

‘YES, I DO’: BINDING ARMED NON-STATE ACTORS TO IHL AND HUMAN RIGHTS NORMS THROUGH THEIR CONSENT

ANNYSSA BELLAL* and EZEQUIEL HEFFES**

Abstract

In the last few decades, the role and status of armed non-state actors (ANSA) have become essential topics of analysis and discussion in order to better understand current international humanitarian law (IHL) and international human rights law (IHRL) dynamics. Although contemporary public international law still seems to be predominantly State-oriented, it is undeniable that a variety of these non-state entities have played quite important roles, giving rise to many discussions and complex debates. One relevant issue is related to the reasons why they are bound by international law. A classical approach to the traditional theory of sources of international law relies on the consent given by States to be bound by an international rule. When dealing with ANSAs, however, the reasons why they are obligated by both IHL and IHRL lie beyond merely accepting the existence of their obligations. While some views take into account their consent, others are based on their relationship with territorial States and the rules previously accepted by States’ authorities. Implementing one or the other is not merely an intellectual exercise, and which alternative is taken will certainly have a direct impact on the effectiveness of international law as perceived by ANSAs.

Keywords: Armed Non-State Actors; Equality of Belligerents; International Humanitarian Law; International Human Rights Law; Non-International Armed Conflicts

* Annyssa Bellal (Lawyer, PhD in International Law at the Graduate Institute of International Studies and Development) is the strategic adviser on International Humanitarian Law (IHL) and Senior Research Fellow at the Geneva Academy of IHL and Human Rights in Geneva [e-mail: annyssa.bellal@graduateinstitute.ch].

** Ezequiel Heffes (Lawyer, LLM in International Humanitarian Law and Human Rights) is Thematic Legal Adviser at Geneva Call and external researcher at the University of Buenos Aires, School of Law [e-mail: eheffes@genevacall.org]. The views expressed in this piece do not represent those of Geneva Call.



1. INTRODUCTION

In the current international humanitarian law (IHL) context, the majority of armed conflicts includes at least one armed non-state actor (ANSA).¹ In the last few years, a key concern has been the binding nature of international law upon these entities. When it comes to their international obligations, there is general agreement regarding their duty to comply with IHL and there is no significant distinction between the rules applicable respectively to them and to States in non-international armed conflicts (NIACs). While Common Article 3 to the 1949 Geneva Conventions (CA3) affirms that 'each Party to the conflict shall be bound to apply, as a minimum' its provisions, the 1977 Additional Protocol II (AP II) applies to those NIACs between State forces 'and dissident armed forces or other organized armed groups'. The role of ANSAs in the international human rights law (IHRL) sphere has also gained momentum. Although the wording of the main treaties of this regime addresses only the behaviour of States, it has been proposed that there could be added value in holding ANSAs to account under IHRL.² In particular, this could be due to their replacement of State control over a given territory.³

Generally, a classical (and positivist) approach to the theory of sources of international law relies on the consent given by States to be bound by an international rule.⁴ This can be expressed in different ways. The regime of international treaties establishes procedures for States to express their consent to be bound by a norm; customary rules are based on determining their practice and *opinio juris* and may require that there has been no persistent objection to their formation; and general principles of law only emerge from rules already implemented by States' domestic legislation. The reasons why ANSAs can be bound by international law, however, do not seem to lie in their acceptance of the obligations. Proving that they have actually given their consent to be bound by these regimes is not as simple as it is for States. While some theories take into account ANSAs' consent, other views are based on their relationship with States and the rules accepted beforehand by States' authorities. A few scholars have even rejected the relevance of any ANSA consent whatsoever, as it would not reflect the reality of contemporary armed conflicts.⁵ As this paper will

¹ A. Bellal, *The War Report 2017* 17 (Geneva: Geneva Academy, 2018).

² K. Fortin, *The Accountability of Armed Groups under Human Rights Law* 27–68 (Oxford: Oxford University Press, 2017).

³ D. Murray, *Human Rights Obligations of Non-State Armed Groups* 120–154 (Oxford: Hart, 2016).

⁴ See among others, B. Leppard, Introduction, in: B. Leppard (ed.), *Reexamining Customary International Law* 2–3 (Cambridge: Cambridge University Press, 2017); I. Venzke, *How Interpretation Makes International Law. On Semantic Change and Normative Twists* 20 (Oxford: Oxford University Press, 2012); and PCIJ 7 September 1927, *The Case of the S.S. Lotus* (France v. Turkey), www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf (visited on 18 December 2017), p. 18.

⁵ Murray, *supra* note 3, p. 115; and Fortin, *supra* note 2, pp. 184–185.



argue, reflecting on the binding nature of international law obligations for ANSAs is not merely an intellectual exercise. The lack of a coherent answer to this question may indeed directly impact the effective implementation of international norms as perceived by these non-state actors.

In Section 2 we will propose an argument as to why ANSAs are bound by IHL, one which is aimed at achieving greater levels of compliance by including a broad interpretation of the principle of equality of belligerents. This theoretical framework will allow us, in Section 3, to assess some current theories concerning the potential binding nature of IHRL upon ANSAs, and to propose an alternative explanation, which includes the application of the aforementioned principle to this legal regime. In our final thoughts, we will present some challenges facing the adoption of this position.

