

**FACTORS MOTIVATING NON-STATE ARMED GROUPS TO  
COMPLY WITH INTERNATIONAL HUMANITARIAN LAW:  
REFLECTIONS ON POSITIVE PRACTICES**



LLM Paper

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## I. INTRODUCTION

Today, it is more and more recognized that engaging with non-state armed groups (NSAGs) is of primary importance for increasing their compliance with international humanitarian law (IHL).<sup>1</sup> In fact, with the number of conflicts of a non-international character now prevailing over the number of international armed conflicts,<sup>2</sup> and armed groups at the center of the majority of wars, engaging with them becomes not only an option, but a *necessity*. The logical subsequent question is *how* to effectively engage with such groups. The UN Secretary-General has answered in the following way: “[a]rmed groups are not monoliths. They have entry points, such as through the local population, and members who may be more predisposed to engagement”.<sup>3</sup> However, one will notice that even with these “entry points”, such an engagement is vain without a clear understanding of which factors actually encourage armed groups to respect IHL. This is precisely the goal of this paper: to identify the main factors bringing NSAGs to comply with IHL rules.

Traditionally, studies have focused on the roots of *negative* behavior of armed groups, on why they violate IHL. Yet there are very good reasons for considering also *positive* instances of respect, and understanding the motivation of armed groups for complying with it. Firstly, only through a systematic and clear knowledge of the rationale leading armed groups to respect IHL, can we convince them to further comply with these rules and prevent future IHL violations. Secondly, as Bangerter notices, “[i]t is not only wrong but also *counterproductive* to consider all members of armed groups as actual or potential war criminals”.<sup>4</sup> A reason for this is the risk of creating a “vicious circle of non-respect”: if only violations are highlighted, there is a risk of a general loss of trust in the IHL *system*, generating more instances of violations. Thirdly, negative instances have an impact not only at the system level, but also at the level of *single decisions*: if a party in a concrete case does not respect IHL, the other will not see why it should. Needless to say, this would have tragic consequences in terms of protection of civilians and more generally for all the individuals protected under IHL.

The value of studying IHL compliance is thus rather clear. The more difficult question is, however, how to individuate the reasons motivating armed groups to respect it. Considering

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<sup>1</sup> M. Sassòli, ‘Taking Armed Groups Seriously: Ways to improve their Compliance with International Humanitarian Law’ (2010) 1 Journal of International Humanitarian Legal Studies, 6.

<sup>2</sup> See A. Bellal, ‘The War Report, Armed Conflicts in 2016’ (The Geneva Academy of International Humanitarian Law and Human Rights, Geneva 2017), 15.

<sup>3</sup> UNSG, ‘Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict’ (29 May 2009) S/2009/277, [46].

<sup>4</sup> O. Bangerter, ‘Reasons why armed groups choose to respect international humanitarian law or not’ (2011) 93(882) IRRC, 358 [emphasis mine].

the intricacy of human decisions, this task might, at first sight, appear a futile enterprise: “[h]uman behavior is by definition so complex, even in situations that appear quite simple [...], that the attempt to understand why an individual caught up in the turmoil of war and the eruption of passions adopts a particular form of behavior has little chance of producing an entirely satisfactory answer.”<sup>5</sup> However, some clarity *is* possible, especially when considering that members of NSAGs are faced with specific choices and take particular decisions, that can be analyzed separately under their different possible influences (such as social and political). In an attempt to provide a little more clarity, I thus proceed the following way: I start with a short overview of the applicable legal framework, a brief explanation of why armed groups are considered to be bound by IHL, and an illustration of the measures these groups take to show their commitment to IHL; next, I give an overview of the most important and recurrent factors for compliance, taking inspirations from different studies; and finally, I analyze two practical cases of compliance in order to test the factors previously identified.

With a good idea of the elements inducing compliance and with good “entry points” in NSAGs, the ultimate goal is to have several instruments to encourage armed groups to respect and comply with IHL.

## **II. ARMED GROUPS AND IHL COMPLIANCE**

### **a) Legal regime in non-international armed conflicts**

It is firstly necessary to determine the applicable legal framework for armed groups. When these entities are parties to a non-international armed conflict, there are two main relevant texts: Common article 3 to the four Geneva Conventions (CA3)<sup>6</sup> and Additional Protocol II (APII).<sup>7</sup> CA3 applies “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”, and it is recognized to be part of

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<sup>5</sup> J.J. Frésard, ‘The Roots of Behaviour in War: A Survey of the Literature’ (ICRC, Geneva 2004), 8.

<sup>6</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (1949), 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (1949), 75 UNTS 287.

<sup>7</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977), 1125 UNTS 609.

customary international law (CIL).<sup>8</sup> APII applies in the narrower set of circumstances specified in its Art. 1(1), with a higher threshold of organization and territorial control. Its “core” has also been recognized by the ICTY as part of CIL.<sup>9</sup> In general, we can affirm that in a situation of armed conflict, armed groups that have reached the appropriate level of organization in a situation of sufficient intensity are bound by customary international humanitarian law and by certain treaty rules for non-international armed conflicts, provided that the State in which the conflict takes place is a party to the relevant treaty.<sup>10</sup>

### **b) Armed groups bound by IHL**

Although only States may formally become parties to IHL treaties, it is agreed that IHL rules also bind armed groups parties to a non-international armed conflict.<sup>11</sup> This is not only confirmed by the wording of CA3 (“each Party to the conflict”), but also by the practice of international tribunals.<sup>12</sup> To justify armed groups being bound by IHL despite not having agreed themselves to it, the following legal constructions are usually put forward:<sup>13</sup> they are deemed to be bound through CIL; because of the rules of treaties and third parties; because of their claim to represent the state; via the principle of legislative jurisdiction. However, as Sivakumaran shows us, none of these arguments is free from criticisms.

Firstly, while the **CIL explanation** was used by several international tribunals, there is the counter-argument that customary law is only shaped by state practice, not NSAGs, and that, therefore, these customary rules only represent customary law with regard to states.<sup>14</sup> However, one could answer that, CIL being a source of international law, it binds all entities with legal personality, that is, also an armed group possessing sufficient organization and control, and committing acts “above the level of mere banditry”.<sup>15</sup> Even accepting this, NSAGs would only be bound by IHL that is customary.<sup>16</sup>

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<sup>8</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14 [218].

<sup>9</sup> *Tadic Case (Prosecutor v Dusko Tadic)* (Judgment, Appeals Chamber) ICTY-94-1 (15 July 1999) [98].

<sup>10</sup> A. Bellal, S. Casey-Maslen, ‘Enhancing Compliance with International law by Armed Non-State Actors’ (2011) 3 *Goettingen Journal of International Law* 1, 175-197; *Tadic Case* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) [70].

<sup>11</sup> S. Sivakumaran, ‘Binding Armed Opposition Groups’ (2006) 55 *International & Comparative Law Quarterly* 2, 369–394.

<sup>12</sup> See L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (CUP, Cambridge 2002), 9-38.

<sup>13</sup> See Sivakumaran, note 11, 369-394.

<sup>14</sup> H.A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Clarendon Press, Oxford 1998), 50.

<sup>15</sup> Sivakumaran, note 11, 374.

<sup>16</sup> By 2005, according to the ICRC study on CIHL, at least 136 (and arguably 141) rules governed the conduct of

Secondly, NSAGs are sometimes considered as bound by IHL because of the **binding nature of treaties on third parties** as provided in the Vienna Convention on the Law of Treaties (VCLT).<sup>17</sup> Yet some argue that VCLT rules cannot be used in this sense, since NSAGs are non-state entities, not referees of the VCLT (see its Art. 1). Furthermore, looking at Arts. 35 and 36 VCLT, only the armed groups expressing consent to IHL rules would be bound by them.

Pictet considered an armed group to be bound by the Convention because, “if the responsible authority at [its] head exercises effective sovereignty, it is bound by the very fact that it **claims to represent the country**, or part of the country”.<sup>18</sup> However, one might wonder about the status of the armed groups that in practice do not achieve such a status.

Finally, there is the most convincing explanation of the **principle of legislative jurisdiction**: the government has the competence to legislate for all its nationals and when it ratifies IHL treaties, these also bind NSAGs.<sup>19</sup> The main advantage of this argument is that it provides a solid reason for why an armed group should be bound by *all* the rules that a state has agreed to, not only the ones that are CIL.

Having briefly illustrated the main arguments, we can conclude this part by saying that, “while it is controversial why armed groups are bound by IHL, it is uncontroversial that they are bound by certain IHL rules”.<sup>20</sup>

### **c) Elements showing commitment to IHL**

At this point, it is important to notice that often armed groups consider themselves as bound by IHL in order to avoid to be considered as terrorist groups or to gain legitimacy.<sup>21</sup> In fact, it would be a misleading to argue that NSAGs rarely commit to humanitarian law. These “voluntary commitments” are important, firstly because they increase the sense of ownership of IHL norms by the armed groups; secondly, because they can inspire other armed groups to do the same, and they create a space for dialogue on IHL rules; and finally, because they can bring to the creation of appropriate internal disciplinary measures.<sup>22</sup>

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NSAGs. See J.M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1 (CUP, Cambridge 2005) (CIHL Study).

<sup>17</sup> Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, Arts. 35-36.

<sup>18</sup> J.Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 3: Geneva Convention relative to the Treatment of Prisoners of War* (ICRC, Geneva 1960) 37.

