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CHALLENGING THE WESTPHALIAN ORDER: INCORPORATING ARMED GROUPS IN LAW-MAKING UNDER INTERNATIONAL HUMANITARIAN LAW**

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1. *Introduction: The Necessity of Engagement with Armed Groups*

Although states remain at the core of the formation of international law, new processes of informal international law-making have emerged during the last few decades. These new processes have incorporated a variety of international actors, such as international organizations and other non-state actors which are gaining influence in the making of international law[1].

Against this background, it is key to understand that the state-centric framework of international law has been progressively changing. During recent decades, the focus with regard to new law-making processes has been placed on certain non-state actors, such as

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[1] A. N. PRONTO, *Some Thoughts on the Making of International Law*, in *Eur. Journ. Int. Law*, Vol. 19, No. 3, 2008, p. 601.

NGOs and transnational corporations, as contributors to such processes[2], but less interest has been shown in possible forms of participation of armed groups. Non-state armed groups are playing a significant role in the current armed conflicts. For instance, in 2014, there were 39 non-international armed conflicts involving different NSAGs[3]. In this regard, the intensification of the actions of armed groups are stimulating a reconsideration of the traditional Westphalian order. However, although we acknowledge the increasing power of armed groups, the fact is that they are excluded from the normal treaty-making process and are unable to become parties to the relevant IHL treaties. The formal incorporation of armed groups in the international legal order has been controversial and subject to significant difficulties. According to Clapham, «the traditional approach, which sees international law as excluding armed non-state actors from its list of suitable subjects, is not only unhelpful, but also dangerous»[4]. In this sense, with regard to non-international armed conflicts, only State parties are recognized to participate in the development of the relevant rules[5]. Armed groups are bound by IHL through customary rules, or because states have accepted treaty rules and the relevant territorial State has legislated accordingly, but such groups have not themselves participated in their formation[6].

During the last few years, some scholars and organizations have proposed the inclusion of armed groups in the creation of new binding rules of international law[7]. The reason is that one of the incentives for armed groups to comply with humanitarian rules is the sense of ownership of those rules, which means that armed groups will be more willing to recognize and be bound by rules if they have participated in their formation[8]. However, there are still legal and practical problems which make their participation extremely difficult. This means that traditional law-making processes need to be adapted or new forms of commitment must be found.

The necessity of engagement with NSAGs has been identified by the UN Secretary-General as one of the core challenges in the protection of civilians in armed conflicts. The main reason to engage with NSAGs is the lack of compliance by such groups with international norms. This engagement consists not only of condemning and sanctioning armed groups but also entering into dialogue with them. Accordingly, the Secretary-General has stated that «unpalatable though this may be for some States, the simple yet brutal reality is that the failure to engage armed groups is always likely to mean more, not

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[2] Ibid, pp. 604-607. See also J. WOUTERS & A.L. CHANÉ, *Multinational corporations in International Law*, in M. NOORTMANN, A. REINISCH & C. RYNGAERT (eds.), *Non- State Actors in International Law*, Hart Publishing 2015.

[3] T. PETTERSSON & P. WALLENSTEEN, *Armed conflicts, 1946-2014*, in *Jour. Peace Res.*, Vol. 52(4), 2015, pp. 536-550, p. 537: «What stands out in the 21st century is the lack of large-scale interstate conflict. Only one was active in 2014, the conflict between India and Pakistan, which led to fewer than 50 fatalities. The remaining 39 conflicts were fought within states […]».

[4] A. CLAPHAM, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement*, 2010, p. 3 available at SSRN: http://ssrn.com/abstract=1569636.

[5] S. SIVAKUMARAN, *The Law of Non-International Armed Conflicts*, Oxford University Press, Oxford, 2012, pp. 108-109.

[6] M. SASSÒLI, *Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law*, in *Jour. Int. Hum. Leg. St.*, Vol. 1, No. 1, 2010, pp. 26-27.

[7] See A. ROBERTS & S. SIVAKUMARAN, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, in *Yale Journ. Int. Law,* Vol. 37(1), 2012. Also, S. RONDEAU, *Participation of armed groups in the development of the law applicable to armed conflicts*, in *Int. Rev. Red Cr.*, Vol. 93, No. 883, 2011.

[8] M. SASSÒLI, *Taking Armed Groups Seriously*, cit., p. 26.

fewer, civilians killed and wounded»[9]. Subsequently, he emphasized that «improved compliance with international humanitarian law and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-state armed groups»[10].

Such engagement may be justified if it leads to concrete benefits, such as increased knowledge of and compliance with international humanitarian law. In this sense, Sassòli has pointed out that «non-state armed groups should be directly engaged by the international community, rather than ignored or left to the exclusive prerogative of States, and should have a role to play in developing the norms and rules they are expected to respect».[11]

Taking into account these concerns, I will address the added value of the inclusion of armed groups in law-making (section 2). Then I will deal with four mechanisms to engage with armed groups in connection with law-making processes, namely: tools of express commitment (unilateral declarations, special agreements and codes of conduct); granting them some role in multilateral negotiations; incorporating the practice of NSAGs into customary law; and their possible engagement at the interpretation of existing IHL rules (section 3). Finally, special consideration will be given to the Geneva Call Deed of Commitment and the case of Sudan as an example of the way in which the commitment of an armed group can influence the willingness of a State to ratify a treaty on IHL, in this case, the Ottawa Convention (section 4).

For the purpose of this paper, the terms "armed groups" and "non-state armed groups" will be used interchangeably. These terms will refer specifically to armed groups that are fighting in opposition to a Government or other armed groups and are operating within the context of non-international armed conflicts which have at least reached the threshold of Common Article 3 of the 1949 Geneva Conventions.

2. *The Added Value of the Incorporation of Armed Groups in Law-Making*

Although armed groups are bound by IHL rules as parties of non-international armed conflicts[12], there are several benefits which may be gained through their inclusion in the creation of future norms of IHL. First of all, it has been determined that there is a psychological incentive to have humanitarian rules accepted and respected on the part of persons who were involved in their development[13]. The participation of armed groups in the development of IHL contributes to their "ownership" of the rules and makes compliance a more achievable goal[14]. According to the Geneva Academy of International Humanitarian Law and Human Rights, the term "ownership" means the capacity and willingness of actors engaged in armed conflict to set, and/or take responsibility for the

[9] UN Security Council, Proceedings of the 6151st meeting, 26 June 2009, S/PV.6151, p. 4.
[10] Report of the Secretary-General on the Protection of Civilians, 11 November 2010, S/2010/579, para. 52.
[11] M. SASSÒLI, *Taking Armed Groups Seriously*, cit., p. 3.
[12] There is a consensus on the applicability of IHL to armed groups. However, the concrete legal justification is still under debate. See, J.K. KLEFFNER, *The applicability of international humanitarian law to organized armed groups*, in *Int. Rev. Red Cr.,* 2011, Vol. 93, No. 882.
[13] M. SASSÒLI, *Taking Armed Groups Seriously*, cit., p. 3.
[14] See Geneva Academy of International Humanitarian Law and Human Rights (ADH), *Rules of engagement: protecting civilians through dialogue with armed non-state actors*, 2011, p. 6, available at: http://www.adh-geneva.ch/docs/publications/Policy%20studies/Rules%20of%20Engagement.pdf.

respect of, norms intended to protect civilians as well as other humanitarian norms applicable in armed conflict»[15].

The ICRC has acknowledged that some NSAGs refuse to comply with a system of law which has been established exclusively by the governments against whom they are fighting[16]. In this sense, there are examples of armed groups that deny the applicability of such rules when they have not participated in their formation, such as certain Colombian armed groups[17] and the Frente Farabundo Martí para la Liberación Nacional (FMLN) in El Salvador, who refused to follow particular humanitarian law norms because «no agreement exist[ed] between the parties»[18]. In addition, the International Council on Human Rights Policy suggests that where armed groups commit themselves to written codes of conduct, this encourages them to respect human rights.[19]

The participation of armed groups in the development of IHL rules would not only contribute to their sense of ownership of those rules, but would also make the adherence to them more realistic for armed groups[20]. Some humanitarian norms of non-international armed conflicts need to be adapted to the specificities of armed groups, for instance, the issue of due judicial process in Common Article 3 of the Geneva Conventions or the debated matter of prisoners of war in non-international armed conflicts. In fact, certain gradation is already established in some IHL rules, such as those obliging parties to act «within the limits of their capabilities» or «to the fullest extent practicable»[21].

