

**GENEVA  
ACADEMY**

Académie de droit international  
humanitaire et de droits humains  
Academy of International  
Humanitarian Law and Human Rights

**Participation of Non-State Armed Groups  
in the Formation of  
Customary International Humanitarian Law:  
Arising Challenges and Possible Solutions**

---

By  
**Lizaveta Tarasevich**

Under the supervision of  
**Prof. Marco Sassòli**

Submitted in partial fulfillment of the requirements of the  
LL.M. in International Humanitarian Law and Human Rights

August 2019

## TABLE OF CONTENTS

1. <b>INTRODUCTION</b> .....	3
2. <b>STATE OF THE ART</b> .....	5
2.1. Current stance on the formation of customary international law .....	5
2.2. To engage or not to engage, this is the question.....	6
3. <b>ARISING CHALLENGES AND POSSIBLE SOLUTIONS</b> .....	9
3.1. The classification problem: does the classification of a conflict influence the participation of non-state armed groups in customary law formation? .....	9
3.2. The selection problem: which non-state armed groups to “admit” to law-making? .....	11
3.3. The contrary practice problem: how not to turn humanitarian law into non-humanitarian? .....	13
3.4. The identification problem: do actions speak louder than words and how to identify those of non-state armed groups? .....	17
3.5. Temporary character problem: can the lifespan of non-state armed groups preclude them from participation in customary law formation? .....	19
3.6. Practical accommodation problem: how non-state armed groups could be practically accommodated in the formation of customary law?.....	21
4. <b>CONCLUSIONS</b> .....	25
5. <b>BIBLIOGRAPHY</b> .....	26

## 1. INTRODUCTION

While yet several decades ago waging wars has been considered to be a prerogative of sovereign states,<sup>1</sup> most armed conflicts nowadays are the conflicts, fought between states and non-state armed groups (hereinafter NSAGs) or between NSAGs.<sup>2</sup> Just as international armed conflicts (hereinafter IACs), non-international armed conflicts (hereinafter NIACs) result in human rights abuses and extreme human suffering. This requires the *effective* regulation of the actions of NSAGs.<sup>3</sup>

At present, NIACs are regulated by Common Article 3 (hereinafter CA3) to the Geneva Conventions of 12 August 1949, Additional Protocol II to the Geneva Conventions of 12 August 1949 (hereinafter APII) and the rules of customary international law (hereinafter CIL). Do these rules provide the necessary effective regulation? While CA3 is sometimes referred to as “a convention in miniature”,<sup>4</sup> it provides only a core minimum of obligations.<sup>5</sup> APII provides a more detailed regulation of NIACs. However, besides being applicable to some conflicts only,<sup>6</sup> it has been also influenced by the fears of states for their sovereignty.<sup>7</sup>

Outside treaty law, regulations can be found in customary international humanitarian law (hereinafter CIHL). While customary law is, by nature, the most flexible and realistic source as it is based on the actual practice of states,<sup>8</sup> whether the same is true for the CIHL of NIACs remains questionable. CIHL rules remain based only on the practice of states, while the practice of at least half of the parties to such conflicts – NSAGs – remains ignored. Despite several steps are being taken towards including NSAGs into the formation of CIHL,<sup>9</sup> they are yet far from being implemented in practice.

---

<sup>1</sup> Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups Under International Humanitarian Law, Human Rights Law, And International Criminal Law* (Oxford University Press 2018) 19.

<sup>2</sup> Annyssa Bellal, 'The War Report: Armed Conflicts In 2018' (2019) <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf> accessed 24 July 2019 32–34.

<sup>3</sup> Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 373.

<sup>4</sup> Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, *Final Record of the Diplomatic Conference of Geneva of 1949* (1949) Article 2A.

<sup>5</sup> Marco Sassòli, *International Humanitarian Law: Rules, Controversies, And Solutions to Problems Arising in Warfare* (Edward Elgar Publishing Limited 2019) 214.

<sup>6</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (signed 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609, Article 1(1).

<sup>7</sup> Sassòli, *International Humanitarian Law* (n 5) 216.

<sup>8</sup> Jean-Marie Henckaerts and Els Debuf, 'The ICRC And The Clarification Of Customary International Humanitarian Law' in Brian D. Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) 165.

<sup>9</sup> See e.g. *Prosecutor v Dusko Tadić a/k/a 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction [1995] International Criminal Tribunal for the former Yugoslavia (ICTY), Appeals Chamber, IT-94-

This is not least because international law remains state-centered: it is made by states and primarily addresses states.<sup>10</sup> This might be justified in other branches of law, which have a lot more to do with state sovereignty. However, while IHL regulates the conduct of the parties on the battlefield, it is important to keep in mind its objective which is, as forethought by Henri Dunant, to alleviate human suffering caused by armed conflicts.<sup>11</sup>

The vector for the development of international law in general and IHL, in particular, has been best phrased by the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY): “A state-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach”.<sup>12</sup> For such an approach to be fully realized, considerations of sovereignty should give a way to considerations on what is best for human beings, affected by armed conflicts. Human beings affected by armed conflicts would benefit from the better compliance of NSAGs with the rules of IHL, which can be significantly enhanced by the participation of NSAGs in the formation of CIHL. This has been confirmed by the United Nations (hereinafter UN) Secretary-General, according to whom: “[i]mproved compliance with IHL and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-state armed groups”.<sup>13</sup>

Thus, while the topic of the present research paper might seem theoretical at first glance, its results are aimed to have a practical bearing. The objective of the present research paper is to identify the main challenges related to the consideration of NSAGs’ practice in the formation of CIHL and look for possible solutions. The overall aim is to find the solutions that would outweigh the negative implications and permit to admit NSAGs to participation in CIHL and, as a result, enhance compliance of NSAGs with the rules of IHL.

---

1-AR72 (International Criminal Tribunal for the former Yugoslavia (ICTY) para. 107–108; Robert McCorquodale, 'An Inclusive International Legal System' 17 (2004) *Leiden Journal of International Law*.

<sup>10</sup> Marco Sassòli, 'Taking Armed Groups Seriously: Ways To Improve Their Compliance With International Humanitarian Law' (2010) 1 *Journal of International Humanitarian Legal Studies* 3.

<sup>11</sup> Hans-Peter Gasser, 'International Humanitarian Law An Introduction' (1994) 34 *International Review of the Red Cross* 88.

<sup>12</sup> *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (n 9) para. 97.

<sup>13</sup> Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2010/579, 11 November 2010 para. 52.

## 2. STATE OF THE ART

Before turning to the challenges and possible solutions related to the participation of NSAGs in the formation of CIHL, it is necessary to make some preliminary points. First, to conceive a framework for further research, it is essential to understand the current state of the art regarding the formation of customary international law in general, as well as the perception concerning the participation of NSAGs in the formation of CIHL. Second, it is necessary to outline the positive and negative implications of admitting NSAGs to CIHL formation. This makes it possible to seek solutions to arising challenges with caution towards possible negative implications.

### 2.1. Current stance on the formation of customary international law

An international custom, as defined in Article 38(1)(b) of the Statute of the International Court of Justice (hereinafter ICJ), consists of two elements: general practice and acceptance of such practice as law. This two-element structure of custom has recently been confirmed by the International Law Commission (hereinafter ILC).<sup>14</sup>

It is, however, peculiar that Article 38 does not explicitly mention “state” practice, even though the Statute has been drafted in a very state-centered context. Recently, several scholars put forward well-argued proposals for how to accommodate other actors into law-making in general, and in the formation of customary law in particular.<sup>15</sup> One of the proposals is that practice and *opinio juris* of the addressees of the rules shall be taken into account in IHL formation.<sup>16</sup> Had it been true, this argumentation would automatically admit the NSAGs’ role in the formation of CIHL of NIACs.

