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Non-State Actors in Non-International Armed Conflicts and IHL: To engage or not to engage?

Prof. Dr. Horst Fischer Ruhr-University Bochum

Abstract

This study is conducted to find out in what ways compliance with international humanitarian law (IHL) by non-state actors can best be improved. Therefore the study first looks into the traditional framework of IHL that currently exists. The gaps in the applicable law, implementation mechanisms and enforcement mechanisms will be identified. Consequently a variety of new creative mechanisms that aim to improve compliance with IHL by non-state actors will be described. These mechanisms are different in initiator, the aspect it aims to change and actors involved. For the mechanisms that are not implemented yet the study looks into the advantages and disadvantages these mechanisms could have. For the mechanisms that have already been implemented the study looks into their results. Based on all the gathered information about the (possible) effectiveness of the new mechanisms a conclusion will drawn as to which type of mechanism is most promising to make non-state actors comply with IHL.

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Introduction

1. Situating the problem: Non-State Actors violate IHL

Already in Biblical tradition there was a voice to limit the ways of war. The concerns in the bible are mainly about the justification of wars[1]. This study will not go into the *jus ad bellum*[2] and will only focus on the *jus in bello*[3].

International Humanitarian Law (IHL) has been designed for the purpose of alleviating suffering in times of war. Both Henri Dunant and Francis Lieber can be seen as the founders of IHL as it is known today[4]. Their initiatives to put constraints on the waging of war date from the 19th century. There are two historical streams that make up modern international law: the law of The Hague and the law of Geneva. The latter is a body of rules to protect the victims of war, the former are those provisions that affect the conduct of hostilities.

Since the 19th century the laws of war have been developing as part of the international law system. One of the characteristics of this system however is the lack of a strong central authority capable of enforcing the full range of rules that states and non-state bodies are obliged to follow[5]. Compliance with IHL therefore poses a serious problem[6]. This is sadly evidenced by most recent wars. The conflict in the former Yugoslavia, Rwanda, Sudan, Sri Lanka, Nepal, Iraq, Afghanistan, and the Democratic Republic of Congo show that in times of war IHL is not the first thing on the mind of the conflicting parties. As a consequence violations of IHL occur frequently. There are alleged cases of female inmates in the Abu Ghraib prison who said to have been raped by soldiers; reports say that all parties in the Sudanese conflict recruit child soldiers; in the conflict in Afghanistan and Gaza soldiers have been accused of using dum-dum bullets.

IHL today distinguishes between international armed conflicts and non-international armed conflicts. The rules designed for the latter are very much underdeveloped in contrast to the rules for the former. Because 90% of all the wars are of a non-

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[1] Perna, 2006, p. 1.
[2] Rules that deal with the justification of why an actor becomes party to a conflict.
[3] Rules that put constraints on the waging of war.
[4] Acke, 2005, p. 10.
[5] Roberts, 1995, p. 14.
[6] Patrnogic, 2004, pp. 11-12.

international character the development of IHL applicable to these wars is an important issue[7]. The way to tackle this issue has been the subject of debate for quite some time. Several scholars have proposed to lose the distinction[8], others have suggested to further developing IHL applicable to internal armed conflicts. This study will not focus on this debate because only changing the applicable law would not enhance compliance with the rules of IHL.

States are the main creators of IHL. They sign treaties and contribute to the creation of customary IHL. Therefore states have some obvious reasons to comply with it. There are however other actors in armed conflicts than states. These non-state actors also need to comply with certain norms of IHL. The reasons for these actors to comply are however not as obvious, since they do not contribute to the creation of IHL. The term non-state actor in this study refers to armed movement, *de facto* authorities and non-internationally recognised states[9]. Examples are Hamas in Gaza, Sudan People's Liberation Movement/Army in Sudan, the Communist Party of Nepal, Somali National Front in Somalia, Fuerzas Armades REcolucionarias de Colombia, and Aceh Sumatra National Liberation Front/Free Aceh Movement in Indonesia. All these differ in level of organisation, hierarchy, control of territory and ideology.

The underdeveloped law applicable to non-international armed conflicts and the lack of a strong central authority are sadly evidenced by the cruelty in non-international armed conflicts. The traditional framework that exists today clearly needs improvement so that non-state actors, party to a non-international conflict, comply with IHL.

[7] de Beco, 2005, p. 190; Sivakumaran, 2006, p. 369; Capie qnd Policzer, 2004, p. 1; Smith, 2004, p. 3; Andreopoulos, 2006, p. 141.

[8] Partnogic, 2004, pp. 13-14; Crawford, 2007, pp. 441-465.

[9] Other terms that are used are non-state armed groups, armed opposition groups, armed non-state actors,…

2. Research Questions

The problem outlined above gives rise to a number of questions. This study tries to answer the following questions:

Concerning the traditional framework: What are the gaps in the existing framework of IHL in terms of accountability, implementation and enforcement? The more specific questions are:

- Accountability: To what extent are non-state actors accountable under international humanitarian law for acts violating IHL?
- Implementation: How do non-state actors make their members comply with IHL and how do other actors encourage non-state actors to implement IHL?
- Enforcement: Which mechanisms currently exist to address violations of IHL?

In relation to improving compliance with IHL by non-state actors: Can new mechanisms fill the gaps in the existing traditional framework to ensure compliance with IHL by non-state actors?

- What are possible new mechanisms to improve compliance?
- Which of these mechanisms are most effective?

The first part will thus analyse the traditional framework of IHL in three aspects. Based on this analysis a conclusion will be drawn as to where the gaps are in the traditional framework to ensure compliance with IHL by non-state actors in internal conflicts. The second part describes a number of recent initiatives and ideas that aim to enhance compliance with IHL by non-state actors.

3. Methodology

The first part of this study will analyse the traditional framework of IHL by conducting a literature study.

The first aspect of the framework is a legal analysis. This will mainly explain the content of IHL that applies to non-state actors. To this end various sources of law will be used. Treaty law, customary law, domestic law and others sources of law will be examined to define the obligations that non-state actors have in non-international armed conflicts. However, where the law is not conclusive, decisions of international tribunals and resolutions of international organisations will be taken into account to interpret the law.

The second aspect of the traditional framework deals with the implementation of the applicable law. In this part special attention must be paid to social phenomena such as media and other organisations active in the field.

Enforcement is the last aspect that will be examined under the traditional framework. The analysis of this part will look into the competences of the international criminal tribunals and the impact of their jurisprudence so far.

After the analysis of these three aspects under the traditional framework a conclusion will be drawn as to where the current gaps are in ensuring compliance with IHL. This conclusion will point out where improvements are possible.

The second part of this study will then look into various initiatives and ideas to make non-state actors in non-international armed conflicts comply with IHL. These initiatives will try to ensure compliance by other means than creating more law. Research on various initiatives has been done once again by conducting a literature study. Different scholars propose different new mechanisms. Most initiatives are still just ideas. To make an assessment on the possible effectiveness of these mechanisms, this study will therefore mainly be based on the different arguments made by scholars in peer-reviewed literature. Other initiatives are case studies of new mechanisms. They have already been implemented. Especially when dealing with the effectiveness of these initiatives, this study will look into concrete results of the initiatives. These empirical data will indicate whether the initiative improves compliance with IHL by non-state actors.

I. Traditional Framework

The traditional framework can be split up into three aspects. First of all one needs to look at the applicable law in non-international armed conflicts that bind non-state actors. Secondly, the traditional mechanisms of implementation will be discussed. The last aspect deals with the existing enforcement mechanisms related to non-state actors.

1. Applicable Law in Non-International Armed Conflicts

It is of paramount importance for this study to determine the applicable law relevant to the regulation of the conduct of non-state actors in non-international armed conflicts. To improve compliance by these actors with IHL, one must know the laws that make them accountable.

Although international human rights law (IHRL) and international criminal law are also applicable, for the purpose of this study the focus will be on IHL. IHRL and international criminal law will be examined in the role they can play to improve compliance with IHL.

a. Treaty Law

- Before 1949

The development of IHL in terms of treaty law started in 1864 when the first Geneva Convention for the Amelioration for the Condition of the Wounded in Armies in the Field was ratified by 16 states[10]. A Geneva Convention on the same subject replaced this Convention in 1906 in 1929. All these conventions however did not deal with conflicts of a non-international character. Classical international law, prior to the twentieth century, did not distinguish between international and non-international armed conflicts, the two types of conflict that exist today. At that time the doctrine of belligerency existed. The law of armed conflict only dealt with armed conflict between two states. However, the type of war that was named ‘civil war’, which was a condition of armed conflict between a state and an internally located insurgent movement that had

[10] Schindler and Toman, 1988, p. 280-281.

taken up arms against its own state[11], could also have the law of applied. When the 'host' state or a third state recognised the insurgents as belligerents, the law of war came into action. Without such recognition it was a matter of purely domestic concern[12].

- The distinction made in the 1949 Geneva Conventions

The system discussed above lasted until the atrocities of the Second World War and the Spanish Civil war led to the creation of the 1949 Geneva Conventions. This Convention made the distinction between two new concepts, namely 'international armed conflicts' and 'non-international armed conflicts'. The idea of making the law of war applicable in its entirety in instances of non-international conflicts was rejected since 'States were not prepared to accept an obligation to apply the fullness of the detailed and complicated provisions of the Conventions in such internal situations'[13]. However, recent events at that time made it impossible to not address the lacunae of existing laws of armed conflict, including the issue of non-international armed conflicts. Hence the distinction between the two types of conflict as it is still known today.

- Article 3 common to all four Geneva Conventions[14]

As it was inevitable not to address the issue of non-international armed conflicts, a common article to the four Conventions was introduced to set down some fundamental principles governing the conduct in these conflicts. Common article 3 is often referred to as a 'mini-Convention' within the Conventions because it entails minimum standards of humanity applicable to all kinds of conflicts. It is applicable to armed groups as well as State armies. Different theories are used to explain the binding nature of this article seen that non-state actors are not contracting parties to the Conventions[15]. The best explanation is to be found in the theory that a state has the ability to legislate on behalf of all its nationals under its jurisdiction[16].

[11] Crawford, 2007, 443-444.
[12] Cullen, 2005, p. 68 at p. 78.
[13] Kalshoven and Zegveld, 2001, p. 38.
[14] Common article 3 to the Geneva Conventions.
[15] For the different theories about binding armed opposition groups see Sivakumaran, 2006.
[16] David, 2003, pp. 34-38.

Although the international legal regulation of non-international armed conflicts was groundbreaking, the protection afforded is of a considerably lower level than in case of international armed conflicts[17]. One major impediment is the absence of combatant-status and consequently the lack of protection for fighters due to the absence of the rights that follow from the status[18]. Additionally common article 3 was not designed with the precision of a criminal statute. A number of prohibitions listed in the article lack a sufficiently precise definition[19]. The distinction introduced in the 1949 Conventions therefore has important legal consequences. To improve protection in non-international armed conflicts a number of scholars have made the case of eliminating the distinction between international and non-international armed conflicts[20].

It is important to note that specialists reckon that 90% of violations of IHL applicable to internal conflicts are violations of these minimum standards of humanity as enclosed in common article 3[21]. Hence, before creating more and wider obligations, enhanced compliance of these basic standards would already be an improvement.

- Additional Protocol II

In the decades following the Second World War the nature of conflicts changed rapidly. The only provision applicable to non-international armed conflicts before the adoption of the present Additional Protocol was common article 3. This Article proved to be inadequate in view of the fact that about 80% of the victims of armed conflicts since 1945 have been victims of non-international conflicts and that non-international conflicts are often fought with more cruelty than international conflicts. The '60s and '70s knew a lot of guerrilla type and decolonisation wars. Never seen levels marked the brutality in these conflicts[22]. A revision of the law became inevitable. Therefore the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was convened[23]. The fear that

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[17] International Council on Human Right Policy, 2000, pp. 62-64.
[18] More information about combatant-status in Pejic, 2007.
[19] Bellinger III, 2010, pp. 252-253.
[20] The arguments for this case are elaborated upon in Crawford, 2007.
[21] Gutman, Zegveld, Veuthey, Sassoli and Henckaerts, 2003, p. 176.
[22] Crawford, 2007, pp. 447-448
[23] Acke, 2005, PP. 12-13

Additional Protocol II might affect State sovereignty, prevent governments from effectively maintaining law and order within their borders and that it might be invoked to justify outside intervention led to the decision of the Diplomatic Conference at its fourth session to shorten and simplify Additional Protocol II. Instead of the 47 Articles proposed by the ICRC the Conference adopted only 28. The essential substance of the draft was, however, maintained. The part on methods and means of combat was deleted, but its basic principles are to be found in Article 4 (fundamental guarantees). The provisions on the activity of impartial humanitarian organisations were adopted in a less binding form than originally foreseen. The restrictive definition of the material field of application in Article 1 will have the effect that Additional Protocol II will be applicable to a smaller range of internal conflicts than Article 3 common to the Conventions of 1949[24].

- Post-1977

Although the 1977 Additional Protocols are the last overall revision of IHL, it has since then not stopped developing. Numerous new treaties were designed. These treaties however only deal with specific aspects of IHL[25] and are never universally ratified. Most of these treaties do apply in non-international armed conflicts. A clear shift in the field of application can thus be noticed. Whereas up to 1977 most provisions of IHL only apply to international armed conflicts, most treaties created afterwards are also applicable in the case of non-international armed conflicts. Perna explains this shift based on two arguments. Where the issue is presented in terms of the prohibited conduct

[24] Additional Protocol is available at http://www.icrc.org/ihl.nsf/INTRO/475?OpenDocument.

[25] 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. Geneva, 10 October 1980 with 5 additional protocols: Protocol on Non-Detectable Fragments. 10 October 1980 (Protocol I), Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. 10 October 1980 (Protocol II), Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons. 10 October 1980 (Protocol III), Protocol on Blinding Laser Weapons. 13 October 1995 (Protocol IV), Protocol on Explosive Remnants of War. 28 November 2003 (Protocol V). Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction. Paris 13 January 1993. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000. Convention on Cluster Munitions, 30 May 2008.

of individuals, military thinkers and Non-Governmental Organisations (NGOs), albeit for different reasons, can to some extent make common cause[26]. The starting point here is the situation on the ground where NGOs are concerned about humanitarian issues and military thinkers are concerned about the fighting. These concerns on the ground will not differ whether the conflict is international or non-international. On the other hand, when NGOs agree with political representatives, they can defeat military objections. Additionally, the focus on human rights issues and the vulnerability of democratic governments to the campaigning of NGOs, partly explain the expansion of treaty norms applicable in non-international armed conflicts.

The shift can also be explained based on the content of the treaties. Most treaties created after 1977 deal with the use of specific weapons. Because non-state actors are known for their guerilla-type of warfare, states might have been more willing to apply limits on the use of certain weapons in the situation of non-international armed conflict, because these weapons, such as anti-personnel mines and booby-traps, are frequently used by their opponents.

- Problems with the Applicable Treaty Law

Although it has been established that all parties to a conflict, including non-state actors, are bound be certain rules of treaty law, the question of the threshold of application however remains. Situations described as ‘internal disturbances and tensions’ are not covered by IHL at all. The question therefore is what situations of violence cross the threshold to become an armed conflict such that IHL applies. The negative formulation[27] poses a lot of questions. The drafters of the Geneva Conventions decided when designing common article 3 neither to formulate a definition nor to provide precise guidelines or objective conditions for its application. Tahzib-Lie and Swaak-Goldman therefore propose four criteria to determine objectively the threshold of applicability of IHL. They take into account the territorial scope of application, the temporal scope of application, the intensity of the hostilities and the parties to the

[26] Perna, 2006, p. 161.
[27] Art. 1(2) Additional Protocol II.

conflict[28]. Related to this way of determining the threshold is defining who is bound it. Common article 3 binds all parties a conflict, but does not elaborate on the conditions to be party to conflict. The International Committee of the Red Cross (ICRC) recognizes that there should be a distinction between genuine armed conflicts and mere acts of banditry or an unorganized and short-lived insurrection[29]. Article 1 (1) of Additional Protocol II states that it 'shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.' The threshold of application for Additional Protocol II is thus higher than the threshold of application for common article 3.

It is also important to note that no matter a definition or objective criteria, it is still up to the state affected by a conflict to determine whether the conditions for applicability of IHL are present. Certain limitations on this freedom of the states do exist. The United Nations (UN) Security Council for one has claimed the authority when acting under Chapter VII to decide with binding force the existence of an armed conflict. Nonetheless the determination of applicability of IHL is still largely left to auto-interpretation. Whether the creation of a specifically mandated international body to decide in specific cases on the applicability of IHL would improve compliance with the rules of IHL, is a question that falls outside the scope of this study.

Besides this issue about the threshold/definition, IHL has the problem that except for the Geneva Conventions, no treaty has been universally ratified. Different treaties will thus apply according to the situation and to the parties involved. In any case, the applicable treaty law in a situation of non-international armed conflict is insufficient[30].

[28] Tahzib-Lie and Swaak-Goldman, 2004, pp. 243-252.
[29] Abdelsalam Babiker, 2007, p. 127.
[30] Henckaerts and Acke, 2005, p. 21.

