21</sup> *Ibid.* See also *Prosecutor v. Dusko Tadić a/k/a “Dule”*, Opinion and Judgment, IT-94-1, 7 May 1997, 193-194, para. 562; *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Muliu*, Judgment, IT-03-66-T, 30 November 2005, 18-41, paras. 46-102; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Judgment, IT-04-82, 10 July 2008, 89-92, paras. 197-203; Moir, *supra* note 7, 34-52.

Criminal Tribunal for Rwanda and by the International Criminal Court.<sup>22</sup> A list of non-exhaustive factors that should be taken into account in that regard has been defined by the ICTY in the *Boškoski* decision: i) the existence of a command structure; ii) the military (operational) capacity of the armed group; iii) its logistical capacity; iv) the existence of an internal disciplinary system and the ability to implement IHL; and v) its ability to speak with one voice.<sup>23</sup> Of course, not all factors need to be fulfilled and they are not a definitive list, but they do provide useful practical guidance.<sup>24</sup>

The lack of a unified terminology has led to the use of many different terms to refer to non-state entities involved in NIACs: “armed groups”, “non-state organized armed groups”, “armed non-state actors”, “armed opposition groups”, etc. While sometimes that depends on the international rules under analysis, as may be the case of *AP II*, others are related to the specific features of NSAGs that need to be stressed. In any case, all of those terms seem to comprise entities that: i) are illegal under domestic law; ii) are not part of governmental armed forces; iii) are mainly created to use armed violence; and iv) unlike governments, they will most likely cease to exist after the end of an armed conflict, either because they triumph in their struggle, eliminating the need to fight, or because they are defeated and disbanded.<sup>25</sup> The last two elements stress the intrinsic relation between the notion of NIAC and the notion of NSAG, since the latter cannot exist without the former.<sup>26</sup> Murray, however, presents one decisive factor in

<sup>22</sup> *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, 155, para. 620; *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, 29 January 2007, 79, para. 233.

<sup>23</sup> *Boškoski and Tarčulovski*, *supra* note 21, 89-92, paras. 197-203. Most of them, however, were drafted before in *Limaj*, *supra* note 21, paras 46, 94-102.

<sup>24</sup> Cf. *Boškoski and Tarčulovski*, *supra* note 21, para. 193.

<sup>25</sup> E. Heffes, ‘The Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law. Challenging the State-Centric System of International Law’, 4 *Journal of International Humanitarian Legal Studies* (2013) 1, 81, 91 [Heffes, Responsibility of Armed Opposition Groups]. There, the author affirms that armed opposition groups no longer exist after the end of an armed conflict, “whether because they result victorious or because they are dissolved”. See also M. Sassòli, ‘Two Fascinating Questions. Are all Subjects of a Legal Order Bound by the Same Customary Law and can Armed Groups Exist in the Absence of Armed Conflict?’, available at <http://www.ejiltalk.org/book-discussion-daragh-murrays-human-rights-obligations-of-non-state-armed-groups-3/> (last visited 20 December 2017) [Sassòli, Fascinating Questions], where Sassòli also argues against the existence of NSAGs in the absence of armed conflicts.

<sup>26</sup> On the link between the definition of NIACs and the elements that determine the existence of an NSAG, see M. Schmitt, ‘The Status of Opposition Fighters in a Non-International Armed Conflict’, 88 *International Law Studies. US Naval War College* (2012), 119.

determining their legal personality as duty bearer: the presence of a responsible command.<sup>27</sup> According to him, there must be “[...] an organisational structure capable of ensuring internal discipline, and thus capable of ensuring the group’s fulfilment of any obligation arising under international law”.<sup>28</sup>

Yet, Murray’s position still leaves a margin of uncertainty. Indeed, it is possible to find a wide variety of entities in terms of size, command and control capabilities, *modi operandi*, goals, and so on, also fulfilling the criterion of responsible command. For instance, while some NSAGs have strong individual leaders, such as Joseph Kony in the Lord’s Resistance Army (Uganda), Foday Sankoh in the Revolutionary United Front (RUF) in Sierra Leone, or John Garang in the Sudan People’s Liberation Movement/Army (SPLM/A) in Sudan, others may be more dispersed and decentralized.<sup>29</sup>

### C. The International Obligations of Non-State Armed Groups: Why are They Bound by IHL?

As a party to NIACs either regulated only by CA3, or also by *AP II*, the IHL obligations of NSAGs seem to be clear. Accepting that they can potentially be internationally responsible for the violation of these rules, however, raises the question as to why they are bound by them in the first place.<sup>30</sup> Addressing this issue will allow us to present a framework aimed at generating greater levels of compliance.<sup>31</sup>

<sup>27</sup> Murray, *supra* note 4, 75-77.

<sup>28</sup> *Ibid.*, 75.

<sup>29</sup> Jo, *supra* note 14, 39.

<sup>30</sup> E. Heffes, M. Kotlik & B. Frenkel, ‘Addressing Armed Opposition Groups through Security Council Resolutions: A New Paradigm?’, in F. Lachenmann, T. J. Röder & R. Wolfrum (eds), 18 *Max Planck Yearbook of United Nations Law* (2014), 32, 52-60; A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), 271-316; and Sivakumaran, *Law of NIAC*, *supra* note 16, 236-246.

<sup>31</sup> Some issues related to the reasons why NSAGs are bound by IHL have been partially explored in Heffes, *supra* note 2, 184-188.

## I. Contemporary Explanations of NSAGs' Obligation to Comply with IHL

When it comes to NSAGs, there is a general agreement regarding their obligation to comply with IHL and there is no significant distinction between their international duties under IHL and those of States.<sup>32</sup> The reasons why NSAGs are bound by IHL, however, lie beyond merely accepting the existence of their obligations. Different views have been proposed in this sense.<sup>33</sup> While some of them take into account their consent, others are based on their relationship with States.

Two traditional theories suggest that NSAGs are bound by IHL independently from their consent to these obligations. On the one hand, the argument of effective sovereignty, focuses on armed groups' territorial link to a State party to the *GCs*. It was pointed out in the Commentary to *GC I* that they are bound by the international obligations of previous administrations, in a similar way that successive governments are due to their claims to represent the country, or part of it.<sup>34</sup> On the other hand, the domestic legislative jurisdiction argument is the most commonly suggested and it is based on the State's capacity to legislate for all its nationals.<sup>35</sup> As explained in the Commentary to *GC II*, "[...] in most national legislations; by the fact of ratification, an international Convention becomes part of law and is therefore binding upon all the individuals of that country".<sup>36</sup>

These positions raise, at least *a priori*, some challenges that are difficult to address. With respect to the effective sovereignty over the territory argument, it derives NSAGs' rights and obligations exclusively from those already agreed upon by the State party to the conflict. Moreover, it is only applicable to the

<sup>32</sup> La Rosa & Wuerzner, *supra* note 7, 327-329.

<sup>33</sup> On the different theories, see the ICRC new commentary on CA3, para 507, available at [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#\\_Toc465169878](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169878) (last visited 21 December 2017).

<sup>34</sup> J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), 51.

<sup>35</sup> Moir, *supra* note 7, 53-54; A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocols on Non-International Armed Conflicts', 30 *International and Comparative Law Quarterly* (1981) 2, 416, 429.

<sup>36</sup> J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1960), 34.

extent that the non-state armed group itself purports to represent the State, which is not always the case. Regarding the domestic legislative jurisdiction argument, it only focuses on the link between national legislation and those members of NSAGs, challenging the status of rebels not only under domestic law but also under international law *vis-à-vis* the government, third States and the international community.<sup>37</sup> Both arguments, in short, entail at least two practical problems for IHL implementation. Firstly, NSAGs that might be committed to observe humanitarian rules are unlikely to have any commitment to domestic national legislation.<sup>38</sup> In this sense, to what extent is it possible to attain their compliance with rules imposed by their “enemies”? And secondly, these theories do not explain certain situations, such as when NSAGs, while having effective control over a territory, do not claim to represent the State.<sup>39</sup> Certainly, these issues affect why NSAGs feel obliged to follow any given rule.