However, the current state of the debate on the issue does not seem to be supportive of this view. In 1995, ICTY seemed to have made a big step forward, having considered the practice of NSAGs, when evaluating whether a customary norm existed in CIHL of NIACs.<sup>17</sup> In 2005,

---

<sup>14</sup> United Nations International Law Commission, *Draft conclusions on identification of customary international law, with commentaries* (Geneva: United Nations, 2018) Conclusion 2, <[http://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_13\\_2018.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf)> accessed 24 July 2019.

<sup>15</sup> See e.g. Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking By Non-State Actors: Engaging Armed Groups In The Creation Of International Humanitarian Law' (2012) 37 *Yale Journal of International Law*; George D Kyriakopoulos, 'Formation Of International Custom And The Role Of Non-State Actors' in Photini Pazartzis (ed), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Hart Publishing 2016).

<sup>16</sup> Sassòli, *International Humanitarian Law* (n 5) 50.

<sup>17</sup> *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (n 9) para. 107–108.

the ICRC referred to the significance of such practice as being unclear.<sup>18</sup> Finally, the ILC has recently stated in the clearest terms that except for the practice of states and international organizations, in particular circumstances, the “conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law”.<sup>19</sup>

Therefore, it is difficult to conclude that NSAGs at present have any role in CIHL formation. This is, however, regrettable. It is suggested that such participation would improve compliance with IHL following the reasons, discussed in the following section.

## **2.2. To engage or not to engage, this is the question**

Before turning to the core of the present paper, it is necessary to consider the positive and negative aspects of the inclusion of NSAGs into the CIHL formation. Admitting new actors in the formation of CIHL would necessarily require adjustments of the existing system. To have chances for coming into reality, the advantages of such participation must outweigh the negative implications of such induced adjustment.

Despite major differences between IACs and NIACs, the laws regulating the two types of conflicts, developed in close proximity. The norms governing NIACs have rarely developed specifically for the situations of internal conflicts – they rather developed by analogy to the rules, regulating IACs where such extension has been possible.<sup>20</sup> The ICTY rightfully stated that the rationale underpinning the protection from the belligerent violence, rape, torture or destruction of hospitals, museums, churches in IACs applies to NIACs.<sup>21</sup> The same is hardly true, however, *e.g.* for the CIHL rule regulating internment in IACs,<sup>22</sup> the application of which to NIACS would require NSAGs to legislate and institute *habeas corpus* proceedings.<sup>23</sup>

Furthermore, even the rules, which have been designed specifically for NIACs, primarily take into account the capacities of states. While there are two parties to NIACs – states and NSAGs, only one party is being treated seriously. NSAGs, besides often being referred to as criminals and terrorists outside the IHL realm,<sup>24</sup> are often treated as having secondary status and are being

---

<sup>18</sup> Louis Doswald-Beck and Jean-Marie Henckaerts, *Customary International Humanitarian Law* (Cambridge University Press 2005) xlii.

<sup>19</sup> Draft Conclusions (n 14) Conclusion 4(3).

<sup>20</sup> Sandesh Sivakumaran, 'How To Improve Upon The Faulty Legal Regime Of Internal Armed Conflicts' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 525.

<sup>21</sup> *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (n 9) para. 97.

<sup>22</sup> Doswald-Beck, Henckaerts (n 18) rule 99.

<sup>23</sup> Sassòli, 'Taking Armed Groups Seriously' (n 10) 14.

<sup>24</sup> Antonio Cassese, 'Should Rebels Be Treated As Criminals? Some Modest Proposals For Rendering Internal Armed Conflicts Less Inhumane' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 519.

ignored within the IHL realm.<sup>25</sup> At the same time, NSAGs are considered to be bound by the rules of CIHL<sup>26</sup> and are often called upon to comply with them.<sup>27</sup> In case NSAGs do not comply, they are “criticized, but rarely encouraged” to comply.<sup>28</sup>

These two factors lead to two major problems, which make the compliance of NSAGs with IHL rules more difficult. First, the rules, regulating NIACs, are not always realistic for NSAGs,<sup>29</sup> as they have initially been designed to regulate states’ conduct. Second, NSAGs often reject to be bound by CIHL rules, because they did not participate in their creation and thus do not have a “sense of ownership” of these rules.<sup>30</sup>

Engaging NSAGs into the formation of CIHL of NIAC would contribute to resolving these problems. First, having the practice of NSAGs considered, would enable the international community to better understand which norms NSAGs find difficult to comply with. This would, in turn, lead to the formation of the rules “with a greater sense of realism”.<sup>31</sup> Second, NSAGs would obtain a “sense of ownership” of IHL rules and have more incentives to comply with them. Finally, the engagement of NSAGs would help build communication channels with them. Such channels would “afford the international community points of contact with the group for engagement on humanitarian issues at a later stage”.<sup>32</sup> Taken together those advantages would, on a bigger scale, contribute to enhancing NSAGs’ compliance with IHL.

The possible objections are as well numerous. First, one of the objections that states are likely to make is that admittance of NSAGs to participation in CIHL would put them in a position equal to that of states.<sup>33</sup> Second, it might be argued that admitting NSAGs to the formation of CIHL rules would lead to the regress of IHL.<sup>34</sup> Third, NSAGs’ participation would inevitably

---

<sup>25</sup> *Ibid.*

<sup>26</sup> Jonathan Somer, 'Jungle Justice: Passing Sentence On The Equality Of Belligerents In Non-International Armed Conflict' (2007) 89 *International Review of the Red Cross* 661.

<sup>27</sup> Sivakumaran (n 20) 530.

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

<sup>29</sup> Sassòli, 'Taking Armed Groups Seriously' (n 10) 11.

<sup>30</sup> Marco Sassòli, 'The Implementation Of International Humanitarian Law: Current And Inherent Challenges' (2007) 10 *Yearbook of International Humanitarian Law* 64.

<sup>31</sup> Sivakumaran (n 20) 534.

<sup>32</sup> *Ibid.*

<sup>33</sup> Roberts, Sivakumaran (n 15) 133.

<sup>34</sup> Cedric Ryngaert, 'Non-State Actors In International Humanitarian Law', in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple perspectives on Non-State Actors in International Law* (Routledge 2011) 289.

lead to the need for change in the current system,<sup>35</sup> which may “disrupt the formation of custom”.<sup>36</sup>

All of these possible counter-arguments will be addressed in the following chapter to show that the possible advantages of NSAGs’ participation in CIHL formation greatly outweigh the possible downsides, most of which can be mitigated.

---

<sup>35</sup> Hilary Charlesworth, 'The Unbearable Lightness Of Customary International Law' (1998) 92 Proceedings of the Annual Meeting (American Society of International Law) 45.

<sup>36</sup> Iain Scobbie, 'The Approach To Customary International Law In The Study' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) 47.



### 3. ARISING CHALLENGES AND POSSIBLE SOLUTIONS

The present chapter seeks to identify problems, which arise once NSAGs are admitted to participate in the formation of CIHL, and provide possible solutions to eliminate them or to mitigate their effects, where possible. Apart from legal arguments, relevant policy considerations are also taken into account.

#### **3.1. The classification problem: does the classification of a conflict influence the participation of non-state armed groups in customary law formation?**

IHL, with the exception of a limited number of rules applying in peacetime, applies only in times of armed conflict. Nevertheless, even in the absence of armed conflict, states can express *opinio juris* on conflict-related issues, as well as form the relevant practice, *e.g.* by undertaking certain treaty obligations or issuing legislative or administrative acts.<sup>37</sup> NSAGs, on the other hand, cannot form practice on a particular issue unless a NIAC breaks out.<sup>38</sup> That means that NSAGs could contribute to the formation of CIHL of NIACs, only once a situation of fighting qualifies as a NIAC.

Thus, the question arises: what happens if a state either rejects the existence of a NIAC or classifies a conflict as an IAC? How would such a rejection influence the NSAGs' role in the formation of CIHL? Would it lead to ignoring the practice of NSAGs? This section seeks to find answers to these questions.

