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SASSÒLI, Marco. Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law. *Journal of international humanitarian legal studies*, 2010, vol. 1, no. 1, p. 5-51

DOI : 10.1163/187815210x12766020139767

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Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law

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Abstract

Most contemporary armed conflicts are not of an international character. International Humanitarian Law (IHL) applicable to these conflicts is equally binding on non-State armed groups as it is on States. The legal mechanisms for its implementation are, however, still mainly geared toward States. The author considers that the perspective of such groups and the difficulties for them in applying IHL should be taken into account in order to make the law more realistic and more often respected. It is submitted that the law is currently often developed and interpreted without taking into account the realities of armed groups. This contribution explores how armed groups could be involved in the development, interpretation and operationalization of the law. It argues that armed groups should be allowed to accept IHL formally, to create – amongst other things – a certain sense of ownership. Their respect of the law should also be rewarded. Possible methods to encourage, monitor and control respect of IHL by armed groups are described. The author suggests in particular that armed groups should be allowed and encouraged to report on their implementation of IHL to an existing or newly created institution. Finally, in case of violations, this contribution proposes ways to apply criminal, civil and international responsibility, including sanctions, to non-State armed groups.

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Keywords: International Humanitarian Law; Armed Groups; Implementation; Non-International Armed Conflict; Commitment; Monitoring

1. Introduction

By definition, at least half the belligerents in the most widespread and most victimizing of armed conflicts around the world, i.e. non-international armed conflicts, are non-State armed groups.¹ For the purposes of this article it does not matter whether armed groups are themselves seen as parties to non-international armed conflicts or as armed forces of a non-State party to such a conflict.² It is urgent to improve the compliance with International Humanitarian Law (IHL) by such armed groups (and by the parties for which they fight). Its observance undoubtedly depends mainly on non-legal factors, such as public opinion, ethics, religion and reciprocity,³ just as violations of IHL are often due to these same factors, and not to shortcomings in the law or its mechanisms of implementation. It is nonetheless imperative to explore possible legal mechanisms to increase respect of IHL by armed groups.

This contribution will first explore how armed groups could participate in the development, interpretation and “operationalization” of IHL, and how they could better accept those laws, *inter alia* by creating a certain sense of ownership of that law within such groups. It argues that non-

¹ Wars fought by national liberation movements are even considered to be international armed conflicts (see *infra* note 25). In addition, according to the theory the U.S. initially applied to its “war against terrorism” a conflict between a State and an armed group may also be qualified, in some circumstances, as an international armed conflict. See for a legal explanation of the U.S. position excerpts from an interview with Charles Allen, Deputy General Counsel for International Affairs, U.S. Department of Defense, 16 December 2002, online: Crimes of War Project, <http://www.crimesofwar.org/onnews/news-pentagon-trans.html> (last accessed 21 September 2009), and Respondents’ Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, *Padilla v. Rumsfeld*, Civ. 4445 (MBM), The United States District Court for the Southern District of New York, 27 August 2002, at 7, online: <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf> (last accessed 21 September 2009). This position was partly accepted by the Court of Appeals in *Hamdi v. Rumsfeld*, No. 02-6895, United States Court of Appeals for the Fourth Circuit, 12 July 2002, and *Hamdi v. Rumsfeld*, No. 02-7338, United States Court of Appeals for the Fourth Circuit, 8 January 2003. See however now the US Supreme Court in *Hamdan v. Rumsfeld*, *infra* note 24 and accompanying text.

² See International Committee of the Red Cross, ‘Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law’, 90 *Int’l Rev. Red Cross* 991 (2008) at 1006.

³ See M. Sassòli and A. Bouvier, *How does Law Protect in War?* (2006), at 338-339; M. Veuthey, *Guérilla et droit humanitaire* (1983), at 338-347.

State armed groups should be directly engaged by the international community, rather than ignored or left to the exclusive prerogative of States, and should have a role to play in developing the norms and rules that they are expected to respect. Possible methods for encouraging, monitoring and controlling respect of IHL by armed groups will be described. Finally, where violations of IHL occur, this contribution will describe ways to apply criminal, civil and international responsibility. However, before proceeding in this manner, some preliminary remarks must first be made to describe the legal and factual context in which these issues are situated.

2. International Humanitarian Law and Armed Groups

A. International law remains State-centred

In 1930, a British author wrote: “[I]n spite of the modern theories [...] international law [...] nevertheless has something to do with States”⁴ Despite all the changes that the world and international law have since undergone, this dictum still rings true today. International law is mainly made by States; it is mainly addressed to States; its implementation mechanisms are particularly State-centred. While the rules on State responsibility are today considerably codified, the international responsibility of non-State actors remains largely uncharted waters. Even when rules apply to non-State actors or are claimed to apply to them, in most cases no international forum exists in which the individual victim, the injured State, an international intergovernmental or non-governmental organization, or a third State could invoke the responsibility of a non-State actor and obtain relief.

The international reality is, however, less and less State-centred. NGOs, trans-national corporations and armed groups have one thing in common: they are important international players, but they are still largely non-existent for international law. When asked how the law should deal with this reality, we are confronted with genuine dilemmas. Should international law

⁴ T. Baty, *The Canons of International Law* (1930), at 1 (quoted by C. Parry, *The Sources and Evidences of International Law* (1965) at 8).

engage these non-State actors, ultimately give them a certain international standing (with the advantage of being able to require them to comply with international standards), or should it ignore them? For trans-national corporations and NGOs, an alternate route may be taken through the domestic law of the State on the territory of which they are operating. For armed groups, this alternative is by its very definition not practicable, because they would not be armed groups engaged in an armed conflict (and in IHL there can be no armed group without an armed conflict) if they were within the practical reach of the law of the land and the law enforcement systems of the State on whose territory they are fighting; they would rather be outlaws, criminals, even “terrorists”. Therefore, the only possibility of positively influencing their compliance with IHL during the course of an armed conflict is through international law and mechanisms of international law.

B. Ways to enforce international law against armed groups

International law can be enforced against armed groups in three ways.⁵ First, indirectly, by attributing their behaviour to a State and using the traditional enforcement mechanisms to ultimately hold a State responsible for their actions. In some cases, a State may be responsible for an armed group fighting on its territory, either because it controls it, directs it, adopts its conduct as its own, or for its lack of due diligence in controlling it.⁶ The International Law Commission (ILC) also considers that a State is retroactively responsible for conduct of an armed group if that group becomes the government of the State or forms a new State.⁷ This is astonishing, because it makes a State responsible for the act of an actor over whom it did not have any influence at the time of the act.⁸ In other cases a third State may be responsible for an armed group because the former possesses effective or overall control over the latter,⁹ because it

⁵ L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (2002), at 97-228.

⁶ Arts. 8, 10(3) and 11 of the Draft Articles on Responsibility of States for internationally wrongful acts (hereinafter ‘Draft Articles’), *Report of the Commission to the General Assembly on the work of its fifty-third session (23 April - 1 June and 2 July - 10 August 2001)*, Document A/56/10, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10, at 29, online: <http://untreaty.un.org/ilc/reports/2001/2001report.htm> (last accessed 22 September 2009). The UN General Assembly took note of the Draft Articles in Res. 56/83, 12 December 2001.

⁷ See *ibid.*, Art. 10(1) and (2).

⁸ For well reasoned criticism of this rule see D’Aspremont, ‘Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents’, 58 *ICLQ* 427 (2009).

⁹ See, for the effective control standard, the International Court of Justice (ICJ) in the case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ, 27 June

aids or assists the group in violations of international law,¹⁰ or it may breach, as far as IHL is concerned, its obligation to ensure respect of IHL by others,¹¹ including by parties to non-international armed conflicts abroad.¹²

Second, international criminal law, a branch piercing the corporate veil of the State, is directly addressed to individuals and possesses mechanisms, including international criminal tribunals, which directly enforce IHL against such individuals. It is today no longer controversial that some international crimes such as war crimes, crimes against humanity and genocide may be committed not only by individuals acting for a State, but equally by individuals acting for a non-State group.¹³

The third possibility, which is more innovative and less explored than State responsibility and individual criminal responsibility, is to enforce IHL directly and through international mechanisms against the armed group as a group. While the other two approaches each have advantages, the present contribution exclusively focuses on this latter approach. There are several reasons for doing so.¹⁴

Governments often do not have the capacity to control or even influence armed groups. In other cases, attribution is difficult to prove because specific instructions, or other forms of direction

1986, para. 115, reaffirmed in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Merits, ICJ, 24 February 2007, paras. 396-407 and, for the broader overall control standard, the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Case Prosecutor v. Tadić*, Appeal Judgment, ICTY, Appeals Chamber, 15 July 1999, paras. 116-144.

¹⁰ Draft Articles, *supra* note 6, Art. 16.

¹¹ Convention [No.I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 UNTS 31 (entered into force 21 October 1950) ; Convention [No. 2] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), 75 UNTS 85 (entered into force 21 October 1950); Convention [No. III] relative to the Treatment of Prisoners of War (1949), 75 UNTS 135 (entered into force 21 October 1950); Convention [No. IV] relative to the Protection of Civilian Persons in Time of War (1949), 75 UNTS 287 (entered into force 21 October 1950), Art. 1 common. See on this obligation Condorelli and Boisson de Chazournes, 'Quelques remarques à propos de l'obligation des États de "respecter et faire respecter" le droit international humanitaire en toutes circonstances', in C. Swinarski (eds.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* 17 (1984); Boisson de Chazournes and Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests', 82 *Int'l Rev. Red Cross* 67 (2000).

¹² *Nicaragua v. United States of America*, *supra* note 9, para. 220.

¹³ See Art. 8(2) (c)-(f) of the Rome Statute of the International Criminal Court [hereinafter 'Rome Statute'], A/CONF.183/9, 17 July 1998 and Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict', 26 *Fordham Int'l L.J.* 907 (2003).

¹⁴ Zegveld, *supra* note 5, at 220-228.

and control exercised by a State, remain secret. In addition, at least according to the International Court of Justice, the standard for attribution based upon effective control over the conduct of the group is very high.¹⁵

Individual criminal responsibility exists only for the most egregious violations and may only be enforced through a fair trial in which the facts and their individual attribution have to be proven. In Anglo-Saxon legal systems the standard that must be reached is “beyond reasonable doubt” and under international law the presumption of innocence applies. Such standards of evidence are not necessary to engage the group itself by non-criminal means after a violation has occurred. Criminal prosecution of members of an armed group by outside tribunals is less effective as a deterrent than is punishment by the group itself. Prospective perpetrators know there is a higher probability that they will be caught by the group to whom they belong. In addition, rejection by their own social environment has a greater stigmatising effect than reprobation by the enemy, third States or a distant “international community”.

Furthermore, groups are able to take preventive steps, which cannot be and are not requested from every individual involved in a conflict. Only the groups themselves can disseminate the law, instruct and train their members, or fix rules for the benefit of persons under their control. Third, as Liesbeth Zegveld points out, international law must be adapted to the international political order, in which a variety of actors from multinational corporations to indigenous peoples, non-governmental organizations and armed groups play an increasing role.¹⁶

Today, the idea to engage with armed groups in order to increase their respect of IHL and to assist them in this respect has become increasingly accepted. It is no longer only covered by the pioneering work of the NGO “Geneva Call”¹⁷ and by some academic initiatives.¹⁸ In its latest report to the UN Security Council on the protection of civilians in armed conflict, the UN Secretary-General identifies “[e]nhancing compliance by non-State armed groups” as one of the

¹⁵ See *supra* note 9.

¹⁶ Zegveld, *supra* note 5, at 224.

¹⁷ See Geneva Call, <http://www.genevacall.org/>.

¹⁸ See, e.g., University of Calgary, *The Armed Groups Project*, <http://www.armedgroups.org/>, and Harvard University, Program on Humanitarian Policy and Conflict Research, *Transnational and Non-State Armed Groups: Legal and Policy Responses*, <http://www.hpcrresearch.org/projects/tags.php>.

five core challenges and devotes ten out of 78 paragraphs of his report to the need to engage and not only condemn armed groups.¹⁹

C. International Humanitarian Law binds armed groups

Currently, IHL is largely codified in treaties, in particular the four 1949 Geneva Conventions²⁰ and the two 1977 Additional Protocols.²¹ These instruments make a strict distinction between international and non-international armed conflicts, the latter being governed by fewer, less detailed and less protective treaty rules, contained in Article 3 common to the four Geneva Conventions. More specific treaty rules may apply in some cases, where the conflict is fought between governmental and insurgent forces and the latter control part of the territory of a State that is party to Protocol II. As for customary international law, a recent comprehensive study undertaken under the auspices of the International Committee of the Red Cross (ICRC) has articulated a large body of customary rules, the majority of which are claimed to apply to both international and non-international armed conflicts.²²

I will apply in this article the rules of IHL of non-international armed conflicts to armed groups. Technically, such conflicts are called “armed conflicts not of an international character”.²³ In my view, the US Supreme Court was correct when it held in *Hamdan v. Rumsfeld* that every armed conflict which “does not involve a clash between nations” is not of an international character, and that the latter phrase “bears its literal meaning.”²⁴ The only exception, where armed groups are governed by IHL of international armed conflicts, are when they are either attributable to a State or when they are national liberation movements fighting a national liberation war. Under Protocol I, national liberation movements, “fighting against colonial domination and alien

¹⁹ See *Report of the Secretary-General on the protection of civilians in armed conflict*, S/2009/277, 29 May 2009, paras. 38-47.