There are also theories that actually recognize the direct relation between IHL and armed groups, highlighting the importance of their expressions of willingness to follow international law. It has been suggested in this sense that NSAGs are bound to IHL by virtue of the customary status of its content,<sup>40</sup> which has been further explored by Somer who affirms that “[...] in order for insurgents to be bound by a customary rule, their practice would need to be taken into account.”<sup>41</sup> The ICTY in the *Tadić* jurisdiction decision and the UN Commission of Enquiry’s Report on Darfur have actually supported the view that NSAGs already participate in the formation of customary IHL.<sup>42</sup> Sassòli has affirmed in this sense that:

<sup>37</sup> Cassese, *supra* note 35, 429-430.

<sup>38</sup> Moir, *supra* note 7, 54; and Cassese, *supra* note 35, 429-430.

<sup>39</sup> For further critiques, see J.-M. 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* (2002), 123-137; cf. J. d’Aspremont & J. De Hemptinne, *Droit international humanitaire* (2012), 98-99.

<sup>40</sup> Somer, *supra* note 7, 661; A. Bellal, G. Giacca & S. Casey-Maslen, ‘International Law and Armed Non-State Actors in Afghanistan’, 93 *International Review of the Red Cross* (2011) 881, 47, 53-56.

<sup>41</sup> Somer, *supra* note 7, 661-662; E. Heffes & M. Kotlik, ‘Special Agreements as a Means of Enhancing Compliance with IHL in Non-International Armed Conflicts: An Inquiry Into the Governing Legal Regime’, 96 *International Review of the Red Cross* (2015) 895-896, 1195, for an analysis on special agreements concluded in NIACs as sources of IHL.

<sup>42</sup> See *Prosecutor v. Dusko Tadić aka “Dule”*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, 51, paras 107-108; *Letter from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/2005/60, 31 January 2005, Annex.

“In my view, customary IHL of non-international armed conflicts must already now be derived from both State and non-State armed actors’ practice and *opinio juris* in such conflicts. [...] [Customary] law is based on the behavior 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 behavior. Non-State actors would logically be subject to customary law they contribute to creating.”<sup>43</sup>

Although this still remains a minority view,<sup>44</sup> it is proposed that there is a good case to argue that NSAGs already participate in the formation of customary rules, which can be deduced by taking into account their public statements in the form of unilateral declarations, special agreements and codes of conduct. These sources serve the purpose of having NSAGs affirming their commitment to apply a set of international rules.<sup>45</sup> Only reviewing those expressions of willingness will make it possible to appreciate armed groups’ practices and *opinio iuris*. In this sense, from a NSAG’s perspective an opportunity to participate in law-making processes can serve as a powerful incentive to change behavior.<sup>46</sup>

Certainly, including NSAGs in the development of customary international rules will have to face different challenges, such as selecting armed groups<sup>47</sup> capable of doing it, monitoring and interpreting their actions to ascertain the existence of *consuetudo* and *opinio iuris*, and weighing it along with those of States and other armed groups, amongst many others. Furthermore, Ryngaert explains that if arguing in favor of NSAGs’ participation in the norm-creation process,

“[...] one should also be willing to accept the consequence that the content of the customary rules thus formed may not, as a matter of course, be a humanitarian’s dream. Armed opposition groups [...] are not known for their respect of IHL. Indeed, quite the contrary

<sup>43</sup> M. Sassòli, ‘Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law’, 1 *Journal of International Humanitarian Legal Studies* (2010) 5, 21-22 [Sassòli, Taking Armed Groups Seriously].

<sup>44</sup> Somer, *supra* note 7, 662; and Heffes & Kotlik, *supra* note 41, 1203.

<sup>45</sup> O. Bangerter, *Internal Control: Codes of Conduct within Insurgent Armed Groups. Small Arms Survey* (2012).

<sup>46</sup> Jo, *supra* note 14, 256.

<sup>47</sup> For a proposal on NSAGs’ criteria to be engaged, *Ibid.*, 260-264.

is true. Accordingly, including non-state actors in the process of customary law formation may lead to regression [...].<sup>48</sup>

Indeed, there is evidence that several NSAGs do not actually respect international norms. Wood has argued in this sense that violence intentionally directed against civilians “[...] is a short-term strategy that helps insurgents to recoup lost human and material resources”.<sup>49</sup> However, it is also possible to find that certain NSAGs are abiding by those rules. Jo has argued that

“[rebels] with secessionist aims are one of the best candidates for compliant rebels. Groups that rely on international supporters that care about their human rights records also abide by humanitarian rules and refrain from civilian abuse. [...] [As] the M23 case illustrates, some rebel groups consciously care about international law and conduct diplomacy about their human rights records.”<sup>50</sup>

Indeed, she proposes three hypotheses that are worth noting. Firstly, that NSAGs with political wings are more likely to comply with international norms. According to her, this would be even stronger if this branch had a firm control over the group’s military section. Secondly, that NSAGs with secessionist aims are more likely to comply with international law. Since these non-state entities can establish social relations with civilians because of family or ethnic ties, the expectation is that groups with social relations are more likely to refrain from violence against civilians. Thirdly, Jo argues that NSAGs that rely on foreign sponsors with a human rights approach are more likely to comply with international law. Those non-state entities that open themselves to organizations such as the ICRC or Geneva Call, according to her, are more likely to make commitments to international law, and therefore positively modify their behaviors.<sup>51</sup>

<sup>48</sup> C. Ryngaert, ‘Non-state Actors in International Humanitarian Law’, in J. d’Aspremont (ed.) *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law* (2011), 284, 289.

<sup>49</sup> R. M. Wood, ‘Understanding Strategic Motives for Violence Against Civilians During Civil Conflict’, in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region* (2015), 13, 15.

<sup>50</sup> Jo, *supra* note 14, 144.

<sup>51</sup> *Ibid.*, 110-111.

There is actually some evidence indicating that when NSAGs have had a role in the drafting of rules, greater levels of compliance were achieved.<sup>52</sup> For instance, at the beginning of 2017 more than forty children left NSAGs operating in the Democratic Republic of Congo after engaging with Geneva Call on the ban of child soldiers.<sup>53</sup> Also, non-state armed groups' commitments can have an impact on other actors. Sivakumaran in this line has affirmed that "[...] [commitments] by one group may later be used as a model by other groups."<sup>54</sup>

Non-state armed groups' respectful actions might also have an impact on the governmental side. As Schneckener and Hofmann have explained with respect to Geneva Call:

"[...] [NSAGs] decisions to abstain from using landmines have in the past facilitated the accession of States to the 1997 Ottawa Treaty, as social pressure on the State government built up once a local non-State armed actor had signed the Deed of Commitment. This happened in Sudan after the signature of the Sudan People's Liberation Movement/Army (SPLA/M) and in Iraq after the accession of the Kurdistan Democratic Party (KDP) and regional governments led by the Patriotic Union of Kurdistan (PUK)."<sup>55</sup>

As Martin Barber has affirmed elsewhere when referring to the SPLM/A – the military branch of the SPLM/M –, "[it] is clear from conversations with senior officials of the Government, that they would not have felt able to ratify the Treaty, if the SPLM/A had not already made a formal commitment to observe its provisions in the territory under its control."<sup>56</sup>

<sup>52</sup> *Ibid.*, 256.

<sup>53</sup> Geneva Call, *DR Congo: Child Soldiers Leave Armed Groups Following Geneva Call's Awareness-Raising Efforts*, available at <https://genevacall.org/dr-congo-child-soldiers-leave-armed-actors-following-geneva-calls-awareness-raising-efforts/> (last visited 21 December 2017).

<sup>54</sup> Sivakumaran, *Implementing Humanitarian Norms*, *supra* note 15, 131.

<sup>55</sup> U. Schneckener & C. Hofmann, 'The Power of Persuasion. The Role of International Non-Governmental Organizations in Engaging Armed Groups', in H. Krieger *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region* (2015), 79, 102.

