The Applicability of International Humanitarian Law on Non-State Armed Groups

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1. INTRODUCTION

1. Throughout history, armed conflicts have had a constant presence; however, the nature of those conflicts has been far from consistent. Armed conflicts have evolved as much as the societies waging them have. Nevertheless, as armed conflicts evolve, the older forms of violence do not entirely disappear, even when new forms arise. Meaning that, even in this age where cyber and space are increasingly instrumental, the typical agrarian or industrial warfare still stands.[1]

2. In *War and the Law of Nations*, Stephen Neff holds that merely a small portion of the study of armed conflict touches upon the rules that govern the conduct of those conflicts.[2] However, the atrocities committed during wars from the second half of the 1800's onwards have put the conduct of conflicts under extreme scrutiny. This attention sparked the creation of Geneva Conventions and later Hague Conventions. We have come a long way since the Battle of Solferino and the World Wars, but evolution of the rules governing the conduct of hostilities, has halted decades ago.[3]

3. This paper focuses on the contemporary state of armed conflict and how it relates to the Geneva Conventions of 1949 and the Additional Protocols of 1977. It will do so by first discussing the spectrum of armed conflicts and the law governing them, to distill the academic research question and proposed methodology (second section). Followed by defining the most proliferated type of armed conflict and the problems that ensue in doing so (third section), conclude with a critical discussion of the predominant theories of the applicability of these rules on actors that are not States (fourth section).

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[1] BAYLIS, J., WIRTZ, J. & GRAY, C., *Strategy in the Contemporary World*, 4th ed., Oxford, Oxford University Press, 2013, 58.
[2] NEFF, S., *War and the Law of Nations. A General History*, New York, Cambridge University Press, 2005, 1.
[3] Specifically focusing on the Geneva Conventions and its Additional Protocols, thus omitting bi- and multilateral treaties which govern the ban on the use of certain weapons, strategies and tactics, such as arrangements seeking to reduce or eliminate certain categories of nuclear weapons, or the ban on the use of anti-personnel landmines (*https://www.un.org/disarmament/wmd/nuclear/*, consulted on the 4th of December 2021).

2. THE SPECTRUM AND THE LAW OF ARMED CONFLICT

4. A basic principle in international law is that the use of force between States is prohibited. Article 2(4) of the Charter of the United Nations prohibits resorting to armed force and addresses the possible derogations to the clause.[4] The prohibition on the use of force and its exceptions are what we call the *jus contra bellum*. However, violence between States, between States and non-State Armed Groups (hereafter 'NSAG'), or between such groups, has not been rendered impossible by the Charter or domestic law. Such violence, either justified or unjustified, legal or illegal, might still occur. That is why there is a strong need to regulate the conduct of hostilities, otherwise known as the Law of Armed Conflict, *jus in bello* or International Humanitarian Law (hereafter 'IHL').[5]

5. This body of law has been specifically designed to be applicable in situations of armed conflicts and interplays in a specific way with International Human Rights Law (hereafter 'IHRL'). As the International Court of Justice (hereafter 'ICJ') stated in its '*Construction of a Wall*'-opinion, some matters are to be exclusively governed by IHL, other exclusively by IHRL and some by both.[6] For years, academics and justices have discussed how a conflict between IHL and IHRL must be approached. The most radical approach states that in situations where IHL is applicable, the entirety of IHRL is suspended. This is, however, contested by the ICJ in its '*Armed Activities in the Territory of the Congo*'-judgment, where it found that there had been violations of both IHL and IHRL, thus implying both were simultaneously applicable to a certain situation.[7] Therefore a more nuanced approach is to state that IHL partly excludes IHRL. The reasoning behind this is that IHL is considered to be *lex specialis* and thus more suitable to deal with the issues at hand. Therefore, it trumps IHRL-rules, which might restrict what IHL allows.[8] The more practicable approach is to interpret IHL against the backdrop of IHRL, which provided a critical context for interpretation.[9] This is ever so important, especially considering there are international human rights courts, such as the European Court for Human Rights, but there are no IHL-courts as such, so IHL matters are dealt with in different (international) courts. However, some violations of IHL could be tried before international criminal tribunals if the *responsible* State fails to act. The

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[4] Art. 2(4) UNC.
[5] G. HERNÁNDEZ, *International Law*, Oxford, Oxford University Press, 2019, 377.
[6] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 136 (9 July 2004). para 106.
[7] ICJ, *Armed Activities on the Territory of the Congo*, Judgement, No. 908 (19 December 2005), para 216 & 219.
[8] High Court of Justice, *Serdar Mohammed v. Ministry of Defense*, Case No. HQ12X03367 (2 May 2014), para 278.
[9] ECtHR, *Hassan v. The United Kingdom*, Application No. 29750/09 (16 September 2014), para 103; ECtHR, *Loizidou v. Turkey*, Case No. 23 EHRR 513 (28 November 1996), para 43; ECtHR, *Bankovic v. Belgium*, Case No. 11 BHRC 435 (19 December 2001), para 55; ECTHR, *Al-Adsani v. United Kingdom*, Case No. 34 EHRR 11 (21 November 2001), para 52-67; ECtHR, *Jones v. United Kingdom*, Case No. 3435/06 & 40528/06 (14 January 2014), para 189 & 195.

general lack of a central enforcing authority poses real issues, the ramifications of which will be highlighted throughout the paper.