²⁰ See *supra*, note 11.

²¹ Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UNTS 3 (entered into force 7 December 1978) ; Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977), 1125 UNTS 609 (entered into force 7 December 1978) .

²² J.-M. Henckearls and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (2005).

²³ Art. 3 common and Art. 1 of Protocol II, see *supra* note 21.

²⁴ See Judgment, *Hamdan, Salim v. Rumsfeld, Donald (Secy. of Defense)*, No. 05-184, US Supreme Court, 29 June 2006, at 67.

occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations” are indeed subject to IHL of *international* armed conflicts.²⁵ Independently of whether a non-State actor such as a national liberation movement will ever be able to comply with such detailed and sophisticated rules of IHL of international armed conflicts as those governing the treatment of prisoners of war or occupied territories, only few situations will be recognized today by States as fulfilling these criteria – and, what is more important, none will be recognized by the territorial State as being national liberation wars. Indeed, no State will comply with IHL of international armed conflicts if this implies that it is a colonial dominator, a foreign occupier or a racist regime. In any case, what are interesting for the purposes of this contribution are armed groups whose actions are neither attributable to a State nor which are uncontroversial subjects of international law (such as, at least for IHL and *jus ad bellum*, national liberation movements). Indeed, the implementation mechanisms addressed to States and other subjects of international law are much more developed and need much less elaboration.

Logically, compliance with IHL by armed groups presupposes that they are bound by these rules. For IHL, or more precisely that part of it that applies to non-international armed conflicts, it is undisputed that it binds, under the explicit wording of common Article 3 of the four Geneva Conventions of 1949, “each party to the conflict,” i.e. the non-State armed group as equally as the governmental side.²⁶ For Protocol II, the treaty text is not clear on this issue, as these rules were deliberately formulated by States in the passive tense, and they do not therefore clarify to whom they are addressed. States, obsessed by their Westphalian concept of sovereignty, wanted to avoid conferring any recognition whatsoever to groups fighting against them.²⁷ They therefore rejected at the 1974-1977 diplomatic conference, in which Protocol II was elaborated, an explicit provision prescribing that its rules applied to both sides equally.²⁸ In scholarly writings, it is

²⁵ Art. 1(4) of Protocol I, *supra* note 21.

²⁶ Zegveld, *supra* note 5, at 9-38, with further references.

²⁷ See R. Abi-Saab, *Droit humanitaire et conflits internes* (1986), at 156-159; G. Abi-Saab, ‘Non-International Armed Conflicts’, in United Nations Educational, Scientific and Cultural Organization (ed.), *International Dimensions of Humanitarian Law* 217 (1988), at 231.

²⁸ See Art. 5 of draft Protocol II, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, ICRC, June 1973.

however uncontroversial that this must be the case.²⁹ In contrast to the Geneva Conventions and Protocol II, other IHL treaties such as the Ottawa Convention banning landmines, are still only addressed to States. This is precisely one of the reasons why Geneva Call,³⁰ an NGO that tries to engage non-State armed groups to respect humanitarian rules, and which started with engaging them not to use landmines, tries to get these armed groups to sign a *Deed of Commitment* not to use landmines:³¹ without such a commitment they would simply not be bound to refrain from using anti-personnel landmines.

Different legal constructions exist to explain why armed groups are thus bound by certain IHL rules.³² First, it is claimed that they are bound by customary IHL or general principles (and that most rules of IHL of non-international armed conflicts have a customary character or correspond to general principles). IHL implicitly confers a limited international legal personality to armed groups, i.e., by providing them with a functional international legal personality that entails the necessary rights and obligations foreseen by it.³³ Even if this is the case, the question still remains open why non-State actors should be bound by the same rules as States? One approach is to look into the practice and *opinio juris* of armed groups.³⁴ Or one can claim that there is a rule of customary international law (or a general principle) according to which armed groups are bound by obligations accepted by the government of the State on the territory of which they fight.³⁵ Second, one can consider armed groups bound by IHL under the general rules governing the binding nature of treaties on third parties.³⁶ This presupposes, however, that these rules are the same for States as they are for non-State actors and, more importantly, that a given armed

²⁹ See Bugnion, 'Jus ad Bellum, Jus in Bello and Non-International Armed Conflict', 6 *Yearbook of International Humanitarian Law* 167 (2003); Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) [hereinafter *Commentary Protocols*], paras. 4442-4444; R. Abi-Saab, *supra* note 27, at 157-159; Bothe, 'Conflits armés internes et droit international humanitaire', 82 *RDGIP* (1978), at 92-93.

³⁰ See *supra* note 17.

³¹ See *infra*, text accompanying notes 101-104, 108 and 130.

³² See Sivakumaran, 'Binding Armed Opposition Groups', 55 *ICLQ* 369 (2006).

³³ See already P. Guggenheim, *Traité de droit international public*, vol. 2 (1954), at 314; GIAD Draper, *The Red Cross Conventions* 17 (1958); C. Zorgbibe, *La guerre civile* (1975), at 187-189; the Constitutional Court of Colombia in Case No. C-225/95, partly reproduced in Sassòli & Bouvier, *supra* note 3, at 2266, para. 14.

³⁴ See *infra*, text accompanying notes 62-63.

³⁵ Bothe, *supra* note 29, at 91-93.

³⁶ See Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflict', 30 *ICLQ* 416 (1981), at 423-429.

group has actually expressed its consent to be bound by them.³⁷ A third approach is grounded on the principle of effectiveness, which is said to imply that any effective power on the territory of a State is bound by that State's obligations.³⁸ Fourth, given that armed groups often want to become the government of the State, and that once in government such a group is bound by the international obligations of that State, it can be argued that the group must comply with these obligations even before it reaches this aim.³⁹ Fifth, they may be considered to be bound because a State incurring treaty obligations has legislative jurisdiction over everyone found on its territory, including armed groups.⁴⁰ Such undertakings then become binding upon the armed group via the implementation or transformation of international rules into national legislation or by the direct applicability of self-executing international rules.⁴¹ In conclusion, while it is controversial why armed groups are bound by IHL, it is uncontroversial that they are bound by certain IHL rules.

D. The diversity of armed groups – a sufficient reason to engage only some of them?

Armed groups are very diverse in their degree of organization and control over their members, territory or people, their aims, and in particular in their inclination to respect IHL. Most people who write about them make distinctions between different categories of groups and suggest certain methods to improve compliance only for some of these categories. Very often it is argued that some groups (e.g. Al-Qaeda) cannot possibly be made to respect IHL. I dare to suggest that the international community should try to apply all the legal mechanisms suggested to all armed groups.

The only limitation is that such a group must be a genuine armed group engaged in a genuine armed conflict. Both the necessary level of violence to make a situation an armed conflict and the necessary degree of organization (to make a group a party to a non-international armed

³⁷ Similarly sceptical Sivakumaran, *supra* note 32, at 378-379.

³⁸ Pinto, 'Les règles du droit international concernant la guerre civile', 114 *Collected Courses* 451 (1965-I), at 528 ; Zegveld, *supra* note 5, at 15.

³⁹ J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, III, Geneva Convention Relative to the Treatment of Prisoners of War* (1960), at 37.

⁴⁰ Sivakumaran, *supra* note 32, at 381-387.

⁴¹ *Commentary Protocols*, *supra* note 29, para. 4444 and G. Abi-Saab, *supra* note 27, at 230.

conflict) are admittedly not very clearly defined in IHL.⁴² If it is unclear whether a situation constitutes an armed conflict, either because the facts are controversial or because the legal criteria are unclear, it is also unclear whether those involved in that situation are addressees of IHL or only of domestic criminal law.

Concerning armed groups which are taking part in a genuine armed conflict, however, I would leave the decision to exclude a given group from those mechanisms (and therefore the renunciation of any hope of obtaining some restraint) to that group, if it rejects the mechanism, does not take it seriously or only abuses it for propaganda purposes. There are several reasons for this inclusive approach. First, it is very difficult to define objective criteria to characterize those groups that are “hopeless”. For example, even the Algerian independence war – one of the world’s examples of State-building triggered by armed groups – started with sixty indiscriminate terrorist attacks perpetrated during one night.⁴³ Whether a group is “serious” or not, or whether it is willing to comply with restraints, will be shown by the result of the process and therefore cannot be a precondition to the process. From a humanitarian point of view such distinctions would mean that those in need of the greatest protection would be deprived of any protection efforts just because they are in the hands of a group whose aims or methods are utterly rejected. Second, even if criteria of exclusion exist, it will be very difficult to convince the State(s) or other armed groups fighting against a given group that the latter merits inclusion and that they should therefore tolerate the functioning of international mechanisms in respect of that group. To offer some practical examples: were the Afghan Mujaheddin fighting against the Soviet Union, the FLMN in El Salvador, or the LTTE in Sri Lanka, or are the FARC in Colombia, sufficiently “civilized” that they deserved efforts to improve their compliance with international standards? If our answer (for some of them) is affirmative, would the governments of the Soviet Union, El Salvador, Nicaragua, Colombia or Sri Lanka agree with our qualification? If we refuse, for example, to engage Hezbollah in Lebanon or the Taliban in Afghanistan, how can we justify with the Government of Colombia that we engage the FARC? Those governments would never

⁴² See for a relatively high, but probably realistic threshold, the ICTY in Judgment, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Trial Chamber, 3 April 2008, in particular paras. 49 and 60, and for an even more detailed analysis, based upon a vast review of the jurisprudence of the ICTY and of national courts, Judgment, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Trial Chamber, 10 July 2008, paras. 177-206.

⁴³ F. Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (2003), at 632.

accept that their opponents are “better”, more “serious” or more willing to comply with rules than other armed groups.

With the groundwork now laid for understanding the context of non-State armed groups and international law, our attention turns to elaborating possible avenues to ensure that armed groups comply with IHL.

3. Ensuring that International Humanitarian Law is Realistic for Armed Groups

A. Are some rules of International Humanitarian Law unrealistic for armed groups?

All law has to take into account, as closely as possible, the social reality it seeks to govern. Non-international armed conflicts are by definition fought at least as much by armed groups as by governmental armed forces. If only the needs, difficulties and aspirations of the latter are taken into account by the law, it will be less realistic and effective. For all existing, claimed and newly suggested rules of IHL, or whenever we interpret IHL, we have therefore in my view to check whether an armed group having the necessary will is able to comply with the rule found, without necessarily losing the conflict. If this is not the case for a certain rule, such a rule will not be complied with and it will undermine the credibility and protecting effect of other rules.

The current tendency of international criminal tribunals, the ICRC and scholars to bring IHL of non-international armed conflicts, mainly via alleged customary rules, closer to that of international armed conflicts may have a negative side effect in this respect. The ICTY writes in a much applauded judgment “that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned.”⁴⁴ It forgets however, that IHL of non-international armed conflicts fundamentally differs from IHL of

⁴⁴ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, ICTY, Appeals Chamber, 2 October 1995, para. 97.

international armed conflicts as far as its addressees are concerned. It not only binds States, but also armed groups.

In another judgment, the ICTY concludes that command responsibility must necessarily apply in non-international as in international armed conflicts.⁴⁵ Although it may be astonishing to claim that this is a rule of customary law, based, as customary rules must be based, upon general (State) practice, this appears as a result of logical legal thinking as far as State agents are concerned. Did the judges however realize that their pronouncement implies that command responsibility also applies to armed groups, which may have much less factual control over their members than commanders of governmental armed forces and which, more importantly, may not have the legal capacity to punish members who have committed violations? A reasonable answer may be that those factual differences will be taken into account when the rule is applied, but the judgment does not say so. The suggestion, however, that to avoid command responsibility, commanders of armed groups must hand over their subordinates who committed violations to the government or to international tribunals⁴⁶ is totally unrealistic. Or did the judges want to abandon in this respect the principle of the equality of belligerents? This general principle of IHL, resulting from the fundamental distinction between *jus ad bellum* and *jus in bello*, states that both sides in every armed conflict have the same rights and obligations under IHL, independently of the legitimacy or otherwise of their cause.⁴⁷ Otherwise IHL could never be expected to be respected. It also applies to non-international armed conflicts, but it can obviously

⁴⁵ See Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadzihasanovic et al.*, ICTY, Appeals Chamber, 16 July 2003.

⁴⁶ See *Amicus curiae* observations on superior responsibility submitted pursuant to rule 103 of the Rules of Procedure and Evidence, submitted by Amnesty International, *Prosecutor v. Bemba*, ICC, Pre-Trial Chamber II, 20 April 2009, paras 21-26.

⁴⁷ See on this fundamental principle of the equality of the belligerents before IHL, Protocol I, preambular para. 5; the US Military Tribunal at Nuremberg in the Case of *Wilhelm List et al.* (8 July 1947- 19 February 1948), The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. VIII, at 34-76 (see for this case and other references Sassòli & Bouvier, *supra* note 3, at 102-108); Sassòli, 'Jus ad bellum and Jus in Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?', in M. Schmitt and J. Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein* 242 (2007); Greenwood, 'The Relationship Between *jus ad bellum* and *jus in bello*', 9 *Review of International Studies* 221 (1983); Bugnion, 'Guerre juste, guerre d'agression et droit international humanitaire', 84 *Int'l Rev. Red Cross* 523 (2002); H. Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (1970).

not require equality before domestic law in such conflicts.⁴⁸ While some may argue that certain rules are only designed for States, I do not think that it will be possible, in practice, to convince parties to comply with rules that are not binding upon their enemy, even less so when it is controversial, in a given armed conflict, who are the State authorities and who the insurgent group.

