

Chapter 2

Welcome on Board: Improving Respect for International Humanitarian Law Through the Engagement of Armed Non-State Actors

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Abstract Contemporary armed conflicts are characterised by an increase of violence against civilians and a lack of compliance with international humanitarian law (IHL) by both states and armed non-state actors (ANSAs). The international community has acknowledged the importance of engaging ANSAs on compliance with international norms to any effort to improve the protection of civilians in armed conflict, despite the fact that it is, in some contexts, actively discouraged or even prohibited by states. This chapter aims at identifying the key elements as well as the challenges underlying the humanitarian engagement of armed non-state actors. It will argue that meaningful engagement, that is engagement that also takes on board the views, perceptions and conceptions of international norms by ANSAs calls for a much more sustained effort from the part of the international community. These efforts include the need of more systematic research on the facts and scale in which ANSAs allegedly violate IHL, more inquiry in their actual practice and their impact on the development of international norms, a clarification on the applicable legal framework as well as a more thorough reflection on means to establish a coherent and just system of accountability in case of violations.

Keywords Armed non-state actors · Humanitarian engagement · Counter-terrorism · Peace mediation · International humanitarian law · International human rights law · Accountability · Responsibility

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2.1 Introduction

According to the Oxford Dictionary, to “engage” means a variety of things. The first definition to appear in the list of the respectable online dictionary is to “*involve someone into*”, but “engaging with” also means to “*establish a meaningful contact or connection with*” someone or something.¹ These definitions seem to give a sense of an exchange and to comprise both an element of offer and acceptance of someone’s views or role.

“Engaging” armed non-state actors² (ANSAs) to improve respect for international humanitarian law (IHL) thus means, according to these definitions, involving them into the discussions on IHL and engaging *with* them would imply establishing a meaningful contact in order to exchange on IHL matters. In a system still dominated by the preservation and regulation of states’ interests and in which ANSAs are usually considered at a minimum as a disrupting force and at a maximum as a dangerous and lethal one, it is not surprising that any sort of engagement with these actors is received with suspicion by states and part of the international community.

Engagement with a wide range of ANSAs will raise similar questions of security and access for humanitarian organisations. In many cases, ANSAs will find incentives in such engagement by, for instance, political recognition or access to basic resources for their group or constituency. But conducting dialogue with ANSAs also comes with a specific set of challenges. The complexity of

¹ English Oxford Living Dictionary (2016) “Engage”. <https://en.oxforddictionaries.com/definition/engage>. Accessed 2 May 2017.

² In the context of this chapter, ANSAs should be understood as covering armed actors operating “primarily within state borders, engaged in violent attempts to challenge or reform the balance and structure of political and economic power, to avenge past injustices and/or to defend or control resources, territory or institutions for the benefit of a particular ethnic or social group”. Conciliation Resources 2005.

contemporary armed conflicts and the sheer multiplicity and diversity of ANSAs involved in violent contexts make it more difficult to elaborate on the means to practically engage with them on peace building or humanitarian issues and encourage us to be wary of oversimplification or standard approaches.

The lack of clarity of the legal framework, especially with regard to the controversy over the applicability of human rights law to ANSAs is also problematic for humanitarian organisations, which need to frame their action on legal standards. Encouraging an ANSA to respect human rights law obligations might indeed prove problematic for field operations, especially if the implementation of the norms requires some form of capacity building.

Finally, counterterrorism policies present a further obstacle for the engagement of ANSAs. Since September 11 (11 September 2001), states have adopted a variety of counterterrorism legislations, listing some groups as “terrorist” and imposing sanctions, including on those who provide “material support” to these groups. This notion has been interpreted quite broadly in some cases, including for instance trainings in IHL for ANSAs that have been listed as terrorist organisations. This has impacted humanitarian organisations and reduced their scope of action.

This chapter will reflect on the recent practice and challenges that have arisen with regard to the engagement of ANSAs by different organisations. It will argue that meaningful engagement, that is an engagement that also *takes on board* the views, perceptions and conceptions of international norms by ANSAs calls for a much more sustained effort from the part of the international community. These efforts include the need of more systematic research on the facts and scale in which ANSA allegedly violate IHL, more inquiry in their actual practice and their impact on the development of international norms, a clarification on the applicable legal framework as well as a more thorough reflection on means to establish a coherent and just system of accountability in case of violations.

2.2 Engaging ANSAs

2.2.1 *Mapping IHL Violations Committed by ANSAs*

The majority of contemporary armed conflicts are fought between states and ANSAs or between ANSAs.³ Therefore armed groups are pivotal actors in the implementation of IHL norms by which they are bound.⁴ It is clear that both states

³ According to the War Report 2016, 36 of 48 contemporary armed conflicts occurring in the world are “non-international” in character, i.e. are situations regulated by IHL, in which protracted armed violence takes place between states and organised ANSAs or between ANSAs. See Bellal 2017a, b.

⁴ While the precise legal means by which ANSA are bound by IHL have been debated, state practice, international case law, and scholarship have confirmed that Common Article 3 of the 1949 Geneva Conventions, Protocol Additional to the Geneva Conventions of 12 August 1949,

and ANSAs violate IHL, but it remains rather difficult to know with more precision which norms are violated by ANSAs and in what scale. To my knowledge, no precise figures seem to exist for instance with regard to certain IHL norms like the prohibition of forced displacement of the civilian population or the impediment of humanitarian access committed by ANSAs in recent conflicts, except for the few case by case reports issued by NGOs, as we will see below. It is true that reporting on both states and ANSAs on IHL and human rights violations is a difficult exercise, especially during an actual conflict. Security issues, lack of access to certain zones, or the fear of victims to testify explain in part these difficulties.

It is however essential to better research and more systematically map violations committed by ANSAs, especially because many of them will tend to argue that they are not the ones to violate IHL, but that the violations are committed by the opposite enemy forces. Approaching ANSAs with approximation and factual generalisation is a too easy way out for them to claim they are not responsible. Being more precise on the types of violations allegedly committed also allows starting a discussion with the armed group on certain IHL norms. For example, in August 2015, Amnesty International (AI) issued a report which uncovered a wave of forced displacement and home demolitions allegedly carried out by the Autonomous Administration led by the Syrian Kurdish political party *Partiya Yekîtiya Demokrat* (PYD) controlling the area and which could amount to war crimes.⁵ This in turn provoked a reaction from the General Command of PYD who released a detailed statement responding to AI's report.⁶ The report and the discussion it sparked then allowed other organisations, which were already engaging the group, to further discuss this matter with them.