Another reason why treaty law falls short in its application is because non-state actors, who are not subjects of international law and therefore cannot ratify treaties, do not feel bound by it[31].

b. Customary Law

- Relevance for non-international armed conflicts

As set out in the above, treaty law applicable to non-international armed conflicts gives only very limited protection in non-international armed conflicts and has a number of problems with its application as well. Therefore solace might be sought in customary international law. This sequence however is a misconception since customary international law precedes treaty law[32]. About 150 years ago the codification of these customs started with in 1864 the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field and the trend of codification pushed customary law to the background. Nonetheless customary IHL continues to exist in parallel with these treaties. In 2005 the ICRC carried out a study pursuant to an international mandate[33]. Because Additional Protocol II has not been ratified be several states in which non-international armed conflicts are taking place, the first purpose of the study was to determine which rules of IHL are part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules[34]. Secondly the rudimental framework that is provided for by treaty law is elaborated upon by customary international law[35]. A more detailed regulation for non-international armed conflicts was highly necessary since this type of armed conflict forms the vast majority of all armed conflicts today. Therefore even the customary nature of the rules of the Geneva Conventions is not purely academic[36]. Bethlehem adds that customary international law may be self-

[31] Henckaerts, 2003, p. 126.
[32] Weeramantry, 2006, p. 26-39; Henckaerts, 2006, p. 43
[33] This mandate came from the 26 International Conference of the Red Cross and the Red Crescent in December 1995.
[34] Heckaerts, 2006, p. 260.
[35] *Ibid.,* pp. 274-275.
[36] Meron, 1987, pp. 348-349.

executing and apply directly in the municipal sphere[37]. Furthermore he states that customary international law may be opposable beyond states to non-state actors and individuals[38].

- Content of the ICRC study on Customary IHL

The Statute of the International Court of Justice (ICJ) describes customary international law as 'a general practice accepted as law'[39]. The existence of a rule of customary international law requires the presence of two elements. These two elements are state practice and *opinio juris*[40]. The ICRC study takes the classic approach of the ICJ in the *North Sea Continental Shelf cases*[41] to determine whether a rule of general customary international law exists[42]. This research was split up based on six categories[43]:

- Principle of distinction
- Specifically protected persons and objects
- Specific methods of warfare
- Weapons
- Treatment of civilians and persons *hors de combat*
- Implementation

These categories form the structure of both Volumes in which the study is published[44]. Although the study is comprehensive, it is not exhaustive. Most rules that are formulated in the study apply to both types of conflict. There are however a few exceptions[45]. The study contains 149 rules applicable to non-international armed

[37] Bethlehem, 2007, p. 7.
[38] *Ibid.,* p. 8.
[39] Henckaerts, 2006, 261; Guzman, 2008, pp. 184-188.
[40] The belief that a certain practice is required prohibited or allowed as a matter of law.
[41] ICJ, 20 February 1969, p. 3.
[42] For an elaborate explanation on the determination of rules of customary international law see Heckaerts, 2006, pp. 257-285.
[43] For more information about the conduct of the study: Report of the 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007.
[44] Volume I contains the 161 rules that are found to be customary international law. Volume II contains the research conducted on state practice and *opinio juris* that led to the conclusion of customary law rules.
[45] The rules that deal with occupied territory, the definition of armed forces and combatants and the rules on entitlement to combatant status and prisoner-of-war status are rules that are only relevant in international armed conflicts. The rules dealing with amnesty at the end of hostilities and the rules dealing with reprisals in non-international armed conflicts are only relevant in the aforementioned type of conflict.

conflicts. These rules are of paramount importance as treaty law is limited both in scope of application as in content to this type of conflicts. The limited scope of application of treaty law is overcome by the fact that many of the provisions of Additional Protocol II are found to be part of customary international law. This includes the following rules: the prohibition of attacks on civilians, the obligation to respect and protect medical and religious personnel, medical units and transports, the obligation to protect medical duties, the prohibition of starvation, the prohibition of attacks on objects indispensable to the survival of the civilian population, the obligation to respect the fundamental guarantees of civilians and persons *hors de combat,* the obligation to search for and respect and protect the wounded, sick and shipwrecked, the obligation to search for and protect the dead, the obligation to protect persons deprived of their liberty, the prohibition of forced movement of civilians and the specific protections afforded to women and children. All these rules are thus applicable as a matter of customary law, no matter the ratification of treaties or the qualification of the conflict.
The study however also found rules of customary international law that go beyond the rudimentary rules outlined in Additional Protocol II. This is the most innovative contribution of customary international law to the regulation of non-international armed conflicts. Examples are the distinction between civilian objects and military objectives, the prohibition of indiscriminate attacks, the obligation to take precautions in attack, the obligation to take precautions against the effects of attack, the obligation to protect and respect humanitarian relief personnel and objects, the obligation to protect civilian journalists, the obligation to respect protected zones, the prohibition of denial of quarter and the prohibition of deception. Important gaps in the regulation of non-international armed conflicts are thus filled by customary international law.
Evidently not all discussions were solved in the study. Therefore it mentions issues that require further clarification. Practice is not clear on issues such as the meaning of the terms ‘combatants’ and ‘civilians’ in non-international armed conflicts, the meaning of the term ‘direct participation in hostilities’ and the exact scope and application of the principle of proportionality.
In spite of the ICRC customary law study, which generated a more elaborate body of rules applicable to non-international armed conflicts, massive violations of IHL still

occur. Although the study might be a useful tool for different decision-makers on the international level such as judges of international tribunals to determine what rules of customary IHL exist[46], the compliance with these rules remains an issue of paramount importance. Merely determining the nature of certain rules as customary will not ensure compliance.

- Critique on the ICRC study

Besides the fact that the customary nature of a rule does not ensure compliance with it, other issues have been raised relating to the ICRC study on customary law[47].

First of all the remark is made that it is difficult to identify state practice relative to a rule of customary international law by a state party to a treaty of parallel application[48]. Secondly, because IHL is heavily regulated by treaties and heavy reliance is placed on those treaties, the study might be seen by states not party to the treaties as an attempt to circumvent the requirement of express consent[49]. Additionally, the existence of customary law rules might raise the question about why states should still ratify. After all if the rules of for example Additional Protocol II are applicable no matter the ratification, why bother to accede?

Another critique concerns the imprecise nature of customary law. When dealing with individual criminal responsibility, the application and interpretation of customary law may run against the core principle of legal certainty of penal law: *nullum crimen sine lege, nulla poena sine lege*[50].

Lastly it must be mentioned that the creation of customary law inevitably comes across the issue of the application in time[51]. This issue is however too detailed for the purposes of this study.

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[46] Sreenivasa Rao, 2006, p. 55.
[47] For the specific comment from the U.S. Government look at the article 'United States Responds to ICRC Study on Customary International Law', 2007.
[48] This is also reflected in the dissenting opinion expressed by Judge Sir Robert Jennings in the *Nicaragua* case.
[49] Bethlehem, 2007, p. 8.
[50] Meron, 2005, pp. 817-818. Meron elaborates in this article on how the principle affects the application of customary humanitarian law by the criminal tribunals.
[51] Lloyd Jones, 2004, pp. 52-55.

c. ***Accountability of non-state actors***

Applicable law, both treaty law and customary law, in non-international armed conflicts has created obligations for non-state actors[52]. Therefore when violations of these laws occur it should be possible to hold non-state actors accountable[53]. This study follows the opinion of the International Law Commission that has recognised the legal principle of responsibility of non-state actors. This however does not exclude the existence of individual criminal responsibility and command responsibility.

d. ***Impact of Jurisprudence of International Tribunals***

A number of issues under treaty and customary law are or have been subject to debate. The norms of IHL are not always clear or comprehensive. Jurisprudence of international tribunals has contributed to solving some of those issues by interpreting norms of IHL. A first example is found in the *Tadic* case before the International Criminal Tribunal for the former Yugoslavia (ICTY), which deals with the issue of the threshold of application for IHL. As already mentioned above, there is no definition of the situation of armed conflict in the treaty or customary rules of IHL. The appeals chamber of the ICTY does provide a definition in its decision. An armed conflict exists, according to the appeals chamber, whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. Concerning the application of IHL the appeals chamber states that IHL applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached or in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, IHL continues to apply in the whole territory under control of a party, whether of not actual combat takes place there[54]. The two aspects taken into account to determine the existence of a *de facto* armed conflict and therefore the application of IHL, are thus the intensity of the conflict and the organisation of the parties to the conflict[55].

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[52] This study will not go into detail about every exact obligation for non-state actors.
[53] Zegveld creates criteria for accountability of armed opposition groups in her dissertation. See also Zegveld, 2003, pp. 153-166.
[54] Paragraph 70 of the *Tadic* case.
[55] Cullen, 2005, pp. 97-102

Another example can be found in the definition of torture that was developed by the ICTY. Although the UN Convention Against Torture (UNCAT) provides a definition in article 1, this definition does not reflect the customary international legal position[56]. In the first cases concerning torture, both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) stressed the unity between the approach to torture in IHRL and international criminal law. In December 1998 in *Prosecutor v Furundzuja* the ICTY continued to interpret in accordance with the human rights' definition in UNCAT, but referred to some additional elements. Specific elements pertaining to torture in relation to armed conflicts were identified and spelled out. This only presented a slight change and it was not until 2001 when the clearest and most in depth expression of the tribunal's reasoning in this area can be found. In the case of *Prosecutor v Kunarac, Kovac and Vukovic* the tribunal explains that the absence of an express definition of torture under IHL does not mean that this body of law should be ignored altogether. Two crucial structural differences are to be taken into account. Firstly the role and position of the state as an actor is completely different in IHRL and IHL. In IHL individual criminal responsibility for violations does not depend on the participation of the state and conversely, its participation in the commission of the offence is not a defence to the perpetrator. IHL purports to apply equally to, and expressly bind, all parties to the armed conflict. IHRL on the other hand generally applies only to the state[57]. The public official element is extraneous to international criminal law. A violation of IHRL will lead to the responsibility of the state to take the necessary steps to redress or make reparation for the negative consequences of the criminal actions of its agents. A violation of IHL might also lead to this state responsibility, but individuals can also be held criminally responsible, irrespective of their status. The tribunal found that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under IHL. The elements of torture in IHL under customary international law are:

- the infliction by act or omission of severe pain or suffering physical or mental
- it must be intentional

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[56] Marshall, 2005, pp. 172-173.
[57] *Ibid,* pp. 177-178.

- the act or omission must aim at obtaining information or a confession or at punishing, intimidating or coercing the victim or a third person or at discriminating on any ground against the victim or a third person.

The penal law regime of international criminal law that is applied by the tribunal sets one party against another. It is concerned with the individual protection and individual accountability, regardless of the individual's status.

In IHRL the respondent is always the state because it is the only duty barer.

These differences between IHRL and IHL have been confirmed in *Prosecutor v Kvocka, Kos, Radic, Zigic and Prac.* The tribunal expressed its approach: 'the state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law'[58].

These two examples show that the international tribunals have made a contribution to the development of IHL. Numerous other examples can be found where jurisprudence of the tribunals has refined IHL. The United Nations Fact Finding on the Gaza Conflict also finds that jurisprudence of international tribunals has led to the conclusion that the body of substantive rules applicable to either international or non-international armed conflicts is becoming more and more identical.[59] This indicates the influence of the international criminal tribunals' jurisprudence on IHL.

[58] Marshall, 2005, p. 181.
[59] UN Doc. A/HRC/12/48.

2. Implementation of IHL by Non-State Actors

The international law system has always used traditional mechanisms to ensure compliance with IHL. The issue of enforcement is dealt with in a separate section because this implies that a violation has already occurred. Implementation in this section means all the mechanisms that are used to ensure compliance and therefore avoid violations.

a. ***Legal Tools***

- Domestic laws

One way of increasing compliance with IHL by non-state actors is incorporating legal rules in the domestic legal system[60]. Because non-state actors are not subject of international law and therefore cannot ratify treaties, they might not feel bound by it. Although non-state actors are often fighting the government in place, domestic laws might carry more sense of proximity.

The tools discussed below are traditional legal mechanisms to ensure compliance that have been used by the ICRC and other humanitarian actors in their efforts to improve compliance with IHL by non-state armed groups[61]. The tools do on themselves not guarantee increased respect, but the nevertheless provide a basis on which legal representations can be made and on which accountability can be required.

- Special Agreements[62]

This legal tool asks of parties to the non-international conflict to make an explicit commitment to comply with IHL. The content of these agreements can be either a simple restatement of the law that is already binding or it might go beyond the provisions of IHL already applicable and therefore create new legal obligations. When the special agreement is limited to specific rules that are particularly relevant to the

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[60] Turns, 2007, p. 354.
[61] ICRC, 2008, pp. 16-29; Kelleberger, 2004, 25-26.
[62] Provided for in common Article 3.

conflict, it is important to make clear that the limited scope of the agreement is without prejudice to other applicable rules not mentioned in the agreement[63].

The added value of a special agreement is particularly relevant to the compliance with IHL. Both parties recognise that they have the same obligations under IHL[64]. It furthermore provides an important basis for follow-up interventions to address violations of IHL. Additionally, it clearly identifies leaders for each party who take on responsibility to ensure adherence by signing as representative for the party.

This traditional legal mechanism is not very commonly used. Although the legal status of the parties to the conflict is in no way affected by the agreement, states might be concerned with granting a degree of legitimacy to the non-state armed group.

- Unilateral Declarations

International law does not recognise non-state armed groups as subjects of international law. Therefore these actors cannot ratify treaties and as a consequence they might consider themselves technically not bound[65]. A unilateral declaration provides armed groups with an opportunity to express their commitment to comply with IHL and by doing so the party recognises that it has obligations under IHL. It also provides an important basis for follow-up interventions to address violations of IHL. The express commitment gives the armed group a sense of ownership and therefore they might make more efforts to disseminate knowledge about IHL. An important note is that no matter the commitments made in these declarations, no changes are made to the applicable rules under IHL.

Chances are that non-state armed groups make unilateral declarations for political reasons.

- Codes of Conduct for Armed Groups

After a unilateral declaration adjusting or writing the code of conduct is often seen as a necessary next step to ensure implementation. However, a unilateral declaration beforehand is not at all necessary to have a code of conduct consistent with IHL.

[63] ICRC, 2008, p. 16.
[64] The negotiation on its own might also be very valuable for the future of resolving the conflict.
[65] ICRC, 2008, p. 19.

Implementing IHL implies that those who need to comply with it know and understand it. Thus armed groups could make sure that their codes of conduct are consistent with IHL and are understandable for their members. Manuals are a vital tool to ensure dissemination[66] and follow-up is provided with a good basis when violations occur. The codes of conduct should include internal sanctions to ensure implementation. Because the armed group itself writes the code of conduct, it gives a sense of ownership and therefore might more easily influence the behaviour of the members. The hierarchy of the armed group recognises that it has obligations under IHL. Even when the armed group uses a code of conduct that is provided for by the ICRC or another actor, it is still their own initiative and therefore will still create a sense of ownership. The positive consequences will thus not stay out merely because another organisation has written the code.
For a code of conduct to be effective in ensuring compliance with IHL, the armed group needs to have a certain level of control and organisation.

- Ceasefire or Peace Agreements

The inclusion of IHL commitments in ceasefire or peace agreements entered into by all parties to non-international armed conflicts can help to ensure compliance with IHL. Depending on the type of agreement these commitments consider either IHL provisions that continue to apply in case of a ceasefire agreement or IHL provisions that come into force after the cessation of hostilities in case a peace agreement. The latter are post-conflict obligations such as the release of detained members of the parties to the conflict, the duties of the parties toward evacuated, displaced and interned civilians, the respective duties of military and civilian authorities to account for the missing and dead and the requirement that the parties report the location of landmines.
Mentioning the applicable rules of IHL in both types of agreement reminds the parties of their obligations and secures a commitment to compliance. These commitments provide an important basis for follow-up and interventions in case violations of IHL occur.

[66] Garraway, 2004, p. 439.

- Grants of Amnesty for Mere Participation in Hostilities

In non-international armed conflicts the members of non-state armed groups are likely to face domestic criminal prosecution and serious penalties for taking part in the hostilities even if they did so in compliance with IHL. This gives very little legal incentive for members of those groups to comply with IHL. Granting the broadest possible amnesty to persons who have merely participated in the armed conflict might create such a legal incentive for the members of the armed groups to adhere to IHL. Additional Protocol II, Article 6, para. 5 says that the authorities in power shall endeavour to grant the broadest possible amnestyo persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained. Amnesty is not intended for war crimes or other crimes under international law. This would go against the underlying objective of IHL[67].

- Dissemination

Although dissemination is not a direct legal tool, it is a tool inscribed both in the rules of customary law[68] and in treaty law[69]. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. Dissemination is an obligation under the law that strives to ensure compliance and can even already be done in peacetime[70]. As mentioned before, those who (will) fight the conflict need to be made aware of the rules that apply so they can abide by them. Codes of conduct for armed groups are one an example of the first step in disseminating knowledge about IHL.

[67] See also Rule 159 of the ICRC study on Customary International Humanitarian Law.
[68] Rule 139 of the ICRC Study on Customary IHL.
[69] Article 19 of Additional Protocol II.
[70] Kellenberger, 2004, p. 22.

b. ***Other Tools***

Making non-state armed groups comply with IHL can also be done by other means than legal tools. Because non-state armed groups are often fighting against a political situation, using persuasion and political pressure might also encourage them comply[71]. IHL on itself is however apolitical and is only concerned with alleviating suffering[72].