When the ICRC claims in its Customary Law Study that 136 (and arguably even 141) out of 161 rules of customary humanitarian law, many of which parallel rules of Protocol I applicable as a treaty to international armed conflicts, apply equally to non-international armed conflicts,⁴⁹ did it bear in mind that for each one of these rules such applicability necessarily implies that they are also binding upon armed groups? To take but one example, the ICRC considers (mainly based upon the practice of Human Rights bodies) that there is a customary IHL prohibition of arbitrary detention. In interpreting this prohibition, the Study states that the basis for internment must be previously established by law and restates an “obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention”.⁵⁰ Did the ICRC realize that this either requires armed groups to legislate and to institute *habeas corpus* proceedings or means that they may never detain anyone, not even government soldiers? Is the latter realistic?

As demonstrated by the last-mentioned example, similar concerns may be expressed about the effect of the increasing integration of Human Rights standards into IHL. For States, such development is necessary. In my view, it should however not be assumed that the same interplay applies to armed groups. First, the very applicability of International Human Rights Law to armed groups is controversial.⁵¹ Even if Human Rights apply, the possibility for armed groups to comply with the resulting obligations must be carefully reviewed.

⁴⁸ See Bugnion, ‘Jus ad Bellum’, *supra* note 29, at 167-198; Sassòli, ‘Jus ad bellum’, *supra* note 47, at 254-257, and with a more critical and nuanced approach, Somer, ‘Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict’, 89 *Intl Rev Red Cross* 655 (2007), at 659-664.

⁴⁹ J.-M. Henckaerts and L. Doswald-Beck, *supra* note 22.

⁵⁰ *Ibid.* at 348-351.

⁵¹ See A. Clapham, *Human Rights Obligations of Non-State Actors* (2006); P. Alston (ed.), *Non-State Actors and Human Rights* (2005); Tomuschat, ‘The Applicability of Human Rights Law to Insurgents Movements’, in H. Fischer, U. Froissart and W. Heintschell von Heinegg (eds.), *Krisensicherung und Humanitären Schutz – Crisis Management and Humanitarian Protection. Festschrift für Dieter Fleck* 573 (2004); L. Moir, *The Law of Internal Armed Conflict* (2002), at 193-277; Matas, ‘Armed opposition groups’, 24 *Manitoba L J* (1997) 621, at 630ff; Zegveld, *supra* note 4, at 38-55; International Council on Human Rights Policy, ‘Ends & means: Human Rights

For the abovementioned example of the prohibition of arbitrary detention and its interpretation by the ICRC Customary Law Study, this means for instance that the requirements (inherent in a procedure to challenge the lawfulness of a detention) that there be a legal basis and procedures established by law for internment, raise concern.⁵² Neither Human Rights nor IHL applicable to non-international armed conflicts provide a specific legal basis for internment – while a legal basis for any detention is required by Human Rights.⁵³ While a State can provide for such a basis in its domestic law, how is the non-State actor to do this? Parties to armed conflicts intern persons, hindering them from continuing to bear arms, so as to gain the military advantage. If the non-State actor cannot legally intern members of government forces it is left with no option but either to release the captured enemy fighters or to kill them. The former is unrealistic, because it obliges the group to increase the military potential of their enemies, the latter a war crime.⁵⁴ These may be reasons for not applying to armed groups the *lex specialis* reasoning that applies to States with respect to procedural safeguards for detention.⁵⁵

The same doubts apply to the question when armed groups may attack government soldiers and whether they must first try to arrest them. Even if one considers that Human Rights norms as *lex specialis* require government forces to try to arrest rather than attack isolated rebels in

approaches to armed groups' (2000), [http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5CYJPJ/\\$file/EndsandMeans.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5CYJPJ/$file/EndsandMeans.pdf?openelement) (accessed 2 October 2009). See for a critical view Rodley, 'Can Armed Opposition Groups Violate Human Rights Standards?', in K. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty-First Century* 297 (1993). See also para. 47 of the *Report of the consultative meeting on the draft Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international Human Rights and humanitarian law*, UN ESCOR, UN Doc. E/CN.4/2003/63, 27 December 2002. Martin Scheinin, in his Preliminary Report on the idea to establish a World Human Rights Court significantly envisages that 'other entities but states, including multinational corporations, religious communities, and indigenous or minority groups may by unilateral declaration recognize the binding jurisdiction of the Court', but he does not mention armed groups, although all other non-State entities mentioned could also be reached through the national implementation system of States (see Scheinin, 'Towards a World Human Rights Court, Interim Research Paper submitted within the framework of the Swiss Initiative to Commemorate the 60th Anniversary of the Universal Declaration of Human Rights' (2008), http://www.udhr60.ch/report/hrCourt_scheinin0609.pdf (accessed 2 October 2009) at 7).

⁵² L. M. Olson, 'Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict', 40 *Case Western Reserve Journal of International Law* 437 (2009), at 451-454.

⁵³ See, e.g., Article 9(1) of the International Covenant on Civil and Political Rights (1966), 999 UNTS 171 (entered into force 23 March 1976).

⁵⁴ Article 8 (2)(e)(x) of the Rome Statute. See also Henckaerts and Doswald-Beck, *supra* note 22, at 161.

⁵⁵ See Sassòli and Olson, 'The Relationship between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts', 90 *Intl Rev Red Cross* 599 (2008), at 615-616.

government controlled areas, the reverse is not necessarily true. Armed groups have no jurisdiction over a territory. A government has the alternative of law enforcement and of applying domestic criminal law, and must therefore plan an operation in such a way so as to maximize the possibility of being able to arrest persons,⁵⁶ while the question whether armed groups may legislate to make government action illegal or whether they may enforce government legislation is controversial, as will be shown below.⁵⁷ Here too, it may be that the rule resulting from the interplay of IHL and Human Rights is different for armed groups than for States.⁵⁸

The aforementioned examples show that a serious analysis of existing IHL of non-international armed conflicts from the perspective of armed groups should be made. As such an analysis has not yet taken place, it is not possible to know how the existing rules and possible future developments of IHL of non-international armed conflicts envisaged by the ICRC⁵⁹ would change if they were taking the perspective of non-State armed groups into account. One may, however, make some provocative speculations, which also demonstrate the dangers inherent in such an exercise.

It may be that the current assumption – that that all of customary IHL of non-international armed conflicts applies as soon as the minimum threshold requirements of organization and intensity are met, which are necessary to make a situation an armed conflict – is wrong.⁶⁰ It may be that the much criticized fact that Protocol II has a higher minimum threshold of applicability than Article 3 common to the Geneva Conventions is realistic. It may even be that a sliding scale is needed, providing for increasing obligations for armed groups according to their degree of organisation and the intensity of the violence in which they are involved. This would certainly involve difficulties and controversies on the level of application in a given situation. In addition,

⁵⁶ Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?', 88 *Intl Rev Red Cross* (2006) 881, at 890; University Centre for International Humanitarian Law, *Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation* (2005), http://www.adh-geneva.ch/events/pdf/expert-meetings/2005/3report_right_life.pdf (last accessed 2 October 2009) [hereinafter 'UCIHL Report'], at 35.

⁵⁷ See *infra* notes 111-113 and accompanying text.

⁵⁸ See Sassòli and Olson, 'The Relationship', *supra* note 55, at 626.

⁵⁹ See *Sixty years of the Geneva Conventions: learning from the past to better face the future*, Ceremony to celebrate the 60th anniversary of the Geneva Conventions. Address by Jakob Kellenberger, President of the ICRC, Geneva, 12 August 2009, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-statement-president-120809>, (last accessed 6 February 2010).

⁶⁰ See *supra* note 42.

if the principle of equality of the belligerents before IHL is maintained, the obligations of governmental forces confronted to a poorly organized armed group in a low intensity armed conflict would equally be limited, although the government would be able to comply with a higher standard. The result would however be less shocking than it appears, as the government forces would in addition be bound by International Human Rights Law.

An even more revolutionary result, which would solve the aforementioned problem, would be to abandon the equality of belligerents and introduce differentiated rules for governments and non-State armed groups. This already corresponds largely to the reality of the rules which are actually respected in most contemporary armed conflicts. To abandon even the normative claim is a decision which should not however be easily taken. By consulting practitioners on both governmental and non-governmental sides, it should first be clarified whether this would not further decrease the willingness to respect the rules on both sides. If the dogma of the equality of the belligerents was abandoned, at least the equal applicability of all those rules of IHL which are influenced by Human rights should be revisited. As a minimum, Human Rights obligations should be translated to fit the reality of armed groups and adapted to what they are actually able to respect.

B. Involve armed groups in the development of IHL?

The main reason for involving armed groups in the development of IHL is that this would constitute the best way to ensure that compliance with IHL is realistic for them. A minor additional reason may be that it is psychologically easier for individuals to accept and respect rules that people confronted with similar problems were involved in developing. In the 1970s, several guerrilla movements declared that they would not feel bound by new rules of IHL which they could not participate in developing.⁶¹ Today, in my experience, armed groups are more concerned that the law applies to them equally and that it is realistic than that they may contribute to its development. Their contribution is nevertheless needed to make sure that the law is realistic.

⁶¹ Veuthey, *supra* note 3, at 61.

Today, many people suggest that IHL is no longer adequate for modern conflicts and should be revised. One of the inadequacies mentioned is precisely situations of armed conflicts with armed groups – in particular when they are trans-national armed groups. In the present international environment, I am rather sceptical about the chances of obtaining consensus on new rules genuinely improving the protection of war victims. But let us assume we should revise the law applicable to the fighting between States and armed groups. If we want to revise IHL in a certain area, we have to discuss with the actors, which, in the area of non-international armed conflicts, include the armed groups. No one would suggest revising the law of naval warfare without speaking with navies. This is the essence of IHL. 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. This is the big difference compared to criminal law. Criminal law does not have to accommodate the aspirations of the criminals, allow them to reach their aims, or be realistic for them. For criminal law, however, there is vertical, hierarchical enforcement while IHL is still basically enforced horizontally, by the parties.

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. The ICRC Customary Law Study considers that the legal significance of such practice is unclear⁶² (and this may be one of the reasons why the rules it articulates for non-international armed conflicts are in my view not always realistic for armed groups). One of its authors writes that “[u]nder current international law, only State practice can create customary international law”, but he advocates taking into account practice of armed groups at least *de lege ferenda*.⁶³ In my view, customary law is based on the behaviour 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 behaviour. Non-State actors would logically be subject to customary law which they contribute to creating.

⁶² Henckaerts and Doswald-Beck, *supra* note 22, at xxxvi.

⁶³ Thus Henckaerts, ‘Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law’, in *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors, 25th-26th October 2002*, 27 *Collegium* 123 (Spring 2003), at 128.

However, to involve armed groups in the development of treaty rules is more difficult. It would be almost impossible to reach agreement over which groups should be invited to participate in the respective diplomatic conferences drafting those treaties.⁶⁴ At a minimum, the groups should exist for a minimal time before being able to make useful contributions. Even then, their participation will make the treaty-making process even more cumbersome and politicized than it already is. In addition, armed groups involved in ongoing conflicts are by definition illegal under the law of the State where they fight and often also under the law of third States. This is even more so the case due to the recent practice of States and international organizations of labelling many groups as “terrorist”, subject to travel bans and making any contact with them a crime under domestic law. It may therefore be practically difficult and politically controversial to involve their representatives in any formal (preferably separate) preparatory meetings or, even more so, in diplomatic conferences adopting new instruments. It should be noted that in the past, from 1974-1977, eleven national liberation movements participated, as observers, in the deliberations of the *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* convened by Switzerland, which adopted the 1977 Protocols.⁶⁵ This participation led however to very arduous and politically heated discussions at the conference. Furthermore, from the point of view of international law, those regionally recognized national liberation movements were all well established and broadly supported armed groups. It is therefore doubtful whether such an experience could be repeated.

A solution may be to invite only those groups that participated in past armed conflicts that have since ended. However, this will in turn increase the time gap between the needs of practice and the response of the law. Moreover, for practical reasons those participants of past conflicts that can still be reached consist of groups that have succeeded in establishing or participating in developing the new government of a State. Experience shows that armed groups quickly adopt the perspective of governments after gaining power, by being equally unforgiving of other non-State armed groups that would dare to fight against them and by not acknowledging them. They will no longer represent their views.

⁶⁴ *Ibid.*

⁶⁵ *Commentary Protocols*, supra note 29, at xxxiii.

In my view the groups' views could and should nevertheless be collected as part of the factual research preceding any codification or adoption of "new interpretations."⁶⁶ This is certainly easier for an independent organization such as the ICRC,⁶⁷ when it prepares new developments of IHL, or for NGOs, than it is for bodies of intergovernmental organizations such as the UN High Commissioner for Human Rights.

