ASSER PRESS

Yearbook of International Humanitarian Law

2017

Springer

Yearbook of International Humanitarian Law

Volume 20

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ISSN 1389-1359 ISSN 1574-096X (electronic)
Yearbook of International Humanitarian Law
ISBN 978-94-6265-263-7 ISBN 978-94-6265-264-4 (eBook)
https://doi.org/10.1007/978-94-6265-264-4

Library of Congress Control Number: 2018955914

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

Cover picture: Aleppo. This street is one of several in the city that remains riddled with unexploded mines that threaten the lives of pedestrians.
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The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

Editorial

Despite an enduring perception that the rules of International Humanitarian Law need to be adapted to changing circumstances of warfare, States do not rely on formal procedures to conclude new treaties or amend existing ones. While formalised multilateral negotiations seem to have become the exception, the development of International Humanitarian Law currently relies first and foremost on interpretative processes. Even though States also remain the main actors in such processes, there is a widespread perception that in the contemporary geopolitical environment they are reluctant to clearly express their positions or any kind of opinio iuris. As a result, other actors step in. Not only courts but also different non-State actors, such as expert groups, NGOs and even armed groups, bring forward interpretations of relevant treaties or rules of customary international law. How far does the impact of these interpretations reach? Have States lost or are they about to lose hold of the development of International Humanitarian Law? Is International Humanitarian Law being developed adequately in this manner?

Part of the 2017 Yearbook of International Humanitarian Law is devoted to such interpretative processes. *Heleen Hiemstra* and *Ellen Nohle* look into "The Role of Non-State Armed Groups in the Development and Interpretation of International Humanitarian Law", demonstrating that even violent non-State actors might belong to the interpretative community of International Humanitarian Law, although this claim is often met with criticism and rejection by States. In his contribution "A Fine Line Between Protection and Humanisation: The Interplay Between the Scope of Application of International Humanitarian Law and Jurisdiction over Alleged War Crimes Under International Criminal Law", *Rogier Bartels* analyses the impact of International Criminal Law on the development of International Humanitarian Law. The contributions by *Samit D'Cunha*, "The Notion of External NIACs: Reconsidering the Intensity Threshold in Light of Contemporary Armed Conflicts", and *Valentina Azarova*, "Towards a Counter-Hegemonic Law of Occupation: On the Regulation of Predatory Interstate Acts in Contemporary International Law", demonstrate the need for an interpretative development of the law in the face of States' reluctance to tackle any of the politically underpinned legal uncertainties and biases in the law.

The second part of the Yearbook considers the law of targeting. This particular focus exemplifies the need for developing and adapting International Humanitarian Law through interpretation to changing realities of warfare. *Jeroen C. van den Boogaard* and *Arjen Vermeer* demonstrate how the rules on precautions in attack need to be adapted to the challenges of urban and siege warfare. *Till Patrik Holterhus* elaborates on the challenges arising for the law of targeting from the allegedly religious context in which the armed conflict against the so-called Islamic State takes place. *Héctor Olasolo* and *Felipe Tenorio-Obando* ask if and under which limitations "[a]re the Targets of Aerial Spraying Operations in Colombia Lawful under International Humanitarian Law?"

As is customary, the Yearbook concludes with "The Year in Review", this year authored by *Beier Lin, Marie Wilmet* and *Charlotte Renckens*.

Amsterdam/Breda, The Netherlands — Terry D. Gill
Glasgow, UK — Robin Geiß
Berlin, Germany — Heike Krieger
The Hague, The Netherlands — Christophe Paulussen

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Part I
The Development and Interpretation of International Humanitarian Law

Chapter 1
The Role of Non-State Armed Groups in the Development and Interpretation of International Humanitarian Law

Heleen Hiemstra and Ellen Nohle

Contents

Abstract With most contemporary armed conflicts being of a non-international nature, non-State armed groups (NSAGs) play a prominent role in the factual reality regulated by international humanitarian law (IHL). While it is widely recognised that NSAGs have obligations under IHL applicable in non-international armed conflicts (NIACs), their role in the creation of this body of law remains highly

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T. D. Gill et al. (eds.), *Yearbook of International Humanitarian Law 2017*,
Yearbook of International Humanitarian Law 20,
https://doi.org/10.1007/978-94-6265-264-4_1

controversial. Accepting that the capacity of NSAGs to contribute to the development of IHL rests on the consent of States, the authors demonstrate that NSAGs have thus far only been granted limited capacity to do so. Yet, there are feasible avenues for increasing the participation of NSAGs in the creation of IHL rules applicable in NIACs, which might contribute to enhanced compliance with IHL by NSAGs and lead to a more realistic and conceptually coherent legal regime. In addition, NSAGs can and do play an important role in the interpretation of IHL rules applicable in NIACs. The process of interpretation provides an opportunity for NSAGs to influence the legal content of these rules without directly challenging the primacy of States as international law-makers.

Keywords Non-State armed groups · Non-international armed conflict · International law-making · Special agreements · Customary international humanitarian law · Interpretation of international law

1.1 Introduction

Contemporary armed conflicts are predominantly of a non-international character, involving at least one, but oftentimes several, non-State armed groups (NSAGs).[1] To some extent, this factual reality has been paralleled by developments in the international legal landscape. The law regulating non-international armed conflicts (NIACs) has expanded over time, notably with the adoption of the Second Additional Protocol of 1977 (AP II) and the recognition that a considerable number of customary rules of international humanitarian law (IHL) apply irrespective of the classification of the conflict as international or non-international.[2]

This article does not dispute that parties to a NIAC are equally bound by the applicable rules of IHL—States and NSAGs alike.[3] The recognition that armed

[1] Because this chapter limits itself to the role of NSAGs in the development and interpretation of IHL, the term "NSAG" as used in this chapter is confined to armed groups that are a party to a NIAC. It only analyses the role of those armed groups that are sufficiently organised to be party to a NIAC, in the sense of Article 3 common to the Geneva Conventions and customary IHL, and that are involved in armed confrontations of a certain intensity. See ICTY, Appeals Chamber, *The Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case no. IT-94-1-AR72 (*Tadić*), para 70. See further ICTY, Trial Chamber II, *The Prosecutor v Boškoski and Tarčulovski*, Judgment, 10 July 2008, Case no. IT-04-82-T, paras 199–203 for an account on factors that indicate sufficient organisation. For Additional Protocol II (AP II) to be applicable a higher level of organisation is required, i.e. the NSAG must control territory pursuant to Article 1(1) AP II. For an overview of factors to be taken into account to assess the intensity of a NIAC, see ibid., paras 177–193.