- Persuasion

The ICRC is active in engaging with non-state armed groups to make them abide by IHL. One of the tools they recommend to improve compliance is 'strategic argumentation'[73]. By explaining why it is in a party's interest to comply with IHL they hope to encourage compliance. Evidently the characteristics of both the conflict and the party engaging with need to be taken into account. Arguments that have been used by the ICRC are the following:

- Military efficacy and discipline: By explaining that military commanders who took into consideration the necessary balance between military needs and the dictates of humanity originally developed IHL, members of armed forces might accept the usefulness of the principles. Commanders should be brought to see the usefulness of having well-disciplined troops who obey the command structure and do not indulge in behaviour that violates the law.
- Reciprocal respect and mutual interest: From a pragmatic point of view, the argument of reciprocity might help even though the obligation to respect IHL is not based on that principle.
- Reputation[74]: Most non-state armed groups fighting for political reasons care deeply about their reputation. When engaging with these parties it might help to explain that by abiding by IHL they could improve their image.

[71] Ravasi, 2004, pp. 9-10.
[72] Kiwanuka, 1989, p. 233.
[73] ICRC, 2008, pp. 30-31.
[74] This argument is very much linked to the power of the media to ensure compliance with IHL.

- Appealing to core values: To create a sense of ownership over the rules of IHL a party is asked to comply with, it could be useful to point out that the same rules exist in their own tradition.
- Long-term interests: The argument can be made that although violations might serve a short-term interest, in the long run violations could be self-defeating. Sanctions, criticism, weak legitimacy, failure of national reconciliation and condemnation are only a few examples of the damage that could be caused violations of IHL.
- Criminal prosecution:[75] Making the parties to the conflict aware of the fact that they might face criminal prosecution in case violations of IHL occur, might make them rethink before choosing the short-term gain of a violation. Recent developments in international criminal justice and in the repression of war crimes add strength to this argument.
- Economy: Saving resources by abiding by IHL might be an argument that works particularly well among non-state armed groups that lack major funding.

▪ Pressure

While the tool of persuasion asks for an interactive dialogue between a party to the conflict and actor trying to improve compliance with IHL, pressure is a tool that can be used from outside.

- From the traditional media[76]: As already mentioned in the part about persuasion, non-state armed groups often fight against their government to replace it. Therefore they need a reputation that afterwards gives them the legitimacy they need to be accepted as a player in the international community. The traditional media have a severe impact on this reputation. Whenever possible the traditional media should use their power to put pressure on non-state armed groups to encourage

[75] The details of criminal prosecution for violations of IHL in non-international armed conflicts will be dealt with in the section of enforcement.
[76] More information about media in armed conflict: Melone, Terzis, & Beleli, Ozsel, 2002, pp. 1-5.

compliance with IHL[77]. This is easily done by giving attention to either the violations committed by the non-state armed group or to the respect that is paid to IHL. The first situation will harm their reputation; the second carries the possibility of increasing their legitimacy once they come to power. As Gustave Moynier said, pressure of public opinion is the best guarantee of respect for the law[78]. Since traditional media are the basis of public opinion, they can play a vital role in ensuring compliance by non-state armed groups with IHL[79]. An important parallel trend is the growth of public interest in the application of IHL[80].

- From the International Community: The international community has several means to make non-state armed groups comply with IHL. Without getting involved in the actual conflict, they can clearly take a stance about it. If the non-state armed group were to win the conflict when the international community does not recognize it as the legitimate government, they will face a difficult future. Restrictions on trade and embargo's are only two examples of ways the international community can put pressure on a conflict situation. Furthermore the international community can put pressure on the government to prosecute members of non-state armed groups who have committed violations of IHL. Consequently this puts pressure on the non-state armed groups itself to comply with IHL.

[77] The UN affirms this power of the media e.g. in UN Doc. A/RES/60/251.
[78] McCormack, 2004, p. 321.
[79] Patrnogic, 2004, p. 17.
[80] De Hoop Scheffer, 2004, p. 30.

3. Enforcing IHL: Non-State Actors in national and international courts

Any court vested with jurisdiction in criminal matters strives to the effective trial and punishment of persons who have committed violations of the law. For international criminal tribunals one may add the goal of restoring and maintaining the peace[81].

An effective enforcement system might lead to a deterrent effect on violation of IHL. Although it is impossible to measure how many violations would occur were there no system of punishment in place, by examining the likelihood and limits of criminal prosecution of members of non-state armed groups, this study will try to give an idea about the impact on compliance with IHL international criminal law might have.

a. Domestic enforcement - National courts

- Principle of universal jurisdiction

An offence subject to universal jurisdiction is one that comes under the jurisdiction of all states wherever it may be committed, because it affects the interests of the international community as a whole[82]. The principle of universal mandatory jurisdiction allows try serious violations of humanitarian law obliges states to exercise jurisdiction in case a serious violation of the Conventions occurs[83]. Among scholars this principle is not uniformly accepted. For the purpose of this study however, the principle needs to be discussed[84].

Although there is no such obligation under the Geneva Conventions to prosecute for non-international armed conflicts, the Rome Statute has made the concept of war crimes applicable to non-international armed conflicts[85]. The ICRC study on customary law establishes that states have the right to vest universal jurisdiction in their national courts for war crimes committed in non-international armed conflicts[86]. The customary law rule however does not go that far to create an obligation to other states than the one

[81] Meron, 2006, p. 265.
[82] Penna, 2006, p. 148.
[83] Hampson, 2007, pp. 105-106.
[84] More information about the effect of customary international law on domestic law can be found in Mendelson QC, 2004.
[85] Wouters, 2005, p. 99-100.
[86] ICRC, 2005, p. 603.

involved in the non-international armed conflict to prosecute violations of IHL committed in such conflicts.

States need to shape their domestic law, in particular their criminal and military codes of discipline, so that the punishment of grave breaches on IHL is ensured. This assumes that both the elements constituting the offence and the range of punishment are established for each offence. The principle of *nullum crimen sine lege* is thereby respected. In addition further measures must be employed to ensure that the additional protective provisions of the Conventions are observed and that offences that do not constitute grave breaches are prosecuted according to domestic law[87].

The crimes that fall in the category of universal jurisdiction are not defined in the Geneva Conventions. Customary IHL helps defining these 'international law crimes'[88]. The ICRC study on customary IHL lists violations that qualify as grave breaches. This study will not go into the details of the definition. For the purposes of this study it is important to note that national courts have an obligation to prosecute serious violations of IHL and the list of these violations is less expanded in non-international armed conflicts than in international armed conflicts.

- Advantages and disadvantages of enforcement at national level

International criminal tribunals can often not deal with the workload that certain conflicts might bring upon them. The 1994 Rwandan Genocide is such an example. Not all individuals who have committed serious violations of IHL can be prosecuted before the ICTR. Therefore the government of Rwanda introduced the Gacaca jurisdictions[89]. One of the advantages is that it inhibits a sense of ownership that might disappear when international judges in a foreign country hold the trial.

When leading state officials are to be prosecuted national courts are not always capable of ensuring a (fair) trial[90]. This was one of the incentives to create international criminal tribunals. Another disadvantage at the national level is the deficient domestic judicial review of internal law with regard to international law, which undermines the most

[87] Fleck, 2008, p. 693.
[88] Wouters, 2005, pp. 94-95.
[89] For more information about the Gacaca Courts see Mibenge, 2004.
[90] Skillen elaborates on the inadequacy of the national and international approaches in Skillen, 1999.

effective mechanism for enforcing international rules that concern the individual[91]. The large openness of domestic legal orders in continental Europe to customary international law reflected in numerous statements of principle is not found in its actual application in practice[92]. This shows a reluctance of national courts to apply international law. On top of that comes the unwillingness to prosecute perpetrators of IHL violations[93].

b. ***Interstate enforcement - International Criminal Law***

- More than just deterrence by trials[94]

International criminal tribunals ought to have a deterrent effect, just as domestic criminal law. On the international level this effect will however not be a consequence of mere criminal trials and judgments. Nonjudicial effects that the existence of such tribunals can have in the given region will also have a deterrent effect as a consequence. The first effect is the increased political pressure brought to bear on regions affected by serious violations of IHL. The political pressure on the region to prosecute criminals domestically, to institute adequate measures for the protection of victims and witnesses, and to take local measures to prevent further atrocities can diminish unless there are frequent reminders to the international community of the seriousness and urgency of the situation. An international criminal tribunal can provide such reminders. The danger that the reaction of extreme outrage at serious violations wanes with time is thus avoided. This should increase the deterrent effect.

A second effect is the building of domestic institutions capable of trying serious cases of war crimes or crimes against humanity in the region itself.

It has already been mentioned that the deterrent effect is nonetheless impossible to measure.

[91] Stirling-Zanda, 2004, pp. 20-21.
[92] Wouters, 2004, pp. 25-28.
[93] Katalikawe, Onoria & Wairama, 2004, pp. 132-134.
[94] This section is based on Meron, 2006.

- The way to the International Criminal Court (ICC)

In 1872 already Gustave Moynier made a draft statute for an international criminal court. 130 years later the international community finally saw the entry into force of the Rome Statute for the ICC.

Between 1872 and 2002 there were however a number of other developments in international criminal law that paved the way for the creation of the ICC. After World War I the creation of a High Tribunal was put on the agenda. This tribunal never came into existence. War crimes trials on the national level failed dramatically in the aftermath of World War I. This experience leads to a strong motivation after World War II to create international criminal tribunals. Evidently there were criticisms[95] on the tribunals, but the precedential value of their establishment is difficult to overstate. For the first time international criminal tribunals were created on the basis of the principle that individuals could be tried for their alleged violations of international criminal law before international institutions created for that very purpose[96].

The decades following World War II knew a number of atrocities themselves. Alleged violators were to be prosecuted on the national level solely. Despite the rhetoric of a commitment to the principle of trying war crimes, the practice showed inadequacy of an exclusive reliance on national enforcement of international criminal law only.

In the 1990's two international criminal tribunals were created pursuant to Chapter VII of the UN Charter. These tribunals were to prevent impunity for serious international crimes. The impact that the tribunals had could not have been predicted. Without the precedents set by these two courts, the establishment of an international criminal court might not have been achieved.

[95] For more information about critique on the tribunals see McCormack, 2004, pp. 327-329.
[96] McCormack, 2004, p. 328.

- The International Criminal Court

The Rome Statute of the International Criminal Court was adopted in 1998 and entered into force in 2002. The Statue clearly defines the jurisdiction of the ICC. First of all there are limits to the crimes the ICC has jurisdiction over. Article 5 of the Statute names the following crimes: the crime of genocide, war crimes, crimes against humanity and crimes of aggression. For these crimes the Court does not have universal jurisdiction. The Court may only exercise jurisdiction[97] if:

- The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court.
- The alleged crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court.
- The United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

Furthermore the Court abides by the principle of complementarity[98]. This means that a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction. However, a case may be admissible if the investigating or prosecuting State is unwilling or unable to genuinely to carry out the investigation or prosecution.

Article 25 of the Statute deals with the issue of individual criminal responsibility[99].

Based on these provisions it is clear that members of non-state armed groups can be prosecuted before the ICC. Because impunity leads to escalating violations, enforcing

[97] Article 12 of the Rome Statute, For more information about jurisdiction and admissibility see http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm.

[98] Article 17 of the Rome Statute.

[99] Article 25 of the Rome Statute says that 'The Court shall have jurisdiction over natural persons pursuant to this Statute. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. (…)

IHL is an important issue[100].

One major problem with the ICC is the way cases come before it. There is no individual complaints procedure for violations of IHL. The only ways in which a case can come before the ICC and the prosecutor can open investigation are described in article 13[101].

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[100] Hampson, 2007, p. 107.

[101] (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15; For more information about this last route to the seizing of the Court see Cassese, 2006, p. 730.

4. Conclusion

The first part of this study has examined what rules apply to non-state actors, how these rules are currently implemented and what enforcement mechanisms exists to avoid impunity for violations of IHL.

Treaty law applicable to non-international armed conflicts has stayed very much underdeveloped for mainly legal and political reasons. The treaty law that is applicable creates fundamental guarantees of protection in case of non-international armed conflicts. These obligations are valid for all parties to the conflict. Customary IHL has considerably broadened these obligations. Whereas common article 3 is universally ratified, Additional Protocol II is far from. The ICRC study on customary law has shown that practice has made most of the guarantees of IHL applicable to both types of conflict. Therefore we can say that non-state actors do have obligations under international law even if they are not a subject of it. Jurisprudence of the international tribunals affirms this finding and contributes to the body of rules that forms IHL.

In spite of all these rules, violations of IHL still occur by non-state actors even though they are bound. Therefore the relevant question is not whether to create more law but how to increase respect for the existing law.

As shown in section 2 the traditional implementation tools have one very important impediment in common: because non-state actors are not recognised as subjects of international law, the legal force of their commitments is always the subject of discussion. Whether they agree to abide by certain rules in a special agreement or public pressure makes them act in a certain way to avoid any harm to their reputation, nothing but moral standards holds them from violating these commitments.

Section 3 deals with the traditional enforcement mechanisms on the national and international level. These mechanisms have the possibility to address violations of IHL by members of non-state armed groups, but are not without shortcomings. The willingness of national courts to prosecute might lead to impunity and the course of action to go to the ICC might exclude certain cases.

Overall, the traditional framework has shown gaps in every aspect. Therefore the second part of this study will look into new creative mechanisms to ensure compliance

with IHL by non-state actors. Although this part will not describe mechanisms where the legal status of the commitments by non-state actors is without debate, mechanisms that go outside the traditional way of thinking will be discussed.

II. New Mechanisms

The second part of this study looks into different initiatives developed in recent years to try to improve compliance with IHL by non-state actors. As has been shown in the first part of this study, the traditional system of IHL, discussed in three aspects, still has a lot of gaps in ensuring compliance. Solutions will be sought in the three aspects of applicable law, implementation and enforcement. In practice the last two aspects are the most important because merely creating more applicable law will never solve the already existing problems[102]. Although ideally compliance should be assured by implementation mechanisms only, violations are still likely to occur and therefore improving enforcement might also lead to better implementation. Only focussing on enforcement is not an option however because the goal is to prevent violations of IHL rather than prosecuting them afterwards.

For this study seven new mechanisms have been selected. The choice of these mechanisms reflects the three aspects, applicable law, implementation and enforcement, that form the outline of part I. For every aspect minimum two new mechanisms are discussed. This division automatically leads to a broad scope of creative new mechanisms. They differ in a number of ways. First of all there is a variety in who is involved in the mechanisms. Additionally different actors propose the new mechanisms.

1. Changes to the Applicable Law

When trying to improve compliance with the rules of IHL, one must always look at the applicable law. This section will deal with two alternatives that might increase the adherence to the rules of IHL by non-state actors.

a. ***Opportunities in Human Rights Law***

The first option to look at when trying to improve compliance with the rules of IHL is the opportunities that exist in the application of human rights law. This part of law has known a dramatic development after the creation of common article 3. In 1949 the assumption was that unless IHL norms were applied to non-international armed

[102] Sandoz, 2004, p. 354.

conflicts, the way States acted would be unrestrained by international law. IHRL has however since 1949 developed to become a viable alternative model of law in non-international armed conflicts. This regime makes minimum humanitarian standards or fundamental standards of humanity applicable to all parties in all situations. Only in the cases where the conflict reaches the threshold of Additional Protocol II, the regime of IHL should be applied. The ideal solution would be to demand that a state, which applies the armed conflict model should demand that a state has to draw the legal consequences and recognise as combatants those members of dissident forces who meet the substantive conditions of combatants under article 4, paragraph 2 of the Third Geneva Convention[103].

The two systems in case of non-international armed conflict will apply simultaneously[104]. A state is not relieved from its obligations under IHRL in the situation of non-international armed conflict[105]. Kretzmer takes this situation to the next level and argues to rethink the application of IHL in non-international armed conflicts[106].

First of all the assumptions behind IHL should be examined. Introducing elements of humanity in situations of armed conflict was the first impetus to develop IHL. The basic principles were symmetry and reciprocity between states. At that time non-international armed conflicts were still solely a matter for domestic laws and although IHL is concerned with protection of individual victims, IHL followed the state-centred pattern.

In 1949 the ICRC succeeds in extending IHL to non-international armed conflicts based on the argument that there was no reason why protection should be confined to these affected by international armed conflict. At this point IHL and IHRL start to overlap because they both apply in the situation of non-international armed conflict. The main difference is the relationship to which each system of law applies. The State has the power to derogate from some of its obligations under IHRL in times of war to allow the adoption of emergency measures that affect the rights of persons subject to that state's

[103] Kretzmer, 2009, p. 8.

[104] Penna, 2006, pp. 142-144.

[105] Meron, 2000, p. 239; Hampson and Salama, 2005; Special Issue: Parallel Application of IHR and IHL, 2007.

[106] Kretzmer, 2009, pp. 11-13.

jurisdiction. A formal declaration of emergency is required to resort to these measures. IHL on the other hand applies automatically in a situation of armed conflict. Thus the distinction between the relationships to which the two regimes apply, can no longer be maintained. In non-international armed conflicts all participants are subject to the State's jurisdiction and therefore enjoy the protection offered by IHRL. When the State derogates from part of its human rights obligations, this has clear implications for persons not involved in the conflict, as well as those who are participants. In its advisory opinion in the *Nuclear Weapons* case, the International Court of Justice made an analysis of the inter-relationship between the two legal regimes stating that IHL becomes *lex specialis* in an armed conflict situation[107]. This point of view implies that IHRL remains applicable as *lex generalis.* In 2000 however, Israeli military lawyers claimed that the situation pertaining in the West Bank and Gaza was "an armed conflict short of war"[108] and therefore IHL applies as a policy to free the authorities of some of the constraints of a law-enforcement model of law. Once a situation reaches the threshold of armed conflict, the principle of distinction[109] applies and using force against members of the armed groups without specific justification is allowed because of the targeted person's status as a fighter. Under human rights law that is unthinkable. Every individual's right to life is protected and may not be violated merely because of a status. There are severe limits to lethal force. This disparity in the legitimacy of lethal force between a human rights regime and an armed conflict situation is the reason why states involved in severe internal unrest might be interested in characterising the situation as one of armed conflict[110]. An additional argument is the issue of the investigation a government needs to conduct according to human rights law after every killing of a person by law-enforcement authorities. Under IHL an investigation is only required when there is some evidence that the killing itself was carried out in violation of IHL. Furthermore, there is no symmetry between the parties in a non-international armed conflict when it comes to prosecution. In practice, members of the armed forces of the State who kill fighters belonging to the other party are not subject to prosecution,

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[107] Szablewska, 2007, p. 346.
[108] Kretzmer, 2009, p. 22.
[109] Article 13 AP II or Rule 1 of the customary law study by the ICRC.
[110] Kretzmer, 2009, p. 23-29.

whereas fighters who belong to organised armed groups may well be prosecuted for killing soldiers belonging to the State's armed forces. States who use the armed conflict model of law can change the rules of engagement without paying the price paid in international armed conflicts, namely immunity from prosecution as a consequence of combatant status.

