
The Practice of Non-state Armed Groups and the Formation of Customary International Humanitarian Law

Towards Direct Relevance?

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1 Introduction

In orthodox international law, the formation of customary international law (CIL) takes root in the practice and *opinio juris* of states. The prevalence of this doctrine echoes international law's state-centric tradition. The post-war international legal order, however, has deeply changed in many respects. Two of those changes are particularly pertinent to the present topic: first, there has been a proliferation of non-state actors playing an increasingly important role in this legal system; and second, in international humanitarian law (IHL), only since the adoption of the 1949 Geneva Conventions has non-international armed conflict (NIAC), representing the majority of contemporary armed conflicts and involving non-state armed groups (NSAGs), been placed under regular and systematic regulations of international law.¹ Against this background, it is logical to call into question the traditional doctrine as to whether it has or, if not, should have evolved to confer a role upon non-state actors, including NSAGs, in the formative process of CIL.

As shown throughout this chapter, a number of prominent scholars have uttered their approval, with or without substantive reservations, for the proposition that the practice of NSAGs shall be incorporated into, and thus directly relevant to, the formation of customary IHL. This chapter serves as a critical appraisal of this notion. Section 2 reviews

¹ Prior to 1949, states were strongly opposed to any compulsory international regulation of NIAC, accepting only the consensual legal regime of recognition of belligerency; see L Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2004) 21.

the relevance of the practice of NSAGs to customary IHL under *lex lata*. Section 3 analyses, from a *lex ferenda* perspective, the credibility of the proposed rationales for incorporating the practice of NSAGs. Admitting that this proposition is theoretically possible and, in some ways, desirable, Section 4 turns to examine which types of practice of which armed groups should be potentially absorbed into the corpus of customary IHL. Section 5 zeroes in on the legal implications of effectuating this proposition on the existing frameworks of CIL and IHL.

2 *Lex Lata*

An initial inquiry can be made as to whether the practice of NSAGs has been recognised as an element of CIL under *lex lata*. ‘International custom’ is defined in Article 38(1)(b) of the Statute of the International Court of Justice (ICJ) as ‘evidence of a general practice accepted as law’.² The use of words ‘general practice’ has led some to argue that international custom is not restricted to the practice of states only,³ as practice may emanate also from non-state actors.⁴ While such an interpretation arguably runs against the drafters’ intention,⁵ it is not ruled out by the textual meaning of the term ‘general practice’. For the future purpose at least, this interpretation retains its viability.

At any rate, given this inborn ambiguity of the law in books, international institutions have bred divergent understandings of the relationship between the practice of NSAGs and CIL. The most pertinent and specific elucidation is found in the International Committee of the Red Cross (ICRC)’s *Customary IHL*, in which the ICRC estimated the legal significance of the practice of NSAGs as ‘unclear’ and classified it under the heading of ‘other practice’, with a view that such practice may at best

² Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993 art 38(1)(b).

³ RY Jennings & A Watts (eds), *Oppenheim’s International Law – Vol 1: Peace* (9th ed, Longmans 1992) 47.

⁴ JP Bohoslavsky et al, ‘Emerging Customary International Law in Sovereign Debt Governance?’ (2014) 9 CMLJ 55, 63.

⁵ Karol Wolfke submitted that the original proposal for that provision was based on the ‘constant expression of the legal conviction and the needs of nations’; see K Wolfke, *Custom in Present International Law* (2nd ed, Martinus Nijhoff 1993) 3; Robert McCorquodale nevertheless contested that that provision actually ‘acknowledges the difference between states and nations . . . [I]t is conceptually coherent to include actions, practices, and views of non-state actors in the determination of “sources”’; see R McCorquodale, ‘An Inclusive International Legal System’ (2004) 17 LJIL 477, 498.

contain evidence of the acceptance of existing IHL rules.⁶ The International Law Commission (ILC), in its comprehensive *Draft Conclusions on Identification of CIL*, asserted that the conduct of non-state actors other than international organisations ‘is not practice that contributes to the formation, or expression, of rules of [CIL]’,⁷ although it ‘may have an indirect role in the identification of [CIL], by stimulating or recording the practice and acceptance as law (*opinio juris*) of States and international organizations’.⁸

Hitherto, only a few international institutions have recognised the direct relevance of the practice of NSAGs to the formation of CIL. In the *Tadić* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) considered the practice of NSAGs to be ‘instrumental in bringing about the formation of the customary rules at issue’.⁹ In the same vein, the International Commission of Inquiry on Darfur observed that many rules of customary IHL originate from the practice of states, international organisations and armed groups.¹⁰ Be that as it may, there is little other support for such a stance.¹¹ It is also noteworthy that post-*Tadić* ICTY jurisprudence tended to revert to the elements of state practice and *opinio juris*.¹²

It may be concluded that under *lex lata*, only states and international organisations have actually been entrusted with a law-making power.¹³ While the practice of NSAGs plays an indirect role in the formation of CIL, its direct relevance to this process has yet been generally recognised. Accordingly, debates over this issue by and large dwell in the domain of *lex ferenda* instead of *lex lata*.

⁶ JM Henckaerts & L Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (Cambridge University Press 2005) xlii.

⁷ ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries’ (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 11, 119.

⁸ *ibid* 132.

⁹ *Prosecutor v Duško Tadić a/k/a/ “Dule”* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-T (2 October 1995) [108].

¹⁰ International Commission of Inquiry on Darfur, ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General’ (Geneva, 25 January 2005) [156].

¹¹ D Murray, ‘How International Humanitarian Law Treaties Bind Non-state Armed Groups’ (2015) 20 JCS&L 101, 108.

¹² S Sivakumaran, ‘Making and Shaping the Law of Armed Conflict’ (2018) 71 CLP 118, 145.

¹³ J d’Aspremont, ‘International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?’ in M Noortmann & C Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Routledge 2010) 187.