First, we need to look at who (if anyone) has the final say in determining the nature an armed conflict has and whether a state is involved in it. States are undoubtedly best placed to assess the facts on the ground and determine the existence of a conflict and its character. However, at the same time, they have the greatest interest in the determination.<sup>39</sup> While the trend in recent years has shifted from rejecting the applicability of IHL to the contrary,<sup>40</sup> that does not exclude the possibility of manipulation on the part of states. The ICRC has made a clear pronouncement on the matter, according to which the determination of the existence of a NIAC cannot be

---

<sup>37</sup> Draft Conclusions (n 14) Conclusion 6(1).

<sup>38</sup> The reasons which led me to this conclusion are discussed in the following section.

<sup>39</sup> Chatham House, 'International Law Meeting Summary: Classification Of Conflicts: The Way Forward' (2012), 6, <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/011012summary.pdf> accessed 24 July 2019.

<sup>40</sup> Katharine Fortin, *The Accountability Of Armed Groups Under International Law* (Oxford University Press 2017) 121.

subject to an abusive interpretation by states.<sup>41</sup> Furthermore, the Commission of Experts, entrusted with the task to study an issue of humanitarian aid to the victims of internal conflicts, came to the conclusion that the existence of a NIAC *cannot be denied* if the objective criteria are satisfied.<sup>42</sup> Thus, when a confrontation between a state and an NSAG satisfies the objective criteria, IHL shall apply to such fighting.<sup>43</sup> Moreover, the view that the pronouncements of a state rejecting the existence of a NIAC have little relevance for the classification of conflict was supported by the ICTY.<sup>44</sup> This scales down, to some extent, the possibility of manipulation by states, however, it does not exclude it in the absence of a body which would be able to decide when IHL starts to apply to a particular situation.<sup>45</sup>

The ICRC, while sometimes publishing its views on the classification of particular armed conflicts,<sup>46</sup> sees undertaking the role of a determining body on a regular basis undesirable as it might jeopardize its relations with states involved in NIACs.<sup>47</sup> Thus, authoritative classifications are made mostly by adjudicative bodies, however only rarely and *post factum*.<sup>48</sup> Views on the classifications of ongoing conflicts are oftentimes expressed by the UN Security Council and General Assembly, influential non-governmental organizations (hereinafter NGOs).<sup>49</sup> However, as international law is a self-applied system, classifications made by one actor cannot be imposed on others.<sup>50</sup>

Which implications does this state of affairs have for the inclusion of NSAGs in the formation of CIHL?

The denial of the existence of a NIAC by a state-party to the conflict cannot exclude the practice of NSAGs for the formation of CIHL. Such determination remains objective and once the objective criteria of a NIAC are met, the practice and *opinio juris* of NSAGs shall be considered. Any other conclusion would defeat the purpose of including NSAGs in the process of customary

---

<sup>41</sup> International Committee of Red Cross, 'Report On The Protection Of Victims Of Non-International Armed Conflicts' (1971) (Conference of Government Experts on the Reaffirmation and Development of Customary International Humanitarian Law applicable in Armed Conflicts, Geneva, 1971) 36, 41.

<sup>42</sup> 'Humanitarian Aid To The Victims Of Internal Conflicts. Meeting Of A Commission Of Experts In Geneva, 25–30 October 1962, Report' (1962) 3 International Review of the Red Cross 82.

<sup>43</sup> For the criteria of a NIAC, see *Prosecutor v Dusko Tadić a/k/a 'Dule'*, Opinion and Judgment [1997] International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber II, IT-94-1-T (International Criminal Tribunal for the former Yugoslavia (ICTY) para. 562.

<sup>44</sup> *Prosecutor v Boskoski and Tarculovski*, Trial Judgment [2008] International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber, IT-04-82-T (International Criminal Tribunal for the former Yugoslavia (ICTY) para. 191.

<sup>45</sup> Fortin (n 40) 122.

<sup>46</sup> *Ibid* 124.

<sup>47</sup> 'Report On The Protection Of Victims Of Non-International Armed Conflicts' (n 41) 41.

<sup>48</sup> Classification Of Conflicts: The Way Forward (n 39) 7.

<sup>49</sup> Fortin (n 40) 123.

<sup>50</sup> Sassòli, *International Humanitarian Law* (n 5) 169.

law-making. If a state's rejection of the existence of a NIAC would have an effect on the exclusion of practice of NSAGs, states could use it as a manipulative tool. The CIHL rules would then remain unrealistic for NSAGs and the rationale for the inclusion of NSAGs into the formation of CIHL would diminish.

The same is true for situations in which states classify existing NIACs as IACs. If in fact, the control of a non-territorial state over an NSAG in another state's territory does not reach a standard sufficient to classify the conflict as an IAC by proxy and criteria for NIAC are objectively satisfied, the practice of an NSAG shall be taken into account.

### **3.2. The selection problem: which non-state armed groups to “admit” to law-making?**

One of the major challenges related to the formation of CIHL by NSAGs is the question of how to identify the groups which have the capacity to form the practice and express *opinio juris*. This question only arises in relation to NSAGs. While states may differ in size and lie on the opposite sides of a political spectrum, they share some basic uniform characteristics and are much less diverse than NSAGs.<sup>51</sup> Moreover, the principle of sovereign equality, stipulated in Article 2(1) of the UN Charter, at least formally contributes to the homogeneity of states.<sup>52</sup> NSAGs, in turn, are heterogenic and differ in capacities, control over a territory, operational practices, relations with the parent state and the third states,<sup>53</sup> their aims and inclinations to respect IHL,<sup>54</sup> thus it is unclear which of them shall be ‘admitted’ to the formation of CIHL. This section is aimed to outline the possible ways to overcome this challenge.

The selection problem is one of the most delicate ones. As we will see below, taking a wrong perspective on the possible solution to this problem might lead to the opposite result, *i.e.* a decrease in compliance. For the solution, one must again take into account the states' perspective: realistically, in the state-centered system that international law is, it is the states who adopt new rules on whom to “admit” to international law-making.<sup>55</sup> Thus, a solution to the problem shall be tested against the likelihood of its acceptance by states.

One way to address the problem is to take into account only those groups complying with the requirements of Article 1 of the APII, which requires them to be organized under the

---

<sup>51</sup> Sassòli, *International Humanitarian Law* (n 5) 50.

<sup>52</sup> Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) Article 2(1).

<sup>53</sup> Fortin (n 40) 154.

<sup>54</sup> Sassòli, 'Taking Armed Groups Seriously' (n 10) 10.

<sup>55</sup> Isabelle R. Gunning, 'Modernizing Customary International Law: The Challenge Of Human Rights' (1991) 31 *Virginia Journal of International Law* 215.

responsible command and to control part of a territory of a state.<sup>56</sup> This position stems from one of the views on the legal personality of NSAGs. Under this view, NSAGs have a legal personality when they have control over a territory and perform the responsibilities that are normally performed by states.<sup>57</sup> The positive side of such an approach would consist in excluding less organized NSAGs, whose participation in the formation of CIHL would pose more practical difficulties as compared to those controlling the territory. A possible objection to such an approach is given by Roberts and Sivakumaran. They point out that states would be more reluctant to admit that NSAGs should have a role in law-making when such role would be based on the fact that they are controlling the territory or exercise government-like functions, as this may be viewed as upgrading their legal status.<sup>58</sup> The authors, however, do not find this view persuasive. They argue that granting armed groups a role in law-making would not lead to upgrading their status to the one similar to states', akin giving international organizations the right conclude treaties had not made them equal to states.<sup>59</sup> This is a valid point. However, when we transfer this argument to a more practical level of selection of groups for participation in the formation of CIHL, it presents a significant challenge to basing the selection solely on the control of an NSAG over a territory. Such selection criterion would less likely be well-received not only by states but by NSAGs as well. The exclusion of groups not controlling a territory could nourish dissatisfaction among them and, as a result, lead to non-compliance. Moreover, it would create an incentive for them to strive to control territory.