The notion of proportionality, that applies to non-international armed conflicts, as a rule of customary law, is also a reason why states might be interested in naming a situation an armed conflict. Under IHL this term refers the collateral damage that might follow a attack, knowingly killing or wounding civilians. The attack will not be unlawful when all the feasible precautions with a view to avoiding or at least minimising civilian casualties have been taken and there is no excessive loss to civilians in relation to the direct and concrete military advantage anticipated from the attack. Under IHRL this doctrine does not exist.

The European Court of Human Rights (ECtHR) has taken a different approach than the ICJ on the relationship between the two regimes. Rather than seeing IHL as *lex specialis* when a situation escalates and reaches the threshold of an armed conflict, the ECtHR interprets the human rights provisions of the European Convention on Human Rights (ECHR) in a manner that takes consideration of the violent conflict concerned[111]. This demonstrates that it is possible to apply a human rights framework to certain types of non-international armed conflicts without ignoring the extraordinary features of such conflicts, which demand that the norms applied not prevent the States involved from pursuing their legitimate interest[112]. The ECtHR has reached conclusions in such cases that appear to be largely consistent with the norms of IHL. However, the ECtHR has yet to make a formal stand on the issue of which regime should apply. The assumption therefore remains that there are essential differences between the two regimes.

A very recent case in the Supreme Court of the United Kingdom ruled that the ECHR only covers soldiers while at their military bases abroad and not when they are on the

[111] *Ergi v. Turkey*.
[112] Kretzmer, 2009, p. 30.

battlefield[113]. If this case were to be challenged in the ECtHR, there might follow a formal stand on the issue.

The paragraphs above show states might abuse the qualification of a situation as an armed conflict so that IHL would apply and the broader protection offered by IHRL is derogated. Hence, IHRL becomes seen as the secondary regime. However, developments in IHRL made all the prohibitions in common article 3 become part of IHRL. These provisions as IHRL apply at all times. Even the ICRC can and has acted to protect victims of internal unrest that does not amount to an armed conflict[114]. The problem however remains that non-state actors have no obligations under IHRL. States have duties under IHRL, while individuals are subject to the applicable domestic legal system. Thus, applying IHRL rather than IHL may imply abandoning the principle of symmetry that IHL has attempted to maintain. This lack of symmetry can be mitigated in several ways[115]. First of all, the development of individual international criminal liability makes sure that even if armed groups are not directly bound by IHRL, members of those groups could face both domestic and international criminal liability for violation of all the norms in common article 3. Secondly, there is the option of adopting minimum humanitarian standards, which bind state and non-state actors in all situations. These standards would bind all states, organised groups and individuals alike in all circumstances no matter the applicable legal regime. Especially in the situation where a state derogates from certain provision of IHRL claiming a public emergency while the necessary threshold for the application of IHL is not yet reached, these minimum standards are an important alternative. A last option is departing from the accepted notion that human rights obligations apply only to states and impose such standards on certain types of non-state actors, including organised armed groups, especially when such armed groups have *de facto* control over the lives and liberty of many people who are not their members[116]. As a consequence, organised armed groups could face

[113] *R. v. Secretary of State for Defense.*
[114] Statutes of International Committee of the Red Cross, articles 4.1.d. & 4.2.
[115] Kretzmer, 2009, pp. 37-39.
[116] Clapham, 2006.

international liability for violating fundamental human rights standards, even when IHL does not apply.

Based on a different reasoning, Tomuschat also argues for IHRL to bind non-state actors[117]. He bears in mind the situation where all governmental structures have disappeared in a country and only factions remain which raise claims to different portions of the national territory but which do not govern according to the rule of law. In this situation that can be described as a case of a public emergency, threatening the life of the nation, human rights instruments provide for exceptional derogations. If the situation amounts to an armed conflict, IHL applies too. All parties to a conflict need to abide by IHL, but where IHL has not established any rules, IHRL can be invoked. This situation poses a real problem because IHRL cannot be invoked against a non-state armed group that forms the *de facto* government. The legal foundation for IHRL to bind non-state actors remains problematic. Tomuschat uses the argument of Pictet that if 'effective sovereignty' is exercised, the group is bound by the fact that it claims to represent the country or part of it. The general idea is that a movement struggling to become the legitimate government of the nation concerned is treated by the international community as an actor who, already at his embryonic stage, is subject to the essential obligations and responsibilities every state must shoulder in the interest of a civilised state of affairs among nations. The fact that the movement did not consent is refuted by the existence of a general framework of rights and duties the international community has set up which every actor seeking to legitimise himself as a suitable player at the inter-state level must respect.

Making IHRL binding for non-state armed groups during non-international armed conflicts has a lot of practical difficulties and raises questions about the scope of the obligations[118]. One of the consequences could be the limitation of the states' responsibility for not taking necessary or effective enough measures to protect civilians from acts committed by non-state actors, also on territories still under the effective

[117] Tomuschat, 2004, pp. 573-576.
[118] More information about the horizontal application of Human Rights Law see Knox, 2008.

control of the state[119]. On the other hand, not to make IHRL applicable has its own problems. One of these problems is the states' responsibility to prevent, investigate or punish those responsible even when they are not state agents and the government has no control over certain areas.

Applying IHRL to armed conflicts has advantages and disadvantages. Although there has been a lot of development in the rules of IHRL and in many cases it might provide a wider protection than IHL, the application of IHRL to armed conflicts also entails a lot of difficulties. The suggested solutions are not likely to succeed. Leaving the principle of symmetry takes away a major incentive for states; minimum humanitarian standards might offer too little protection in general. The third option of applying IHRL to non-state actors[120] sounds as a mere theoretical option as does the argument of Tomuschat. Whether the application of IHRL can also serve as an early-warning mechanism is outside the scope of this study[121].

b. Engaging non-state actors in the creation of IHL

Generally, international law does not recognise non-state actors as subjects that can create treaty law. Several attempts have been made by scholars to change this premise. To a certain extent international organisations are already seen as subjects of international law as well. The chances that this could happen for other non-state actors as well are worth an independent dissertation. Therefore this study will not go into this option[122].

Customary international law is based on a representative, widespread and consistent practice. Armed opposition groups have to abide by these rules that represent the common standard of behaviour within the international community. Current international law only allows state practice to create customary international law[123]. An

[119] Szablewska, 2007, pp. 351-353.
[120] In this study this option is merely seen from a legal point of view. IHRL can however also be enforced in non-legal ways. See Reinisch, 2009, pp. 439-443.
[121] Parlevliet, 2009.
[122] More information on this debate can be found in Chibueze, 2009; Bianchi, 2009: Klabbers, 2009.
[123] Henckaerts, 2003, p. 128. Article 38 of the Vienna Convention on the Law of Treaties.

exception is made if the armed opposition group is successful in its rebellion and becomes the new government. Henckaerts however believes that the argument of customary international law would be stronger if the practice of armed opposition groups could be taken into account in the formation of customary rules of IHL applicable in non-international armed conflicts. The current theory denies the reality that armed opposition groups are important actors in non-international armed conflicts and could play a role in the creation of the rules that apply to such conflicts. States could recognise that armed opposition groups can contribute to the formation of customary law. The likelihood that this would happen is however very limited.

An interesting fact about customary international law is that the only way to propose an amendment is to break it. But how then to tell the difference between breaking to change and plain law breaking? Goodin proposes to use the same reasoning as for distinguishing civil disobedients from ordinary law breakers: the law must be broken openly, the legal consequences must be accepted and there must be a preparedness to have the same rules applied as to everyone else. In this situation the lawbreaker is a would-be lawmaker[124]. In the issue of engaging non-state armed groups in the formation of customary law in the future this reasoning could provide a good basis. The development of the customary law study of the ICRC provides a starting point. When non-state actors breach the rules enacted in this study, the theory of civil disobedience can serve as a means to include the practice of these groups in changing the customary rules of IHL. Once again, the likelihood of states accepting non-state actors to contribute to the changing of customary law is limited. Nonetheless, Goodin's reasoning provides a good basis to start a debate.

[124] Goodin, 2005, p. 225.

2. Implementation Mechanisms

a. ***Geneva Call***

- Description of the organisation and its activities

Geneva Call is an international humanitarian organisation dedicated to engaging armed non-State actors towards compliance with humanitarian norms[125]. Members of the International Campaign to Ban Landmines officially launched it in 2000 in response to the realisation that the landmine problem could only be addressed effectively if armed non-State actors, which represented an important part of the problem, were included in the solution.

The mission statement[126] of Geneva Call says that Geneva Call is a neutral and impartial humanitarian organization dedicated to engaging armed non-State actors towards compliance with the norms of IHL and human rights law. The organization focuses on Non-State Actors (NSA) that operate outside effective State control and are primarily motivated by political goals. The organisation engages non-state actors in a dialogue aimed at persuading them to change their behaviour and respect specific IHL and IHRL standards. Geneva Call conducts its activities according to the principles of neutrality, impartiality, and independence. Transparency is also a core working principle of the organization. As a standard operating practice, it informs stakeholders, including the governments concerned, of its engagement efforts with armed non-State actors.

Since its creation in 2000, Geneva Call has focused on advocating the ban on anti-personnel (AP) mines to non-State actors. The *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*[127] promotes an inclusive approach by enabling non-State actors to subscribe to the norms of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction[128]. The *Deed of Commitment* is an internationally recognized mechanism through which 41 non-state actors have already

[125] NGOs can have different functions in international law: see Charnovits, 2006, pp. 352-355.
[126] Available at: http://www.genevacall.org/home.htm.
[127] Hereafter *Deed of Commitment.*
[128] Hereafter Mine Ban Treaty.

adhered to a total ban on the use of AP mines and to cooperate in humanitarian mine action activities. Under the *Deed of Commitment* banning AP mines, signatory non-state actors agree, *inter alia*, to:

- prohibit under any circumstance the use, production, stockpiling and transfer of AP mines;
- undertake and cooperate, in stockpile destruction, mine clearance, victim assistance, mine awareness and various other forms of mine action in areas under their control;
- allow and cooperate in the monitoring and verification of their commitment by Geneva Call, notably by providing information and compliance reports as well as allowing field visits and inspections;
- issue orders and directives for the implementation and enforcement of this commitment;
- consider this commitment against AP mines as a first step towards a wider acceptance of IHL and international human rights law.

The work of Geneva Call does not end with the signature of the *Deed of Commitment* but the organisation plays an important role in monitoring and supporting the implementation of these commitments[129].

Building on the previous work done in the area of landmines, the organisation decided in 2008 to expand its work to the areas of children and gender.

Following the encouragement of a wide range of national and international actors, Geneva Call is extending its efforts towards improving non-state actors compliance with international norms related to children and armed conflict. Activities relating to Children and Armed Non-State Actors (CANSA) are being implemented in consultation with legal and policy experts, international actors, local civil society partners, former child members of non-state actors, and non-state actors themselves. Essential to the process is the trust and confidence Geneva Call has built up with non-state actors over the past nine years of engagement on the AP mine ban.

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[129] The work Geneva Call does in monitoring and supporting the implementation will be discussed further below.

Geneva Call aims to engage non-state actors in a dialogue on CANSA issues, sensitize them towards existing international norms, and provide them with a universal and standard mechanism to demonstrate their accountability and to contribute to the consolidation of norms on children and armed conflict issues. A *Deed of Commitment* on children in armed conflict will aspire to the most effective standards of protection. Yet engagement efforts do not end with commitments. They require monitoring, follow up, and assistance in ensuring that commitment translates into implementation, processes in which Geneva Call has built up valuable experience over the past years. Inclusive dialogue will help to identify potential obstacles, and work towards sustainable solutions for the protection of children from the effects of armed conflict.

The organisation is also expanding its efforts towards developing a strategy on an engagement process with non-state actors on the prohibition of sexual violence during conflict and on the protection of women and girls, both civilians and those associated with non-state actors, during armed conflicts. Geneva Call also endeavours to support women within and outside non-state actors so that they are better able to achieve the recognition of their rights during armed conflicts and to articulate them. Activities are being designed in consultation with other civil society actors involved in addressing the issue and with non-state actors themselves. Once again, the trust and confidence Geneva Call has built up with non-state actors over the past ten years of engagement on the anti-personnel mine ban is essential to the process. Desk- and field-based research is being undertaken to better understand the roles and experiences of women and girls during armed conflicts, the gender (power) dynamics that operate during armed conflicts, as well as women's specific vulnerabilities and capabilities within non-state actors. In partnership with the Small Arms Survey, Geneva Call co-published a first case study in 2008 examining the situation of women associated with non-state actors in southern Sudan. Geneva Call's work on gender builds upon two conferences with women associated with non-state actors held in Geneva (2004) and Addis Ababa (2005), which the organization co-organized with the Program for the Study of International Organization(s) (PSIO) (Part of the Graduate Institute for International and Development Studies).

- Results obtained in the landmine issue

Geneva Call publishes annual reports on their activities as well as reports on conferences and conducted research. These documents form the basis to measure the effectiveness of Geneva Call as a new implementation mechanism. Because the area of landmines is the most developed one, this study will mainly focus on that area in measuring the effectiveness of the initiative.

In 2000 Geneva Call started its action against landmines by developing the *Deed of Commitment.* To date 41 armed non-State actors in Burundi, India, Iran, Iraq, Myanmar/Burma, the Philippines, Somalia, Sudan, Turkey, and Western Sahara have signed the *Deed of Commitment* banning AP mines. In addition and as a result of Geneva Call's efforts, several non-state actors that have not signed the *Deed of Commitment* banning AP mines have nevertheless pledged to prohibit or limit the use of AP mines. They have done so either unilaterally or through a ceasefire agreement with the government, while some have undertaken mine clearance and victim assistance in areas under their control.

Geneva Call has since its creation been active in researching the use of landmines. Four years after the creation of Geneva Call there is still not sufficient information available regarding the extent to which armed non-State actors are implicated in the landmine problem. On a global scale, those who monitor the landmine problem and the implementation of the Mine Ban Treaty focus their attention on States, signatories and non-signatories alike. With a few noteworthy exceptions, non-state actors mine use has not been explored in any depth. This is mostly due to the lack of available information and limited experience in researching armed non-state actors. Another reason is that in some situations, States have been reluctant to allow research on the subject or provide information. Moreover, researchers in the field may face security problems in gathering information on a subject that is considered sensitive. In light of the considerable number of active armed non-State Actors around the world and the impact their mine use has on the lives of civilians, Geneva Call believes that it is essential to complement available information on State use of AP mines by collecting data on mine use by armed non-state actors.

The organisation tried to fill the information gap by compiling and analysing available information on armed non-State actors' mine use for the period of 2003-2004 in the report 'The involvement of Armed Non-State Actors in the Landmine Problem: A Call for Action'[130]. Once systematized and analysed, this information will serve as a useful tool for engaging armed non-State Actors in the mine ban. The aim is to reflect with as much accuracy as possible the contribution of armed non-state actors to the landmine problem. By mapping the scope of mine use by armed non-state actors as well as the logic behind this use, Geneva Call hopes to better understand the problem and, ultimately, to use this information to increase the engagement of armed non-state actors in the mine ban. The underlying rationale for this report is the need to gain a better understanding of what information is available and to use this to conduct a first analysis of the global trends of how and why armed non-state actors use landmines.
In 2005 the organisation published a report entitled 'Armed Non-State Actors and Landmines Volume I: A Global Report Profiling NSAs and their Use, Acquisition, Production, Transfer and Stockpiling of Landmines[131]'. This report is based on the findings reflected in the 2004 Executive Summary. Widespread landmine use by armed non-state actors documented in the Executive Summary made clear that there was a need for a detailed analysis of how and why armed non-state actors use, acquire, produce, transfer, and stockpile landmines, and the extent to which civilian populations are affected by this.