<sup>19</sup> Sivakumaran, note 11, 371, 381.

<sup>20</sup> Sassòli, note 1, 14.

<sup>21</sup> D.P. Forsythe, ‘Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts’ (1978) 72 AJIL 272, 292.

<sup>22</sup> UNSG, note 3.

One instrument used by NSAGs to show their commitment are **special agreements**. Indeed, CA3 urges parties to a non-international armed conflict to make agreements to “bring into force [...] all or part of the other provisions” of the Conventions.<sup>23</sup> These agreements represent the opportunity for armed groups to understand and clarify IHL obligations already existing (“declaratory agreement”), but can potentially also increase the obligations of the parties, going beyond the IHL provisions already applicable (“constitutive agreement”).<sup>24</sup> On the negative side, we can firstly observe the lack of clarity with regard to the applicable legal framework, and secondly, their rare use, since states are afraid that such an agreement might confer legitimacy to NSAGs (although CA3 clearly indicates the opposite).<sup>25</sup>

Armed groups may also make **unilateral declarations** stating their commitment to IHL. These declarations may create legal obligations depending on their content, the circumstances of the declarations, and on who made them.<sup>26</sup> On the negative side, these declarations are hardly enforceable legally, and are often made for political reasons with no real intention of implementing them.<sup>27</sup>

Potentially more easily accepted by the members of the armed group are **codes of conducts**, or rules of engagement, since they originate *from* the armed group *for* the group itself.<sup>28</sup> Despite this potential acceptance, however, the rules should have provisions on dissemination, enforcement and monitoring, in order to be effective.<sup>29</sup>

In addition, parties may take the opportunity of ceasefire or peace **agreements** to restate their IHL obligations, and to ensure compliance to them in case of the restart of hostilities.<sup>30</sup> Agreements on precise IHL topics, such as humanitarian assistance, are also possible, and can be made between with states or humanitarian agencies.<sup>31</sup>

Finally, in some cases, armed groups promulgate IHL respect through **“laws” or policies**. The legality of such acts is however controversial.<sup>32</sup>

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<sup>23</sup> CA3(3).

<sup>24</sup> E. Heffes, M.D. Kotlik, ‘Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime’ (2014) 96(895) IRRC, 1205.

<sup>25</sup> M. Mack, ‘Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts’ (ICRC 2008), available at <<https://www.icrc.org/en/publication/0923-increasing-respect-international-humanitarian-law-non-international-armed-conflicts>> accessed 15 August 2017, 17.

<sup>26</sup> *Nuclear Tests Case (Australia v France)* (Judgment) [1974], ICJ Rep 253, [42]-[51].

<sup>27</sup> Mack, note 25, 19.

<sup>28</sup> *Idem*.

<sup>29</sup> Sassòli, note 1, 25.

<sup>30</sup> Mack, note 25, 24.

<sup>31</sup> See O. Bangerter, ‘Measures armed groups can take to improve respect for international humanitarian law’ in Angeli (ed), *Non-State Actors and International Humanitarian Law* (Studi FrancoAngeli, Sanremo 2010), 198.

<sup>32</sup> *Idem*, 199.

### III. MOTIVATIONAL FACTORS FOR ARMED GROUPS

I now come to the core of this paper, the armed groups' motivation for compliance, more and more framed in terms of their *benefits from* compliance.

In contrast to the ICRC Roots of Behavior Study, which considers the influences on the single *individual combatant*,<sup>33</sup> I will concentrate on the elements bringing to compliance the *armed group as a whole*, whose decision will ultimately be determined by the decision-makers of the group. I do this not only for reasons of limited space, but also because of the central importance of the decision of the leader of the group: “[i]f the top leadership does not want to respect IHL, that is the end of the matter. One cannot hope to change an armed group’s practice without having its leadership genuinely committed to do so”.<sup>34</sup> Therefore, I will focus on the motivation of decision-makers of armed groups and refer to the ICRC study for the individual motivations of single soldiers.

Motivations of armed groups greatly vary depending on the type of armed group we are talking about and depending on the context.<sup>35</sup> However, it is possible to identify some recurrent general patterns, or, in Castano’s words, “clusters of realities”.<sup>36</sup> For the purpose of this paper, I have taken inspiration from different authors who classified such patterns and their approaches in my research. The result can be observed in Annex I, starting by distinguishing the motivations of armed groups between *logic of consequences* and *logic of appropriateness*.<sup>37</sup> Under the former, the armed group is motivated to respect IHL considering the consequences of complying with it, mainly thinking in terms of military, political and legal self-interest, as well as reciprocity, and reputation (or self-image).<sup>38</sup> At the other side of the spectrum, under the logic of appropriateness, we find ethical arguments and humanitarian considerations.

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<sup>33</sup> ICRC, ‘A study on the roots of restraint in war’ (2017), available at <https://www.icrc.org/en/document/study-roots-restraint-war> accessed 13 August 2017.

<sup>34</sup> Bangerter, note 31, 194-6. On obedience to commanders: S. Milgram, *Obedience to Authority* (Harper & Row, New York 1974).

<sup>35</sup> E. Castano, ‘Interview with Emanuele Castano’ (2014) 96 (895/896) *IRRC*, 702.

<sup>36</sup> *Idem*.

<sup>37</sup> See J. March, J. Olsen, ‘The Institutional Dynamics of International Political Orders’ (1998) 52 *International Organizations Law Review* 943, 949.

<sup>38</sup> Inspired by: H. Krieger, ‘Inducing Compliance in Areas of Limited Statehood’ in Krieger and Willms (eds), *Inducing Compliance with International Humanitarian Law* (CUP, Cambridge 2015), 512-513; and Bellal, note 10, 194.



## a) Logic of consequences

### i. Self-interest: military, political and legal aspects

Respect for IHL is often linked to **military efficacy**. This makes sense recalling that IHL norms were drafted in a way as to consider both principles of humanity *and* military necessity.<sup>39</sup> Military commanders themselves frequently recognize that not respecting IHL can be counterproductive in terms of material costs, or in terms of humanitarian costs leading to a loss of support.<sup>40</sup> In fact, avoiding IHL violations such as indiscriminate bombing, and targeting only military objectives, seems to be both militarily and economically efficient: in particular, it will reduce the financial investments necessary for reconstructing infrastructure that might be useful for the group itself if it were to win the conflict.<sup>41</sup> The financial argument may also motivate NSAGs not to starve populations (which would inevitably create future refugees and IDPs), and not to kill the population (often their source of financial support).<sup>42</sup> Furthermore, if a party to the conflict is known for treating its prisoners well, the soldiers of the opposing party will surrender to it more easily, facilitating the combat for the NSAG: vice-versa, “an adversary who has no hope of surviving if he surrenders is likely to fight to the death”, complicating the task of the commander.<sup>43</sup> IHL compliance can also have a positive impact on the readiness of fighters to follow orders and to combat, since it has been shown that attacks on individuals considered as vulnerable (civilians and in particular children), “may seriously undermine the morale of the combatants, which is vital to continuing the struggle”.<sup>44</sup>

Comparing different armed groups, Hayner notices that NSAGs “may be fighting for many different things but one thing they generally share is an interest in **political power** and the benefits that come with such positions in the future”.<sup>45</sup> since IHL is usually seen as “moral high”, its respect helps armed groups to gain the political support and the **legitimacy** necessary to reach the aspired power.<sup>46</sup> In other words, armed groups “will care about international standards [such as IHL] when adherence is beneficial for their political

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<sup>39</sup> See N.C.H. Dunbar, ‘The Significance of Military Necessity in the Law of War’ (1955) 67(2) in *Juridical Review*, 201-212.

<sup>40</sup> Bellal, note 10, 194.

<sup>41</sup> But consider also opposite argument, and the «costs of compliance» in J. Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (CUP, Cambridge 2015), 58-59.

<sup>42</sup> M. Veuthey, *Guérilla et droit humanitaire* (ICRC, Geneva 1983), 345.

<sup>43</sup> O. Bangerter, note 4, 365.

<sup>44</sup> *Idem*, 362.

<sup>45</sup> P. Hayner, ‘Creating incentives for compliance: between amnesty and criminalization’ in Angeli (ed), *Non-State Actors and International Humanitarian Law* (Studi FrancoAngeli, Sanremo 2010), 184.

<sup>46</sup> Bellal, note 10, 194-5.

survival”, or their political success.<sup>47</sup> Ernesto “Che” Guevara, for instance, realizing the importance of the contribution of civilians for the Revolution - his political aim - considered that rebels should avoid violence towards them.<sup>48</sup> In fact, the political success of armed groups and the support of the local population often go hand in hand, because, if treated badly, the population might retaliate and hamper the political aims of the NSAGs.<sup>49</sup>

The impact that the “**legal factor**” has on IHL compliance is less clear: can the fear of prosecution influence the behavior of NSAGs? According to Hayner yes, “there are still quite a number of interesting examples where the threat (or perception of a threat) of criminal accountability may have affected behavior of non-state armed groups”.<sup>50</sup> One of the examples she brings is the message sent by the US to a rebel group in Liberia who had previously hit a US compound: “[i]f you send another shell into a compound owned by the US, we will assure that you are taken before a war crimes court”.<sup>51</sup> After this, no US compound was targeted. However, Hayner notices that even though it appears that the behavior of armed groups is *affected* by the threat of prosecution, it is not always clear whether this actually increases their *compliance* with IHL. Wood is more categorical, arguing that the threat of prosecution at the international level is unlikely to change the behavior of armed groups in a meaningful manner, since NSAGs concentrate on short-term, and the conflict environment is so unpredictable.<sup>52</sup> The opinions in this regard are thus not unanimous. In general, it can however be affirmed that NSAGs will consider two aspects in particular: the magnitude and the likelihood of the punishment.<sup>53</sup> Considering the unlikelihood of punishment of NSAGs at the international level, the fear of prosecution can probably not be considered as the central factor for compliance for armed groups. In any event, international prosecutions are not the only possible legal factor: the freezing of assets and embargoes are other examples of possible legal factors.