In recent years, commissions of inquiry and fact-finding missions have been able to address more frequently violations of IHL and human rights committed by ANSAs. For instance, the mandate of the Office of the UN High Commissioner for

and relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (AP II) and customary international humanitarian law apply to ANSAs that are party to non-international armed conflicts. For example, in 2004, the Appeals Chamber of the Sierra Leone Special Court simply held that "it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties." SCSL, *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, Case No. SCSL-2004-14-AR72(E), para 22; for the different theories on the applicability of IHL to ANSAs, see Sivakumaran 2006 and Kleffner 2009; Furthermore, the customary international humanitarian law study conducted by the ICRC has identified 161 Rules of which a great majority are also applicable in non-international armed conflicts. The rules are available on the ICRC website, www.icrc.org/customary-ihl/eng/docs/v1_rul. Accessed 4 July 2017.

⁵ Amnesty International (2015) Syria: US ally's razing villages amounts to war crimes. <https://www.amnesty.org/en/latest/news/2015/10/syria-us-allys-razing-of-villages-amounts-to-war-crimes/>. Accessed 2 May 2017.

⁶ ANF News (2015) YPG General Command: Amnesty International report is contradictory. <https://anfenglish.com/kurdistan/ypg-general-command-amnesty-international-report-is-contradictory-12971>. Accessed 2 May 2017.

Human Rights (OHCHR)'s investigation in Sri Lanka expressly included the examination of "alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the last phase of the armed conflict."⁷ The Independent International Commission of Inquiry on the Syrian Arab Republic has, since 2012, also systematically reported on the violations of international law committed by ANSAs,⁸ as have other OHCHR fact-finding missions in Mali⁹ and the Central African Republic.¹⁰

Commissions of inquiry and fact-finding missions can therefore be useful tools for mapping IHL violations during a particular conflict. That said one should also keep in mind that these mechanisms often operate with tight time constraints and can focus only on a narrow scope of events and facts. Another limitation of such bodies lies in the multiplicity of existing ANSAs in some conflict situations, such as in Libya, the Democratic Republic of the Congo, and Syria. As a consequence, it can prove difficult for these mechanisms to address all the violations committed by all the actors at a given time, leaving many violations unaccounted for.

Truth commissions have also been useful in addressing violations committed by ANSAs. These can be described as officially sanctioned, temporary, non-judicial investigative bodies, whose tasks usually include collecting statements from victims, witnesses, and perpetrators; researching and investigating the root causes of an armed conflict; holding public hearings; engaging in outreach programs; and issuing a final report that summarises the commission's findings and recommendations.¹¹ Some truth commissions have been able to denounce violations of IHL and human rights committed by ANSAs.¹²

Truth commissions present good conditions for reporting on violations: the support of former parties, easy access to places and people, and their aim of reconciliation rather than retribution.¹³ Because they have a wide margin for also including the voices of ANSAs, not only as individuals who have violated international law but also in certain circumstances as victims, especially when they are

⁷ UN General Assembly 2014.

⁸ The different reports of the Independent Commission on Syria can be found at: www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx. Accessed 2 May 2017.

⁹ See United Nations General Assembly 2013a.

¹⁰ See United Nations General Assembly 2013b.

¹¹ OHCHR 2006, p. 1 and pp. 17–20.

¹² For instance, Liberia's Truth and Reconciliation Commission determined that: "all armed groups whether affiliated with warring factions or with the Government of Liberia are responsible for the commission of human rights violations including violations of international humanitarian law, international human rights law, war crimes and egregious domestic laws violations of Liberia. These groups include: NPFL, LURD, Liberia Peace Council, Militia, ULIMO, MODEL, Armed Forces of Liberia, ULIMO-K, ULIMO-J, Antiterrorist Unit, ECO MOG, Vigilantes, Lofa Defense Force, Liberia National Police, Special Operation Division, Revolutionary United Front (RUF), Special Anti-Terrorist Unit, Special (SATU) Security Unit, Special Security Service, Black Beret, National Security Agency, National Bureau of Investigation, Criminal Investigation Division, and Kamajors". Republic of Liberia Truth and Reconciliation Commission 2009, p. 336.

¹³ Bangerter 2011a, p. 356.

former child soldiers,¹⁴ truth commissions can be particularly useful where armed groups are concerned. In addition, as truth commissions are non-judicial tools that often take a comprehensive approach to establishing facts and understanding the root causes of and circumstances surrounding a given conflict, they may be less threatening to ANSAs than strict criminal justice mechanisms. Many armed groups believe indeed, rightly or not, that national or international criminal law processes are biased against them. As a matter of fact, ANSAs are aware that many if not the majority of the International Criminal Court (ICC) cases deal with individual members of ANSAs.

While it is true that the development of international criminal law has made an important contribution to the fight against impunity and provided for reparations to some victims of international crimes committed by members of ANSAs, international and national criminal law, focusing only on the individual criminal responsibility of the members of ANSAs, fails to address in its entirety the often complex dynamic between individuals and the armed groups to which they belong. At the very least, it seems justified to hold a group itself responsible from a moral point of view, as it may be condoning, justifying and even inciting an individual to commit crimes. Indeed, “organized armed groups regularly succeed to create a climate in which crimes are perceived to be in conformity with, rather than a deviation from, standards of behaviour accepted within such a group”.¹⁵ To illustrate this point, one might recall the words of Dominic Ongwen, a former leader of the Lord’s Resistance Army (LRA) and former child soldier who is currently being tried at the ICC for multiple war crimes. In an impassioned speech, he told to the court: “I am not the LRA [...] It is the LRA who abducted people, in northern Uganda. It is the LRA who killed people.”¹⁶

Outside the framework of international criminal law, there is also a need to reflect more thoroughly on the establishment of the responsibility of ANSAs, in particular with regard to the norms pertaining to the “attribution” of violations to the armed groups.¹⁷ This seems to be of particular importance when several ANSAs are operating in the same region, as is the case for instance in Syria, Iraq and Turkey. While a certain practice already exists in this regard, notably through the work of commissions of inquiry, more attention should be given to how violations of the

¹⁴ See in that regard Parmar et al. 2010.