<sup>56</sup> Anki Sjöberg, *Armed Non-State Actors and Landmine*. Vol. 1: *A Global Report Profiling NSAs and Their Use, Acquisition, Production, Transfer and Stockpiling of Landmines*, Geneva Call and the Program for the Study of International Organization(s), 2005, 1,

Geneva Call has had a similar impact in other armed conflicts. In Burundi, for instance, the fact that the CNDD-FDD had already committed to the Deed of Commitment banning anti-personnel mines

“[...] facilitated the acceptance and implementation of the [Mine Ban] Treaty when the movement came to power in 2005. In Iraq, officials of the KDP and PUK, two signatory groups that became members of the national authorities after the fall of the Saddam Hussein’s regime in 2003, encouraged the government to join the Mine Ban Treaty.”<sup>57</sup>

To some extent, advancing on the behaviors of NSAGs requires an *ex post facto* analysis with respect to the specific instances of NSAGs’ participation. Although it would exceed the scope of this paper to examine the full content of customary IHL, some basic aspects should be mentioned. Firstly, it is well established that the provisions of CA3 are considered basic humanitarian rules applicable in any armed conflict.<sup>58</sup> Therefore, it can be argued that the obligations contained therein cannot be in any way diminished by the practices of armed groups or States. This could be, for example, the outcome that the international community faces concerning the action of Daesh and Al Nusrah Front. In a similar sense, the SPLM’s understanding of persons who may be targeted included individuals who were

“[...] directly or indirectly cooperating with the autocratic regime in Khartoum in order to sustain and consolidate its rule and to undermine the objectives and efforts of the People’s Revolution [...] [and individuals] who propagate or advocate ideas, ideologies or philosophies or organize societies and organizations inside the country or abroad, that tend to uphold or perpetuate the oppression

available at <http://www.ruig-gian.org/research/outputs/outputb049.html?ID=76> (last visited 21 December 2017).

<sup>57</sup> Geneva Call, *Engaging Armed Non-State Actors In a Landmine Ban. The Geneva Call Progress Report 2000-2007*, available at [https://www.genevacall.org/wp-content/uploads/dlm\\_uploads/2013/12/raport.pdf](https://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/raport.pdf) (last visited 21 December 2017).

<sup>58</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement, ICJ Reports 1986, 14, 113-114, para. 218.

of the people or their exploitation by the Khartoum regime or by any other system of similar nature.”<sup>59</sup>

As it can be seen, this could be contrary to IHL standards, as set in CA3 (1), when it refers to “[...] [persons] taking no active part in the hostilities [...]” who cannot be the target of certain acts as listed therein.

Secondly, it will have to struggle with the most difficult barrier: the erosion of the idea of States as the only international law-maker entity.<sup>60</sup> Yet, one cannot ignore the value of NSAGs’ public expressions of willingness in order to deal with IHL effectiveness issues. As Sivakumaran has claimed, “[only] by understanding what the parties think of the rules, why they comply with them, and why they do not, can the law be better tailored to meet the specificities of non-international armed conflicts”<sup>61</sup>

## II. Generating Respect for IHL and the Principle of Equality of Belligerents

The principle of equality of belligerents affirms that all the parties to an armed conflict have the same rights and obligations, regardless of their cause.<sup>62</sup> It is implied in CA3, which directly addresses “each party” to a NIAC, and by Article 1 (1) of *AP II*. In the case of non-state armed groups, their obligation to comply with those provisions remains despite any domestic legislation criminalizing their use of force against the State.<sup>63</sup>

Based on this principle, it is proposed that not only should all parties to the conflict be bound by IHL to the same extent but also for the same legal

<sup>59</sup> SPLM/A, *Penal and Disciplinary Laws*, 4 July 1984, Section 29, § 1c Report on SPLM/A Practice, 1998, Chapter 1,2, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter1\\_rule1\\_sectionb](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter1_rule1_sectionb) (last visited 21 December 2017); J.-M. Hanckerts & L. Doswald Beck, *Customary International Humanitarian Law*, Vol. II Practice, Part 1 (2005), 126-127.

<sup>60</sup> Several very interesting and even ground-breaking answers to some of these issues are proposed in Sassòli, *Taking Armed Groups Seriously*, *supra* note 43, 10-14.

<sup>61</sup> Sivakumaran, *Law of NIAC*, *supra* note 16, 4.

<sup>62</sup> Cf. Somer, *supra* note 7, 663-664; and generally C. Greenwood, ‘The Relationship Between *ius ad bellum* and *ius in bello*’, 9 *International Law Studies* (1983) 4, 221.

<sup>63</sup> M. 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 M. Schmitt & J. Pejić, *International law and Armed Conflict: Exploring the Faultlines* (2007), 241, 256 [Sassòli, *Ius ad bellum*].

reasons. This is because the contrary would entail the subordination of NSAGs' rights and obligations to those previously accepted by States and would affect their equal status. In this sense, IHL has greater possibilities to be respected if every party to a conflict has a certain level of ownership of its rules, and with regards to NSAGs if such rules are not merely imposed by the States fighting against them. That is precisely what occurs with the abovementioned effective sovereignty argument and the domestic legislative jurisdiction perspective. They seem to fail when addressing non-state armed groups' actions or expressions, denying them any significance whatsoever, and thereby ignoring the participation of these entities. By challenging the equality of belligerents, they may actually adversely affect IHL as an effective body of law.

The explanation that grants NSAGs a role in the process of creation of those rules that regulate their actions thus has an important edge in terms of equality of the parties to NIACs and NSAGs' ownership of humanitarian norms.<sup>64</sup> Indeed, it is better placed to solve IHL compliance issues, which often go back to different circumstances, such as the unwillingness to acknowledge that an armed conflict is taking place, the absence of incentives to comply with IHL obligations, or even the lack of appropriate structures or resources to comply.<sup>65</sup> Bangerter has explained that IHL compliance will be enhanced only "[...] if the reasons used by armed groups to justify respect or lack of it are understood and if the arguments in favor of respect take those reasons into account."<sup>66</sup> Acknowledging that NSAGs can have a role in the formation of the law applicable upon them is certainly an important step in this direction.<sup>67</sup>

In particular, considering that the value of their public expressions of willingness is a useful tool for understanding their views on IHL. In fact, non-state armed groups are keen on using unilateral declarations, special agreements and codes of conduct, and these have been encouraged by States, international organizations, the International Committee of the Red Cross (ICRC) and other non-governmental organizations.<sup>68</sup> As it will be seen, this is also the case when

<sup>64</sup> Somer, *supra* note 7, 663-664.

<sup>65</sup> ICRC 'Improving Compliance with International Humanitarian Law: ICRC Experts Seminars' (2003), 20-21, available at [https://www.icrc.org/eng/assets/files/other/improving\\_compliance\\_with\\_international\\_report\\_eng\\_2003.pdf](https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_report_eng_2003.pdf) (last visited 21 December 2017); cf. O. Bangerter, 'Reasons why Armed Groups Choose to Respect International Humanitarian Law or not', 93 *International Review of the Red Cross* (2011) 882, 353, 357.

<sup>66</sup> Bangerter, *ibid.*, 353 and 383.

<sup>67</sup> Heffes, Kotlik & Frenkel, 2015, *supra* note 30, 59.

<sup>68</sup> Sassòli, *Taking Armed Groups Seriously*, *supra* note 43, 30.

dealing with their possible international responsibility. By publicly recognizing IHL violations, or by establishing formal mechanisms of reparation, NSAGs take an active role in the development and reaffirmation of the rules that could be applied when a breach is attributed.

In sum, the proposed theory tries to narrow the breach between theoretical explanations and real strategies to address IHL compliance. To that end, a broad interpretation of the principle of equality of belligerents takes into account NSAGs' contributions. Thus, this will serve for the purpose of ensuring the application of IHL equally and realistically.<sup>69</sup>

#### D. International Responsibility of Non-State Armed Groups: Why is it Important?

In general, the importance of holding non-state armed groups internationally responsible is related to different factors. Bellal, for instance, recognizes a moral perspective, “[...] as the group may be condoning, justifying and even inciting the individual to commit crimes.”<sup>70</sup> Interestingly, she also claims that this can enable “[...] better implementation of international law, for instance by calling on the group to change its practice rather than simply punish the individual [...]”.<sup>71</sup> Moffet focuses on a different aspect by affirming that “[...] [it] provides [for the victims] an important psychological function in appropriately directing blame at those who committed the atrocity against them and to relieve their guilt.”<sup>72</sup> Zegveld also explains that

“[...] [in] order to enforce international law applicable to armed opposition groups effectively, we should be able to involve the group itself as a collectivity. Indeed, the acts that are labelled as international crimes find their basis in the collectivity. [...] Therefore, the most challenging level of accountability is the accountability of armed opposition groups as such.”<sup>73</sup>

<sup>69</sup> *Ibid.*, 13-26.