6. Turning to the contents of IHL: the classical view of defining armed conflicts in IHL is dichotomous. An armed conflict is either international or non-international in nature.[10] An International Armed Conflict (hereafter 'IAC') occurs in situations of declared war or any other armed conflict between two or more States, without declaring a state of war by one of them. It is clear that this requires a material assessment and not a formal one.[11] Armed conflicts in which peoples are fighting against colonial domination, alien occupation and against racist regimes in the exercise of their right of self-determination, shall also be considered as being of an international nature.[12]

7. On the other side, there are non-International Armed Conflicts (hereafter 'NIAC'), which will be discussed in detail in the next section. These types of armed conflicts need to be distinguished from other types of violence intra-State, such as internal disturbances, riots, manifestations, which are not considered to be armed conflicts and are thus primarily governed by domestic law. It is only when certain conditions, such as a violence threshold, have been met, that such an intra-State violence might evolve to a NIAC.[13] These elements of distinction between those situations are addressed in the next section.

8. A large set of rules, but different scopes of applicability, make for complicated situations. Especially considering that when the Geneva Conventions were drafted, every living adult at that time had clear memories of the Second World War and its implications on his or her life. The Additional Protocols proved to be necessary only years later and even then, it was clear that, with the World War far away in the rear-view mirror, the political will to legislate the conduct of armed conflicts shrunk.[14] Contemporary armed conflicts have proven to be more and more complex, and while the Conventions or Protocols were not made with these types of conflicts in mind, they do however provide an answer for some of those situations. In fact, NIACs have become more and more widespread, becoming the predominant type of armed conflict, while simultaneously being the least governed by IHL-rules.[15] It is without a doubt that IHL is an international legal instrument that is binding on States, while it contains binding rules for NSAG. Otherwise put, it contains rights and obligations for parties that are not party to the treaties, at least not in a formal way. The question then follows if these NSAGs are bound by international obligations and if they hold

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[10] Contra: the theory of Transnational Armed Conflicts (cf. Chapter 2, Section 3).
[11] Common Article 2 to the Geneva Conventions; G. HERNÁNDEZ, *International Law*, Oxford, Oxford University Press, 2019, 383.
[12] Article 1(4) Additional Protocol I to the Geneva Conventions; G. HERNÁNDEZ, *International Law*, Oxford, Oxford University Press, 2019, 384.
[13] S. VITÉ, '*Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*', in *International Review of the Red Cross* 2009, 75.
[14] This is evidenced by the number of signatories to the Additional Protocols vis-à-vis the Geneva Conventions.
[15] BAYLIS, J., WIRTZ, J. & GRAY, C., *Strategy in the Contemporary World*, 4th ed., Oxford, Oxford University Press, 2013, 189.

international rights in NIACs and if so, to what extent? This will be the main research question of the seminar paper. To answer it, a thorough examination of the (international) legal personality of NSAG is required, as it is primordial for an entity to hold international rights and obligations. The predominant ways in which IHL can be binding on a subject with international legal personality, will also be researched.

9. To narrow the scope of the paper, the field in which the NSAG operate must be defined precisely, which makes for a descriptive second chapter, on which the paper is founded. While the research in itself is evaluative, assessing the predominant approaches to the binding nature of IHL on NSAGs, the research objective of this seminar paper is recommendatory. The idea is to give a state of current affairs and summarize the criticism of academics and the author of this paper, followed by a more solution-oriented attitude, and make some concrete suggestions.[16]

3. DEFINING NON-INTERNATIONAL ARMED CONFLICTS

3.1. COMMON ARTICLE 3 TO THE GENEVA CONVENTIONS

10. Common Article 3 to the Geneva Conventions (hereafter 'CA3') does not provide a clear-cut definition of a NIAC. It only refers to the situation in which an "*armed conflict not of an international character occurring in the territory of one of the High Contracting Parties [takes place]*".[17] It is important to emphasize that the rules enshrined in the common article apply to situations where State Actors are fighting NSAG or where such groups are fighting each other. The International Criminal Tribunal for Yugoslavia (hereafter 'ICTY') provided a more practical definition relating to CA3, namely that a NIAC takes place when there is protracted armed violence. Two indicators to determine if this is the case, are the intensity of the conflict and the organization of the armed groups.[18]

11. The intensity of the conflict is gauged through different sub-indicators[19], such as the frequency, form and spread of the armed attacks[20], the deployment of Armed Forces by the State in which the supposed NIAC takes place[21] or if, for example, the United Nations Security Council follows the situation and / or votes resolutions relating to the situation.[22] The certain degree of organization of the