By analogy to other fields of international reality dominated by non-State actors, one could imagine armed groups developing among themselves a new trans-national law of armed groups, just as sports clubs and their organizations have developed international sports law,⁶⁸ internet users and providers the cyber law⁶⁹ and merchants the *lex mercatoria*.⁷⁰ The relationship between such new *lex armatorum* and the IHL adopted by States would have to be clarified, but similar clarification was also necessary to establish the relationship between the *lex mercatoria* and the instruments of international trade law. The greater difficulty is that armed groups, unlike sports clubs, merchants and Internet users, are not repeat players and are illegal under their domestic legislation. Furthermore, while those other non-State actors mainly interact with each other and the trans-national law they create governs such interactions, armed groups do not fight worldwide against each other. They either fight against governments, whom it would be difficult to subject to the new *lex armatorum*, or against other specific armed groups in their geographic vicinity. It is nevertheless interesting to notice in meetings of armed groups organized by Geneva Call that armed groups, coming from very diverse cultural, political and geographical backgrounds find a common agenda and have common aspirations.⁷¹ The 2009 Second Meeting

⁶⁶ See the Alabama Process, launched by the Harvard Program on Humanitarian Policy and Conflict Research and Switzerland, online: <http://ihl.ihlresearch.org/index.cfm?pageId=481> (last accessed 3 October 2009).

⁶⁷ Veuthey, *supra* note 3, at 61.

⁶⁸ J. R. Nafziger, *International Sports Law* (1988), at 32-38; Nafziger, 'International Sports Law Search Term End: A Replay of Characteristics and Trends', 86 *Am. J. Int'l L.* 489 (1992); Nafziger, 'The Future of International Sports Law', 42 *Willamette Law Review* 861 (2006).

⁶⁹ Johnson and Post, 'Law and Borders - The Rise of Law in Cyberspace', 48 *Stan. L. Review* 1367 (1996); M. Franda, *Governing the Internet, the Emergence of an International Regime* (2001); A. Kamal, *The Law of Cyber-Space* (2005).

⁷⁰ Virally, 'Un tiers droit? Réflexions théoriques', in *Le droit des relations internationales économiques : études offertes à Berthold Goldman* 373 (1987); Teubner, 'The King's many bodies: the self-deconstruction of Law's hierarchy', 31 *Law. & Soc'y Rev.* 763 (1997); F. Osman, *Les principes généraux de la Lex Mercatoria - contribution à l'étude d'un ordre juridique anational* (1992); Dasser, 'Mouse or Monster : some facts and figures on the "lex mercatoria"', in *Globalisierung und Enstaatlichung des Rechts* 129 (2008).

⁷¹ See 18-19 June 2009 - Geneva - Switzerland. Second Meeting of Signatories to Geneva Call's "Deed of Commitment for Adherence to a Total Ban on Anti-Personnel (AP) Mines and for Cooperation in Mine Action", Geneva Call, <http://www.genevacall.org/news/events/events.htm> (last accessed 3 October 2009).

of Signatories to Geneva Call's "Deed of Commitment" adopted two Declarations, one of them addressed to the Cartagena Summit on a Mine-Free World held on 30 November to 4 December 2009.⁷²

Another option for States is to adopt in existing or in new international fora new soft law standards in the fields of IHL to be respected by armed groups, similar to those adopted or suggested in the UN and OECD for trans-national corporations.⁷³ When such rules for armed groups are elaborated, the views of those groups should however be fully taken into account. In practice, this is difficult even for soft law. It is hardly surprising that the UN did not involve armed groups in the preparations of *Minimum Humanitarian Standards*.⁷⁴ It is more remarkable that armed groups were completely excluded from informal non-governmental processes, such as the "post-modern" process of reaffirmation and development of IHL started by Switzerland and the Harvard Program on Humanitarian Policy and Conflict Research, although this process did not aim at new treaty rules, but at action-oriented research, informal discussions with governments and possibly "new interpretations" of IHL.⁷⁵ Admittedly, the relationship between the new soft law and the hard law obligations of armed groups under the law of non-international armed conflicts, customary or conventional, has to be clarified. In addition, as the rules will apply frequently to conflicts between armed groups and States, this would lead to a situation in

⁷² See Declaration by Signatories, <http://www.genevacall.org/news/events/f-events/2001-2010/2009-19jun-finalsign.pdf> and Declaration to the Summit, <http://www.genevacall.org/news/events/f-events/2001-2010/2009-19jun-finalpart.pdf> (last accessed 3 October 2009).

⁷³ See e.g. *OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications of October 2001*, online: http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html (last accessed 3 October 2009); the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* adopted on 13 August 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights, UN ESCOR, 55th Sess., UN Doc. E/CN.4/Sub.2/2003/12/Rev.1, 26 August 2003; Human Rights Council, *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HCR/8/L.8, 18 June 2008; Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*', in Alston, *supra* note 46, at 177; Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *The Yale Law Journal* 443 (2001).

⁷⁴ See *Minimum Humanitarian Standards, Analytical Report of the Secretary-General submitted pursuant to Commission of Human Rights Resolution 1997/21*, UN ESCOR, 54th Sess., UN Doc. E/CN.4/1998/87, 5 January 1998.

⁷⁵ See Harvard Program on Humanitarian Policy and Conflict Research, *supra* note 66, notably the *Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law (IHL)*. See for instance *Third informal, High-Level Expert Meeting on Current Challenges to IHL* (22-24 May 2006), http://ihl.ihlresearch.org/data/n_0002/resources/live/AlabamaIIISummary.pdf (last accessed 3 October 2009).

which both sides are not bound by the same rules, which would be contrary to the principle of the equality of belligerents before IHL.⁷⁶

In view of the aforementioned difficulties, it may be preferable to negotiate with individual armed groups specific codes of conduct that they could adopt and which interpret and adapt existing IHL rules to their specific situation. When such codes of conduct are adopted as a result of negotiations with international players and publicly announced, they may be considered to constitute both unilateral declarations binding the group and internal “legislation” implementing such commitments. This would help achieve the greatest possible sense of ownership by a given armed group and to obtain rules as adapted as possible to the concrete situation the group is involved in and the humanitarian problems it raises. For example, the prohibition of trials without judicial guarantees may represent for a group with stable territorial control something very different than for a group without such control. For the former, the principle that courts must be established by law may raise problems discussed below,⁷⁷ while for the latter, the prohibition may mean that it is barred from sentencing anyone.

Such codes of conduct should obviously contain provisions on their dissemination and enforcement within the armed group and designate, if possible, an outside monitoring mechanism. Here again a certain analogy can be made with codes of conduct and social labelling mechanisms adopted by or for trans-national enterprises,⁷⁸ which can be efficient only if they translate, reformulate and reconceptualize the general human rights norms into something meaningful for the given enterprise and its field of activities.⁷⁹ The mere discussion and drafting of such codes within an armed group would certainly have a considerable impact in terms of causing groups to reflect upon and perhaps alter their behaviour. Armed groups might also relish the opportunity to manifest their acceptance of IHL in order to sway local and/or international public opinion.

⁷⁶ See *supra* note 47.

⁷⁷ See *infra* notes 114-124 and accompanying text.

⁷⁸ See Clapham, *supra* note 51, at 212, n. 74; Dubin, ‘The direct application of human rights standards to and by transnational corporations’, 61 *Int’l Comm. Jur. Rev.* 35 (1999), at 62-65; T. Sagafi-Nejad, *The UN and transnational corporations: from code of conduct to global compact* (2008). See also *infra* note 155.

⁷⁹ See e.g. Amnesty International, *Human Rights Principles for Companies*, Document ACT 70/01/98 and *Multinational enterprises and Human Rights, A report by the Dutch Sections of Amnesty International and Pax Christi International* (1998).

Once several codes have been developed with different armed groups they would then offer a sound basis for future developments of IHL. At the very least they would influence the development of customary international law (if it is accepted, as suggested above, that the practice of armed groups contributes to customary IHL of non-international armed conflicts). Another outgrowth of the process of drafting such codes or collecting armed groups' declarations of acceptance is that States may realize that several groups refuse to accept certain provisions of IHL or that they go beyond existing IHL, e.g. when they prescribe not to target, except where absolutely necessary, enlisted government soldiers. In both cases States may wish to react to such practices of armed groups during conflict by adapting the existing rules.

C. Rewarding respect of the law

A step which would both make IHL more realistic for armed groups and increase their sense of ownership is to reward them for respecting IHL. In international armed conflicts, fighters enjoy combatant status and become prisoners of war if they fall into the power of the enemy. As such, they may not be punished for the mere fact of having directly participated in hostilities (including for having killed enemy combatants). They may and must however be punished if they violate IHL. They have therefore a direct interest to comply with IHL, in order to retain immunity from punishment. In non-international armed conflicts, a member of a rebel armed group who falls into the power of the government may be punished for the simple fact of having fought, independently of whether or not he complied with IHL. Most national criminal laws will qualify the killing of a government soldier during an armed rebellion and the killing of a peaceful civilian in the same way: as murder. As the punishment for this crime is always harsh, any additional violations of IHL will not considerably increase the punishment. It is therefore difficult to motivate a member of an armed group to comply with IHL if his treatment by the government will not be affected by such compliance. Understanding this difficulty, the ICRC suggested to the Diplomatic Conference which adopted Protocol II, a provision which would have required a tribunal sentencing someone for having participated in a non-international armed conflict to take into account, to the largest extent possible, whether the accused complied with

Protocol II.⁸⁰ This proposal was unfortunately rejected. In State practice, as soon as a non-international armed conflict intensifies to a certain level, governments often do not punish every individual “rebel” captured while carrying his weapon openly, except for acts of terrorism, but rather simply intern him or her.⁸¹ However, States have refused to translate this practice into an obligation under IHL. They even rejected the ICRC proposal to prohibit the carrying out of death sentences during a conflict.⁸² All that survived is an appeal to extend, at the end of hostilities, the broadest possible amnesty to persons having participated in the conflict⁸³ – although war crimes would be excluded.⁸⁴ Any of the aforementioned ICRC proposals that give some form of legal incentive to those who respect IHL deserves to be revived.⁸⁵ Another idea might be to delay any criminal prosecution for acts of hostilities other than violations of IHL and human rights until the end of hostilities, when the atmosphere is less passionate and reconciliation can be achieved.

Third party States could reward members of armed groups fighting abroad while respecting IHL in two ways. First, they could consider prosecution for the mere fact of having participated in hostilities as a persecution leading to eligibility as a refugee, while denying refugee status to members of armed groups who violated IHL.⁸⁶ Similarly, third States could apply the exemption from extradition for political offenders in extradition treaties to members of armed groups involved in an armed conflict, except for acts contrary to IHL.⁸⁷ The same attitude could be adopted in providing mutual judicial assistance in criminal matters. This is another reason why, in armed conflicts, only acts contrary to IHL should be classified as terrorist acts in international anti-terrorism law.⁸⁸

⁸⁰ Art. 10 (5) of Draft Protocol II, *supra* note 28.

⁸¹ See for State practice, Veuthey, *supra* note 3, at 216-240, and Bugnion, *The International Committee*, *supra* note 39, at 632.

⁸² See *Draft Protocol II*, *supra* note 28, Art. 10 (3).

⁸³ Art. 6 (5) of Protocol II.

⁸⁴ See Constitutional Court of Colombia, *supra* note 33, paras. 41-42.

⁸⁵ See also *Report of the Secretary-General*, *supra* note 19, para. 44.

⁸⁶ An example for the latter is the case *Sivakumar v. Canada (Minister of Employment and Immigration)*, 1 F.C. 433 (C.A.), Federal Court (Canada), 4 November 1993, in which a LTTE member was denied refugee status although he had to fear persecution in Sri Lanka, because he had violated IHL. Available at: <http://www.unhcr.org/refworld/docid/3ae6b695c.html> (last accessed 3 October 2009).

⁸⁷ See *Mahmoud el-Abed Ahmad, v. George Wigen et al.*, 726 F. Supp. 389, United States District Court for The Eastern District of New York, 26 September 1989.

⁸⁸ See Sassòli and Rouillard, ‘La définition du terrorisme et le droit international humanitaire’, *Revue québécoise de droit international (Hors-série), Études en hommage à Katia Boustany* 29 (2007), at 41-44.

4. Promotion of IHL among Armed Groups

Despite some doubts expressed in relation to some of the rules outlined in the previous section, the main problem is not the content of the rules of IHL, but the fact that they are not sufficiently implemented by armed groups. This section considers possible mechanisms to directly engage and integrate armed groups into the international legal frameworks they are expected to respect. The most important thing is to educate armed groups about the rules of IHL. However, they must also be allowed and encouraged to commit themselves to comply with IHL and they must be assisted in respecting such commitments.

A. Dissemination

The first step in encouraging armed groups to conform to IHL is to educate them on the relevant provisions.⁸⁹ This includes explaining the very notion of IHL and the separation between *jus ad bellum* and *jus in bello*. If combatants within armed groups are not properly instructed, the very detailed rules of IHL, for the myriad different situations that arise in armed conflicts, will never be respected. This will require informing combatants of existing rules and explaining these rules, but it will also require making all parties to a conflict understand that IHL applies even in situations where the worst of enemies are being confronted. Protocol II therefore prescribes that IHL must be “disseminated as widely as possible,”⁹⁰ i.e. including to armed groups.

To be successful, such dissemination must begin during peacetime, for once an armed conflict breaks out, with its heightened levels of animosity and polarisation, it is often too late to learn the applicable rules and to alter practices accordingly. All this is even more difficult for non-international armed conflicts involving armed groups. While it is possible to train governmental forces in view of their possible future involvement in either an international or a non-international armed conflict, it is often politically delicate to engage potential armed groups

⁸⁹ *Report of the UN Secretary-General*, *supra* note 19, para. 41.

⁹⁰ Art. 19 of Protocol II.

before they are actually involved in armed conflict. Once the conflict has started, it is often too late to contact combatants.