Besides research, Geneva Call also organises conferences for non-state actors where representatives from signatory groups and prospective signatory groups, humanitarian actors, academics, diplomats and mine action practitioners have a unique opportunity to meet, exchange views and review Geneva Call's work. One of these conferences was the 'First Meeting of Signatories of the Geneva Call's Deed of Commitment'. This meeting was scheduled a few weeks prior to the First Review Conference of the Mine Ban Treaty. Geneva Call felt it was crucial to simultaneously highlight the progress

[130] Sjöberg, 2004.
[131] Sjöberg, 2005.

made in universalising the mine ban through the inclusion of armed non-state actors[132]. The report of this meeting describes the results and challenges in four facets:

- Implementation of the Deed of Commitment
- Monitoring and Promoting the Deed of Commitment
- Expanding the Geneva Call Mechanism to other Humanitarian Norms
- Mine Action and Peace Processes

Comparable to the report of the conference in 2004, Geneva Call published a Progress Report in 2007. This report reviews the operation and status of the *Deed of Commitment* and documents the progress accomplished. It is based on self-assessment and research efforts carried out by Geneva Call. The purpose is to take stock of the action taken to date, to record the achievements and remaining challenges, and to highlight priority areas for future work. Like the report of the conference, the Progress Report is split up into three sections:

- Advocating a Universal Ban on Anti Personnel Mines
- Implementing the *Deed of Commitment*
- Monitoring the *Deed of Commitment*

These two documents provide the basis to ascertain whether Geneva Call's initiative is an effective new implementation mechanism. A first indicator is the number of signatories[133]. To date there are 41 armed non-state actors that signed the *Deed of Commitment* and thereby formally renounced the use of an indiscriminate weapon. This is significant because many of these groups were allegedly involved in the landmine problem[134]. In 2007, all 34 signatories reported that the areas they control or operate in contain, or are suspected to contain, mines and/or explosive remnants of war.

Some of the signatories changed their status from when they signed the *Deed of Commitment.* Either they have become part of their State's governing authorities[135] or

[132] Geneva Call, 2004.
[133] 27 signatories in 2004, 34 in 2007.
[134] Geneva Call, 2007, p. 7.
[135] Examples are the National Council for the Defence of Democracy/Defence Forces of Democracy (CNDD-FDD), Sudan People's Liberation Movement/Army (SPLM/A), Kurdistan Regional Government-Erbil (led by the Kurdistan Democratic Party) (KRG-KDP) and Kurdistan Regional Government-Sulaimanyia (led by the Patriotic Union of Kurdistan) (KRG-PUK).

they dissolved or abandoned armed struggle[136]. The first category has shown to have a positive impact on the acceptance and implementation of the Mine Ban Treaty. One example is the case of the Sudan People's Liberation Movement/Army (SPLM/A) in Sudan. In 2001 the group signed the *Deed of Commitment.* Two years later the government ratified the Mine Ban Treaty. Both parties confirm that without the formal commitment SPLM/A made to observe the provisions of the Mine Ban Treaty, the government would not have felt able to ratify the Treaty[137].

There are also armed non-State actors, non-signatories to the *Deed of Commitment,* who have made progress towards the mine ban. The Progress Report mentions that the Democratic Party of Iranian Kurdistan (DPIK) indicated that it would become signatory. One month after publication of the Report the DPIK signed the *Deed of Commitment.* This example clearly shows that efforts made by Geneva Call and its partners pay off. It is also an obligation of signatories under article 8 of the *Deed of Commitment* to promote the mine ban with friendly of neighbouring armed groups. In the 2004 Report of the First Meeting of Signatories mention is made of arguments that signatories used to persuade other armed groups. For example: when armed non-state actors use landmines, governments are given a new reason to demonise the groups and challenge their legitimacy or when an armed non-state actor succeeds in establishing their own homeland, its first task will be to reconstruct the territory, which includes mine clearance.

Even when the result is not the singing of the *Deed of Commitment,* Geneva Call's efforts are still worthwhile. For example, in June 2003 the Venezuelan National Liberation Army (ELN) informed Geneva Call that, although it was not prepared to adhere to the *Deed of Commitment,* it would be willing to explore ways to reduce the impact of AP mine use on civilians. Already in January 2005 ELN announced that it had cleared an area it had previously mined along a 15 km stretch of a road in Micoahumando, south of Bolivar. Geneva Call was provided with a map of the cleared

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[136] Examples are Arakan Rohingya National Organization (ARNO), National United Party of Arakan, Banadiri, Somali African Muki Organization (SAMO/SRRC/Nakuru), Somali Patriotic Movement, Southern Somali National Movement, Transitional National Government and USC/North Mogadishu/SRRC.

[137] Sjöberg, 2005, p.1. Geneva Call conducted interviews with representatives from both the Government of Sudan and the SPLM/A.

zones. Consequently in December 2005 the ELN publicly announced its new mine policy. It claimed that it would not lay mines in an indiscriminate way, instruct commanders to map mined areas, warn local communities about the location of mines and areas to avoid, and remove mines which served no military purpose. These commitments and measures might not be sufficient, yet they are encouraging steps since they reflect an increasing awareness of the devastating impact of AP mines and indeed help to reduce it. The 2007 report states that the increasing awareness has made even some non-signatory armed non-state actors act in accordance with the Mine Ban Treaty's provisions. This trend might be facilitated on a bilateral basis or in multilateral fora such as the Unrepresented Nation and Peoples Organization where signatories to the *Deed of Commitment* promote adherence to the anti-personnel mine ban.
Another positive aspect that follows the signing of the *Deed of Commitment* is that it facilitates the launch of international humanitarian mine action in areas under the signatory armed non-state actors control. The Polisario Front in Western Sahara signed the *Deed of Commitment* and a few months later allowed the British NGO Landmine Action to start a technical survey and Explosive Ordonance Disposal Project in its territory.

Besides the positive aspects that the signing of the *Deed of Commitment* has, it is of paramount importance to look at the implementation of the obligations under the *Deed of Commitment* when assessing the effectiveness of Geneva Call as implementation mechanism[138]. In the first place it is the responsibility of each individual signatory to ensure compliance. Nevertheless, Geneva Call and its partners have actively followed up and supported implementation of the *Deed of Commitment* as much as possible[139].
Article 1 of the *Deed of Commitment* asks of signatories to adhere to a total ban on AP mines[140]. This obligation is overall complied with. The Progress Report mentions only

[138] Geneva Call, 2004, p. 13.
[139] Support from Geneva Call generally took the form of training on the mine ban, facilitating technical assistance from specialised organisations, and promoting mine action intervention in areas controlled by signatory groups.
[140] Article 1 of the *Deed of Commitment* explains: By anti-personnel mines are meant, those devices which effectively explode by the presence, proximity of contact of a person, including other victim-activated explosive devices and anti-vehicle mines with the same effect whether with or without anti-

five cases in which a signatory are accused of violating their obligations under the *Deed of Commitment*[141]. In four of these cases no conclusive evidence was found to support the allegations and in one case it appeared that the group did not realise it was using prohibited weapons by employing what it thought to be command-detonated devices. All five accused groups cooperated fully in the verification process conducted by Geneva Call, as prescribed in article 3 of the *Deed of Commitment*.

Article 2 of the *Deed of Commitment* obliges signatories to cooperate in and undertake stockpile destruction, mine clearance, victim assistance, mine awareness, and various other forms of mine action, especially where these programmes are being implemented by independent and national organisations. Due to a lack of technical capacity, qualified personnel, equipment and financial resources, most signatories cooperated with specialised organisations more than undertaking mine action on their own. Signatories mainly granted specialised organisation access to areas under their control, shared information, and provided security, logistical and sometimes even financial support. An important remark to be made is that the signatories most active in mine action are *de facto* authorities facing a serious mine problem in the areas under their control. Examples are the SPLM/A, the Polisario Front, the Kurdistan Regional Government-Erbil (led by the Kurdistan Democratic Party) (KRG-KDP) and Kurdistan Regional Government-Sulaimanyia (led by the Patriotic Union of Kurdistan) (KRG-PUK).

A very important aspect regarding implementation of the commitments is the cooperation in monitoring[142]. When the Progress Report was made, nearly all[143] signatories had complied with this obligation to allow and cooperate in the monitoring and verification of their commitments by Geneva Call and other independent international and national organisations associated for this purpose with Geneva Call. The monitoring and verification includes field visits and inspections, as well aw the provision of information and reports. In a complementary way monitoring is thus done by self-monitoring and self-reporting, third-party monitoring and field missions

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handling devices. By a total ban is meant, a complete prohibition on all use, development, production, acquisition, stockpiling, retention, and transfer of such mines, under any circumstances. It also includes an undertaking on the destruction of all such mines.

[141] Details about these cases can be found in the Progress Report, pp. 15-16.

[142] Article 3 of the *Deed of Commitment.*

[143] At that time there were 34 signatories.

conducted by Geneva Call.

By October 2007 29 out of 34 signatories had reported to Geneva Call on the measures they had taken to implement their commitments. The advantage of self-monitoring is that the groups take full responsibility for their commitments. An important remark is made in the report of 2004, namely that the leadership of a group has a monitoring role in that it is in a privileged position to assess the extent to which obligations are effectively complied with or not. Therefore a group with a strong hierarchy is most fit to meet this monitoring obligation.

Third-party monitoring has also proved to be valuable. In 2004 there was an example where Geneva Call was informed about a landmine incident in Sool, Puntland, northern Somalia, a region disputed by Somaliland and Puntland. The organisation contacted the Puntland Mine Action Centre (PMAC) to conduct a field investigation. It appeared to be an old mine planted in the late 1980s in an area where the two parties had not engaged in conflict.

Geneva Call can also decide on its own initiative to send a field mission. In that case no further approval is required from the armed non-State actor, since that has already been given upon signing the *Deed of Commitment.* By October 2007, Geneva Call had visited over 20 signatories to review progress and/or assist in the implementation of the *Deed of Commitment.* No signatory ever consistently refused a field visit or denied access to its areas of operation or control. A very successful example was the verification mission conducted in the Philippines with the support of the government and the armed group concerned[144].

A last obligation under the *Deed of Commitment* is to issue the necessary orders and directives to the commanders and fighters for the implementation and enforcement of the commitments under the previous articles, including measures for information dissemination and training, as well as disciplinary sanctions in case of non-compliance[145]. In 2007 19 out of the 34 signatories had reported to have issued orders to their rank and file and/or informed their members and constituencies about the *Deed of Commitment.* Some signatories such as National Council for the Defence of

[144] Geneva Call, 2009, p. 3 and p. 13.

[145] Article 4 of the *Deed of Commitment.*

Democracy/Defence Forces of Democracy (CNDD-FDD), KRG-KDP, KRG-PUK, Polisario Front and Puntland, either participated in or conducted, with Geneva Call and local partners' support, mine ban education and implementation workshops for their rank and file and members. Another tool used by some signatories is the Geneva Call's training manual on the *Deed of Commitment*[146]. Geneva Call has created this training manual, entitled *Implementing the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and Cooperation in Mine Action*, to help disseminate and explain the obligations of the *Deed of Commitment* banning anti-personnel mines to armed non-State actors' members. This manual exists in Arabic, English, Magindanao, Marano, Somali, and Tao Sug. A similar manual, entitled *Principles of the Total Ban on AP Mines and Cooperation in Mine Action*, also exists in French and Diola.

Four signatories[147] have also adopted mine action decrees, policies and laws to the end of establishing structures to regulate, coordinate and implement mine action in territories under their control.

Reports have been made by nine signatories[148] to have provided for disciplinary sanctions such as demotion, suspension, expulsion and imprisonment in cases of non-compliance.

After discussing the obligations of signatories it is important to have a look at the sanctioning mechanisms. Article 7 of the *Deed of Commitment* provides for 'naming and shaming' as a means of sanctioning non-compliance. So far this mechanism has not yet been used because all signatories overall comply with their obligations. The First Meeting Report mentions the idea of inducements as a viable alternative to sanctions. That way implementation and acceptance of the mine ban could lead, for example, to the financing of mine clearance activities by international donors. This could be used as a leverage to encourage adherence[149].

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[146] Available at: http://www.genevacall.org/resources/training-materials/f-training-materials/english/training-manual.htm.

[147] SPLM/A, Puntland, KRG-KDP and KRG-PUK.

[148] ARNO, Kuki National Organisation (KNO), The Lahu Democratic Front (LDF), Moro Islamic Liberation Front (MILF), National Socialist Council of Nagalim (Isak-Muivah faction) (NSCN-IM), Polisario Front, SAMO/SRRC/Nakuru, Somali National Front (SNF) and SPLM/A.

[149] Geneva Call, 2004, p. 22.

Although many challenges such as continued use of AP mines by armed non-state actors, the lack of financial and technical resources to support implementation of the *Deed of Commitment* and insufficient cooperation from some concerned States remain, humanitarian engagement with armed non-state actors has shown the potential to work successfully in practice. The achievements listed above prove that the *Deed of Commitment* is a very practical and effective tool. It complements the inter-state framework and enables armed non-state actors to express their consent to be bound by the Mine Ban Treaty's rules without affecting their legal status. By making these rules their own, the *Deed of Commitment* also entails that signatories can be held accountable for their commitment.

Engaging non-state actors in the issue of landmines provided an entry point for dialogue on wider humanitarian and human rights issues. This possibility was already discussed in the First Meeting of Signatories in 2004. The experience Geneva Call had with landmines demonstrates that there is an alternative way of dealing with armed non-state actors, even those labelled as "terrorists", to denunciation, criminalisation and military action, and that an inclusive approach, based on dialogue and persuasion, can be effective in securing their compliance with IHL[150].

- Children and Women in Armed Conflict

The annual report of 2009 indicates that non-state actors are willing to make commitments on other humanitarian and human rights issues than landmines. The report talks about the Second Meeting of Signatories to the *Deed of Commitment* where 40 members of non-state actors or representatives of partially recognised states met. The discussions where however not limited to the landmine issue. The role of women and children in armed conflict was also on the agenda. The relationship of trust, which Geneva Call has built up with these groups, allowed it to leverage those relationships in order to address new humanitarian issues. Specialised workshops were organised to discuss these issues. There were talks about the diverse reasons that children become associated with armed conflict, as well as the range of the types of association, and the

[150] Geneva Call, November 2007, p. 32.

age of the child. Delegates indicated to be mostly in favour of Geneva Call developing an instrument like the *Deed of Commitment* specifically adapted to cover the impact of conflict on children, taking into account the cultural differences and contexts. The minimum age is an issue particularly sensitive to cultural differences. A consensus could nonetheless be reached that 15 should be the absolute minimum age for a combat role. The Western norm of 18 was counter argued by the fact that not a few delegates affirmed that they themselves had joined or attempted to join their armed non-state actor before that age. This issue clearly shows the importance of talking with non-state actors rather than taking decisions in their name.

Geneva Call has also dealt with the issue of women and gender in armed conflicts. Already in 2004 there was a workshop organised by Geneva Call entitled 'Women in Armed Opposition Groups Speak on War, Protection and Obligations under International Humanitarian and Human Rights Law'[151]. The aim was to learn more about the experiences of women and girls within armed opposition groups and to answer questions about their potential roles in promoting IHL in IHR. The workshop in 2005 in Addis Abbba 'Women in Armed Opposition Groups in Africa and the Promotion of International Humanitarian Law and Human Rights', served the same purpose[152].

The annual Report of 2009 mentions that Geneva Call began to assess the situation of women within the PKK, because women are an integral part of this armed non-state actor. In February 2009 Geneva Call completed its first assessment mission on gender and protection in Colombia. An assessment was also made in Central African Republic and Chad to explore the possibilities there of engaging non-state actors on the subject of sexual violence and gender-based violence in armed conflict. Also in 2009, Geneva Call was able to gather valuable input during discussions with Iranian Kurdish non-State actors in Northern Iraq. The Second Meeting of Signatories' working group on the protection of women gave special impetus. All participating non-state actors agreed to pursue collaboration with Geneva Call on this subject.

[151] Mazurana, 2004.
[152] Mazurana, 2005.

In 2010 Geneva Call will start a three-year strategy engaging non-state actors, thereby leveraging the extensive built up experience with armed actors to draft a *Deed of Commitment* on gender issues in the second year. From the third year on the organisation intends to start gathering signatures and monitoring its implementation.
During the Second Meeting of Signatories nine Asian non-state actors accepted Geneva Call's initiative to lead a regional workshop in 2010 aimed at reviewing their existing internal policies and practices in prohibiting sexual violence by their armed forces during conflicts, and protecting women and girls.

- Criteria developed by Geneva Call

In the previous section this study has made clear that Geneva Call is a viable alternative way to make armed non-state actors comply with rules of IHL. The question that still needs to be answered is whether any type of armed nonsState actor is suitable to engage with. In June 2007 Geneva Call held a conference to explore criteria and conditions for engaging armed non-state actors to respect humanitarian law. The results of this conference are to be found in the conference report. Five chapters divide the report:
1.Who: reflections and arguments on the selection of groups classified as non-state actors.
2. Why: reasons are analysed why non-state actors should be engaged.
3. When: reflections on the right timing to engage non-state actors.
4. How: methods of engaging non-state actors are discussed.
5. Which topics: examine through specific examples which topics non-state actors can be engaged on.
For the purpose of this study it is not necessary to go into all of these details. As already mentioned above, Geneva Call focuses on armed actors that are primarily motivated by political goals and operate outside state control. Paramilitary groups are therefore excluded since they are tied in some way to a state apparatus. It might not always be easy to distinguish between a state-supported proxy force and an autonomous pro-government militia. Therefore, where evidence suggests that the government exerts effective control over a paramilitary group, Geneva Call assumes that the state is

accountable for the conduct of such *de facto* state agents[153]. Similarly, although it is true that the distinction between political and economically motivated violence is increasingly blurred in practice, mere profit-driven organisations are not targeted by Geneva Call's advocacy efforts. Geneva Call makes the determination on a case-by-case basis.

Based on the results described above it is clear that Geneva Call can make a significant contribution to the compliance of non-state actors with IHL. The organisation makes rebel groups realise the advantages of being seen to abide by international norms[154]. Overall, Geneva Call's trump card is the dialogue it maintains with non-state actors. This dialogue creates a sense of ownership. Additionally, the workshops and conferences organised by Geneva Call, offer an opportunity for leaders of non-state actors to exchange experiences. Charing positive experiences among 'equals' is the best advocacy Geneva Call can wish for.