Secondly, another advantage of the participation of armed groups is that, even if reciprocity is not applicable under IHL, states can appreciate the formal commitment of armed groups to adhering to humanitarian rules as offering a reciprocal obligation on the other side of the conflict[22]. The inclusion of armed groups would mean effective and reciprocal commitment by both parties the conflict and not only the State. In this regard, we can point to the experience of Geneva Call and its Deeds of commitment, which will be discussed in section 4.

Thirdly, the inclusion of NSAGs is also beneficial because it would help to improve the accountability processes in cases of transgressions of such norms. The involvement of armed groups in decision-making processes would contribute to a system of accountability where those actors would be held accountable for any violations of the norms in whose formulation they have participated[23].

Finally, according to Rondeau, the participation of armed groups in law-making would help to address the needs of the international community, the international legal

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15 *Ibid*, p. 6.

16 M. MACK, *Increasing respect for IHL in non-international armed conflicts*, *ICRC* 2008, p. 11.

17 Human Rights Watch has reported that certain Colombian armed groups have informed that «although they support humanitarian standards in theory, they do not accept [Additional] Protocol II since it was not negotiated directly with them». See Human Rights Watch, *War Without Quarter: Colombia and International Humanitarian Law*, October 1998, p. 25.

18 UN Observer Mission in El Salvador (ONUSAL), *Second Rep. of the United Nations Observer Mission in El Salvador*, 15 November 1991, U.N. Doc. A/46/658, paras 64-65.

19 International Council on Human Rights Policy, *Ends and Means: Human Rights Approaches to Armed Groups*, 2000, p. 52.

20 M. SASSÒLI, *Taking Armed Groups Seriously*, cit., p. 17.

21 See Articles 5 (2) and 7 (2) Additional Protocol II, Geneva Conventions.

22 A. ROBERTS & S. SIVAKUMARAN, *Lawmaking by Nonstate Actors*, cit., p. 129.

23 With regard to non-state actors in general, see C. RYNGAERT, *Imposing International Duties on Non-State Actors and the Legitimacy of International Law*, in M. NOORTMANN & C. RYNGAERT (eds) *Non-State Actors Dynamics in International Law. From Law-Takers to Law-Makers*, Asghate Aldershot, 2010, p. 79.

order, the armed group itself and the victims of conflict. In particular, Rondeau claims that from the victims' perspective, «engaging with all parties – state and non-state actors alike – involved in the armed conflict increases the likelihood of getting commitments from all of them to respect the limits within which they agree to wage war»[24].

However, even if there are advantages for the incorporation of armed groups in processes of norm creation, there are still some legal objections put forth by states and part of the scholarship. There are two fundamental obstacles, namely the possibility of conferring a legal status on armed groups, and the prospect of reducing the humanitarian law protection. With regard to the concerns surrounding the legal status of armed group, this is a traditional debate that emerges every time we deal with armed groups in international law, and one which has recently been revived in relation to the issue of the accountability of armed groups under human rights law[25]. It is important in this context to recall the Advisory Opinion of the ICJ in the case of *Reparations* to remind ourselves that recognizing that different entities are subjects of international law does not mean that they hold the same rights, duties, and capacities as states[26]. For instance, international organizations have limited legal personality and they can only act and enter into treaties in relation to their specific competences and functions. Cassese notes that armed opposition groups in general possess limited international legal personality.[27]

In addition, if we look to the limited number of treaties where some degree of participation is permitted to armed groups, these frequently expressly declare that this does not affect the groups' legal status. In particular, Common Article 3 of the Geneva Conventions states that parties to the conflict can conclude agreements on international humanitarian law, but provides that this «shall not affect the legal status of the Parties to the conflict». Along the same lines, the African Union Convention on Internally Displaced Persons provides that «[t]he provisions of [Article 7] shall not, in any way whatsoever, be construed as affording legal status or legitimizing or recognizing armed groups».[28] Some international and national institutions have adopted a similar view. For instance, the Resolution of the European Parliament of 6 September 2001 notes that the seeking of commitments by armed groups does not imply any recognition as to the status of these groups.[29] Similarly, a decision by the Colombian Constitutional Court stressed that the application of IHL has no effect on the legal status of the parties.[30]

In relation to the issue of limiting the scope of protection of humanitarian law, Roberts and Sivakumaran have called for striking «a balance between recognizing the interests of armed groups in creating and developing international humanitarian law and maintaining important humanitarian protections»[31]. Although armed groups should remain

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[24] S. RONDEAU, *Participation of armed groups in the development of the law applicable to armed conflicts*, cit., p. 656.

[25] See A. CLAPHAM, *Human rights obligations of non-state actors in conflict situations*, in *Int. Rev. Red Cr.*, Vol. 88, No. 863, 2006.

[26] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ, 11 April 1949, 174, 178.

[27] A. CASSESE, *International Law in a Divided World*, Clarendon Press, Oxford, 1986, p.84.

[28] Article 7(1) African Union Convention on Internally Displaced Persons.

[29] European Parliament Resolution of 6 September 2001, on measures to promote a commitment by non-State actors to a total ban on anti-personnel landmines, B5-0542, 0561, 0568, 0575, 0590 and 0599/2001, para. F available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2001-0465+0+DOC+XML+V0//EN&language=GA.

[30] *Constitutional Conformity of Additional Protocol II,* Constitutional Court of Colombia, Ruling No. C-225/95, para.15.

[31] A. ROBERTS & S. SIVAKUMARAN, *Lawmaking by Nonstate Actors*, cit., p. 141.

bound by existing IHL obligations, they should be granted the capacity to abide by these obligations and the opportunity to undertake new ones, even increasing their commitments beyond current international standards[32].

3. *Mechanisms to Incorporate Armed Groups in Law-Making*

It is recognized that the traditional sources of international law are established in Article 38(1) of the Statute of the International Court of Justice, and consist of: international conventions, international customs, general principles of law, and judicial decisions and teachings of the most highly qualified publicists as subsidiary sources. Consequently, in this static doctrine there is no explicit framework for the participation of NSAGs in law-making. However, as I pointed out in the introduction, this state-centric approach has been challenged in recent years by some scholars and within a number of international fora[33].

The participation of armed groups in the development of IHL rules should be addressed through mechanisms beyond the traditional Westphalian system. In this regard, the Geneva Academy of International Humanitarian Law and Human Rights Law in its report «Towards a better protection of civilian in armed conflicts» has stated that:

> It is not realistic for armed non-state actors to participate formally in the drafting of multilateral treaties not that such actors formally adhere to those treaties, but it is possible for their views to be reflected at future law-making negotiations. Armed non-state actors may sometimes argue that they are not bound by international norms as they had no role in their negotiation and adoption. Although this argument should be opposed, it is worth seeking to involve armed non-state actors in international discussions on new norms. Their views could, for example, be discerned by analysing relevant agreements or unilateral declarations. It may be easier to associate former members of armed non-state actors in such processes. In addition, greater efforts can be made to ensure that relevant international treaties address directly the behaviour of armed non-state actors[34].

In the present article, I will analyse, on the one hand, the actual practice of armed groups declaring their compliance with certain humanitarian rules ("tools of express commitment" in section 3.1), and, on the other hand, possible ways to reconcile the

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[32] In this regard, Sivakumaran has pointed out that «a role for non-state armed groups in the creation of the law of non-international armed conflict could be construed in such a way that does not downgrade exisiting standards nor affords them legal status or legitimacy, but does give them a sense of ownership over the rules, potentially leading to increased compliance. The methodology by which the law is created is thus a further aspect that needs greater consideration». S. SIVAKUMARAN, *The Law of Non-International Armed Conflicts*, cit., p. 564.

[33] See A. CLAPHAM, *Human Rights Obligations of Non-state Actors*, Oxford University Press, Oxford, 2006; R. MCCORQUODALE, *The individual and the international legal system*, in M. D. EVANS (ed.), *International Law*, 2nd edn, Oxford University Press, Oxford, 2006, p. 309; R. MCCORQUODALE, *An inclusive international legal system*, in *Leid. Jour. Int. Law*, Vol. 17, 2004, pp. 477-504.

[34] Geneva Academy of International Humanitarian Law and Human Rights, *Armed non-state actors and international norms: towards a better protection of civilians in armed conflicts: summary of initial research and discussions during an expert workshop in Geneva in March 2010*, 2010, p. 8.

traditional law-making processes of IHL with the incorporation of armed groups in their future development (section 3.2, 3.3 and 3.4).

3.1. *Tools of Express Commitment: Unilateral Declarations, Special Agreements and Codes of Conduct*

Several NSAGs have committed to apply international humanitarian law and other rules of international law through the participation in different written statements and agreements. These instruments can be classified into unilateral declarations, special agreements and codes of conduct. These three mechanisms have in common that they are based on the commitment of the armed group to comply with the rules of IHL, in full or in part. Therefore, the ICRC uses the notion of "tools of express commitment"[35].