[2] Henckaerts and Doswald-Beck 2005.

[3] For the acceptance that NSAGs are bound by IHL of NIACs, see, e.g., Sassòli 2010, pp 10–13; Zegveld 2002, p 10 referring to "wide international practice confirm[ing]" this for Common Article 3 and AP II. See also SCSL, Appeals Chamber, *Prosecutor against Morris Kallon and Brima Bazzy*

groups have obligations under this body of law when they are party to a NIAC is in line with the shift that has taken place over the past decades from a purely statist model to an approach of international legal personality that is based on the function of the actor in the international sphere. Pursuant to the classic positivist tradition, only States have international legal personality; as the sole subjects of international law, States are the only entities upon which international law "confers rights and imposes duties".[4] Yet, subsequent to the recognition of the international legal personality of the United Nations by the International Court of Justice (ICJ) in 1949,[5] it has become widely accepted that certain entities other than States can have rights and obligations under international law. This does not mean that such non-State entities necessarily have the same competencies, rights and obligations as a State. Departing from the unitary concept of international legal personality, their legal subjectivity depends on the functions they perform at the international level. As the ICJ stated in the *Reparations* case, "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community."[6]

Acknowledging that NSAGs have obligations under IHL applicable in NIACs responds to a need of the international community, as the effectiveness of this body of law depends on it. However, this international legal personality does not necessarily entail that NSAGs also have the capacity to create new IHL rules, or that they can modify or cancel existing ones.[7] International law-making remains highly statist, and States are generally reluctant to extend international law-making capacity to entities that are not States.

Nevertheless, if the rationale for recognising that NSAGs have obligations under IHL is based on the needs of the international community, it should be considered

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Kamara, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, Case no. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E) (*Kalon and Kamara*), para 45; Henckaerts and Doswald-Beck 2005, p 495 (Rule 139). However, the legal basis of the obligations they incur remains unclear. See Sassòli 2010, pp 13–14; Kleffner 2011; Sivakumaran 2006; Murray 2015 for a discussion on several explanations for how the binding force of IHL on NSAGs can be construed.

[4] Lauterpacht 1970, p 136. The concepts of international legal personality and of legal subjectivity under international law are used interchangeably in this chapter. See also Portmann 2010, p 1.

[5] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, [1949] ICJ Rep 174, p 179.

[6] Ibid., p 178. In line with this, see Lauterpacht 1950, pp 20, 12. Lauterpacht wrote:

> an international public body - such as the United Nations - may possess or acquire international personality by virtue of facts other than formal attribution of such capacity. Such a result may be brought about by the fact of that body being entrusted with or *exercising functions compatible with or implying international personality* (emphasis added).

Accordingly, he wrote:

> in each particular case the question of whether a person or body is a subject of international law must be answered in a pragmatic manner by reference to actual experience and the reason of the law as distinguished from a preconceived notion as to who can be subject of international law.

[7] Portmann 2010, p 277; Roberts and Sivakumaran 2012, p 112.

that those same needs may also warrant granting NSAGs capacity to contribute to the creation of IHL rules applicable in NIACs.[8] This chapter will demonstrate that NSAGs already have some capacity to produce legal effects at the international plane, although this is largely limited to a power to accept the applicability of pre-existing norms of IHL that would otherwise not bind them. The chapter begins with an overview of the normative arguments against and in favour of including NSAGs in the development of IHL, concluding that the latter outweigh the former. The remainder of the chapter is divided into two main sections. The first considers whether and how NSAGs can contribute to the creation of IHL rules applicable in NIACs. This issue is addressed by distinguishing between, on the one hand, international agreements and unilateral agreements and, on the other hand, customary IHL. Irrespective of the capacity of NSAGs to contribute to the development of IHL, the second section explores the role of NSAGs in the interpretation of existing IHL norms.

1.2 Should NSAGs Be Included in the Creation of IHL Applicable in NIACs?

There are normative arguments both in support of and against NSAGs playing a direct role in the development of IHL applicable in NIACs. As a preamble to the substantive discussion that will follow, it is useful to summarise the main arguments of both sides, demonstrating that the benefits of recognising a limited capacity of NSAGs to contribute to the creation of IHL prevail over the disadvantages of doing so.

1.2.1 Disadvantages of Involving NSAGs in the Creation of IHL[9]

In view of the historical reluctance of States to extend IHL rules to regulate NIACs, in part for fear that it would affect the legal status and/or increase the perceived legitimacy of NSAGs, it can be expected that similar objections will be raised concerning any proposal granting NSAGs the capacity to contribute to the creation of this body of law.

The objection that granting NSAGs a direct role in the creation of IHL rules would somehow enhance their legal status and make them more akin to States stems

[8] See Roberts and Sivakumaran 2012, p 125.