<sup>70</sup> Bellal, *supra* note 12, 305.

<sup>71</sup> *Ibid.*

<sup>72</sup> L. Moffet, ‘Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda’, in N. Gal-Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings* (2015), 323, 324-325.

<sup>73</sup> L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002), 133.

When dealing with this topic, Sassòli has also proposed to “[...] enforce IHL directly and through international mechanisms against the armed group as a group.”<sup>74</sup> By referring to Zegveld, he explained that international law must indeed be adapted to the current international realm, in which “[...] a variety of actors from multinational corporations to indigenous peoples, non-governmental organizations and armed groups play an increasing role.”<sup>75</sup> Probably, the most important reason can be found in the gap created by the rules on international responsibility.<sup>76</sup> States and individuals, separately, can both be responsible for violating an international obligation.<sup>77</sup> On the one hand, individual criminal responsibility is applied over NSAGs’ members, but only ensures that a specific set of violations is punished, those considered to amount to international crimes, e.g. war crimes and crimes against humanity.<sup>78</sup> On the other hand, *a priori*, States should not be held responsible for the actions of NSAGs acting beyond their control.

As Murray has pointed out, this “confirms the necessity of directly subjecting the armed groups themselves to the rule of international law, so that they may be held to account and a legal vacuum avoided”.<sup>79</sup> This has already been affirmed by the British Secretary of State for Foreign Affairs in 1861 with respect to an unrecognized *de facto* government: “Her Majesty’s Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a state are injured by a *de facto* government, the state so aggrieved has a right to claim from the *de facto* government redress and reparation”.<sup>80</sup> The existence of NSAGs’ international responsibility, therefore, shall be undertaken in the interests of both the affected individuals and the international community, and legal gaps should be avoided.

<sup>74</sup> Sassòli, *Taking Armed Groups Seriously*, *supra* note 43, 9.

<sup>75</sup> *Ibid.*, 10; Zegveld, *supra* note 73, 224.

<sup>76</sup> K. Schmalenbach, ‘International Responsibility for Humanitarian Law Violations by Armed Groups’, in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region* (2015), 470, 495-496.

<sup>77</sup> M. Dixon, *Textbook on International Law*, 7th ed. (2007), 252-253 and 284.

<sup>78</sup> Zegveld, *supra* note 73, 106.

<sup>79</sup> Murray, *supra* note 4, 132.

<sup>80</sup> *Ibid.*

## I. Traditional Approaches to Non-State Armed Groups' International Responsibility

In the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),<sup>81</sup> the International Law Commission (ILC) decided to regulate the conduct of a certain type of NSAG: insurrectional movements that eventually become the new government of States. Article 10 affirms that the conduct of “a movement, insurrectional or other” which establishes a new State “in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law”.<sup>82</sup> In order to determine the meaning of the phrase “movement, insurrectional or other”, the ARSIWA commentaries assert that “[...] the threshold for the application of the laws of armed conflict contained in the *Additional Protocol to the Geneva Conventions* of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (*Protocol II*) may be taken as a guide.”<sup>83</sup>

Therefore, *AP II* must be analyzed in order to understand what kind of NSAG can be considered as an insurrectional movement. As mentioned above, this treaty refers to “dissident armed forces or other organized armed groups”. Along this line, the commentary to the ARSIWA affirms that these dissident armed forces represent the essential components of an insurrectional movement.<sup>84</sup> As a consequence, it seems to be clear that Article 10 applies in the special case of the responsibility for the conduct of insurrectional movements in a NIAC within the scope of *AP II* – and therefore also of CA3. Interestingly, d’Aspremont recognizes that the *rationale* behind Article 10 is not only to ensure accountability, but also to prevent impunity for acts committed by non-state actors.<sup>85</sup> However, by using *AP II*'s definition as guidance, the commentary

<sup>81</sup> *Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission*, 2001, Vol. II 2, 26 [ARSIWA].

<sup>82</sup> ARSIWA, *supra* note 81, Art. 10. See also A. Clapham, *Brierly's Law of Nations*, 7th ed. (2012), 396 [Clapham, Law of Nations]; J. Crawford, *State Responsibility: The General Part* (2013), 170 [Crawford, State Responsibility]; and J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 554 [Crawford, Brownlie's Principles].

<sup>83</sup> *Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission*, 2001, Vol. II 2, 31, 51 Art. 10, para 9. (hereinafter ARSIWA with Commentaries).

<sup>84</sup> *Ibid.*

<sup>85</sup> J. d'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents', 58 *International and Comparative Law Quarterly* (2009) 2, 427, 432 [d'Aspremont, Rebellion].

actually required a high threshold for the application of ARSIWA, since in contrast to CA3, the Protocol does not cover all NIACs.

In terms of the responsibility of these NSAGs, the ILC has also recalled that while it is not concerned with the responsibility of subjects of international law other than States

“[a] further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces.”<sup>86</sup>

In any case, Article 10 of ARSIWA affirms that the responsibility of an insurrectional movement is recognized only when that group obtains power and replaces the government in the State’s territory, becoming responsible as a State for those actions committed when it was a NSAG.<sup>87</sup> This position has also been recently reaffirmed by the ICRC in its latest Commentary to CA3:

“The responsibility of armed groups for violations of common article 3 can also be envisaged if the armed group becomes the new government of a State or the government of a new State. In these circumstances, the conduct of the armed group will be considered as an act of that State under international law.”<sup>88</sup>

Ago and Crawford explain the basis of this view by referring to the notion of “continuity” between the insurrectional movement and the State created by its actions.<sup>89</sup> Ago states in this sense that

<sup>86</sup> ARSIWA with commentaries, *supra* note 83, 51.

<sup>87</sup> H. Atlam, ‘National Liberation Movements and International Responsibility’, in M. Spinedi & B. Simma (eds), *United Nations Codification of State Responsibility* (1987), 35, 38 and 51–52; G. Cahin, ‘The Responsibility of Other Entities: Armed Bands and Criminal Groups’, in J. Crawford, A. Pellet & S. Olleson (eds), *The Law of International Responsibility* (2010), 331, 248 and 253.

<sup>88</sup> ICRC ‘Commentary on Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field’ (2016), para. 890, available at [https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6C DFA490736C1C1257F7D004BA0EC#863\\_B](https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6C DFA490736C1C1257F7D004BA0EC#863_B), (last visited 21 December 2017).

<sup>89</sup> Crawford, *State Responsibility*, *supra* note 82, 174.

“the affirmation of the responsibility of a newly-formed State for any wrongful acts committed by the organs of an insurrectional movement which preceded it would be justified by virtue of the continuity which would exist between the personality of the insurrectional movement and that of the State to which it has given birth. [...] The attribution to the new State of the acts of organs of the insurrectional movement would therefore be only a normal application of the general rule providing for the attribution to any subject of international law of the conduct of its organs.”<sup>90</sup>

Although the rule has been applied in certain arbitral decisions during the first half of the 20th century,<sup>91</sup> practices of States and NSAGs confirming this Article are rare,<sup>92</sup> if not non-existent. By failing to deal with real-world practice, and in particular with armed groups’ actions or expressions, Article 10 may pay a very high cost in terms of effectiveness. In the end, as a rule that has never been applied by the entities included within its scope of application, its usefulness remains unclear.

<sup>90</sup> R. Ago, *Fourth Report on State Responsibility*, *Yearbook of the International Law Commission* (1972), Vol. II, 131-132, available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_264.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_264.pdf) (last visited 21 December 2017).