¹⁵ Kleffner 2009, p. 246. See also the ICTY in the Tadić case: “Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less or indeed no different from that of those actually carrying out the acts in question”. ICTY, *Prosecutor v Duško Tadić*, Judgment, 15 July 1999, Case No. IT-94-I-A, p. 191.

¹⁶ The Guardian (2016) Ex-child soldier Dominic Ongwen denies war crimes at ICC trial. <https://www.theguardian.com/world/2016/dec/06/dominic-ongwen-the-hague-trial-war-crimes-lra-uganda>. Accessed 7 June 2017.

¹⁷ Bellal 2015.

norms are linked to the different ANSAs concerned. As was rightly noted by Kleffner, the absence of clear rules of accountability is contrary to an international order based on the rule of law, which include principles such as legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁸

2.2.2 *Understanding the Causes of the Violations*

Why any norms, international or not, are violated in a given society has to do with many factors, sociological or political. It is possible however to summarise the reasons for lack of compliance of IHL by ANSAs according to six main factors.

There are first strategic military concerns. It is sometimes argued that the nature of warfare in non-international armed conflicts may lead to the use of tactics that violate international law, such as launching attacks from within the civilian population.¹⁹ The imbalance between a state's security forces (in size, weaponry, and financial resources) and the actions or even mere existence of an ANSA may also be used as a reason for not respecting certain norms in practice. As the UN Secretary-General (UNSG) has pointed out:

[A]rmed groups have often sought to overcome their military inferiority by employing strategies that flagrantly violate international law. These range from deliberate attacks against civilians, including sexual violence, to attacks on civilian objects such as schools, to abduction, forced recruitment and using civilians to shield military objectives. The risks for civilians are further increased as militarily superior parties, in fighting an enemy that is often difficult to identify, respond with means and methods of warfare that may violate the principles of distinction and proportionality, giving rise to further civilian casualties.²⁰

This argument though works both ways in the sense that some states will also use this excuse to violate IHL.

A second factor is the likelihood of prosecution under domestic legislation for having taken up arms against the state, wholly irrespective of the ANSA's respect for international legal norms. Thus, whereas combatants in an international armed conflict are entitled to prisoner of war status, thereby receiving immunity from prosecution for having participated in hostilities, a fighter from an ANSA is not normally recognised as a combatant under IHL and faces prosecution for having taken up arms under the national law of the state that captures him or her.²¹ In some

¹⁸ Kleffner 2009, p. 259.

¹⁹ See for example Geiss 2006.

²⁰ UN Security Council 2010, para 8.

²¹ See, *inter alia*, Articles 4 and 118 of the Geneva Convention relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (Geneva Convention III). Quite exceptionally prisoner of war (POW) status can be accorded to members of ANSAs implicated in conflicts falling into the scope of application of Article 1, para 4 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 12

instances governments have offered amnesties to those who have taken up arms against them, and indeed this is encouraged under Article 6 of Additional Protocol II to the Geneva Conventions.²²

The third factor possibly leading to violations of IHL is that ANSAs may also simply lack knowledge of some IHL norms. While states have a clear obligation to provide instruction in international humanitarian law to their armed forces,²³ members of ANSAs may have little or no training in IHL, thus significantly impeding efforts to increase respect for IHL.²⁴ They may not know of (let alone agree with) norms prohibiting the recruitment of children as soldiers, or the outlawing of certain weapons, for instance. Concepts familiar to military lawyers or IHL specialists, such as the principle of proportionality in the conduct of hostilities, may also not be well understood by members of ANSAs, both at senior and at lower operational levels.

Fourth, even though certain ANSAs may know of applicable law, ideology, whether political or religious, may lead to their deliberately violating IHL. Jihadist ANSAs, like the Islamic State and Al Qaeda and their affiliates could fall within this category, but they are not the only ones. ANSAs as diverse as the LRA in Uganda or the RUF (Revolutionary United Front) in Sierra Leone have, to a certain extent, used strategies terrorising the population for tactical reasons.²⁵ But even with these types of ANSAs, some form of humanitarian engagement is feasible in specific circumstances, for example through indirect means such as using the positive influence of the ANSAs' close constituencies.²⁶

Structural differences and lack of capacity are the fifth factor that can also explain, to a certain extent, the difficulties for ANSAs to respect certain IHL norms. The growing convergence between IHL applicable in international armed conflict to non-international armed conflicts and the influence of human rights law on IHL has only worsened the problem.²⁷

December 1977, 1125 UNTS 3 (entered into force 7 December 1979) (API). An ANSA can also recognise the applicability of the Geneva Conventions and API by making a declaration under Article 96(3) API. Only the Polisario Front regarding its conflict with Morocco over Western Sahara has so far successfully lodged such a unilateral declaration on 20 June 2015. See the analysis by Fortin K (2015) Unilateral Declaration by Polisario under API accepted by Swiss Federal Council. <https://armedgroups-internationalallaw.org/2015/09/02/unilateral-declaration-by-polisario-under-api-accepted-by-swiss-federal-council/>. Accessed 2 May 2017.

²² According to Article 6(5) AP II: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

²³ See, for example, Articles 47, 48, 127, and 144 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (Geneva Convention IV) and Article 83 API.

²⁴ ICRC 2008, p. 12.

²⁵ See Bangerter 2011b, pp. 353–384.

²⁶ See Bellal 2016a.

²⁷ See Sassòli 2011.