*b. **Berghof***

Under this section both Berghof Conflict Research (BCR) and Berghof Peace Support (BPS) will be discussed. Separate mention will be made of the most important publication.

- Description of BCR and its activities

BCR is a think tank operating at the interface between conflict research and peace policy. BCR has a research-oriented perspective. They investigate and develop innovative and pragmatic approaches to conflict transformation. Among other activities they try to help conflict stakeholders to identify peaceful ways of addressing their differences[155].

This study deals with the BCR initiative since IHL has an important function in the situations looked at by BCR.

[153] Geneva Call, June 2007, p. 109.
[154] Clapham, 2008, p. 932. In this article more advantages of Geneva Call's working method are listed.
[155] For more information about the organisation see http://www.berghof-conflictresearch.org.

For this study on non-sate armed groups, two of the three areas in which BCR has done research are relevant:

- Resistance and Liberation Movements in Transition: Recent experience around the world has demonstrated that non-state armed actors have become a defining feature of contemporary political conflicts, and that in the end, reaching political settlements needs their active involvement and cooperative engagement. This programme seeks to gain insiders' knowledge on the role and practice of resistance and liberation movements conducting conflict, negotiations and peace building, through the methodology of participatory action research. In close collaboration with local researchers and political stakeholders in various conflict or post-conflict settings, BCR carries out joint analysis on the organisational shifts from militant structures to post-war political actors, mechanisms and processes of peace negotiations, and the interface between political and security transition processes (e.g. demobilisation, security sector reform, civilian reintegration and political-structural reform). BCR also explores best practices and models for external support by international actors.

- State and Non-State Relations in Transforming Violent Conflicts: Most of the current violent conflicts in the world involve both state and non-state actors. At the same time, most models for transforming these conflicts fail to take into account that the varying conflict parties may have certain interests in common. Unilateral approaches to 'solving' conflicts, particularly those based on armed force, are never durable – if they can be enforced at all. BCR rejects such power politics approaches on principle, because they tacitly accept that the weaker party's legitimate interests will be suppressed. Developing sustainable incentives for actors to work together constructively is, in BCRs view, the only lasting way to break spirals of violence. That is why BR insists on inclusivity in their projects, i.e. looking into the aims and potential contributions of *all* conflict parties in the transformation process. Based on analysis of the various strategies that the actors within a conflict have adopted, BCR works with them to try and identify appropriate common ground and synergies, in order to promote constructive interaction. Here, the research interest lies primarily in constellations involving actors with ethno political motivations.

- Results obtained in the area of Resistance and Liberation Movements in Transition

BCR has several publications regarding project results in this area of research. These include research, conferences and dialogue projects addressing resistance and liberation movements that have made, or are making, the transition from armed struggle to politics, and their involvement in shaping peace processes. Using action research methodology and active networking, BCR supports and better enables these transition processes through relevant advice, facilitating peer exchange and capacity building. In the first phase of the project, participating partners shared and explored their own experiences of transition. Based on this information, the emerging network of participants then compared and analysed their findings. This has resulted in a new conceptual focus on active, autonomous ways of shaping the future security policy of the groups involved, which now constitutes the second phase of the project. Findings from this research are also currently being adapted for use as policy advice.
This study will look into three publications in the area of resistance/liberation movements in transition. The publications selected should be able to provide a general idea on the effectiveness of Berghof's initiative as a mechanism to engage armed non-state actors in IHL.

The first publication is entitled 'From War to Politics: Resistance/Liberation Movements in Transition'[156]. This report describes a project that builds on a network of groups who have experienced the transition from armed resistance in violent conflict to political engagement in post-war state building. Its overall goal is to carry out focused analysis and participatory action research on security-related transition processes, by critically reassessing international approaches to security and political negotiations, demobilization, civilian reintegration, military or police integration, and the transformation of national security architectures from the point of view of resistance and liberation movements.
The incentive for this report was given by statistics revealing that many recent peace agreements have not been fully implemented, and in fact more than one third of armed

[156] Dudouet, 2009.

conflicts ended by negotiated agreement since 1990 have relapsed into some degree of violent warfare within the following five years[157]. Therefore research must be done on the role played by non-state armed groups in peace processes and post-war peace building, exploring their organisational and strategic shifts from armed insurgency in underground movements towards an engagement in peace negotiations, post-war conventional politics and the acquisition of (shared) state-power. Innovative about the research done by BRC is the direct engagement with insurgency groups to their points of view, rationales, and self-understanding of their environment and courses of action. Leaders members or 'advisors' of six resistance and liberation movements have been invited by BCR to engage in internal self-reflection and analysis on their respective organisations' formation, development and experience in conflict transformation, as well as the strategic, organisational and structural shifts entailed by such transitions. BCR has conducted six case studies to this end[158]. The publication described here compiles some important comparative findings, which emerged from the case studies. An important preliminary remark is that the participants in this project are not seen as 'converts to peace' but as pragmatists who have at some stage chosen to expand political strategies to achieve their goals, and who have in the course of the conflict made the transition from opposing a state regime to participating in the construction of a new, more democratic system[159].

The project conveners and participants formulated five basic research questions:

1. What is/was the objective of the movement?
2. How was the movement drawn into armed struggle?
3. What internal and external factors persuaded the movement to pursue or consider a non-violent political strategy?
4. How does/did the movement mobilise itself and its constituencies towards pursuing a political strategy?
5. What is the nature of any resulting/potential transformation?

[157] Dudouet, 2009, p. 3. Information from Human Security Center, 2008.
[158] African National Congres (ANC) in South-Africa, Movimiento 19 de Abril (M-19) in Colombia, Communist Party of Nepal – Maoist (CPN-M) in Nepal, Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, Gerakan Acheh Merdeka (GAM) in Aceh, Indonesia and Sinn Fein in Ireland.
[159] Dudouet, 2009, p. 14.

A more detailed analytical framework was provided to the participants in order to guide them in their research process. It suggested possible dynamics and ‘drivers of change’ which might help them to explore both the various arenas of transition which their movement and country had been through, and the various factors influencing such transformations. The framework is split up I three sections: internal shifts, inter-party dynamics and international factors.

The result of this research is to learn about experiences of the transition process that resistance and liberation movements go through when going from war to politics. Based on the findings of comparing the six case studies, practitioners guiding such groups can get a better insight in how, with who and when to bring up the issue of IHL. An example that shows the influence of the international community is the case of the Gerakan Acheh Merdeka (GAM) movement. During the 2000-2003 peace process, the GAM movement intensified its international advocacy work and built a transnational solidarity network relayed by civil society groups. In its search for international legitimacy to balance its asymmetrical position with Jakarta, the exiled leadership advanced its political cause by shifting from anti-capitalist and anti-Western discourses to appeals for human rights and democracy[160]. Both the Liberation Tigers of Tamil Eelam (LTTE)[161] and the Communist Party of Nepal – Maoist (CPN-M)[162] confirm that recognition as legitimate political actors on the international stage is an incentive for a conciliatory attitude.

The second publication is entitled ‘Negotiating conflict settlements: Lessons learnt and challenges’[163]. The report describes how to conduct peace talks. It starts with the phase of coming to the negotiation table, then addresses the rules of engagement during peace negotiations and ends with advice on how to negotiate the implementation of peace agreements. The relevance to IHL is that when non-state armed groups become political players and time arrives to have peace talks, IHL is a subject that must be dealt with. Therefore BCR could contribute to a better compliance with the rules of IHL when parties to a conflict sit around the table.

[160] *Ibid,* p. 33-34.
[161] The complete report on the LTTE: Nadarajah & Vimalarajah, 2008.
[162] The complete report on the CPN-M: Ogura, 2008.
[163] Dudouet, 2008.

The third publication under this area of research deals with mediation. It is entitled 'Mediating Identity Conflicts: Potential and Challenges of Engaging with Hamas'[164]. This paper aims at deriving lessons for mediating identity conflicts from scenario interviews[165] conducted with Hamas members and leadership in Syria in July 2008. The research sought to answer three crucial questions: who should be the partners addressed to take part? When should mediation set in? And what should the content of mediation be? All three questions can be linked to IHL. The first question also seeks an answer to which group can guarantee the implementation of a ceasefire. The second addresses the right timing of mediation, balancing an early intervention to save every possible life against the possible clashing with the purpose of long-term conflict resolution that might come from intervening too early. The third question asks whether there is room to talk about IHL.

The relevant part of the first question is answered as followed in the paper: Mediation might show a way out by engaging those groups who are too radical to engage in negotiation, but moderate enough to accept mediation. Mediation is necessary with those groups who have enough support to guarantee a ceasefire and enough support not to be ignored, but to be addressed. Hamas has shown that it enjoys a large amount of support among Palestinian people. Therefore the guarantee is turned into a means of pressure; Hamas is not just like other resistance movements that will easily agree to any offer. If the reached agreement be broken, Hamas and its supporters are ready to react and due to the strength of resistance, Hamas can guarantee such a reaction.[166]' Generally, a group that can mobilize more support and is more radical – meaning less willing to compromise on substantial issues – can have a stronger capability to guarantee a ceasefire. When a ceasefire agreement includes provisions on IHL, a strong guarantee for implementation is of paramount importance.

The second question also has implications for IHL. When the timing for mediation is overdue, an identity conflict might become impossible to solve. Therefore mediation is best started too early rather than too late. Every life lost however, fosters radicalisation

[164] Goerzig, 2010.
[165] This is method of using hypothetical questions – in this context about possible solutions to the conflict.
[166] Goerzig, 2010, p. 17.

and every life saved prevents it. Mediators should thus not wait until the best moment for long-term conflict resolution to come because that moment might never come.

The content of mediation in the case of Hamas is opportune because it allows for establishing a relationship with Israel without the risk of losing the identity of resistance. It enables talking without talking, recognising without recognising, so that a (slow) process of deconstructing hostility and re-constructing common ground can set in. Recreating multiple identities and liberating them from the one overarching identity of hate means giving space for multiple identities to grow. This is a slow process of shifting perceptions. These identities and perceptions are carried in daily practical matters and therefore daily issues should be changed first. This way of transforming identity step by step is the only way in mediating between Hamas and Israel. Rules of IHL are such small steps that should be included in the mediation process early on. One of the interviewees said: "We can negotiate about daily issues. We can negotiate about temporary ceasefire. We can negotiate about terms of release of captured soldiers. …[167]". All of these issues are very much related to IHL.

- Results obtained in the area of State and Non-State Relations in Transforming Violent Conflicts

This field of interest comprises research, dialogue and networking projects aimed at transforming asymmetric conflicts that involve both state and non-state actors. As yet, little research has been conducted on the possibilities for constructive interaction between these two sets of actors. This approach also involves making good use of conflict parties' traditional (indigenous), cultural and/or religious affinities. Here, we focus on investigating third-party and insider mediation, as well as conducting comparative analyses of the conflict transformation approaches adopted by intrastate groups.

The only publication in this area of research so far is entitled 'Conflict Parties' Interests in Mediation[168]'. In this publication only one recommendation is specifically aimed at non-international armed conflicts. It says that since those conflicts in particular are

[167] *Ibid,* p. 20.
[168] Giessman and Wils, 2009.

characterised by competing factions within conflicting parties, the need for committed skilled insider mediators who enjoy trust across the various factions is obvious. Their activities, however, should be linked to the third-party mediators, through focal point persons or by other mechanisms, such as regular information exchange and consultation[169].

The projects in this area of research have however been carried out in close cooperation with Berghof Peace Support (BPS), an initiative elaborated upon in the section below.

- Berghof Peace Support

BPS is an independent non-governmental organisation with a team of conflict transformation practitioners dedicated to make a practical, hands-on contribution by supporting just and sustainable solutions to violent conflict throughout the world. In a complementary cooperation with BCR, a dynamic synergy is produced that enables new possibilities for both better understanding and more effectively transforming violent conflict[170]. Where BPS offers practical experience in the field, BCR supports and develops this work from a research-oriented perspective.

BPS offers mediation services, dialogue facilitation, problem solving and negotiation support and provides advice, technical assistance and capacity building on a wide range of topics relevant to peace building. Two factors distinguish the approach: a systemic approach to peace building and a commitment to reflective practice.

The aim of BPS is to enable stakeholders to transform effectively the dynamics and structures of violent conflict to the end of building a lasting and just peace in their societies through non-violent means[171]. BPS supports this process by working towards political, economic, social and cultural changes within a society.

In their work of supporting peace and conflict transformation BPS is guided by the principles of non-violence and respect for human rights. Therefore BPS promotes political solutions and freedom for all people. BPS seeks to build a sustainable peace by improving local capacities for mediation, dialogue and problem solving and by including all relevant stakeholders in the transformation process. Confidentiality and

[169] *Ibid,* p. 12.
[170] A comprehensive overview of BPS' activities is available at: http://berghof-peacesupport.org/
[171] Mission of BPS.

transparency are constantly balanced.

BPS works in three inter-linked programmes: Mediation and Peace Support Infrastructures, Peace Envoys and Resistance and Liberation Movements in Transition. It is this last programme that is particularly relevant for this study. Understanding the perspectives of armed groups in conflicts is of crucial importance when the goal is to foster peaceful social change. To this end BPS has created a network of experience where individuals can exchange the relevant experiences they had with conflict transformation. This exchange can then provide insights for practice-oriented engagement and policy advice.

Based on some practical experiences with resistance and liberation movements in conflict transformation processes, BPS realised that to foster peaceful social change, understanding the perspectives of these groups is vital. Therefore BPS engages with these groups in order to improve the framework conditions for political solutions to violent conflicts. Requested by these movements, BPS tries to enhance their capacities to enter into effective and meaningful negotiations.

The second activity BPS is currently involved in is contributing to a critical reassessment of current proscription regimes as they are counterproductive to, and pose serious restrictions for, peace mediation and conflict transformation work. BPS believes that the international community needs effective instruments to sanction violations of both human rights and international humanitarian law. These instruments need to be based on clear and transparent principles and due processes. Otherwise, proscription carries the risk of escalating instead of reducing violence. The process of lifting proscription is complicated and seemingly arbitrary – all the more so because the criteria justifying the original classification are often excessively vague. This presents a challenge to ensure that the international community takes a coherent approach. It also offers an opportunity to define a constructive roadmap for lifting proscription that can be clearly communicated to those affected by these policies. To this end BPS has organised a one-day high-level event on peace mediation and proscription.

- Berghof Handbook for Conflict Transformation[172]

In 1998/99, the Berghof Research Center took the initiative to produce the Berghof Handbook for Conflict Transformation as a response to the contemporary challenges of violent ethno political conflict and recent developments in the field of conflict transformation. The project is based on the conviction that responding constructively to inter-group conflicts requires more ingenuity, creativity and hard work than has so far been invested in this area. The aim therefore is to identify lessons learned and best practices in a way that would engage practitioners and scholars from different fields and disciplines, as well as those working on different levels of political action.

The Berghof Handbook for Conflict Transformation is a comprehensive and cumulative website resource that provides continually updated cutting-edge knowledge, experience and lessons learned for those working in the field of transforming violent ethno political conflict. It is an effort to draw attention to established practices and concepts, as well as to thorny issues and challenges. Instead of presenting a collection of recipes or ready-made tools, the goal is to put these established practices into a broader conceptual framework in order to understand their functions, strengths and weaknesses. The Handbook attempts to address all relevant aspects of conflict management and transformation – concepts and challenges, appropriate action for different conflict phases, processes and structures, interpersonal and inter-group strategies, and so on.

BCR, with as its most important publication the Berghof Handbook for Conflict Transformation, and BPS together can be seen as a tandem. BCR focuses mainly on gathering information and gaining knowledge on thematic issues from an understanding point of view. Great potential however lies in the peer exchange that this research enables. BCR provides an opportunity for non-state actors to network. BPS completes this work by trying to provide practical sustainable solutions to reach peace, based on the information BCR provided.

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[172] All information was found on the website available at: http://berghof-handbook.net.

c. ***Human Rights Council***

- The mandate

United Nations General Assembly Resolution 60/251 created the Human Rights Council (HRC) in 2006 to replace the Commission on Human Rights. This proposal was contained in the former Secretary General Kofi Annan's report 'In larger Freedom'[173]. The reform intended to minimise the political aspects evident in the work of the former Commission[174].

The HRC is an inter-governmental body within the UN system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe. Making the HRC a subsidiary organ of the General Assembly, unlike its predecessor the Commission on Human Rights, intended to have the effect of making its deliberations more authorative, visible, and influential within the United Nations as well as outside it[175]. The Council is given an explicit mandate to protect all human rights and fundamental freedoms and prevent human rights violations and respond promptly to human rights emergencies. The HRC has the responsibility to address human rights violations including gross and systemic violations and make recommendations[176]. This responsibility fits in with the doctrine of responsibility to protect, accepted at the 2005 Millennium Summit, whereby the international community has responsibility to help protect people from genocide, war crimes, ethnic cleansing, and crimes against humanity. This protection mandate is the basis for the approach that is needed to include non-state armed groups in addressing violations and in its recommendations.

The HRC mandate also includes promotion, coordination and mainstreaming of human rights.