3 Rationales for Incorporating the Practice of NSAGs

Scholars advocating the incorporation of the practice of NSAGs into the formation of CIL have commonly built their argumentation upon two grounds, namely, curing the legitimacy deficit of customary rules binding NSAGs and enhancing NSAGs' compliance with IHL.

3.1 *The Legitimacy Problem of Customary Rules Binding NSAGs*

There is little dispute today that NSAGs are bound by IHL.¹⁴ It is also generally accepted that NSAGs are bound by customary IHL. As the Special Court for Sierra Leone asseverated, '[insurgents] are bound as a matter of international customary law to observe the obligations declared by Common Article 3.'¹⁵ Alleging that NSAGs are bound by CIL, in addition to treaties and their unilateral commitments, substantially expands the ambit of their obligations under IHL¹⁶ and is thus vital for the protection of war victims.

In the eyes of some, the legitimacy of customary rules binding NSAGs is flawed, inasmuch as their formation does not take into account the practice of those actors. As argued, one of the legitimising premises of CIL is that it originates in the actions and beliefs of those whom it later comes to bind.¹⁷ Since CIL binds not only states, clinging to a state-centric notion merely evinces a perceived loss of its democratic legitimacy.¹⁸ In the process of CIL's formation, the unfair lack of the participation of the entities that the law intends to regulate would

¹⁴ However, there has been no consensus on why NSAGs are bound by IHL. It is commonly argued that NSAGs are bound: (1) via the legislative jurisdiction of the state on whose territory they operate; (2) because their members are bound directly by IHL; (3) by virtue of the fact that they exercise de facto governmental functions; (4) through CIL; and (5) because they have consented thereto. For a critical evaluation of these doctrines see for example JK Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 IRR 443, 445–61.

¹⁵ *Prosecutor v Kallon et al* (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-2004-16-AR72(E) (13 March 2004) [47].

¹⁶ M Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar 2019) 51.

¹⁷ C Ochoa, 'The Individual and Customary International Law Formation' (2007) 48 *VaInt'lL* 119, 122; J Klabbers, 'Sources of International Organizations' Law: Reflections on Accountability' in S Besson & J d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 997.

¹⁸ T Müller, 'Customary Transnational Law: Attacking the Last Resort of State Sovereignty' (2008) 15 *IndJGlobal Legal Studies* 19, 40.

severely compromise its legitimacy.¹⁹ The need to cure this legitimacy deficit hence justifies incorporating the practice of non-state actors, such as NSAGs, as an element of CIL.²⁰

Indeed, depicting CIL as such a behaviourally self-generated norm-forming process represents the dominant approach, according to which no conceptual obstacle, at first blush, seems to arise for non-state actors to create customary rules for themselves.²¹ A closer inspection, however, unveils a major deficiency of this logic chain that is followed by a dramatic corollary: the legitimacy of CIL is fully restored only if all participants of the international legal order, ranging from states to international organisations to individuals, are conferred the capacity to create customary rules for themselves.²² This theoretical prospect, explicitly noted by a few authors,²³ confuses states which play a cardinal role in international law with others which do not, based on a taken-for-granted equivalence between them. By doing so, it improperly overlooks the built-in but defensible inequality between states and non-state actors before international law.

Such a presupposed equivalence is a fiction. According to Hugh Thirlway, a unique characteristic of states, which bars any non-state actor being promoted to full state rank, is that they best represent the interests and needs of human beings in international society.²⁴ It is possible that the idea of an entity creating self-governing law fits only the club of sovereign states. Traditional voluntarist approach to international law has confirmed that by virtue of sovereign equality of states, no legal obligations can be imposed on any one of them without its consent.²⁵ A legitimacy criticism is hence

¹⁹ C Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in M Noortmann & C Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Routledge 2010) 69, 73.

²⁰ S Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 ICLQ 369, 374–75.

²¹ J d'Aspremont, 'Non-State Actors and the Formation of International Customary Law: Unlearning Some Common Tropes' in S Droubi & J d'Aspremont (eds), *International Organisations, Non-State Actors and the Formation of Customary International Law* (Manchester University Press 2020).

²² As Hugh Thirlway pointed out, under this approach, no non-state actor shall be excluded from the corpus of law-creators, because doing so would raise just as much of a legitimacy problem; see H Thirlway, 'The Role of Non-State Actors: A Response to Professor Ryngaert' (2017) 64 NILR 141, 149.

²³ See for example M Akehurst, 'Custom as a Source of International Law' (1975) 47 BYBIL 1, 53; DJ Bederman, *Custom as a Source of Law* (Cambridge University Press 2010) 162–63.

²⁴ Thirlway (n 22) 147.

²⁵ As the Permanent Court of International Justice declared, '[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' see *SS 'Lotus' (France v Turkey)* (Judgment) [1927] PCIJ Series A 10 [44].

devised for addressing the lack of involvement of some states in the formation of CIL.²⁶ Non-state armed groups and other non-state actors, however, are not sovereign entities, and the principle of voluntarism never precludes the imposition of obligations on them in the absence of their consent.²⁷ Thus, there is no inherent reason why they cannot be subjected to the will of states in international law.²⁸ If the creation of CIL should be monopolised by states, even recognising the self-generating nature of this body of law cannot automatically bring out a legitimate appeal for non-state participation. In effect, the theory of legitimacy accommodates the possibility ‘for A to have legitimate authority over B even if A’s rule is neither consented to nor democratic’.²⁹ This modality of legitimacy especially caters to international law which ‘does not now enjoy, and is unlikely to achieve in the foreseeable future, a significant grounding either in the consent of its subjects or in democratic law-making processes’.³⁰

The ILC’s approaches to the role of international organisations in the formation of CIL reveal the intransigence of the state-centred CIL system. In its *Draft Conclusions on Identification of CIL*, the ILC proffered that ‘[i]n certain cases, the practice of international organizations also contributes to the formation of [CIL].’³¹ The ILC foresaw two clear circumstances where such practice arises as an element of CIL: states have transferred exclusive competences to international organisations, or have conferred upon them competences that are functionally equivalent to powers exercised by states.³² Rossana Deplano argued that the ILC’s seemingly ground-breaking conclusion is stealthily anchored in an unspoken premise: international organisations are empowered by states, and their practice can contribute to the formation of CIL only insofar as it is conceived as a surrogate of state

²⁶ See A Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 AJIL 757, 767; JP Kelly, ‘Customary International Law in Historical Context: The Exercise of Power without General Acceptance’ in BD Leppard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) 49.