Another possible proposition might be considering the practice of the groups which possess certain characteristics, the most apparent of which would be a pursuit of a political agenda by a group. The value of a group's objectives has been discussed in the context of the elements of a NIAC.<sup>60</sup> The proposition was to include a political purpose to be an implicit requirement to the existence of a NIAC.<sup>61</sup> A group having a political objective was said to have more incentives to respect IHL as it wants to govern a country, as compared to a group pursuing a purely criminal objective.<sup>62</sup> However, the ICRC, as well as the ICTY, rejected the proposition that the political motivation of a group is a prerequisite to the existence of a NIAC.<sup>63</sup> The ICRC points

---

<sup>56</sup> Additional Protocol II (n 6) Article 1(1).

<sup>57</sup> Fortin (n 40) 155-156.

<sup>58</sup> Roberts, Sivakumaran (n 15) 133.

<sup>59</sup> *Ibid.*

<sup>60</sup> See the proposal of the Danish delegation proposal and the French delegation objection at the Stockholm Conference, *Final Record*, (n 4) Vol. II-B 99.

<sup>61</sup> Sassòli, *International Humanitarian Law* (n 5) 182.

<sup>62</sup> *Ibid.*

<sup>63</sup> Knut Dörmann & International Committee of the Red Cross, *Commentary On The First Geneva Convention: Convention (I) For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field: Part Of Commentaries On The 1949 Geneva Conventions* (Cambridge University Press 2016) para. 451; *Prosecutor v Fatmir Limaj, Bala and Musliu*, Trial II Judgment [2005] International Criminal Tribunal for the

out that the evaluation of a group's motives is controversial: it is difficult to determine and evaluate the motivations of the group as well as separate political and non-political objectives.<sup>64</sup> Introducing a subjective selection criterion into the selection of NSAGs for participation in the formation of CIHL would likewise open the door for speculations as to whether a group has a political objective. Moreover, if an NSAG with a non-political objective in a NIAC has the capacity to form a practice on a particular issue, e.g. detain members of armed forces or civilians, use certain means and methods of warfare, just like the groups with a political objective, there are no reasons to disregard these practices based on a formal subjective criterion.

Thus, it is suggested that the selection of NSAGs for participation in the formation of CIHL should be based solely on the existence of armed conflict. The decisive criteria, as pronounced by the ICTY in *Tadić*,<sup>65</sup> would be those of sufficient organization of an NSAG and a certain level of intensity of violence.<sup>66</sup> That would in effect mean, that only the practice of NSAGs, participating in NIACs, is to be considered. Such selection would best serve the aims of NSAGs inclusion. First, as discussed in the previous section, those criteria are in essence objective, what means that there are (or at least there should be) fewer opportunities for states to manipulate them. Second, such selection would make sure that the practice of all addressees of the IHL rules – parties to an armed conflict – is considered, what best serves the purpose of NSAGs' inclusion – enhancing compliance with the rules of IHL. Third, in the absence of a uniform definition of an NSAG, the use of the two criteria for the existence of NIAC would facilitate the selection process on a practical level.

### **3.3. The contrary practice problem: how not to turn humanitarian law into non-humanitarian?**

If one takes the position, proposed in the previous section, regarding the criteria to select NSAGs for participation in the formation of CIL, the question arises: if every group participating in a NIAC is admitted to the formation of CIHL, how should we deal with groups, which systematically pursue practices of non-humanitarian character? How can we ensure that admitting all armed groups, partaking in NIACs, to participation in the formation of humanitarian law does not turn it into non-humanitarian law, which no longer serves its

---

former Yugoslavia (ICTY), Trial Chamber II, IT-03-66-T (International Criminal Tribunal for the former Yugoslavia (ICTY) para. 170.

<sup>64</sup> *Ibid* para. 450.

<sup>65</sup> *Tadić*, Trial Judgment and Opinion (n 43) para. 526.

<sup>66</sup> For the discussion on how to assess two criteria see e.g. Rodenhäuser (n 1) 61 – 112.

purpose? This section seeks to answer these questions by outlining possible ways to mitigate the negative effects of such kind.

Some NSAGs “persistently object” to IHL and exercise no restraint when engaged in an armed conflict.<sup>67</sup> In this respect, Ryngaert points out that rules formed as a result of the inclusion of NSAGs into the formation of CIHL would not represent “a humanitarian’s dream”, but rather lead to IHL’s regression.<sup>68</sup> This remains one of the most frequent critiques of NSAG’s engagement. Thus there is a need to identify ways of how to deal with such groups and their practices. Unless addressed in a proper manner, this problem might present an obstacle to accepting *any* NSAGs into the formation process of CIHL rules, even those which genuinely want to participate in its formation and have motivations to comply with IHL.

There are two possible ways to address this challenge. The first option is to connect the admittance of NSAGs to the participation in CIHL formation to their compliance with IHL.

When discussing the possibility of engagement with NSAGs to enhance their compliance with IHL rules, Sassòli proposes to engage with all “genuine armed groups engaged in a genuine armed conflict”.<sup>69</sup> Concerning the exclusion, he proposes to leave such decision to the group itself – when a group rejects legal mechanisms, abuses them or uses them only for propaganda purposes, it “self-excludes” itself.<sup>70</sup> He stresses that it is difficult to determine the group which is “hopeless” or “not serious” because whether the group is willing to comply could be only evidenced in the process and cannot be a precondition thereof.<sup>71</sup> This proposal provides a viable solution to the question of which groups to admit to the formation of CIHL, however, some of its aspects can be further elaborated on.

To better understand the position on a practical level, it is useful to resort to the distinction between a “practical failure to comply” and a “declared refusal to comply”.<sup>72</sup> The distinction permits to approach the exclusion more cautiously so as not to exclude the groups, which want to comply but simply cannot. As discussed above, a number of current rules of IHL are unrealistic for NSAGs,<sup>73</sup> especially those which require action rather than abstention. Thus the exclusion of those groups, which are unable to comply with the existing IHL due to the

---

<sup>67</sup> Hyeran Jo, *Compliant Rebels* (Cambridge University Press 2015) 47.

<sup>68</sup> Ryngaert (n 34) 289.

<sup>69</sup> Sassòli, 'Taking Armed Groups Seriously' (n 10) 10.

<sup>70</sup> *Ibid* 11.

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

<sup>72</sup> James C Scott, *Domination And The Arts Of Resistance: Hidden Transcripts* (Yale University Press 1990) 203.

<sup>73</sup> Sassòli, 'Taking Armed Groups Seriously' (n 10) 12.

objective shortage of material resources, from participation in its formation would be counterproductive. At the same time, NSAGs who openly declare to disregard the existing rules are to be excluded. To illustrate the distinction, it is useful to draw two examples of non-compliance. The failure of Frente Farabundo Marti para la Liberacion Nacional (FMNL) to provide proper training to those involved with the courts<sup>74</sup> represents non-compliance with the fair trial requirements, provided under CIHL.<sup>75</sup> However, one has to compare this failure to the numerous beheadings performed by the members of the Islamic State of Iraq and Syria (ISIS) and published in social media networks.<sup>76</sup> The first represents the “practical failure to comply” while the second – the “declared refusal to comply”. The use of such distinction would be helpful for the analysis of whether a group “self-excludes” itself from the formation of CIHL, as the explicit declaration by the group of its refusal to comply would provide an objective justification for exclusion as compared to subjective evaluation of the groups’ compliance.

It is also important to note that the exclusion shall not be permanent. A group, initially excluded, may change its behavior for a number of reasons. First, as evidenced in practice, one group could influence another group either through peer pressure or through example setting.<sup>77</sup> Second, the participation of other NSAGs in the formation of CIHL, leading to the formation of more realistic rules, might foster the incentives of the other groups to comply with them.