A most promising innovation is the Universal Periodic Review (UPR), a peer review system that reviews the human rights performance of all 192 UN member states in a four-year cycle. The participation of the country under review is axiomatic but the need to involve NGOs as well as National Human Rights Institutions is noteworthy. The state

[173] UN Doc A/59/2005.
[174] Eiriksson, 2008, p. 101.
[175] Boyle, 2009, p. 12.
[176] A new complaint mechanism is built on the 1503 procedure of the former Commission.

is to prepare a national report and the other stakeholders are to provide information to the Office of the High Commissioner for Human Rights. In a next step a review hearing, conducted by a working group, will take place of which the outcome is a report to be considered by the plenary HRC. The report comprises a summary of the review process along with recommendations and/or conclusions and voluntary commitments. Crucial to the effectiveness of UPR is the implementation of these recommendations[177]. According to paragraph 36 in Resolution 5/1 the international community would be asked to be involved where capacity-building and technical assistance is required in consultation and with the consent of the state. The follow-up will happen in the second cycle of UPR. Persistent non-cooperation will be addressed be the Council[178].

- Expanding to IHL and non-state actors

On numerous occasions the HRC has been confronted with humanitarian law breaches. Although humanitarian law is not expressly included in the mandate of the HRC, several examples show that the overlap between human rights law and humanitarian law has led the HRC to address violations of IHL and give recommendations on compliance with it.

A first example is to be found in the eleventh regular session of HRC, held in Geneva in June 2009. An update was presented on the fact-finding mission to Gaza, established by the HRC in its Resolutions S/9-1 passed at its Ninth Special Session. The High Commissioner for Human Rights addressed the HRC on this agenda item. She called for the investigation by a credible, independent and transparent mechanism of all allegations of breaches of *humanitarian law* and violations of human rights during and in the aftermath of the Israeli invasion of Gaza. She also called on *all parties* as well as the international community to support and cooperate with such accountability efforts.

A second example is the situation in Sudan. Already in 2007 the HRC welcomed a report submitted by the HRC group of Experts on the situation of human rights in Darfur[179]. The HRC answer that it '*reiterates its call upon* all parties to put an end to all acts of violence against civilians, with special focus on vulnerable groups, including

[177] Boyle, 2009, pp. 34-36.
[178] Para 38 in A/HRC/Res/5/1.
[179] UN Doc. A/HRC/6/19.

women, children and internally displaced persons, as well as human rights defenders and humanitarian workers. This call clearly implies compliance with some rules of IHL. The HRC also calls for compliance with the obligations of the Darfur Peace Agreement. In 2008 this call is repeated and the HRC asks of non-signatories to engage in the Darfur political process le by the African Union and the UN[180]. In 2009 the HRC adopted again a Resolution on 18 June on the human rights in Sudan[181]. This time too, the HRC reiterates its call upon the signatories[182] of the Darfur Peace Agreement to comply with their obligations under the Agreement, and calls upon non-signatory parties to join in and to commit themselves to the peace process in compliance with relevant United Nations resolutions. The Darfur Peace Agreement also deals with rules of humanitarian law in chapter three[183]. As a consequence the HRC thus calls upon all parties to the conflict to comply with these rules of IHL.

The situation in Sri Lanka, as a third example, has been the subject of the eleventh special session of the HRC from 26 to 27 May 2009. At that time Sri Lanka was in the final stages of armed conflict between the government and the LTTE. In the joint statement of the Special Procedure mandate holders they express their deep concern at the humanitarian crisis and serious human rights violations occurring in the context of the conflict. They reiterated the obligations under international law to distinguish between combatants and civilians, to direct attacks only against combatants and military targets, and to ensure protection of civilians and noted that all parties were bound by these obligations. Furthermore the HRC expressly condemns all attacks that the LTTE launched on the civilian population and its practice of using civilians as human shields[184]. In this session the High Commissioner for Human Rights addressed the HRC stating that 'there are strong reasons to believe that both sides have grossly disregarded the fundamental principle of the inviolability of civilians'[185]. Consequently, she called for 'an independent and credible international investigation into recent events be dispatched to ascertain the occurrence, nature and scale of violations of international

[180] UN Doc. A/HRC/7/35.
[181] UN Doc. A/HRC/11/10.
[182] The Sudan Liberation Movement/Army and the Government of Sudan.
[183] Available at: http://www.sd.undp.org/doc/DPA.pdf.
[184] UN Doc. A/HRC/S-11/2.
[185] Thiele and Gòmez, 2009, pp. 408-410.

human rights and international humanitarian law, as well as specific responsibilities'. She mentioned specifically reports of the LTTE purposefully preventing civilians from leaving the conflict zone, despite their suffering and the dangers they faced, forced conscription for military purposes and locating military facilities amongst civilians, as well as alleged cases of the LTTE firing on civilians as they sought to flee, or targeting with suicide attacks[186]. Violations on part of the government were also specified.

In a resolution on the elimination of violence against women the HRC 'strongly condemns all acts of violence against women and girls, whether these acts are perpetrated by the State, private persons or non-State actors...[187]'.

In several instances the HRC asks 'all parties', thereby including non-state actors, party to a non-international armed conflict, or 'all States and other parties to armed conflict' or 'armed groups that are distinct from the armed forces of a state, to abide by the rules of IHRL and IHL. Examples can be found in its resolution on the Rights of the Child the HRC[188] and in the HRC Resolution on Assistance to Somalia in the field of human rights[189].

A very explicit example can be found in how the HRC dealt with the situation in Lebanon. In its second special session, the HRC adopted a resolution on the grave situation of human rights in Lebanon caused by Israeli military operations[190]. Not only does the HRC urge all concerned parties to respect the rules of international humanitarian law, to refrain from violence against the civilian population and to treat under all circumstances all detained combatants and civilians in accordance with the Geneva Conventions of 12 August 1949, it also decides to urgently establish and immediately dispatch a high-level commission of inquiry comprising of eminent experts on human rights law and international humanitarian law, and including the possibility of inviting the relevant United Nations special procedures to be nominated to the Commission: (a) To investigate the systematic targeting and killings of civilians by Israel in Lebanon; (b) To examine the types of weapons used by Israel and their

[186] *Ibid.*
[187] UN Doc. A/HRC/7-24.
[188] UN Doc. A/HRC/7-29.
[189] UN Doc. A/HRC/7-35.
[190] UN Doc A/HRC/S-2/1.

conformity with international law and (c) To assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment[191].

This high-level commission of inquiry said about its mandate that 'A fundamental point in relation to the conflict and the Commission's mandate as defined by the Council is the conduct of Hezbollah. The Commission considers that any independent, impartial and objective investigation into a particular conduct during the course of hostilities must of necessity be with reference to all the belligerents involved. Thus an inquiry into the conformity with international humanitarian law of the specific acts of the Israel Defense Forces (IDF) in Lebanon requires that account also be taken of the conduct of the opponent. That said, taking into consideration the express limitations of its mandate, the Commission is not entitled, even if it had wished, to construe it as equally authorizing the investigation of the actions by Hezbollah in Israel. To do so would exceed the Commission's interpretative function and would be to usurp the Council's powers[192]'. Nevertheless, the commission expressly stated that Hezbollah, as a party to the conflict, is bound by IHL and IHRL. Therefore the commission expressly mentions that some evidence was found that Hezbollah used towns and villages as "shields" for their firings. At the same time, evidence points to such use when most of the civilian population had departed the area. The Commission found no evidence regarding the use of "human shields" by Hezbollah. However, there was evidence of Hezbollah using UN Interim Force In Lebanon (UNIFIL) and Observer Group Lebanon posts as deliberate shields for the firing of their rockets.

This example of the Lebanese situation clearly shows that the HRC does have the potential to serve as a control mechanism for non-state actors.

The best example however is to be found in the situation in Gaza. In Resolution S-9/1 the HRC decided to dispatch an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian

[191] UN Doc 1/HRC/S-2/2.
[192] UN Doc A/HRC/3/2.

Territory, particularly in the occupied Gaza Strip[193]. The UN Fact-Finding Mission on the Gaza Conflict deals explicitly with armed groups[194]. The September 2009 report elaborates on the applicability of IHL and IHRL in the conflict and argues why non-state armed groups, including Hamas[195], are bound[196]. The report discusses in detail the examination the Mission conducted whether and to what extent the Palestinian armed groups violated their obligation to exercise care and take all feasible precautions to protect the civilian population in Gaza from the inherent dangers of the military operations[197]. That the conduct of armed groups is under serious scrutiny is shown by the findings in the report. For example the Mission finds that 'In relation to the firing of rockets and mortars into southern Israel by Palestinian armed groups operating in the Gaza Strip, the Mission finds that the Palestinian armed groups fail to distinguish between military targets and the civilian population and civilian objects in southern Israel'[198]. The Mission not only looked into violations of international law, but also deals with the responsibility for ensuring that effective measures for accountability for violations of IHRL and IHL committed by armed groups acting in or from the Gaza Strip are established. The Mission finds that such responsibility would continue to rest on any authority exercising government-like functions in the Gaza-Strip[199]. In its recommendations the Mission expressly addresses both the Palestinian armed groups and the responsible Palestinian authorities. The advice of the Mission is very detailed. The Mission recommends that Palestinian armed groups should undertake forthwith to respect international humanitarian law, in particular by renouncing attacks on Israeli civilians and civilian objects, and take all feasible precautionary measures to avoid harm to Palestinian civilians during hostilities and recommends that Palestinian armed groups who hold Israeli soldier Gilad Shalit in detention should release him on humanitarian grounds. Pending such release they should recognize his status as prisoner of war, treat

[193] UN Doc A/HRC/S-9/2.
[194] UN Doc. A/HRC/12/48. The armed groups are specified on p. 86.
[195] On pp. 291-292 the Report explains that the Gaza authorities are not internationally recognised. Therefore they cannot be seen as states and need be dealt with as a non-state actor. The report nevertheless also explains why they are bound by both IHL and IHRL.
[196] *Ibid,* p. 75.
[197] *Ibid,* p. 18, pp. 31-32 and p. 35; On pp. 335-345 the report discusses in detail the conduct of the Gaza Authorities.
[198] *Ibid*, pp. 419-420.
[199] *Ibid,* p. 394-396.

him as such, and allow him ICRC visits[200]. To the responsible Palestinian authorities the Mission recommends to issue clear instructions to security forces under its command to abide by human rights norms as enshrined in the Palestinian Basic Law and international instruments, ensure prompt and independent investigation of all allegations of serious human rights violations by security forces under its control, and end resort to military justice to deal with cases involving civilians. Furthermore the Mission advises that the Palestinian Authority and the Gaza authorities should release without delay all political detainees currently in their power and refrain from further arrests on political grounds and in violation of international human rights law[201].

All the examples above show that the HRC does address non-state armed groups and deals with IHL. Various examples show that the HRC asks for justification of IHL violations and calls for undertaking to avoid violations in the future. The discussion that follows each report in the HRC might give an incentive to non-state actors to comply with IHL for they can gain some legitimacy in the international forum by showing their willingness and capability to abide by the rules of the international community.

The impact of this practice of the HRC on the conduct of non-state armed groups is however yet to be assessed. Nevertheless the HRC has hereby shown potential to develop as a control mechanism to ensure compliance with IHL by non-state armed groups.

Sassòli says that reporting periodically to an international monitoring body on their respect and implementation creates political will, because States want to avoid the embarrassment either to be obliged to report violations or thebe subject to questions by the monitoring body. The same reasoning might prove correct for non-state actors.

Expanding this mechanism could happen by allowing non-state actors to report on states if they also report on their own compliance[202]. If non-state actors would be allowed/obliged to report as well, this might be a new way to increase compliance.

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[200] *Ibid,* p. 427.
[201] *Ibid,* p. 427.
[202] Sassòli, 2004, pp. 57-58.

3. Enforcement Mechanisms

The last aspect of IHL to be looked at in this study is the enforcement. This aspect only becomes an issue once violations have occurred and hence the two previous aspects have failed to ensure compliance with IHL.

a. Individual Complaints Procedure for violations of IHL

In the first part of this study mention has already been made of the individual criminal responsibility for violations of IHL. There are however limits to this mechanism. For one, there is no collective responsibility of parties to the conflict. Yet the violations of IHL are based in collective entities, as they are committed in the context of protracted armed violence between them[203]. Another important shortcoming in the traditional enforcement mechanisms is the role of the victim. Only the prosecutor can initiate and conduct proceedings.

At the Hague Appeal for Peace and Justice for the 21st Century the idea of an individual complaint procedure for violations of IHL was launched[204]. The overriding theme was to replace the law of force with the force of law[205]. An individual complaints procedure suits the purpose of IHL to protect individual and human dignity beyond the interstate level by reaching for the level of the real beneficiaries, i.e., individuals and groups of individuals[206].

The creation of such a procedure should be adjusted to the special circumstances of armed conflict. Kleffner mentions four areas of particular concern:

- Competence *ratione materiae:* The body of rules over which the supervisory body would have jurisdiction should be as complete as possible. Therefore not only the applicable treaty law should be under the competence of the supervisory body but it should also include the rules of customary law.

- The conceptualisation of the legal basis for individual complaints: Kleffner suggest two options for conceptualising the legal basis of an individual complaints procedure. The first option is to include in the competence of the supervisory body competent to

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[203] Kleffner, 2002, pp. 237-238.

[204] Fleck, 2004, p.71. Fleck also supports the idea of an individual complaints procedure.

[205] *Ibid*, p. 239.

[206] Meron, 2000, pp. 240-241.

deal with individual complaints only those rules that confer rights to individuals. Although obligations under IHL treaties generally apply to states *vis-à-vis* each other, many rules can in fact be indentified containing elements of individual benefits, especially when keeping the purpose of IHL in mind[207]. These rules thus suggest that individuals have rights under some provisions of IHL[208]. The justiciability of these rights should be sought in the liability of parties to the conflict to pay compensation for violations of IHL committed by persons forming part of their armed forces. This liability could provide for an obligation to compensate not only states but also individuals. A second option as legal basis for an individual complaints procedure can be found in the concept of an injury. When an individual claims to have suffered an injury as a consequence of a violation of a rule of IHL committed by a party to an armed conflict, that injury might give rise to responsibility and a corresponding right to reparation[209]. The two options make clear that establishing an individual complaints procedure is feasible.

- Armed opposition groups as respondents of complaints: The traditional scheme of individual complaints procedure only knows the state and its agents as respondents. When dealing with (violations of) IHL, non-state armed groups are addressees of the law as well. Moreover, today most armed conflicts are of a non-international character and thus non-state armed groups are often involved in violations of IHL. A number of legal issues arise however when complaints are made on the international level against non-state armed groups. For one there exist certain criteria for accountability of non-state armed groups[210]. They need to be 'organised' and capable of carrying out 'protracted armed violence'[211]. The temporary nature of these entities makes it more complex to hold them accountable before an international supervisory body. A last issue arising when non-state armed groups are is the representation of the group. When there is no clear organisational structure of the armed group, it might not be easy to ascertain that the agents representing are really authorised to do so.

[207] *Ibid,* p. 245.
[208] Meron, 2000, pp. 247-256 and pp. 266-273.
[209] Kleffner, 2002, p. 246.
[210] For more information about these criteria see Zegveld, 2000.
[211] Prosecutor *v.* Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 70.

- Reparations: Reparatory measures seek to relieve the suffering of and afford justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts, and by preventing and deterring them[212]. The particularities of IHL might cause some difficulties in giving reparation for violations. First of all, individualising the claims might overwhelm the capacities of the supervisory body. Secondly, it is of paramount importance to guarantee the effectiveness of an individual complaints procedure by adopting credible reparatory measures rather than undermining its authority by foreseeing illusory ones. Although monetary compensation might not be possible on the large scale on which violations of IHL often occur, there are still multiple alternatives. Examples are public apologies are allowing the ICRC to train the members in IHL so that the risk of future violations is reduced.

The idea of creating an individual complaints procedure for violations of IHL touches upon many problems that still exist in the enforcement of IHL today. The supervisory body that would have the competence to deal with these complaints would be created so that it can address groups as such, which would be an improvement to the current system. The reparations however pose the biggest challenge. The nature of violations of IHL make it difficult to always assure appropriate redress. The scale on which violations occur also pose a problem. Therefore the effectiveness of this mechanism is doubtful.

b. ***Courts by non-state armed groups***

Several non-international armed conflicts have already known the creation of courts by non-state armed groups[213]. The international community however has so far not engaged with these courts because they are said to be illegitimate and these courts are often said not to guarantee fair trial standards. This section will therefore look into the legitimacy of such courts and the fair trial guarantees applicable in non-international armed conflicts.

[212] Kleffner, 2002, pp. 248-249.
[213] Examples are to be found in the conflicts in: Sri Lanka, Sierra Leone and El Salvador.

- Legitimacy

Common article 3 of the Geneva Conventions explicitly states that 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples[214]' is prohibited. Summary justice must thus be avoided and a judicial process is needed even in times of war. This provision binds all parties to the conflict according to the chapeau of common article 3. Although the creation of courts is not an explicit right under IHL, it is on the other hand not a priori ruled out[215]. When non-state armed groups decide to convene a court, IHL will regulate the creation and operation. One of the conditions is that the court be regularly constituted. Although at a formal level, common article 3 (1)(d) might bind all parties to a conflict, at the material level it is possible that only states can conform to the 'regularly constituted' requirement[216]. Courts of armed groups are after all ad hoc in nature. The meaning of the words 'regularly constituted' is however not clear. So far there is no uniform definition. The customary law study of the ICRC defines it as follows: 'a court that has been established and organized in accordance with the laws and procedures already in force in a country'[217]. Therefore under this definition, courts of armed groups, established under their own 'law', are excluded. Another opinion is that reflected by the Elements of Crimes[218] defining 'regularly constituted' by referring to 'the essential guarantees of independence and impartiality'[219]. A lost option is to define the requirement as 'established by law', which is done in article 6 (1) of the European Convention on Human Rights. In this view courts of armed groups would be included if established pursuant to their own law. Thereby the focus is shifted away from the particular manner in which the court is set up and towards the way in which it operates. The operation of courts by armed opposition groups will be discussed below, focusing on fair trial guarantees.