Sometimes it is unrealistic to apply the standard procedure of passing over the rank and file troops and focus training efforts on the leaders of armed groups. Many armed groups do not have a formal training structure. Their members do not receive, as do members of regular armed forces, months of basic training. Frequently, once they become members of the armed group, they are immediately sent to fight. In addition, their leadership is, for reasons of secrecy, also much less in direct contact with the actual fighters than in regular armed forces. Non-State groups often leave the choice of means and methods to a greater extent to those actually fighting in the field than regular commanders. We should at least be able to suggest some realistic ways in which such people can be trained to respect IHL.

Perhaps the most promising preventive action is to ensure that before any armed conflict breaks out, the whole population has a basic understanding of IHL in order to realize that even in armed conflict, certain rules apply irrespective of who is right and who is wrong, protecting even the most licentious belligerents. Thus, political or social activists, journalists, students, schoolchildren, or anyone else who may become a member or supporter of an armed group must understand the obligations to which everyone's actions are subject, and the rights each may claim, in armed conflicts.⁹¹

B. Allowing and encouraging armed groups to commit themselves to respect IHL

The second requirement for ensuring that armed groups comply with IHL is to increase their sense of ownership over this law. Formally, States are the legislators of international law and it is this law that also binds armed groups. As explained above, in theory, armed groups are bound by international rules not because they have accepted them, but because States have accepted them, because the relevant territorial State has legislated for them or because customary law so

⁹¹ This obligation to disseminate IHL already in peacetime is prescribed in Arts. 47, 48, 127, 144, respectively, of the four Conventions, and Art. 83 of Protocol I.

determines.⁹² All these legal constructions have the disadvantage of making the obligation of the armed group often, i.e. in the case of traditional internal insurgencies by armed groups against government forces, dependent on the government against which they fight. In practice, it is however always easier to obtain respect of a rule by invoking the acceptance of that rule by the addressee, rather than by arguing in favour of sophisticated legal constructions. It is therefore psychologically and diplomatically preferable to have a commitment by the group itself.⁹³ Most importantly, those elites, representatives, activists or sympathizers of a given armed group who have been involved in discussions about the applicability of IHL to their group will be more familiar with these rules, will view their respect as important for the credibility of their group, and will encourage potentially recalcitrant individuals within the group to respect these rules. Informal networks of IHL “advocates” within armed groups can be created in such a manner. “Armed groups are not monoliths. They have entry points [...]”.⁹⁴ Some members and leaders, who undertook the commitment, do not want to lose face by showing that they do not have any influence over the group and that the group continues to violate IHL as much as before the commitment was undertaken.

One method of securing such a commitment is explicitly mentioned in IHL. Article 3 common to the Geneva Conventions encourages the parties to a conflict not of an international character “to bring into force, by means of special agreements, all or part of the other provisions” of the Conventions. Such agreements are then governed by international law.⁹⁵ They were in particular concluded, under the auspices of the ICRC, in the different conflicts in the former Yugoslavia.⁹⁶ Under the auspices of the UN, similar less formal agreements, sometimes referred to as codes of

⁹² See Zegveld, *supra* note 5, at 14-18 and *supra* notes 29-37 and accompanying text.

⁹³ *Report of the Secretary-General*, *supra* note 19, para. 41. Zegveld, *supra* note 5, at 17, provides the example of the FMLN in El Salvador, which would not let the ICRC evacuate wounded enemies because it “did not consider itself bound by Protocol II, unless it had concluded an agreement to this effect.”

⁹⁴ *Report of the Secretary-General*, *supra* note 19, para. 46.

⁹⁵ Sivakumaran, *supra* note 32, at 389-392.

⁹⁶ See for their text Sassòli and Bouvier, *supra* note 3, at 1761-1771; Jakovljevic, ‘Memorandum of Understanding of 27 November 1991: International Humanitarian Law in the Armed Conflict in Yugoslavia in 1991’, 3 *Yugoslav Review of International Law* 301 (1991); Jakovljevic, ‘The Agreement of May 22, 1992, on the Implementation of International Humanitarian Law in the Armed Conflict in Bosnia-Herzegovina’, 39 *Yugoslovenska Revija za Medunarodno Pravo* 212 (1992); Sandoz, ‘Réflexions sur la mise en œuvre du droit international humanitaire et sur le rôle du Comité international de la Croix-Rouge en ex-Yougoslavie’, 4 *SZIER* 461 (1993). See for examples from other conflicts Sivakumaran, *supra* note 28, at 391-392.

conduct, were concluded in Sudan, Congo and Sierra Leone.⁹⁷ They have the particular advantage of clarifying the law for all parties to a conflict and of increasing the obligations compared to those obligations that would otherwise apply under the law of non-international armed conflicts.

National liberation movements may also make a unilateral declaration of accession to certain IHL treaties, which brings them into force between them and State parties.⁹⁸ Other armed groups have also made declarations of intention to respect either the law of non-international armed conflicts that they would have to respect anyway, or, in addition, some rules of the law of international armed conflicts they are normally not bound to respect.⁹⁹ In the latter case it is important that such groups realize that their declarations do not imply that their (governmental) enemies are equally bound to such additional rules. Such declarations are often motivated by questions of propaganda and status, which does not matter as long as the declaring group can be brought to implement them. Legally, the application of parts or all of IHL never confers any legal status upon an armed group¹⁰⁰ beyond, I would add, the functional legal personality necessary to be addressees of those rules of IHL.

In the non-governmental International Campaign to Ban Landmines (ICBL), the Non State Actors Working Group and Geneva Call have succeeded in obtaining adherence to a “Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action” by 38 armed groups.¹⁰¹ Geneva Call succeeds at drawing such groups into the political arena for dialogue, and hopes to get them to adhere to wider basic humanitarian principles through the landmine issue. State parties to the Ottawa Mine Ban Treaty¹⁰²

⁹⁷ See Commission on Human Rights, *Fundamental standards of Humanity, Report of the Secretary-General submitted pursuant to Commission resolution 2000/69*, UN ESCOR, UN Doc. E/CN.4/2001/91, 12 January 2001, paras. 42-45.

⁹⁸ Arts. 96 (3) and 1 (4) of Protocol I and Art. 7 (4) of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980), 1342 UNTS 142 (entered into force 2 December 1983).

⁹⁹ Sivakumaran, *supra* note 32, at 387-388; Plattner, ‘La portée juridique des déclarations de respect du droit international humanitaire qui émanent de mouvements en lutte dans un conflit armé’, 18(1) *Revue belge de droit international* 298 (1984-1985); Veuthey, *supra* note 3, at 50.

¹⁰⁰ Art. 3 (4) common to the four Geneva Conventions.

¹⁰¹ See for the list online: Geneva Call, *supra* note 17.

¹⁰² Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), 2056 UNTS 211 (entered into force 1 March 1999).

acknowledged the importance of engaging non-State armed groups in a total antipersonnel mine ban.¹⁰³ The Deed of Commitment and the follow-up work of Geneva Call were mentioned by the UN Secretary-General as a “successful example” of engaging armed groups.¹⁰⁴

As mentioned above, a particular way of obtaining a commitment, which is simultaneously part of the next step – implementation – is to negotiate with an armed group a code of conduct.¹⁰⁵ In my view, a declaration by an armed group that it will comply with “the Geneva Conventions and Additional Protocols” merits some scepticism. There are some 500 articles in those treaties! Often, a two page code of conduct is preferable, which really addresses the genuine humanitarian issues that arise for a given armed group in the field. It involves a commitment, obliges leaders to think about what the abstract rules mean in practice for their way of fighting and translates the legal provisions into instructions understandable for the fighters of a given group.

C. Encouraging and assisting armed groups to implement the law

States must undertake specific national measures of implementation in order to comply with their obligations under IHL.¹⁰⁶ The ICRC has a unit within its legal division which advises States how to implement IHL, how to adopt legislation in conformity with IHL, and which advises them to create inter-ministerial commissions looking into IHL issues, for example. Such advice is also needed for armed groups. Obviously, armed groups are confronted with other difficulties in implementing IHL than States and the solutions must consequently also be different. They probably do not include inter-ministerial commissions. Non-State armed groups need assistance to give proper instructions to their members, and to establish internal monitoring systems to

¹⁰³ See e.g. the *Managua Declaration* adopted by the Third Annual Meeting of States Parties to the Convention, 21 September 2001, para. 12, <http://www.un.org/News/Press/docs/2001/dc2809.doc.htm>, and the Final declaration, fifth meeting of States parties, Bangkok, 15-19 September 2003, para. 12, http://www.gichd.ch/fileadmin/pdf/mbc/MSP/5MSP/5MSP_Final_Report_english.pdf (last accessed 5 October 2009).

¹⁰⁴ *Report of the Secretary-General*, *supra* note 19, para. 43.

¹⁰⁵ See for a list of armed groups which have adopted codes of conduct, La Rosa and Wuerzner, ‘Armed groups, Sanctions and the Implementation of international Humanitarian Law’, 90 *Int’l Rev. Red Cross* 327 (2008), at 333.

¹⁰⁶ See Art. 80 (1) of Protocol I and for criminal legislation Arts. 49 (1), 50 (1), 129 (1), and 146 (1), respectively, of the four Conventions. On the ICRC efforts to encourage such national measures of implementation see Berman, ‘The ICRC’s Advisory Service on International Humanitarian Law: The Challenge of National Implementation’, 78 *Int’l Rev. Red Cross* 338 (1996).

ensure that IHL is respected in the activities of the group.¹⁰⁷ Geneva Call requires each armed group signatory of its Deed of Commitment to establish self-regulation mechanisms (orders and directives, measures of information, dissemination and training, disciplinary sanctions in case of non-compliance, etc.) to ensure that its commanders and rank-and-file are aware of and abide by the Deed of Commitment requirements.¹⁰⁸

If we want to obtain respect for IHL by armed groups, we should put ourselves into the shoes of their leaders. Obviously our advice will be based upon the assumption that the group wants to respect IHL. This assumption may often be wrong. It is however often equally wrong for States, which does not hinder us from providing them with advice based on that assumption. Experience shows that such advice will often contribute to making its beneficiaries want to comply with IHL even if initially they did not want to do so. I do not think the ICRC has a list of States to which it does not provide advisory services to on the basis that it considers that in any case they are not willing to respect IHL.

In my view, it is more difficult to implement IHL for an armed group than for a government with a structure and institutions in place. How does a clandestine, illegal group ensure compliance with IHL by its members? In practice, one can well imagine disciplinary sanctions, such as demotion, assignment of extra duty or withdrawal of the weapon.¹⁰⁹ According to some, even such measures have to comply with Human Rights guarantees.¹¹⁰ Often criminal prosecution will be necessary, and such prosecution must comply with judicial guarantees under IHL. But how can an armed group provide a fair trial? Based on what legislation? Even beyond “legislation” for their own members, in my view armed groups that have territorial control and therefore *de facto* control over persons who are not their members in those territories, must determine the rights and obligations of such persons by some sort of “legislation.” This could guarantee a minimal rule of law, with all its inherent benefits, for such persons. States will strongly object to any kind of “legislation” by armed groups on their territory. However, how else than based upon

¹⁰⁷ International Council on Human Rights Policy, *supra* note 51, at 49-51.

¹⁰⁸ *Supra* note 17.

¹⁰⁹ La Rosa and Wuerzner, *supra* note 105, at 334.

¹¹⁰ *Ibid.*, without explaining why armed groups are bound by International Human Rights Law and what such guarantees mean for an armed group.

general and abstract regulations can the latter obtain compliance by their members, punish those who do not comply or require certain conduct from those who are under their *de facto* control?

IHL prohibits that anyone be held guilty on account of any act or omission that does not constitute a criminal offence under *law*, at the time when it was committed.¹¹¹ Both in respect of their members violating IHL and in respect of persons found in territories under their control, the question arises whether armed groups may legislate.¹¹² They certainly have to respect the prohibition of retroactive criminal legislation.¹¹³ From a humanitarian point of view, one may even prefer that they could not legislate. It is sufficient that the group enforces the criminal law of the country, which should include international criminal law. Ad hoc criminal legislation is not desirable. The government may, however, introduce new legislation during the conflict, including outlawing support for armed rebels. Is it realistic to expect rebels not to prohibit support for their enemy? Such differential treatment would, here again, be contrary to the IHL principle of the equality of the belligerents.

A parallel question arising both in respect of their own members and of persons in territories under their control is whether armed groups may establish a regularly constituted court.¹¹⁴ Only such a court may pass criminal sentences.¹¹⁵ One may argue that if IHL requires armed groups to comply with such a standard it must also enable them to comply with it, inter alia by establishing courts. It is however difficult to imagine a criminal court constituted by anyone else than by the State. Hastily set up “popular” or “revolutionary” courts rarely conduct fair trials. Indeed, courts set up by armed groups in El Salvador, Nepal and Sri Lanka were subject to harsh criticism by intergovernmental and non-governmental Human Rights bodies.¹¹⁶ In Human Rights Law, to be regularly constituted, a court must be established by law,¹¹⁷ which again raises the question

¹¹¹ Art. 6 (2) (c) of Protocol II.

¹¹² La Rosa and Wuerzner, *supra* note 105, at 337-340 are very cautious and vague, but do not exclude such a possibility.

¹¹³ *Ibid.*

¹¹⁴ See *Ibid.* See generally Somer, *supra* note 48, at 655-690, and Sivakumaran, ‘Courts of Armed Opposition Groups’, 7 *Journal of International Criminal Justice* 489 (2009), at 495-500. In my view, Article 3 common to the Conventions, protecting all those who do no longer directly participate in hostilities, also binds an armed group in respect of its own members it detains and wants to prosecute.