These tools of express commitment serve as the basis of armed groups to recognize and apply IHL provisions since they cannot formally sign or ratify IHL treaties. Clapham recognizes unilateral declarations, special agreements and codes of conduct as a source of international obligations[36]. Along similar lines, Sivakumaran refers to them as «less traditional sources of the law of non-international armed conflicts» because they do not feature in the traditional list of the sources of international law. He notes that:

> The existence of these less traditional «sources», especially those of non-state armed groups, tends to be overlooked. This is not a conscious decision on the part of the international community. Rather, they are forgotten because, oftentimes, they do not have a counterpart in international armed conflict[37].

Even if their normative status is still a matter of debate, these instruments represent a useful tool for the provision of humanitarian action, dissemination of IHL standards and also access to victims[38]. International organisations and international tribunals have recognised the significance of unilateral declarations and special agreements made by NSAGs, in some cases treating them as binding and requiring the monitoring and enforcement of such commitments.

With regard to their content, these commitments can be equivalent to international standards, go beyond such standards, or fall short of them[39]. It has to be recalled that it would be easier to engage with NSAGs if they have established their position in written terms in relation to IHL standards. Therefore, these tools of express commitment could be seen as an alternative to the traditional sources of international law, especially in relation to those instruments that reflect international standards or go beyond them[40]. In the following sections, these three types of commitment will be studied taking into account their practice, content and normative status.

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[35] M. MACK, *Increasing respect for IHL in non-international armed conflicts*, cit., p. 27.
[36] See A. CLAPHAM, *Focusing on armed non-state* actors in A. CLAPHAM & P. GAETA, *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, pp. 782-786.
[37] S. SIVAKUMARAN, *The Law of Non-International Armed Conflicts*, cit., p. 107.
[38] S. RONDEAU, *Participation of armed groups in the development of the law applicable to armed conflicts*, cit., p. 665.
[39] S. SIVAKUMARAN, *Lessons for the law of armed conflict from commitments of armed groups: identification of legitimate target and prisoners of war*, in *Int. Rev. Red Cr.,* 2011, Vol. 93, No. 882, pp. 7-12.
[40] *Ibid*, p. 20.

a) Unilateral Declarations

Armed groups have the possibility to express their willingness to abide by IHL rules through the issuance of unilateral declarations.[41] However, it should be reminded that in any case armed groups continue to be bound by the rules of IHL related to non-international armed conflicts even if armed groups do not make any unilateral declaration. In relation to treaty law, there is an express recognition of this position in connection with National Liberation Movements (NLMs) under article 96(3) Additional Protocol I, with the effect of bringing into force the Conventions and this Protocol «for the said authority as a Party to the conflict with immediate effect»[42].

Unilateral declarations do not only provide armed groups with an opportunity to explicitly express their commitment to comply with IHL but also serve as a tool for the hierarchy of the group to ensure that its members respect the law[43]. In addition, they also serve as the basis for future follow-up operations and supervision of the compliance with the law[44].

In relation to the content of unilateral declarations, armed groups can express their consent to be bound by existing treaty rules to which they are already bound, like Common Article 3 and Additional Protocol II. This was the case with the commitments made by the FMLN in El Salvador in 1988 and the NDFP in the Philippines in August 1991 to comply with Common Article 3 and Additional Protocol II.[45] Moreover, armed groups can give their consent to be bound by the rest of the Geneva Conventions and Additional Protocol I or other conventions on IHL. Some examples are the commitments of Afghan opposition groups in 1985[46], the PKK in 1995 and the CPP-NPA in 1996.[47] Thirdly, other armed groups have declared their consent with IHL rules but avoiding the specific reference to the provisions of the Geneva Conventions, as seen with the Ejército de Liberación Nacional (ELN) in Colombia in 1995[48], or more recently the declaration of the National Coalition of the Syrian Revolution and Opposition Forces in 2014[49].

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41 M. MACK, *Increasing respect for IHL in non-international armed conflicts*, cit., p. 19.
42 Art. 96 (3) (a) Additional Protocol I.
43 M. MACK, *Increasing respect for IHL in non-international armed conflicts*, cit., p. 19.
44 *Ibid*, p. 19.
45 For the FMLN, see *Prosecutor v. Tadic*, Case IT-94-I, ICTY Appeals Chamber, Decision in the Defence Motion for Interlocutory Appeal on jurisdiction of 2 October 1995, para.107. The FMLN declared furthermore to consider the needs of the population and defend their freedoms. For the Philippine insurgents, see L. MOIR, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p.131.
46 In 1985, Afghan opposition groups fighting against the Russian army, declared to comply with the third 1949 Geneva Convention, relating to Prisoners of War. *1985 Report of the Special Rapporteur on Afghanistan*, United Nations Commission on Human Rights, E/CN.4/1985/21, at 43, paras 104, 163.
47 As regards the PKK (the Kurdistan People's Party), see M. VEUTHEY, *Learning from History: Accession to the Conventions, Special Agreements, and Unilateral Declarations*, in: Collegium/ Proceedings of the Bruges Colloquium: Relevance of International Humanitarian Law to Non-State Actors, special edition, No. 27 (2003), p. 144. The CPP-NPA (Communist Party of the Philippines-New People's Army) deposited with the Swiss Federal Council a Declaration of Undertaking to apply the 1949 Geneva Conventions and the first Additional Protocol.
48 M. MACK, *Increasing respect for IHL in non-international armed conflicts*, cit., p. 20.
49 National Coalition of Syrian Revolution and Opposition Forces, Declaration of Commitment on Compliance with IHL and the Facilitation of Humanitarian Assistance, 19 March 2014 available at http://d3n8a8pro7vhmx.cloudfront.net/etilaf/pages/103/attachments/original/1395262155/March_19_2014_SC_IHL_Declaration.pdf?1395262155.

A specific example is the work of the NGO Geneva Call and its Deed of Commitment (DoC), which is treated as binding on its signatories. The Deed of Commitment and the follow-up work of Geneva Call were mentioned by the UN Secretary-General as a «successful example» of engaging armed groups[50]. The Deeds of Commitment will be examined in Section 4, with particular reference to the example of Sudan.

However, it is of great importance here to reduce the obligations to a feasible list. According to Sassòli, «a declaration by an armed group that it will comply with 'the Geneva Conventions and Additional Protocols' merits some skepticism. There are some 500 articles in those treaties! Often, a two-page code of conduct is preferable, which really addresses the genuine humanitarian issues that arise for a given armed group in the field»[51]. In this context, Sivakumaran has referred to these genuine humanitarian issues as the «substance approach», noting that «commitments to the substance of particular rules may prove more beneficial given that all parties concerned have a clear understanding as to the nature and content of a particular commitment»[52].

As regards the normative status of such commitments, with respect to States, the ICJ recognized in the Nuclear Tests case that «declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations»[53]. In connection with armed groups, unilateral declarations have at times been criticised for their supposedly weak effectiveness. The fact that they are easily used for propaganda purposes leads the international community to often receive them with caution or scepticism. However, it must be recognised that states also ratify treaties moved by political considerations or other reasons[54].

International organisations have acknowledged the significance of unilateral declarations made by NSAGs. Some UN reports have recognised unilateral declarations as been binding for armed groups and have established the necessity of supervision of such commitments[55] In its resolution of 6 September 2001, the European Parliament stressed the significance of declarations or commitments by armed opposition groups relating to a total mine-ban, and expressed its support for the DoC-mechanism initiated by Geneva Call.[56] Another example is provided by the Inter-American Commission on Human Rights,

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[50] *Report of the Secretary- General on the Protection of Civilian in Armed Conflict*, 29 May 2009, S/2009/277, para. 43.
[51] M. SASSÒLI, *Taking Armed Groups Seriously*, cit., p. 29.
[52] S. SIVAKUMARAN, *Lessons for the law of armed conflict from commitments of armed groups: identification of legitimate target and prisoners of war*, in *Int. Rev. Red Cr.,* 2011, Vol. 93, No. 882, p. 9.
[53] *Nuclear Tests* (Austl. v. Fr.) ICJ, 20 December 1974, 253, paras 43-46
[54] M. MACK, *Increasing respect for IHL in non-international armed conflicts*, cit., p. 20.
[55] See Special Representative of the Secretary-General, Additional Rep. of the Special Representative of the Secretary-General for Children and Armed Conflict, 9 February 2000, UN Doc. E/CN.4/2000/71, para. 20 (by Olara Otunnu); Special Rapporteur to the Secretary-General, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,27 March 2006, U.N. Doc. E/CN.4/2006/53/Add.5, para. 30 (by Philip Alston). See also *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2009/277, 29/05/2009, para. 42, where the Secretary-General mentioned unilateral undertakings by armed groups as a useful tool for promoting engagement with already existing obligations incumbent on these groups.
[56] European Parliament Resolution of 6 September 2001, on measures to promote a commitment by non-State actors to a total ban on anti-personnel landmines, B5-0542, 0561, 0568, 0575, 0590 and 0599/2001, paras 5, 6.

which addressed the relevance of declarations made by armed groups in its third report on the human rights situation in Colombia.[57]

International courts have also resorted to the statements of certain armed groups committing with IHL. For instance, when referring to the unilateral declaration to comply with the Fourth Geneva Convention made by Palestine, the ICJ noted that the depository had treated this undertaking as «valid».[58] Likewise, the ICTR in the *Rutaganda* and *Akayesu* cases discussed a statement of the RPF to the ICRC where the RPF declared itself to be bound by the rules of international humanitarian law[59].