[9] See, generally, Roberts and Sivakumaran 2012, pp 132–141 for a more extensive analysis of the three objections discussed in this section.

from the close link between international law-making capacity and State sovereignty.[10] In view of this link, States are reluctant to recognise in entities other than States, with the possible exception of "State-empowered" bodies, law-making capacity.[11] Not only are NSAGs typically created in diametric opposition to the interest of States, they are often unlawful under domestic laws and often openly challenge the sovereignty of a State. Yet, there is no conceptual reason why the recognition of a limited capacity for NSAGs in the creation of IHL rules applicable in NIACs would alter their legal status. If it did, Article 3 common to the Geneva Conventions (Common Article 3) would contradict itself, as this article recognises that NSAGs may enter into special agreements yet expressly provides that this does not affect their legal status.[12] Indeed, as the 2016 ICRC Commentary states, "it cannot be deduced that the recognition of the capacity to conclude special agreements bringing into force additional obligations in the Conventions implies recognition of belligerency or in any way signifies that the non-State Party to the agreement possesses full international legal personality."[13]

The objection based on legitimacy, as opposed to legal status, is valid in the sense that there will always be a tension between regulating and engaging with NSAGs and affording them some form of political legitimacy.[14] However, any legitimacy which NSAGs would obtain by contributing to the creation of IHL would be purely formal or procedural. It would have no impact on the merits of their political agendas or their existence. The same is true for States. Once a State exists, it is accepted that it has the capacity to contribute to the formation of IHL. This does not entail that the existence of the State is good or bad or that its political regime is legitimate or not. Moreover, the benefits of involving NSAGs in the development of IHL, even if it implies granting them some form of legitimacy, might still offset the disadvantages of doing so.[15]

An additional, and considering the humanitarian purpose of IHL, more fundamental objection to involving NSAGs in the creation of new IHL norms is that it

[10] See, e.g., PCIJ, *Case of the S.S. Wimbledon (United Kingdom, France, Italy & Japan v Germany)*, Judgment, 17 August 1923, P.C.I.J. Reports (Ser. A, No. 1), para 35.

[11] Roberts and Sivakumaran 2012, pp 116–118. Roberts and Sivakumaran define "State-empowered bodies" as "international bodies created by two or more States and granted authority to make decisions or take actions, such as developing, interpreting, applying, and enforcing international law", p 116.

[12] See also, e.g., 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 (and Protocols) (as amended on 21 December 2001), opened for signature 10 April 1981, 1342 UNTS 137 (entered into force 2 December 1983) (CCW), Article 1(6).

[13] ICRC 2016, p 289, para 860. The "Deeds of Commitment" designed by Geneva Call that NSAGs can sign to commit to respect certain humanitarian norms also include such a provision. See, e.g., Geneva Call 2013, which states: "This *Deed of Commitment* shall not affect our legal status, pursuant to the relevant clause in common article 3 of the Geneva Conventions of August 12, 1949."

[14] See Roberts and Sivakumaran 2012, pp 134–137. See also Sivakumaran 2009, p 512.

[15] See Sect. 1.2.2.

could downgrade the protective standards of IHL. If law-making is opened up to NSAGs, could they also challenge the norms that already bind them? And would the development of new norms be slowed down by including NSAGs in the process?[16] It is moreover conceivable that the substance of IHL protections could be affected by opening up the law-making process to NSAGs. This objection is particularly strong with respect to the formation of customary IHL. Since the practice of NSAGs will necessarily be circumscribed by their factual capabilities, and since the capabilities of NSAGs will in many cases not match those of most States, the participation of NSAGs in the creation of customary IHL might water-down the resulting rules. For example, Clapham cautions that the international legal regime could be transformed "into a more descriptive normative framework where the law reflects existing cannons of behaviour by all concerned, rather than generating injunctions for non-State actors".[17]

While this concern should be taken seriously, it should not be exaggerated. First, although numerous violations of IHL have been committed by NSAGs in past and present conflicts, there are also instances of NSAGs declaring or entering into agreements to be bound by norms that go beyond the standards set out in the existing body of IHL.[18] Second, having high standards that NSAGs cannot comply with is of limited use from a humanitarian perspective.[19] Third, and with respect to the formation of customary IHL, conduct that contravenes existing IHL rules will in general not be considered as practice relevant to the creation of new rules but rather as a violation of existing rules. Moreover, the practice of NSAGs would only be relevant to the extent that it is accompanied by a belief that the practice is required or authorised by law.[20] Recognising the capacity of NSAGs to contribute to the formation of customary IHL would therefore not be tantamount to saying that all of the practices of NSAGs would automatically be legally significant. Indeed, States also have vastly different capabilities and engage in conduct contrary to existing IHL rules, yet this has not resulted in a customary body of IHL applicable in international armed conflicts that is descriptive. There is no inherent reason to assume that the IHL rules of NIACs would become more watered-down simply because an additional category of international legal subjects is accepted as competent to contribute to their substance.

[16] See Roberts and Sivakumaran 2012, p 138.

[17] Clapham 2010, p 43.

[18] For example, Geneva Call's Deed of Commitment relating to anti-personnel mines goes beyond the terms of the Antipersonnel Mine Ban Convention of 1997. See also Roberts and Sivakumaran 2012, pp 138–139.

[19] See, e.g., Sivakumaran 2009, p 501; Sassòli 2010, pp 15–20. See also Rondeau 2011, p 654.

[20] See ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, [1969] ICJ Rep 3, para 77.

1.2.2 Advantages of Including NSAGs in the Development of IHL

The arguments in favour of NSAGs playing a role in the development of IHL can be traced to the needs and interests of the international community. They include the presumed concomitant increase in compliance with IHL norms by NSAGs,[21] as well as the objective of ensuring that IHL remains a realistic and coherent legal framework.