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[16] KESTEMONT, L., Handbook on Legal Methodology. From Objective to Method., Cambridge, Intersentia, 2018, 17.
[17] Common Article 3 to the Geneva Conventions.
[18] ICTY, Prosecutor v. Tadic, Opinion and Judgment, Case No. IT-94-1-T (7 May 1997), para 70; S. VITÉ, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', in International Review of the Red Cross 2009, 76.
[19] Not an exhaustive list.
[20] ICTY, Prosecutor v. Tadic, Opinion and Judgment, Case No. IT-94-1-T (7 May 1997), para 565-566.
[21] ICTY, Prosecutor v. Boskoski, Judgment, Case No. IT-04-82-T (10 July 2008), para 177.
[22] ICTY, Prosecutor v. Tadic, Opinion and Judgment, Case No. IT-94-1-T (7 May 1997), para 567.

armed group is attained when they possess a clear command structure and organization table, recruitment channels, training facilities, etc.[23]

12. The article also provides that the armed conflict needs to occur "*in the territory of one of the High Contracting Parties*"[24], which sparked the academic debate on whether this excludes NIACs that take place on the territory of more than one Party. This hints towards the so-called Transnational Armed Conflict-theory, which proposes a third type of armed conflict, supposedly with different thresholds and applicable rules.[25] The academic world mostly agrees that the wording of the article simply emphasizes the scope itself and did not intend to exclude said situations, thus creating a new type of armed conflict.[26]

3.2. ADDITIONAL PROTOCOL II TO THE GENEVA CONVENTIONS

13. The Second Additional Protocol to the Geneva Conventions (hereafter 'APII') has its own scope of applicability as set out in the first article and in that way has a different definition of NIACs. In particular it applies to armed conflict *"[taking] place in the territory of a (...) Party between its armed forces and (...) organized armed groups, which under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations (...)*".[27] This scope is clearly more limited, as there is a need of a high level of organization which follows from the responsible command that can exercise effective control of the territory and which is able to carry out sustained military operations. The scope also excludes the fighting against colonial domination and racist regimes[28] and the conflicts between NSAG as possible NIACs.[29]

3.3. POSSIBLE DEVIATIONS FROM THE DICHOTOMOUS CLASSIFICATION

14. The two definitions, discussed above, allow for a multitude of types of NIACs to fall within their scope. Armed conflict between State forces and NSAG within the territory of the former fall under the definition of CA3 and/or APII. The conflict between NSAG is excluded by APII but is included in CA3. Then there are two border situations. The first being the situation in which the international community or a third State intervenes in an existing NIAC and the second one being the so-called global NIAC, otherwise called the transnational armed conflict.

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[23] ICTY, *Prosecutor v. Boskoski*, Judgment, Case No. IT-04-82-T (10 July 2008), para 194-203.
[24] Common Article 3 to the Geneva Conventions.
[25] Cf. infra.
[26] S. VITÉ, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', in *International Review of the Red Cross* 2009, 78.
[27] Article 1 of Additional Protocol II to the Geneva Conventions.
[28] Cf. Section 1.
[29] S. VITÉ, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', in *International Review of the Red Cross* 2009, 79; J. WOUTERS, C. RYNGAERT, T. RUYS & G. DE BAERE, *International Law. A European Perspective*, Oxford, Hart Publishing, 2019, 645.

3.3.1. Internationalized Armed Conflicts

15. The ICTY set out two distinct scenarios in which internationalization of a NIAC could occur. The first was when a State were to intervene directly in a conflict. Secondly, when a non-State Armed Group were to be acting on behalf of another State.[30]

16. It is believed that foreign intervention in a NIAC on the side of the *de jure* government will not lead to the internationalization of the conflict.[31] Foreign intervention by a third State in a NIAC on the side of (one of) the NSAG against the *de jure* government will create a situation of parallel conflict. A NIAC would exist between the State and the non-State Armed Group, and an IAC would exist between the intervening third State and the attacked State. The same amounts for a State attacking a non-State Armed Group on the territory of another State without its consent to do so.[32]

17. In a similar fashion, if a third State were to engage in proxy warfare, by providing essential support to the efforts of NSAG in their conflict with a State, or by exercising control over such a group, the conflict will be regarded as being an IAC between both State actors.[33] However, the threshold for this essential support is high and goes beyond mere advising or sending financial or material aid.[34]

3.3.2. Transnational Armed Conflicts

18. As touched upon in the previous section, there are some paradigms in the academic world that believe there is a need for a third type of conflict, namely Transnational Armed Conflicts. This conclusion follows from two assumptions: the first being that NIACs are only waged in the territory of one State Party to the Conventions of Geneva. The second is that an IAC is only possible when there is armed conflict between government armed forces.[35] So a Transnational

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[30] ICTY, Prosecutor v. Tadic, Opinion and Judgment, Case No. IT-94-1-T (7 May 1997), para 84; G. HERNÁNDEZ, *International Law*, Oxford, Oxford University Press, 2019, 385.