In addition, we also find some references in literature with regard to the binding effect of unilateral declarations when they are made by non-state actors. In particular, Ryngaert explains that «there is no reason not to extend the binding nature of unilateral acts to other actors whose international legal personality is functionally necessary for the international community to function adequately»[60]. Similarly, Klabbers and Clapham have also recognised that non-state actors can bind themselves on the international level[61].

Finally, unilateral declarations have been used by the ICRC as the justification for interventions in cases of alleged violations committed by armed groups and also to remind them their written commitment to comply with IHL[62].

b) Special Agreements

Special agreements are agreements that the parties to a conflict may conclude among themselves to improve or supplement the rules of international humanitarian law. This possibility is established under Common Article 3, which states that «The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention». Previously, Article 19(2) of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in 1954 strengthened this obligation, converting the «should» into a «shall».

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[57] See Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102, Doc.9 rev.1, at 78, para. 20, n.11.

[58] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ 136, para. 91 (July 9): «La Palestine s'est par ailleurs engagée unilatéralement, par déclaration du 7 juin 1982, à appliquer la quatrième convention de Genève. La Suisse, en qualité d'Etat dépositaire, a estimé valable cet engagement unilatéral».

[59] *Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, judgment of 2 September 1998, para. 627.

[60] 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*, New York, Routledge, 2011, pp. 289-290.

[61] See A. CLAPHAM, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement*, cit, pp. 19-20: «One can make the case that such a declaration, whether or not it is written and witnessed, could be considered binding under international law and therefore a further source of obligation; this would be the case even in a situation where the relevant treaty made no provision for declarations with the depositary». According to Klabbers, «[o]f course, non-state entities may make unilateral declarations even in the absence of a specific provision to that effect, and following general international law, it may very well be that by making unilateral declarations those entities bind themselves on the international level». 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 Martii Koskenniemi,* 2003, pp. 354-55, p. 351.

[62] Such ICRC's interventions with armed groups occurred in Angola, Colombia, Nicaragua, Rwanda, South Africa, Sri Lanka, and other countries.

Like unilateral declarations, special agreements can be declaratory, if they restate the law that is already binding on the parties, or constitutive, if they create new legal obligations by going beyond the provisions of IHL already applicable in the specific circumstances[63]. According to Clapham, such agreements will not be applied where they conflict with peremptory norms of international law[64].

The most well-known special agreements are those concluded between the parties to the armed conflict in Bosnia and Herzegovina from 1992 to 1995. This agreement makes specific reference to the provisions of Common Article 3 as been binding for all the parties involved. There have been other special agreements regarding IHL issues. In particular, two agreements must be highlighted. Firstly, the agreement in 2002 between the Government of Sudan and the SPLM/A on the protection of civilians where the parties «reconfirm their obligations under international law, including Common Article 3 of the 1949 Geneva Conventions, to take constant care to protect the civilian population, civilians and civilian objects against the dangers arising from military operations»[65]. Later on, the agreement on Civilian Protection Component between the Government of the Philippines and the MILF in 2009 to reconfirm their obligations to respect international humanitarian haw, in particular in connection with the civilian population[66].

In addition, other agreements contain both international humanitarian law and human rights law norms. For example, the 1998 Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Philippines and the NDFP contains a lengthy list of human rights and humanitarian law guarantees. The San José Agreement on Human Rights between the Government of El Salvador and the FMLN, adopted in 1990, included commitments to comply with Common Article 3 and Additional Protocol II, alongside various human rights norms. Similarly, the Comprehensive Agreement on Human Rights between the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG) in 1994 recognized «the need to put a stop to suffering of the civilian population and to respect the human rights of those wounded, captured and those who have remained out of combat»[67].

Regarding their normative status, special agreements between states and NSAGs do not fall within the conventional regime of the law of treaties. However, Article 3 of the Vienna Convention provides that this fact shall not affect the legal force of such agreements[68]. Correspondingly, the ICTY in the *Tadic* case declared that it was authorised to apply any agreement which unquestionably bound the parties and was not in conflict

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[63] M. MACK, *Increasing respect for IHL in non-international armed conflicts*, cit., p. 16.

[64] A. CLAPHAM, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement*, cit., p. 19.

[65] Agreement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack, Sudan-SPLM, 10 March 2002.

[66] Agreement on the Civilian Protection Component of the International Monitoring Team, Philippines-MILF, 27 October 2009.

[67] Comprehensive Agreement on Human Rights between the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG), March 1994.

[68] Although the VCLT applies to international agreements between states, it does not preclude recognition of international agreements between other subjects of international law. Vid. Art. 3 VCLT: The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect: […] c) The application of the Convention to the relations of States as between themselves under international agreements *to which other subjects of international law are also parties*.

with peremptory international norms.[69] In addition, according to Clapham, such special agreements have been considered to represent international agreements by the Darfur Commission of Inquiry, and can be seen as giving rise to international rights and obligations[70]. The Commission has noted:

> In addition, the SLM/A and the JEM possess under customary international law the power to enter into binding international agreements (so called *jus contrahendum*), have entered various internationally binding Agreements with the Government. In these Agreements the rebels have undertaken, among other things, to comply with humanitarian law. The NMRD (National Movement for Reform and Development) concluded two Agreements with the Government of the Sudan on 17 December 2004, one on humanitarian access and the other on security issues in the war zone. In these Agreements the parties pledged to release prisoners of war and organize the voluntary repatriation of internally displaced persons and refugees[71].

Some scholars have also placed special agreements in the category of treaties[72], while others have considered them as being of a mixed legal nature, both internal, on the basis of the parties involved, and, international because of the existence of a subject of international law which guarantees their implementation[73].

Apart from special agreements, humanitarian law obligations also form a common component of ceasefire and peace agreements entered into between governments and armed groups, such as those between the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG), the Government of El Salvador and the FMLN, and the Government of Sierra Leone and the RUF[74]. More recently, the discussion about the nature of peace agreements has been reopened with the peace talks between the Government of Colombia and the FARC[75].

Finally, commitments made in special agreements have also provided a basis for follow-up interventions with parties to a conflict, concerning either respect for IHL in general or a specific issue[76].

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[69] *Prosecutor v. Tadic*, Case IT-94-I, ICTY Appeals Chamber, Decision in the Defence Motion for Interlocutory Appeal on jurisdiction of 2 October 1995, para.143.

[70] A. CLAPHAM, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement*, cit., p. 19.

[71] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005 at para. 174.

[72] See, for example, L. VIERRUCI, *Applicability of the Conventions by Means of Ad Hoc Agreements*, in A. CLAPHAM, P. GAETA & M. SASSÒLI (eds.) *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 516-517.

[73] See, for example, P. KOOIJMANS, *The Security Council and Non-State Entities as Parties to Conflicts*, in K. WELLENS (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, Martinus Nijhoff, The Hague, 1998, p. 338.

[74] See, C. BELL, *Peace Agreements: Their Nature and Legal Status*, in *Am. Jour. Int. Law*, Vol. 100, 2006, p. 373.

[75] See N. CARRILLO SANTARELLI, *An International Legal Agreement between the FARC guerrilla and the Colombian Government?* in *Opinio Juris* blog on 19 May 2016 available at http://opiniojuris.org/2016/05/19/an-international-legal-agreement-between-the-farc-guerrilla-and-the-colombian-government/.