No categorisation of ANSAs is broadly accepted, in terms of structure and ideology, but it is possible to roughly describe the different types of ANSAs in the following terms:²⁸

- partially recognised states or quasi-states;
- armed opposition groups seek the liberation of a social class or a nation and oppose the state or its administration;
- paramilitary groups or militias are irregular combat units that usually act on behalf of, or are at least tolerated by, a governing regime;
- ANSA that spread panic and fear in societies in order to achieve political goals (“so-called terrorist groups”);
- vigilante or self-defence groups that are usually composed of armed civilians acting in self-defence, whose degree of organisation varies and is often loose. Such groups do not necessarily have a political purpose (such as replacing the existing government) but rather aim to defend themselves against the attacks of enemy armed forces or other ANSAs.
- Territorial gangs do not have political aims per se but try to gain control of a territory in order to oversee criminal activities or “protect” residents in the area concerned.²⁹

Quite evidently, “partially recognised or quasi-states” will not encounter the same structural problems in implementing IHL, as other types of ANSAs. For example, ANSAs organised as “networks”, which are likely to be characterised by ‘cell-like’ structures, with varying degrees of connectedness between the cells, will tend to operate in a clandestine manner.³⁰ As such, these types of ANSAs may have difficulties to implement IHL norms on detention, such as to allow for example visits of detainees to ensure they are well treated, because they precisely do not want to disclose their location to external actors.³¹ Self-defence groups are also problematic in terms of compliance with international law. These types of ANSAs can be defined as a form of militia composed of individuals, who gather themselves collectively for the purpose of defending themselves or others against armed violence committed by generally another ANSA. An example of such type of group can be the “Anti-Balaka”, which was formed during the conflict in the Central African Republic in 2013.³² Self-defence groups are usually more loosely

²⁸ The list classifies ANSAs in terms of their operational rationale and does not pretend to include scientific definitions. It should also be kept in mind that any particular group may present characteristics associated with several categories or may shift from one category to another.

²⁹ See Homequist 2005, p. 46; Schneekener 2006, p. 25; Sinno 2011, pp. 311–332.

³⁰ Whitfield 2010, p. 6; a typical example of an ANSA organised in a cell-like structure is the Jemaah Islamiya (JA) which is active in South East Asia. Haer 2015, pp. 49–50.

³¹ See Tuck 2011.

³² See on this Bellal 2014.

organised. In these contexts, despite high level of violence, the applicability of IHL will be unclear.³³ In addition, these types of ANSAs blur the line between fighters and civilians, putting at risk the principle of distinction, as their members will easily slide from one status to another.³⁴

Finally, ANSAs may feel they lack “ownership” over international norms, i.e. lack the capacity and willingness to set, and take responsibility for the respect of IHL. Indeed, ANSAs are not entitled to ratify the relevant international treaties, and are generally precluded from participating as full members of a treaty drafting body. Thus, they sometimes argue that they should not be bound to respect rules that they have neither put forward nor formally adhered to.³⁵ This argument has been criticised by Bangerter for whom

the idea that armed groups have an issue with IHL because they have not contributed to its formulation and cannot ratify it seems wrong if we consider their discourse [...] For instance, the FARC have often held such a stance but at the same time have stated—sometimes in the same documents—that they incorporate into their own rules (and therefore accept) basic notions of IHL.³⁶

It is true that ANSAs do not frequently invoke the lack of ownership over IHL in case of violations, but rather deny they are responsible for them. However involving armed groups in some form of law-making remains important. This can be done for instance by encouraging them to draft their own codes of conduct or to collect their views through interviews.³⁷ Indeed, it is not uncommon that ANSAs argue that they either have a different understanding and interpretation of international norms or that they lack the capacity of implementing them. In that sense, reflecting on the practice and views of ANSAs is not altogether deprived of a certain level of normativity. ANSAs might feel bound by the norms that they have agreed upon rather than by international treaties or international customary norms, the elaboration of which they have not participated in, and these norms emerging from their own practice might have a higher chance of being implemented.

³³ According to case law (see notably, ICTY, *Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-A, para 70), two conditions determine the occurrence of a non-international armed conflict: protracted violence, and the level of organisation of the ANSA involved. In the IHL context, “protracted violence” implies that armed violence is intense as well as enduring, notwithstanding the ordinary meaning of these words. See Sivakumaran 2012.

³⁴ See on that the very interesting report by the International Crisis Group on the Central African Republic. International Crisis Group 2015.

³⁵ See, among others, Sivakumaran 2006, pp. 369–394; de Beco 2005, pp. 190–199; Zegveld 2002.

³⁶ Bangerter 2011a, b.

³⁷ See the very interesting study from Geneva Call titled “In their words: Perceptions of armed non-state actors on humanitarian action”, Jackson 2016.

2.2.3 Identifying the Incentives³⁸

It is often wondered what are the interests or incentives for ANSA to respect IHL. There are in fact a number of reasons or factors supporting compliance with the law such as the need for popular support (“winning hearts and minds”); the self-image of the group; the group’s own internal beliefs; reciprocity; projecting a good national or international image; and family ties with the population. Generally, however, the primary incentive that might lead to engagement is the group’s own *self-interest*. This has military, political, legal, and humanitarian aspects.

The military arguments comprise both an element of reciprocity and strategic choices: respect for norms by one party to the conflict may encourage respect for norms by the other. Conversely, abuses and violations committed by one party are normally met with a similar response from the other party. Furthermore, an ANSA that treats captured soldiers with humanity encourages soldiers to surrender. This might prove less “costly” for the group as mistreatment or summary executions are more likely to lead to soldiers fighting to the death. Thus, ANSAs may come to understand that certain means and methods of warfare are counterproductive or have excessive humanitarian costs.

The political arguments for compliance centre on the desire of many ANSAs to be recognised, along with their cause, as legitimate. In certain cases, ANSAs may even wish to be seen as more respectful of international norms than the state against which they are fighting.³⁹ In addition, many ANSAs need the support (e.g. human, material, and financial) of the “constituency” on behalf of whom they claim to be fighting:

Armed groups may perceive compliance with international legal norms as enhancing their credibility and their own perceived legitimacy with internal or external audiences, including their own diasporas.⁴⁰

Fear of prosecution for international crimes is another factor that influences the behaviour of certain ANSAs or of senior individuals who know they might be held accountable under international criminal law under the principle of command responsibility within that group. For instance, the condemnation in February 2017 by a Swedish court to a life sentence a member of a Syrian armed group for the

³⁸ This section is based on a research conducted at the Geneva Academy of International Humanitarian Law and Human Rights, which included interviews with ANSAs. The study notably analysed and commented on the best practice of humanitarian organisations on ANSA engagement. See Bellal and Casey-Maslen 2011.