[31] E.g., Coalition forces attacking ISIL within Iraq, with the consent of the latter; S. VITÉ, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', in *International Review of the Red Cross* 2009, 89-90; J. WOUTERS, C. RYNGAERT, T. RUYS & G. DE BAERE, *International Law. A European Perspective*, Oxford, Hart Publishing, 2019, 646; J. WOUTERS, P. DE MAN & N. VERLINDEN, *Armed Conflicts and the Law*, Cambridge, Intersentia, 2016, 176-177.

[32] E.g., Israeli attacks against Hezbollah in Lebanon, without the consent of the latter.

[33] For the 'control' threshold to be met, there are two tests, one being the effective control test (cf. Nicaragua-case), the other being the overall control test (cf. Tadic-case). (ICJ, *Military and Paramilitary Activities in and Against Nicaragua*, Merits, Judgment (27 Jun 1986); ICTY, *Prosecutor v. Tadic*, Opinion and Judgment, Case No. IT-94-1-T (7 May 1997).); J. WOUTERS, C. RYNGAERT, T. RUYS & G. DE BAERE, *International Law. A European Perspective*, Oxford, Hart Publishing, 2019, 646.

[34] J. WOUTERS, P. DE MAN & N. VERLINDEN, *Armed Conflicts and the Law*, Cambridge, Intersentia, 2016, 176-177.

[35] *Ibid*, 179.

Armed Conflict should be something in between, As Wouters *et al.* state, *"[this type of conflict] geographically points to an [I]nternational [A]rmed [C]onflict, whereas the actors involved point to the existence of a non-[I]nternational [A]rmed [C]onflict*".[36]

19. Authors continue saying that armed conflict within non-Party States and armed conflict within multiple Party States are not covered. The latter follows from a strict reading of Common Article 3 and has been rebutted by many, stating that the article merely wants to re-emphasize the scope and not narrow it further.[37] The first argument has also been disproved, as CA3 is regarded to be part of Customary International Law and therefore there are no non-Party States to this provision, as assumed to be universally binding.[38]

20. As discussed in the internationalization-debate, the idea of a Transnational Armed Conflict is one of convenience and not out of necessity. If State Armed Forces would attack a non-State Armed Group in a Third State, this happens with or without the Third State's consent. Having the Third State's consent would keep the NIAC from internationalizing. Without the Third State's consent, it is viewed to be a parallel conflict.[39]

21. Even though the idea of a Transnational Armed Conflict has been used multiple times in relation to hunt down terrorist groups, it must be dismissed. Such a type of armed conflict is not supported by general practice and does not seem desirable from a political point of view, otherwise it would have been added in one of the Additional Protocols.[40] The conclusion is that there is no need or room for an implied third category of armed conflicts, as every relation between parties to an armed conflict can be classified as either an IAC, a NIAC or both happening simultaneously.[41]

4. APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW ON NON-STATE ARMED GROUPS

4.1. LEGAL STANDING OF AND RELEVANCE FOR NON-STATE ARMED GROUPS

[36] Ibid.
[37] Cf. supra; Ibid, 180.
[38] ICJ, Military and Paramilitary Activities in and Against Nicaragua, Merits, Judgment (27 Jun 1986), para 218; ICTY, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 (2 Oct 1995), para 98; ICTR, Prosecutor v. Jean-Paul Akayesu, Judgment, ICTR-96-4 (2 September 1998), para 608.
[39] Cf. supra.
[40] J. WOUTERS, C. RYNGAERT, T. RUYS & G. DE BAERE, International Law. A European Perspective, Oxford, Hart Publishing, 2019, 647.
[41] J. WOUTERS, P. DE MAN & N. VERLINDEN, Armed Conflicts and the Law, Cambridge, Intersentia, 2016, 182.

22. The High-level Panel on Threats, Challenges and Change of the United Nations released a report in 2004 stating that a significant majority of armed conflict is of a non-international nature.[42] Seventeen years later, this is still the case, according to a dataset provided by the Peace Research Institute Oslo, which is corroborated by data from the Geneva Academy.[43] As discussed, these conflicts are typically governed by CA3 and APII.[44] The question then rises: "*Who has the legal obligation, not only the moral one, to uphold these norms? Who is considered to be bound by them?*". In any case, it is important to reiterate that the application of IHL does not require reciprocity, in the sense that it is not only binding if all opposing parties have ratified and / or implemented the relevant principles and provisions.[45]

23. It is clear that signatory States are bound by IHL according to the *pacta sunt servanda*-principle[46]. But also, non-signatories are bound, when considering the customary status[47] of CA3.[48] While States are the primary subjects of International Law, endowed with full international legal personality, they are not the only actors on the international playing field.[49] The ICJ recognized that non-State Actors (hereafter 'NSA'), such as international organizations were also capable of possessing, to some extent, such rights. It acknowledged an NSA, in this case the United Nations, could bring a claim to an international court.[50] NSAG, as being a subset of that category, are becoming increasingly sophisticated and ever more proliferated, but are they capable of having international rights or adhering to international obligations?