²⁷ Hiemstra H & Nohle E, ‘The Role of Non-State Armed Groups in the Development and Interpretation of International Humanitarian Law’ (2019) 20 Yearbook of International Humanitarian Law 3, 11.

²⁸ *ibid.*

²⁹ J Tasioulas, ‘The Legitimacy of International Law’ in S Besson & J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 101.

³⁰ *ibid.*

³¹ ILC Report 2018 (n 7) 119.

³² *ibid.* 131.

practice.³³ To say the least, ILC's work brings to light that contemporary international law offers little ground for elaborating on the contribution to CIL by international organisations as independent actors.³⁴ In other words, states seem never to have lost, or will lose, monopoly over the creation of CIL by countenancing limited participation of international organisations in this process.

Even if it may be contended that international organisations' capacity to contribute to CIL accords with CIL's character as a set of rules arising from the practice and usage of a distinctive community,³⁵ their case is not comparable to that of NSAGs. Kristina Daugirdas articulated three reasons justifying why international organisations can directly contribute to CIL: first, the states establishing an international organisation may subjectively intend for that organisation to be able to do so; second, this capacity may be an implied power of the organisation; and third, this capacity may be a byproduct of other features of the organisation, such as international legal personality, the capacity to enter into treaties, incurring responsibility for violations and making claims.³⁶ None of these is neatly applicable, by analogy, to NSAGs. First and foremost, NSAGs are not created or empowered by states. On the contrary, their presence in the territory is essentially illegal under national laws. Second, NSAGs do not have 'implied powers' – a principle that has no concern with them. Third, NSAGs cannot participate in treaties, and there is no agreement as to whether they can assume direct responsibility under international law.³⁷ Among all these considerations, the lack of states' empowerment is most fatal. The absence of such a process manifesting states' privilege helps explain why non-state actors other than international organisations are not considered creators of practice that contributes to the formation of CIL.³⁸

³³ R Deplano, 'Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues' (2017) 14 IOLR 227, 229.

³⁴ C Brölmann, 'Capturing the Juridical Will of International Organisations' in Droubi S & d'Aspremont J (eds), *International Organisations, Non-State Actors and the Formation of Customary International Law* (Manchester University Press 2020).

³⁵ K Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) 31 EJIL 201, 203, 214.

³⁶ *ibid* 210.

³⁷ ILA Committee on Non-State Actors, 'Third Report of the Committee: Non-State Actors' (Washington Conference, 2014) II(1)(b).

³⁸ SD Murphy, 'Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission' (2015) 109 AJIL 822, 830.

In sum, although it may be said that the legitimacy of CIL comes from its self-generating character, it is doubtful whether this formula is applicable beyond states and state-empowered entities. At present, 'states always retain the final word' to decide whether to bestow upon non-state actors a law-making power.³⁹ This is a status quo, and is not bound to suffer from legitimacy flaw if the legal asymmetry between states and non-state actors is not convincingly repudiated.

3.2 *The Sense of Ownership and the Compliance Dynamics*

Moving one step further from the legitimacy criticism, scholars arguing in favour of incorporating the practice of NSAGs put forward an argument concerning compliance. Marco Sassòli questioned how NSAGs could be expected to abide by IHL if they are not involved in the law-making process.⁴⁰ Indeed, sometimes NSAGs denied the binding force of IHL norms on them by arguing that they did (and could) not participate in the creation of those norms which is monopolised by states.⁴¹ This was the case with the Fuerzas Armadas Revolucionarias de Colombia, the Frente Farabundo Martí para la Liberación Nacional of El Salvador, and the National Liberation Front of Vietnam.⁴² Therefore scholars argued that to overcome this quandary, it is necessary to adopt an ownership approach, whose core message is that engaging NSAGs in the creation of norms vests them with a 'sense of ownership' which would strengthen their incentive for compliance with obligations.⁴³ On the part of CIL,

³⁹ J d'Aspremont, 'The Doctrinal Illusion of the Heterogeneity of International Law-Making Processes' in H Ruiz Fabri et al (eds), *Select Proceedings of the European Society of International Law*, Vol 2 (Hart 2010) 301.

⁴⁰ M Sassòli, 'Transnational Armed Groups and International Humanitarian Law' (2006) Winter 2006(6) HPCR Occasional Paper Series 1, 40 <<https://bit.ly/3oW3F4Y>> accessed 1 March 2021.

⁴¹ ICRC, 'Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts' (ICRC 2008) 11 <<https://bit.ly/3GK1K9y>> accessed 1 March 2021.

⁴² S Sivakumaran, 'The Addressees of Common Article 3' in A Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 418.

⁴³ S Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts' (2011) 93 IRRC 649, 654; S Sivakumaran, 'Implementing Humanitarian Norms through Non-State Armed Groups' in H Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press 2015) 130; A Bellal & E Heffes, "'Yes, I Do': Binding Armed Non-State Actors to IHL and Human Rights Norms through Their Consent' (2018) 12 HR&ILD 120, 126.

such engagement efforts mean incorporating their practice into the formative process.⁴⁴

This line of reasoning postulates that an actor's compliance can be improved if it feels a sense of ownership of the rules. As Hyeran Jo expounded, '[a] sense of ownership increases the likelihood that rules will take root within a rebel movement and be perceived as meaningful and worthwhile. When rules are internalized in this way, compliant behavior may eventually become a matter of habit . . . When this happens, self-implementation and self-policing replace outside supervision.'⁴⁵ Notwithstanding the plausibility of such an explanation as it appears, it is doubtful to what extent this ownership approach would work, in the context of custom-making, for NSAGs whose compliance poses a perennial threat to IHL.