<sup>91</sup> *Bolivar Railway Company*, Mixed Claims Commission Great Britain-Venezuela constituted under the protocols of 13 February and 7 May 1903, Opinion on Merits, 9 Reports of International Arbitral Awards, 445, 453; *Puerto Cabello and Valencia Railway Company*, Mixed Claims Commission Great Britain-Venezuela constituted under the protocols of 13 February and 7 May 1903, Opinion on Merits, 9 Reports of International Arbitral Awards, 510, 513; *Dix*, Mixed Claims Commission United States-Venezuela constituted under the protocol of 17 February, 9 Reports of International Arbitral Awards, 119, 120; *Henry*, Mixed Claims Commission United States-Venezuela constituted under the protocol of 17 February, 9 Reports of International Arbitral Awards, 125, 133; *French Company of Venezuelan Railroads*, Mixed Claims Commission France-Venezuela constituted under the protocols of 19 February 1902, Opinion, 31 July 1905, 10 Reports of International Arbitral Awards, 285, 354; *Georges Pinson v. United Mexican States*, Mixed Claims Commission France-Mexico, Decision, 24 April 1928, 5 Reports of International Arbitral Awards, 325, 353. See also S. I. Verhoeven, ‘International Responsibility of Armed Opposition Groups. Lessons from State Responsibility for Actions of Armed Opposition Groups’ in N. Gal-Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings* (2015) 285, 287–288.

<sup>92</sup> d’Aspremont, *Rebellion*, *supra* note 85, 431–432.

## II. Towards an Alternative Framework of Non-State Armed Groups' International Responsibility

Before accepting that NSAGs can be internationally responsible, the possible applicable rules to their behaviors should be clarified. As it was previously submitted, there is a good case to claim that armed groups already participate in the formation of customary rules, mainly with respect to international humanitarian law. It is submitted that the same argument could be proposed for certain rules on international responsibility, which can be deduced by looking at their actions and behaviors.

### 1. Rules of Attribution

The ARSIWA Commentary refers to “attribution” as the assessment of the circumstances in which “conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State”.<sup>93</sup> For the purpose of this paper, however, “attribution” will be understood as linking an internationally wrongful act to a non-state armed group.

In general, depending on the organization of the entity, the attribution of the breach of an international obligation may not be an easy exercise. As it was previously affirmed, there is a variety of non-state armed actors in the international arena with different features. In this line, Zegveld has affirmed that this issue is “closely related to the problem of definition of armed opposition groups and it is a central aspect of their accountability. Armed opposition groups are abstractions. Like states, they act only through human beings”.<sup>94</sup> This notion is also supported by Sassòli, who affirms that “[NSAGs] have members and other persons exercising elements of their authority, who act in that capacity, and they have direction or control over some persons. A group is responsible for such persons.”<sup>95</sup> Bílková, by referring to Zegveld, has also followed this line of thought by stating that “it is accepted that [Armed] [Opposition] [Groups] must bear responsibility for wrongful acts committed by their organs/members”.<sup>96</sup>

<sup>93</sup> ARSIWA with commentaries, *supra* note 83, 38.

<sup>94</sup> Zegveld, *supra* note 73, 152.

<sup>95</sup> Sassòli, *Taking Armed Groups Seriously*, *supra* note 43, 47.

<sup>96</sup> V. Bílková, ‘Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law?’, in N. Gal-Or, C. Ryngaert & M. Noortmann

The ICRC has been ambiguous in this respect. While in its Customary Study it pointed out that NSAGs “incur responsibility for acts committed by persons forming part of such groups”,<sup>97</sup> in the recent Commentary to CA3 affirmed that “[international] law is unclear as to the responsibility of a non-State armed group, as an entity in itself, for acts committed by members of the group”.<sup>98</sup>

Traditionally, when dealing with States’ responsibility, the ILC presented the principles of attribution in Articles 4 to 11 of ARSIWA.<sup>99</sup> As a general rule, it established that “the conduct of any State organ shall be considered an act of that State under international law [...] whatever position it holds in the organization of the State. [...] An organ includes any person or entity which has that status in accordance with the internal law of the State”.<sup>100</sup> In this line, exploring NSAGs’ practices requires an analysis of the possible existence of “non-state” organs that could potentially be considered as such by international law. As long as armed groups actually take part in the implementation of international obligations, there may be possibilities to eventually identify signs of a nascent *consuetudo* and *opinio iuris*. To that end, a broader interpretation based on the principle of equality of belligerents could recognize the existence of these organs grounded on NSAGs’ own regulations. In this sense, the United Kingdom Manual of the Law of Armed Conflict considers that the word “law” in Article 6 (2) (c) of *AP II* “could also be wide enough to cover ‘laws’ passed by an insurgent authority”.<sup>101</sup> Also, the commentary to *AP II* affirms “the possible co-existence of two sorts

(eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings* (2015), 261, 279.

<sup>97</sup> J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law* Volume I (2005), 530.

<sup>98</sup> ICRC, *supra* note 88, para. 892.

<sup>99</sup> Although a detailed analysis of the possible application of all the rules of attribution to NSAGs’ behaviors could be useful, this article only focuses on some of them, excluding those that the authors believe are either inapplicable or too theoretical.

<sup>100</sup> ARSIWA, *supra* note 81, Art. 4. See also for an analysis of this rule Dixon, *supra* note 77, 248; C. Ahlborn, ‘Rules Of International Organizations And Responsibility’, SHARES Research Paper 02 2011/02, 37, available at <http://www.sharesproject.nl/wp-content/uploads/2012/04/SHARES-RP-02-final.pdf> (last visited 21 December 2017); D. Momtaz, ‘Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority’, in J. Crawford, A. Pellet & S. Olleson, *The Law of International Responsibility* (2010), 237, 239; Crawford, *Brownlie’s Principles*, *supra* note 82, 117–118; and Crawford, *State Responsibility*, *supra* note 82, 543.

<sup>101</sup> UK Ministry of Defence, ‘The Joint Service Manual of the Law of Armed Conflict’ (2004), 404, fn 94, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27874/JSP3832004Edition.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf) (last visited 21 December 2017).

of national legislation, namely, that of the State and that of the insurgents”.<sup>102</sup> Sivakumaran advances on a similar point by affirming that “reference to law in this context should not be limited to state law”.<sup>103</sup>

This proposition could be validated by real-world examples and practice of armed groups. For instance, the *Mouvement de Libération du Congo* includes within its Statute four “organs”: the President, the Political–Military Liberation Council, the General Secretariat and a military wing called “Liberation Army of Congo”.<sup>104</sup> Articles 12 to 16 determine the internal organization of each organ. Article 16, in fact, establishes that the military branch is composed of an “Army Commander”, or *Chief de Etat Major*, and other individuals who are in charge of different areas, such as personnel, intelligence, operations, logistics and civil and political affairs. According to the same provision, “all are appointed and removed by the Commander in Chief of the [Liberation Army of Congo] after favorable opinion of the politico-military council”.<sup>105</sup> Furthermore, the Code of Conduct of the Islamic Emirate of Afghanistan has an entire chapter on its organizational structure. Article 34 points out that “[the] persons responsible in the provinces are obliged to create a commission at the provincial level comprised of qualified members. [...] The provincial commission, along with each district chief and with the agreement of the person responsible in the province, should organize such commissions at the district level”.<sup>106</sup> Article 40 also deals with the internal organization of the group, determining that

“[it] is compulsory for the Mujahids to obey their [military] squad leader; for the squad leader to obey their district leader; for the district leader to obey the provincial leader; for the provincial leader to obey the organizing director and for the organizing director to

<sup>102</sup> Y. Sandoz, C. Swinarski & B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 1339.

<sup>103</sup> Sivakumaran, *Law of NIAC*, *supra* note 16, 306.

<sup>104</sup> Mouvement de Libération du Congo, ‘Statuts du Mouvement de Libération du Congo’ (Statute of the Liberation Movement of Congo) (1999), Art. 11, available at [http://theirwords.org/media/transfer/doc/cd\\_mlc\\_1999\\_09-28d0edd1d32a444ad3205b5f82476140.pdf](http://theirwords.org/media/transfer/doc/cd_mlc_1999_09-28d0edd1d32a444ad3205b5f82476140.pdf) (last visited 21 December 2017).