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<sup>47</sup> Jo, note 41, 78.

<sup>48</sup> E. Guevara, *Guerrilla Warfare* (Vintage Books, New York 1969).

<sup>49</sup> Bangerter, note 4, 363.

<sup>50</sup> Hayner, note 45 182.

<sup>51</sup> P. Hayner, ‘Negotiating Peace in Liberia: Preserving the Possibility for Justice’ 2007 Report (Centre for Humanitarian Dialogue and International Center for Transitional Justice, December 2007).

<sup>52</sup> R.M. Wood, ‘Strategic Motives for Violence against Civilians’ in Krieger and Willms (eds), *Inducing Compliance with International Humanitarian Law* (CUP, Cambridge 2015), 41.

<sup>53</sup> Jo, note 41, 74.

## ii. Reciprocity

According to Rule 140 CIHL, “the obligation to respect and ensure respect for the Geneva Conventions does not depend on [legal] reciprocity”.<sup>54</sup> However, Pictet notices that there can be *positive reciprocity*, “by which the Parties mutually encourage each other to go beyond what is laid down by humanitarian law”.<sup>55</sup> Furthermore, while reciprocity is not a legal requirement under the IHL system, in practice it seems to play an important role in the decision of NSAGs to respect (or not) IHL. The treatment of detainees is the area where *inductive reciprocity* (inducing respect for IHL) has the greatest effect, since a party will be more likely to treat its prisoners well if it knows that the other party is doing the same.<sup>56</sup> Furthermore, with time, it seems that in certain cases the parties to a conflict develop a general (or *systematic*) solidarity that “brings to a reciprocal attempt to limit the atrocities of war”.<sup>57</sup> In such a case, reciprocity can be seen as an important factor for a more “regular” and stable compliance, not only at the level of individual cases, but as a generalized respect. However, one cannot disregard the fact that in other cases, reciprocity brings to the opposite effect, that is, an escalation of violence and revenge, starting from the reasoning “if the other party does not comply with IHL, I don’t see why I should”.<sup>58</sup> This reciprocity is not acceptable under the law of the Geneva Conventions, but it does happen in practice. We can, therefore, see reciprocity as both a factor for compliance and non-compliance.

## iii. Reputation

As we have seen, the positive perception that the local population has of an armed group is often essential for the survival and the success of that armed group, since the population is frequently “the main source of recruits to sustain a rebellion, the main source of food and logistical support, and the ultimate guarantor of a rebel group’s power on its own turf”.<sup>59</sup> Armed groups will then respect IHL *because* of the positive perception that this will create among the local population. In this sense, it has been affirmed that self-image “is one of the

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<sup>54</sup> See also J. Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 1: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, Geneva 1952), 25: IHL treaties do not constitute “an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations”.

<sup>55</sup> Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols* (ICRC, Geneva 1987), [50].

<sup>56</sup> U. Schneekener, C. Hofman, ‘The Power of Persuasion’ in Krieger and Willms (eds), *Inducing Compliance with International Humanitarian Law* (CUP, Cambridge 2015), 97.

<sup>57</sup> Veuthey, note 42, 341.

<sup>58</sup> See *idem*, 342.

<sup>59</sup> Jo, note 41, 15.

most powerful generators of respect for IHL”.<sup>60</sup> This is also connected to **legitimacy**, since NSAGs often improve their self-image with “good actions” (or IHL compliance) to be considered as legitimate entities by the population. In fact, according to Jo, “[c]ompliant rebels are those that want to enhance the ‘legitimacy’ of their own organization and movement in the eyes of key political ‘audiences’”, which would also include the domestic population.<sup>61</sup> It must however be noticed that the importance of reputation for the respect of IHL varies depending on the armed group: for instance, it will be particularly important for NSAGs that rely on civilian support, or for strong armed groups with the political aims of replacing the government.<sup>62</sup> Public opinion at the international level also matters, although, according to some scholars, compared to local public opinion, it seems to be of a secondary importance for NSAGs.<sup>63</sup> Still, if the armed group is seen with respectability and as being trust-worthy by the international community, this will put the NSAG in a stronger position with greater international support.

#### **b) Logic of Appropriateness**

Every armed group has principles or “guidelines of behavior”.<sup>64</sup> These are often based on **morality, culture, or religion**, sometimes considered under the *chapeau* of “ideology”. The commander will orient the armed group following these elements, since “[i]f he wants his subordinates to follow his orders, he has to do things that are compatible with what they will accept”.<sup>65</sup> Interestingly, in codes of conduct of armed groups we often find general ethical principles related to human dignity and solidarity, where the enemy is considered to have some basic rights.<sup>66</sup> In this sense, “[i]deology can be a good explanation for normative voluntary compliance”.<sup>67</sup> In fact, in some cases, these guidelines of behavior allow to provide an even greater protection of civilians compared to IHL standards. However, there are also cases where the cultural or moral lenses of the group define “humanity” in a different way, excluding certain groups from it, thus becoming a factor for non-compliance with IHL.<sup>68</sup>

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<sup>60</sup> Bangerter, note 4, 358.

<sup>61</sup> Jo, note 41, 13.

<sup>62</sup> Krieger, note 38, 528.

<sup>63</sup> Bangerter, note 4, 360-1.

<sup>64</sup> *Idem*, 359.

<sup>65</sup> *Ibid.*

<sup>66</sup> See Bellal, note 10, 195.

<sup>67</sup> Jo, note 41, 73.

<sup>68</sup> Castano, note 35, 700.

Veuthey includes another interesting factor for the respect of IHL: “**return to peace**”. He suggests that respecting IHL during the conflict, will facilitate a return to peace later, because the compliance with humanitarian principles will enable a context more open to dialogue and reconciliation.<sup>69</sup> Indeed, peace is harder to achieve and maintain when there is a high level of resentment due to the atrocities (or IHL violations) the parties committed.<sup>70</sup> Furthermore, peace agreements containing promises of future benefits conditional to “good behavior” are also strong motivators for IHL compliance: in order not to risk future benefits in the future, armed groups respect IHL in the present, encouraged by the peace agreement.<sup>71</sup> Typical benefits would be amnesties or demobilization and reintegration packages.

The **universality of IHL rules** is another interesting potential factor. IHL is “universal” at the level of international rules, with the Geneva Conventions ratified by all states and an extensive body of CIHL, but also (and more important for armed groups since they cannot ratify treaties) at the level of perception of legitimacy of IHL principles. The *People on War* survey conducted by the ICRC confirmed this latter point, affirming that “in all the contexts studied and in all the different regions, there emerges a universal consensus as to the importance of the humanitarian principles.”<sup>72</sup> The surveyed drew the moral authority of IHL norms from culture, be it religion or secular traditions.<sup>73</sup> A leader of a NSAG might thus decide to comply with IHL rules because he relates to them due to similar humanitarian principles in his group: the shared principles become in this sense a reason for respect.

### c) **Other elements facilitating respect for IHL**

Until now I have considered “internal motivations” of armed groups: in essence, what would motivate the decision-maker of the group to bring the NSAG to comply with IHL. In the following, I illustrate elements facilitating IHL compliance that are mostly *independent* from the will of the higher members of the groups.

Firstly, the **structure of the group** affects the performance of an armed group, and can play a certain role for compliance. Indeed, if there is a clear hierarchy with a well-defined system of

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<sup>69</sup> Veuthey, note 42, 346.

<sup>70</sup> Bangerter, note 4, 366.

<sup>71</sup> Hayner, note 45, 186.

<sup>72</sup> D. Munoz-Rojas, J. Frésard, ‘The roots of behaviour in war’ (2004), 86(853) IRRC, 192.

<sup>73</sup> *Idem*.

discipline, once the decision-maker is determined to comply with IHL, the rest of the soldiers in the hierarchy will have no other choice but to follow his example and orders.<sup>74</sup>

Secondly, the **control that a NSAG has over a territory** can be another relevant factor according to Geneva Call.<sup>75</sup> In this context, “territorial safe havens”, where rivals are not able to intervene, are of importance.<sup>76</sup> armed groups are less tempted to violate IHL when they perceive no threat to their survival.