First, acknowledging NSAGs as participants in the creation of IHL might give them a sense of ownership of the rules, making NSAGs more invested in ensuring respect for the rules and more inclined to self-enforce the rules within the group.[22] This could contribute to enhanced compliance with the rules, which clearly serves the interests of the international community.[23]

Second, granting NSAGs the necessary capacity to contribute to the formation of IHL rules may contribute to the conceptual coherence of IHL of NIACs. The principle of the equality of belligerents, which arguably applies also in NIACs,[24] entails that the parties to an armed conflict are subject to the same obligations under IHL. For this principle to be coherent, it could be argued that NSAGs and States should both have the capacity to influence the content of the obligations that bind them.[25]

Third, it is in the interest of the humanitarian legal order and the international community that IHL rules are capable of serving as a normative framework for present and future political realities. As Sassòli writes, "[a]ll law has to take into account, as closely as possible, the social reality it seeks to govern".[26] The reality which IHL governs is increasingly comprised of NSAGs, as more and more conflicts are of a non-international character. It is therefore critical to ensure that the rules of IHL applicable in these conflicts can be complied with by States and NSAGs alike. This might best be achieved by granting NSAGs a direct role in the law-making process. After all, IHL "has to be based on an understanding of the problems, the dilemmas and the aspirations of the parties to armed conflicts."[27]

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[21] See, also for a discussion on how this might equally increase the compliance of States in conflict with NSAGs, Roberts and Sivakumaran 2012, pp 126–132.

[22] See, e.g., Sivakumaran 2006, p 375; Sassòli 2010, p 29; Rondeau 2011, p 654; Clapham 2010, pp 43–44; Bellal 2015, p 138. For a broader discussion on the reasons for NSAGs to respect the law, see Bangerter 2011.

[23] Although a comprehensive study on whether involvement in law-making correlates with enhanced compliance has yet to be undertaken, there is some evidence suggesting a link between allowing NSAGs a role in the creation of IHL and their increased acceptance and compliance with that law. See Roberts and Sivakumaran 2012, pp 126–132, 141.

[24] Bugnion 2003; Somer 2007.

[25] See, e.g., Somer 2007, pp 661–662; Bugnion 2007, p 28. See also Sassòli 2010, p 21.

[26] Sassòli 2010, p 15.

[27] Ibid., p 21.

It is true that the need to take into account reality in the development of IHL must not come at the expense of the humanitarian objective of IHL. However, there is a real risk that if NSAGs are excluded from the process of developing IHL rules applicable in NIACs, the divide between the normative and social realities might grow too large and the price for this will be paid by those whom IHL seeks to protect.

1.3 The Participation of Non-State Armed Groups in the Creation of International Humanitarian Law

The sources of international law that can be applied by the ICJ are listed in Article 38 of its Statute as international conventions, international custom, and general principles of law recognised by civilised nations.[28] The article further identifies judicial decisions and the teachings of the most highly qualified publicists as subsidiary means to determine the rules of law. Traditionally, international law was a law created by and for States, the rules of "which are considered legally binding by civilised States in their intercourse with each other".[29]

1.3.1 Normative Basis for the Capacity of NSAGs to Participate in the Creation of IHL

The traditional doctrine of sources is influenced by the principle of voluntarism. This principle requires "international law to be derived from the consent of those it governs."[30] In a purely State-focused system of international law in which States are the only entities with legal subjectivity, the implication of this principle is that only States can create international law. Consequently, "any theory of the binding force of law which does not ultimately rest on the assent of States" must be rejected.[31] If it is accepted that legal subjectivity is not exclusive to States, and that NSAGs have obligations under IHL, does the principle of voluntarism mandate that NSAGs also have the capacity to contribute to the creation of IHL?[32]

[28] See Crawford 2012, p 20.

[29] Oppenheim 1920, p 1.

[30] Roberts and Sivakumaran 2012, p 112.

[31] Villiger 1997, p 41.

[32] See Roberts and Sivakumaran 2012, pp 121–123.

An argument that NSAGs must be able to contribute to the development of IHL because they bear obligations under this branch of international law overlooks the fact that the voluntarist approach to international law is intrinsically linked to the concept of the sovereign equality of States. It expresses the idea that, by virtue of their sovereign equality, no State can be subjected to the will of another State and "[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law […]".[33] It is not the principle of voluntarism that grants States the capacity to create international law; that power is a manifestation of their sovereignty. Rather, the principle of voluntarism restricts the imposition of legal obligations on a State without its consent.[34]

NSAGs, on the other hand, are not sovereign entities and the principle of voluntarism therefore does not preclude the imposition of obligations on NSAGs without their consent. Lacking the same legal status as States, there is no inherent reason why NSAGs cannot be subjected to the will of States in international law. It is moreover accepted that "[i]t is entirely possible that certain subjects of international law possess the rights to create law, while others do not".[35] On a pragmatic note, if it was accepted that having obligations under international law automatically implied a capacity to create international law, States would likely become even more reluctant to regulate NIACs at the international level.

Since NSAGs do not have sovereign rights, the basis for their capacity to create IHL must be found elsewhere. As long as the traditional doctrine of sources of international law remains intact, the legal basis for the law-making capacity of NSAGs in relation to IHL of NIACs must be premised on express or implied State-consent.[36] It is on this basis that the capacity of other ("State-empowered") non-State entities to contribute to the formation of international law has so far been recognised.[37] States could, for instance, expressly agree that NSAGs be included in the negotiation of a treaty. State consent can also be implied when, for example, a State enters into a special agreement with an NSAG, thereby recognising that the NSAG has sufficient capacity to do so. The practice and *opinio juris* of States could

[33] PCIJ, *The Case of the S.S. Lotus (France v Turkey)*, Judgment, 7 September 1927, P.C.I.J. Reports (Ser. A, No. 10), para 44.

[34] See Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (VCLT), Articles 34–35.

[35] Murray 2015, p 107. See also Portmann 2010, p 176.

[36] See Arend 1999, pp 43–45; Roberts and Sivakumaran 2012, p 120. Roberts and Sivakumaran 2012, pp 118–125 analyse two more approaches that justify participation of non-State actors, including NSAGs, in international law-making. The first is based on the State-like features of certain non-State entities. The second posits that non-State actors whose voices are not represented by States should participate in the law-making process. On this later argument, see also Klabbers 2003, p 359.

[37] Roberts and Sivakumaran 2012, p 120.

also lead to the formation of a rule of customary international law endowing NSAGs with the capacity to contribute to the development of IHL of NIACs. As is evident, this approach to the legal basis of the law-making capacity of NSAGs makes the potential for involving NSAGs in the development of IHL hinge upon the willingness of States. It is therefore critical that States take into account the broader interests of the international community which, as demonstrated above, are in favour of granting NSAGs the capacity to contribute to the development of IHL applicable in NIACs.

