Armed Groups and International Humanitarian Law

A study on parallel legal agreements, armed groups and compliance with international humanitarian law

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Abstract

This thesis seeks to analyze whether, and how, parallel legal tools can contribute to increasing non-state armed groups (NSAGs) compliance with international humanitarian law (IHL). The initial parts of this study highlight how the changing nature of warfare has brought forth a number of challenges to the framework of IHL. It is argued that while the international laws guiding conduct in war remains state-centered, the practical reality is less and less centered on the state. In following, it puts forth that enhancing NSAGs compliance with IHL is viewed as one of the core challenges to strengthen protection of civilians in armed conflict. It is suggested that the mechanisms for implementing IHL have failed to keep up with the changing nature of warfare, and that NSAGs must be addressed directly to strengthen respect for IHL in non-international armed conflicts (NIACs). Thus, it is argued that of the instruments available, one of the most intriguing and innovative tools in the contemporary toolbox is the use of special agreements, or parallel legal tools on IHL.

A literature analysis on three levels has been conducted. First, research on treaty effectiveness and legal agreements from the field of international human rights law (IHRL) has been utilized. Second, a general, and a specific, analysis of NSAGs and commitment to parallel legal tools on IHL is put forth to extract what the status is on the effectiveness of this instrument. Third, a combination of the latter two approaches, as well as research on NSAGs and engagement efforts, shows that the value of parallel legal tools is largely dependent upon group characteristics. Ultimately, this thesis does not suggest that parallel legal tools have the potential to end all violations of IHL committed by NSAGs. What it suggests, however, is that parallel legal tools do have the ability to strengthen compliance with IHL for NSAGs that inhabit certain characteristics. While this is not ideal, it would be a chimera that increased compliance with IHL by NSAGs could be achieved through a universal solution. In sum, it is argued that engagement efforts through parallel legal tools have practical utility because they address the gap between the practical reality and the legal reality.

Preface

I first discovered my interest for international humanitarian law (IHL) when I became a volunteer for the Red Cross. Having learned little about this area of law during the course of my three years as a bachelor student in international studies, I was struck by the fact that the level of knowledge about this field was rather scarce, both among fellow students and among the general population whom I conversed with. Most seemed to believe that humanitarian law was the same as human rights law, and some where even surprised that the conduct of war is in fact regulated by laws. As a volunteer, I began to disseminate IHL to youth through creative and practical exercises that encourage debate and discussion. I was frequently asked, "what is the purpose of IHL, when in war, no one cares about the rules anyway"? Those that I spoke to were especially critical to its usefulness when it came to modern conflict, so called non-international armed conflicts or civil wars, because there was a general perception that the groups that carry out these armed struggles are not capable of, nor willing to, respect the applicable rules. In fact, many believed that a majority of armed groups violate IHL as a part of a deliberate strategy. It is intriguing to discover that though scholars, and legal experts, predominantly agree that IHL applies to non-state actors as well as state actors, the fact is that today, the vast number of non-state armed groups (NSAGs) that violate, or are accused of violating IHL stand completely outside the inter-state system. In the effort to protect civilians, and ensure respect for IHL in war, NSAGs are seldom engaged, spoken to, and asked to accept and commit to IHL. While the international system, and the international laws guiding conduct in war remains state-centred, the practical reality is less and less centred around the state, and the mechanisms to ensure that NSAGs respect IHL in their conduct, are still somewhat unexplored and innovative. This, in addition to my interest in the work of the Red Cross, has inspired the subject matter of this thesis.