[76] For example, the ICRC referred to the 1992 BiH agreement, asking the parties to put their commitments into effect and to allow the ICRC to provide relief and protection to the victims of the conflict. Similarly, the ICRC based its representations on the 1998 special agreement in the Philippines. Other humanitarian actors have also based various actions on special agreements, such as the UN observer mission in El Salvador (ONUSAL) that referred to the 1990 agreement in El Salvador. See M. MACK, *Increasing respect for IHL in non-international armed conflicts*, cit.

c) Codes of Conduct

Another legal tool that can serve to express commitment to the law is the adoption and distribution of codes of conduct that are consistent with IHL. Codes of conduct are defined as «the set of rules an organization expects its members to respect under all circumstances»[77], which expresses the group's minimum standards. As the International Council on Human Rights Policy states, «the point is to have some kind of written statement of commitment from the leaders about how they will behave, and to ensure so far as possible that it reflects international standards».[78] One of the key characteristics of codes of conduct is the fact that IHL rules should be described in simple terms so all the members of the armed groups can easily understand them. Apart from the provisions regulating international standards, the code should include the mechanisms which are required for their implementation as well as the internal sanctions which members can be subject to[79].

Codes of conduct in the form of military manuals or internal regulation have been developed primarily by States. By analogy to the State practice, armed groups have also proceeded to issue similar instruments, for example, the Workers' and Peasants' Red Army / People's Liberation Army (PLA) in China, the New People's Army (NPA) in the Philippines, the National Liberation Army (ELN) and Revolutionary Armed Forces of Colombia (FARC) in Colombia, the National Redemption Army (NRA) in Uganda and the Revolutionary United Front (RUF) in Sierra Leone[80].

Other codes of conduct have been the result of the dialogues with the ICRC such as the 10-point code of conduct by the Sudan Allied Forces (SAF)[81]. Other examples include the Regulation by the FLN issued in April 1958, committing to observe the laws of war and provisions of the 1949 Geneva Conventions;[82] and the «Internal Regulations on use, stockpiling, production and transfer of anti-personnel mines» by the Moro Islamic Liberation Front (MILF) of 21 March 2000.[83] Finally, the National Transition Council (NTC) in Libya has issued some guidelines on the treatment of detainees and the use of violence[84].

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[77] O. BANGERTER, *Disseminating and Implementing International Humanitarian Law within Organized Armed Groups: Measures Armed Groups Can Take to Improve Respect for International Humanitarian Law* in *Non-State Actors and International Humanitarian Law, Organized Armed Groups: A Challenge for the 21st Century*. San Remo and Milan: International Institute of Humanitarian Law, p. 202.

[78] International Council on Human Rights Policy, *Ends and Means: Human Rights Approaches to Armed Groups*, 2000, pp. 51-52.

[79] M. MACK, *Increasing respect for IHL in non-international armed conflicts*, cit., p. 22.

[80] See N. VAN AMSTEL, *A collection of codes of conduct by armed groups*, in *Int. Rev. Red Cr.*, Vol. 93, No. 882, 2011. See also the list of armed groups that use codes of conduct per continent in O. BANGERTER, *Internal Control. Codes of Conduct within Insurgent Armed Groups* in *Small Arms Survey Occasional Paper 31*, November 2012, pp. 13-14.

[81] M. MACK, *Increasing respect for IHL in non-international armed conflicts*, cit., p. 23.

[82] This practice of the Algerian National Liberation Front was stated in L. MOIR, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p.73.

[83] Text available in Non-State Actors Database (Compilation of March 2000) at http://www.icbl.org/wg/nsa/library/nsadeclarations.html#anchor512088.

[84] N. VAN AMSTEL, *A collection of codes of conduct by armed groups*, in *Int. Rev. Red Cr.*, Vol. 93, No. 882, 2011, p. 15.

Sassòli points out that it may be preferable to negotiate with individual armed groups specific codes of conduct that they could adopt and which interpret and adapt existing IHL rules to the specific situation[85]. Codes of conduct could constitute a useful tool to increase respect for the law. The ICRC Study has noted that «codes of conduct that are consistent with IHL provide a concrete mechanism for persons to respect the law»[86]. In fact, there are certain advantages for using this kind of instrument. First, IHL rules are expressed in simple terms so it is easy for the members of the group to comply with them. In this sense, they translate legal provisions into instruments understandable for members of a given group. Secondly, codes of conduct should contain provisions on their dissemination and enforcement within the armed group[87]. Thirdly, they have the advantage of clarifying the law for all parties to a conflict, and the possibility of increasing the obligations applicable in non-international armed conflicts[88].

3.2. *Granting Armed Groups Some Roles in Multilateral Negotiations*

It has been suggested that representatives from non-state armed groups should be implicated and involved in any revision of international humanitarian law involving treaty drafting[89]. For some, such as Sassòli, the «essence» of international humanitarian law is that it «has to be applied by the parties and with the parties and it has to be based on an understanding of the problems, the dilemmas and the aspirations of the parties to armed conflicts»[90]. It would be very difficult to have armed groups represented in any treaty drafting process, but we might consider ways of including a «rebel point of view» in treaty discussions, as Clapham has suggested[91].

In this section, I will try to analyse the possible ways of involving armed groups in multilateral negotiations, such as: a) giving them a role in treaty negotiations; b) granting the right of access to treaties; or c) enabling participation in *soft law* standards.

a) A Role in Treaty Negotiations

There have been some precedents of National Liberation Movements (NLMs) participating in diplomatic conferences. In this regard, eleven NLMs, including the Palestinian Liberation Organization (PLO) and the Southwest African Peoples Organization (SWAPO), took part, as observers, in the negotiations of the two Additional Protocols to the Geneva Conventions. Rondeau has advocated this model of observer status without voting rights, adopted at the 1974-1977 Diplomatic Conference, because «the format allows one common denominator to emerge, the conference itself, and give the possibility to

[85] M. SASSÒLI, *Taking Armed Groups Seriously*, cit., pp. 22-23.
[86] M. MACK, *Increasing respect for IHL in non-international armed conflicts*, cit., p. 22.
[87] N. VAN AMSTEL, *A collection of codes of conduct by armed groups*, in *Int. Rev. Red Cr.*, Vol. 93, No. 882, 2011, pp. 3-4.
[88] M. SASSÒLI, *Taking Armed Groups Seriously*, cit., pp. 28-29.
[89] A. ROBERTS & S. SIVAKUMARAN, *Lawmaking by Nonstate Actors*, cit., p. 146. S. RONDEAU, *Participation of armed groups in the development of the law applicable to armed conflicts*, cit., p. 659.
[90] M. SASSÒLI, *Taking Armed Groups Seriously*, cit., p. 18.
[91] A. CLAPHAM, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement,* cit., p. 42.

step back, re-focus on the humanitarian imperatives and find common ground»[92]. Previously, in 1966, the International Law Commission had argued that «other subjects of international law, such as international organizations and *insurgent communities*, may conclude treaties»[93].

Leaving aside these precedents, the inclusion of armed groups in the process of treaty negotiations would represent a more difficult undertaking[94]. First, it is necessary to establish a criterion for the selection of groups to be invited to participate in the respective diplomatic conferences drafting those treaties. At a minimum, these groups should have a required level of organization, with a hierarchy to select their representatives, and they should have existed for a prescribed minimum period of time. Another problem is that armed groups involved in ongoing conflicts are labelled as "terrorists" or "criminals" by some states and international organizations, and are considered illegal under the national jurisdictions. It may therefore be difficult in practice to involve their representatives in diplomatic conferences geared towards adopting new instruments. On this basis, Sassòli proposes to invite only those groups that participated in past armed conflicts that have since ended[95].

Apart from these practical difficulties, conferring participatory rights to armed groups would still be dependent on the discretion of states and other organizations. In fact, the participation of armed groups in norm-creation would depend on the agreement of the rest of participants which would need to accept the contributions of other actors in that process[96].