2. ANSAs' INTERNATIONAL HUMANITARIAN LAW OBLIGATIONS

2.1. THE BINDING FORCE OF IHL FOR ANSAs: SOME CONTEMPORARY EXPLANATIONS

Broadly speaking, there is general agreement that under IHL all parties to a NIAC have the obligation to comply with the same set of rules, which is based on the principle of equality of belligerents. However, the legal basis for this direct application of IHL remains uncertain. Different arguments have been proposed to justify why ANSAs are actually bound by IHL.⁶

Two traditional theories suggest that ANSAs are bound by IHL without taking their consent into consideration. The argument of effective sovereignty, on the one hand, focuses on ANSAs' territorial link to a State party to the IHL treaties. Pictet's Commentary to the 1949 Geneva Convention I (GC I) points out that ANSAs are bound by the international obligations of previous administrations in a similar way to successive governments, owing to their claims to represent the country or a part of it.⁷ The domestic legislative jurisdiction argument, on the other hand, is the most

⁶ ICRC, Commentary on Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2016, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#236_B (visited on 18 December 2017), para. 507. In this paper, we have listed some of the most common and traditional theories that explain why ANSAs are bound by IHL, but other views have also been proposed. See notably S. Sivakumaran, Binding Armed Opposition Groups, 55(2) *The International and Comparative Law Quarterly* 369–394 (2006); and Murray, *supra* note 3, pp. 89–90.

⁷ J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 51 (Geneva: ICRC, 1952).

commonly suggested and it is based on the State's capacity to legislate for all its nationals.⁸ As explained in the 1960 Commentary of Geneva Convention II (GC II), 'in most national legislations, by the fact of ratification, an international Convention becomes part of law and is therefore binding upon all the individuals of that country'.⁹

Although these arguments may seem convincing at first sight, they raise some real-life scenarios that are difficult to solve. The former derives an ANSA's rights and obligations exclusively from those already agreed upon by the State party to the conflict. Moreover, it is only applicable to the extent that the ANSA itself claims to represent the State.¹⁰ The domestic legislative jurisdiction argument, however, focuses on the link between national legislation and those members of the ANSA that are nationals of the State party to a treaty,¹¹ equating the legal obligations of the group to those of its members. This has been criticised, as some IHL obligations would hardly be binding upon ordinary individuals, such as the obligation to provide children with the care and aid they require and the obligations relating to individuals whose liberty has been restricted.¹²

In addition, both arguments entail other practical problems for IHL implementation. Firstly, ANSAs that might be committed to observing humanitarian rules are unlikely to have any commitment to national legislation.¹³ If IHL were to be considered binding upon these non-state entities only by virtue of State acceptance, ANSAs would have no sense of ownership of the rules and would probably have fewer incentives to comply as well.¹⁴ These views might affect the way ANSAs perceive

⁸ See, among others, L. Moir, *The Law of Internal Armed Conflicts* 53–54 (Cambridge: Cambridge University Press 2002); and Sivakumaran, *supra* note 6, p. 381, in which the author explains that '[t]he principle of legislative jurisdiction may be described as the competence of the government to legislate for all its nationals. Applying the principle to treaties, when a state ratifies a treaty, it does so not just on behalf of the state but also on behalf of all individuals within its territory.' Interestingly, Fortin refers to the 'legislative jurisdiction' theory in different terms, affirming that it is based 'on the argument that armed groups are bound by international humanitarian law as a result of the Geneva Conventions and the Additional Protocols creating *direct* obligations upon individuals'. Fortin, *supra* note 2, p. 187.

⁹ J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. II: Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* 34 (Geneva: ICRC, 1960).

¹⁰ In this sense, Pictet even claimed that the ANSA could 'free itself from its obligations under the [Geneva Conventions] by following the procedure for denunciation laid down in Article 63 [of Geneva Convention I]. But the denunciation would not be valid, and could not in point be effected, unless the denouncing authority was recognized internationally as a competent Government'. See Pictet, *supra* note 7, p. 51.

¹¹ A. Cassese, *The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30(2) *International and Comparative Law Quarterly* 429–430 (1981).

¹² Fortin, *supra* note 2, pp. 194–195.

¹³ Moir, *supra* note 8, p. 54. See also Sivakumaran, *supra* note 6, p. 384; and J. Kleffner, *The Applicability of International Humanitarian Law to Organized Armed Groups*, 882(93) *International Review of the Red Cross* 446 (2011).

¹⁴ E-C. Gillard, *Promoting Compliance with International Humanitarian Law* 7 (2016), <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-10-05-promoting>



international law. In other words, to what extent is it possible to request compliance with rules imposed by one's enemy?

Secondly, these theories do not explain some particular contexts. For instance, what about ANSAs having a wide territorial control but not claiming to represent the State; ANSAs that operate in different States at the same time; and ANSAs that may even decide to be bound by more humanitarian rules than those accepted by the territorial State.¹⁵ If that were the case, should these practices be ignored from an international law perspective because of State-centric arguments? Furthermore, when States are fighting a NIAC against ANSAs in the territory of a third State, the reasons why those entities would be bound by IHL are unclear. Could the national law of the third State be relied upon as a legal basis for ANSAs' international obligations? Or should the domestic law of the State party to the conflict prevail? And what would happen in the case of NIACs where ANSAs fight across the borders of two States? As explained, both CA3 and AP II address ANSAs. Therefore, a theoretical perspective that subordinates their obligations to those previously accepted by States would straightforwardly ignore their standing in international law and vis-à-vis the international community.