Abbreviations

ANSA	Armed non-state actor
AP I	Additional Protocol I
AP II	Additional Protocol II
CA3	Common Article 3
GC I	Geneva Conventions I
GC II	Geneva Conventions II
GC III	Geneva Conventions III
GC IV	Geneva Conventions IV
DoC	Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action
IAC	International armed conflict
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
NIAC	Non-international armed conflict
NSA	Non-state actor
NSAG	Non-state armed group

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1 Introduction

1.1 Topic and background

Throughout the last century, the conduct of warfare has changed dramatically. In its traditional sense, war has been waged between and against states. In the aftermath of the Second World War, and in particular after the end of the Cold War, we have seen a dramatic increase in civil wars – wars fought between armed groups or wars fought between armed groups and the state.[1] One of the prominent characteristics of intra-state war is addressed in a letter dated the 12th of November 2010 from the former General Secretary of the Norwegian Red Cross, Børge Brende, to the Norwegian Minister of Foreign Affairs, Jonas Gahr Støre, stating that: "modern wars are characterised by armed groups presence on the battlefield".[2] Since World War II, the majority of armed conflicts in the world have not been international armed conflicts (IACs), but rather non-international armed conflicts (NIACs),[3] involving hostilities between government's armed forces and non-state armed groups (NSAGs) or is carried out among members of such groups themselves.[4] According to the Uppsala Conflict Data Program (UCDP) and the International Peace Research Institute (PRIO), there were 264 armed conflicts between 2000 and 2007, of which 225 were internal in nature.[5]

The changing nature of warfare described in the latter paragraph has brought forth a number of challenges to international humanitarian law (IHL), the body of law that seeks to regulate the conduct of hostilities and protect the victims of armed conflict. As argued by Bruderlein *et al*: "the ascendancy of NSAGs alongside state actors represents a core challenge in terms of international law, and in particular IHL and international human

[1] See James D. Fearon and David D. Laitin, "Ethnicity, Insurgency and Civil War", *The American Political Science Review,* Vol. 97, No. 1, February 2003, also see Mary Kaldor, *New and Old Wars,* Stanford University Press, 1999, also see Michelle Mack, "Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts", *International Committee of the Red Cross Publication,* Geneva, February, 2008

[2] Letter from the General Secretary's of the Norwegian Red Cross's office to the Minister of Foreign Affairs, Jonas Gahr Støre, 12th of November 2010

[3] Professor Norman Printer, Lecture at the 28th Warsaw Course on IHL, Warsaw, Poland, July 6th, 2010.

[4] Mack, op. cit.

[5] UCDP and PRIO Armed Conflict Dataset referenced in Dawn Steinhoff, "Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups", in *Texas International Law Journal 45 Tex. Int'l L. J. (2009-2010),* p. 301

rights law (IHRL)".[6] On the 21st of September 2010, the President of the International Committee of the Red Cross (ICRC), Dr. Jakob Kellenberger reflected upon the organisations most recent research study which was conducted with two main aims: identifying and understanding, more precisely and clearly, the humanitarian problems arising from armed conflict and devising possible legal solutions to them in terms of legal development or clarification.[7] The study concludes that what is required to preserve human life and dignity during armed conflict is not the adoption of new rules, but rather to *ensure greater compliance* with the existing rules. It is stated that:

> Failure to comply with international humanitarian law, whether on the part of State armed forces or of non-governmental armed groups, is without doubt the main cause of suffering in armed conflicts. The major challenge of protecting victims in these situations thus consists of persuading, or even compelling, the parties concerned to comply with the rules by which they are bound.[8]

Kellenberger's reflections on failure to comply with IHL is illustrated by the unnerving brutality of modern warfare that we have witnessed in the course of the last few decades. Deliberate targeting of civilians, the forced displacement of populations, the use of civilians as human shields, the destruction of infrastructure vital to civilian populations, rape and other forms of sexual violence, torture and indiscriminate attacks are all acts of violence that occur frequently in the context of NIACs.[9] These violations, as pointed out by Kellenberger, cannot be ascribed in full to either the State armed forces or NSAGs. According to Olivier Bangerter, ICRC advisor for the Dialogue with Armed Groups, where reasonably accurate figures are available, they do not support the allegation that armed groups commit the most, or the most gruesome violations. On the contrary, they reveal that there is no fixed pattern.[10] We could therefore argue that both states and