The first uncertainty is whether creating a sense of ownership is serviceable enough for fostering compliance. Although the same question can be asked vis-à-vis states, that the compliance mechanisms of NSAGs are more fragile may render the ownership approach particularly feeble. In fact, the ownership consideration is far from the whole picture of the compliance dynamics. Besides the lack of ownership of norms, NSAGs may refuse to observe or implement IHL on various grounds, including strategic military concerns, the likelihood of prosecution, the lack of knowledge of applicable norms and political or religious ideology.⁴⁶ More importantly, the sense of ownership arguably stands among the least influential factors affecting NSAGs' behaviour. While it is logically sound for Western scholars that the reluctance to accept IHL norms is due to non-participation in their creation, such a stance is not really expressed by most of NSAGs today.⁴⁷ Instead, the ownership argumentation appears only to be retained by some Colombian NSAGs.⁴⁸ It is also reported that Geneva Call, in its experience of engaging NSAGs, has not

⁴⁴ Sivakumaran (n 20) 375; R Geiss, 'Humanitarian Law Obligations of Organized Armed Groups' in International Institute of Humanitarian Law (ed), *Non-State Actors and International Humanitarian Law: Organized Armed Groups: A Challenge for the 21st Century* (FrancoAngeli 2010) 96.

⁴⁵ H Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015) 255.

⁴⁶ A Bellal & S Casey-Maslen, 'Rules of Engagement, Protecting Civilians through Dialogue with Armed Non-State Actors' (Geneva Academy of IHL and Human Rights, 2011) 5–7 <<https://bit.ly/3DAwiZK>> accessed 1 March 2021.

⁴⁷ O Bangerter, 'Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not' (2011) 93 IRRC 353, 381.

⁴⁸ *ibid* 380–81.

confronted any NSAG citing its exclusion from norm formation as a ground for rejecting the application of humanitarian standards; even many NSAGs which have agreed to adhere to IHL do not raise objections concerning non-participation.⁴⁹ Given such a nebulous nexus between the ownership approach and NSAGs' compliance, it might be too exaggerated to suggest that the compliance record of NSAGs would be palpably altered once a sense of ownership is in place, in light of the sundry temptations to ignore the law.

Even if it is acceptable that more engagement and a sense of ownership are better than nothing for cultivating NSAGs' willingness for compliance, another issue that requires careful unpacking is whether such a sentiment can really be aroused in the context of custom-making. Unlike treaty negotiations or issuance of unilateral commitments in which NSAGs may have their voice and (un)acceptance of norms plainly heard, the codification process of customs would foreseeably remain in the hands of expert groups conducting research from a third-party's standpoint. Being remote from that pursuit, NSAGs would stand little chance to express their concerns or mount effective challenges when they have issues. It is thus questionable whether a mere promise to take into account their practice in the codification of CIL, without providing occasions for them to speak their mind, would equip NSAGs with a sense of ownership and induces their adherence to the resultant norms. In fact, criticisms have already been enunciated against the ICRC's study of customary IHL for not being sufficiently reflective of what states truly think and do pursuant to the law.⁵⁰ If these criticisms are apposite, to what extent can a sense of ownership be conveyed from the codification of CIL?

It may be argued that to ensure NSAGs' opinions and concerns being genuinely heard and addressed, unprecedented participatory mechanisms are needed. However, there are numerous NSAGs operating in widely scattered areas of the world. Is it physically feasible to come into contact with all, or at least a substantial part of them? If not, should certain NSAGs be selected as 'representatives' getting involved in the

⁴⁹ E Decrey Warner et al, 'Armed Non-State Actors and Humanitarian Norms: Lessons from the Geneva Call Experience' in B Perrin (ed), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* (University of British Columbia Press 2012) 82.

⁵⁰ See for example Y Dinstein, 'The ICRC Customary International Humanitarian Law Study' (2006) 36 *IsrYBHumRts* 1, 6; MN Schmitt, 'The Law of Targeting' in E Wilmschurst & S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) 134.

codification process? How to then assure that the competence of those who are invited to participate would be recognised by other NSAGs? Moreover, even if participatory mechanisms for NSAGs are adequately devised, they cannot fix the participation and representativeness plights in the long run. Unlike states, NSAGs are often ephemeral. After the close of hostilities, an NSAG may be disbanded or form the legitimate government of a (new) state. Hence, '[t]here remains a risk that even if the armed groups of today contribute to the formation of international law, the armed groups of tomorrow will still not feel any ownership of these norms and will use that as an excuse not to comply with them.'⁵¹

Hitherto, even though an ownership approach should be adopted for the sake of compliance, constructing the direct relevance between the practice of NSAGs and customary IHL would sit among the most specious propositions for approaching this goal.⁵² In fact, there are no statements on the part of NSAGs suggesting that they are aware of the possibility that their acts could contribute to CIL, or that they consent to it.⁵³ It might eventually become one's own wishful thinking to purport that the compliance predicament could be practically remedied through admitting NSAGs into the formative process of CIL.

4 Scope of Incorporating the Practice of NSAGs

Despite the flaws identified, it is admitted that the proposition of incorporating the practice of NSAGs is still theoretically possible and, in some ways, desirable. Going along with this line of thinking, it has to be decided which types of practice of which NSAGs should be absorbed into the corpus of customary IHL.

4.1 *Scope Ratione Personae*

Non-state armed groups are extremely diverse. They differ in the extent of territorial control, internal structure, capacity to train members, and the

⁵¹ K Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 328.

⁵² The experience of Geneva Call shows that the question of NSAGs' participation in international norm formation appears to be less important than ensuring NSAGs' capability to factually express their adherence to, and ownership of, such norms; see Warner et al (n 49) 82.