There are also theories that do recognise the direct relation between IHL and ANSAs, highlighting the importance of their expressions of willingness to be bound. Cassese, for instance, has suggested that the legal basis for AP II's binding nature could be found by relying on the effects of a treaty on third parties, as foreseen in Article 34 of the Vienna Convention on the Law of Treaties (VCLT), which affirms that '[a] treaty does not create either obligations or rights for a third state without its consent'.¹⁶ Two requirements thus have to be met for the treaty to be applicable to the ANSA: 1) the High Contracting Parties must have intended the Protocol to bind ANSAs; and 2) the ANSAs must accept the rights and obligations thereby conferred upon them.¹⁷ Importantly, this principle was referred to in the drafting process of the Geneva Conventions.¹⁸ While Cassese has demonstrated the intention of States to bind ANSAs through different arguments,¹⁹ ANSAs' acceptance of AP II could be

compliance-ihl-gillard.pdf (visited on 18 December 2017). The notion of ownership refers to the capacity and willingness of ANSAs 'to set, and/or take responsibility for the respect of, norms intended to protect civilians as well as other humanitarian norms applicable in armed conflict'. Geneva Academy of International Humanitarian Law and Human Rights, Rules of Engagement Protecting Civilians through Dialogue with Armed Non-State Actors 6, fn. 11 (2011), <https://www.geneva-academy.ch/joomlatools-files/docman-files/Research%20documents/Rules-of-Engagement-EN.pdf> (visited on 18 December 2017).

¹⁵ S. Sivakumaran, Implementing Humanitarian Norms Through Non-State Armed Groups, in: H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region* 133 (Cambridge: Cambridge University Press, 2015).

¹⁶ Vienna Convention on the Law of Treaties; and Cassese, *supra* note 11, p. 428.

¹⁷ Cassese, *supra* note 11, p. 423.

¹⁸ Murray, *supra* note 3, p. 92.

¹⁹ Cassese, *supra* note 11, pp. 423–427.



identified elsewhere. Moir, for instance, has suggested that it should be appreciated through their actual compliance with AP II.²⁰ As he claims, '[t]he best show of willingness to be bound by the Protocol is thus to observe it, so that the conditions in Article 1(1) are met and the instrument can be applied by both sides'.²¹ Accordingly, a case-by-case analysis could consider ANSAs' practices in the field, unilateral declarations, codes of conduct, internal laws and special agreements concluded with other parties to NIACs, to the extent that AP II provisions are included.²² This would entail that the treaty would apply not only because of States' consent, but also through ANSAs' acceptance, as exemplified through their practices, both in the field and in written documents.

The second theory which addresses ANSAs' expressions of willingness considers that they are bound by IHL through customary international law,²³ which is undisputed with respect to CA3 and some of the rules recognised in the ICRC Study as applicable in NIACs. The Appeals Chamber of the Special Court for Sierra Leone affirmed in this sense that 'a convincing theory is that [ANSAs] are bound as a matter of international customary law to observe the obligations declared by Common Article 3'.²⁴ When addressing this, Somer has further affirmed that 'in order for insurgents to be bound by a customary rule, their practice would need to be taken into account'.²⁵ Sassòli has explained this in the following way:

In my view, customary IHL of non-international armed conflicts must already now be derived from both State and non-State armed actors' practice and *opinio juris* in such conflicts. [...] [Customary] law is based on the behavior of the subjects of a rule, in the form of acts and omissions, or in the form of statements, mutual accusations and justifications for their own behavior. Non-State actors would logically be subject to customary law they contribute to creating.²⁶

As he further pointed out, allowing ANSAs to participate in the formation of IHL would 'constitute the best way to ensure that compliance with IHL is realistic' for such groups.²⁷ Just as one could not conceive a law of naval warfare that does not take into

²⁰ Moir, *supra* note 8, p. 99.

²¹ *Ibid.*

²² Sivakumaran, in this sense, affirms that there has been more acceptance of AP II by ANSAs than is commonly thought. For some practical examples, see Sivakumaran, *supra* note 6, p. 388.

²³ J. Somer, *Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict*, 867(89) *International Review of the Red Cross* 661 (2007). See also Murray, *supra* note 3, pp. 83–89; and Fortin, *supra* note 2, pp. 203–206.

²⁴ SCSL 13 March 2004, *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, Appeals Chamber, www.legal-tools.org/doc/c1b45c/pdf/ (visited 18 December 2017), para. 47.

²⁵ Somer, *supra* note 23, pp. 661–662.

²⁶ M. Sassòli, *Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law*, 1 *Journal of International Humanitarian Legal Studies* 21–22 (2010).

²⁷ *Ibid.*, p. 20.



consideration the practice and *opinio juris* of those involved, Sassòli argues that ANSAs should be involved in the creation of IHL because the essence of IHL is that it has to be applied 'by parties and with the parties and it has to be based on an understanding of the problems, the dilemmas and the aspirations of the parties to armed conflicts'.²⁸ In its Tadić jurisdiction decision, the ICTY actually supported the view that ANSAs participate in the formation of customary IHL.²⁹

Although this remains still a minority view,³⁰ we submit that there is a good case to argue that ANSAs should participate in the formation of customary IHL. Just as for States, their practice and *opinio juris* could be deduced not only by looking at their actions in the field but also by analysing their public statements. Moreover, through the recognition of the role of ANSAs in the elaboration of international law, these actors would be likely to develop a sense of ownership of the humanitarian rules they undertake to respect.³¹ This in turn may enhance their level of compliance with IHL.