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[6] Claude Bruderlein, Andrew Clapham, Keith Krause and Mohammad-Mahmoud Ould Mohamedou, "Transnational and Non-State Actors: Issues and Challenges", *Concept Note,* Prepared for Seminar on Transnational and Non-State Armed Groups convened by the Program of Humanitarian Policy and Conflict Research at Harvard University in cooperation with the Graduate Institute of International Studies (Geneva), and the Radcliffe Institute for Advanced Study at Harvard University, Cambridge, March 9-10, 2007 (hereinafter Bruderlein et.al)
[6] Steinhoff, op. cit., p. 298
[7] Dr. Jakob Kellenberger, "Strengthening Legal Protection for Victims of Armed Conflicts", in *International Review of the Red Cross,* Volume 92, Number 879, September 2010, p. 799
[8] International Committee of the Red Cross, Draft resolution and Report for the 31st International Conference of the Red Cross and Red Crescent, *Strengthening Legal Protection for victims of armed conflicts,* October 2001, Geneva, p. 13
[9] Mack, op. cit., p. 5
[10] Olivier Bangerter, "*Measures armed groups can take to improve respect for IHL"*, in "Non-State Actors and International Humanitarian Law, Organized armed groups: a challenge for the 21st century", proceedings of the 32nd roundtable

NSAGs violate IHL. I argue that what is interesting about these violations is not the fact that they are committed by both state and non-state entities, but rather, that despite the overwhelming number of NSAGs that operate at present, and the frequent reminders that NSAGs do participate in a majority of the conflicts that we see unfolding, there is still, as Mary Foster argues, an "overwhelming focus on the state in dominant discourses and institutions of global relations".[11] Foster made this statement in 2000, and one can argue that almost 12 years later, it is still the case that "efforts to protect civilians in situations of armed conflict must address not only the behaviour of States, but also that of NSAGs".[12] Further highlighting not only the relevance, but also the importance of the issue of compliance is the fact that a 2009 United Nations Report of the Secretary-General points to enhancing NSAGs compliance with IHL as one of "the core five challenges" to strengthen the protection of civilians in armed conflict.[13] Again highlighting the ever-present nature of this issue is the fact that at current, the Norwegian Red Cross is encouraging the Norwegian Foreign Ministry to play an important role in dialogue with armed groups about strengthened respect for IHL on the battlefield.

Four years before the previously mentioned ICRC study was concluded, David P. Forsythe argued that "never before in world history have civilians constituted such a high percentage of the casualties in armed conflicts. But never have there been so many rules and actors trying to humanize war".[14] Forsythe's passage illustrates the clear paradox between existing law and the existing non-compliance with the law. Following what Forsythe pointed out in 2006 one could arguably make the case that the problem lays not in the lack of law, but rather in the lack of compliance with the law. This argument, combined with the previously highlighted statement by Foster, sets the platform for the very core of this thesis, namely how one can effectively work to increase NSAGs respect, and subsequent compliance with the IHL. It is from this contention that I will move on to explaining the objectives of this thesis and the research question.

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on current issues, 11-13 September 2009, International Institute of Humanitarian Law - San Remo & Franco Angeli, 2010, p. 190

[11] Mary Foster, in "Engaging Non-State Actors in a Landmine Ban", *Full Conference Proceedings, Geneva 24th and 25th of March 2000,* accessible through http://www.genevacall.org/resources/conference-reports/f-conference-reports/pre/gc-2000-24mar-geneva.pdf

[12] Geneva Call, *About us,* http://www.genevacall.org/about/about.htm, consulted 15th of February, 2011

[13] See *Report of the Secretary-General on the Protection of Civilians in Armed Conflict,* S/2009/277, 29 May 2009, paras. 38-47.