⁵³ A Kleczkowska, 'Searching for Armed Non-State Actors' Role in the Process of Formation of Customary Law' (2019) 19 ICLR 97, 112.

disciplinary or punitive measures that are taken against members.⁵⁴ It seems intricate to establish detailed criteria for including some of them while excluding the rest. Pondering over the appropriateness of engaging selected NSAGs only, Marco Sassòli submitted that ‘the international community should try to apply all the legal mechanisms suggested to all armed groups.’⁵⁵ This view holds up inasmuch as it seems to be the only likely solution in harmony with the legitimacy concern as displayed in Section 3.1, which implies that all non-state actors shall be treated as law-creators because excluding any of them would defeat the argumentation itself.⁵⁶ Now that it is insisted that CIL can be legitimately binding only for those whose practice and beliefs are constitutive to its formation, and that it shall bind all NSAGs which are parties to armed conflicts, it would be groundless to disqualify any of them for the purpose of custom-making.

Therefore, since customary IHL applies only in the situations of armed conflict, an NSAG shall be taken into account for the formation of this body of law so long as it can engage in a NIAC.⁵⁷ Criteria of a NIAC include ‘the intensity of the conflict and the organization of the parties to the conflict’.⁵⁸ Accordingly, to be a party to a NIAC and then a prospective candidate for custom-making, an NSAG is required to have ‘a sufficient degree of organization’ and ‘be able to and does conduct, or is otherwise involved, in an armed campaign which reaches the required degree of intensity’.⁵⁹

This approach seems counter-intuitive, as even Al-Qaeda and the Islamic State of Iraq and Syria would attain the law-creator status. It has to be emphasised that an all-inclusive approach for NSAGs per se is not tantamount to indiscriminate incorporation of any sort of their practice. As will be illustrated in Section 4.2 below, the practice should be subject to scrutiny before being utilised as the basis of customary IHL.

4.2 *Scope Ratione Materiae*

The practice of NSAGs consists of various types and forms. They may include, but are not limited to: first, verbal acts, such as codes of conduct,

⁵⁴ ICRC (n 41) 11.

⁵⁵ M Sassòli, ‘Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law’ (2010) 1 JHLS 5, 14.

⁵⁶ Thirlway (n 22) 149.

⁵⁷ Sassòli (n 55) 14.

⁵⁸ *Prosecutor v Duško Tadić a/k/a/ “Dule”* (Opinion and Judgment) IT-94-1-T (7 May 1997) [108].

⁵⁹ D Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in E Wilmschurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 52.

internal legislations, unilateral commitments, instructions to armed members, special agreements, peace treaties and statements in international fora; and second, physical acts, such as battlefield behaviour, the use of certain weapons and the treatment afforded to different categories of persons.⁶⁰

As with state practice, the practice of NSAGs is innately Janus-faced. It contains both the positive practice of committing to and complying with IHL and the negative acts of disregarding, rejecting and wilfully breaking the rules. As often reported in NIACs, some NSAGs have blatantly denied, in whole or in part, the application of IHL. In the context of custom formation, those persistently defying existing norms and continuing waging their rebellions without any restraints could arguably be labelled as ‘persistent objectors’.⁶¹ This reality entails a pressing question: should the anticipated NSAG-contributed customary IHL incorporate both the positive and negative components of their practice? With a view to curbing the implications of the contrary practice of NSAGs, Anthea Roberts and Sandesh Sivakumaran suggested that ‘armed groups, acting alone, would not have the power to create a new custom or undermine or change an existing custom.’⁶² It is also noteworthy that the ICTY, which affirmed the direct relevance of the practice of NSAGs, has only cited their practice consistent with the objectives of protecting war victims.⁶³ Nonetheless, the lack of articulated justifications and criteria for doing away with what looks repugnant risks opening the door to arbitrariness and subjectivity.

The imbroglio caused by the negative practice of NSAGs might be defused through the *mutatis mutandis* application of the norms governing custom-making to the case of NSAGs. On one hand, deviation from a rule should generally be treated as ‘breaches of that rule, not as indications of the recognition of a new rule’.⁶⁴ Therefore, the misdeeds of

⁶⁰ A Bellal, P Bongard & E Heffes, ‘Research Brief: From Words to Deeds: A Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms’ (Geneva Academy of IHL and Human Rights, December 2019) 4 <<https://bit.ly/3lwCL7>> accessed 1 March 2021.

⁶¹ Jo (n 45) 47.

⁶² A Roberts & S Sivakumaran, ‘Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law’ (2012) 37 *YaleJInt’lL* 107, 151.

⁶³ I Scobbie, ‘The Approach to Customary International Law in the Study’ in E Wilmshurst & S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) 46.

⁶⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, 98 [186].

NSAGs can seldom result in the emergence of new norms. On the other hand, the formation of CIL demands state practice be ‘extensive and virtually uniform’⁶⁵ rather than universal, and be generally consistent with, rather than ‘in absolutely rigorous conformity with’, the rules.⁶⁶ While NSAGs have often been demonised as nothing but criminal gangs, some scholars testified that contrary to the public’s stereotype, NSAGs have frequently committed to and/or implemented humanitarian norms,⁶⁷ and that only a few NSAGs entirely reject the pertinence of IHL.⁶⁸ As Raphaël van Steenberghe analysed, ‘practice evidences that most of the armed groups being party to an armed conflict are ready to respect IHL . . . [T]he rare official oppositions from armed groups to IHL application do not seem to be sufficiently important [to the formation of CIL rules].’⁶⁹ If the empirical evidence as offered is solid, the negative practice of NSAGs may not carry as much weight as it seems to have in determining the contents of CIL norms.

Another mechanism that would function as a powerful filter of practice is *jus cogens* (peremptory norms). One of the legal consequences of *jus cogens* in relation to CIL is that even if constituent elements of CIL are present, a putative customary rule does not come into existence if it conflicts with *jus cogens*.⁷⁰ In this sense, there would be no customary rule that may conflict with *jus cogens*. As a logical result, the practice of NSAGs potentially contributing to such a ‘rule’ would simply play no role in its formation which is forestalled.

This inhibitory effect of *jus cogens* works for those that have persistently objected to an emerging customary rule and maintain their objection after the rule has crystallised. The persistent objector rule does not prevent the emergence of a customary norm of a *jus cogens* character to which one or more states have persistently objected.⁷¹ Likewise, even if

⁶⁵ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, 43 [74].