Of course, this position will have to face many challenges, such as selecting ANSAs, monitoring and interpreting their practice and *opinio juris*, weighing them along with those of States, amongst others.³² Fortin has presented one of the most difficult objections in this sense. As ANSAs are inherently transitory, their contribution

to the formation of customary international law does not necessarily fix the problem of ownership of norms. There remains a risk that even if the armed groups of today contribute to the formation of international law, the armed groups of tomorrow will still not feel any ownership of these norms and will use that as an excuse not to comply with them.³³

²⁸ M. Sassòli, The Implementation of International Humanitarian Law: Current and Inherent Challenges, 10 Yearbook of International Humanitarian Law 64 (2007).

²⁹ ICTY 2 October 1995, Prosecutor v Dushko Tadić a/k/a 'Dule', Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, www.icty.org/x/cases/tadic/acdec/en/51002.htm (visited 18 December 2017), paras 107–108.

³⁰ The Special Rapporteur of the International Law Commission on the identification of customary international law has recently rejected the possibility that ANSAs – even as part of a broader category of non-state actors – may contribute to the formation of customary norms. See UN General Assembly (2016) International Law Commission: Draft conclusions provisionally adopted by the Drafting Committee, Part III, Draft Conclusion 4 [5] (3), <http://legal.un.org/docs/?symbol=A/CN.4/L.872> (visited on 18 December 2017). Furthermore, although including the behaviour of certain ANSAs, the ICRC Customary Law study clarifies that the legal significance of such practice remains 'unclear'. This is why it was only listed under the heading of 'other practice'. J-M. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law. Vol. I: Rules xlii (Cambridge: Cambridge University Press/ICRC, 2005).

³¹ Jo has recently argued in this sense that '[f]rom the rebel perspective, an opportunity to participate in this drafting process may also serve as a powerful incentive and rationale to change behavior'. H. Jo, Compliant Rebels. Rebel Groups and International Law in World Politics 256 (Cambridge: Cambridge University Press, 2015).

³² Sassòli, *supra* note 26, p. 22. Customary law has indeed been defined as situated in a 'theoretical mine field'. M. Koskeniemi, The Pull of the Mainstream, 88 Michigan Law Review 1947 (1990).

³³ Fortin, *supra* note 2, pp. 327–328.



Although addressing this issue would require a detailed analysis, when looking at ANSAs we might in fact observe some cases in which their internal legal sources are based on other ANSAs' public statements. This seems to follow Sassòli, who has suggested that 'it is psychologically easier for individuals to accept and respect rules that people confronted with similar problems were involved in developing'.³⁴ For example, the Revolutionary United Front (RUF) of Sierra Leone, the National Resistance Army (NRA) of Uganda, the New People's Army (NPA) of Philippines, the CPN-M in Nepal and the Naxalities in India have internal codes based on the Three Main Rules of Discipline and Eight Points for Attention of the Chinese People's Liberation Army.³⁵ The *Conseil National de Libération* (CNL) in the Democratic Republic of the Congo has adapted these Rules to their own, and they were also part of the SPLA's accepted rules.³⁶ Considering that one important challenge for the formation of a customary rule is the collection of dense and robust practice,³⁷ exploring this dynamic could be the first step towards overcoming Fortin's argument.

2.2. AN ALTERNATIVE EXPLANATION: GENERATING RESPECT FOR IHL AND THE PRINCIPLE OF EQUALITY OF BELLIGERENTS

The principle of equality of belligerents affirms that all the parties to an armed conflict have the same rights and obligations, regardless of their cause.³⁸ It is implied in both CA3 and Article 1(1) of AP II. In the case of ANSAs, their obligation to comply with those provisions remains despite any domestic legislation criminalising their use of force against the State.

³⁴ Sassòli, *supra* note 26, pp. 20–21.

³⁵ O. Bangerter, Internal Control. Codes of Conduct within Insurgent Armed Groups 70 (Geneva: Small Arms Survey, 2012), <https://www.files.ethz.ch/isn/154966/SAS-OP31-internal-control.pdf> (visited 19 February 2018).

³⁶ *Ibid.*

³⁷ One important challenge would be to collect dense and robust practice by both States and ANSAs in order to avoid what Tesón has called 'fake custom' – pieces of advocacy disguised as law. On the important differences between 'genuine custom' and 'fake custom', see in particular F. Tesón, Fake Custom, in: B. Leppard (ed.), *Reexamining Customary International Law* 86–110 (Cambridge: Cambridge University Press, 2017).

³⁸ Somer, *supra* note 23, pp. 661–662. See also S. Sivakumaran, Re-envisioning the International Law of Internal Armed Conflict, 22(1) *European Journal of International Law* 241 (2011). Sassòli, however, has argued in favour of abandoning the fiction of the principle of equality of belligerents and instead applying a sliding scale of obligations for ANSAs. This would entail 'full respect of customary and conventional rules of IHL from the government, while demanding respect only according to their ability from their enemies. This corresponds to the real expectations of contemporary governmental forces fighting armed groups.' M. Sassòli, *Inducing a Sliding-Scale of Obligations to Address the Fundamental Inequality Between Armed Groups and States?*, 882(93) *International Review of the Red Cross* 431 (2011).



Based on this principle, we submit that not only all parties to the conflict must be bound by IHL to the same extent but also for the same legal reasons, since the contrary would entail the subordination of ANSAs' rights and obligations to those previously accepted by States and would affect their equal status. Consequently, IHL's legitimacy as perceived by ANSAs would be diminished by the fact that the rules would be exclusively imposed by the opposing party to the conflict. In this sense, a recent study by Geneva Call on humanitarian action has found that according to certain ANSAs, international law is seen 'as biased and privileging States'.³⁹ That is precisely what occurs with the abovementioned effective sovereignty and domestic legislative jurisdiction perspectives. Due to their link to States' obligations, they seem to fail when addressing ANSAs' actions or expressions, denying them any significance whatsoever. By challenging the equality of belligerents, they might actually weaken IHL as an effective body of law.