[14] David P. Forsythe, *Human Rights in International Relations,* Second Edition, Cambridge University Press, 2006, p. 85

1.2 Objectives and research question

The respect for IHL in NIACs needs to be strengthened because parties often evade humanitarian regulation of their conduct. As pointed out in the latter section, both states and NSAGs frequently fail to comply with IHL. However, while state actors, as parties to the Geneva Conventions, are bound by Common Article 3[15] in addition to other applicable conventional and customary norms, the theory under which non-state actors are bound is a bit more problematic. After all, NSAGs cannot become parties to treaties and cannot contribute to the creation of customary law. Despite this, there seems to be consensus among scholars on the applicability of IHL to NSAGs. Though undeniably interrelated, as will be discussed in a later section, one can argue that the issue then seems to be one of compliance, rather than applicability. In this regard, Claude Bruderlein brings forth an important point. He argues that IHL and human rights standards offer only limited opportunities to persuade armed groups to comply, whereas a collection of legal instruments have been developed to supply state actors with a comprehensive framework, guiding the conduct of their combatants.[16] Thus, as briefly mentioned earlier, and as argued in a report by the Program of Humanitarian Policy and Conflict Research (HPCR) at Harvard University and the Graduate Institute of International Studies (HEI) "the rise of non-state armed groups in the post-Cold War period raises legal challenges in terms of how to deal with these entities using IHL and international human rights law (IHRL)".[17] In the realization that these challenges are not easily solved, scholars and practitioners have explored, proposed and utilized a variety of tools in the effort to increase NSAGs respect for IHL.[18] In recent years, much focus has been directed towards the argument that to hold NSAGs responsible for violations of IHL, "they have to be assigned responsibility for ending them", and according to David Capie and Pablo Policzer "for this to happen, groups have to be addressed directly".[19] The idea to engage with NSAGs

[15] Common Article 3 to the Geneva Conventions of August 12, 1949
[16] Claude Bruderlein, "*The Role of Non-State Actors in Building Human Security - The Case of Armed Groups in Intra-State Wars,* Human Security Network, Geneva, 2000, p. 6
[17] Report by HPCR and HEI, op. cit., p. 14
[18] The various 'tools' are elaborated further in section 4.3
[19] David Capie and Pablo Policzer, "Keeping the Promise of Protection: Holding armed groups to the same standard as states", *Working Paper 3,* Armed Groups Project, January 2004, p. 2

in order to increase their respect for IHL and to assist them in this regard has become increasingly accepted.[20] Out of this conception, an idea, and a practice, of agreements that are functionally, as opposed to legally, equivalent to the Geneva Conventions has grown to develop. I will hereinafter refer to the functional equivalent as 'parallel legal agreements' or 'parallel legal tools'. In light of this, and due to the necessity of a narrowed focus, we shall limit the scope of this paper by asking the following research question:

Can parallel legal tools contribute to increasing non-state armed groups compliance with international humanitarian law? If so, how?

In order to answer the stated question, I find it necessary to begin by clarifying the framework and the important concepts that lie beneath the research question. Subsequently, I investigate different perspectives on violations of IHL, and explore a variety of suggestions as to how compliance with IHL can be strengthened. I argue that of all the instruments available, one of the most intriguing and innovative tools in the contemporary toolbox is the use of special agreements, or parallel legal tools. In order to assess whether, and how, parallel legal tools can contribute to increasing NSAGs compliance with IHL, I will conduct a literature analysis on three levels. First of all, I will draw upon research on treaty effectiveness and legal agreements from the field of IHRL, and secondly, I will present a general, and a specific, analysis of NSAGs and parallel legal tools to extract what the status is on the effectiveness of this instrument. The third approach will build upon some of the elements from the first two approaches and argue that the value of parallel legal tools is largely dependent upon group characteristics. The research question will thus be answered through a threefold approach, with the aim of acquiring empirical knowledge on the value of parallel legal tools for NSAGs.

1.3 Justification of topic

Political science and international law are interdependent subjects, and several political science studies examine the role of international law in current international relations.

[20] Marco Sassóli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", in *International Humanitarian Legal Studies 1,* 2010, p. 10

However, there has been an overwhelming focus on *jus ad bellum*, the legality of waging war in political science. *Jus in bello,* the laws in war, or IHL, have not been given as much attention within the same field. In addition, when it comes to the various branches of international law, one could argue that IHRL as a subject matter has overshadowed IHL within the field of political science. Thus, much of the academic literature on IHL has been conducted by scholars of law within the field of law, with the purpose of addressing strictly judicial questions of application and enforcement.