Thirdly, the **sense of ownership of IHL rules** by NSAGs can increase their compliance. Different guerrilla movements in the 1970s confirmed this by affirming that they would not consider themselves bound by new IHL rules unless they could participate in their development.<sup>77</sup> This means that including armed groups in the codification of IHL rules or in the process of creation of CIHL would encourage them to comply with those rules they contributed to develop.<sup>78</sup> Their increased participation in the law-making process is also likely to increase the legitimacy of IHL in their eyes. Indeed, according to Franck, legitimacy depends on procedural fairness and authority of the source of the norm: we can thus increase the legitimacy of IHL from an armed group’s perspective by including them in the process, rendering the process fairer.<sup>79</sup> Another less far-reaching way of creating a greater sense of ownership, would be to understand the system of internal rules of a group, and link them to IHL rules, showing that the two systems have much more in common than it might seem.<sup>80</sup>

Fourthly, the **realistic possibility of implementation of IHL rules** matters in the decision of NSAGs to respect them or not. If the rule is only hardly implementable, NSAGs might just ignore it completely.<sup>81</sup> For instance, in some cases NSAGs are simply unable to comply with the prohibition in CA3 to passing a sentence without “previous judgment pronounced by a regularly constituted court”.<sup>82</sup> It is precisely for this reason that some argue that the difference between NSAGs and states should be taken into account and that a sliding scale of obligations for NSAGs should be foreseen.<sup>83</sup> The main counter-arguments are that this would undermine the principle of equality of belligerents (potentially undermining the whole IHL

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<sup>74</sup> See Jo, note 41, 72.

<sup>75</sup> Geneva Call, ‘Armed non-State actors and Landmines: Towards a Holistic Approach to Armed Non-State Actors?’, available at <[https://www.files.ethz.ch/isn/46887/2007\\_11.pdf](https://www.files.ethz.ch/isn/46887/2007_11.pdf)> accessed 14 August 2017.

<sup>76</sup> A.H. Sinno, ‘Armed Groups’ Organizational Structure and their Strategic Options’ (2011) 93(882) IRRC, 317.

<sup>77</sup> Veuthey, note 42, 61.

<sup>78</sup> *Idem*.

<sup>79</sup> T. Franck, ‘Legitimacy in the International System’ (1988) 82 AJIL, 705-6.

<sup>80</sup> See Castano, note 35, 704.

<sup>81</sup> Sassòli, note 1, 18-19.

<sup>82</sup> CA3(2).

<sup>83</sup> See M. Sassòli, Y. Shany, ‘Debate: should the obligations of states and armed groups under international humanitarian law really be equal?’ (2011) 92(882), IRRC.

system), and that it might create practical difficulties on the ground.<sup>84</sup> What is important for the purpose of this discussion, is merely to underline the disparity of means and structure between NSAGs and states, and to recognize that, in practice, such a difference can represent an obstacle to IHL implementation by armed groups. Vice-versa, realistic IHL rules have a greater chance of actually being implemented.

Fifth, **international organizations and NGOs** can encourage an armed group to respect IHL, be it through information, persuasion, monitoring, support or coercion.<sup>85</sup> However, studies are not always unanimous regarding the impact of such external actors. For instance, some consider that UN peacekeeping operations (PKOs) lead to increased violence against civilians by NSAGs, while others see PKOs more positively.<sup>86</sup> While the impact of specific actors might diverge depending on the circumstances, what seems to be established is that external actors should not wait for wars to disseminate IHL, but should be pro-active and work on prevention in peacetime.<sup>87</sup> Indeed, as Pictet affirmed, “[o]ne of the worst enemies of the Geneva Conventions is ignorance”,<sup>88</sup> and dissemination should be accompanied by education, training and integration of the law into instructions.<sup>89</sup>

Finally, the **role of third states** in the process of inducing IHL compliance should not be underestimated. Common article 1 to the Geneva Conventions provides that the High Contracting Parties respect and ensure respect for the Geneva Conventions, interpreted by the majority opinion as to obliging states to take *all measures in their power* to ensure compliance to IHL.<sup>90</sup> This pressure could increase NSAGs’ compliance with IHL.

#### **d) Challenges to IHL implementation**

While understanding the factors motivating NSAGs to comply with IHL is essential, knowing the challenges to compliance is as important. However, not being the focus of this paper, I will only briefly mention the main factors challenging compliance.

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<sup>84</sup> *Idem*. See also Sassòli, note 1, 20.

<sup>85</sup> O. Bangerter, ‘Comment: Persuading armed groups to better respect international humanitarian law’ in Krieger and Willms (eds), *Inducing Compliance with International Humanitarian Law* (CUP, Cambridge 2015), 113.

<sup>86</sup> See L. Hultman, ‘Keeping Peace or Spurring Violence? Unintended Effects of Peace Operations on Violence against Civilians’ (2010) 12(1-2) *Civil Wars*, 29; V. Fortna, ‘Does Peacekeeping Keep Peace? International Intervention and the Duration of Peace After Civil War’ (2004), 48 *International Studies Quarterly*, 269.

<sup>87</sup> As foreseen in Arts. 47/48/127/144 GC I/II/III/IV.

<sup>88</sup> Pictet, note 54, 348.

<sup>89</sup> Munoz-Rojas, note 72.

<sup>90</sup> R. Geiss, ‘Scope and Content of the Obligation to “Ensure Respect”’ in Krieger and Willms (eds), *Inducing Compliance with International Humanitarian Law* (CUP, Cambridge 2015), 419. See also *Legal Consequences of the Construction of a Wall* (Advisory Opinion), 2004, ICJ Rep 136 [159].

The **asymmetry in means** between armed groups and states is one challenging factor: “[w]hen a conflict is asymmetric, as in civil wars, it is easy to resort to whatever methods of war appear immediately effective, even if they involve some violation of international law”.<sup>91</sup> Armed groups who do not have as much resources as states might decide to fight the government with means and methods contrary to IHL, as they see it as the only way of compensating the asymmetry.<sup>92</sup>

A further challenge to compliance is the **inability of armed groups to ratify IHL treaties**, since such possibility would increase a sense of legal obligation and commitment. Their inability to be part of the *process* of creation of IHL also causes NSAGs to consider IHL as a non-legitimate legal regime and non-applicable to them.<sup>93</sup>

“**Spirals of violence**” or “cycles of vengeance” are further impediments to IHL compliance, creating irrational reactions driven by uncontrollable hatred, with parties seeing their non-compliant response as the legitimate consequence of the violations that the other party committed in the first place (also called “negative reciprocity”).<sup>94</sup> As problematic are policies of ethnic cleansing, or more generally, armed groups having a **final goal going against IHL principles**.<sup>95</sup> Indeed, some researchers affirm that in many contemporary armed conflicts IHL is not respected because IHL violations are intrinsic to the nature of these “new conflicts”, choosing, for instance, to target directly the civilian population.<sup>96</sup>

In addition, when there is a **lack of understanding or knowledge of IHL**, leaders of armed groups will not have the motivation to comply with it and disseminate it down the hierarchy.<sup>97</sup>

Finally, “**loose organizational structures**”, with less military hierarchy and less clear disciplinary systems, can also be a challenge for the efficient implementation of IHL by NSAGs.<sup>98</sup>

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<sup>91</sup> Jo, note 41, 17.

<sup>92</sup> Wood, note 52, 19-21.

<sup>93</sup> See Bangerter, note 4, 380.

<sup>94</sup> Munoz-Rojas, note 72, 195-200.

<sup>95</sup> Krieger, note 38, 518.

<sup>96</sup> M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (SUP, Stanford 1999).

<sup>97</sup> See Bangerter, note 4, 370.

<sup>98</sup> H. Krieger, ‘Introduction’ in Krieger and Willms (eds), *Inducing Compliance with International Humanitarian Law* (CUP, Cambridge 2015), 3.



#### IV. A COMPARATIVE ANALYSIS

How do these motivational factors play out in practice? I will illustrate this with a practical exercise, comparing the motivations of two structurally, ideologically and geographically distant NSAGs: the *Fuerzas Armadas Revolucionaria Colombianas* (FARC) in Colombia, and the *Justice and Equality Movement* (JEM) in Sudan. In order to limit the field of study, I will focus on the motivations of these two armed groups for complying with a specific set of IHL rules: the recruitment of child soldiers. Indeed, both the FARC and the JEM appear to have made some progress in this context, taking measures to prohibit the recruitment of child soldiers.

##### a) Child soldiers: the legal framework

When it comes to IHL obligations of armed groups concerning the recruitment of child soldiers, the main relevant rules are Art. 4(3)(c) APII and Rule 136 CIHL. The former states that children under 15 shall not be recruited nor be allowed to take part in hostilities. The latter, more general, states that children must not be recruited into armed forces or armed groups.<sup>99</sup> This prohibition can also be found in the Convention on the Rights of the Child (CRC) and its Optional Protocol on the Involvement of Children in Armed Conflict.<sup>100</sup> Furthermore, under the ICC Statute, “conscripting or enlisting children” into armed forces or groups constitutes a war crimes in both non-international armed conflicts and international armed conflicts.<sup>101</sup> With regard to the specific age of the prohibition, Art. 4(3)(c) APII, Art. 8(2)(e)(vii) ICC Statute and Art. 38(3) CRC set the minimum age for recruitment at 15 for both states forces and armed groups. On the other hand, under Art. 4 of the Optional Protocol to CRC, NSAG should not, “under any circumstances”, recruit persons under 18. Finally, more generally, IHL requires all parties to provide children with special respect and protection.<sup>102</sup>

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<sup>99</sup> See also Rule 137 CIHL.

<sup>100</sup> Convention on the Rights of the Child (1989) 1577 UNTS 3, Art. 38(3); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000) 2173 UNTS 222.

<sup>101</sup> Rome Statute of the International Criminal Court (1998) 2187 UNTS 90, Arts. 8(2)(b)(xxvi) and (e)(vii).