On the contrary, an explanation that includes ANSAs in the formation and development of the law that regulates them would represent an important improvement in terms of equality of the parties,⁴⁰ and it would be better placed to resolve IHL effectiveness issues. Research has shown, in fact, that individuals obey the law not because they fear possible consequences, but because they actually view it as legitimate.⁴¹ As Roberts and Sivakumaran have affirmed, evidence to date suggests that, 'at least to certain groups and certain norms, there is a link between allowing armed groups a role in the creation of international humanitarian law and their increased compliance with that law'.⁴² Recognising that ANSAs play a relevant role in the formation of the law and particularly considering the value of their public expressions of willingness as useful tools is an important step in this direction,⁴³ and serves to create a sense of ownership of the law.

Based on the principle of equality of belligerents, we propose a combination between the customary law theory and the effects of AP II on third parties.⁴⁴ While the former could be used to justify the obligation to comply with customary IHL, the latter would address those rules of IHL without a customary character, such as certain provisions of AP II. This combination would avoid leaving ANSA members 'off the hook' in terms of their individual criminal responsibility.⁴⁵

³⁹ Geneva Call, *In Their Words: Perceptions of Armed Non-State Actors on Humanitarian Action 25* (2016), https://genevacall.org/wp-content/uploads/dlm_uploads/2016/09/WHS_Report_2016_web.pdf (visited on 18 December 2017).

⁴⁰ Somer, *supra* note 23, pp. 663–664.

⁴¹ Jo, *supra* note 31, p. 76.

⁴² A. Roberts and S. Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37(1) *Yale Journal of International Law* 141 (2012).

⁴³ Jo, *supra* note 31, p. 256.

⁴⁴ E. Heffes, M. Kotlik and B. Frenkel, *Addressing Armed Opposition Groups through Security Council Resolutions: A New Paradigm?*, 18 *Max Planck Yearbook of United Nations Law* 55–58 (2014).

⁴⁵ Fortin, *supra* note 2, p. 185.



3. ANSAs' INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS

It is nowadays accepted that IHRL is applicable in NIACs.⁴⁶ One of the most important concerns raised by this scenario is the role of ANSAs. Although the wording of the main treaties of this legal regime addresses only the behaviour of States, it has been proposed that in exceptional scenarios their obligations can also be extended to ANSAs, mostly due to their replacement of State control over a given territory or population.⁴⁷ Otherwise, as Murray has explained, this would result in a legal vacuum and affected individuals would be left without any effective international legal protection.⁴⁸

Generally, views on why ANSAs are bound by IHRL have focused on their relationship with the territorial State.⁴⁹ This has been justified by Fortin in relation to the principle of effectiveness, which requires 'not only the established government to adhere to treaty obligations, but also any other authority which claims to exercise, or actually exercises, powers which usually belong to the State'.⁵⁰ Although a thorough analysis of this topic would be useful, given the inherent limitations of the paper we have selectively engaged with specific difficulties. In particular, these arguments raise practical problems related to the nature of IHRL. First, derogations by States are

⁴⁶ The International Court of Justice has formally confirmed on several occasions that IHRL also applies in situations of armed conflict, whether these have an international or non-international character. See ICJ 8 July 1996, Nuclear Weapons Advisory Opinion, www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf (visited on 18 December 2017), and ICJ 9 July 2004, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf (visited on 18 December 2017). The ICJ also confirmed that IHRL is applicable in situations of armed conflict in a case concerning armed activities in the territory of the Congo. ICJ 19 December 2005, Case Concerning Armed Activities in the Territory of the Congo (Congo v Uganda) www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf (visited on 18 December 2017).

⁴⁷ Murray, *supra* note 3, pp. 120–154. There, the author claims that IHRL can in principle apply to ANSAs based on a *de facto* control theory, which 'applies international law to non-state entities on the basis of exclusive control exercised over a specific territory'. Murray, p. 121.

⁴⁸ *Ibid.*, p. 10.

⁴⁹ A. Clapham, *Human Rights Obligations of Non-State Actors* 280 (Oxford: Oxford University Press, 2006). See also G. Oberleitner, *Human Rights in Armed Conflict. Law, Practice, Policy* 211 (Cambridge: Cambridge University Press, 2015); and Murray, *supra* note 3, p. 121. The Office of the High Commissioner for Human Rights (OHCHR) has also taken this position by pointing out that ANSAs 'that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control'. OHCHR, Report on the Question of Human Rights in Cyprus (A/HRC/25/21) (2014), para. 11.

⁵⁰ Fortin, *supra* note 2, p. 200. Fortin follows in this respect Kelsen's views that according to the principle of effectiveness, 'an actually established authority is the legitimate government, the coercive order enacted by this government is the legal order, and the community constituted by this order is a State in the sense of international law, insofar as this order is, on the whole efficacious'. See H. Kelsen, *General Theory of Law and State* 121 (Cambridge: Harvard University Press, 1945).



available legal tools in times of public emergencies which threaten the life of the nation,⁵¹ such as NIACs. If a government decides to derogate, for example, a provision enshrined in the ICCPR, as allowed in its Article 4, it remains unclear how this would affect ANSAs' obligations linked to that State.⁵² Second, the application of IHRL to ANSAs operating in cross-border NIACs also remains uncertain. Can the same group be bound by different provisions according to the territorial State in which a part of it is located? These theories, therefore, do not address all the practical issues raised by the prospect of binding ANSAs by IHRL.