Secondly, and perhaps most importantly, the increasing role of non-state armed groups in modern conflicts highlights the need for further research. Apart from the existing gap linking political science and IHL, it is particularly important that the main justification for addressing this particular area of international law is because there is a great need to strengthen respect for IHL in NIACs. As argued by Mack: "where IHL is not respected, human suffering increases and the consequences of the conflict become more difficult to repair".[21] In addition, those waging war are using techniques or strategies that are causing superfluous damage to combatants, civilian populations and infrastructure. Though both state and non-state actors commit these violations, it is particularly important to address the violations committed by NSAGs, as the methods and instruments to address these actors are highly undeveloped. As Marco Sassóli points out, "international law is mainly made by states; it is mainly addressed to states; its implementation mechanisms are mainly state centred", but yet, "the international reality is, however, less and less state-centred".[22] The subject matter of this paper is thus justified by a critical need to tackle the emerging role of NSAGs in modern conflicts, and furthermore, because it is crucial to look into the potential of instruments that may possibly increase NSAGs respect for IHL. A number of scholars and practitioners as well as international organisations such as the ICRC and the United Nations have highlighted the importance of developing new insight into how one can achieve compliance with IHL in NIACs, and especially how one can strengthen NSAGs respect for IHL.

[21] Mack, op. cit., p. 5
[22] Sassóli, op. cit., p. 10

1.4 Structure

Before moving on to methodology, I will provide a short overview of the structure of this paper, as well as the main purpose of each chapter. First of all, the purpose of this paper is to analyze whether parallel legal tools can increase non-state armed groups compliance with IHL applicable in NIACs. The second objective of this paper is to discuss how it can lead to compliance, and for who parallel legal tools have potential value.

Chapter two will put forth how this thesis will attempt to answer the stated research question, discuss the challenges related to the cross-disciplinary nature of the area of research, reflect upon the use of sources, put forth some methodological concerns and make a note on the issues of validity and reliability.

Chapter three will introduce important frameworks and concepts related to the subject matter of this thesis. The body of law known as IHL will be properly introduced, and the debate on its applicability to NSAGs will be put forth. It will be argued that though there is an existing debate on IHLs applicability to NSAGs, the bottom line – legally - is that once an armed conflict breaks out between a state party and a non-state party, both parties are obliged to comply with IHL in whole or part. Before moving on, it is critical to the validity of this thesis to map out what exactly the NSAG concept entails. NSAGs are not a homogenous group, they differ in size, motivation, strategy, and it is difficult to ascribe a concrete definition of what constitutes an NSAG. Therefore, it is necessary to reflect upon the debate on the concept in itself and outline some of the main observations that have been made in dealing with this multifarious concept. In following, I will move on to explore the concept of parallel legal tools. I will put forth what they are, and more importantly, *why* they are, as well as explain how they are utilized and what purpose they are thought to serve. It will be argued that parallel legal tools may be used as substitute agreements because states have legitimacy concerns with engaging armed groups, and are unwilling to include NSAGs in international legal agreements that regulate warfare. Thus, its function comes not from changing the content of a group's legal obligation, but rather, from putting in place genuine commitment to the rules. The

main argument is based upon Olivier Bangerter's notion that parallel agreements "create accepted standards, instead of what is often considered as imposed standards".[23]

Chapter four will put forth various explanations for why IHL is violated, and examine different approaches to how increased compliance with IHL can be achieved. This chapter will suggest that one of the most modern, appropriate and intriguing tools in the contemporary toolbox is the use of parallel legal tools, or special agreements for NSAGs on IHL. It will be argued that there is a clear discrepancy in the fact that modern wars are fought within, rather than between, states, and the fact that the legal framework that seeks to regulate conflict is built by, and centred on the state. In order to challenge this state-centric framework, parallel legal tools have been utilized to include NSAGs in the IHL equation without jeopardizing the sovereignty of the state as a powerful and law-making entity. The purpose of chapter four is thus to justify the focus on parallel legal tools, and create a platform from which one can move on to discuss how the tool itself can contribute to increasing NSAGs respect for IHL.