<sup>102</sup> See Rule 135 CIHL Study.

## **b) Origin and goals of the FARC and the JEM**

First things first: one cannot understand the motivation of an armed group for complying with IHL without knowing its origin and goals. Indeed, as we will now see, the groups under examination arose from two different contexts.

The **FARC**, defined as a “rural-based agrarian movement” were born out of the “frustration with failed agrarian struggles of the 1930s and 1940s”, struggles originated by the Colombian state pressure.<sup>103</sup> They thus developed from a community of peasants that were fighting for land, and were then joined by revolutionary students in the wake of the Cuban Revolution and by political activists in the 1980s.<sup>104</sup> Their campaign was focused on political exclusion, access to state resources, national security and denounced corruption, poverty and inequality.<sup>105</sup> They are today officially demobilized.<sup>106</sup>

The **JEM**, on the other hand, was founded by Dr. Khalil Ibrahim Muhammad, a physician and former Minister for Education in the old Darfur Province, who called for redressing injustices perpetuated by a “small group of autocratic rulers”.<sup>107</sup> Developed from an academic, educated environment and with a connection to Islamist movements, the JEM aims at establishing a Sudan with equal rights and economic development for each region and to abolish social injustice for *all* Sudanese. In 2013, the Small Arms Survey described the JEM as one of the “strongest and most cohesive force in Darfur”.<sup>108</sup>

## **c) Structure of the groups**

The **FARC** were a vertically organized NSAG, with well-defined hierarchies, a clear line of command, and where any act of insubordination was punished.<sup>109</sup> They controlled their fighters closely, for instance ensuring that contacts with friends and family were kept to a

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<sup>103</sup> M.J.LaRosa, G. R. Mejica, *Colombia: A Concise Contemporary History* (Rowman & Littlefield Publishers, Maryland 2012), 88.

<sup>104</sup> V.M.Bouvier, *Colombia: Building Peace in a Time of War* (United States Institute of Peace Press, Washington DC 2009), 65.

<sup>105</sup> *Idem*, 67.

<sup>106</sup> S. Brodzinsky, ‘Welcome to peace: Colombia Farc rebels seal historic disarmament’ *Guardian* (27 June 2017) <<https://www.theguardian.com/world/2017/jun/27/colombia-farc-weapons-war-government>> accessed 13 August 2017.

<sup>107</sup> Quoted in J.M.Burr, R.O.Colling, *Darfur, The Long Road to Disaster* (Markus Wiener Publishers, Princeton 2008), 291.

<sup>108</sup> Small Arms Survey, ‘Human Security Baseline Assessment for Sudan and South Sudan, Justice and Equality Movement’, <<http://www.smallarmssurveysudan.org/fileadmin/docs/facts-figures/sudan/darfur/armed-groups/opposition/HSBA-Armed-Groups-JEM.pdf>> accessed 11 August 2017.

<sup>109</sup> A. Arjona, *Rebelocracy: Social Order in the Colombian Civil War* (CUP, Cambridge 2016), 97.

minimum, and often decided whether women fighters could have children or not.<sup>110</sup> The disciplinary system was strict, and fighters using unauthorized violence against the civilian population could be punished with capital punishment.<sup>111</sup> The FARC also had a strong impact on the local population, effectively taking over the local government in certain regions.<sup>112</sup> Their vertical organization and their strong control over people and territory (at least at some point) were thus a good “basis” for the implementation of IHL, once the leaders were driven by the “right motivations”.

In contrast, the **JEM** cannot be said to have a fixed, permanent structure like the FARC. The whole group seemed to gravitate around its founder, Khalil Ibrahim, with his aura of power and charisma, until his death.<sup>113</sup> Thereafter, different internal tensions and problems of command led to a split of the Movement in different separate groups. Indicative of the easy versatility of the Movement is also its composition, with JEM leaders admitting that the movement’s rapid growth makes it hard to ascertain the precise number of fighters: “[t]here are no hard numbers [...] fighters join us, then leave”.<sup>114</sup> Therefore, at least after Khalil’s death, there seems to have been a lack of structure and stability in the JEM, that would have potentially facilitated a better IHL implementation.

#### **d) Type of measures taken**

The **FARC** took various measures concerning child soldiers over time, for instance: a unilateral declaration in 2015, where they announced that they were going to raise the minimum age for recruitment into their forces from 15 to 17;<sup>115</sup> an agreement in May 2016 with the Colombian government establishing the demobilization of minors from FARC camps;<sup>116</sup> and the peace agreement of 24 November 2016.<sup>117</sup> In fact, most of the measures were taken in connection to the peace process between the FARC and the Colombian

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<sup>110</sup> *Idem*. See also F. Gutierrez, ‘Telling the Difference: Guerrillas and Paramilitaries in the Colombian War’ (2008) *Politics & Society* 36, 3-34.

<sup>111</sup> See A. Arjona, S. Kalyvas, ‘Una Aproximacion Micro al Conflicto Armado en Colombia’ in Cante, *Argumentacion, Negociacion y Acuerdos* (Universidad del Rosario, Bogota 2008).

<sup>112</sup> Quoted in Arjona, note 109, 243.

<sup>113</sup> J. Flint, A. Waal, *Darfur, A new history of a long war* (Zed Books, London 2008), 109.

<sup>114</sup> V. Tanner and J. Tubiana, Interview with JEM cadre, Small Arms Survey (Abéché, September 2006).

<sup>115</sup> See Geneva Call, ‘Geneva Call welcomes the announcement by the FARC-EP on a raise of the minimum recruitment age’ (16 February 2015), <<https://genevacall.org/geneva-call-welcomes-announcement-farc-ep-raise-minimum-recruitment-age/>> accessed 14 August 2017.

<sup>116</sup> UN News Centre, ‘Colombia: agreement to reintegrate children from FARC welcomed by UN envoy’ (16 May 2016), <<http://www.un.org/apps/news/story.asp?NewsID=53948#.WY19B8aB3EY>> accessed 14 August 2017.

<sup>117</sup> Peace agreement, ‘Acuerdo final para la terminacion del conflict y la contruccion de una paz estable y duradera’ (24 November 2016), <<http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>> accessed 14 August 2017.

government. Indeed, in 2010, President Santos initiated peace talks with the FARC, and pushed for the *Law of Justice and Peace* to allow guerrilla and paramilitary forces to voluntarily demobilize in exchange for freedom from prosecution.<sup>118</sup> This culminated in the agreement of November 2016 and the demobilization process.

The **JEM** also took different measures in this sense. For instance, in 2008, they made a declaration with the Sudan Liberation Movement-Unity (SLM-Unity) restating their commitment to IHL principles, and affirming that they would “adopt measures ensuring protection of children in Darfur”.<sup>119</sup> Later, in 2010, the JEM and the UN signed a Memorandum of Understanding regarding the protection of children in Darfur, where the JEM stated that they would “[p]revent and work to end the association, recruitment and use of children under the age of 18, including those in non-combatant or supportive roles”.<sup>120</sup> This was followed by an Action Plan transmitted to the United Nations on the issue of child soldiers, and a ceasefire agreement between the JEM and the government of Sudan, including the prohibition of recruitment of children under 18.<sup>121</sup> Finally, in January 2017, the JEM renewed a “command order” prohibiting the recruitment and use of children in its ranks and instructing all JEM members to continue to adhere to international and local laws protecting children.<sup>122</sup>

#### e) Motivation for compliance

As we have seen, armed groups are influenced by a multitude of factors that are intertwined with each other. The following is an attempt to individuate the *main* factors relevant in the cases at hand.

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<sup>118</sup> LaRosa, note 103, 94.

<sup>119</sup> Centre for Humanitarian Dialogue, ‘The Geneva/Darfur Humanitarian Dialogue (11 July 2008), <[http://theirwords.org/media/transfer/doc/1\\_sd\\_jem\\_slm\\_a\\_unity\\_2008\\_18-9786ecfed2b4605ff60bc4a4ab48b2.pdf](http://theirwords.org/media/transfer/doc/1_sd_jem_slm_a_unity_2008_18-9786ecfed2b4605ff60bc4a4ab48b2.pdf)> accessed 15 July 2017.

<sup>120</sup> Relief Web, ‘Memorandum of Understanding between the JEM and the UN regarding Protection of Children in Darfur’ (21 July 2010), <[http://reliefweb.int/sites/reliefweb.int/files/resources/3864EE07BF38473C852577670066EA08-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/3864EE07BF38473C852577670066EA08-Full_Report.pdf)> accessed 15 July 2017.

<sup>121</sup> Geneva Call, ‘Action Plan: Operational Mechanism to prevent and end recruitment and use of child soldiers’ (26 September 2012), <[http://theirwords.org/media/transfer/doc/sd\\_jem\\_2012\\_55-b4f6cb533f33a9415cc738069a0efee6.pdf](http://theirwords.org/media/transfer/doc/sd_jem_2012_55-b4f6cb533f33a9415cc738069a0efee6.pdf)> accessed 10 August 2017; UN Peacemaker, ‘Ceasefire Agreement’ (10 February 2013), <[http://peacemaker.un.org/sites/peacemaker.un.org/files/SD\\_130210\\_CeasefireGoSJEMSudan.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_130210_CeasefireGoSJEMSudan.pdf)> accessed 13 August 2017.