We can also mention the alternative of organizing pre-conference meetings with armed groups in order to solicit their views and communicate to the conference delegates. We have witnessed such initiatives in meetings of armed groups that were signatories of the DoCs, organized by Geneva Call, where armed groups with similar aspirations but diverse political and geographical circumstances have found a common space of dialogue[97]. Moreover, there was another meeting in 2010 between the Swiss Government, Geneva Academy and armed groups on the concept of "ownership" of humanitarian norms[98].

b) Right of Access to Treaties

Another possibility is related to the accession to multilateral treaties. Analogously with the participation of NLMs in treaty negotiations, there have been examples of certain entities who declared their adherence to the Geneva Conventions. Among these examples, we can highlight two of them such as the provisional government of the Algerian Republic that acceded to the Geneva Conventions in 1960 before becoming an independent state[99], and the Palestine Liberation Organization (PLO) who declared to adhere to both the Geneva Conventions and the Additional Protocols in 1989[100]. In this regard, the right to accede to

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92 S. RONDEAU, *Participation of armed groups in the development of the law applicable to armed conflicts*, cit., p. 659.
93 See INTERNATIONAL LAW COMMISSION, Draft Articles on the Law of Treaties, YB. *Int. Law Comm.,* 1966, vol. II, pp. 188-189, emphasis added.
94 M. SASSÒLI, *Taking Armed Groups Seriously*, cit., p. 19.
95 *Ibid.*
96 C. RYNGAERT, *Imposing International Duties on Non-State Actors and the Legitimacy of International Law*, cit., p. 76.
97 See *18-19 June 2009 - Geneva - Switzerland. Second Meeting of Signatories to Geneva Call's 'Deed of Commitment for Adherence to a Total Ban on Anti-Personnel (AP) Mines and for Cooperation in Mine Action',* Geneva Call http://www.genevacall.org/news/events/events.htm.
98 See ADH GENEVA, *Armed Nonstate Actors and International Norms*, http://www.adh- geneva.ch/policy-studies/ongoing/armed-nonstate-actors-and-protection-of-civilians.
99 Instruments of Accession of the Algerian Republic to the Geneva Conventions of August 12, 1949 registered at Berne, 20 June 1960.
100 In 1989, the Palestine Liberation Organization (PLO) submitted a declaration to the depositary, which

treaties could be satisfied by the submission of a declaration to the depositary, in this case Switzerland, similarly to the issuance of unilateral declarations examined in section 3.1. A parallel system to access to treaties has been established by Geneva Call regarding the Ottawa Convention, which will be analysed in the last section.

c) Participation in Soft Law Standards

Finally, armed groups could be incorporated in existing or new international debates regarding the development of *soft law* standards in the fields of IHL, along similar lines to those adopted for transnational corporations[101]. The views of different non-state actors could be taken into account when elaborating new *soft law* provisions. This could have been the case for the Turku Declaration on Minimum Humanitarian Standards. However, the UN did not involve any non-state armed groups in the preparation of this instrument, probably because armed groups were considered illegal under the relevant domestic jurisdictions[102]. Nevertheless, it could be feasible to provide armed groups with new fora where they can discuss how to show that they are respecting international humanitarian norms, or how they can comply with further rules, in particular since there are rules applicable to non-international armed conflicts that require significant further clarification[103]. In this regard, the fact that non-binding instruments could be accepted by both states and non-state actors represents a first step for developing future international rules as far as they are in line with the aims and objectives of international humanitarian law[104].

3.3. *Incorporating the Practice of Armed Groups into Customary Law*

As I have noted in the foregoing sections, certain armed groups have publicized their practice and views with respect to IHL through unilateral declarations, special agreements and codes of conduct. In respect of this development, the ICRC customary international humanitarian law study concluded that the legal significance of this «other practice» was «unclear»[105]. Under the traditional system of sources of international law, customary IHL can only be derived from states' practices and *opinio juris*. In this sense, Henckaerts states that:

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provided that «the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto». This purported accession was not accepted by the depositary. However, it noted that the PLO's «unilateral declaration of application of the four Geneva Conventions and of the additional Protocol I made on 7 June 1982 [...] remains valid». See S. SIVAKUMARAN, *The Law of Non-International Armed Conflicts*, cit., p. 118.

[101] See UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN General Assembly, Human Rights Council, UN Doc. A/HRC/17/3, 21 March 2011.

[102] M. SASSÒLI, *Taking Armed Groups Seriously*, cit., p. 21.

[103] For instance, clarification is needed with regard to the issue of judicial guarantees under Common Article 3 of the Geneva Conventions when applicable to armed groups or the issue of prisoner of war status, which is not applicable in non-international armed conflicts.

[104] S. RONDEAU, *Participation of armed groups in the development of the law applicable to armed conflicts*, cit., p. 670.

[105] ICRC Customary Law Study, J.M. HENCKAERTS AND L. DOSWALD-BECK (eds), *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge, 2009, p. xlii available at

> […] the practice of armed opposition groups does not constitute State practice given that armed opposition groups do not possess international legal personality. Such practice may nevertheless contain evidence of the acceptance of certain rules in non-international armed conflicts[106].

Thus, the question should be to what extent the relevant conduct of armed groups is recognised to be part of customary IHL. According to the ICRC customary law study, it can be argued that the practice of armed groups is regarded as declaratory of existing customary rules[107]. However, in the *Tadic* case, the ICTY moved forward, considering the behaviour of insurgents as «instrumental in bringing about the formation of customary rules».[108] The Tribunal examined unilateral declarations, bilateral agreements and internal regulations by armed groups. As regards unilateral declarations, it ruled that statements by both warring parties, and thus including armed groups, could contribute directly to the formation of customary humanitarian law.[109] Concerning special agreements, the ICTY declared that when various agreements are made in accordance with Common Article 3, this would be evidence of *opinio (juris sive) necessitatis*[110]. Therefore, it can be argued that the ICTY considered special agreements pursuant to Common Article 3 as evidence of the customary status of the relevant provisions.[111] Finally, the Tribunal found that the internal regulations issued by Mao Tse Tung during the Chinese Civil War were a sign of state practice, extending general principles of the laws of warfare to internal armed conflict.[112]

Cassese had suggested the direct relevance of unilateral declarations by armed opposition groups for the formation of humanitarian customary rules[113]. Moreover, Roberts and Sivakumaran call for armed groups to play a role in the creation of what they term as «quasi-custom», stating:

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https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf .

[106] J.M. HENCKAERTS, *International Humanitarian Law as Customary International Law,* in *Ref. Sur. Quart.*, Vol. 21, No. 3, 2002, p.192.

[107] See ICRC Customary Law Study, cit. In the *Volume II* of the study, examples of acceptance of IHL rules by different armed groups are described, specifically regarding the principle of distinction between civilians and combatants, distinction between civilian objects and military objectives and the provisions regarding protected persons. See ICRC Customary Law Study, J.M. HENCKAERTS & L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, *Volume II: Practice (Part 1 and Part 2),* Cambridge University Press, Cambridge, 2009.

[108] *Prosecutor v. Tadic*, Case IT-94-I, ICTY Appeals Chamber, Decision in the Defence Motion for Interlocutory Appeal on jurisdiction of 2 October 1995, paras 107-108.

[109] *Ibid.*, paras 104 -108.

[110] *Ibid.*, paras 104 -108.

[111] See Zegveld notes the difficulty of assessing whether the agreeing parties are indeed complying with a general conviction/customary law, or whether they are «just» applying the 1949 Geneva Conventions; *see:* L. ZEGVELD, *Armed Opposition Groups in International Law: The Quest for Accountability*, Dissertation, Erasmus University Rotterdam 2000, p.118.

[112] *Prosecutor v. Tadic*, Case IT-94-I, ICTY Appeals Chamber, Decision in the Defence Motion for Interlocutory Appeal on jurisdiction of 2 October 1995, para.102.

[113] A. CASSESE, *The Spanish Civil War and the Development of Customary Law concerning Internal Armed Conflict*, in A. CASSESE (ed.), *Current Problems of International Law, Essays on U.N. Law and on the Law of Armed Conflict,* Giuffrè editore, Milano, 1975, pp. 296-297.

> […]one way forward would be to develop a theory of quasi- customary international law that would be based on the practices and views of states plus actors other than states, including, in the present context, armed groups[114].

Similarly, Sassòli declares that «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»[115].

However, some authors have recognized that although desirable, the incorporation of the practice of armed groups into customary rules is a complex endeavour. Clapham fears that including such practice would transform the international legal system into a mere description of existing canons of behaviour by different actors[116]. Moreover, Rondeau claims that the current system of creation of customary international norms is not necessarily aimed to include the views and practices of different actors apart from states. In her words, «to open the door for input from different stakeholders would lead to the presence of multiple levels of customary norms in international law, as well as differently tailored boundaries of the rules, depending on who is involved»[117]. In a similar line, the recent work carried out by the ILC and his Special Rapporteur Wood on the issue of the identification of customary international law has proposed that even if certain non-state actors can play an important role in promoting international law, «their actions are not "practice" for purposes of the formation or evidencing of customary international law»[118].

To mitigate these concerns, Sivakumaran and Roberts suggest that account must be taken of three alternatives. The first consists of drawing inspiration from how international law addresses the customary law rights and obligations of new states. Secondly, armed groups would not have the power to create a new custom or undermine or change an existing custom without some sort of consensus between armed groups and states. Thirdly, the practice of armed groups should not be treated as equal to the practice of states. Instead, the role of states in the formation of customary international law should still be prioritized over other actors[119].