Chapter five takes on a threefold approach to explore how parallel legal tools may facilitate compliance. The first approach discusses the contention that legal agreements have the ability to facilitate compliance and is based on research from IHRL on treaty effectiveness. The second approach examines the idea that ownership of the law, or commitment to the law, is vital in generating rule-consistent behaviour. First, I will present general perspectives on ownership, and secondly, I will move on to a more case specific example and discuss how the tool has been utilized in practice by the humanitarian organization Geneva Call's and its efforts since 2000 to engage NSAGs in a landmine ban, also known as The Deed of Commitment. The third approach will build upon the theoretical work of Beth Simmons on typologies, and bring in central elements from literature on groups characteristics as a decisive factor in the success or failure of engagement with NSAGs. The main purpose of discussing this approach is to establish that there is no cure all when dealing with NSAGs and IHL.

[23] Bangerter, op. cit., p. 196

Chapter six will put forth concluding remarks; provide an answer to the research question, state what contributions this thesis has made to research, and at last, make some suggestions towards future research.

2 Methodology

This thesis seeks to investigate whether parallel legal tools can lead to increased respect for IHL by NSAGs, and through a threefold approach, explore how and for whom this tool can facilitate compliance. Firstly, this requires an understanding of what IHL is, and whom it applies to. To appreciate why parallel legal tools are suggested as a way to increase NSAGs respect for IHL, one must also have insight into the debate on application of IHL to NSAGs, as well as an understanding of how the state centric nature of IHL is of hindrance to NSAGs. As the question speaks of NSAGs and parallel legal tools, any attempt to provide an answer would fail without an understanding of the two concepts. Furthermore, without exploring how violations can be explained, and the various suggestions to increase compliance, the focus on parallel legal tools would seem naïve.

The main methodological question is; how will I proceed to answer the stated research question? Field research on NSAGs and compliance with IHL is arguably difficult. Due to the difficulty, and danger, of gathering a representative selection of leaders or members of NSAGs, this thesis cannot rely on own interviews and field data. If it were possible, and if safety could be guaranteed, meeting with a selection of NSAGs to ask them their perspectives on application, commitment and compliance with IHL would have been intriguing. However, due to the considerations associated with such a task, the possibility of conducting interviews with former members of NSAGs that are currently living in Norway was contemplated. Former work at the Embassy of Sri Lanka, and contacts gained through this experience would perhaps have made this possible. Yet, this method is not executable for two main reasons; first, they are difficult to locate and second, they are not willing to talk. Furthermore, a distributed questionnaire, if possible, would hardly provide me the insight required to answer the research question. Therefore, in order to answer the stated research question, I will collect, compare and analyse existing literature and conduct a literature analysis on three different levels. First, I will draw upon research on treaty effectiveness and legal agreements from the field of IHRL, and second, I will

use what is already established about NSAGs and parallel legal tools to conduct a general and a specific analysis on the status of this instrument. Third, I will combine elements from the two first approaches, as well as previously conducted research into the role played by group characteristics in engagement efforts, to arrive at an answer to the question posed. The research question will thus be answered through a threefold approach to the literature, with the aim of acquiring empirical knowledge on the value of parallel legal tools for NSAGs.

2.1 Methodological concerns

First of all, because the subject matter of this paper falls in the purview of both law and political science, it becomes crucial to make sure that all concepts and terms are clearly defined and understandable to both a political scientists and a lawyer. This is particularly challenging when it comes to the IHL, because as stated previously, the general knowledge of IHL is rather scarce within the field of political science. To address this concern, and to accommodate the combination of both disciplines, a thorough introduction to IHL and the debate on applicability to NSAGs will be given in chapter three.

The terms parallel legal tools and non-state armed groups are particularly important to an understanding of this thesis, and therefore, I have dedicated a section in chapter three to reflect upon the use of terminology. It will however be shown that a clear definition of non-state armed groups is not viable, nor productive.