The approach, however, has its downsides. One might call it “cherry-picking” based on the allegation that such exclusion is not present in the law.<sup>78</sup> This objection would turn the discussion of the problem in another direction. In particular, the second option is to shift from how to deal with particular *groups*, to how to deal with their contrary *practice*.

The question on how to evaluate contrary practice remains a weak point even with regard to the practice of states.<sup>79</sup> Little controversy arises when the practice of NSAGs contradicts an existent CIL rule. According to the relevant pronouncement of the ICJ in *Nicaragua*, such contrary practice would generally be a violation of a customary rule already formed.<sup>80</sup> However, the

---

<sup>74</sup> S. Sivakumaran, 'Courts Of Armed Opposition Groups: Fair Trials Or Summary Justice?' (2009) 7 Journal of International Criminal Justice 491.

<sup>75</sup> Doswald-Beck, Henckaerts (n 18) rule 100.

<sup>76</sup> Simone Molin Friis, 'Beyond Anything We Have Ever Seen': Beheading Videos And The Visibility Of Violence In The War Against ISIS' (2019) 91 International Affairs.

<sup>77</sup> Roberts, Sivakumaran (n 15) 130-131.

<sup>78</sup> I thank Benedikt Behlert for this observation.

<sup>79</sup> Kyriakopoulos (n 15) 49.

<sup>80</sup> According to the ICJ: “... it [is] sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule” *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* [1986] Merits, International Court of Justice (ICJ) ICJ Rep 14 (International Court of Justice (ICJ) para. 186.

problem exists when a CIL rule is nascent, *i.e.* in the process of its formation, and the existing practice is controversial. The ICTY came to a conclusion on the existence of a customary prohibition of torture despite the existence of the contrary practice, as no state has ever claimed torture to be authorized.<sup>81</sup> Such justification would not, however, work in case of non-compliant NSAGs. NSAGs may explicitly claim certain prohibited practices to be authorized.<sup>82</sup> Thus, if one follows the argument of the ICTY, the contrary practice coupled with its approval as legal should be considered. That, in turn, would either mean that the formation of some CIHL rules might be blocked or would lead to the formation of non-humanitarian rules.

However, it could be argued that even in such a situation the influence of contrary practice would be mitigated if the practice of armed groups is taken into account alongside the practice of states and other armed groups.<sup>83</sup> While states violate legal norms, they are less likely to claim such violations to be lawful due to the political non-acceptability of such statements and their treaty commitments.<sup>84</sup> However, the argument only takes into account the scenario, in which the practice of states and NSAGs are taken together, which is not the single mode of inclusion of NSAGs into law-making.<sup>85</sup> Moreover, even in case the practice of states and NSAGs are taken together, the risk of formation of non-humanitarian norms cannot be excluded.

This analysis suggests that dealing with non-compliant groups' acceptance to the formation of CIHL either through a group itself or through its contrary practice, does indeed pose a number of challenges. While the first approach may seem to be preferable as it does not bear the risk of leading to a regression of IHL, it might lead to the exclusion of certain groups unjustified in law. At the same time, the second approach while being legally preferable bears in itself more risk for downgrade of IHL. However, implementing either of the options would permit to mitigate the negative effects of downgrading CIHL.

It must, however, be noted that the participation of NSAGs in CIHL formation would not always lead to regression of the rules. Robers and Sivakumaran identify several points to illustrate this. For example, while there are numerous situations in which the practice of NSAGs goes contrary to the requirements of IHL, there are as well situations, in which NSAGs have undertaken obligations higher than those of states, *e.g.* obligations under the Geneva Call Deed

---

<sup>81</sup> *Prosecutor v Anto Furundzija*, Trial Judgment [1998] International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber, ICTY-IT-95-17/1-T (International Criminal Tribunal for the former Yugoslavia (ICTY)), para. 138.

<sup>82</sup> See *e.g.* Jo (n 67) 48.

<sup>83</sup> Fortin (n 40) 327.

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

<sup>85</sup> See section 3.6.



of Commitment on anti-personnel mines go further than the ones under Ottawa Convention.<sup>86</sup> This must be as well highlighted in the discussion about NSAGs' participation in law-making.

### **3.4. The identification problem: do actions speak louder than words and how to identify those of non-state armed groups?**

The identification of CIHL rules is by itself a more difficult task than the identification of customary rules in other branches of law. This is due to several reasons. For example, state practice is usually limited to one of the belligerent parties, it often consists of omissions and the lack of transparency makes it difficult to identify the parties' intentions.<sup>87</sup>

Would these problems reveal themselves even greater with regard to NSAGs? How could one identify that what an NSAG does is a rule for that group? The present section will attempt to answer these questions to find the practical solutions to the problem of identification and accumulation of practice and *opinio juris* of NSAGs.

The recently published Draft Conclusions on the identification of CIL, which are the result of the ILC's work on the topic, explicitly exclude any conduct of actors other than states and international organizations from the scope of the requirement of general practice for the formation of customary rules.<sup>88</sup> What is more, the ILC confirms the "traditional"<sup>89</sup> formula of a CIL rule, which consists of state practice and *opinio juris*, each of which, although might be emanating from the same source, have to be separately ascertained.<sup>90</sup> The ILC does not seem to admit, that in certain circumstances one may prevail over the other.

Such view, however, might be traced in judicial practice. ICTY in *Kupreskic* case found that IHL is the area, where "*opinio iuris sive necessitates* may play a much greater role than *usus* ..." and that "... principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where state practice is scant or inconsistent".<sup>91</sup> This, however, does not seem to become a prevailing opinion and the following analysis will thus concentrate equally on both elements.

---

<sup>86</sup> Roberts, Sivakumaran (n 15) 138.

<sup>87</sup> Sassòli, *International Humanitarian Law* (n 5) 47.

<sup>88</sup> Draft Conclusions (n 14) Conclusion 4(3).

<sup>89</sup> Noora Arajärvi, 'From State-Centrism To Where?: The Formation Of (Customary) International Law And Non-State Actors', 5, <http://dx.doi.org/10.2139/ssrn.1599679> accessed 24 July 2019.

<sup>90</sup> Draft Conclusions (n 14) Conclusion 2.

<sup>91</sup> *Prosecutor v Kupreskic*, Trial Judgment [2000] International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber, ICTY-IT-95-16-T (International Criminal Tribunal for the former Yugoslavia (ICTY)), para 527; Tadić, Decision on the Defense for Interlocutory Appeal on Jurisdiction (n 9) para. 99.

At first glance, it might seem that the difficulties related to the identification of practice are bigger in relation to NSAGs. According to Rondeau, this is not always the case and the problem of collection of any “real-life” practices is acute both for states and NSAGs.<sup>92</sup> She cites the ICTY, which held that the difficulties of collecting the practice are related to the difficulties of access to the actual theater of fighting by independent observers, including the ICRC, non-disclosure of the information by the parties and resort to misinformation.<sup>93</sup> These difficulties indeed relate equally to both parties.

However, one problem, highlighted by Fortin, exists only with regard to armed groups: due to their factual and legal heterogeneity, it is much more difficult to identify their practice, which is representative of the groups as a class.<sup>94</sup>

One of the possible solutions with regard to the collection of NSAG’s actual practices might be a creation of a systemized database, which would include reports and other contributions regarding the NSAGs’ conduct in the field. Such contributions could come from various sources, but primarily from international and local NGOs, which are present in a country, where an armed group operates. One example of a database concerning NSAGs’ compliance with IHL is the “Armed Groups and International Law” database.<sup>95</sup> The database provides a solid basis for the studies of NSAGs’ compliance. The introduction of a database would undoubtedly require great efforts for its creation and management. On the other hand, it would greatly enhance and facilitate the collection of reliable and accurate information regarding the NSAGs’ practices.

As regards the identification of the second element of a customary rule – *opinio juris* – it might indeed be a more difficult task to identify its expression by NSAGs, as compared to states.