In sum, it is suggested that some weight should be given to the practice of armed groups, at least as an indirect influence to the formation of customary international law, especially in relation to those areas of the law of non-international armed conflicts which need to be significantly clarified and somehow adapted to the particularities of the actors involved. This influence would be relevant since armed groups are party to the vast majority of contemporary armed conflicts. Therefore, it will not be balanced to take into account only one side of the relevant practice. We cannot deny, however, that there remain a number of practical problems, which need further discussion, especially, the possible creation of multiple levels of customary norms in international law, some for states and others for armed groups. Nevertheless, as advocated by the ICJ in the *Reparations* case, not all entities need to be subject to the same duties and this can also goes for customary law.

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114 A. ROBERTS & S. SIVAKUMARAN, *Lawmaking by Nonstate Actors*, cit., p. 150

115 M. SASSÒLI, *Taking Armed Groups Seriously*, cit., p. 18.

116 A. CLAPHAM, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement*, cit., p. 43.

117 S. RONDEAU, *Participation of armed groups in the development of the law applicable to armed conflicts*, cit., p. 668.

118 INTERNATIONAL LAW COMMISSION, *Second report on identification of customary international law by Michael Wood, Special Rapporteur*, A/CN.4/672, p. 32, para. 45.

119A. ROBERTS & S. SIVAKUMARAN, *Lawmaking by Nonstate Actors*, cit., p. 151.

3.4. *Their Possible Role in Interpreting IHL Rules*

As far as the interpretation of IHL rules is concerned, some armed groups, such as the Sudan Justice and Equality Movement (JEM) and the National Democratic Front of the Philippines (NDFP)[120], have issued statements on particular international humanitarian law issues. Sassòli suggests that the groups' views should be collected as a previous research exercise which need to precede any future project of codification or in the form of «new interpretations» of IHL. This could be done by an independent organization such as the ICRC[121].

In this regard, the perspectives of armed groups with regard to the interpretation of IHL rules could constitute a useful addition to the ongoing debates that are taking place in different international fora, because their views are based on their actual experiences as parties to armed conflicts[122]. In fact, there have been a number of recent research initiatives where the views of armed groups and other related international actors have been collected. We can mention at least three examples. First, the research project «Towards a better protection of civilians in armed conflict» by the Geneva Academy of International Humanitarian Law and Human Rights where armed groups from different regions and backgrounds attended the meetings and subsequently concluding in various reports. The reports serve as good practice guidelines with regard to engagement with armed non-state actors in terms of increasing respect for IHL[123]. The second example of research engaging with different actors including armed groups is the «Viewpoints» project of the Centre for Humanitarian Dialogue related to peace processes. This project was useful in collecting the views and opinions of different stakeholders including, among others, former members of armed groups, academics, policy advisers, NGOs, mediators, and former diplomats[124]. Finally, the two-year research project led by the Humanitarian Policy Group (HPG) which incorporated the interviews with aid workers, members of armed groups and other actors

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120 See, e.g., Statement, Sudan Justice and Equality Movement (JEM), Report of the Panel of Experts Established Pursuant to Resolution 1591 (2005) Concerning the Sudan Issued 29 October 2009: A Response from JEM (Nov. 18, 2009), available at http://www.sudanjem.com/2009/11/report-of-the- panel-of-experts-established-pursuant-to-resolution-1591-2005-concerning-the-sudan-issued-29- october-2009/; Press Release, Karen National Union, Press Statement on Report of UNSG (Apr. 27, 2009), available at http://www.genevacall.org/resources/nsas-statements/f-nsas-statements/2001- 2010/2009-27apr-knu.pdf; Letter from National Democratic Front of the Philippines to Ban Ki Moon, U.N. Sec.-Gen. (Nov. 24, 2008), available at http://www.philippinerevolution.net/statements/letter-of-the-ndfp-nec-to-un-secretary-general-ban-ki-moon.

121 M. SASSÒLI, *Taking Armed Groups Seriously*, cit., p. 20.

122 *Ibid.*

123 The areas represented included Colombia, Congo, Darfur, Kosovo Kurdistan, Malaysia, Nepal, Nigeria, Northern Ireland, Palestine, Sierra Leone, and Sri Lanka. See Geneva Academy of International Humanitarian Law and Human Rights, *Armed non-state actors and international norms: towards a better protection of civilians in armed conflicts. Summary of good practice discussed and elaborated during an expert workshop in October 2010*, February 2011, available at http://www.adh-geneva.ch/docs/projets/NonStateActors/Armed%20Non-State%20Actors%20and %20International%20Norms_Workshop%20Summary_ENG.pdf.

124 C. BUCHANAN (ed.), *Viewpoints: Negotiating Disarmament, Vol. 1*, Centre for Humanitarian Dialogue, March 2008, available at http://www.hdcentre.org/publications/reflections-guns-fighters-and-armed- violence-peace-processes and Vol. 2, November 2008, available at: http:// www.hdcentre.org/publications/viewpoints-volume-2-negotiating-disarmament. See also S. RONDEAU, *Participation of armed groups in the development of the law applicable to armed conflicts*, cit. p. 663.

in relation to humanitarian negotiations with non-state armed groups in Afghanistan, Sudan and Somalia[125].

These examples show that engaging armed groups on the issue of interpretation of existing norms would serve to improve their compliance with IHL, avoiding the problems associated with the so-called legitimation of armed groups and any possible transgressions of the sovereign functions of states[126].

4. *Deeds of Commitment in the Case of Sudan*

As an effort to promote and enhance NSAGs' compliance with international humanitarian norms, the NGO Geneva Call was established in 2000 by members of the International Campaign to Ban Landmines[127]. In this respect, it was created as a response to the fact that a treaty exclusively between states was not satisfactory to eliminate the whole problem created by anti-personnel mines, and that both states and NSAGs had to commit themselves to avoid the use of these weapons[128]. Initially, Geneva Call focused on landmines, but it recently expanded its work to incorporate the protection of children, in particular the recruitment and use of children in hostilities, and the prohibition on sexual violence in armed conflict.

Geneva Call has followed a distinctively inclusive approach through the signing by armed groups of a "Deed of Commitment" (DoC) to express their adherence to specific humanitarian norms and to establish self-reporting mechanisms, as well as to allow external monitoring of compliance[129]. To date, they have elaborated three types of documents involving 54 NSAGs from Africa, Asia, Europe, the Middle East and South America[130]. They are signed by the leadership of the relevant armed group and countersigned by Geneva Call and the Government of the Republic and Canton of Geneva. It is noteworthy that some of the obligations contained in the Deeds of Commitment go beyond existing international standards. For instance, under Article 1 of the DoC for the prohibition of anti-personnel mines, these weapons are defined on the basis of their impact or effect,

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125 See, A. JACKSON, *Humanitarian negotiations with armed non-state actors: key lessons from Afghanistan, Sudan and Somalia*, Humanitarian Policy Group, Policy Brief 55, 2014 available at https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8847.pdf.

126 S. RONDEAU, *Participation of armed groups in the development of the law applicable to armed conflicts*, cit., pp. 660-663.

127 See Geneva Call at http://www.genevacall.org.

128 At least 50 NSAGs have committed to halt the use of antipersonnel mines over the past 12 years. From 1999 to 2015, the use of landmines by armed groups have been considerably reduced from 44 countries during the 1990s to only 10 countries in 2015. See the International Campaign to Ban Landmines – Cluster Munition Coalition (ICBL-CMC), 2015 Landmine Monitor Report, November 2015.

129 P. BONGART & J. SOMER, *Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment*, in *Int. Rev. Red Cr.*, Vol. 93, No. 673, 2011, p. 688.

130 The Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action in 2000 (50 NSAGs have signed it); the Deed of Commitment for the Protection of Children from the Effects of Armed Conflict in 2010 (18 NSAGs have signed it); and the Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination in 2012 (16 NSAGs have signed it). See the list of the signing armed groups in http://www.genevacall.org/how-we-work/armed-non-state-actors.

rather than on the basis of their design intention, as is the case with the Ottawa Convention[131].

As pointed out earlier, commitments made by armed groups merited some scepticism by the international community based on the idea that they are only used as merely exercises of propaganda. However, the experience of Geneva Call shows that in practice, some armed groups may abide by their commitments, and consequently, such commitments can play a positive role in the policies of states and also other NSAGs. In this regard, engagement with an armed group on humanitarian norms has had a noteable impact on the state with which the armed group is in conflict. This has been the case in particular with the Government of Sudan's approach to the Ottawa Convention and the Deed of Commitment signed by the SPLM/A[132].