24. States might be reluctant to fully say 'yes' to that question, as they seek not to legitimize armed opposition groups in their territories. But it has become apparent that there is no way around it, and we should endeavor for such an applicability for moral reasons. CA3 also states that "*the application of the preceding provisions shall not affect the legal status of the Parties to the conflict*", thus catering to the concerns of States and opening the door for international legal personality for NSAG.[51] Sivakumaran holds that the armed groups are "*subject to rights and obligations under international law pertaining to their particular status. In the case of armed oppositions groups, these consist of*

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[42] High-level Panel on Threats, Challenge and Change, '*A more secure world: Our shared responsibility*', Report, 2004, 11; S. SIVAKUMARAN, 'Binding Armed Opposition Groups', in *The International and Comparative Law Quarterly* 2006, 369.
[43] This data shows there are currently 5 ongoing IACs and 26 ongoing NIACs (*https://ucdp.uu.se/#/*, consulted on 4 December 2021; *https://www.rulac.org/browse/conflicts*, consulted on 8 December 2021).
[44] If the respective conditions have been fulfilled.
[45] G. HERNÁNDEZ, *International Law*, Oxford, Oxford University Press, 2019, 380.
[46] Article 26 of the Vienna Convention on the Law of Treaties.
[47] Cf. Section 3 of this Chapter.
[48] Cf. supra.
[49] J. WOUTERS, C. RYNGAERT, T. RUYS & G. DE BAERE, *International Law. A European Perspective*, Oxford, Hart Publishing, 2019, 389.
[50] ICJ, *Reparation for injuries suffered in the service of the United Nations,* Advisory Opinion (11 April 1949), 178.
[51] Common Article 3 to the Geneva Conventions; J. WOUTERS, C. RYNGAERT, T. RUYS & G. DE BAERE, *International Law. A European Perspective*, Oxford, Hart Publishing, 2019, 403.

limited rights and obligations relating to [I]nternational [H]umanitarian [L]aw".[52] Suggesting that, if they have (limited) international legal personality, they have rights and obligations under the law of armed conflict.

25. In a classic conception of international law as a consensual system, the participants only have the rights and obligations to the extent they have chosen to be put in that position.[53] Therefore, can NSAG be given rights and duties under international law, without having consented to it? According to the customary international law approach or the theory of legislative jurisdiction, the answer is 'yes'. However, a clear distinction is necessary between the binding nature of IHL on NSAG and their willingness to adhere to the rules. As this section will show, the prior influences the latter. It is a very difficult balancing exercise, as one should not forget that NSAG are more than likely in a *de facto* illegal situation according to the domestic law of the State in which they operate. Why break domestic law and adhere to IHL? Before going into the 'why'-question, the next sections will investigate 'how' the NSAG are bound.

4.2. CONSENT-BASED APPROACH

26. To build further on the suggestion of Sivakumaran, does 'holding (limited) international legal personality' enable an NSAG to consent to being bound by the IHL-provisions? Essentially the question transforms to 'Can a NSAG conclude international agreements?'. A close reading of the Vienna Convention of the Law on Treaties (hereafter 'VCLT') would suggest a negative answer to that question, as the relevant articles are expressly limited to States.[54] Even when those provisions of the VCLT are regarded to reflect international custom, their scope is still limited to States. Some academics argue that VCLT could be applicable on NSAG through a *mutatis mutanda*-reasoning, to continue with the idea that NSAG can ascend to the treaty.[55] If such a reasoning would be possible, then the point of this research would be moot. And yet, this is exactly what Sivakumaran does by paraphrasing article 35 and 36 VCLT as *"[observing] that a third party may be subject to obligations that are contained in a treaty to which it is not party provided that those that are party to the treaty 'intend the provisions to be the means of establishing the obligation' and the third party itself 'expressly accepts that obligation in writing.' (emphasis added)*" and "*that third parties may receive rights that are contained in a treaty to which they are not party provided that the parties to the treaty 'intend the provision to accord that right' to the third parties and the third parties 'assent thereto.'*".[56] In phrasing his conclusion this way, he broadens the scope of those articles from being applicable to third States to being applicable to third parties, thus potentially NSAGs. He does this based

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[52] S. SIVAKUMARAN, 'Binding Armed Opposition Groups', in *The International and Comparative Law Quarterly* 2006, 390.
[53] C. RYNGAERT, *Imposing International Duties on non-State Actors and the Legitimacy of International Law*, 2009, 1.
[54] Art. 34-36 VCLT.
[55] S. SIVAKUMARAN, 'Binding Armed Opposition Groups', in *The International and Comparative Law Quarterly,* 2006, 377.
[56] S. SIVAKUMARAN, 'Binding Armed Opposition Groups', in *The International and Comparative Law Quarterly* 2006, 378.

on an opinion of Cassese stating that the Customary International Law-status of the VCLT is wider than the narrow texts of the VCLT itself and is applicable on any international subject that places itself or is placed in the position of the third party.[57]