<sup>105</sup> *Ibid.*, Art. 16.

<sup>106</sup> Islamic Emirate of Afghanistan, ‘The Layha [Code of Conduct] For Mujahids’ (2010), Art. 112, available at <https://www.icrc.org/eng/assets/files/review/2011/irrc-881-munir-annex.pdf> (last visited 21 December 2017).

obey the Imam and Najib Imam as long as it is rightful under the Sharia.<sup>107</sup>

In Sudan, the leadership of the Justice and Equality Movement sent a “Command order” to all field commanders of the NSAG recalling the prohibition of child recruitment.<sup>108</sup> In 2010, the same group even established a “Committee for Human Rights” for which it appointed three lawyers and one representative of humanitarian affairs.<sup>109</sup> Also in Sudan, the *Statute of the Sudan Revolutionary Front* includes a chapter on its internal leadership structure. Article 11 establishes that it shall be composed of: “i) the Leadership Council, ii) The Chief, iii) The Deputy Chiefs / Head of Sectors; iv) The Secretariats, v) The Head of the Joint Forces Committee, vi) The rest of the Council members”.<sup>110</sup> The Constitution of the Sudan People’s Liberation Movement of 2008 also describes its organizational structure as follows: a) National organs, which includes the National Convention as the supreme political organ of the movement; b) State organs; c) County organs; d) Payam organs; e) Boma organs.<sup>111</sup>

In Colombia the *Ejército de Liberación Nacional* (National Liberation Army) and the *Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo* (FARC-EP) established in their “Rules of Conduct with the Masses” that

“14. Leaders and combatants should bear in mind that executions may only be carried out for very serious crimes committed by enemies of the people and with the express authorization in each

<sup>107</sup> *Ibid.*, Art. 40.

<sup>108</sup> Justice and Equality Movement, ‘Prohibiting Recruitment’ (2012), available at [http://theirwords.org/media/transfer/doc/sd\\_jem\\_2012\\_48-6fc3e6e13af6a631f2afcd86e7fb22bd.pdf](http://theirwords.org/media/transfer/doc/sd_jem_2012_48-6fc3e6e13af6a631f2afcd86e7fb22bd.pdf) (last visited 21 December 2017).

<sup>109</sup> Justice and Equality Movement, Presidential Decree No 71 ‘Establishment of A JEM Committee for Human Rights’ (2010), available at [http://theirwords.org/media/transfer/doc/sd\\_jem\\_2010\\_49-03a60fff4d0b8044d99e8b15eae55d2e.pdf](http://theirwords.org/media/transfer/doc/sd_jem_2010_49-03a60fff4d0b8044d99e8b15eae55d2e.pdf) (last visited 21 December 2017).

<sup>110</sup> Sudan Revolutionary Front, ‘Statute of the Sudan Revolutionary Front of 2012’ (2012), Art. 11, available at [http://theirwords.org/media/transfer/doc/ut\\_sd\\_srf\\_2012\\_27\\_eng-3a5dcae4a8d4ebe3cdc9fc28f5536d44.pdf](http://theirwords.org/media/transfer/doc/ut_sd_srf_2012_27_eng-3a5dcae4a8d4ebe3cdc9fc28f5536d44.pdf) (last visited 21 December 2017).

<sup>111</sup> Sudan Peoples’ Liberation Movement, ‘The Constitution of the Sudan People’s Liberation Movement SPLM’ (2008), Art. 12, available at [http://theirwords.org/media/transfer/doc/1\\_sd\\_splm\\_spla\\_2008\\_42-3d12760c83c083afb4b1d84fb0e2e5e.pdf](http://theirwords.org/media/transfer/doc/1_sd_splm_spla_2008_42-3d12760c83c083afb4b1d84fb0e2e5e.pdf) (last visited 21 December 2017).

case of each organization's senior governing body [...] The leadership must produce a written record setting out the evidence."<sup>112</sup>

Finally, through the signature of Geneva Call's Deeds of Commitment for the protection of children in armed conflicts and the prohibition of sexual violence and gender discrimination, several NSAGs have committed to issue "the necessary orders and directive to [their] political and military organs, commanders and fighters for the implementation and enforcement of [their] commitment [...]"<sup>113</sup>

As it can be noticed, these provisions recognize the existence of some sort of non-state armed groups' organs. Moreover, they may also provide for the distinction between *de jure* and *de facto* organs,<sup>114</sup> which with respect to States is enshrined in Article 5 of ARSIWA. While the former would include those "officially" designated by the armed group to act on its behalf, *de facto* organs would be those not having any official position by merely acting under its control.<sup>115</sup> In addition to those mentioned above, another example of a *de jure* member can be found in Sri Lanka, where there was an official "legal chief" exercising functions in the courts of the Liberation Tigers of Tamil Eelam.<sup>116</sup> Furthermore, they could serve to determine if NSAGs' organs were acting *ultra vires*, and therefore attribute their behavior to the non-state entity.<sup>117</sup> For instance,

<sup>112</sup> *Coordinadora Guerrillera Simón Bolívar, Reglas de Conducta con Masas* (Rules of Conduct with the Masses), Art. 14, available at [http://theirwords.org/media/transfer/doc/ut\\_co\\_farc\\_ep\\_eln\\_2009\\_03\\_eng-d6eeb91f83eb1e9976140625c24ff870.pdf](http://theirwords.org/media/transfer/doc/ut_co_farc_ep_eln_2009_03_eng-d6eeb91f83eb1e9976140625c24ff870.pdf) (last visited 21 December 2017).

<sup>113</sup> Geneva Call, *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict* (2010), Art. 8, available at [https://www.genevacall.org/wp-content/uploads/dlm\\_uploads/2013/12/DoC-Protecting-children-in-armed-conflict.pdf](https://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Protecting-children-in-armed-conflict.pdf) (last visited 21 December 2017); and Geneva Call, *Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination* (2012), Art. 7, available at [https://www.genevacall.org/wp-content/uploads/dlm\\_uploads/2013/12/DoC-Prohibiting-sexual-violence-and-gender-discrimination.pdf](https://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Prohibiting-sexual-violence-and-gender-discrimination.pdf) (last visited 21 December 2017).

<sup>114</sup> See in this sense Ahlborn, *supra* note 100, 39; Momtaz *supra* note 100, 243; Crawford, *State Responsibility*, *supra* note 82, 124; and Crawford, Brownlie's Principles, *supra* note 82, 545.

<sup>115</sup> Bílková, *supra* note 96, 279.

<sup>116</sup> C. Kamalendran "The Inside Story of "Eelam Courts"", *The Sunday Times Sri Lanka* (2 December 2008), available at <http://www.sundaytimes.lk/021208/news/courts.html> (last visited 21 December 2017).

<sup>117</sup> *Ultra vires* acts are considered under Article 7 in ARSIWA. See also Clapham, *Law of Nations*, *supra* note 82, 394; Dixon, *supra* note 77, 248; Ahlborn, *supra* note 100, 40,

the Special Rapporteur on Human Rights in Sudan stated in his report that the non-state armed group “bears responsibility for the violations and atrocities committed in 1995 by local commanders from its own ranks, although it has not been proved that they committed these actions on order from the senior leadership, nor is it known whether they have been or will be pardoned by superiors”.<sup>118</sup> Interestingly, Bílková addresses this possibility, but correctly points out its difficulties since the line between those acts carried out under non-state armed groups’ control and those in their members’ private capacity does not seem to be clear.<sup>119</sup> Based on the abovementioned scenarios, however, there is nothing to prevent NSAGs’ members to act *ultra vires*.

Although it has been recognized that the existence of an institutional link between individuals and the NSAGs may run into practical difficulties,<sup>120</sup> these examples indicate an organizational structure of the abovementioned NSAGs that resembles that of States. In this sense, they can serve as a promising road of action, proving a nascent *consuetudo* and *opinio iuris* by armed groups to the extent that they comply with the requirements of giving a legal basis for the existence of their organs. In the end, this could serve to attribute their members’ acts to the armed groups.