The interaction between the SPLM/A and the Sudanese government merits some consideration. Sudan signed the Mine Ban Treaty on 4 December 1997.[133] Despite the SPLM/A declaring their intention to de-mine areas within their control, the Sudanese government had not ratified the Ottawa treaty prior to the SPLM/A signing the Deed of Commitment. In 2001, the SPLM/A signed the Geneva Call Deed of Commitment stating that «as we stand committed to deposit our Deed of Commitment, we raise our voice to the international community to bring pressure to bear on the government of the Sudan to ratify the Ottawa Convention […]»[134]. Subsequently, the SPLM/A and the Government of Sudan signed a Memorandum of Understanding with the United Nations on mine action in 2002[135]. The agreement was signed during the Fourth Meeting of States Parties to the Antipersonnel Mine Ban Convention. Sudan had repeatedly denied laying landmines, claiming that the SPLM/A is primarily responsible for their use in Sudan. After citing continued use of mines by rebel groups, the Government representative of the Humanitarian Aid Commission reiterated that the government would ratify the Ottawa Treaty, but only «as soon as the above-mentioned violations are ceased»[136]. The following year, in October 2003, the Government finally ratified the Ottawa Convention.

It is worth noting that the former director of the UN Mine Action Service claimed that «[i]t is clear from conversations with senior officials of the Government, that they would not have felt able to ratify the [Ottawa] Treaty, if the SPLM/A had not already made a formal commitment to observe its provisions in the territory under its control».[137] In this regard, the Deed has become a complementary means of commitment, which parallels the

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131 See the wording of article 2 of the Ottawa Convention in comparison with article 1 of the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines.

132 S. SIVAKUMARAN, *The Law of Non-International Armed Conflicts*, cit., pp. 542-543.

133 Country Profiles 'Sudan', International Campaign to Ban Landmines – Cluster Munition Coalition (ICBL-CMC) at http://archives.the-monitor.org/index.php/publications/display?url=lm/2002/sudan.html.

134 Statement made by the Cdr Nhial Deng Nhial, Chairman of the Commission for External Relations, Information and Humanitarian Affairs of the Sudan People's Liberation Movement/Army on the Occasion of the Signing and Depositing to Geneva Call Deed of Commitment to Ban Anti-Personnel Mines, 4 October 2001.

135 Geneva Call, *Report of Proceedings an Recommendations Mine Ban Education Workshop in Southern Sudan*, September 2003, p. 68 available at http://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/11/20031001_mine_ban_education_workshop_southern_sudan_proceedings1.pdf.

136 Statement of Sudan delegation to the Intersessional Meeting of Experts on Implementation of Ottawa Convention on Banning Anti-personnel Landmines, delivered by Dr. Sulafeldin Salih Mohamed, Commissioner General, Humanitarian Aid Commission, Geneva, May 2002.

137 M. BARBER, *Preface*, in Geneva Call, *Armed Non-State Actors and Landmines: Volume I* (2005) 1.

Ottawa Convention. It has been common for the ratification of the Ottawa Convention to be linked to non-state armed group signature of Geneva Call's Deed of Commitment. In this regard, the Government of Sri Lanka has also indicated that «it would be willing to sign the Mine Ban Treaty if the LTTE takes on a similar commitment».[138]

While initially aiming at the elimination of on anti-personnel mines, Geneva Call has viewed the particular case of mines as a step towards greater engagement with NSAGs on other humanitarian norms[139]. Therefore, the Deed of Commitment provides that armed non-state actor signatories treat «this commitment as one step or part of a broader commitment in principle to the ideal of humanitarian norms, particularly of international humanitarian law and human rights, and to contribute to their respect in field practice as well as to the further development of humanitarian norms for armed conflicts»[140]. With respect to this, the SPLM/A also acted pursuant to the Article 8 obligation to promote the Deed and encourage other groups to sign it, sending a letter to the ELN in Colombia outlining its reasons for prohibiting landmines in its territory[141]. They have also shared their experience with Angolan and other Sudanese armed groups[142].

This experience provides support for the perception that the commitments of states and armed groups can be equal and complementary. Secondly, it shows that some NSAGs are willing to abide by international standards where they have participated in their development, even when such participation is not compulsory[143]. Therefore, we need to look for opportunities for constructive engagement with NSAGs instead of viewing them as perpetrators only[144]. Thirdly, the conduct of armed groups can have a role influencing the conduct of other actors, whether state or non-state. However, the effect of the Deed with regard to other issues such as the protection of children and prohibition of sexual violence in conflict settings still remains to be seen. It is submitted that it is highly desirable that the Geneva Call approach could be extended to other areas of IHL.

5. *Conclusions*

When dealing with non-international armed conflicts, we must take into account the views of both parties to the conflict because they are fought at least as much by armed groups as by governmental armed forces[145]. The first step in encouraging armed groups to conform to IHL is to educate them on the relevant humanitarian provisions[146]. The duty to train armed forces in IHL is recognized, in customary law, as binding both on states and on

[138] *Ibid*., 31. See also Geneva Call, Annual Report 2002, 8.
[139] Geneva Call, *Geneva Call Strategy 2014-2016. Protecting Civilians in Armed Conflicts through Humanitarian Engagement with Armed Non-State Actors*, 2014, p. 3.
[140] Deed of Commitment, para. 5. See also S. SIVAKUMARAN, *The Law of Non-International Armed Conflicts*, cit., p. 541.
[141] E. CRAWFORD, *Identifying the Enemy. Civilian participation in armed conflict*, Oxford University Press, Oxford, 2015, p. 219.
[142] Geneva Call, *Armed Non-State Actors and Landmines, Volume II: A Global Report of NSA Mine Action*, Geneva Call 2006, p. 81.
[143] E. CRAWFORD, *Identifying the Enemy. Civilian participation in armed conflict*, cit., p. 221.
[144] P. BONGARD, *Engaging armed non-state actor son humanitarian norms: reflections on Geneva Call's experience*, in *Humanitarian Network Practice, Humanitarian Exchange* Number 58, July 2013, pp. 9-11.
[145] M. SASSÒLI, *Taking Armed Groups Seriously*, cit., p. 12.
[146] *Ibid*., p. 25.

armed groups party to non-international armed conflicts[147]. The law should be presented strategically in terms that are concrete and operational, although it should always be presented accurately and without compromising existing provisions[148].

Furthermore, engagement has to be seen as a long-term process. As I have claimed in this article, one of the means for possible engagement is the inclusion of armed groups in some forms of law-making. In this regard, we can conclude on the best ways to incorporate them in law-making under IHL. First, the promotion of the so-called "tools of express commitment", namely unilateral declarations, special agreements and codes of conduct by armed groups to comply with IHL rules, should be encouraged. This commitment has to be realistic, which means that it is preferable that an agreement be based on particular, specified substantive rules rather than a declaration to comply with all four Geneva Conventions. In particular, the precedent of the work of the Geneva Call and the Deeds of Commitment, as seen in the case of Sudan, could be extended to other areas of IHL. Second, dialogue with armed groups regarding issues of IHL should be considered as a possibility in pre-conference meetings and the accession to treaties should also be taken into account for those groups. The problem here is the selection of armed groups, as some states might label them as "terrorist or criminal groups". Therefore, there is a need to establish some sort of criteria. The same criteria can also apply to the negotiations of *soft law* standards. Third, it is desirable that the practice of armed groups is analysed for the formation of future rules of customary IHL, or at least taken into account when interpreting and applying IHL rules, especially in relation to those areas of the law of non-international armed conflicts which need to be significantly clarified and somehow adapted to the particularities of the actors involved.

Even so, two key limitations have to be set out. It is important to ensure that the participation of armed groups is not equated to giving them the same role as states. Though armed group's involvement in law-making processes is desirable from the perspective of the effectiveness of IHL, an overstated involvement of armed groups is not considered beneficial either[149]. Finally, it has to be reminded that armed groups remain bound by crucial treaty obligations. Therefore, they cannot unilaterally liberate themselves from the existing legal obligations under IHL. As affirmed by the International Court of Justice in 1986, the provisions of Common Article 3 represent a minimum standard from which the parties to any type of armed conflict must not depart[150].

To conclude, it is suggested that there must be a balance between the traditional sources of international law and the actual needs of the international community. Avoidance of engagement with armed groups in the regulation of contemporary armed conflicts and in the application of IHL has no positive impact on the realization of human rights and the effective protective role of humanitarian norms.

147 See ICRC Customary Law Study, cit., Rule 142.
148 M. MACK, *Increasing respect for IHL in non-international armed conflicts*, cit., p. 13.
149 C. RYNGAERT, *Imposing International Duties on Non-State Actors and the Legitimacy of International Law*, cit., p. 80.
150 See *Military and Paramilitary Activities In and Against Nicaragua*, 1986 ICJ, Reports p.114, paras 218-219.