Provided that ANSAs' views are taken into account for the implementation of their international obligations, including IHRL, there may be chances to develop a sense of ownership of these rules and to raise the level of protection of individuals living in the territories they control. We could also avoid the abovementioned problems related to the obligations of the territorial States. In this sense, similarly to what occurs with respect to IHL, there are certain theories that recognise the direct relationship between IHRL and ANSAs.

First, there are specific treaties that directly recognise rights and impose obligations upon these entities, binding them as third parties.⁵³ This is the case with, for example, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict⁵⁴ and with the Kampala Convention.⁵⁵ Second, Sassòli has also argued that IHRL could potentially apply in a graduated – or sliding scale – approach to armed groups, which would 'adapt the customary rules to the realities and capacities – and [he] would add to the practice and *opinio juris* – of armed groups'.⁵⁶ This practice and *opinio juris* could be deduced by looking at ANSAs' participation in the international realm. Sivakumaran has affirmed that agreements by ANSAs 'also tend to contain provisions on human rights norms, lending support to the view that [...] armed groups may be bound by human rights obligations'.⁵⁷

⁵¹ See, for instance, International Covenant on Civil and Political Rights, Article 4.

⁵² For an interesting proposal on the possibility of having ANSAs derogating from human rights treaties, see R. Provost, FARC Justice: Rebel Rule of Law 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925278 (visited on 18 December 2017).

⁵³ Clapham, *supra* note 49, p. 280; and Murray, *supra* note 3, pp. 90–105. The International Convention for the Protection of All Persons from Enforced Disappearance, although not explicitly creating obligations for ANSAs, admits that there might be enforced disappearances by 'groups of persons acting without the authorization, support or acquiescence of the State' (Article 3).

⁵⁴ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Article 4(1).

⁵⁵ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Article 7(5).

⁵⁶ M. Sassòli, Two Fascinating Questions: Are all Subjects of a Legal Order Bound by the Same Customary Law and Can Armed Groups Exist in the Absence of Armed Conflict?, Book Discussion, *Ejil: Talk!* 2016, <https://www.ejiltalk.org/book-discussion-daragh-murrays-human-rights-obligations-of-non-state-armed-groups-3/> (visited on 18 December 2017).

⁵⁷ Sivakumaran, *supra* note 15, p. 130.



Examples of such practice can be found in agreements concluded in the Philippines and Sierra Leone.⁵⁸ Unlike for IHL, however, no exhaustive study exists which lists the customary character of specific provisions of human rights law.⁵⁹ As suggested in previous research, '[t]he important question today is not to be so much "if", but rather "which" obligations are engaged'.⁶⁰ Different institutions and bodies have characterised a number of human rights rules as customary law, and some of them even as *jus cogens* applicable to ANSAs.⁶¹ For instance, the Syrian Commission of Inquiry affirmed that '[h]uman rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities. Acts violating *ius cogens* – for instance, torture or enforced disappearances – can never be justified'.⁶² We believe that there is a good case to identify at least signs of a nascent practice and *opinio juris* when dealing with ANSA parties to NIACs and human rights norms. To that end, we can identify two promising examples.

A first example lead us to examine ANSAs' signing of so-called 'Action Plans' established by the UN purely on the basis of IHRL, leading to their being successfully delisted from the UN Secretary General's (UNSG) list of actors that commit grave violations of children's rights.⁶³ To date, 28 listed parties have signed action plans, including 17 ANSAs.⁶⁴ This procedure was established in 1999 by UNSC Resolution

⁵⁸ See Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, 16 March 1998 (Philippines Agreement), http://theirwords.org/media/transfer/doc/ph_ndfp_1998_17-ef3249df335f48cd378d1c5082457be4.pdf (visited on 18 December 2017); and Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, 30 November 1996, http://theirwords.org/media/transfer/doc/1_sl_ruf_1996_03-e377977056bb4bc499dfaa_593507511d.pdf (visited on 18 December 2017). See also Geneva Call, The Garance Series: Issue 1 7, https://www.genevacall.org/wp-content/uploads/dlm_uploads/2016/08/GaranceTalks_Issue01_Report.pdf (visited on 18 December 2017).

⁵⁹ B. Leppard, Toward a New Theory of Customary International Human Rights Law, in: B. Leppard (ed.), *Reexamining Customary International Law* 239 (Cambridge: Cambridge University Press, 2017).

⁶⁰ A. Bellal, Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution, in: N. Gal-Or, C. Ryngaert and M. Noortmann (eds) *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* 308 (Leiden/Boston: Brill Nijhoff, 2015).

⁶¹ For a reference on the practice citing *jus cogens* norms as a source of obligations for ANSAs under IHRL, see Fortin, *supra* note 2, pp. 345–349.

⁶² HRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/19/69) (2012), para. 106.

⁶³ A UN action plan is a 'written, signed commitment between the United Nations and those parties who are listed'. See online <https://childrenandarmedconflict.un.org/mandate/> (visited on 18 December 2017).

⁶⁴ For a list of the active action plans, see <https://childrenandarmedconflict.un.org/our-work/action-plans/> (visited on 18 December 2017). The last ANSA to be delisted was the Moro Islamic Liberation Front. See online <https://childrenandarmedconflict.un.org/un-officials-congratulate-milf-for-completion-of-disengagement-of-children-from-its-ranks/> (visited on 18 December 2017).