## 2. Rules on Reparations

Generally, reparations in the international arena can take the form of restitution, compensation, satisfaction and guarantees of non-repetition.<sup>121</sup>

42; Condorelli & Kress, *supra* note 11, 230; O. de Frouville, ‘Attribution of Conduct to the State: Private Individuals’, in J. Crawford, A. Pellet & S. Olleson (eds), *The Law of International Responsibility* (2010) 257, 263; Crawford, *State Responsibility*, *supra* note 82, 136; and Crawford, *Brownlie’s Principles*, *supra* note 82, 549.

<sup>118</sup> Special Rapporteur of the Commission on Human Rights, *Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives. Situation of Human Rights in the Sudan*, UN Doc. A/50/569, 16 October 1995, 73.

<sup>119</sup> Bílková, *supra* note 96, 280.

<sup>120</sup> Schmalenbach, *supra* note 76, 499-500.

<sup>121</sup> ARSIWA, Articles 30, 34, 35, 36 and 37. See also C. Tams, ‘Law-Making in Complex Process’, in C. Chinkin & F. Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (2015), 287, 291; Dixon *supra* note 77, 253; Ahlborn *supra* note 100, 48; R. Higgins ‘Overview of Part Two of the Articles on State Responsibility’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (2010), 537, 537–544; Brigitte Stern ‘The Obligation to Make Reparation’, in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (2010), 563, 565; Crawford, *State Responsibility*, *supra* note 82, 459–462; and Crawford, *Brownlie’s Principles*, *supra* note 82, 567.

Restitution requests “to re-establish the situation which existed before the wrongful act was committed”<sup>122</sup>, and in the context of a NIAC, may imply “such conduct as the release of persons wrongly detained or the return of property wrongly seized”.<sup>123</sup> Compensation relates to the “damage caused thereby, insofar as such damage is not made good by restitution” and includes “any financially assessable damage including loss of profits insofar as it is established”.<sup>124</sup> Satisfaction implies, among others,<sup>125</sup> measures such as “an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality”.<sup>126</sup> In this vein, “[satisfaction], [...] is the remedy for those injuries, not financially assessable, which amount to an affront [...] These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.”<sup>127</sup> Finally, guarantees of non-repetition<sup>128</sup> involve assurances aiming to “the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases”.<sup>129</sup> Instead, these are “being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation”.<sup>130</sup>

Non-state armed groups may not have the capacity to actually comply with all of these measures. In the aftermath of a NIAC, for example, the group may not even exist anymore,<sup>131</sup> either because they result victorious, they are dissolved or simply because they become another type of non-state entity.<sup>132</sup> In addition, these groups may not have any resources, or “they may have hidden such assets in off-shore accounts or laundered their resources through legitimate business making it difficult to trace”.<sup>133</sup> Still, Daboné explains that restitutions or

<sup>122</sup> ARSIWA, *supra* note 81, Art. 35.

<sup>123</sup> ARSIWA with Commentaries, *supra* note 83, 96.

<sup>124</sup> ARSIWA, *supra* note 81, Art. 36. See also, Case Concerning the Factory Chorzów, PCIJ Series A, No. 17 (1928), 27, 47; *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, paras. 80, 152.

<sup>125</sup> ARSIWA with Commentaries, *supra* note 83, 105-106.

<sup>126</sup> ARSIWA, *supra* note 81, Art. 37.

<sup>127</sup> ARSIWA with Commentaries, *supra* note 83, 106.

<sup>128</sup> ARSIWA, *supra* note 81, Art. 30.

<sup>129</sup> ARSIWA with Commentaries, *supra* note 83, 89. See also, *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, para. 123.

<sup>130</sup> ARSIWA with Commentaries, *supra* note 83, 90.

<sup>131</sup> Heffes, *Responsibility of Armed Opposition Groups*, *supra* note 25, 91.

<sup>132</sup> Sassòli, *Fascinating Questions*, *supra* note 25.

<sup>133</sup> Moffet, *supra* note 72, 334; Clapham, *supra* note 3, 768.

compensations could come from the resources of the former leaders of the group, or States and individuals who were enriched by the actions of that group.<sup>134</sup>

The possibility of non-state armed groups giving reparations, however, has been recognized both historically and recently. Historically, Ago gives three examples of State practice where NSAGs were requested to provide compensation for the damages caused by them. These cases are the American Civil War (1861–1865), the Spanish Civil War (1936–1939) and an insurrectional movement in Mexico in 1914.<sup>135</sup> A recent example can also be found in the 2006 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law that have been adopted by the General Assembly.<sup>136</sup> Although these are non-legally binding, Principle 15 affirms that where “a person, a legal person, or *other entity* is found liable for reparation for a victim, such party should provide reparation to the victim or compensate the state if the state has already provided reparation to the victim” (emphasis added).<sup>137</sup> Despite not including a provision on how the breach could be attributed, according to this principle NSAGs could be held internationally responsible, with the following duty to provide reparation for their unlawful conduct.

Similar to the abovementioned analysis on attribution, assessing rules on reparations by non-state armed groups requires addressing their actual practice. Certain agreements concluded in the context of NIACs have included an obligation to make reparations as a consequence of international law violations. In 1998, the Government of Philippines and the National Democratic Front of the Philippines concluded an agreement entitled “Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Republic of the Philippines and the NDFP”, which establishes in its Part III (Respect for Human Rights) that

“[t]his Agreement seeks to confront, remedy and prevent the most serious human rights violations in terms of civil and political rights, as well as to uphold, protect and promote the full scope of human

<sup>134</sup> Z. Daboné, *Le droit international relatif aux groupes armés non étatiques* (2012), 149.

<sup>135</sup> Ago, *supra* note 90, 151-152.

<sup>136</sup> UN General Assembly, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 21 March 2006.

<sup>137</sup> *Ibid.*, Principle 15.

rights and fundamental freedoms, including [...] [t]he right of the victims and their families to seek justice for violations of human rights, including adequate compensation or indemnification, restitution and rehabilitation, and effective sanctions and guarantees against repetition and impunity.”<sup>138</sup>

Furthermore, in the *Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord’s Resistance Army* of 2007 it is affirmed that “[t]he Parties agree that collective as well as individual reparations should be made to victims through mechanisms to be adopted by the Parties upon further consultation”.<sup>139</sup> Another example can be found in the 2006 *Darfur Peace Agreement between the Government of Sudan, the Sudan Liberation Movement and the Justice and Equality Movement*. Article 194 points out that “[displaced] persons have the right to restitution of their property, whether they choose to return to their places of origin or not, or to be compensated adequately for the loss of their property, in accordance with international principles”.<sup>140</sup> Article 199 also addresses this issue, and establishes that “war-affected persons in Darfur have an inalienable right to have their grievance addressed in a comprehensive manner and to receive compensation. Restitution and compensation for damages and losses shall necessitate massive mobilization of resources”.<sup>141</sup> Although these sources represent interesting steps, there is limited information regarding the execution of the reparation clauses.<sup>142</sup>

Additionally, when non-state armed groups do not have the monetary resources to provide compensation to the victims, symbolic forms of reparation as part of specific measures of satisfaction should not be dismissed. These could be carried out through public apologies or information aiming to find the

<sup>138</sup> *Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Republic of the Philippines and the National Democratic Front of the Philippines*, Part III Art 2 (3), available at <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/phil8.pdf> (last visited 21 December 2017). On the legal value of special agreements, see generally Heffes & Kotlik, *supra* note 41, 1195-1224.

<sup>139</sup> *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement*, Art. 9(2), available at [http://theirwords.org/media/transfer/doc/ug\\_lra\\_2007\\_08-1093f38010fc545b1610f537e0c82394.pdf](http://theirwords.org/media/transfer/doc/ug_lra_2007_08-1093f38010fc545b1610f537e0c82394.pdf) (last visited 21 December 2017).

<sup>140</sup> *Darfur Peace Agreement*, 5 May 2006, Art. 194, available at [http://peacemaker.un.org/sites/peacemaker.un.org/files/SD\\_050505\\_DarfurPeaceAgreement.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_050505_DarfurPeaceAgreement.pdf) (last visited 21 December 2017).

<sup>141</sup> *Ibid.*, Article 199.