³⁹ For example, many ANSAs that have signed the Geneva Call’s Deed of Commitment whereby they renounce the use of anti-personnel mines have done so in States not party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, opened for signature 18 September 1997, 2056 UNTS 241 (entry into force 1 March 1999) (Anti-Personnel Mine Ban Convention), such as India, Iran, Myanmar, and Somalia.

⁴⁰ McHugh and Bessler 2006, p. 40.

execution of seven detainees pushed other armed groups to request being trained and have more information on international criminal law.⁴¹

Finally, certain ANSAs also have a fundamental desire to respect human dignity. Such a desire should not be underestimated—certain ANSAs may genuinely desire to behave “in a humanitarian way”. According to a recent Geneva Call study on the perceptions of ANSAs on humanitarian action, many ANSAs view themselves as being responsible for the fate of the civilian population under their control as exemplified by this statement of a Karen National Union (KNU) representative in the context of the conflict in Myanmar: “Although I don’t know all the rules, I do think we should take part and fulfil our responsibilities”.⁴²

2.2.4 Existing Practice

It has been long recognised by humanitarian actors that engaging ANSAs on compliance with international norms is a critical element in any effort to strengthen the protection of civilians and improve respect for IHL. By “engagement” is meant efforts to enhance compliance with international norms by ANSAs through a variety of direct or indirect means, especially awareness raising, dissemination, persuasion, technical support/capacity-building, negotiation, dialogue, and advocacy.

The International Committee of the Red Cross (ICRC), since its early days in the nineteenth century, has regularly engaged with ANSAs as a means of building respect for IHL and humanitarian action as these actors are believed to have

great influence on what happens to people affected by these situations, and their members can also become victims of the hostilities due to injury or capture. The ICRC therefore strives to maintain and strengthen dialogue with them in order to ensure that they are aware of their obligations.⁴³

The legal basis for engagement can be found in Common Article 3, para 2 of the 1949 Geneva Conventions, which states that:

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

⁴¹ The Local (2017) Swedish court hands life sentence to Syrian for war crimes. <https://www.thelocal.se/20170216/swedish-court-hands-life-sentence-to-syrian-for-war-crimes>. Accessed 2 May 2017. This example is drawn from my own experience.

⁴² Jackson 2016, p. 22.

⁴³ ICRC (2010) Building respect for humanitarian action and IHL among “other” weapon bearers. <https://www.icrc.org/eng/what-we-do/building-respect-ihl/dialogue-weapon-bearers/other-weapons-bearers/overview-icrc-other-weapon-bearers.htm>. Accessed 2 May 2017.

The term “such as” indicates that the organisations that may offer their services to ANSAs as parties to the conflict are not limited to the ICRC, but can be any humanitarian entity, including those linked to states, provided that they are considered to be impartial.⁴⁴ In that regard, in his report for the 2016 World Humanitarian Summit, the UN Secretary-General emphasised that

at a time when most conflicts are non-international, it is critical for impartial humanitarian actors to engage in dialogue with States as well as non-State armed groups to enhance their acceptance, understanding and implementation of obligations under international humanitarian and human rights law.⁴⁵

Practice shows that those engaging with ANSAs can be states, international and humanitarian organisations, NGOs, members of the constituency from which an ANSA draws its support, former fighters from other ANSAs, as well as those with political or moral influence over a group. The purpose of engagement can be equally diverse: getting humanitarian access, promoting respect for IHL or striving to achieve or mediating the resolution of a conflict.

States such as Nigeria, South Africa, India, Indonesia, Malaysia, Saudi Arabia, Turkey and Qatar have all played a mediation role with ANSAs in certain countries but their potential link with their own interests in the conflicts have been an issue with the armed groups. Norway and Switzerland, both outside the EU, and perhaps perceived by ANSAs as more impartial and neutral have also been very active in peace negotiations and mediation.⁴⁶

The UN also regularly engages with ANSAs. According to a recent study, at least five different UN organs and agencies have drafted policies or guidelines on engagement with ANSAs (UN Office for the Coordination of Humanitarian Affairs (OCHA), Department for Peacekeeping Operations (DPKO), the UNSG, UNICEF and the UN Refugee Agency (UNHCR)).⁴⁷

Because NGO’s are not subject to the same diplomatic constraints and commitments as states and international organisations, it can prove easier for them to engage specifically with ANSAs.⁴⁸ Geneva Call for instance is a neutral and impartial non-governmental organisation dedicated “to promoting respect by [ANSAs] for international humanitarian norms in armed conflict and other situations of violence, in particular those related to the protection of civilians”.⁴⁹

⁴⁴ See the 2016 Commentary to Common Article 3, in ICRC (2016) Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016 – Article 3: Conflicts not of an international character. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169934. Accessed 2 May 2017, paras 779, 791, 861.

⁴⁵ UN General Assembly 2016, para 51.

⁴⁶ See Whitfield 2010, p. 18.

⁴⁷ McQuinn and Oliva 2014.

⁴⁸ On that, see Schneckener and Hofmann 2015.

⁴⁹ See the website of Geneva Call, Geneva Call (2017) Mission. <https://genevacall.org>. Accessed 8 July 2017.

Another active NGO is the Centre for Humanitarian Dialogue (HD Centre), which mission is to “help prevent, mitigate, and resolve armed conflict through dialogue and mediation”, including with ANSAs.⁵⁰ Other NGOs need to engage with ANSAs in order to be able to fulfil their humanitarian mission, by for example negotiating humanitarian access, but their mandate is not necessarily specific to ANSAs. This will be the case, for instance, of the Norwegian Refugee Council (NRC).⁵¹

A variety of mechanisms exist for ANSAs to commit to respecting international norms, such as unilateral declarations, special agreements, memoranda of understanding, “ground rules” (for example the “Ground Rules” agreed between the UN’s Operation Lifeline Sudan and SPLM/A leader John Garang in July 1995)⁵² or “action plans”.