1261 concerning children and armed conflicts, which called on the parties to the conflicts to respect their legal obligations. In 2001, it required the UNSG to submit reports, including as an annex a list of parties that recruit and use child soldiers,⁶⁵ with the aim of ‘naming and shaming’ the perpetrators.⁶⁶ In 2005, after the UNSG suggested the establishment of a monitoring mechanism for six grave violations of children’s rights – some of them being IHRL standards – the UNSC issued Resolution 1612, which created the Working Group on Children and Armed Conflict. As Clapham explains, ‘[t]he mechanism vis-à-vis the non-state actor works not only through naming and shaming but by encouraging the non-state actor to submit an “action plan” to the Security Council, in this way the group can be removed from the list of violators’.⁶⁷

The second case can be found in Geneva Call’s Deeds of Commitment prohibiting sexual violence and gender discrimination and protecting of children from the effects of armed conflict, both of which include IHL and IHRL obligations. The former, indeed, engages groups to take measures to ensure ‘among other things, equal protection before law, equal enjoyment of rights and remedies, equal access to health care and services and equal access to education’. The Deed on children commits ANSAs to ‘take concrete measures towards ensuring that children have access to adequate food, health care (including psycho-social support), education, and where possible, leisure and cultural activities’. Interestingly, it also affirms that this is part of a broader commitment to the ideal of humanitarian norms, particularly of IHL and IHRL, ‘and to contribute to their respect in field practice as well as to the *further development of humanitarian norms* for armed conflict’ (emphasis added). To date, 26 ANSAs have committed to the Deed on children, while 24 have signed the Deed prohibiting sexual violence and gender discrimination.⁶⁸

In order to develop a sense of ownership by ANSAs and enhance their level of respect for the law, it is proposed to apply to IHRL a similar combination as the one referred above for IHL between the customary law theory, as submitted by Sassòli, and the effects of the abovementioned human rights norms for third parties.⁶⁹ We acknowledge that relying on this view would only include a limited number of IHRL obligations, but they would be those that ANSAs can realistically comply with.

⁶⁵ UNSC Res 1379 (2001) ‘Children and Armed Conflict’.

⁶⁶ S. Sivakumaran, *The Law of Non-International Armed Conflicts* 533–534 (Oxford: Oxford University Press, 2012).

⁶⁷ A. Clapham, *The Accountability of Armed Groups*, in: A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* 801 (Oxford: Oxford University Press, 2014).

⁶⁸ Geneva Call, *Deed of Commitment*, <https://genevacall.org/how-we-work/deed-of-commitment/> (visited on 18 December 2017).

⁶⁹ See Fortin, *supra* note 2, pp. 227–238, for an analysis on the drafters’ intentions to bind ANSAs.



4. SOME SELECTED CHALLENGES AND POSSIBLE SOLUTIONS

As mentioned above, this view will have to face different challenges. We will address only two of them. One specific difficulty when dealing with this particular issue is the general lack of knowledge of the law, which may raise substantial difficulties in demonstrating ANSAs' *opinio juris*. Bangerter has correctly pointed out that 'only a relatively small circle of persons are aware of legal concepts in any given society, and it is unlikely that leaders of armed groups will be recruited in this particular circle'.⁷⁰ ANSAs may not know, among others,

norms prohibiting the recruitment of children as soldiers, or the outlawing of certain weapons [...] Concepts familiar to military lawyers or IHL specialists, such as the principle of proportionality in the conduct of hostilities, may also not be well understood by members of [Armed Non-State Actors], both at senior and at lower operational levels.⁷¹

Exploring the actual knowledge of ANSAs is not a simple task, and the way we address it will certainly serve as an important step when engaging with these actors on respect for the law. In practice, there are different ways to assess ANSAs' knowledge of international law. One is to observe their formal commitments to be bound by an international rule.⁷² Moreover, if the group has received international law training by humanitarian organisations, such as Geneva Call or the ICRC, its members might have a better understanding of international legal frameworks.⁷³ In order for these to have added value, a key aspect is the dissemination of decisions related to IHL and its basic principles made by the leadership.⁷⁴ It has also been argued that another

⁷⁰ O. Bangerter, Comment – Persuading Armed Groups to better Respect International Humanitarian Law, in: H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region* 113 (Cambridge: Cambridge University Press, 2015). See also ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* 12, https://www.icrc.org/sites/default/files/topic/file_plus_list/0923-increasing_respect_for_international_humanitarian_law_in_non-international_armed_conflicts.pdf (visited on 18 December 2017).

⁷¹ A. Bellal, *Welcome on Board: Improving Respect for International Humanitarian Law through the Engagement of Armed Non-State Actors*, 19 *Yearbook of International Humanitarian Law* 7 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008506 (visited on 18 December 2017). See also Geneva Academy of International Humanitarian Law and Human Rights, *supra* note 14, p. 6.

⁷² Jo, *supra* note 31, p. 48.

⁷³ U. Schneekener and C. Hofmann, *The Power of Persuasion. The Role of International Non-Governmental Organizations in Engaging Armed Groups*, in: H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region* 92–109 (Cambridge: Cambridge University Press, 2015).

⁷⁴ O. Bangerter, *Disseminating and Implementing International Humanitarian Law within Organized Armed Groups. Measures Armed Groups Can Take to Improve Respect for International*



indicator for ANSAs' knowledge of international law is the presence of a political wing within their structure.⁷⁵ The use of social networks has also become a strong indicator of ANSAs' familiarity with international rules. Two other alternatives have been proposed. First, ANSAs may have an understanding of international law through norms that have spanned all cultures, such as the humane treatment of civilians.⁷⁶ Second, it has been said that ANSAs' internal codes of conduct, where consistent with IHL, can also be an indicator of their knowledge of international law.⁷⁷ This could also be conceived with respect to IHRL rules.