⁶⁶ *Military and Paramilitary Activities in and against Nicaragua* (n 64) 69 [186].

⁶⁷ Sivakumaran (n 43) 125–26; Jo (n 45) 238; Bangerter (n 47) 367.

⁶⁸ Bellal & Heffes (n 43) 136.

⁶⁹ R van Steenberghe, ‘Non-State Actors from the Perspective of the International Committee of the Red Cross’ in J d’Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 223.

⁷⁰ ILC, ‘Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*)’ (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, reproduced in [2019/II – Part Two] YBILC 141, 145, 182.

⁷¹ *ibid* 185.

an NSAG has persistently maintained its objection to a customary rule of a *jus cogens* character since that rule was in the process of formation, it could not thwart the crystallisation of that rule. In other words, its practice signalling persistent objection would be irrelevant to the formation of such a rule.

Customary IHL contains abundant rules of a *jus cogens* character. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ described the fundamental rules of IHL as constituting ‘intransgressible principles’ of CIL.⁷² According to the ILC, the intention of the world court was to treat these principles as peremptory.⁷³ Thus far, it has been widely agreed among scholars that basic rules of IHL have achieved the *jus cogens* status,⁷⁴ although there is no consensus as to which basic norms exactly fall into this genre. Also, it has been determined in both international and domestic jurisprudence that IHL rules prohibiting war crimes form part of *jus cogens*.⁷⁵ Given the coverage of *jus cogens* in the realm of IHL, it is promising that not much room is left for NSAGs to create customary rules that contravene existing ones, or to maintain objections to them.

With these principles in mind, the implications of the frustrating negative practice of NSAGs should not be overstated. The positive and negative facets of their practice may be weighed together as a whole for determining the contents of customs.

5 Legal Implications of Incorporating the Practice of NSAGs

The proposed direct relevance between the practice of NSAGs and the formation of customary IHL would have legal implications for not only the theory of CIL, but also the contents of IHL. Theoretical and practical difficulties arising therefrom would affect in return the acceptability of this project.

⁷² *Legality of the Threat and Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 241, 257 [79].

⁷³ ILC, ‘Content of the International Responsibility of a State’ (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, reproduced in [2001/II – Part Two] YBILC 86, 113.

⁷⁴ For enumerations of authors of this view, see R Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (Hart 2015) 81; D Tladi, ‘Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*)’ (31 January 2019) UN Doc A/CN.4/727 [120].

⁷⁵ For international jurisprudence, see *Prosecutor v Kupreskić* (Trial Judgment) IT-95-16-T (14 January 2000) [520]; for cases before domestic courts, see Tladi (n 74) [119].

5.1 *Implications on the Structure of CIL*

The conceptual distinction between state practice and the practice of NSAGs gives rise to a question: if the practice of NSAGs were to count as an element of CIL, what would the hierarchy between such practice and state practice? Put another way, in determining the contents of norms, would the practice of NSAGs be superior, equal or inferior to state practice be? In fact, this question posits the existence of a unitary body of CIL norms applicable to states and NSAGs alike. A legal pluralist outlook would suggest another way of perceiving the structure of CIL. To address this hierarchy issue, the two scenarios should be examined respectively.

Traditionally, CIL is understood as a unitary legal system. As Daragh Murray maintained, CIL shall 'be regarded as a unitary body of law, binding all entities possessing international legal personality. While elements of the law may be limited *ratione personae*, this does not imply the existence of distinct bodies of customary law relevant to particular categories of entity.'⁷⁶ However, the alleged self-generating nature of CIL as noted in Section 3.1 would imply that each and every type of entities which are bound by CIL should be vested with a power to create customary rules for itself. Such a theoretical perspective was envisaged by Anthony Clark Arend: '[i]f, however, the [S]tate were to lose its monopoly in a neomedieval system, ... [t]here could, in fact, be *multiple levels of CIL* ... [A] scholar ... would need to examine the practice of this entire panoply of actors ... [I]t is also possible that there could be rules of CIL that are *binding on some, but not all*, international actors.'⁷⁷

Indeed, if the creators of CIL are no longer to be confined to states, the traditional structure of CIL would be radically stretched. It is conceivable that this body of law is likely, if not bound, to become multi-layered to accommodate multifarious sets of norms created by and applied to different actors.⁷⁸ As Jean d'Aspremont wrote, 'if one accepts that non-state actors can contribute to the formation of [CIL] ... the practice of non-state actors can only be germane to the emergence of customary rules whose object is to regulate non-state actors' behaviour.'⁷⁹ As to IHL, the expected diversification of CIL, resulted from non-state participation

⁷⁶ Murray (n 11) 108.

⁷⁷ AC Arend, *Legal Rules and International Society* (Oxford University Press 1999) 176–77 (emphasis added).

⁷⁸ Katharine Fortin even asserted that 'different subjects of international law are bound by different norms of CIL' has already become a fact; see Fortin (n 51) 328.

⁷⁹ J d'Aspremont, 'Conclusion: Inclusive Law-Making and Law-Enforcement Processes for an Exclusive International Legal System' in J d'Aspremont (ed), *Participants in the*

in custom-making, would engender two main layers of customary norms: (1) norms created by and applicable to states;⁸⁰ and (2) norms created by and applicable to NSAGs. In such a double-layered system, the hierarchy problem between state practice and the practice of NSAGs would not arise, because wherever a discrepancy exists between their practices, it can be handily deposited onto two entities' respective exclusive domains of norms whose scopes of application *ratione personae* would not overlap.