1.3.2 International Agreements and Unilateral Declarations

A large part of IHL is codified in the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, to which only States can be parties. This section will explore what role NSAGs could play in the event of a new IHL treaty being negotiated. It will subsequently assess the capacity of NSAGs to conclude other international agreements, either with States or with each other. Lastly, it will look at the possibility for NSAGs to accept the binding nature of IHL obligations by means of unilateral declarations.

1.3.2.1 Traditional Treaties

Article 2(a) of the 1969 Vienna Convention on the Law of Treaties (VCLT) defines a treaty as "an international agreement concluded between States in written form and governed by international law." Article 6 moreover provides that "[e]very State possesses capacity to conclude treaties." A convention not yet in force provides the possibility for international organisations to enter into treaties with States and with one another.[38] While these instruments do not apply to NSAGs and NSAGs cannot at present conclude treaties amongst themselves or with States or international organisations, this does not mean that they have no capacity whatsoever in the creation of IHL norms by means of treaty law. Different capacities can be envisaged, some of which would more likely be conferred on NSAGs than others.

NSAGs could, for example, be granted the capacity to participate in the negotiation of IHL treaties.[39] Giving NSAGs a seat at the table would enable them to formally share their views and thereby influence the existence or content of certain rules. For example, several national liberation movements were invited "to

[38] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, opened for signature 21 March 1986, UN Doc. A/CONF.129/15 (not yet entered into force).

[39] Roberts and Sivakumaran 2012, pp 146–149.

participate fully in the deliberations of the Conference and its Main Committees" during the 1974–1977 Diplomatic Conference that led to the adoption of the Additional Protocols of 1977. This was based on the recognition of "the paramount importance of ensuring broad participation in the work of the Conference" and the positive contributions national liberation movements could make to the progressive development and codification of IHL.[40] Eleven such movements accepted the invitation and were represented at the Conference.[41]

States are unlikely to allow this capacity to be combined with the right to vote on rules or with the right to ratify or accede to the treaty once finalised, as this would suggest an equal role to that of States.[42] At the Diplomatic Conference of 1974–1977, NSAGs were given neither of these additional rights.[43] By restricting the capacity of NSAGs, the concerns associated with involving NSAGs in the development of IHL were mitigated. This model ensures the continued primacy of States as international law makers, while permitting the views of NSAGs to be considered in the creation of rules that will bind them. Given the multitude of NSAGs in existence, one practical difficulty will likely be to determine which NSAGs should be invited to participate in treaty negotiations.[44]

Alternatively, NSAGs could be excluded from the negotiation process of a treaty but be granted the capacity to accede to, ratify, or unilaterally accept a treaty. This would preclude NSAGs from influencing the substance of the rules, thereby responding to the concern that humanitarian standards might be watered-down if NSAGs can influence their content. This approach would moreover ensure that NSAGs cannot filibuster negotiation processes, which are already complex and generally slow. Still, NSAGs might gain a sense of ownership of State-negotiated rules if they had the ability to formally express their adherence to the normative responsibilities set out therein.

Taking the example of national liberation movements, although they cannot be party to Additional Protocol I, they can be party to an international armed conflict regulated by that Protocol based on Article 1(4). Article 96(3) provides that "[t]he authority representing a people engaged against a High Contracting in an armed conflict of the type referred to in Article 1, para 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral

[40] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1977b, para 3. Note, however, that States included a reservation in the Final Act of the Diplomatic Conference stipulating that "[i]t is understood that the signature by these movements is without prejudice to the positions of participating States on the question of precedent.".

[41] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1977a, para 3.

[42] Roberts and Sivakumaran 2012, p 148.

[43] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1977b, para 1.

[44] Henckaerts 2003, p 128; Sassòli 2010, p 22.

declaration addressed to the depositary."[45] The effect of such declaration is that (a) the Geneva Conventions and Additional Protocol I are brought into force for said authority as a party to the conflict with immediate effect and (b) said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and the Protocol.[46] While national liberation movements cannot become party to the Protocol and are not on the same footing as States, Article 96(3) thus affords them the capacity to bring into application the IHL rules applicable in international armed conflicts.[47]

Lastly, there may be indirect avenues for involving NSAGs in the development of IHL treaty law. NSAGs could be given participatory rights in special mechanisms external to the treaty-making process that exert an influence on the development of new IHL treaty law. For example, meetings could be convened inviting NSAGs, States and other interested humanitarian actors prior to any diplomatic conference negotiating a new IHL treaty.[48] NSAGs could also be invited to submit their views in the form of position papers or declarations to a diplomatic conference. An interesting example of indirect input from NSAGs is the process leading up to the 1997 Anti-Personnel Mine Ban Convention (APMBC). Several NSAG signatories to the Geneva Call Deed of Commitment to ban anti-personnel mines issued a declaration to the Second Review Conference of the APMBC "[c]all[ing] on those 44 States that have not yet done so, to accede to the Convention as soon as possible".[49] They equally called on other "non-State actors and internationally non-recognized or partially recognized States to ban the use of AP mines and to sign the *Deed of Commitment* or undertake similar commitments as soon as possible" and urged both States and these other entities "involved, or about to be involved in peace or ceasefire negotiations, to include the landmine ban and mine action provisions in agreements."[50]

This approach, which falls short of recognising NSAGs as formal participants in the treaty-making process, might be the most acceptable to States. By creating

[45] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1979) (AP I).

[46] See also, CCW, above n 12, Article 7(4).

[47] The depository can only accept the unilateral declaration of a national liberation movement if the State against which the national liberation movement is fighting is a Party to Additional Protocol I. The Polisario Front is the only movement that has submitted a unilateral declaration to the Swiss Federal Council that the latter could accept. The declaration was deposited 23 June 2015 and has the effects mentioned in Article 96(3) of the Additional Protocol since that date. Federal Department of Foreign Affairs FDFA 2015.