A second challenge suggests that taking into account ANSAs' practices and opinions on IHL and human rights norms might create a backlash. As explained by Ryngaert, if one argues in favour of ANSAs' participation in the norm-creation process,

one should also be willing to accept the consequence that the content of the customary rules thus formed may not, as a matter of course, be a humanitarian's dream. Armed opposition groups [...] are not known for their respect of IHL. Indeed, quite the contrary is true. Accordingly, including non-state actors in the process of creating customary law formation may lead to *regression*.⁷⁸

That said, although there is evidence that certain ANSAs (as well as States for that matter) do not respect international rules, the argument should be nuanced. First, it should be noted that violations of humanitarian rules by one member do not necessarily reflect the position of the ANSA on their binding nature. In fact, it has been shown that in several cases, violations of the norms are rather related to command and control issues and not to the group's commitment to respect IHL or IHRL.⁷⁹ In addition to abovementioned cases in which ANSAs have publicly expressed their knowledge of and commitment to international norms, Jo has argued that '[g]roups that rely on international supporters that care about their human rights records also abide by humanitarian rules and refrain from civilian abuse'.⁸⁰ Furthermore, there are instances where ANSAs have undertaken obligations that go beyond those of States. For instance, while the Ottawa Convention prohibits mines that are 'designed

Humanitarian Law, in: M. Odello and G.L. Beruto (eds), *Non-State Actors and International Humanitarian Law. Organized Armed Groups: A Challenge for the 21st Century* 204 (San Remo: IIDH, 2009).

⁷⁵ Jo, *supra* note 31, p. 48.

⁷⁶ *Ibid.*, p. 49.

⁷⁷ *Ibid.*

⁷⁸ C. Ryngaert, *Non-state Actors in International Humanitarian Law*, in: J. d'Aspremont (ed.), *Participants in the International Legal System. Multiple perspectives on Non-state Actors in International Law* 289 (Oxon: Routledge, 2011). This is also presented as a possible challenge by Roberts and Sivakumaran, *supra* note 42, pp. 137–138; and in Sivakumaran, *supra* note 15, p. 133.

⁷⁹ With respect specifically to IHL, see Bangerter, *supra* note 74, p. 191.

⁸⁰ Jo, *supra* note 31, p. 144.



to be exploded by the presence, proximity or contact of a person',⁸¹ Geneva Call has gone further by prohibiting in its Deed of Commitment those mines that have that effect, whether or not they are actually designed for that purpose.⁸² This has already been signed by 49 ANSAs.

Even though a mere commitment to respect the law is certainly not sufficient, some practical cases have revealed that enforcement of humanitarian rules by ANSAs is possible.⁸³ As Roberts and Sivakumaran have suggested, taking into account ANSAs' practices may serve to shape IHL, since it could demonstrate the inadequacies of this legal regime and support the recognition 'of different standards for states and armed groups, or for different types of states and armed groups, in certain circumstances'.⁸⁴ In any case, although it would exceed the scope of this paper to examine the full content of both IHL and IHRL, we can affirm that CA3, insofar its content is considered to comprise the basic humanitarian rules applicable to any armed conflict,⁸⁵ and those *jus cogens* rules belonging to IHRL, cannot be in any way diminished by the practices of either ANSAs or States.⁸⁶

5. CONCLUDING IDEAS: SHAPING ALTERNATIVE PARADIGMS

Devising why ANSAs are bound by IHL and IHRL is not an easy task. In this paper, we have dealt with several different elements that must be taken into account in attempting to reach a practical solution.

First, we suggested that a combination of two arguments, the customary status of IHL and the effects of treaties on third parties, which enable a broad interpretation of the principle of equality of belligerents, provides a plausible explanation of the binding nature of IHL for ANSAs. This theoretical framework could allow these non-state

⁸¹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Article 2(1).

⁸² Geneva Call, Deed of Commitment for the Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, Article 1.

⁸³ In 2014, for instance, after several months of negotiations with Geneva Call, the People's Protection Units (YPG) and the Women's Protection Units (YPJ) in Syria demobilized 149 children from their ranks and signed Geneva Call's Deed of Commitment protecting children in armed conflict. See <https://genevacall.org/syria-kurdish-armed-forces-demobilize-149-child-soldiers/> (visited on 18 December 2017).

⁸⁴ Roberts and Sivakumaran, *supra* note 42, pp. 139–140.

⁸⁵ ICJ 27 June 1986, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf (visited on 18 December 2017), para. 218.

⁸⁶ It should be mentioned in any case that a *jus cogens* rule can only be modified by a 'subsequent norm of general international law having the same character'. Vienna Convention on the Law of Treaties, Article 53.

entities to develop a sense of ownership of the rules applicable to them. In Section 3 we tackled the binding nature of IHRL, proposing the application of the abovementioned theory and citing some promising examples concerning specific actions and expressions by ANSAs in this regard.

This paper has attempted to show that a plausible means of ensuring respect for and implementation of IHL and IHRL by ANSAs is to take into account some form of consent to be bound by the law. This consent could be found in their practices, codes of conduct or written declarations. The main challenge for this proposal would be the possible lowering of legal standards. However, as for States and their participation in processes for making international law, a contrary practice does not necessarily mean a disagreement with the norm. In fact, only a few ANSAs actually reject entirely the pertinence of international law.