“Unilateral declarations” by which ANSAs pledge to abide by certain international treaties or norms have been made by a number of such actors. A military code of conduct drawn up by the ANSA could also be considered a form of unilateral declaration, when its existence is made known externally. Perhaps the best-known form of unilateral declaration is the “Deed of Commitment” elaborated by Geneva Call. This innovative and particular type of unilateral declaration allows ANSAs to pledge to respect specific humanitarian norms and be held publically accountable for their commitments. Geneva Call has developed three such documents so far: Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, launched in 2000; Deed of Commitment for the Protection of Children from the Effects of Armed Conflict, launched in 2010; Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination, launched in 2012. As of writing, 49 ANSAs have signed the Deed of Commitment banning anti-personnel mines, 19 have signed the Deed of Commitment protecting children in armed conflict, and 16 have signed the Deed of Commitment prohibiting sexual violence and gender discrimination.⁵³

“Special agreements”, by which some or all of the rules of IHL applicable to international armed conflict are to be applied in non-international armed conflicts, were originally perceived as a means by which parties to a non-international conflict could bring into force other provisions of international humanitarian law. The term is also now used to refer more generally to documents that reflect the parties’

⁵⁰ See the website of the HD Centre, Center for Humanitarian Dialogue (2017) About. www.hdcentre.org/. Accessed 8 July 2017.

⁵¹ See the website of the NRC, www.nrc.no/. Accessed 8 July 2017.

⁵² On the agreement, see Bradbury et al. 2000.

⁵³ See the website of Geneva Call, <https://genevacall.org>. Accessed 8 July 2017.

understanding of applicable law, in particular customary norms and the interpretation of those norms.⁵⁴

Finally, “Actions Plans” are used by UNICEF and the support of the Special Representative of the UN Secretary-General for Children and Armed Conflict, to negotiate their possible de-listing of the UNSG list of states and ANSAs (see UNSC Resolution 1882)⁵⁵ that have committed one or several of the six grave violations against children (killing and maiming of children, recruiting and using child soldiers, attacks against schools or hospitals, rape or other grave sexual violence against children, abduction of children, and denial of humanitarian access for children) as stated in UNSC Resolution 1612 (2005).⁵⁶

All in all, this short description of the existing practice shows that there is an increasing awareness of the necessity to engage ANSAs on IHL and humanitarian concerns. Many challenges remain however that may prevent organisations from improving and furthering efficient engagement with these actors.

2.3 Challenges and Risks

2.3.1 *The Changing Nature of Armed Conflicts and the Structural Diversity of ANSAs*

Non-international armed conflicts differ enormously. They range from those that resemble conventional warfare, similar to international armed conflicts, to others that are essentially unstructured. In her seminal work, Mary Kaldor described contemporary forms of violence as “new wars” which

involve a blurring of the distinction between war (which is defined as violence between state or organized political groups for political motives), organized crime (violence undertaken by privately organized groups for private purposes) and large-scale violations of human rights (violence undertaken by states or politically-organized groups or other groups against individuals).⁵⁷

These different forms of armed violence and conflicts will make it very difficult to elaborate plans of action for increasing respect for international law. In addition, the diversity of the types and motivations of ANSAs is another obstacle to the elaboration or adoption of general standards and methodologies for engagement:

Armed groups represent a wide variety of actors, from quasi-State organizations to a mere handful of predators, and standardised approaches are doomed to fail. This is the biggest

⁵⁴ See Heffes and Kotlik 2014.

⁵⁵ UN Security Council 2009.

⁵⁶ UN Security Council 2005; see the website of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict. <https://childrenandarmedconflict.un.org/>. Accessed 4 July 2017.

⁵⁷ Kaldor 2012, p. 2; see also Blin 2011, pp. 287–310.

challenge to a typology-based approach. [...] Even standard material is impossible to devise. Tailor-made approaches must be the motto.⁵⁸

The sheer multiplicity of ANSAs in some conflicts is a further challenge for engagement. In a given conflict, like in Syria, ANSAs might merge or split. It is thus estimated that between 1 000 and 6 000 ANSAs are operating in the country. While some, particularly the larger groups, are highly sophisticated, others have little command and control structure or unity of purpose.⁵⁹ Some of them control territory at a certain time and then lose it again. They can be very organised at a certain moment and then lose part of their structure over time.⁶⁰ All these evolving and changing characteristics of the group is a challenge for the implementation of the norms, in particular because it is not always easy to determine at a certain point in time when IHL is applicable.

There are also ANSAs, which seem remote from the possibility of humanitarian engagement, such as territorial armed gangs. Engaging these actors on humanitarian norms seems to be however increasingly relevant. In 2015, for example, the Geneva Declaration on Armed Violence ranked the states of Honduras and Venezuela just below Syria in terms of violent death rates.⁶¹ Unlike armed oppositions groups, territorial gangs do not wish to replace the state and might not be concerned about the population under their control. Many of these gangs are short-lived structures, made up of young people, with no economic, or social prospects. That said, a certain number of territorial gangs have become permanent enough so as to allow them to gain control of a territory and establish an organised and hierarchical structure and they exist, albeit in different forms, in every continent.⁶² While urban violence seems far from the traditional framework of IHL, there is some room for engagement on humanitarian norms with territorial gangs. In fact, many humanitarian agencies, NGOs as well as national Red Cross or Red Crescent societies do work in these contexts and promoting compliance with the law with these types of ANSAs should not be discarded too easily.⁶³

2.3.2 The Lack of Clarity of the Applicable Legal Framework

It is well established that ANSAs are bound by IHL, but the extent to which these actors also have obligations under human rights law in situations of armed conflicts

⁵⁸ Bangerter 2008, p. 76.

⁵⁹ Keating and Lewis 2016, p. 2.

⁶⁰ See BBC News (2013) Guide to Syrian Rebels. <http://www.bbc.com/news/world-middle-east-24403003>. Accessed 2 May 2017.

⁶¹ Geneva Declaration 2015.

⁶² Bangerter 2010, p. 392.