[48] Roberts and Sivakumaran 2012, pp 147–148.

[49] Declaration by Signatories to the "Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action" to the Cartagena Summit on a Mine-Free World, 30 November to 4 December 2009, Geneva, 19 June 2009. http://theirwords.org/media/transfer/doc/1_md_2009_02-ba38c4b7e136bcfd5dd5e08f61e81567.pdf. Accessed 3 April 2018.

[50] Ibid.

separate mechanisms for NSAGs to express their views and commitments, States maintain control over the formal sources of international law. Depending on the efficacy of these separate mechanisms, NSAGs might still be able to have an influence, albeit indirect, over their normative responsibilities in NIACs, which could contribute to a sense of ownership and minimise the divide between social and normative reality.

1.3.2.2 "Hybrid" Treaties and Special Agreements

Although NSAGs cannot formally become parties to IHL treaties, they can conclude international agreements with States and international organisations. Roberts and Sivakumaran refer to such agreements as "hybrid treaties", signifying that they are concluded between an entity with recognized law-making capacity (States and international organisations) and NSAGs currently lacking such capacity.[51] NSAGs can also conclude agreements between themselves, for example in a NIAC opposing several NSAGs.

Common Article 3 stipulates in paragraph 3 that "[t]he Parties to the conflict should endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention".[52] This provision clearly presumes that such an agreement will be legally valid, and that NSAGs can enter into such agreements since by definition, a NIAC involves at least one NSAG. The capacity of NSAGs to enter into special agreements rests upon the consent of States, as it is States that have provided for this capacity in Common Article 3. Such consent is also implied in each specific special agreement a State concludes with an NSAG. By entering into such an agreement, the State accepts that the particular NSAG also has sufficient law-making capacity to do so.[53]

With respect to the substantive matters on which NSAGs are competent to enter into agreements, Common Article 3 refers to special agreements bringing into force "all or part of the other provisions of the present Convention". However, as noted in the ICRC Commentary, "[w]hat counts is that the provisions brought into force between the Parties serve to protect the victims of armed conflict."[54] What is

[51] Roberts and Sivakumaran 2012, p 144.

[52] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Article 3.

[53] Roberts and Sivakumaran 2012, p 120.

[54] ICRC 2016, p 284, para 847. For a peace agreement based on Common Article 3, see, e.g., Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, concluded between the National Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army, 24 November 2016. http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf. accessed 23 May 2018, which explicitly states that it is signed by the parties "as a Special Agreement pursuant to Article 3, common to the 1949 Geneva Conventions, as per its international standing", p 5.

relevant, therefore, is that the agreement contains provisions "drawn from humanitarian law" or implementing IHL obligations already incumbent on the parties.[55] It should also be emphasised that NSAGs cannot, by way of concluding agreements with another Party to the conflict, derogate from obligations under humanitarian law already binding upon them.[56]

There are many examples of NSAGs having entered into agreements with States and with one another. A classic example of an agreement pursuant to Common Article 3 bringing into force other provisions of the Geneva Conventions is the agreement relating to the conflict in Bosnia-Herzegovina. The parties to this agreement undertook to respect and ensure respect for Common Article 3 and brought into force certain other provisions relating to, for example, the protection of hospitals and other medical units, captured combatants who would enjoy the same treatment as provided for in the Third Geneva Convention, and assistance to the civilian population.[57] An example of an agreement concluded between NSAGs is the Act of Engagement by a number of NSAGs active in the Democratic Republic of Congo, concluded in 2008.[58] By this Act, the groups committed themselves to "strict observation of the rules of international humanitarian law and human rights law".[59] This included, among other things, the obligation to end acts of violence, liberating prisoners, and ensuring that humanitarian aid could be provided.[60]

With respect to the legal validity of such agreements under international law, Article 3 of the VCLT provides that "[t]he fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law […] shall not affect […] the legal force of such agreements". This provision acknowledges that "other subjects of international law" may also have some form of capacity to create international law by means of agreements. Although agreements entered into by NSAGs do not constitute "treaties" for the purposes of the VCLT, they might therefore still have legal force at the international level.

Nevertheless, the legal validity of agreements entered into by NSAGs is not universally accepted. In the *Kallon and Kamara* case, the Special Court for Sierra Leone stated that "[a] peace agreement which settles an internal armed conflict cannot be ascribed the same status as one which settles an international armed conflict which, essentially, must be between two or more warring States. The Lomé

[55] ICRC 2016, pp 285–286, paras 850–852.

[56] Ibid., p 287, para 854.

[57] ICRC 1992. Note also that the agreement contains a provision similar to Common Article 3 stating that the agreement is "without any prejudice to the legal status of the parties to the conflict or to the international law of armed conflict in force.".

[58] Democratic Republic of the Congo 2008.

[59] Ibid., Article 3. See also Sivakumaran 2012, p 133. An agreement does not have to exclusively refer to IHL for it to constitute a special agreement for the purpose of Common Article 3, see ICRC 2016, pp 285–286, para 851.

[60] See Roberts and Sivakumaran 2012, p 144; Sivakumaran 2012, pp 124–133; Heffes and Kotlik 2014, p 1199 for further references to other such special agreements.