First, as *opinio juris* means acceptance of certain practice as law, it is not clear, what *law* actually means for NSAGs, which reject the binding force of customary rules on them for the reason of non-participation in the norms’ formation. According to the ILC’s Draft Conclusions, state practice “must be accompanied by the conviction that it is permitted, required or prohibited by customary international law”.<sup>96</sup> This creates a vicious circle, in which a group that does not feel bound by a rule as it did not participate in its formation, has to accept that it is bound by a

---

<sup>92</sup> Sophie Rondeau, 'Participation Of Armed Groups In The Development Of The Law Applicable To Armed Conflicts' (2011) 93 International Review of the Red Cross 668.

<sup>93</sup> *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (n 9) para. 99.

<sup>94</sup> Fortin (n 40) 327.

<sup>95</sup> 'Armed Groups And International Law' (*Armed Groups and International Law*) <<https://armedgroups-internationalallaw.org/>> accessed 24 July 2019.

<sup>96</sup> Draft Conclusions (n 14) commentary to Conclusion 9(1).

rule in order to contribute to its formation. Thus, there might be a necessity to reconsider how the perception of law for NSAGs in the context of expression of *opinio juris* shall be understood.

Second, it is more difficult to determine, who represents a group for the expression of *opinio juris*. In the absence of availability of information on the hierarchy in a group, it might be difficult to determine whether a person, *e.g.* making a statement, has a capacity to do so. This problem could only be approached by conducting a careful case-by-case analysis.

Third, armed groups have fewer possibilities to express *opinio juris* than states. States can *e.g.* express their *opinio juris* on international *fora*. However, *opinio juris* of NSAGs may be deducted, *e.g.* from the formal commitments made by NSAGs, analysis of the codes of conduct of NSAGs (when existent and can be accessed), and even the use of social networks.<sup>97</sup>

Overall, identification of practice and *opinio juris* of NSAGs may be a challenging, yet not an impossible exercise. As mentioned above, admitting new actors to the formation of customary rules would inevitably require some modifications to the existing order. However, such modifications seem beneficial rather than harmful, if overall they result in better compliance and thus better protection of those suffering from armed conflicts.

### **3.5. Temporary character problem: can the lifespan of non-state armed groups preclude them from participation in customary law formation?**

One of the main differences between states and NSAGs is the temporary character of the latter. While states may experience changes in political regimes, the states themselves remain unchanged, unless they dissolve.<sup>98</sup> NSAGs, on the contrary, are inherently temporary and exist for a certain purpose, disappearing either by victory or defeat.<sup>99</sup>

In the context of CIHL formation, the temporary character of NSAGs gives rise to two main problems. First, as the formation of a customary rule traditionally requires a certain level of continuity and repetition,<sup>100</sup> it is unclear whether this requirement should be applied to temporarily existing NSAGs and how they may fulfill this requirement. Second, as one of the objectives of admittance of NSAGs to the formation of CIHL is to increase their sense of ownership of the norms, it may be contested whether the acceptance of the groups of today to

---

<sup>97</sup> Jo (n 67) 49.

<sup>98</sup> Zakaria Dabone, *Le droit international public relatif aux groupes armés non étatiques* (Schulthess 2012) 87.

<sup>99</sup> *Ibid* 88.

<sup>100</sup> Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 56.

CIHL formation would give the sense of ownership to the groups of tomorrow.<sup>101</sup> The present section will concentrate on finding possible solutions to the above problems.

According to Sassòli, stability, and continuity of states, the possibility for them to repeat the practice and to become the beneficiaries and addressees of the rules “are all ingredients of the mysterious customary process that turns what is – practice – into what ought to be – the law”.<sup>102</sup> Indeed, it might be argued that the fact that NSAGs’ existence is limited in time would seriously impede their ability to participate in the process of CIHL formation. However, several arguments may be raised as to why it is not so. First, as discussed in section 3.2., to be admitted to the process of formation of CIHL rules, a group shall be involved in a NIAC. The requirement of a certain degree of violence, necessary for the existence of a NIAC, presupposes that a group in question out to have certain continuity in tactics and continuity in the participation in the hostilities.<sup>103</sup> Second, compared to other branches of international law, for IHL the character of an armed conflict implies that parties are engaged in war-related practices if not every day, then at least so frequently that the conflict does not cease to exist. That, in most circumstances, would be more frequent, than *e.g.* the practice of states related to the delimitation of maritime boundaries. Thus, it would seem that subject to the specific character of IHL, the temporary character of NSAGs’ would not preclude them from fulfilling the requirement of continuity and repetition.

As regards the second problem, Fortin rightfully points out that while armed conflicts become more protected in character, the lifespans of NSAGs remain incomparable to those of states.<sup>104</sup> As a result, the problem of ownership of the norms might remain unfixed, as the groups of tomorrow might not feel the ownership of the norms, to which the groups of today have contributed.<sup>105</sup> Bellal and Heffes, in answering to the Fortin’s argument, notice that in many cases different NSAGs base their internal legal sources on the rules of conduct or public statements of the other groups.<sup>106</sup> This is due to the psychological element according to which, as noted by Sassòli, individuals tend to accept and respect the rules, which came into being with the participation of individuals confronted with similar problems.<sup>107</sup> Moreover, as the rules

---

<sup>101</sup> Fortin (n 40) 327–328.

<sup>102</sup> Sassòli, *International Humanitarian Law* (n 5) 50.

<sup>103</sup> Dabone (n 98) 87.

<sup>104</sup> Fortin (n 40) 327–328.

<sup>105</sup> *Ibid.*

<sup>106</sup> Annyssa Bellal and Ezequiel Heffes, ‘Yes, I Do’: Binding Armed Non-State Actors To IHL And Human Rights Norms Through Their Consent’ (2018) 12 *Human Rights & International Legal Discourse* 126–127.

<sup>107</sup> Sassòli, ‘Taking Armed Groups Seriously’ (n 10) 17.

created with the participation of NSAGs are supposed to be more realistic for them, this would provide another incentive to the groups of tomorrow to comply with such CIHL rules.

Overall, it appears that the temporary character of NSAGs would not pose substantial challenges to the formation of CIHL with the participation of such groups. Such challenges are mitigated either by the character of IHL as a system or by the relations of the NSAGs with each other.

### **3.6. Practical accommodation problem: how non-state armed groups could be practically accommodated in the formation of customary law?**

Admitting new actors into the process of CIHL formation would inevitably give rise to a question of how these actors fit into the system. If NSAGs are admitted to participate in international law-making, would the law resulting from such process be universal? Would it bind both armed groups and states or armed groups only? Would this lead to the end of customary law as we know it? All of these questions are of vital practical importance to ensure the possibility for NSAGs to participate in the process of CIHL formation. This section will outline proposals on how the existing system could best accommodate new actors.

A preliminary question to be answered is the actual meaning of giving NSAGs a role in law-making. Should NSAGs be bound by the existing CIHL rules and participate in the creation of new rules or should they not be bound by the existing rules as they did not participate in their creation? Roberts and Sivakumaran argue in favor of the first approach as it would permit to balance the interest of admittance of NSAGs to the law-making process with maintaining important humanitarian protection.<sup>108</sup> Legally, they build their argument using an analogy to newly emerging states, which remain bound by customary rules, despite not having participated in their creation.<sup>109</sup> Besides the legal arguments, put forward by the authors, such position would also be preferable from a policy perspective as it would preclude the operation of NSAGs in a legal vacuum.

The second issue is whether CIHL rules, formed with the participation of NSAGs, should be binding only on NSAGs or the practice and *opinio juris* of NSAGs and states shall be taken and evaluated together and bind both.

---

<sup>108</sup> Roberts, Sivakumaran (n 15) 141.

<sup>109</sup> *Ibid* 151; see also Fernando R. Tesón, 'Fake Custom' in Brian D. Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) 89.