27. On the one hand, this argument is a rather troubling way to introduce the two general conditions of how an NSAG could be bound by treaty provisions to which it is not a party.[58] Troubling because it entails the scope of the VCLT goes beyond States and includes any (international) subject. This is somewhat strange, as it was clearly not the intention of the States Parties to do so, as they had also created the Vienna Convention on the Law of Treaties between States and International Organizations (...) (hereafter 'VCLTIO'). A body of law which has not officially entered into force but was specifically designed to address NSA such as international organizations. Kleffner agrees on this and points to the dangers of expanding the scope. There is no real reason to stop at NSA or NSAG, one could even continue and apply it to individuals. "*Could it not be argued that the same analogy has to be drawn with respect to individuals, for instance?*" he continues.[59] Such situations have been expressly addressed in the prohibition of renunciation by protected persons of certain rights.[60]

28. On the other hand, this reading did not even prove to be necessary, as the answer to '*applicability through consent*'-conundrum can be found in CA3. The article calls for the creation of special agreements between the Parties to an 'armed conflict not of an international character'.[61] These agreements could introduce IHL to a special legal sphere between both NSAG and State. In an ideal world, they would even agree on enforcement mechanisms, for both sides, but it does not seem realistic. Turning to two legal issues: how does an NSAG express its will to be bound? What if the NSAG does not wish to enter into a special agreement with the State?

29. Considering that in both definitions of NIACs a certain degree of organization is required, one could be content with a declaration from the NSAG leadership. But it remains a (legal) question if such a declaration would also bind the individual members of such a group. This question, however, is beyond the scope of the seminar and will not be addressed any further. If an NSAG does not wish to enter into a special agreement with the State it is combatting, there is a need to look at situations where consent is not an essential part of the approach of introducing binding IHL-provisions on the NSAG. Two approaches will be discussed in the subsequent sections.

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[57] A. CASSESE, 'The Status of Rebels Under the 1997 Geneva Protocol on Non-International Armed Conflicts', in *The International and Comparative Law Quarterly* 1981, 423.
[58] The two conditions are that (1) the provisions must intend to bestow rights or obligations onto the third party and (2) the third party should accept these in writing.
[59] J. KLEFFNER, 'The Applicability of International Humanitarian Law to Organized Armed Groups', in *International Review of the Red Cross* 2011, 458.
[60] Art. 7 in GCI, GCII and GCIII and art. 8 in GCIV.
[61] Common Article 3 to the Geneva Conventions.

4.3. CUSTOMARY INTERNATIONAL LAW APPROACH

30. Customary International Law (hereafter 'CIL') was touched upon when addressing the non-Party States to the Geneva Conventions being bound by CA3 to the Conventions. The binding nature does not follow from the consent to be bound, but from the customary status of the provisions. For NSAG to be bound by the law of armed conflict through custom, two assumptions, made by Sivakumaran, need to be addressed. The first one being that the rules governing IHL have become CIL. The second one that NSAG are bound by CIL.

31. The near-universal ratification of the Conventions of Geneva is strong evidence that they can be regarded as being part of CIL.[62] This does not entail the full applicability of the Conventions in any situation, as the scope remains divided between IACs and NIACs. For the scope of this paper, it suffices to research the customary status of CA3. Statements to that extent have been made by the International Court of Justice[63], the International Criminal Tribunal for Yugoslavia[64] and for Rwanda[65], as well as the Special Court for Sierra Leone.[66] APII has far less signatories and is not regarded as fully being part of CIL.[67] In 2005, the International Committee of the Red Cross conducted a comprehensive study to determine which rules of IHL are considered to have customary status. The final report contains 161 rules, which do not all apply to NIACs.[68]

32. CIL, as the oldest and original formal source of International Law, is formed by State practice and its *opinio juris*.[69] Practice consists of "*any behavior of subjects of International Law that discloses their conscious attitude with respect to a [specific] situation*".[70] The practice must be virtually uniform and public to some extent.[71] The aforementioned study does not recognize NSA to also be able to have their practice count towards State practice.[72] The *opinio juris* is "*the recognition or acceptance by States that a certain (uniform, durable and*

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[62] G. HERNÁNDEZ, *International Law*, Oxford, Oxford University Press, 2019, 380; ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Geneva, 2019, 77.
[63] ICJ, Military and Paramilitary Activities in and Against Nicaragua, Merits, Judgment (27 Jun 1986), para 218.
[64] ICTY, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 (2 Oct 1995).
[65] ICTR, Prosecutor v. Jean-Paul Akayesu, Judgment, ICTR-96-4 (2 September 1998), para 608.
[66] S. SIVAKUMARAN, 'Binding Armed Opposition Groups', in *The International and Comparative Law Quarterly* 2006, 391.
[67] *Ibid*, 372.
[68] J.-M. HENCKAERTS & L. DOSWALD-BECK, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005.
[69] Article 38 Statute of the International Court of Justice; ICJ, *North Sea Continental Shelf Case*, Judgment, (20 February 1969), para 77; J. WOUTERS, C. RYNGAERT, T. RUYS & G. DE BAERE, *International Law. A European Perspective*, Oxford, Hart Publishing, 2019, 134.
[70] ILC Draft Conclusion 4, para 1.
[71] ICJ, *North Sea Continental Shelf Case*, Judgment, (20 February 1969), para 75; J. WOUTERS, C. RYNGAERT, T. RUYS & G. DE BAERE, *International Law. A European Perspective*, Oxford, Hart Publishing, 2019, 140.
[72] J.-M. HENCKAERTS & L. DOSWALD-BECK, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005.