⁶³ Ibid., p. 400.

or other situations of violence remains controversial. Indeed, whereas some IHL provisions specifically address ANSAs as parties to a conflict and therefore bound by relevant rules,⁶⁴ few human rights treaties explicitly refer to ANSAs.⁶⁵ It has been argued that the objective of human rights treaties is to establish norms for regulating the relationship between states and individuals living under their jurisdiction, and that in consequence human rights treaties are “neither intended, nor adequate, to govern armed conflict between the state and armed opposition groups”.⁶⁶ Scholars do not unanimously support this interpretation of human rights law. For one author, “the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person’s inherent dignity. The implication is that these natural rights should be respected by everyone and every entity.”⁶⁷

It is not possible within the framework of this chapter to further develop this issue.⁶⁸ It suffices to note that because engagement with ANSA should rest on a clear legal background, the debate on the applicability of human rights law (HRL) to ANSA has had an impact on field operations. As one author observed:

⁶⁴ Common Article 3 to the 1949 Geneva Conventions states: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each Party to the conflict* shall be bound to apply, as a minimum, the following provisions [...]” (emphasis added). Article 1 AP II states: “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 AP I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

⁶⁵ Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002) states: “1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18; 2. State Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices; 3. The application of the present article shall not affect the legal status of any party to an armed conflict.”; Article 2 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, opened for signature 23 October 2009, 52 ILM 397 (entered into force 6 December 2012) states that an objective of the treaty is to “provide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons”; Article 3 of the International Convention for the Protection of All Persons from Enforced Disappearance, opened for signature 6 February 2007, 2716 UNTS 3 (entered into force 23 December 2010) states: “Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice”.

⁶⁶ See Zegveld 2002, p. 54.

⁶⁷ Clapham 2010, p. 24.

⁶⁸ See on this issue among others Clapham 2006, 2007, 2016; Murray 2016; Fortin 2017.

Human rights monitoring experience in Nepal suggests that the lack of a clear framework addressing the human rights obligations of non-state actors can impact the effectiveness of field operations. [...] A narrow focus on the state's responsibility to protect its citizens from violence by non-state actors has proven unsatisfactory. As a consequence, human rights organizations struggle to justify their monitoring and interventions, host states become suspicious of international field presences, and policy makers at the headquarters of monitoring organizations become concerned about potential political fallout from human rights monitoring.⁶⁹

2.3.3 *The Impact of Counter-Terrorism Measures*

In its controversial decision of 21 June 2010, *Holder v Humanitarian Law Project*, the US Supreme Court held that the training in international law for PKK members planned to be given by a US NGO (the Humanitarian Law Project) could be used by the PKK “as a part of a broader strategy to promote terrorism, and to threaten, manipulate, and disrupt”. According to the Court, the planned training would thus rightly fall under the *Anti-terrorism and Effective Death Penalty Act of 1996* which criminalises any material support given to terrorist groups. The fact that, in the circumstances of the case such a training was prohibited by the law, was not found to be a violation of the First Amendment (freedom of expression) enjoyed by the NGO.⁷⁰ Such national practice on counter-terrorism thus had a chilling effect on many humanitarian organisations, which feared criminal prosecution when they engaged ANSAs that might be considered terrorist organisations.⁷¹

It is true that some ANSAs are listed in national and international lists of terrorist organisations, but the problem also lies in that states will tend to label *any* armed group that opposes them as “terrorist”. The branding of ANSAs as “terrorist”, regardless of their nature and motivation, has created difficulties and dilemmas both legally and from a policy point of view.

First, since the legal qualification of an “armed conflict” is based on facts, ANSAs can be party to a conflict and bound by the same relevant rules of

⁶⁹ Rawski 2009, pp. 601–626; see also, on the impact of the lack of a clear legal framework on the work of Geneva Call, Bellal 2015.

⁷⁰ United States Supreme Court, *Holder v Humanitarian Law Project*, 21 June 2010, 130 S. Ct. 2705.

⁷¹ See also The Washington Post (2010) The Supreme Court Goes too far in the Name of Fighting Terrorism. <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/21/AR2010062104267.html>. Accessed 1 February 2017; and The New York Times (2010) What Counts as Abetting Terrorists? <http://roomfordebate.blogs.nytimes.com/2010/06/21/what-counts-as-abetting-terrorists/>. Accessed 1 February 2017.

international law as other parties to that conflict, whether or not it is labelled as a “terrorist group”.⁷² Second, as noted by the ICRC,

a recent challenge for IHL has been the tendency of States to label as terrorist all acts of warfare against them committed by armed groups, especially in non-international armed conflicts. This has created confusion in differentiating between lawful acts of war, including such acts committed by domestic insurgents against military targets, and acts of terrorism.⁷³

Indeed, under IHL, both in international and non-international armed conflicts, only “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”⁷⁴ can be considered as falling into the category of an “act of terrorism” which entails individual criminal responsibility under customary international law.⁷⁵ In other words, attacks that exclusively target military objectives do not fall into this category. The main UN treaties on terrorism include a clause requiring that they must be interpreted in accordance with IHL.⁷⁶ Accordingly, under such treaties, attacks by ANSA on governmental armed forces in armed conflicts cannot be considered as acts of terrorism prohibited by the conventions.

From an engagement perspective, deeming ANSAs “terrorist” irrespective of their compliance with international norms is not conducive to promoting respect for those norms or for the potential success of peace or other negotiations. It may even, in certain cases encourage the violation of international norms.⁷⁷ Moreover, since it is typically far easier to be included on a list of terrorist organisations than it is to be removed from one (and the criteria for inclusion on the list as well as the de-listing procedure are today often opaque and politically motivated), practical incentives to improve respect for international norms may be limited once any armed group has been so designated.

Listing group as terrorists may also result in critical groups or individuals being excluded from peace negotiations, thereby unnecessarily prolonging conflict. It has been emphasised that

Branding any violent resistance as ‘terrorism’, and consequently justifying any use of oppressive force by the state as ‘counter-terrorism’, does not only diminish the chances of

⁷² See Vité 2009, pp. 69–94.

⁷³ ICRC (2010) Contemporary challenges to IHL: Respect for IHL: overview. <https://www.icrc.org/en/document/respect-international-humanitarian-law>. Accessed 6 June 2017.

⁷⁴ See Article 51(2) AP I; and Article 13(2) AP II.

⁷⁵ ICTY, *Prosecutor v Stanislav Galić*, Judgment, 5 December 2003, Case No. IT-98-29-T, paras 113–129.

⁷⁶ See Article 19 of the International Convention for the Suppression of Terrorist Bombings, opened for signature 12 January 1998, 2149 UNTS 256 (entry into force 23 May 2001); Article 4 of the International Convention for the Suppression of Acts of Nuclear Terrorism, opened for signature 14 September 2005, 2445 UNTS 89 (entered into force 7 July 2007); and Article 21 of the International Convention for the Suppression of the Financing of Terrorism, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002). See also Coco 2014, pp. 425–440.