¹¹⁵ Art. 6 (2) (c) of Protocol II and Art. 3 (1) (d) common to the Conventions.

¹¹⁶ Sivakumaran, ‘Courts’, *supra* note 114, at 491-495; Somer, *supra* note 48, at 679-682.

¹¹⁷ Art. 14 (1) of the the International Covenant on Civil and Political Rights.

discussed above. Protocol II, simply requires “a court offering the essential guarantees of independence and impartiality”,¹¹⁸ which implies that even insurgents may set up such courts.¹¹⁹ Even if the latter interpretation is accepted, the substantive due process guarantees must be adapted to the reality in which an armed group fights.¹²⁰ If we want to have those guarantees to have an impact on reality, they must be interpreted in a way which makes it possible for an armed group to comply with them. To deny armed groups the opportunity to set up courts means to prohibit them from punishing whomever and for whatever action. It is difficult to deny an armed group the possibility to punish an enemy, at least for war crimes. Moreover, to allow them to punish their own members for war crimes is even more desirable from the perspective of increasing respect for IHL. It is unclear whether armed groups have an obligation to investigate and prosecute war crimes. The ICRC Customary Law Study considers that only States have such an obligation.¹²¹ Punishment may however be required from a superior to avoid command responsibility,¹²² as the latter applies also in non-international armed conflicts according to the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹²³ To require an armed group to hand over any suspects of war crimes among its own members or captured enemies to the law enforcement system of the government is only a theoretical solution. In practice it is completely unrealistic,¹²⁴ and will only lead to impunity for the members of the groups and to summary executions of captured enemies.

On both issues – whether and on what issues armed groups may legislate and whether, in respect of what crimes and under what conditions they may set up courts – an interesting proposal¹²⁵ would be to limit the admissibility of such action regarding civilians under control of an armed group by analogy to what an occupying power is allowed to do in IHL of international armed

¹¹⁸ Art. 6 (2) of Protocol II. See for a discussion of these terms Somer, *supra* note 43, at 271-276.

¹¹⁹ *Commentary Protocols*, *supra* note 29, para. 4600.

¹²⁰ See Somer, *supra* note 48, at 676-678, and for detailed proposals Sivakumaran, ‘Courts’, *supra* note 114, at 500-508.

¹²¹ Henckaerts and Doswald-Beck, *supra* note 22, at 607-611.

¹²² See Arts. 86 (2), 87 (3) of Protocol I and Art. 28 (1) (b) of the Rome Statute, *supra* note 13.

¹²³ See *supra* note 45.

¹²⁴ Sivakumaran, ‘Courts’, *supra* note 114, at 510.

¹²⁵ See *ibid.*; Zegveld, *supra* note 5, at 65-66, and Fleck, ‘The Law of Non-International Armed Conflict’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), at 628, who also refer to some actual practice.

conflicts.¹²⁶ The law of belligerent occupation indeed also deals with a situation where someone has *de facto* control over persons without being the sovereign. The disadvantage of this proposal is that armed groups would be subject to more restrictions than their enemy, the government, because the latter could certainly not be expected to respect on the territory it controls the restraints applicable to an occupying power. Such a differentiation would be politically delicate and contrary to the principle of equality of the belligerents before IHL.¹²⁷

Both issues discussed here also touch more generally upon this fundamental principle of the equality of the belligerents before IHL. How can an armed group be expected to respect IHL if the law discriminates against it? In addition, it is sometimes a contentious point between the parties to a conflict as to which of them is the government of a State. From a pragmatic and humanitarian point of view, is it not preferable to give armed groups the possibility to respect IHL, rather than exclude them from the outset? Who believes that the latter principled approach will lead armed groups not to punish anyone and not to give orders to persons under their control? Will they not rather do it anyway, but simply without any legal guarantees and protection for those affected? Does anyone believe that the monopoly of violence exercised by the State, which is a great achievement of the modern State, including from a humanitarian and Human Rights point of view, will be more easily re-established if armed groups are denied the right to legislate and to try individuals?

5. Monitoring Observance of IHL by Armed Groups

Even if the rules are realistic, known, accepted and internalized by an armed group, just as for States, the result – compliance – must be monitored. Such verification may take the form of self-reporting and/or independent external monitoring.

A. Self-reporting by armed groups

¹²⁶ See in particular Arts. 64 and 66 of Convention IV and Art. 43 of the Hague Regulations.

¹²⁷ See *supra* note 47.

The most traditional and least intrusive mechanism to monitor the respect of international obligations, including International Human Rights Law, consists of requiring State parties to periodically report to an international monitoring body on their respect and implementation of their obligations.¹²⁸ Such reporting obligations were formerly envisaged for IHL, for example concerning national measures of implementation, but States never accepted them.¹²⁹ If armed groups have obligations under IHL, they could also be formally or informally encouraged to report on their compliance. Geneva Call periodically requests armed groups that have signed their Deed of Commitment on the removal of landmines to report on their compliance and on the measures taken to implement the Deed.¹³⁰ Similarly, the former UN Sub-Commission on the Promotion and Protection of Human Rights suggests that trans-national enterprises periodically report on their compliance with human rights obligations to UN or other international or national bodies.¹³¹ If armed groups were to seriously report on their compliance, they may even be allowed to report on the compliance of their governmental or non-governmental opponents. This may be an important incentive for compliance and counter the criticism made by armed groups that unlike States (and individuals), they have no possibility to lodge complaints. Such reports could either be submitted periodically or on complaints by individuals¹³² or by opposing groups affected by violations. The mere responsibility for writing such reports and collecting the necessary data could increase the awareness of IHL among some segments of the group and add to their sense of ownership of these laws.

Several options exist for the addressee of such reports. Human Rights treaty bodies increasingly deal, under different legal constructions, with the *lex specialis* which constitutes in many respects, IHL.¹³³ If one considers human rights obligations to bind armed groups,¹³⁴ they should

¹²⁸ See for an overview Kornblum, 'A comparison of self-evaluating state reporting mechanisms', 77 *Int'l Rev. Red Cross* 39 (1995).

¹²⁹ *Ibid.* at 43 and ICRC, *Report to the International Conference on the Protection of War Victims* (1993), partly reproduced in Sassoli & Bouvier, *supra* note 3, at 702-703.

¹³⁰ *Supra* note 17.

¹³¹ See *Norms on the Responsibilities of Transnational Corporations*, *supra* note 73, para. 16.

¹³² Such individual complaints procedures against armed groups are suggested by Kleffner, 'Improving compliance with international humanitarian law through the establishment of an individual complaints procedure', 15 *Leiden J. Int'l L.* 237 (2002), at 247.

¹³³ R. Arnold and N. Quéniwet (eds.), *International Humanitarian Law and Human Rights Law : Towards in New Merger in International Law* (2008) ; Sassoli, 'La Cour européenne des droits de l'homme et les conflits armés', in S. Breitenmoser *et al.* (eds.), *Droits de l'homme, démocratie et Etat de droit, Liber amicorum Luzius Wildhaber* 709 (2007), at 713-714 ; Heintze, 'On the relationship between human rights law protection and international

be allowed to report on their compliance to treaty bodies. This could be undertaken when the “host” State (in which the armed group operates) reports on its own compliance practices. Treaty bodies could receive such reports in the same informal way in which they receive NGO reports. It would admittedly be more delicate for them to make recommendations to armed groups, as the host States will certainly object. Although their procedure is less formalized, Charter-based institutions such as the UN Human Rights Council or any ad hoc body it might establish may face the same difficulty. States would certainly object less to the ICRC receiving such reports, as they are accustomed to seeing the ICRC interacting with armed groups and because IHL provides an explicit legal basis for such interaction, allowing the ICRC to “offer its services to the Parties [i.e. including the non-governmental one] to the [non-international] conflict.”¹³⁵ However, the ICRC is an institution that prioritizes its humanitarian fieldwork, which it might not be willing to jeopardize by managing politically sensitive reports, especially if it has to comment upon them. Furthermore, an important part of the impact of any reporting system is due to the publicity given to the reports received and comments by the supervisory body. The ICRC is probably not willing to be involved in such a public mechanism, which would be contrary to its traditionally confidential approach.¹³⁶ Finally, the existence of a distinct body that publishes and provides comments with regard to the IHL performance of an armed group may allow confidentially working ICRC representatives in the field to verify the validity of such reports. An independent, expert body receiving reports by armed groups and commenting in this manner might be established within the framework of the UN, by the periodical International Conferences of the Red Cross and the Red Crescent or by a periodical meeting of the High Contracting Parties to the Geneva Conventions, the first of which was convened by Switzerland, the depositary of the Conventions, in 1998.¹³⁷ Armed groups may however consider the UN, the High Contracting Parties, and even the International Conference of the Red Cross, to be inherently biased against them because they include States, but not armed groups.

humanitarian law’, 86 *Int’l Rev. Red Cross* 789 (2004); Martin, ‘Le droit international humanitaire devant les organes de contrôle des droits de l’homme’, *Droits fondamentaux* 121 (2001). See also *infra* note 142.

¹³⁴ See *supra* note 51.

¹³⁵ Art. 3 (2) common to the four Conventions.

¹³⁶ *Infra* note 152 and accompanying text.

¹³⁷ See ‘First Periodical Meeting on International Humanitarian Law’, 80 *Int’l Rev. Red Cross* 366 (1998).

B. External Monitoring

1. UN Charter-based mechanisms

The UN Charter-based mechanisms, in particular the Security Council, the former UN Human Rights Commission and now the UN Human Rights Council have condemned violations of IHL by armed groups,¹³⁸ which presupposes that they considered themselves competent to monitor the respect of that law by such groups. The UN Secretary-General's Special representative on Children and Armed Conflict regularly reports on violations of the standards it has established (and which go in some respect beyond existing international law) by armed groups.¹³⁹ The former UN Human Rights Commission rejected, however, a proposal to set up a special mechanism for violations by such groups.¹⁴⁰ The only mechanisms to monitor the behaviour of armed groups are those set up by the UN to monitor the fulfilment of obligations outlined in peace agreements. For example, in response to the San José Agreement of 1990, ONUSAL produced reports detailing human rights violations by the government of El Salvador as well as violations by the FMLN and addressed recommendations to the FMLN in light of its observations.¹⁴¹

2. Treaty-based human rights mechanisms

The treaty monitoring mechanisms of International Human Rights Law are very reluctant to monitor the compliance by armed groups. The Inter-American Commission on Human Rights,

¹³⁸ See e.g. SC Res. 1193 (1998) concerning Afghanistan, 764 (1992), 771(1992), 780 (1992), 787 (1992), 827 (1993), 913 (1994), 941 (1994), and 1010 (1995) concerning the former Yugoslavia, 814 (1993) concerning Somalia; Kooijmans, 'The Security Council and Non-state Entities as Parties to Conflicts', in K. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* 339 (1998) and for most recent practice Kleffner, 'The collective accountability of organized armed groups for system crimes', in A. Noellekamper and H. van de Wilt (eds.), *System Criminality in International Law* 238 (2009), at 251 n. 51. For the former UN Human Rights Commission see references in Zegveld, *supra* note 5, at 32, 33, 46, 65-67, 145.

¹³⁹ *Report of the Secretary-General on children and armed conflict in Uganda*, S/2009/462, 15 September 2009, paras. 15-20 ("grave violations against children perpetrated by the Lord's Resistance Army in the region"); *Report of the Secretary-General on children and armed conflict in Burundi*, S/2009/450, 10 September 2009, notably paras. 8-16; R. Coomaraswamy, *Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, A/HRC/12/49, 30 July 2009, in particular paras. 9-19.

¹⁴⁰ Matas, *supra* note 51, at 621.

¹⁴¹ A. Clapham, *International Human Rights in the Private Sphere* (1996), at 116. See also Clapham, *Human Rights Obligations*, *supra* note 51, at 272.

which considers itself competent to apply IHL,¹⁴² has probably gone farthest in this respect. It has decided that when receiving and reviewing reports by States on their compliance with human rights, it may monitor the behaviour of armed opposition groups, including their compliance with IHL.¹⁴³ However, its procedures do not permit a dialogue with armed groups and it has no means to enforce its findings about armed groups.¹⁴⁴ In any case some human rights defenders have expressed their concern that trying to monitor armed groups would simply overextend “resources towards an area where reporting can have little effect,” place the safety of human rights workers “more at risk than ever,” and would never truly satisfy States.¹⁴⁵ In the individual complaints procedure, even the Inter-American Commission claims that it could not evaluate the behaviour of armed groups under IHL or human rights law.¹⁴⁶ Such evaluation would indeed raise delicate procedural problems.

Some suggest that a specific individual complaints procedure should be instituted for violations of IHL, including against armed groups, citing that the procedural difficulties of communicating with armed groups can be overcome.¹⁴⁷ Nevertheless, such a procedure may not be very well suited to the specific kinds of violations of IHL or of gross violations of human rights committed by armed groups. First, these violations typically occur on the battlefield, and they can only be curtailed through immediate reaction – which would not occur through lengthy complaints procedures. Violations also rarely arise from judicial, administrative, and legislative decisions or inaction against which appeal and review procedures prove appropriate and meaningful. Accordingly, implementation through permanent, preventive, and corrective scrutiny in the field is much more appropriate than *a posteriori* control, on demand, in a quasi-judicial procedure. In

¹⁴² See in particular the cases *Abella v. Argentina (Tablada)*, Case 11.137, Inter-American Commission of Human Rights, 18 November 1997; *Coard et al. v. United States*, Case 10.951, Inter-American Commission of Human Rights, 29 September 1999. See however the reservations expressed by the Inter-American Court of Human Rights in its Judgment of 4 February 2000, in the Case *Las Palmeras v. Colombia*, Preliminary objections, para. 34. For an analysis of the argumentation presented by the Commission, see Zegveld, ‘The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case’, 80 *Int’l Rev. Red Cross* 505 (1998).