extensive) practice reflects not simply a usage or tradition, but instead reflects a legal norm permitting, ordering, or prohibiting a certain conduct (emphasis added)".[73] While the definition clearly mentions States, could NSAGs *opinio juris* matter? Academics hold that CIL is binding on States as it follows from States' practice and *opinio juris*, therefore, it should only be binding on NSAGs if their practice and *opinio juris* is considered.[74] But what are NSAGs, if not a grouping of individuals that live in a certain State? Are individuals not held to obey Customary (International) Law, even if they have not participated in the practice and the *opinio juris*? It is evidenced that individuals are bound by it. For example: the individual criminal responsibility can be triggered if a person infringes customary rules such as the prohibition of committing war crimes.[75] If individuals are bound, why would a group of those same individuals not be bound by it? There simply is no reason to argue otherwise. However, the discussion concerning the non-participation in the creation of CIL is pertinent when it concerns the incentive or the will to be bound by it.

33. As introduced in the first section of this chapter, the problem at hand is twofold. On the one hand the rules must be applicable and on the other hand they must be applied. As suggested by many, rules that are imposed on an NSAG, which by its nature and objective is breaking some legal rules, might lack the needed legitimacy to be applied.[76] Such armed groups mostly combat the State they are in, because they disagree with the state of affairs and how the government (dis)functions. In their quest to have their voice heard, they are very unlikely to have such rules imposed on them unilaterally.

34. The CIL-approach allows for some rules of IHL to be considered binding on NSAGs in NIACs. This is far from the entire body of law and lacks a lot of clarity, as CA3 is as concise as it is vague. The primary issue with this approach is that it lacks the legitimacy that is sought after by those same armed groups.

4.4. LEGISLATIVE JURISDICTION APPROACH

35. States have the capacity to legislate for their nationals and in some cases even for people residing in its territory. The legislative jurisdiction approach entails that international obligations and rights are applicable on the individuals of a State, since the State has accepted them on behalf of its nationals.[77] More specifically, if a State has IHL-obligations because it is a party to the relevant conventions and/or additional protocols, or because it has not persistently

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[73] ILA Draft Conclusion on the requirement of acceptance as law.
[74] S. SIVAKUMARAN, 'Binding Armed Opposition Groups', in *The International and Comparative Law Quarterly* 2006, 373.
[75] J.-M. HENCKAERTS & L. DOSWALD-BECK, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005, rule 151.
[76] C. RYNGAERT, Imposing International Duties on non-State Actors and the Legitimacy of International Law, 2009, 3.
[77] J. KLEFFNER, 'The Applicability of International Humanitarian Law to Organized Armed Groups', in International Review of the Red Cross 2011, 445.

objected[78] to the creation of 'Customary International Humanitarian Law', the individuals of that State are also bound by those same IHL-obligations, even if they have not expressly consented to them.[79] At first glance, the theory seems promising and finds backing in International Law. For example, when a rule of International Law criminalizes certain conduct, the stance of the individual *vis-à-vis* said rule is irrelevant when looking at its applicability.[80]

36. The main strength seems to be that this theory allows for the general application of IHL on NSAGs to the same extent as it is applicable on States. From a 'rights & obligations' point of view, the approach puts the States and NSAGs on the same level. This immediately solves a number of practical issues - such as the issue of manipulation of IHL, where States try to bend the rules to provide one side with only rights and the other side only with obligations.[81] Another issue is where States claim to only be bound by the rules to which the other side is bound. This issue might arise from the imbalance of rights and obligations on the side of the State, compared to those on the NSAG-side. The issue might have a psychological reasoning behind it, but it has no legal basis. On the contrary, CIL dictates that reciprocity is not required for IHL to be binding, and this legislative jurisdiction approach further supports that vision.[82] The theory, however, is met with some difficulties. Such as the lack of consent and the specifics of integration of IHL in the domestic system. Both of these issues will be addressed in the next subsections.

37. As discussed in the chapter on CIL, but even more relevant in this approach, the lack of consent of an individual might not have legal implications, but it will certainly have practical implications. An individual that flat out rejects being bound by a certain rule, is very unlikely to adhere to it. The prime argument of the CIL-consent issue is that the NSAG did not help create the given customary obligations.[83] One could argue that the individual members of NSAGs can still partake in the democratic process of the State and influence government policy way. This presupposes that those members are all State nationals, which is not a given, and that the State organizes free and democratic elections, which is even less certain. After all, we are dealing with an NSAG which is combatting its parent State and the reason for this could be the fact that the State is not organized in a democratic State. It is fair to conclude that, while it is possible, it is not certain that NSAGs had a say in the State's approval of international rights and obligations.