<sup>122</sup> Radio Dabanga, ‘Darfur: Unamid welcomes JEM order against child soldiers’ (1 February 2017), <<https://www.dabangasudan.org/en/all-news/article/darfur-unamid-welcomes-jem-order-against-child-soldiers>> accessed 13 August 2017.

The **FARC** have always proclaimed to have as their end goal “popular insurrection and seizure of power for the people”:<sup>123</sup> therefore, the perception that *el pueblo* had of them mattered a great deal. Conscious of this importance and with the aim of gaining more sympathizers, they sometimes provided public goods, maintained roads, and planned parties for the local population.<sup>124</sup> This concern for their **self-image and reputation** could partly explain their motivation to prohibit child recruitment, especially since the children were taken away from families among the local population.

Another relevant factor is **political** in nature: agreements containing a lower age for child recruitment were often connected with their aim of politically succeed and access power.<sup>125</sup> Indeed, the FARC understood the politically risky position of being seen as an armed group with child soldiers in its rank, as they themselves stated: “under no circumstances have we proceeded to forcibly recruit minors nor any fighter; which moreover, *would be totally counterproductive for the political deployment of the FARC-EP*”.<sup>126</sup> The public opinion of the international community also mattered for their strategic actions: “the FARC-EP [...] announce to the country and *to the world* [...] [the decision] not to incorporate, from now on, minors under age of 17 in the guerrilla ranks”.<sup>127</sup> These statements were additionally presumably linked to their striving for legitimacy and international recognition.

On the other side of the spectrum, the “logic of appropriateness” too appears to have played a role in the decision of the FARC to stop recruiting children under a certain age. Indeed, the FARC often justified their actions referring to their “principles” or in terms of **morality**. For instance, in a meeting concerning a Geneva Call’s deed of commitment, the representative of the FARC-EP explained that they did not forcibly recruit children “as a matter of principle”.<sup>128</sup> In addition, as already mentioned, the release of child soldiers was clearly linked to the **peace** process between the FARC and the Colombian government. Their motivation appears to have originated from both a genuine striving for peace after an extenuating conflict, and from the peace-package advantages to be found in the peace agreements conditional to the fulfilment of some conditions (such as the release and demobilization of child soldiers). Finally, as important were the actions of **external** actors

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<sup>123</sup> J. Arenas, *Diario de la Resistencia de Marquetalia* (Paz y Socialismo, Praga 1969), 138.

<sup>124</sup> Arjona, note 109, 243, 246.

<sup>125</sup> See Bouvier, note 104, 74.

<sup>126</sup> Geneva Call, ‘Announcement on minors in the conflict’ (February 2015), <[http://theirwords.org/media/transfer/doc/farc\\_ep\\_announcement\\_on\\_minors\\_in\\_the\\_conflict-e6c1d31649e5c1560d3487a1740e48c0.pdf](http://theirwords.org/media/transfer/doc/farc_ep_announcement_on_minors_in_the_conflict-e6c1d31649e5c1560d3487a1740e48c0.pdf)> accessed 14 August 2017 [emphasis mine].

<sup>127</sup> *Idem*.

<sup>128</sup> Geneva Call, ‘Ricardo Téllez of the Peace Delegation of the FARC-EP’ (16 November 2014), <<https://www.youtube.com/watch?v=cExLLUx0V9c&feature=youtu.be>> accessed 14 august 2017.

such as the ICRC, UNICEF, the UN Special Representative for Children and Armed Conflict, and Geneva Call, that facilitated the release of child soldiers and had an influence on the FARC's decision of forbidding child recruitment.<sup>129</sup>

Similarly to the FARC, the local population also had an impact on the motivation of the **JEM** to forbid child soldiers: "We parents want a peace accord. The rebels come to take our children. They speak to them in secret, they tell them, 'When we win, you will have a position, a rank in the Sudanese army'. We parents don't agree. We don't trust them".<sup>130</sup> This general negative feeling among the population had to be considered by the JEM, whose leader Khalil often affirmed: "I represent the people, the will of the people".<sup>131</sup> Meeting the people's expectations was even more important considering that another armed group, the G-19, enjoyed a significant popular support that appeared to be linked to its concerns for the needs of the population.<sup>132</sup> Not in a position to afford to lose the support of the people, the JEM gave weight to its **self-image**, especially at the time of Khalil, "who understood the importance of publicity and knew how to get it".<sup>133</sup> An example of such publicity is the Memorandum of Understanding on the Protection of Children signed in a public ceremony by the JEM with the UN, with the help of the Humanitarian Dialogue Center (HDC).<sup>134</sup> Needless to say, the importance of JEM's reputation is also linked to its **political** goal of having a position at the national level, and of being considered as a **legitimate** entity, representing the interests of the least considered by al-Bashir's regime. In addition, the "**legal factor**" might also have motivated the JEM to enhance the protection of children: indeed, the armed group was on the list annexed to the annual Report of the UN Secretary-General on the recruitment and use of children, which could be considered as a form of legal pressure.<sup>135</sup> As a result of the listing, the JEM prepared an Action Plan to prevent and end recruitment of child soldiers and presented it to the Joint Special Representative for the African Union and United Nations Mission in Darfur.<sup>136</sup>

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<sup>129</sup> K. Martin, 'Colombia: inicia proceso de desmovilización de menores de las FARC' (11 September 2016), <<https://es.panampost.com/karina-martin/2016/09/11/menores-de-las-farc/>> accessed 14 August 2017.

<sup>130</sup> V. Tanner, J. Tubiana, Interview with Zaghawa traditional leader, Small Arms Survey (Am Nabak, October 2006).

<sup>131</sup> Cited in A. de Waal, 'Darfur's Deadline: The Final Days of the Abuja Peace Process' in A. de Waal (ed), *War in Darfur* (Justice Africa, London 2007), 275.

<sup>132</sup> V. Tanner, J. Tubiana, 'Divided They Fall: The Fragmentation of Darfur's Rebel Groups', Working paper (2007) Small Arms Survey, 38.

<sup>133</sup> Flint, note 113, 100.

<sup>134</sup> Reliefweb, note 120.

<sup>135</sup> UNSG, 'Children and armed conflict: report of the Secretary-General' (23 April 2011) A/65/820-S/2011/250.

<sup>136</sup> Geneva Call, note 121.

Coming to the logic of appropriateness, the first point to be made is that for the JEM, **ideology** has always played a central role.<sup>137</sup> Looking for JEM's doctrine in its "Proposal to solve Sudan's problem in Darfur", we see some attention to children's rights that could, theoretically, provide for the ideological underpinnings of IHL compliance.<sup>138</sup> In particular, the **religious** component of the Movement (its link with Islam revolution engineered by Hasan al-Turabi) also mattered for its rules of behavior.<sup>139</sup> However, in what way religion has had an impact on its decision not to recruit children is something that cannot be established in such a short paper and should be further analyzed, especially considering the religious controversies that were present in the group itself. On the other hand, what seems to be clear, is the link between the **peace** (and ceasefire) agreements and the decisions to prohibit child soldiers: indeed, such agreements often included a part on the protection of children and sometimes the commitment of the parties to stop their recruitment, as in the 2013 ceasefire agreement.

Another relevant element is the interest of the international community for the situation in Darfur and the role of **external actors**. This in particular includes the involvement of the UN Secretary Generals Kofi Annan and Ban Ki-moon, and the African Union/United Nations Mission in Darfur (UNAMID). Furthermore, the aforementioned ceasefire agreement with its commitment on children was only made possible by the support of Qatar and the African Union-United Nations Mediator.<sup>140</sup> Finally, the fact that from 2014, NGOs were particularly focused on the JEM and less on other groups such as the SPLM-N, might also have helped to put more pressure on the JEM.<sup>141</sup>

#### **f) Main findings from the cases**

In the case-studies, I have encountered the same logic of consequences and appropriateness that I had identified in the theoretical part. In particular, as can be seen in Annex II and III, **political aims, reputation and considerations of legitimacy** seemed to play a particularly important role when it came to end the recruitment of child soldiers by the FARC and the JEM. In fact, we can now confirm Jo's findings: there seems to be a link between compliance with international standards on child soldiers and armed groups with legitimate-seeking

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<sup>137</sup> J. Flint, 'Darfur's Armed Movements' in A. de Waal (ed), *War in Darfur* (Justice Africa, London 2007), 161.

<sup>138</sup> See their program available on the website <<http://www.sudanjem.com/>> accessed 13 August 2017.

<sup>139</sup> R.O.Collins, *A History of Modern Sudan* (CUP, Cambridge 2008), 287.

<sup>140</sup> Peacemaker, note 121.

<sup>141</sup> J. Crazne, J. Tubiana, 'A State of Disunity: Conflict Dynamics in Unity State, South Sudan', Working Paper (2016), Small Arms Survey, 179.

characteristics.<sup>142</sup> Indeed, this strive for legitimacy of both the FARC and the JEM, linked to their political agendas, has been a significant factor stimulating their measures on child soldiers. Furthermore, their reaction to the child soldiers' issue is directly related to their interaction with the local population: both armed groups were claiming to fight in its name, thus having to consider the negative reaction of the people regarding the recruitment of children. This support was, in addition, important also in terms of economic and political sustenance. Interestingly, compared to the JEM, the FARC had even stronger ties with, and control over, the local people, with records of local adolescents trying to please FARC fighters: this created a situation where there was less *forced* child recruitment, but more *voluntary* enlistment by children in the FARC's ranks.<sup>143</sup>

Next, the correlation between the strict **hierarchy** of the FARC and the actual release of child soldiers seems to confirm that well-intentioned strong command and control actually discourages child soldiering:<sup>144</sup> once the leadership of the FARC was intentioned to do something regarding the protection of children, the rest of the group had no choice but to follow its command. In contrast, it is unclear whether the less permanent structure of the JEM and its fragmentation had an actual impact on reducing child soldiers.