The first option would, in fact, be law existing only among armed groups. That would take the form of transnational law, similar to the sports law developed by the sports clubs and organizations or *lex mercatoria* by merchants.<sup>110</sup> Such an approach, however, would have a number of disadvantages. First, that option would mean the end of equality of belligerents.<sup>111</sup> Taking practices separately would result in the creation of a substantial gap between the rules for states and the rules for NSAGs, as there would be no need to search for a common denominator. Furthermore, the result might be even that states and NSAGs have different obligations. Second, the system, existing only among armed groups, would not be subject to any restrictions: in such system, the contrary practice of NSAGs, being taken separately from the one of states, might lead to the creation of new rules of non-humanitarian character. Third, giving NSAGs an opportunity to develop their own autonomous legal regime might be seen as a form of legitimization of armed groups. Compared to sports clubs and merchants, armed groups are considered illegal by states.<sup>112</sup> Thus there is little chance that states would accept that option.

The second option would mean that the new CIHL rules would compose of the practice and *opinio juris* of both states and armed groups. As a result, the rules would equally bind states and NSAGs. This option would have a number of advantages as compared to the first option. First, such approach would safeguard the equality of belligerent. Second, as explained in section 3.3., taking the practice of states and NSAGs together would ensure that the rules do not turn the non-humanitarian practice of NSAGs into a new rule. Third, taking the practice of both states and NSAGs together provides a better opportunity to analyze and identify the areas in which the views of states and NSAGs mainly diverge.<sup>113</sup> Identifying legal rules that are systematically violated may be an indicator of the unrealistic character of a particular norm.<sup>114</sup>

One of the possible counterarguments to such approach is that it would lead to the formation of rules which would be rudimentary for states which would be able to comply with more complex ones.<sup>115</sup> There are possibilities to mitigate this risk. For example, states would remain bound by their IHRL obligations,<sup>116</sup> what would serve as a “safety net” of protection. However, IHRL rules are not always suitable for addressing the situations typical in armed conflicts.<sup>117</sup> Another

---

<sup>110</sup> Sassòli, 'Taking Armed Groups Seriously' (n 10) 20.

<sup>111</sup> Sassòli, *International Humanitarian Law* (n 5) 51.

<sup>112</sup> *Ibid.*

<sup>113</sup> Roberts, Sivakumaran (n 15) 139.

<sup>114</sup> *Ibid.*

<sup>115</sup> Sassòli, *International Humanitarian Law* (n 5) 51.

<sup>116</sup> *Ibid.*

<sup>117</sup> Sassòli, *International Humanitarian Law* (n 5) 171.

possibility would be to leave room for differentiation in the rules themselves. Some existing rules of IHL may serve as an example of a built-in differentiation, *e.g.* the rules obliging parties to act “within the limits of their capabilities”, “to the fullest extent practicable” or act in a certain way “whenever the circumstances permit”.<sup>118</sup> Leaving such margins in the rules, where the practice of states and NSAGs diverge due to limited capacities of NSAGs as compared to states, would permit to demand performance of obligations from each party to the highest extent possible for *this* party. Moreover, in particular situations, some NSAGs may be organized if not better, than close to some states. This solution would as well permit to demand the performance of increased obligations by better organized NSAGs. It is, however, important to note that such approach would require determination of a humanitarian minimum, below which the obligations cannot stretch.<sup>119</sup>

One of the proposals on how to accommodate NSAGs in the formation of CIHL without downgrading the rules is by means of introducing a “quasi-custom”.<sup>120</sup> According to the authors, such custom would take an account of the practice of both, states and NSAGs, however, giving the decisive role to the states’ consent as well as give more weight to state practice.<sup>121</sup> The major role of the states is explained by the centrality of the role of states in the international law system in general.<sup>122</sup> Apart from practical difficulties in implementing this proposal, it might also not perform the function which the inclusion of NSAGs into the process pursue, but simply make identification of customary rules a more complex exercise. This proves that considering the practice of NSAGs on an equal footing with the practice of states would best serve the objectives of inclusion of NSAGs into the formation of CIHL, provided that the practices are evaluated in the light of the purpose of IHL – to limit the suffering caused by war situations.

That does not resolve the problem of how the practices of states and NSAGs shall be analyzed on a practical level. Formation of a customary rule requires practice to be widespread, representative and consistent.<sup>123</sup> While the issue of consistency has been already discussed in section 3.3., the other requirements deserve attention. The requirement of widespread practice “cannot be quantified” and will depend on the circumstances.<sup>124</sup> Representativeness of practice

---

<sup>118</sup> Roberts, Sivakumaran (n 15) 139.

<sup>119</sup> Marco Sassòli, 'Introducing A Sliding-Scale Of Obligations To Address The Fundamental Inequality Between Armed Groups And States?' (2011) 93 *International Review of the Red Cross* 430.

<sup>120</sup> Roberts, Sivakumaran (n 15) 151.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> Malcolm D Evans, *International Law* (5th edn, Oxford University Press 2018) 93.

<sup>124</sup> *Ibid.*

requires an inquiry into whether the practice is followed by geographically, economically and geopolitically diverse states.<sup>125</sup> Application of these requirements to the situation in which NSAGs partake in the process of CIHL formation would mean that a certain practice shall be followed by diverse states as well as NSAGs. As NSAGs are inherently very diverse, such analysis should mostly come down to the analysis of the practice of geographically diverse groups. Assessment of the requirement of widespread practice would depend on the circumstances and the issue at stake. However, it would seem that mixing the number of states and groups together is not a workable method. Rather, how widespread the practice is shall first be decided separately relative to the group of states and the group of NSAGs and if such practice is widespread within both groups, it thereafter shall be analyzed together.

Another interesting question is whether a special or regional custom, *i.e.* a rule that may be asserted only within a particular region,<sup>126</sup> may be formed with the participation of NSAGs. While it may be more difficult to determine the existence of such a rule in practice due to, *e.g.* operation of the same NSAG in different regions, it would seem that in theory that there are no reasons to conclude that a regional custom cannot crystalize with the participation of NSAGs.

Admittance of NSAGs to the formation of CIHL would mean the creation of two levels<sup>127</sup> of CIHL: on the one level, there would be rules that are composed of the practice of both states and NSAGs and are thus binding on both of them, while on the other level, there would be rules that are formed only by states and are binding on them. Such differentiation, in IHL in particular, would not present difficulties which might arise in other branches of law, as there would be a clear borderline between the two levels. Such borderline would be the traditional differentiation between internal and international armed conflicts. That would not lead to the end of equality of belligerents, as the same rules would be binding on both parties to a NIAC. It would, however inevitably lead to separation of CIL rules in IAC and NIAC, as NIAC rules would be composed of the practice of states coupled with the one of NSAGs, which is, as explained above, not a negative tendency but rather the desired result.

---

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid* 97.

<sup>127</sup> See further Anthony C Arend, *Legal Rules And International Society* (Oxford University Press 1999) 177–178.



#### 4. CONCLUSIONS

The present paper has been aimed to identify the challenges related to the participation of NSAGs in CIHL formation. Six problems, that would arise once NSAGs are admitted to CIHL formation have been identified. They reveal that advocating the consideration of the practice of NSAGs for the purpose of CIHL formation is a challenging task. Based on the analysis, it can be concluded that those challenges can be either eliminated or at least mitigated. The process of eliminating or mitigating those challenges would, nevertheless, require putting in great efforts and taking a number of active steps, which would depend on the readiness on the part of states to open up a discussion on the matter. Most importantly, eliminating and mitigating the challenges, in the words of d'Aspremont, would require "unlearning of the categories of thoughts which international lawyers have been trained to continuously repeat and articulate their thoughts around".<sup>128</sup> The results of the present research may thus serve that purpose.

The challenges that would arise once NSAGs are admitted to CIHL formation, are not limited to the ones, listed in the paper. Moreover, subject to the changes in the perception regarding NSAGs' participation in law-making, the proposed solutions may be further elaborated on. The results of the present research may as well be used for further work on the topic.