<sup>142</sup> Schmalenbach, *supra* note 76, 502.

truth.<sup>143</sup> Also, as Mampilly has suggested, “[d]ue to their low cost, symbolic processes allow insurgencies to economize their use of material resources in their asymmetric battles with incumbents”.<sup>144</sup> Moreover, armed groups could carry out guarantees of non-repetition through the passing or modification of internal laws to ensure and respect humanitarian rules.<sup>145</sup>

Interestingly, this has been included by the ICRC in its Customary Study when it referred to a public apology by the *Ejército de Liberación Nacional* (National Liberation Army) in Colombia. In Rule 150 it affirms that “[i]t is also significant that in 2001 a provincial arm of the ELN in Colombia publicly apologized for the death of three children resulting from an armed attack and the destruction of civilian houses during ‘an action of war’ and expressed its willingness to collaborate in the recuperation of remaining objects”.<sup>146</sup> Since this was done while the NIAC was taking place, the abovementioned difficulty of non-state armed groups’ disappearance in the aftermath of the hostilities would not be present.<sup>147</sup>

Reparations are an essential element in remedying breaches of international law. Taking NSAGs’ practice into account can help to solve both theoretical and practical problems, mostly regarding the lack of formal rules.

<sup>143</sup> R. Dudai, ‘Closing the Gap: Symbolic Reparations and Armed Groups’ (2011), 93 *International Review of the Red Cross* 783, 808. For instance, in the agreement between the government of Colombia and the FARC it was recognized that to “compensate the victims is at the center of the agreement National Government – FARC-EP”, including two points on the victims’ human rights and the possibility of obtaining the truth. See General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace, 26 August 2012, Point 5, available in Spanish at <https://colombiareports.com/agreement-colombia-government-and-rebel-group-farc/> (last visited 21 December 2017). Furthermore, in the context of the al-Mahdi case before the ICC, the accused publicly apologized to Mali and “to mankind for destroying religious monuments in the ancient city of Timbuktu”. He affirmed that “[all] the charges brought against [him] are accurate and correct. I am really sorry, and I regret all the damage that my actions have caused”, available at <https://www.theguardian.com/world/2016/aug/22/islamic-extremist-pleads-guilty-at-icc-to-timbuktu-cultural-destruction> (last visited 12 December 2017).

<sup>144</sup> Z. Mampilly, ‘Performing the Nation-State: Rebel Governance and Symbolic Processes’, in A. Arjona, N. Kasfir & Z. Mampilly (eds), *Rebel Governance in Civil War* (2015), 74, 82.

<sup>145</sup> Moffet, *supra* note 72, 335; Zegveld, *supra* note 73, 222.

<sup>146</sup> Henckaerts & Doswald-Beck, *supra* note 97, 550.

<sup>147</sup> For an analysis on the temporal scope of application of IHL in NIACs, see M. Milanovic, ‘The End of Application of International Humanitarian Law’, 96 *International Review of the Red Cross* (2014) 893, 163, 178–181. See also Atlam, *supra* note 87, 50.

The abovementioned examples, although insufficient, show that this is neither fictitious nor impossible.

## E. Concluding Remarks: Some Selected Challenges and Possible Solutions

It shall be noted that considering non-state armed groups' behaviors and *opinio iuris* for the creation of customary international law rules on responsibility raises some problematic scenarios. At least two can be identified. Firstly, although the examples abovementioned do not make a comprehensive case, the more evidence there is, the stronger the notion becomes that NSAGs could be internationally responsible. Certainly, we are aware of the fact that it could not be applied in practice to every group. As explained, their level of organization is a determining factor. The question is whether, in situations where armed groups are not sufficiently organized, they would be bound by some of the abovementioned rules, if any. Some non-state armed groups, for instance, do not have written rules, thus making it quite difficult to identify their "non-state" organs. This scenario seems to follow what Sassòli has called a "sliding scale of obligations". In his words, "[t]he better organized an armed group is and the more stable control over the territory it has" the more IHL rules would become applicable.<sup>148</sup> According to him, this "sliding scale of obligations" is the rationale behind the higher level of organization and control over territory required for *AP II* to be applicable.<sup>149</sup> As such, one could argue that a highly organized armed groups exercising long-term control over a territory and having developed State-like institutions would be bound by rules on international responsibility.

In order to address this difficulty and shed some light on the topic, it is submitted that if a non-state armed group does not reach this level of organization, an alternative approach could be implemented in which the group's chain of command linked to the disciplinary power over individuals "exercised on behalf of the group, indicates de facto membership of the group". In Schmalenbach's words, this can be compared to the position of a de facto organ within a State.<sup>150</sup> And in those cases where the position of the acting individuals remains dubious,

<sup>148</sup> M. Sassòli, 'Introducing a Sliding-Scale of Obligations to Address Fundamental Inequality Between Armed Groups and States?', 93 *International Review of the Red Cross* (2011) 882, 426, 430 [Sassòli, Fundamental Inequality].

<sup>149</sup> *Ibid.*, 430-431.

<sup>150</sup> Schmalenbach, *supra* note 76, 500.

“the effective military command becomes the focus for the rules of attribution. If a military commander can be identified and organizationally linked to the armed group, the conduct of all individual combatants acting under the commander’s military command and control are attributable to the group.”<sup>151</sup>

As we have seen, there are a variety of armed groups acting in the international realm. This proposal is built upon the awareness that NSAGs differ in their features, going “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)”.<sup>152</sup>

Regarding the second problematic scenario, non-state armed groups are not meant to exist outside the context of armed conflicts. As Sassòli has recently pointed out, “the requirements of organization that an entity must fulfil to qualify as an armed group [...] do not make sense absent an armed conflict”.<sup>153</sup> This scenario makes it extremely difficult to identify rules on NSAGs’ responsibility applicable after the end of an armed conflict, specifically with respect to possible reparations. Although they could still be provided during hostilities, for instance, in the form of satisfaction and public apologies, when post-conflict situations are being dealt with, it is suggested to assess on a case-by-case basis the feasibility of having the former organs of a NSAG providing for reparatory measures. For instance, if an armed group is dissolved after the end of a conflict, its former leader could still provide a public apology to the victims. As already indicated, one NSAG’s commitment can actually positively affect another group’s engagement. For instance, the Three Main Rules of Discipline and the Eight Codes of Conduct of the Chinese People’s Liberation Army under Mao Tse-Tung were adopted many years later by certain non-state armed groups, such as the National Resistance Army of Uganda and the RUF in Sierra Leone.<sup>154</sup> A public response from a former non-state armed group’s leader,

<sup>151</sup> *Ibid.*

<sup>152</sup> ICRC, ‘Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts’ (2008), 11, available at <http://www.icrc.org/eng/resources/documents/publication/p0923.htm> (last visited 21 December 2017).

<sup>153</sup> Sassòli, *Fascinating Questions*, *supra* note 25.

<sup>154</sup> *Prosecutor v. Sesay, Kallon and Gbao*, Judgment, SCSL-04-15-T, 2 March 2009, 232, para 705. See also Sivakumaran, *Implementing Humanitarian Norms*, *supra* note 15, 135.

as other positive actions by these entities, may have an impact on other groups' respect for the law.

It is important to highlight that the principle of equality of belligerents as the basis for the participation of NSAGs in the process of creation of those rules that regulate their actions could serve the purpose of creating a feeling of ownership of the norms. Nowadays, improving the clarity of the rules on a subject may entail higher levels of respect, since every involved party would be able to recognize its own obligations and act accordingly. As Sivakumaran has explained, "the norms have to be 'translated' into a language that is understood by fighters. They must be internalized both within the group and by individual fighters".<sup>155</sup> This will indeed have a direct impact on the level of compliance demonstrated by a NSAG.

Certainly, we should acknowledge that this paper did not address all the questions that could be raised by the prospect of holding NSAGs internationally responsible, or even by suggesting the inclusion of these non-state entities in law-making processes. In any case, the goal was (and has always been) the continuing study of their actions, especially in order to achieve enhanced IHL compliance by these groups.

<sup>155</sup> Sivakumaran, *Implementing Humanitarian Norms*, *supra* note 15, 125.