Interestingly, **military and financial aspects** did not appear to be that relevant for the prohibition of child recruitment by the two NSAGs. This might be due to a balancing-off of military advantages with military disadvantages deriving from the use of child soldiers: for instance, children are easier to indoctrinate, but they are also more inexperienced and more difficult to train. Furthermore, using child soldiers can mean losing the support of the local population and financial support; but on the other hand, child soldiers might be a way to compensate lack of soldiers, as explained by a leader of an armed group: "if you want to make a large fire, you need lots of wood".<sup>145</sup>

In contrast, **external entities** made a valuable contribution to the prohibition of child recruitment by the two groups: consider for instance the impact of Geneva Call on the FARC, or the JEM's Action Plan with the UN. It is also likely that the Sudanese armed group is particularly sensitive to the pressure of the international community, considering that they are fighting a president indicted by the ICC. In fact, the vice president of the JEM voluntarily

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<sup>142</sup> Jo, note 41, 160.

<sup>143</sup> See Arjona, note 109, 244.

<sup>144</sup> Jo, note 41, 222.

<sup>145</sup> Bangerter, note 4, 354.



appeared at the ICC in 2010, and since the appearance, the JEM has taken several telling measures on child soldiers.<sup>146</sup>

The factor that might have made the most significant difference for the policies of the FARC and the JEM is however the “return to **peace**” factor, with peace and ceasefire agreements motivating the NSAGs to prohibit child recruitment. This makes sense, because such circumstances create space for negotiation and to think about the future, inevitably referring to children. Furthermore, the prohibition of soldiers in peace agreements can be seen as a “conciliatory move coinciding with political compromises” and a step towards political transformation.<sup>147</sup>

Finally, the **ideology** of the FARC and their internal principles might have facilitated the adoption of policies on child soldiers; however, it is rather clear that ideology alone was not a sufficient factor, since the FARC maintained more or less the same ideology since the beginning, and yet, started to prohibit child recruitment only towards the end. Ideology *alone*, therefore, does not explain the change of behavior of the FARC. For the JEM, especially after the death of Khalil, it is even harder to determine if and which ideology kept motivating the JEM. This, and the fragmentation of the group, have been general obstacles in the analysis of the JEM, showing the difficulties that one can encounter when studying a NSAG and trying to find motivational factors.

In short, the two armed groups were motivated to prohibit the recruitment of child soldiers by a variety of reasons that were partly dependent on the specificity, structure, aim and context of the group. However, as it is illustrated in Annex III, it was nevertheless possible to observe some common recurrent themes, or “clusters of realities”, indicating similar motivations for these two disparate entities.

## V. CONCLUSION

The rationale of this paper can be summarized in the following way: “[i]t is unfortunately impossible to define *the* formula that would enable every armed group to be persuaded of the need to respect IHL, but effective persuasion will likewise be impossible without an understanding of the reasons why a particular group would be inclined to respect or to violate

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<sup>146</sup> Jo, note 41, 219.

<sup>147</sup> *Idem*, 161.

the law.”<sup>148</sup> This is what I have attempted to do: to indicate possible motivational factors for compliance by armed groups. The result is a variety of factors that are more or less relevant depending on the specific armed group and the specific context. NSAGs will carefully balance these factors with possible disadvantages deriving from compliance, eventually opting for the most strategic option. In practice, these elements will often be interconnected and might change over time, making it harder to identify them. A hint of this has been given through the analysis of the FARC and the JEM and the prohibition of child recruitment, with overlapping motivational factors often not stable in time. Nevertheless, some recurrent themes have been identified, with both armed groups being largely motivated by political and reputational considerations, as well as driven by considerations of legitimacy and return to peace. This last factor in particular, has proven to be a highly valuable element, encouraging the parties to make ceasefires or peace agreements, and creating an opportunity for discussing humanitarian principles.

In conclusion, I would like to notice that this is not merely an academic exercise. Giving a full picture of the situation on the ground, including instances of respect and persevering in finding ways to increase such respect, is essential for maintaining the trust in the IHL system. This trust, in turn, is what makes the difference between life and death, between respect of human dignity and cruelty without boundaries, allowing us to keep the flame of principles of humanity alive. In this journey, armed groups, must be analyzed and engaged, because as Somer notices, “[a]rmed groups are not just the problem. They are part of solutions”.<sup>149</sup>

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<sup>148</sup> Bangerter, note 4, 384.

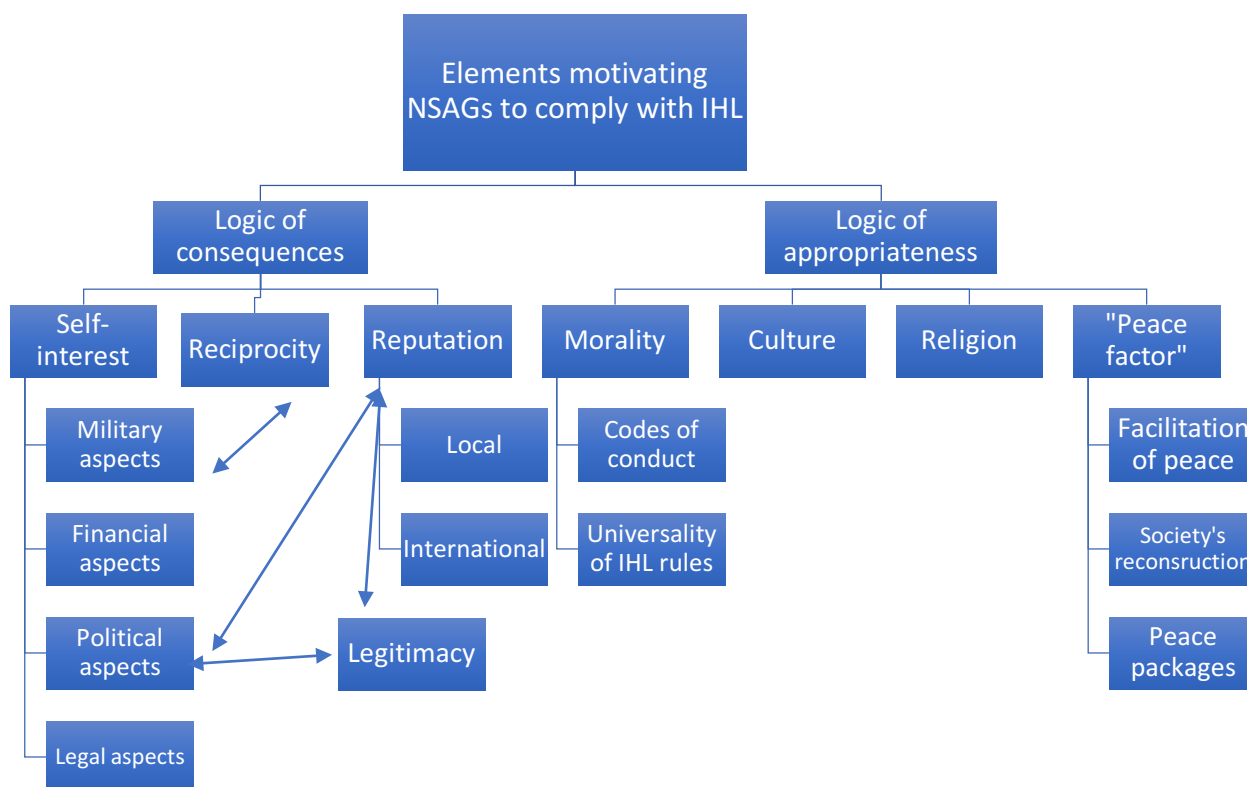
<sup>149</sup> J. Somer, cited in Jo, note 41, 237.

# ANNEXES

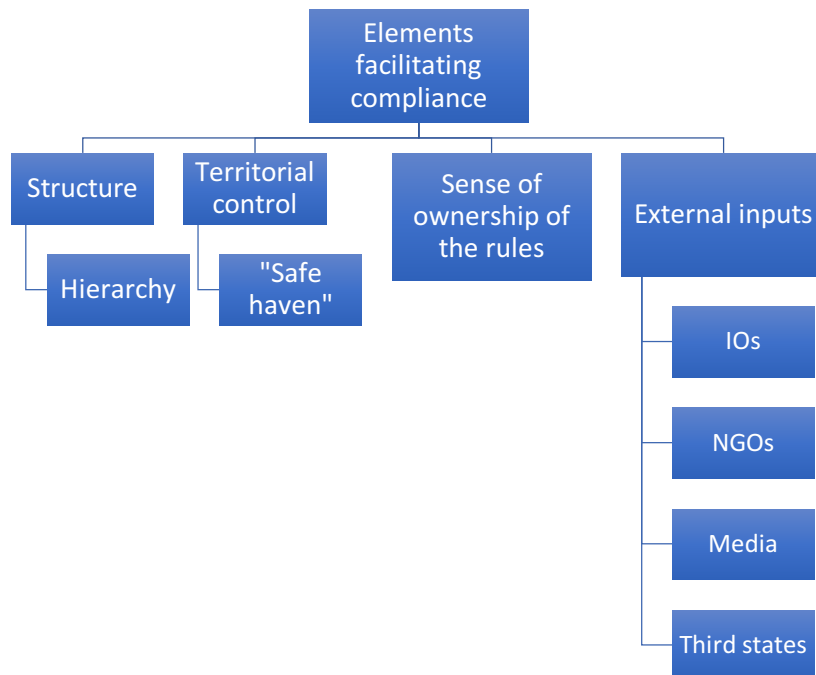
## ANNEX I

The following factors are a simplification of a complex reality. Many more interactions and overlapping would need to be added in order to come slightly closer to a realistic illustration. However, such a more realistic scheme would defeat the actual purpose of a scheme, that is, simplifying reality. I will thus maintain the simplicity of the scheme, leaving the reader free to add interactions and further elements to it as he considers relevant.