A number of authors, including Sassòli, Sivakumaran, Roberts, Fortin, Bellal, Heffes have made significant contributions to the debate on enhancing compliance of NSAGs with IHL through engagement with them, *inter alia*, by means of taking NSAGs' practice into account for CIHL formation. However, no research has been specifically aimed to identify the problems arising from such engagement as well as find the possible solutions to them. The results of the present research thus contribute to closing such a gap.

Most importantly, it is worth to be stressed one more time, that the conversation on the participation of NSAGs in CIHL formation shall be approached with the view of its potential to affect the alleviation of suffering of victims of NIACs, rather than a tool to disrupt the existing system of international law. The present research is believed to be a humble contribution towards this end.

Word Count: 9884/10000

---

<sup>128</sup> Jean d'Aspremont, 'Non-State Actors And The Formation Of International Customary Law: Unlearning Some Common Tropes', in forthcoming Iain Scobbie and Sufyan Droubi (eds), *International Organizations and Non-State Actors in the Formation of Customary International Law, Melland Schill Perspectives on International Law* (Manchester University Press, 2019) 27.

## 5. BIBLIOGRAPHY

### Table of Treaties

Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

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

### Table of Cases

*Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* [1986] Merits, International Court of Justice (ICJ) ICJ Rep 14

*Prosecutor v Anto Furundzija*, Trial Judgment [1998] International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber, ICTY-IT-95-17/1-T

*Prosecutor v Boskoski and Tarculovski*, Trial Judgment [2008] International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber, IT-04-82-T

*Prosecutor v Dusko Tadić a/k/a 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction [1995] International Criminal Tribunal for the former Yugoslavia (ICTY), Appeals Chamber, IT-94-1-AR72

*Prosecutor v Dusko Tadić a/k/a 'Dule'*, Opinion and Judgment [1997] International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber II, IT-94-1-T

*Prosecutor v Fatmir Limaj, Bala and Musliu*, Trial II Judgment [2005] International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber II, IT-03-66-T

*Prosecutor v Kupreskic*, Trial Judgment [2000] International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber, ICTY-IT-95-16-T

### Secondary Sources

Arajärvi N, 'From State-Centrism To Where?: The Formation Of (Customary) International Law And Non-State Actors' <<http://dx.doi.org/10.2139/ssrn.1599679>> accessed 24 July 2019

Arend A, *Legal Rules And International Society* (Oxford University Press 1999)

'Armed Groups And International Law' (*Armed Groups and International Law*) <<https://armedgroups-internationallaw.org/>> accessed 24 July 2019.

Bellal A, E Heffes, 'Yes, I Do': Binding Armed Non-State Actors To IHL And Human Rights Norms Through Their Consent' (2018) 12 Human Rights & International Legal Discourse

Bellal A, 'The War Report: Armed Conflicts In 2018' (2019) <<https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf>> accessed 24 July 2019

Cassese A, 'Should Rebels Be Treated As Criminals? Some Modest Proposals For Rendering Internal Armed Conflicts Less Inhumane' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012)

Charlesworth H, 'The Unbearable Lightness Of Customary International Law' (1998) 92 *Proceedings of the Annual Meeting* (American Society of International Law)

Chatham House, 'International Law Meeting Summary: Classification Of Conflicts: The Way Forward' (2012)  
<https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/011012summary.pdf> accessed 24 July 2019.

Dabone Z, *Le Droit international public relatif aux groupes armés non-etatiques* (Schulthess 2012)

d'Aspremont J, 'Non-State Actors And The Formation Of International Customary Law: Unlearning Some Common Tropes' in forthcoming I Scobbie, S Droubi (eds), *International Organizations and Non-State Actors in the Formation of Customary International Law, Melland Schill Perspectives on International Law* (Manchester University Press, 2019)

Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, *Final Record of the Diplomatic Conference of Geneva of 1949* (1949)

Dörmann K, International Committee of Red Cross, *Commentary On The First Geneva Convention : Convention (I) For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field: Part Of Commentaries On The 1949 Geneva Conventions* (Cambridge University Press 2016)

Doswald-Beck L, JM Henckaerts, *Customary International Humanitarian Law* (Cambridge University Press 2005)

Evans M, *International Law* (5th edn, Oxford University Press 2018)

Fortin K, *The Accountability Of Armed Groups Under International Law* (Oxford University Press 2017)

Gasser H, 'International Humanitarian Law An Introduction' (1994) 34 *International Review of the Red Cross*

Gunning I, 'Modernizing Customary International Law: The Challenge Of Human Rights' (1991) 31 *Virginia Journal of International Law*

Henckaerts J, E Debuf, 'The ICRC And The Clarification Of Customary International Humanitarian Law' in BD Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017)

'Humanitarian Aid To The Victims Of Internal Conflicts. Meeting Of A Commission Of Experts In Geneva, 25–30 October 1962, Report' (1962) 3 *International Review of the Red Cross*

International Committee of Red Cross, 'Report On The Protection Of Victims Of Non-International Armed Conflicts' (1971)

Jo H, *Compliant Rebels* (Cambridge University Press 2015)

Kyriakopoulos G, 'Formation Of International Custom And The Role Of Non-State Actors' in P Pazartzis (ed), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade*, (Hart Publishing 2016)

McCorquodale R, 'An Inclusive International Legal System' [2004] *Leiden Journal of International Law*

Molin Friis S, 'Beyond Anything We Have Ever Seen': Beheading Videos And The Visibility Of Violence In The War Against ISIS' (2019) 91 *International Affairs*

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

Roberts A, S Sivakumaran, 'Lawmaking By Non-State Actors: Engaging Armed Groups In The Creation Of International Humanitarian Law' (2012) 37 *Yale Journal of International Law*

Rodenhäuser T, *Organizing Rebellion: Non-State Armed Groups Under International Humanitarian Law, Human Rights Law, And International Criminal Law* (Oxford University Press 2018)

Rondeau S, 'Participation Of Armed Groups In The Development Of The Law Applicable To Armed Conflicts' (2011) 93 *International Review of the Red Cross*

Ryngaert C, '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* (Routledge 2011)

Sassòli M, 'Introducing A Sliding-Scale Of Obligations To Address The Fundamental Inequality Between Armed Groups And States?' (2011) 93 *International review of the Red Cross*

Sassòli M, 'Taking Armed Groups Seriously: Ways To Improve Their Compliance With International Humanitarian Law' (2010) 1 *Journal of International Humanitarian Legal Studies*

Sassòli M, 'The Implementation Of International Humanitarian Law: Current And Inherent Challenges' (2007) 10 *Yearbook of International Humanitarian Law*

Sassòli M, *International Humanitarian Law: Rules, Controversies, And Solutions To Problems Arising In Warfare* (Edward Elgar Publishing Limited 2019)

Scobbie I, 'The Approach To Customary International Law In The Study' in E Wilmshurst, S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007)

Scott J, *Domination And The Arts Of Resistance : Hidden Transcripts* (Yale University Press 1990)

Shaw M, *International Law* (8th edn, Cambridge University Press 2017)

Sivakumaran S, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly*

Sivakumaran S, 'Courts Of Armed Opposition Groups: Fair Trials Or Summary Justice?' (2009) 7 *Journal of International Criminal Justice*

Sivakumaran S, 'How To Improve Upon The Faulty Legal Regime Of Internal Armed Conflicts' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012)

Somer J, 'Jungle Justice: Passing Sentence On The Equality Of Belligerents In Non-International Armed Conflict' (2007) 89 *International Review of the Red Cross*

Tesón FR, 'Fake Custom' in Brian D. Leppard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017)

The Geneva Academy of International Humanitarian Law and Human Rights, 'The War Report: Armed Conflicts In 2018' (2019) <<https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf>> accessed 24 July 2019

United Nations International Law Commission, *Draft conclusions on identification of customary international law, with commentaries* (Geneva: United Nations, 2018) <[http://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_13\\_2018.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf)> accessed 24 July 2019.