Agreement cannot be characterised as an international instrument."[61] The Court concluded that "[i]nternational law does not seem to have vested them with [treaty-making] capacity. The RUF had no treaty-making capacity so as to make the Lomé Agreement an international agreement."[62]

This decision reflects the orthodox, statist approach to international law-making. By not recognising the capacity of NSAGs to conclude international agreements, the Court failed to consider the provision in Article 3 of the VCLT, which foresees that subjects other than States may also create valid agreements under international law. The decision is also difficult to reconcile with paragraph 3 of Common Article 3, which would lose much of its effectiveness if special agreements entered into by NSAGs did not have legal force. Other international courts and bodies have taken a more liberal approach. For example, in the *Galić* Appeal Judgment, the Appeals Chamber accepted that an agreement between the parties to the conflict brought into force Article 51(2) of Additional Protocol I.[63] The parties to the agreement had thus created binding obligations governing their relations. The Independent Commission of Inquiry on Darfur also recognised that the Sudan Liberation Movement/Army and the Justice and Equality Movement "possess under customary international law the power to enter into binding international agreements (so called *jus contrahendum*), [and] have entered various international binding Agreements with the Government. In these Agreements the rebels have undertaken, among other things, to comply with humanitarian law".[64] This conclusion was confirmed by the demand of the Security Council "that the parties to the conflict in Darfur fulfil their international obligations and their *commitments under relevant agreements*, this resolution and other relevant Council resolutions".[65]

Accepting that NSAGs have a capacity pursuant to Common Article 3 to conclude IHL agreements with legal force under international law is without prejudice to the legal effects of any *particular* agreement entered into by NSAGs. As is the case for treaties, the decisive criterion is the expression of consent to be bound by the agreement.[66] There are no rules of international law setting out the means by which consent must be demonstrated in order for an agreement entered into by an

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[61] *Kallon and Kamara*, above n 3, para 42.

[62] Ibid., para 48. This decision has been criticised in legal literature, see, e.g., Cassese 2004, pp 1133–1134.

[63] ICTY, Appeals Chamber, *Prosecutor v Stanislav Galić*, Judgement, 30 November 2006, Case no. IT-98-29-A, para 119.

[64] International Commission of Inquiry on Darfur 2005, para 174.

[65] UN Security Council (2007) Resolution 1769, UN Doc. S/Res/1769, para 22; UN Security Council (2008) Resolution 1828, UN Doc. S/Res/1828, para 16 (emphasis added).

[66] See Sivakumaran 2006, p 390 where he states that "the only requirement for an international humanitarian law agreement between a state and an armed opposition group with international legal personality to be international in character is for the parties to intend the agreement to be an international one as evidenced from the text of the agreement itself." See also Cassese 2004, pp 1134–1135.

NSAG to be legally valid.[67] In evaluating whether the terms of an agreement evince the necessary consent to be bound, guidance can be drawn from Bell's tripartite test, which considers "(1) how 'legal' the nature of the obligation is, (2) the precision with which it is drafted, and (3) the delegation to a third party of the power to interpret and enforce the agreement."[68] While it might be easier to demonstrate the legal nature of commitments undertaken by the parties if the agreement is in writing, "it may not be essential to have an agreement in writing if it is done in such a way that it can be relied upon."[69] Whether or not the agreement is in writing, it must clearly set out the obligations and expectations of the parties in order to have legal effect.

1.3.2.3 Unilateral Declarations

NSAGs also have the capacity to unilaterally make IHL commitments. Sometimes, these declarations serve but a declaratory purpose, confirming obligations that are already binding on the NSAG under treaty or customary law. Other times, they might expand the NSAG's normative responsibility by, for example, introducing obligations incumbent on parties to an international armed conflict.

There are a variety of manners by which NSAGs can unilaterally commit to IHL norms. This includes declarations made by NSAGs to the ICRC, UN bodies, or Depositories of the Geneva Conventions.[70] Another example of unilateral declarations by NSAGs are the Deeds of Commitment introduced by Geneva Call. Through this mechanism, NSAGs can formally commit to respect IHL norms and be held to account on the basis of their commitments.[71]

With respect to the legal force of unilateral declarations of States, the ICJ confirmed in the *Nuclear Test Case* that "[i]t is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations."[72] The same could apply to unilateral declarations made by NSAGs. For a unilateral declaration to create legal obligations, the NSAG must intend to bind itself to the terms of the declaration.[73] If a declaration to uphold certain humanitarian norms is made by an NSAG during a NIAC, it is

[67] Cf. VCLT, above n 35, Articles 11–17.

[68] Bell 2006, p 385.

[69] ICRC 2016, p 286, para 853.

[70] See Sivakumaran 2012, pp 119–122 referring to several examples.

[71] Geneva Call, Deed of Commitment. https://genevacall.org/how-we-work/deed-of-commitment/. Accessed 18 April 2018.

[72] ICJ, *Nuclear Test Case (Australia v France)*, Judgment, 20 December 1974, [1974] ICJ Rep 253, para 43.

[73] Cf. ibid.

submitted that there should be a presumption that the NSAG intends to bind itself by its terms and that the declaration is therefore legally binding.[74]

The assumption of IHL obligations by NSAGs through unilateral declarations is likely to be the least controversial avenue for NSAGs to contribute to the creation of IHL rules binding upon them in a NIAC. It does not require any interaction between NSAGs and States, making the risk that States would inadvertently legitimise NSAGs minimal.[75] Moreover, unilateral declarations only deal with the declaring entity's own legal obligations; NSAGs cannot create obligations for States or other NSAGs through unilateral declarations. Furthermore, given that NSAGs cannot detract from IHL obligations already binding upon them by means of unilateral declarations,[76] there is no risk of watering down IHL standards. As NSAGs can only extend their own normative responsibilities through unilateral declarations, the capacity of NSAGs to make legally binding declarations should not only be recognised but positively encouraged.

Nevertheless, it must be admitted that the ability of NSAGs to comply with the unilateral declarations they make are conditioned on their factual capabilities. As Sassòli points out, "a declaration by an armed group that it will comply with "the Geneva Conventions and Additional Protocols" merits some scepticism. There are some 500 articles in those treaties!"[77]

1.3.3 Customary IHL

Having examined the capacity of NSAGs to contribute to the creation of IHL rules by international agreements and unilateral declarations, this section explores their capacity to contribute to the formation of customary IHL rules applicable in NIACs.