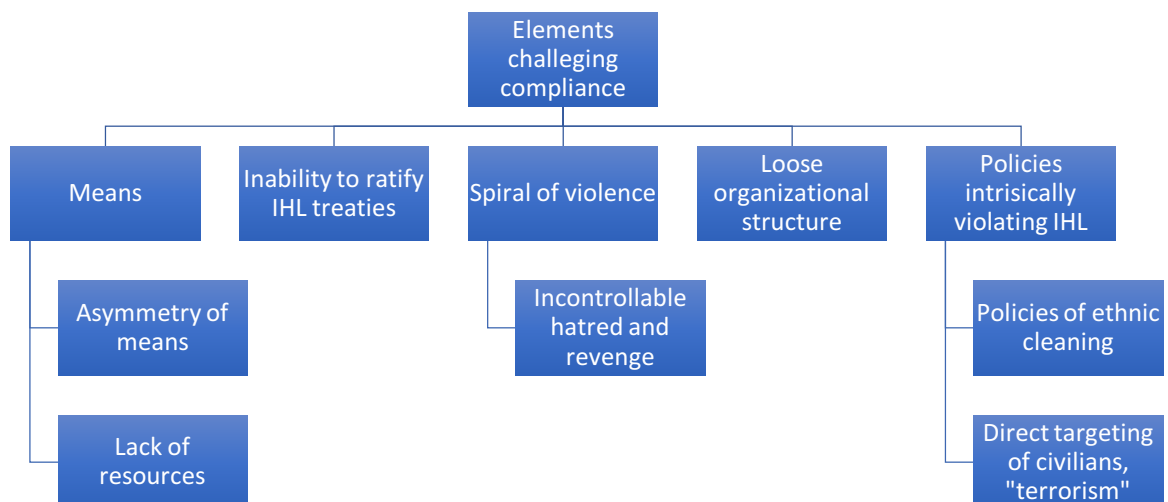
### A. FACTORS FOR COMPLIANCE



## B. ELEMENTS FACILITATING COMPLIANCE



## C. ELEMENTS CHALLENGING COMPLIANCE

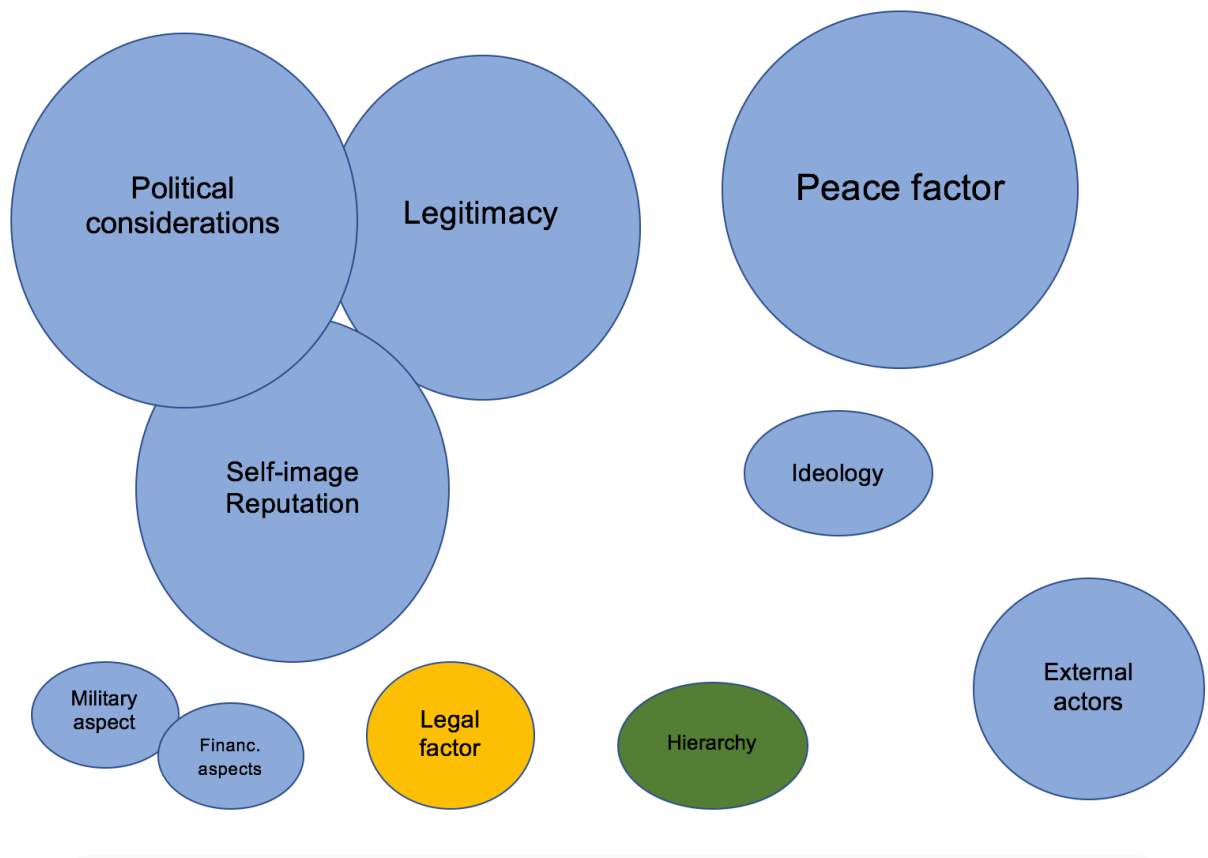


## ANNEX II

	<b>FARC</b>	<b>JEM</b>
<b>Goals</b>	Fighting for land and equality  Proclaimed to be fighting for “the people”	Equal rights for all regions of Sudan and social justice for all  Proclaimed to be fighting for “the people”
<b>Structure</b>	Vertically organized, clear line of command, strict disciplinary system  Strong influence over fighters and population under their control. Strong relation with the local population	Less permanent structure, dependent from who is the leader at a certain time. Still, mostly vertically organized  Less influence on the life of fighters and population
<b>Stage of conflict when measures taken</b>	Towards peace process	Ceasefire agreements and peace negotiations on and off
<b>Relation with the government</b>	Fighting a democratic government	Fighting an authoritarian regime
<b>Measures taken concerning children</b>	Unilateral declarations  Agreements with the Colombian government: mostly agreements about ceasefires, peace, demobilization	Unilateral declarations  Agreements with the government of Sudan and with other NSAGs: ceasefire and peace agreements  Memorandum of understanding  Action Plan with UN
<b>Factors for compliance</b>	<b>Logic of consequences:</b> <u>Mainly:</u> political motivation, reputational concerns, legitimacy  <b>Logic of appropriateness:</b> <u>Mainly:</u> return to peace  Also: ideology (secular)  <b>External factors:</b> Actions by ICRC, UNICEF, UN Representative for Children in Armed Conflict, various NGOs	<b>Logic of consequences:</b> <u>Mainly:</u> political motivation, reputational concerns, legitimacy  Also: legal factor (Secretary-General listing)  <b>Logic of appropriateness:</b> <u>Mainly:</u> return to peace  Also: ideology (partly religious)?  <b>External factors:</b> Actions by UN Secretary Generals, UNAMID, AU, various NGOs  Also: Actions by third states (Qatar)

## ANNEX III

**Main motivational factors for the FARC and the JEM to prohibit child recruitment: the size of the bubble indicates the level of importance of the factor.**



● = relevant for both FARC and JEM

● = mostly relevant for JEM

● = mostly relevant for FARC

## **ABBREVIATIONS**

AJIL	American Journal of International Law
API	Additional Protocol I
APII	Additional Protocol II
Art.	Article
CA3	Common article 3
CIHL	Customary international humanitarian law
CIL	Customary international law
CRC	Convention on the Rights of the Child
FARC	Fuerzas Armadas Revolucionaria Colombianas
HDC	Humanitarian Dialogue Center
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally displaced person
IRRC	International Review of the Red Cross
JEM	Justice and Equality Movement
IHL	International humanitarian law
IRRC	International Review of the Red Cross
NGO	Non-governmental organization
NSAG	Non-state armed group
OP	Optional Protocol
PKO	Peace-keeping operations
Rep	Report

SLM	Sudan Liberation Movement
UN	United Nations
UNAMID	African Union/United Nations Mission in Darfur
UNICEF	United Nations Children's Found
UNSG	United Nations Secretary-General
US	United States
VCLT	Vienna Convention on the Law of Treaties



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