⁷⁷ Bellal and Casey-Maslen 2011, p. 11.

the state and opposition groups engaging with each other constructively in transformation processes. It is also detrimental to the state's flexibility with respect to taking action. Publicly flagging 'counter-terrorism' as a core issue of security policy puts pressure on the government to deliver to society as a whole that which it had promised, namely the elimination of the identified terrorist threat. The government thus runs the risk of losing public support if it enters into a constructive dialogue with actors it had previously branded as 'terrorists'. This dilemma also explains why it is so difficult to get proscribed actors subsequently de-listed when they demonstrate that they are ready to dissociate themselves from the use of force.⁷⁸

What is true for states is also true for international organisations involved in peace mediation and it was noted in that regard that the association of ANSA with terrorists has had "a direct impact on the EU and the international community's capacity for mediation and dialogue in transition processes".⁷⁹

Finally and more generally, experts tend to agree that it is also important to consider ANSAs not only as perpetrators of violations of international law, but also as actors who can play positive roles in the implementation of international law, if only because they are often very close to their constituencies.⁸⁰ In a context where the majority of armed conflicts oppose states and ANSAs, it is indeed counter-productive to stigmatise only one side of the conflict. The necessity to engage ANSAs for a better implementation of IHL calls for a more nuanced approach to the issue, than considering all ANSAs as terrorist organisations. While ANSAs are often a part of the problem, they can also play a positive role and must in any case also be part of the solution. Of course, ANSAs differ in types, structure and ideology. This, however, should not prevent the international community to recognise that these actors might also be driven by consideration of humanity, which permeates many area of international humanitarian law and this may indeed prove to be a powerful incentive to respect IHL norms. To illustrate this point, I encourage the reader to have a look at the picture taken by Mauricio Lima, who won the World Press Photo Award 2016. It shows a wounded Islamic State fighter being treated by a Kurdish doctor, in the Northern part of Syria.⁸¹ One could wonder if what drove this doctor to take care of his enemy was a motivation to respect IHL or if he was simply moved by basic considerations of humanity.

⁷⁸ Dudouet et al. 2012, p. 14.

⁷⁹ See European Union 2012.

⁸⁰ Dudai and McEvoy 2012, p. 15.

⁸¹ The picture can be seen here: World Press Photo (2015) IS Fighter Treated at Kurdish Hospital. <https://www.worldpressphoto.org/collection/photo/2016/general-news/mauricio-lima>. Accessed 14 June 2017.

2.4 Conclusion

The international community has recognised it is essential to engage with ANSAs if we want a better implementation and respect of the international norms that protect civilians and persons from armed violence or increase our chances to bring armed conflicts to an end. There is already a considerable practice of humanitarian organisations in this regard, which have allowed to identify the incentives that will encourage ANSAs to accept humanitarian engagement. Tools of engagement, such as the Geneva Call Deed of Commitment have been invented, allowing ANSAs to take ownership of the norms and express their adherence or disagreement with them.

Many challenges however remain. Conflicts have become more complex and the diversity in types and ideology, as well as the multiplicity of ANSAs in some context has limited the possibility to adopt general policies on engagement, and sometimes even make engagement almost impossible to achieve in practice. Since 9/11 2001, the perceptions by some states of the potential legitimacy of engaging ANSAs have worsened and counter-terrorism measures gave an important blow to efforts of humanitarian engagement and peace mediation with ANSAs.

On a more general level, as reminded a few years ago by Marco Sassòli in a seminal article, it is time the international community take “armed groups seriously”.⁸² As such, it is not enough to chant the virtues and necessity of engaging ANSAs. Extra steps must be taken to “meaningfully” take on board the views and needs of these actors in order to enhance the chances to better implement IHL.

First of all, there is a need to enhance the role of armed groups in the elaboration of the norms. Of course, ANSAs are bound by IHL through treaty and customary international law. That said, convincing ANSAs that they must abide by treaty norms they have not agreed upon is already quite challenging. Explaining to them that some of these obligations come from “customary international law”, i.e. from “*opinio juris*”, a notion that is also quite difficult to understand even for some law students and a “practice”, which is not even ANSA practice, creates another very acute challenge. In that sense, more efforts towards taking into account armed groups’ views in the elaboration of the law and allowing for their ownership is very much instrumental if we aim at a better respect and implementation of international law by these actors.⁸³

Steps must also be taken to clarify the legal framework applicable to ANSAs, especially with regard to human rights law. Humanitarian organisations must be able to engage ANSAs on a realistic and efficient legal framework and ensure that civilians are protected against all forms of armed violence, whether it is in a situation of armed conflict or below the threshold of applicability of IHL.

Finally, there is a need to devising on a more comprehensive and fairer system of accountability, which does not rely exclusively on international criminal law.

⁸² Sassòli 2010, p. 6.

⁸³ See, generally, *ibid.*

Holding an individual criminally responsible for the international crimes he or she committed is necessary, but criminal trials are also reductive, tending not to account for the ANSAs' dynamic in inciting crimes. As we have seen, truth commissions, if well designed, with a more comprehensive and inclusive approach, give more space to this dimension.

In any case, conducting any types of dialogue entails a great deal of listening and understanding of someone else's point of view. Doing otherwise, and not welcoming other perspectives on board, does not generally lead to much improvement on the ground.

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- African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, opened for signature 23 October 2009, 52 ILM 397 (entered into force 6 December 2012)
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, opened for signature 18 September 1997, 2056 UNTS 241 (entry into force 1 March 1999)
- Geneva Convention relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950)
- Geneva Convention relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950)
- International Convention for the Protection of All Persons from Enforced Disappearance, opened for signature 6 February 2007, 2716 UNTS 3 (entered into force 23 December 2010)
- International Convention for the Suppression of Acts of Nuclear Terrorism, opened for signature 14 September 2005, 2445 UNTS 89 (entered into force 7 July 2007)
- International Convention for the Suppression of the Financing of Terrorism, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002)
- International Convention for the Suppression of Terrorist Bombings, opened for signature 12 January 1998, 2149 UNTS 256 (entry into force 23 May 2001)
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1979) (Additional Protocol I)



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