¹⁴³ Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser/L/V/II.102, Doc. 9 rev.1, at 72, para. 6, based on GA Res. 1043 (XX-0/90), 1990.

¹⁴⁴ Zegveld, *supra* note 5, at 158-160.

¹⁴⁵ A. Clapham, *International Human Rights*, *supra* note 141, at 123; Organización de los Estados Americanos, *Informe anual de la Comisión interamericana de los derechos humanos, 1990-1991*, OEA/Ser.L/V/II.79.rev.1 Doc.12, 22 February 1991.

¹⁴⁶ Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in the Republic of Colombia*, OEA/Ser/L/V/II.53, Doc. 22 rev.1, at 16, and *Third Report*, *supra* note 143, at 72, para. 5.

¹⁴⁷ Kleffner, ‘Improving compliance’, *supra* note 132, at 247.

armed conflicts, *redress* to the victims is central, and therefore a confidential, co-operative, and pragmatic approach would be more appropriate.

3. The International Committee of the Red Cross (ICRC)

As mentioned above, IHL in non-international armed conflicts prescribes a specific monitoring mechanism that is equally addressed to armed groups and States: the right of the ICRC to offer its services.¹⁴⁸ This means that in non-international armed conflicts the ICRC has no *right* to undertake its usual activities in the fields of scrutiny, protection, and assistance, though it may *offer* these services to an armed group and then initiate the services with the group that has accepted such an offer. This right of initiative clearly implies that such an offer never constitutes interference in the internal affairs of the State concerned, nor is the undertaking of ICRC activities with a party accepting such an offer an unlawful intervention. Furthermore, such an offer – like any other measure for implementing IHL of non-international armed conflicts – cannot grant any legal status to any party to a conflict.¹⁴⁹ If its offer is accepted, the ICRC deploys the same confidential monitoring activities through bilateral dialogue with those responsible and makes the same kind of interventions with an armed group as it does under the Geneva Conventions with a State involved in an international armed conflict.¹⁵⁰

4. A New Specific Expert Body established by States?

It may be necessary to create a distinct expert body to draft a periodic and public report on the compliance of IHL throughout the world, including by armed groups. This body could be established at the International Conferences of the Red Cross and the Red Crescent, or at the periodic meeting of the High Contracting Parties, and would be charged with receiving and commenting upon reports by armed groups on their compliance with IHL. Because of its normally confidential, field-work-oriented approach, the ICRC might not be the ideal body to

¹⁴⁸ Art. 3 (2) common to the four Conventions. See on ICRC practice, Bugnion, *The International Committee*, *supra* note 43, at 447-465, and Veuthey, *supra* note 3, at 52-61.

¹⁴⁹ Art. 3 (4) common to the four Conventions.

¹⁵⁰ Bugnion, *The International Committee*, *supra* note 43, at 403-844.

undertake this task.¹⁵¹ If such a body is nominated by States, ways must however be found to avoid an automatic State-centric bias of such a body.

To have a distinct body writing such reports could complement the ICRC's confidential field activities. The reports could be based upon periodic or ad hoc reports received from the armed groups themselves, complaints by individual victims and opponent groups, governments, and/or NGOs. In some cases, the ICRC may also choose to provide information, when it abandons its confidential approach because doing so would be in the interests of the victims of the conflict and confidential bilateral measures have not shown sufficient results.¹⁵² In particular, if created by a periodic meeting of the High Contracting Parties, such an expert body could submit its report to this meeting. This would leave to the deliberation of States any decisions about the general measures to be taken to increase respect of IHL,¹⁵³ but would ensure that their deliberations are based upon a sound, impartial and non-selective factual basis. The experience of the UN Human Rights Council nevertheless shows that deliberations between States are highly political and subject to horse-trading. Armed groups are likely to end up as sacrificial lambs in such situations, because they have no horse in the ring. This is however inherent in the present international system, and should not be seen as an argument for not attempting, as far as it is possible, to achieve a basis for such discussions that is less dominated by double standards. At the very least, as evidenced by the experience of truth commissions, the simple existence of an official report on violations provides victims with some relief and constitutes a possible basis for future reconciliation.¹⁵⁴

5. An Auditing Mechanism established by Armed Groups?

¹⁵¹ Zegveld, *supra* note 5, at 162.

¹⁵² See for the conditions in which the ICRC goes public, 'Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of other Fundamental Rules Protecting Persons in Situations of Violence', 858 *Int'l Rev. Red Cross* 393 (2005).

¹⁵³ It should be noticed that under Art. 7 of Protocol I, Switzerland "shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol."

¹⁵⁴ See in particular P. Hayner, *Unspeakable truths: confronting state terror and atrocity* (2001); Hayner, 'Fifteen truth commissions-1974-1994: A comparative study', 16 *Hum. Rts. Q.* 597 (1994); A. Boraine, *A Country Unmasked* (2000); United States Institute of Peace Library, *Truth commissions*, 2003, online: United States Institute of Peace Library, <http://www.usip.org/library/truth.html>.

A much more innovative possibility could be drawn by analogy from ideas and initiatives circulating concerning the respect of human rights by trans-national enterprises.¹⁵⁵ A monitoring body could be established by the armed groups themselves. The basis for this body could be either the individual codes of conduct of armed groups, their unilateral declarations of intention, special agreements concluded among competing factions (including States), or through soft law they establish among themselves. Armed groups might wish to establish an ad hoc monitoring body or work with an existing NGO such as Geneva Call. Individuals and groups who encourage armed groups to commit themselves to IHL should also promote the introduction of a complementary monitoring mechanism – similar to that used to monitor respect of human rights by economic actors. Many trans-national corporations which adopted codes of conduct to respect social and economic rights by their foreign providers or subsidiaries have appointed auditors to monitor respect of those codes.¹⁵⁶ Geneva Call also monitors the respect of Deeds of commitment through a network of NGOs and sporadic field verification missions.¹⁵⁷

6. Responsibility of Armed Groups for Violations

With armed groups as with States, violations occur even if the rules are perfectly realistic, well known, and internalized. The monitoring mechanisms lead to findings of violations. Commitment and monitoring are, at least from a purely legal perspective, useless if violations have no consequences. There must be (and there is) responsibility for violations. There are several different legal recourses that the international community can take to sanction transgressions. Such recourses include applying criminal responsibility, private (civil) legal responsibility, and international legal responsibility.

A. Criminal responsibility

¹⁵⁵ Westfield, 'Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century', 42 *Va. J. Int'l L.* 1075 (2001-2002). For the UN Global Compact initiative, see online: UN Global Compact, <http://www.unglobalcompact.org/>. For ILO initiatives see online: <http://actrav.ilo.org/actrav-english/telearn/global/ilo/guide/main.htm> (last accessed 5 October 2009).

¹⁵⁶ 'Les audits sociaux se multiplient dans les pays émergents', *Le Monde*, 25 September 2003.

¹⁵⁷ See *supra* note 17.

In the Roman-German legal tradition, it used to be said that *societas delinquere non potest* (a society cannot commit a crime), but forms of corporate criminal responsibility are developing at the national level, for example in common law countries and in France, and are proving to perform a useful function.¹⁵⁸ Extending criminal responsibility for serious violations of IHL to armed groups poses no additional conceptual challenge. Interestingly enough, such a proposal was, however, rejected in the International Criminal Court (ICC) Statute.¹⁵⁹ By its nature, the group itself could only be subject to pecuniary (financial) punishment. However, unlike corporations, armed groups will only rarely have sufficient funds to pay fines, and even if they do, they can already be requested to pay compensation in civil law proceedings.

A more effective approach from a punitive point of view would be the idea that once a group is held responsible for a violation, all its members could be held criminally responsible. In the Anglo-Saxon legal tradition such responsibility exists to a large extent through the concept of conspiracy,¹⁶⁰ while Roman-German legal systems adopt more specific crimes of membership in criminal organizations.¹⁶¹ International criminal law has not yet adopted such a concept, but the common purpose theory of the ICTY,¹⁶² the concept of joint criminal enterprise as applied by international criminal tribunals, and, to a lesser extent, the provisions of the ICC Statute on individual criminal responsibility for crimes committed within a group context,¹⁶³ lead sometimes to similar results. However, there are inherent risks in extending individual criminal responsibility in such a manner.¹⁶⁴ First, if the crucial distinction between *jus ad bellum* and *jus in bello* is to be preserved,¹⁶⁵ the mere fact of participating in an armed conflict should not suffice as a criminal enterprise giving rise to criminal responsibility for IHL violations committed.¹⁶⁶ Second, it should not be forgotten that contrary to criminal gangs during

¹⁵⁸ See e.g. B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (1993); J. Pradel, *Droit pénal comparé* (1995), at 306-311.

¹⁵⁹ Art. 25 (1) of the Rome Statute, *supra* note 11, and Ambos, 'Article 25', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* 475 (1999), at 477.

¹⁶⁰ See e.g. Canadian Criminal Code (1985), c. C-46, s. 465.

¹⁶¹ See e.g. Swiss Criminal Code, RS 311.0, Art. 260 ter.

¹⁶² *Prosecutor v. Tadic*, Appeal Judgment, *supra* note 9, at paras. 185-233.

¹⁶³ Art. 25 (3) (d) of the Rome Statute, *supra* note 13.

¹⁶⁴ Sassòli and Olson, 'The decision of the ICTY Appeals Chamber in the Tadic Case: New Horizons for International Humanitarian and Criminal Law?', 82 *Int'l Rev. Red Cross* 733 (2000), at 747-756.

¹⁶⁵ See *supra* note 47.

¹⁶⁶ See Judgment, *Prosecutor v. Brima, Kamara and Kanu*, Special Court for Sierra Leone, Trial Chamber II, 20 June 2007, para. 67, dismissing the argument of the Prosecutor according to whom the Accused participated in a

peacetime, membership in an armed group is often not optional and often not driven by criminal motivations even if it is foreseeable that crimes will be committed. Third, even the systematic and large-scale crimes committed in contemporary conflicts should not be seen as evidence that those conflicts are criminal enterprises in the sense of the common purpose rule.

Consider, as an example, a situation in which a civilian is killed while protecting his property during looting carried out by armed groups. Who may be held accountable – that is, convicted of murder – under international criminal law? Under the common purpose test applied by the ICTY, the actual perpetrator, plus those members of the armed group present with him at the time of the incident, intending to participate in the looting and aware of the potential for harm to civilians, may be held accountable. Superiors or other members of the group ordering, or perhaps merely condoning, the looting could also be prosecuted for the murder of the civilian. But may all members of the armed group, be held accountable for the murder, as soon as it was foreseeable – which is often the case, that murders will be committed by some members? This question remains unsettled.

Under some national legislation, those who join a criminal group are responsible for foreseeable crimes outside the common purpose committed by other members of the "gang." In wartime, however, even if they may be considered as criminal gangs, armed groups have very distinct features in terms of control over territory and persons. Therefore a group and its members should be rewarded if they comply with IHL. A guerrilla fighter should not be considered a rapist because some of his comrades rape, even if this is sadly foreseeable in some armed groups. Indeed, the very basis of international criminal law and its civilizing contribution to the enforcement of international law is that criminal responsibility is individual. As long as the responsibility remains with the group, there is a seed for future wars because wars can be waged against groups, while individuals can only be prosecuted. It is therefore in my view crucial that certain concepts of group responsibility do not lead to a re-collectivisation of responsibility. One

joint criminal enterprise, the objective of which was "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas". The Appeal Chamber held that the common purpose of the joint criminal enterprise was not defectively pleaded, stating that: "the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute", Judgment, *Prosecutor v. Brima, Kamara and Kanu*, Special Court for Sierra Leone, Appeals Chamber, 22 February 2008, para. 340.

may certainly consider that all those who fight unjust or genocidal wars or support inhumane regimes are morally and politically co-responsible for the violations committed in such contexts. However, in my view, this should not lead to criminal responsibility based on simple membership of the group and knowledge of the policy of that group. Such a concept would water down the criminal responsibility of the actual perpetrators and their leaders and create a net of solidarity around the leaders and perpetrators. This in turn would not increase protection for the victims, nor would it facilitate the actual implementation of international criminal responsibility.

B. Private (civil) law responsibility

For the last fifteen years, international attention has been focused on establishing and operationalizing criminal responsibility for serious violations of IHL. However, the virtues of private (civil) law responsibility for such acts should not be underestimated. The degree of evidence for a private tort claim¹⁶⁷ is lower than for criminal conviction, the victims of a violation can directly set it in motion, and the results of the process will benefit them (and, in common law countries, their lawyers). It may be that armed groups are more afraid that their funds will be blocked in a third country than that their leaders will be held criminally responsible.