[214] Article 3 (1)(d) of the Geneva Conventions of 1949. Article 6(2) APII has a similar provision.
[215] La Rosa, 2008, p. 670.
[216] Sivakumaran, 2009, p. 498.
[217] Henckaerts and Doswald-Beck, 2005, p. 355.
[218] Article 9 of the Rome Statute.
[219] Article 8(2)(c)(iv), Elements of Crimes.

Regarding the legitimacy and recognition of these courts, the presumption seems to be that they are illegitimate. This presumption is fed by the fear of the international community to give courts of armed opposition groups a certain status or even recognition to armed opposition group themselves. Despite this fear, when an armed group exercises territorial control, the establishment of courts takes place alongside the provision of education, health services and other manifestations of administrative control. This is often a conscious effort on the part of the armed group to afford services traditionally provided for by the state in an attempt to present the image of a stable, functioning regime[220]. Those groups form the de facto authority in the area. Without them providing such services disorder and chaos would rein in the territory. Therefore the courts of armed opposition groups do have a certain claim to legitimacy. This is strengthened by the fact that the possibility of a trial within the judicial system of the state is not a realistic option. An armed group is not going to be willing to transfer those of its members suspected of having committed violations of IHL to the state against which it is in conflict for prosecution[221]. Thus these courts might be the only forums in which violations of IHL are actually prosecuted.

Linked to these multiple claims to legitimacy[222] is the issue of the legal effect of the decisions of the court. In the case of the unrecognised government, there is an abundance of authority that supports recognising certain acts as official or having legal effect. The key test is whether the failure to so recognise would be to the detriment of the inhabitants of the territory[223]. Trials for violations of IHL would most likely stand this test. The question is thus changed from whether decisions of armed opposition groups have legal effect to which decisions have legal effect.

- Due process Guarantees

Apart from the issue of recognising courts of armed opposition groups, the principal criticism of these courts is that they fail to afford due process guarantees. First of all it

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[220] Sivakumaran, 2009, p. 509.
[221] *Ibid,* p. 510.
[222] Another argument is based on the parallel with the law of occupation; there is an obligation for the occupying power to ensure the effective administration of justice reflected in article 64 of Geneva Convention IV.
[223] Sivakumaran, 2009, pp. 510-511.

necessary to ascertain precisely which fair trial guarantees are applicable in time of non-international armed conflict. Additional Protocol II provides a list of applicable guarantees, but not all non-international armed conflicts reach the threshold for that protocol to apply. In these cases common article 3 provides for 'judicial guarantees which are recognised as indispensible by civilised peoples'. No list is available here, so interpretation is necessary. Several approaches exist, based on different areas of the law. The first interpretation is based on the list entailed in Additional Protocol II. The second uses the guarantees of the law of international armed conflict. A third interpretation turns to the standards of international human rights law.

Sivakumaran builds on article 6 of the second additional protocol as starting point since the list of essential guarantees of independence and impartiality is applicable during a non-international armed conflict. A delegate of the ICRC confirms this view at the Diplomatic Conference of 1974-1977, as do the Elements of Crimes of the Rome Statute in article 8(2)(c)(iv)[224].

None of instruments provided for by the three approaches however can be transported *ipso facto* and without more into a common article 3 conflict, for that would destroy the nexus between the scope and content of that article[225]. The situations in which these instruments apply are profoundly different and thus the obligations should be different too. One of the main concerns is that transferring one the instruments might create obligations that exceed the capabilities of armed groups. The guarantees can still apply but need to be interpreted in a manner that respects their substance while also making compliance with them possible.

To get an idea about the guarantees that apply in situations where common article 3 applies, Sivakumaran takes article 6 of the second additional protocol[226] as a starting

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[224]The article describes the war crime of sentencing or execution without due process as 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable'.

[225] Sivakumaran, 2009, p. 503.

[226] The article reads: a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defense; (b) No one shall be convicted of an offence except on the basis of individual penal responsibility; (c) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the

point. Nearly all of these guarantees are not affected by the intensity of the conflict, the extent of the territorial control of the armed group of its degree of organisation. There is only one exception to be found in sub-paragraph (a). Certain resources might be needed to fulfil this obligation and might prove difficult for the armed opposition group not in control of territory to make available. Sivakumaran elaborates on the specific rights and means of defence[227]. Although some aspects of this obligation might be beyond the reach of many armed groups, most rights and means of defence do not depend on the nature or extent of the control exercised by the armed group. These guarantees may be interpreted in a way that both respects their substance yet modifies them so as to take into account the particular nature of the conflict. Limits however do exist to this interpretation. There is a minimum core content of these rights to be found in international human rights law.

A last issue is the use of the word 'law' in the list of article 6. Does this mean the law of the state or is the meaning broad enough to include the law of the armed group. Again the fear for legitimising the armed group makes states reluctant to accept this.

- Engagement of the state/international community

After exploring the obligations that courts of non-state armed groups have, Sivakumaran concludes that some of the groups might have the potential to conduct trials consistent with international standards. The view that courts of armed groups provide only summary justice might thus well be erroneous. Therefore the international community or the state might benefit by looking into ways how to best they may be utilised because the courts will continue to exist no matter the views of others. A court that is established by law, conducts fair trials, and contributes to the maintenance of peace and good order among citizens, warrants engagement on the part of the international community. The tension between engagement and recognition should be seen in the light of common article 3 which says that all the provisions contained therein

imposition of a lighter penalty, the offender shall benefit thereby; (d) Anyone charged with an offence is presumed innocent until proved guilty according to law; (e) Anyone charged with an offence shall have the right to be tried in his presence; (f) No one shall be compelled to testify against himself or to confess guilt.

[227] Sivakumaran, 2009, pp. 504-505.

shall not affect the legal status of the Parties to the conflict. Fear of legitimating the armed group should hence not lead to turning a blind eye to these courts. They do not only offer a forum for prosecution when non would otherwise exist, contributing to maintenance of law and order preventing a climate of impunity as an alternative to summary executions, but they also provide a means by which to engage the armed group on issues relation to IHL and the rule of law more generally. Armed groups often have offices that design codes of conduct or laws to be applied by their courts. These offices are the appropriate partners for a dialogue on issues of IHL. Interaction on IHL and the ability to enforce it gives the groups a sense of ownership that encourages them to improve their compliance with international law[228].

[228] Petrasek, 2000, p. 52.

4. State-legitimacy concerns with engaging non-state armed groups

The new mechanisms to improve compliance have been split up in three categories: changes to the applicable law, implementation mechanisms and enforcement mechanisms. In each of these categories there is at least one mechanism that implies an engagement with non-state armed groups. Without taking a stance on whether these mechanisms work, from the part of the government(s) concerned one major impediment must be mentioned; states fear that by engaging with non-state armed groups they give them a certain degree of legitimacy[229]. The concept of legitimate authority today is undergoing a shift away from the traditional criteria of legal legitimacy, as derived from constitutional and other legal sources, to performance criteria of legitimacy[230]. Hence the core characteristics of democratic governance, such as respect for human rights, informed consent, popular participation, transparency, and accountability of the exercise of power, become the criteria for legitimacy.

Although it might not be appropriate in every conflict to engage with armed groups[231], there are various benefits of negotiations. This section will first highlight these benefits of engaging non-state armed groups in IHL processes.

The general principles of IHL and the nature of non-international armed conflicts are the first two sets of reasons why states should engage with armed groups. Article 1 of the Geneva Conventions prescribes states to respect and ensure respect of IHL. Negotiating with non-state armed groups to ensure that the full breadth of the Conventions applies to the conflict is one way states can fulfil their obligation. The obligation to protect civilians from abuses by other individuals and groups should convince states to negotiate with armed groups to protect and provide access to civilians during armed conflicts[232]. It should not matter whether the actor agreeing to adhere to IHL norms is a state of armed group[233]. Also, non-international armed conflicts are particularly violent because of the cause they are being fought for. As a consequence

[229] Legitimacy in this section refers to the degree to which the international community acknowledges a state or armed group's authority and sates and is different from the legality or legal authority.
[230] Kunugi, 2006, p. 15.
[231] Negotiating with armed groups can in some cases lead to a negative impact on the humanitarian conditions or legitimise the group's illegal acts.
[232] Wenqi, 2006, p. 129.
[233] Steinhoff, 2009, p.303.

states often feel justified employing harsh military measures to retaliate and are reluctant to consider alternative responses. In this situation, the protection of vulnerable groups is especially needed. Moreover, in non-international armed conflicts certain areas are isolated so that one party can claim territory. As a result civilians cannot escape and aid cannot enter. Talking to armed groups can break the culture of violence and lead to the ceasing of hostilities[234].

Although states have several reasons to engage with non-state armed groups, it is not a customary practice. Already under the traditional doctrine of official recognition of belligerency, states overlooked the humanitarian benefits that recognition could convey[235]. The recognition of the non-state armed group by third states was seen as a declaration of war against the territorial state and gave the group a legal character. Under the Geneva Conventions the nature of a conflict does not change when the territorial state government invites a third-party state to intervene. However, when a third-party state intervenes on behalf of the non-state armed group, the character of the conflict changes. The legal consequences for the status of the group are vague and therefore states are still concerned, even though the doctrine of belligerency is no longer adhered to, that recognising the armed group will grant legal character. The same reasoning goes for common article 3. Being the basic rule to apply to non-international armed conflicts, it imposes obligations on both the state-party and the non-state armed group and thus gives the armed group an international 'legal personality'. Although the article expressly states that it does not affect the legal status of the armed group, states fear that they will send the message that they cannot maintain order when they accept the application of common article 3. Moreover they reject the idea of granting international status to the non-state armed group. Therefore sates are reluctant to admit that a situation amounts to a non-international armed conflict and accept the application of common article 3. As a consequence a state is likely to disregard IHL, unless it is in its own interest to apply it.

[234] The initiative of Geneva Call has several examples where hostilities were ceased when the armed groups signed the Deed of Commitment and the group joined the state government, dissolved, or abandoned their struggle.
[235] Steinhoff, 2009, p. 309.

Altogether, the effect that recognition has on the legal status of the non-state armed group can be determinative of a state's decision of whether to engage with it. State sovereignty issues have already shown to have great influence in the case of the scope of IHL. Encouraging states to negotiate with non-state armed groups, experiences the same influence. States almost always refuse to negotiate with armed groups in order to avoid granting the group a platform of legitimacy[236]. Unless it can be assured that there are no legal implications, it is unlikely that states will engage with those groups.

Legal concerns are however not the only possible explanation for the hesitancy of states to non-violently engage armed groups. States fear that legal recognition will give the armed group political legitimacy. Hence states claim that granting a belligerent entity legal status will impair the state's ability to prosecute and squash armed rebellions to cover the pursuit of political objectives[237]. Steinhoff argues that legal impediments are not necessarily critical to all non-violent engagement because some members of the international community want to engage non-state armed groups. Additionally he says that states' claims that negotiating with groups undermines their authority are undercut by the fact that they still communicate with and trust the ICRC, which regularly negotiates with groups and the fact they provide funding for NGOs that have the sole mission to engage armed groups. He also advocates for the elimination of the distinction between international and non-international armed conflicts.

Not engaging with non-state armed groups can also be seen in a state-wide campaign to preserve the hegemonic status of states in the international community. Only when a group proves to exercise similar sovereign rights as states, will they be accepted into the international arena.

All the concerns listed above about state sovereignty must be weighed against the humanitarian benefits of engaging non-state armed groups, listed in the beginning. For the state humanitarian concerns will only outweigh state sovereignty concerns when the state's power is inadequate to successfully fight the armed group. Then the state might be more willing to give some legitimacy to the group in exchange for greater protection of its soldiers and civilians. The scale is tipped towards humanitarian concerns from the

[236] *Ibid,* p. 316.
[237] Steinhoff, 2009, p. 317.

international community's point of view. No matter the point of view, all parties concerned should be focused on humanitarianism because humane treatment of combatants will lead to less civilian and non-combatant casualties, as well as better treatment of prisoners of war. If a state decides to enter into a dialogue with a non-state armed group, it might legitimise the group in some way. On the other hand, the dialogue will bring about international humanitarian protection for all sides. Of all the ways in which a state can confer legitimacy upon armed groups, deciding whether or not to apply the humanitarian-based laws of war to a conflict, is the one way that has immense benefits[238].

By excluding all options to gain legitimacy, all incentives for armed groups to comply with IHL are taken removed. The consequences of this attitude affect the entire international community. Therefore a state's legitimacy concerns should not be determinative of whether a member of the international community engages an armed group.

[238] Other possible ways are formally declaring war or even responding to the group with state military forces.

III. Conclusion

This study aimed in the first part to outline the existing framework of IHL for non-state actors. The traditional framework was split up in three parts: the applicable law, the implementation mechanisms used today and the current possibilities of enforcement. Each aspect was found to show gaps in the securing of compliance with IHL by non-state actors.

The applicable treaty law for non-international armed conflicts, supplemented by customary law and jurisprudence of international tribunals, still shows severe lacunas in the body of rules. Lack of definitions, the absence of combatant-status and rules that are not detailed enough are examples of the gaps in the applicable law.

The traditional implementation tools have one very important impediment in common: because non-state actors are not recognised as subjects of international law, the legal force of their commitments is always the subject of discussion. Some tools do create a sense of ownership and have potential to make non-state actors comply with IHL.

As a consequence of the gaps in the applicable law and the existing implementation tools, violations of IHL still occur. Numerous non-international armed conflicts evidence this statement.

The enforcement mechanisms try to provide solace for the victims and serve to have a deterrent effect on possible future perpetrators. Yet again, these mechanisms cannot be said to prevent or address every violation. The study identified numerous gaps in the existing system. On the national level willingness to prosecute is in important impediment. On the international level the conditions of entry prevent the system to be fully effective.

Therefore this study looked into new creative mechanisms to ensure compliance with IHL by non-state actors. In total, seven very different mechanisms were discussed.

The first mechanism of applying IHRL to situations of armed conflict merely changes the applicable law. Even if all difficulties that might arise are overcome, this mechanism is likely to follow the same path as IHL today. Non-state actors would have rules applied to them without any sense of ownership. Therefore the second mechanism of engaging non-state actors in the creation of IHL is much more promising. The only impediment here is the willingness of states, as the traditional creators of international

law, to accept new players on the field. Therefore the humanitarian concerns need to outweigh the state-sovereignty concerns.

The mechanisms proposed in the area of implementation introduce a new set of actors. NGOs show a deep concern about the compliance with IHL by non-state actors. By engaging these non-state actors, NGOs try to create a sense of ownership and provide an opportunity for these non-state actors to interact. Geneva Call has shown to bring about adherence to certain rules of IHL. Especially in the landmine-issue Geneva Call has obtained remarkable results. Their way of dealing with non-state actors thus proves to pay off. For the Berghof initiative these results are not presented as clear. The dynamic cooperation BCR has with BPS on the other hand is very promising. The research conducted by BCR provides an opportunity for peer exchange between non-state actors. Charing experiences among non-state actors and creating networks are the most effective ways of advocating for compliance with IHL. The support offered by BPS in terms of practical solutions, tries to end conflicts in a non-violent way by which violations of IHL are avoided.

The Human Rights Council has also shown potential to increase compliance with IHL by non-state actors. In various reports the HRC has addressed non-state actors and called upon them to respect both IHRL and IHL. In certain cases the HRC explicitly asked to undertake special measures to ensure respect in the future and even gives detailed recommendations. The discussions that take place in the HRC as an international forum might serve as an incentive for non-state actors to adhere to the rules of IHL, which are generally accepted by the international community. The idea of allowing non-state actors to report is very promising.

A last are in which new mechanisms were sought is the enforcement of IHL. The first mechanism of creating an individual complaints procedure addresses rightfully a number of shortcomings in the current system of enforcing IHL. Nevertheless, the difficulties in the proposed mechanism are not easily overcome. Especially the issue of reparatory measures might render this new mechanism ineffective.

Courts by armed opposition groups could bring about a significant improvement of the compliance with IHL. Although these courts can work without any recognition of the state or the international community, they are more likely to be created when the armed

groups have some incentives to do so. Engagement of the state and/or the international community could serve as this necessary inventive. An important note is that engagement is not the same as granting legitimacy or recognition.

Overall, the conclusion of this study is that the gaps in the traditional framework can be filled by new mechanisms. Of these mechanisms certain types promise to be more effective than others. The mechanisms that engage with non-state actors are most likely to succeed. Engaging them in the creation of IHL, Geneva Call, Berghof, the HRC and courts by non-state armed groups have more potential to increase the compliance with IHL by non-state actors than applying IHRL or creating an individual complaints procedure.
The study furthermore found that of all the mechanisms that engage non-state actors, those that do not require some form of approval from states are most likely to be successful in the near future. This leads to Geneva Call and Berghof as the most palpable mechanisms to improve compliance with IHL. The results described in the study led to that conclusion. The finding that states are however still not likely to put aside their sovereignty in favour of humanitarian concerns, endangers the mechanisms of engaging non-state actors in the creation of IHL, the HRC and courts by non-state armed groups. Nevertheless, it depends on how the international community treats these two ideas. If the international community is truly concerned with the compliance of IHL by non-state armed groups, it would benefit from developing the HRC Universal Periodic Review and engaging in the courts of non-state armed groups.

If 'to engage or not to engage' is the question, this study strongly suggests 'to engage' as answer.

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