The traditional view that States are the only entities capable of making international law is also reflected in how customary international law is created. Although Article 38(1) of the ICJ Statute does not expressly refer to a general practice by *States* accepted by *States* as law, it has been considered "axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States".[78]

This paradigm is still descriptively accurate with respect to the formation of customary IHL rules applicable in NIACs.[79] The ICRC Customary Law Study

[74] Roberts and Sivakumaran 2012, p 142.

[75] Ibid., p 143.

[76] See Sivakumaran 2011, pp 11–12 discussing commitments of NSAGs that fall below existing IHL norms. Such commitments remain without legal value to the extent they do not meet existing obligations already incumbent upon NSAGs.

[77] Sassòli 2010, p 32.

[78] ICJ, *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)*, Judgment, 3 June 1985, [1985] ICJ Rep 13, para 27.

[79] See, e.g., Murray 2015, pp 107–108.

takes the position that "[t]he practice of armed opposition groups […] does not constitute State practice as such" and that "[w]hile such practice may contain evidence of the acceptance of certain rules in non-international armed conflicts, its legal significance is unclear".[80] Most commentators agree that international law has not (yet) endowed NSAGs with the ability to contribute to the formation of customary IHL.[81] Acknowledging the continued validity of the orthodox theory of custom-creation, Henckaerts concludes that the practice of NSAGs "formally counts only if the group is successful in its rebellion and becomes the new government."[82]

Yet, cracks have started to form in this orthodox paradigm with the acknowledgement that certain non-State actors can contribute to the formation of customary international law. This is illustrated by the International Law Association's working definition of a rule of customary law as "one which is created and sustained by the constant and uniform practice of States *and other subjects of international law* in or impinging upon their international relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future."[83]

With respect to NSAGs, there is some support in international jurisprudence that the practice of NSAGs is relevant to the formation of customary IHL applicable in NIACs. Notably, the International Criminal Tribunal for the former Yugoslavia (ICTY) has relied on the practice of such groups in discerning whether Common Article 3 and provisions of AP II constitute customary IHL. In the *Tadić* case, the Appeals Chamber made no apparent distinction in terms of legal relevance between "the behaviour of belligerent States, Governments and insurgents" and considered all "instrumental in bringing about the formation of the customary rules at issue."[84]

As noted earlier in this Chapter, the ability of NSAGs to contribute to the development of IHL depends on the assent of States, and this applies equally to the role of NSAGs in the development of customary IHL applicable in NIACs. In contrast to the express recognition in Common Article 3 that NSAGs have the capacity to enter into special agreements, there is no parallel treaty rule conferring any capacity on NSAGs to contribute to the formation of customary IHL. Nor can it be concluded, based on the jurisprudence of *ad hoc* international courts, that a customary international law rule has formed conferring such capacity on NSAGs. Judicial decisions being only a subsidiary means of determining existing

[80] Henckaerts and Doswald-Beck 2005, p xxxvi.

[81] For example, Sandesh Sivakumaran observes that "[t]he extension in granting international legal personality to armed opposition groups has not been followed by a similar extension as regards their ability to contribute to the practice required for the formation of customary international law." Sivakumaran 2006, p 374. See also UN General Assembly (2014) International Law Commission: Second report on identification of customary international law, Sir Michael Wood, Special Rapporteur, UN Doc A/CN.4/672, pp 16–17 and 32–33.

[82] Henckaerts 2003, p 128.

[83] International Law Association Committee on Formation of Customary (General) International Law 2000, p 8 (emphasis added).

[84] *Tadić*, above n 1, para 108. See also Zegveld 2002, pp 25–26; De Beco 2005, pp 192–193.

international law, it would be necessary to demonstrate that there is also general and consistent State practice, accompanied by *opinio juris*, recognising that NSAGs have the ability to contribute to the formation of customary IHL. This is not yet the case.

1.3.3.1 Scope of NSAGs' Capacity to Contribute to the Formation of Customary IHL

If the jurisprudence of the ICTY nevertheless hints at the possible emergence of a customary rule conferring capacity on NSAGs to contribute to the formation of customary IHL, it is useful to consider what the scope of their capacity would be. There is no inherent reason why NSAGs would have the same law-making capacity as States with respect to the creation of customary IHL.

First, this capacity of NSAGs would be limited *ratione materiae* to IHL rules applicable in NIACs. A capacity outside the law binding upon NSAGs does not meet the needs of the international community, and it is highly unlikely that States would consent, expressly or implicitly, to NSAGs contributing to law-making outside this branch of law.[85] Second, just as new States are bound by existing customary law obligations, NSAGs would be bound by the rules of customary IHL applicable in NIACs in existence at the moment they become armed groups in the sense foreseen by IHL, i.e. a non-State party to a NIAC.[86] Consequently, the practice and views of NSAGs would be relevant only to the formation of new customary rules or as reaffirmation of existing rules. This temporal limitation is, however, of limited substantive significance since new customary rules can modify and even displace old contradictory customary rules.

Third, NSAGs would not be able to create new customary rules of IHL binding *erga omnes* without the widespread and consistent practice of NSAGs and States. Although there is no requirement of universal practice, the condition that the practice be extensive or widespread ensures that NSAGs could not control the legal content of the general customary rules of IHL applicable to all parties of a NIAC.[87]

The traditional assumption is that "[c]ustomary law rules and obligations […] by their very nature, must have equal force for all members of the international community".[88] This explains why the emergence of a new rule requires "general", that is widespread, practice on the part of the subjects of the legal regime in

[85] A discussion on the position of NSAGs under international human rights law is outside the scope of this chapter. For that, see Fortin 2017; Murray 2016.

[86] See Roberts and Sivakumaran 2012, p 151.

[87] In this regard, it is possible that the development of customary IHL applicable in NIACs might be slowed down if NSAGs are recognised as having a law-making role. The divergence in terms of practice and views both within the broad category of NSAGs and between that category and States would likely make it more difficult to achieve the widespread and consistent practice required for the formation of customary rules of international law.

[88] *North Sea Continental Shelf Cases,* above n 20, para 63.