At the international level, promoters of IHL suggest the adoption of international rules requiring States to offer a forum to victims of IHL violations for tort claims¹⁶⁸ and to establish universal

¹⁶⁷ Broadly, a tort is a civil wrong (other than a breach of contract) which the law will redress by an award of damages if the wronged individual pursues the wrongdoer. Criminal acts, on the other hand, are prosecuted and punished by State on behalf of the public. In common law countries, the standard of proof is different for criminal law than it is for tort law. In criminal cases, prosecutors must convince the trier of fact (i.e. judge or jury) of the facts alleged “beyond a reasonable doubt”, whereas the standard of proof in a tort case is lower: the trier of fact must be convinced only on a “balance of probabilities”. Consequently, somewhat less evidence is required to satisfy the standard of proof in a tort case. However in some legal systems, such as France, something analogous to the common law concept of a ‘standard of proof’ (the *intime conviction* of the trier of fact) will apply to both proceedings where criminal and civil cases are joined.

¹⁶⁸ Art. 19 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by GA Res. A/RES/40/34, 11 December 1985, already states that States should provide remedies to victims of substantial Human Rights violations, including reparation and/or restitution, and Art. 20 encourages the conclusion of international treaties on that matter. See also Principle 17 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* as suggested by Cherif Bassiouni in his final report as a Special Rapporteur on the matter, *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN ESCOR, 56th Sess., UN Doc. E/CN.4/2000/62, 18 January 2000.

jurisdiction over such claims.¹⁶⁹ In this field, the United States is a pioneer with its Alien Tort Claims Act.¹⁷⁰ Such forum and jurisdiction would obviously be particularly useful against armed groups, as they do not benefit, like States, from immunity against civil claims before foreign courts.

C. International Responsibility

In international law, there are basic rules concerning the responsibility of States for their internationally wrongful acts. The International Law Commission (ILC) recalls in its Commentary to its *Articles on State Responsibility* that, while it was not concerned with the responsibility of subjects of international law other than States, “[a] further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces.”¹⁷¹ Indeed, IHL implicitly confers upon parties to non-international armed conflicts – whether they end up succeeding or not – the functional international legal personality necessary to have the rights and obligations foreseen by it.¹⁷² If they violate their obligations, “[i]t is a principle of international law, that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a [rule]”.¹⁷³ While it is today uncontroversial that armed groups are internationally responsible for violations of IHL, the exact rules on attribution, content and implementation of such responsibility are not yet clarified. While it is tempting to reason by analogy with the well established rules on State responsibility, there are serious limits to such analogy because of the

¹⁶⁹ In his *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of Human Rights and humanitarian law*, UN ESCOR, 48th Sess., UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996, Principle 5, Theo van Boven seems to suggest such universal jurisdiction, including for civil procedures, while in the *Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of Human Rights and fundamental freedoms*, UN ESCOR, 55th Sess., UN Doc. E/CN.4/1999/65 (8 February 1999) at para. 55, Cherif Bassiouni seriously questions that universal jurisdiction over all serious Human Rights violations already exists and adds that “this raises the question whether modalities for redress should be deemed part of universal jurisdiction or part of another normative regime”.

¹⁷⁰ 28 USC § 1350, which has existed since 1789.

¹⁷¹ *Report of the Commission to the General Assembly on the work of its fifty-third session*, *supra* note 6, at 118 (para. 16 to Article 10).

¹⁷² See *supra* note 33.

¹⁷³ Judgment, *Factory of Chorzów*, Jurisdiction, Permanent Court of International Justice, 26 July 1927, at 21.

fundamentally different legal character and (right of) existence of an armed group compared with that of a State in international law.¹⁷⁴

1. Rules on attribution and reparation

Before the international responsibility of a group can be invoked, an individual violation of IHL must be attributable to that group. While specific practice on the attribution of unlawful acts to armed groups is largely lacking,¹⁷⁵ the pertinent rules on State responsibility must be modified to respond to the specificities of armed groups. Unlike States, armed groups obviously have no “organs” for which the status could be determined “according to internal law.” However, they have members and other persons exercising elements of their authority, who act in that capacity, and who have direction or control over some persons. A group is responsible for such persons. It is true that the smaller a group is and the less State-like organization and territorial control it has, the more important attribution based on effective control over persons will be in practice.¹⁷⁶ If there is responsibility, the group must in my view, and for reasons of pure legal logic, have obligations to cease a violation and to provide reparations for the injury, similarly to those of a State.¹⁷⁷ Until now, such reparations were only rarely asked from armed groups and even more rarely adjudicated to their victims.¹⁷⁸

2. Implementation of responsibility

State responsibility is implemented at an inter-state level through invocation and, if necessary, countermeasures, or, in a more institutionalized way, through the decisions of the appropriate organs of the UN and of regional organizations. Because of its obligation to “ensure respect” for IHL,¹⁷⁹ every State may invoke the responsibility of an armed group for violations of IHL.

¹⁷⁴ See for an attempt to explore such a regime of responsibility of armed groups, See references in Kleffner, ‘The collective accountability’, *supra* note 138, at 260-268.

¹⁷⁵ Zegveld, *supra* note 5, at 155.

¹⁷⁶ *Ibid.*, at 154.

¹⁷⁷ See Draft Articles, *supra* note 6, Arts. 28-39.

¹⁷⁸ See references in Kleffner, ‘The collective accountability’, *supra* note 138, at 256.

¹⁷⁹ *Supra* note 11.

The UN Security Council, the European Union and more rarely, individual States, have adopted sanctions directed against armed groups, sometimes explicitly to respond to violations of IHL.¹⁸⁰ Recently, such sanctions were mainly taken against groups labelled as “terrorist”, without any link to specific violations of IHL. As under certain current definitions of terrorism, every act committed against State forces is “terrorist”, such sanctions rather weaken than strengthen IHL and the willingness of armed groups to comply with IHL.¹⁸¹ If acts complying with IHL (such as an attack against soldiers) and acts violating IHL (such as attacks targeting civilians) lead to the same sanctions and classification as “terrorists”, an important incentive for complying with IHL disappears.

Sanctions taken by individual States and groups of States may in my view not be considered as a kind of countermeasure for violations of IHL, governed by the relevant rules of the law of State responsibility. Countermeasures consisting of violations of fundamental human rights are prohibited by the law of State responsibility.¹⁸² In the field of IHL, countermeasures in kind are belligerent reprisals and are largely outlawed by the pertinent instruments of IHL of international armed conflicts.¹⁸³ On the other hand, IHL of non-international armed conflicts contains no specific prohibition of reprisals. Nevertheless, many scholars and the ICTY consider them to be outlawed.¹⁸⁴ It may be argued that reprisals are typically an inter-state institution of international law, which cannot be extended, as a circumstance precluding the wrongfulness of an act, to the fundamentally different relations between States and armed groups or between armed groups. Any reprisal against an entity other than a State would consist of a collective punishment of the individuals affected, which is prohibited by the law of non-international armed conflicts.¹⁸⁵ One may object to this line of argument that I may not on the one hand grant international legal personality to an armed group as far as IHL is concerned, yet at the same time deny it the passive

¹⁸⁰ See references in Kleffner, ‘The collective accountability’, *supra* note 138, at 253-255.

¹⁸¹ See *supra* note 88.

¹⁸² See Draft Articles, *supra* note 6, Art. 50 (1) (b).

¹⁸³ Arts. 46/47/13 (3)/33 (3), respectively of the four Conventions and Arts. 20, 51 (6), 52 (1), 53 (c), 54 (4), 55 (2), 56 (4) of Protocol I. These prohibitions are confirmed by Draft Articles, *supra* note 6, Art. 50 (1) (c) prohibiting countermeasures that affect “obligations of a humanitarian character prohibiting reprisals.” In Judgment, *The Prosecutor v. Zoran Kupreskic and others*, ICTY, Trial Chamber, paras. 517-520, the ICTY considers reprisals as generally prohibited in IHL.

¹⁸⁴ See *Commentary Protocols*, *supra* note 29 at paras 4530, 4531, 4536; L. Moir, *supra* note 51, at 237-243; and the ICTY in *The Prosecutor v. Milan Martić*, Rule 61 Decision, ICTY, Trial Chamber, at paras. 15-18.

¹⁸⁵ Art. 4 (2) (b) of Protocol II.

personality as an object of reprisals. In any case, without violating fundamental human rights, the territorial State will only have limited possibilities to take additional measures against an armed group, against which it is already fighting an armed conflict. As for third States, their entitlement to take countermeasures in the collective interest against a State responsible for IHL violations is controversial.¹⁸⁶ In my view, the question does not arise against armed groups, because third States have no legal obligations towards armed groups and they therefore do not need the circumstance of a countermeasure to preclude the unlawfulness of any measure they may take to induce an armed group to comply with its IHL obligations, as they must under IHL.¹⁸⁷ Such a measure must however comply with their international obligations, including in the field of IHL and human rights, towards other States and human beings, as the latter did not violate any obligation and may therefore not be the object of countermeasures.

The possibility for humanitarian organizations to take measures against an armed group is seriously limited by the need for humanitarian organizations to benefit from the co-operation of the armed group, if it wants to have access to the victims under control of the group and if it wants to safeguard the security of its staff. However, in my view, humanitarian organizations should explore the possibility of adopting common guidelines on how they could react to violations of IHL by armed groups with whom they work, without negatively affecting their humanitarian tasks. If a group knows that with respect to certain behaviour all humanitarian organizations will react in the same way, this may inhibit them from perpetrating some violations, because for many of them, humanitarian organizations are important.

Finally, “sanctions” against armed groups violating IHL should also be envisaged by other non-State actors whose cooperation is needed by such groups. Some economic actors have considerable influence on an armed group. Every armed group that wants support needs the media to get its message through to its supporters and to world public opinion. Without encroaching upon the freedom of press, and while fulfilling their important task to inform, including about violations of IHL, could the media not agree upon a code of conduct in case of reporting on such violations? For example, they could agree that when they report violations,

¹⁸⁶ The ILC “leaves the resolution of the matter to the further development of international law”, Draft Articles, *supra* note 6, at 355 (paragraph 6 to Article 54).

¹⁸⁷ *Supra* note 11.

they always qualify them as such. They could furthermore agree never to provide an armed group with a forum for explaining its aims and values in connection with a violation of IHL. It is fully understandable that the media must report the opinions and demands of Palestinian armed groups, including those deliberately and indiscriminately killing civilians through suicide bombers. However, could it not be agreed among the media never to mention such opinions and demands, nor to provide a forum for the leaders of such groups, when they report about such deliberate attacks?

7. Concluding Remarks

The reader may qualify all the abovementioned rules and mechanisms that do not already correspond to current practice as either unrealistic because States will never accept them, or as dangerous because they raise the political status and international acceptability of armed groups. When rules are adapted to the possibilities of armed groups, opponents will argue, they will be less humanitarian, they will lead to a spiral of lowering standards for States as well as individuals, and they will give undesirable non-governmental violence an aura of legality. I am however convinced that unrealistic rules do not protect anyone and undermine the willingness to respect other realistic rules.

When armed groups are engaged by international actors, opponents will argue, they are somehow encouraged to continue violence, which inevitably creates human suffering. I agree that a world without armed groups would be a better world, as would a world without war. However, armed groups are simply a reality, just as armed conflicts are a reality. Those who developed IHL did not like armed conflicts, but they did not simply state that armed conflicts should not exist. They also accepted that armed conflicts exist and tried to design rules applicable to these situations, accepted by those involved in this sad reality.

Similarly, I do not think that the existence of armed groups will disappear because we ignore them. We have to engage with them and the first step towards gaining respect of some IHL rules is to speak with the people involved and to have mechanisms engaging these people to comply

with IHL. In my view, States should abandon their ostrich-like behaviour towards armed groups. Has there ever been an armed group that was overcome, that lost its supporters and its cause, simply because it was ignored by States and by international law? Has the acceptance of armed groups as addressees of legal rules and mechanisms ever guaranteed or facilitated victory to an armed group? Pending serious historical research into those two questions, my impression is that the answer to both questions is negative. Every armed group that has won its cause has done so either through military victory, despite stiff resistance and legal quarantine by its opponents, or by the acceptance of the territorial State to negotiate with the group. As the traditional Westphalian approach of enforcement mechanisms largely ignoring armed groups has not led to an acceptable level of respect for war victims in most of the contemporary conflicts in which armed groups are involved, we should at least attempt a more inclusive approach, by implementing some of the ideas proposed in this article.

No “new” proposal listed is based on the creative thinking of the author of these lines. All the ideas presented are simply applying, to armed groups and IHL, mechanisms that exist either for States or for other kinds of non-State actors, in these or other fields of international law. Those who have accepted such mechanisms apparently thought that the latter could influence the human beings who take the decision whether an abstract entity respects or violates the law. Armed groups like States and trans-national enterprises or sports clubs are made up of human beings. Why should those human beings react in fundamentally different ways when they act for armed groups than when they act for such other corporate entities?

It is clear that many armed groups will themselves not accept the mechanisms suggested. Others will not improve their behaviour even if some of the above suggestions are implemented. However, we can be relatively certain that such mechanisms will affect the behaviour of some groups and thereby improve the cruel destiny of thousands if not hundreds of thousands of people affected by armed conflicts. The UN Secretary-General correctly underlines that “while engagement with non-State armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts.”¹⁸⁸ Therefore, I suggest developing mechanisms, not only for the ideal inter-

¹⁸⁸ *Report of the Secretary-General*, *supra* note 19, para. 40.

state world under the UN Charter, but also for the real world in which armed conflicts are as much fought by armed groups as by governments. This is the new frontier of IHL. If this law does not develop on that frontier, it will become slowly, but increasingly, irrelevant.