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[78] And thus, allowed for Customary International (Humanitarian) Law to form.
[79] SIVAKUMARAN, S., 'Binding Armed Opposition Groups', in The International and Comparative Law Quarterly 2006, 369.
[80] J. KLEFFNER, 'The Applicability of International Humanitarian Law to Organized Armed Groups', in International Review of the Red Cross 2011, 446.
[81] SASSÒLI, M., 'The Implementation of International Humanitarian Law: Current and Inherent Challenges', in *Yearbook of International Humanitarian Law* 2007, 49.
[82] Rule 140 CIHL; HENCKAERTS, J.-M. and DOSWALD-BECK, L., *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005, 498.
[83] Cf. supra.

38. The biggest flaw with this approach is that NSAGs are already in an illegal domestic situation. There is no real domestic incentive for them to adhere to the IHL obligations, if they are already in an open rebellion against the parent State. However, does the consent of the parent State to be bound by IHL entail the entirety of IHL becomes a set of domestic rights and obligations? This is the monism v. dualism debate, which Kleffner touches upon.[84]

39. The general idea is that the State accepts IHL as being binding, so it either automatically becomes binding in the domestic legal order (monist approach) or it requires a domestic legislative act to become part of the domestic legal order (dualist approach). If the latter were to be missing, an individual of a State could be considered not being bound by the obligations and unable to incur the rights set forth in the texts. This does not preclude the individual from exercising its international rights on the international plane. As Kleffner rightly points out, the subjects in this situation are bound by IHL and thus internationally, and not through domestic law.[85]

40. In summary, it is important to note that the acceptance of IHL by States and the subsequent integration in the domestic legal system doesn't undo the international character of the rights and obligations. An individual will always be able to exercise the relevant international rights on the international plane, if they are intended to be exercised in such a way, even in the case of non-integration in a dualist system. The issue with this approach is not necessarily a legal one, rather a practical one. While NSAGs are bound by IHL through the legislative jurisdiction approach, they will most likely not consider themselves to be bound, as they did not consent to certain provisions or the whole body of law.

5. CONCLUSION

41. The main research question of this paper was whether NSAGs are bound by IHL and if so, to what extent. There has been sufficient evidence to state that NSAGs can hold international obligations and international rights, as they have a (limited) international legal personality. This allowed for further research on the way how they are bound. However, the three predominant theories, consent-approach, CIL-approach or 'legislative jurisdiction'-approach, are not without flaw. The CIL-approach, taken at face value, only allows for some obligations and rights to apply, while it the biggest critique is the fact that NSAGs did not help contribute to the international practice. Allowing them to do so would be

[84] KLEFFNER, J., 'The Applicability of International Humanitarian Law to Organized Armed Groups', in International Review of the Red Cross 2011, 446.
[85] *Ibid*, 447; SIVAKUMARAN, S., 'Binding Armed Opposition Groups', in *The International and Comparative Law Quarterly* 2006, 384-385.

an international legal novelty, so this is not a clear-cut solution. The 'legislative jurisdiction'-approach bases the applicability of IHL on the functioning and adherence to the domestic legal system. This is troublesome as the NSAG is seeking to attack and/or overthrow said system. Each approach, however, shares one major flaw with the others, namely the key role that consent plays.

42. From a domestic point of view, NSAGs are in a *de facto* illegal situation and the latter two approaches are based on a consent-less and top-down imposition of international obligations through the (domestic) legal system. This is not something which is very likely to succeed. The likelihood of success here is measured in the factual compliance of NSAGs to IHL-rules and one way to ensure compliance is through enforcement. It is safe to say that domestic enforcement has failed when armed groups have crossed the threshold from internal disturbances to a fully-fledged NIAC. This is why the CIL-approach and 'legislative jurisdiction'-approach fail. While they might be legally sound, they are not practicable or even realistic. Without too much generalization, it is safe to say that NSAGs desire to break away from the current state of affairs. Their main reason might be to oppose the government, the international community as a whole or to grab power and take matters into their own hands. Either way, they want a seat at 'the table'.

43. While the Conventions and Additional Protocols might be in need of a 21st century overhaul, there does not seem to be the political will to do so. This is where the legal issue becomes a more practicable one and where *ad hoc* special agreements need to be encouraged. In this paper it has become evident that this might be the only way of gaining actual compliance by NSAGs. While a parent State might be reluctant to agree to conclude such agreements, because of the fear of legitimizing the NSAG in doing so, they need to transcend their political goals and look at the broader humanitarian picture. This is why the agreements should not only be limited to being concluded between the parent State and the NSAG, but in a way it should be concluded with the International Community as well. If an NSAG is fighting to overthrow the government and to gain international legitimacy, that legitimacy should be made conditional to the complete adherence to IHL and IHRL and the persecution of any offenders among their ranks. Until then, the consent-less approaches remain a patchwork of applicable rules and results in a rather meek will to comply. It is my firm belief that *ad hoc* and comprehensive special agreements, which incorporate both IHL-rules and specific enforcement mechanisms, will eventually lead to new international norms.