In contrast, the hierarchy issue would emerge vis-à-vis the traditional concept of CIL if the practice of NSAGs were to become directly relevant. This is because as long as CIL is considered a unitary system, customary IHL norms binding states and NSAGs alike should be conceptually co-authored by both. In determining the contents of this body of law, the practices of the two entities should be weighed along with one another in a holistic manner. To bridge the potential discrepancies, Anthea Roberts and Sandesh Sivakumaran proposed that states and NSAGs' practices 'need not be treated equally. The centrality of the role of States in international law means that their practice should still be given more weight.'⁸¹ Admittedly, in affirming the direct relevance of the practice of NSAGs, neither the ICTY nor the Darfur Commission pointed to any of such practice that contradicted IHL norms created by states.⁸² However, there appears to be a tension between conferring upon NSAGs a custom-making role in the name of legitimacy on one hand and subordinating them to states on the other hand: if CIL's legitimacy – in the proposed meaning of the term – is to be maximised, it is puzzling why states should retain the authority to deplete at will the value of the conduct of other actors. Probably a more sensible approach is to treat, in theory, the practice of state and NSAGs on an equal footing and to determine the superiority between them on a case-by-case basis, in consideration of the specific problem that a norm seeks to address.⁸³

International Legal System: Multiple Perspectives on Non-State Actors in International Law (Routledge 2011) 430.

⁸⁰ Under this taxonomy, the ICRC's *Customary IHL*, done predominantly based on state practice, would be reclassified as a codification of customary IHL created by and applicable to states, instead of a codification of customary IHL *in toto*.

⁸¹ Roberts & Sivakumaran (n 62) 151.

⁸² J Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict' (2007) 89 *IRRC* 655, 662.

⁸³ Hiemstra (n 27) 26.

5.2 *Implications on the Application and Protective Standards of Customary IHL*

Besides challenging the unitary character of CIL, incorporating the practice of NSAGs would lead to reappraising some crucial aspects of IHL. The most conspicuous is the risk of nullifying the equal application of IHL in NIAC, a principle denoting that IHL 'applies equally to both sides of a conflict'.⁸⁴ Apparently, this principle perches at the opposite end of a conceived double-layered system of CIL, in which states and NSAGs are bound by different norms. Two options for assuaging this tension would arise. One is to incorporate the practice of NSAGs into the traditional unitary body of CIL, on account of the importance of equal application. The other option is to close the door for the equal application of IHL in NIAC, with the possibility of the stratification of CIL preserved.

At first glance, the price of taking the latter path seems exorbitant. In fact, however, there is an ongoing debate in academia over whether the principle of equal application should be established in NIAC. Those who contest the applicability of this principle in NIAC first looked for support from the historical origin of this principle. It was argued that the principle of equal application resulted from the separation between *jus ad bellum* (the law governing resorting to force) and *jus in bello* (the law regulating the conduct of war) – a dichotomy that exists only in inter-state conflict.⁸⁵ The principle of equal application is a necessity to ensure that the same IHL norms apply to both belligerent states regardless their respective causes for resorting to war. International law, however, does not traditionally regulate the legality of the use of force in internal strife.⁸⁶ In other words, there is no *ad bellum/in bello* separation and the resultant theoretical demand for equal application in NIAC. In addition to this argument, it was also noted that the transplant of the equal application from inter-state conflict into NIAC is practically problematic and undesirable, for requiring NSAGs to implement the same obligations as states do is unrealistic, and may result in a high incidence of non-compliance.⁸⁷

⁸⁴ C Greenwood, 'The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign' (2002) 78 ILS 35, 40–41.

⁸⁵ A Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure' (2008) 90 IRRC 931, 932; M Sassòli, 'Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality between Armed Groups and States?' (2011) 93 IRRC 426, 427–28.

⁸⁶ Y Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 4.

⁸⁷ Sassòli (n 85) 427; G Blum, 'On a Differential Law of War' (2011) 52 HarvInt'LLJ 163, 172.

Nevertheless, it is the majority view that the principle of equal application is doubtlessly applicable to NIAC.⁸⁸ While they did not gainsay the inter-state origin of the equal application, the defenders of this principle warned that abandoning it in NIAC would reduce the incentive of government forces involved to comply with their IHL undertakings, as they would hardly benefit from an asymmetric IHL.⁸⁹

It is not the intention of this chapter to work out a definitive answer for this debate. The suggestion is that there is some room to dispute, in theory, the equal application of IHL in NIAC, at the service of the envisaged customary norms based exclusively on the acts of NSAGs. Be that as it may, this would turn out to be a thankless, if not only dangerous, exercise as it denotes radical deviation from the classical perception of how IHL is applied.⁹⁰ It may then be safer to stick to a unitary body of CIL under the co-authorship of states and NSAGs, with the same customs regulating both sides. As can be seen, concerns related to equal application of IHL would restrain the choice of theoretical pathways for those in favour of giving NSAGs a direct role in custom-making.

Another implication that incorporating the practice of NSAGs might have is the risk of regression of IHL, that is, the downgrading of its existing protective standards.⁹¹ While, as analysed in Section 4.2, the negative practice of NSAGs may not have a scathing impact on the formation of CIL, the crux here is that even the acts of NSAGs aimed at regulating their conduct or protecting war victims appear to be more primitive and less humane than states'. For instance, some NSAGs in countries like Sierra Leone, Uganda, Philippines, Nepal and India adopted their codes of conduct based on an instruction of the Chinese People's Liberation Army, with which they share a similar ideology.⁹² This instruction encompasses a number of rules of humanitarianism

⁸⁸ See Y Sandoz et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) 1345; F Kalshoven & L Zegveld, *Constraints on the Waging of War* (4th ed, Cambridge University Press 2011) 2.

⁸⁹ Y Shany, 'A Rebuttal to Marco Sassòli' (2011) 93 IRRC 432, 433.

⁹⁰ As Katharine Fortin warned, 'it cannot be right that there could ever be "customary law created by armed groups themselves and only applicable to those groups". To suggest otherwise undermines one of the key principles of international humanitarian law, equality of belligerents'; see Fortin (n 51) 327.

⁹¹ Sassòli (n 40) 41; C Ryngaert, 'Non-State Actors in International Humanitarian Law' in J d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 289.

⁹² Bellal & Heffes (n 43) 127.

such as ‘do not hit or swear at people’, ‘do not take liberties with women’ and ‘do not maltreat captives’.⁹³ Notwithstanding such laudable efforts, it is evident that those norms, being oversimplified and crude, would not afford war victims protection as comprehensive as that offered by state-crafted ones. Further examples can be found in the codes of conduct of the Ejército de Liberación Nacional in Colombia, Ejército Zapatista de Liberación Nacional in Mexico, the Sudan People’s Liberation Army and the Taliban in Afghanistan. All of those codes contain merely rudimentary or concise rules, and fail to cover many critical aspects of IHL.⁹⁴ Should such instruments, reflective of the practice of NSAGs, be taken as a basis for customary IHL, it would be hard to formulate norms reaching the protective standards that have already been achieved in IHL. In effect, this dilemma arises also in relation to the law-making of other non-state actors. As Hilary Charlesworth observed, engaging non-state actors in the creation of CIL ‘often has the effect of generating weak norms on a wide variety of topics’.⁹⁵

However, such a pessimistic prospect foretelling the inevitable regression of law is not infallible. It should be equally noted that NSAGs have sometimes embraced more protective rules with obligations whose scopes are wider than those agreed among states. An illustrative example is Geneva Call’s Deed of Commitment on landmine ban which has been signed by many NSAGs already.⁹⁶ While the Ottawa Convention on anti-personnel landmines, signed among states, prohibits mines that are ‘*designed to be* exploded by the presence, proximity or contact of a - person’,⁹⁷ Geneva Call’s deed bans mines that have such an effect, whether they are designed for that purpose or not.⁹⁸ Furthermore, there are also cases in which unilateral commitments of NSAGs may be

⁹³ IRRIC, ‘A Collection of Codes of Conduct Issued by Armed Groups’ (2011) 93 IRRIC 483, 487.

⁹⁴ For the text of these codes, see O Bangerter, *Internal Control: Codes of Conduct within Insurgent Armed Groups* (Small Arms Survey 2012) 85–91, 94–95.

⁹⁵ H Charlesworth, ‘The Unbearable Lightness of Customary International Law’ (1998) 92 ASIL PROC 44, 45.

⁹⁶ To date, this document has been signed by fifty-three armed non-state actors; see Geneva Call, ‘What We Do’ (*Geneva Call*) <<https://www.genevacall.org/what-we-do/>> accessed 1 March 2021.

⁹⁷ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211, art 2(1) (emphasis added).

⁹⁸ Geneva Call, ‘Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action’, art 1 <<https://bit.ly/3DOWhRC>> accessed 1 March 2021.

more humane than IHL standards in certain respects. For instance, the Sudan People's Liberation Movement committed to apply the Convention on Certain Conventional Weapons at a time when the convention was applicable to international armed conflicts alone, and the National Transitional Council of Libya issued a communiqué that prohibited the use of anti-vehicle mines and anti-personnel mines during the 2011 civil war in Libya.⁹⁹

These examples illustrate that the alleged regression of IHL may not necessarily be the case, or at least, may not take place in every corner of the law. In certain areas where NSAGs assent to more protection, more progressive norms are in sight. Nevertheless, more empirical studies are needed for judging the exact implications of the practice of NSAGs on the protective standards of customary IHL.

6 Concluding Remarks

Reviewing the seemingly attractive proposal of incorporating the practice of NSAGs into the formation of CIL, this chapter demonstrates that such a concept as it has been explored thus far may not effectively solve as many problems as it may cause. Consequently, while non-state participation in international law-making is often suggested and encouraged, there could be some reasonable hesitation when NSAGs come into sight. It is acknowledged that 'non-state actors' is a designation for entities of diverse origins. A general acceptance of giving a bigger role to them does not naturally guarantee a place for NSAGs. There are good reasons to isolate NSAGs from those non-states entities which are deemed inherently benign (e.g., international organisations, NGOs and judges). What is at the heart of this debate appears not to be the theoretical hurdles for NSAGs to be called law-creators, but the necessity or desirability of moving towards that direction. Indeed, should most NSAGs be able to create exquisite and sophisticated norms and strictly adhere to them, many doubts and objections to their custom-making capacity would fade away.

Such a consequentialist approach is helpful for assuring that international law is evolving on a progressive track. International humanitarian law is a body of law whose implementation greatly depends on voluntary action and goodwill of belligerents.¹⁰⁰ More efforts to engage

⁹⁹ Sivakumaran (n 43) 133.

¹⁰⁰ R Kolb & R Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart 2008) 284.

NSAGs are certainly desirable,¹⁰¹ but law-making represents only one option of engagement. If, through their direct participation in custom-making, NSAGs' compliance records are not expected to be enhanced and/or the application of IHL becomes more uncertain and less protective, it might be hard to convince the mainstream in academia to accept the direct relevance project by hinging on a simplistic call for more inclusiveness with a somewhat hollow legitimacy argumentation. Solutions to the challenges raised during this debate would partially rest with further extensive empirical surveys concerning NSAGs' behaviour. At this stage, it is not unreasonable to stay sceptical about whether such admission of NSAGs marks one of the correct directions of future development for reckoning with the contemporary challenges to IHL.

From a policy-making perspective, it is even more challenging at present to imagine that the direct relevance proposal would be welcomed by states, which are often reluctant to do anything that may legitimise the armed groups with which they are in conflict.¹⁰² In essence, states may have a keen interest in maintaining their exclusive or dominant role in law-making.¹⁰³ Even if states, the ICRC or other authorities agree to put this proposition onto the agenda, there would be more questions, beyond what is discussed in this chapter, waiting for answers, such as the difficulty in discerning *opinio juris* of NSAGs as a result of NSAGs' general lack of knowledge of the law.¹⁰⁴ For the sake of theoretical completeness and practical utility, proponents of this project are invited to make further elaborations on it.

¹⁰¹ UNSC 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (11 November 2010) UN Doc S/2010/579 [52].

¹⁰² Roberts & Sivakumaran (n 62) 135.

¹⁰³ *ibid* 133.

¹⁰⁴ Bellal & Heffes (n 43) 133.