2.2 Cross-disciplinary challenges

The subject matter of this thesis, international humanitarian law, is typically dissected and discussed as a part of legal studies. A quick search through the archive of digital publications at the University of Oslo revealed that no former student in political science had focused on IHL as a part of their thesis. This realization served as motivation, rather than distress. In the study of political science, one is taught of independence and state

sovereignty, but at the same time, one is made aware of how exceptional situations can require the international community to violate the sovereignty of a state. The field of international law is therefore arguably somewhat contradictory to the deep-seated principle of state sovereignty within political science; because international law by its very definition requires states to surrender some of their autonomy to the international community. Researching international humanitarian law within a political science framework may therefore prove to be challenging. Instead of having a rigid framework based on either the one or the other discipline, one may find it useful to employ the parts of each discipline that can prove beneficial to the understanding the subject matter of this thesis.

A few years back, a number of scholars asked: "in a decade when questions of restructuring world order dominated, why has international law not figured in the search for answers?"[24] According to the authors, between 1990 and 1999, only one lead article on international law was published in the American Political Science Review, and less than ten percent of the articles published in the International Studies Quarterly were on a subject related to international law.[25] It is argued that despite the differences between the two fields of international law and political science, both political scientists and lawyers can benefit from greater familiarity with the work of the other. However, as I take on the task of cross-disciplinary research, it is important to keep in mind that goals influence the methods of social scientists and lawyers, and their goals differ, as pointed out by Ku *et al*.[26] It is argued that lawyers are more prescriptive than social scientists, and also, that the main goal or interest is to change behaviour. On the other hand, social scientists seek to understand behaviour but not necessarily change it.[27] The purpose of this thesis is consistent with both disciplines. First, it seeks to understand why NSAGs are not fulfilling their obligations to IHL to the best of their ability, and furthermore, it explores how violations of IHL by NSAGs can be reduced, and suggests how parallel legal tools can contribute to the latter.

[24] Charlotte Ku et al., "Exploring International Law: Opportunities and Challenges for Political Science Research", in *International Studies Review,* Vol. 3, Issue 1, p. 3
[25] ibid.
[26] ibid. p. 22
[27] ibid. p. 22

2.3 Sources

As mentioned, if time, resources, and access to NSAGs were not problematic, nor dangerous, this study would have benefited from in-depth interviews with the leadership of some of the NSAGs that have committed to IHL through parallel legal tools. Instead, I have met, spoken to and benefited from the advice and the insight of Dr. Olivier Bangerter, who has been working for the ICRC for ten years, and who has met, engaged and spoken to a number of NSAGs about IHL on several occasions throughout his career. In addition to meeting him at a conference arranged by the ICRC in Warsaw, Poland, I have exchanged e-mails with Dr. Bangerter, and made great use of his written academic work on IHL application to NSAGs.

In addition, I have made a conscious choice to draw upon much of the literature written within the field of IHRL, particularly on the matter of commitment and compliance. Therefore, one will find that parts of the discussion in chapter five are based upon work by some of the most prominent scholars within the field of IHRL. Although IHRL and IHL are different branches of law, they are closely related as they share a common basis of fundamental concern for humanity, and sets out mechanism that serve to protect people in vulnerable situations. IHRL and IHL are reconciling distinct, yet increasingly convergent legal regimes that are applicable in situations of violence.[28] The main difference between IHRL and IHL is that the obligations in IHRL applies to the state in both peace and war, with some obligations being derogable in situations of public emergency, while the obligations in IHL apply to both state and non-state parties once a war has broken out.[29] The threshold of violence and the pronouncement of a state of war will be discussed further in a later section. The convergence between the two bodies of law is particularly present in the debate of parallel application, the principle of *lex specialis*, which is the idea that when multiple bodies of law regulate a single event, one uses the

[28] Naz Modirzadeh, Associate Director at the International Association for Humanitarian Policy and Conflict Research (HPCR), Lecture at the 28th Warsaw Course on IHL, Warsaw, Poland, July 4th, 2010
[29] ibid.

body of law that is most specifically tailored to the situation at hand.[30] The principle of *lex specialis* is interesting, however, further elaboration will not be provided because it would require a judicial and legal focus. However, as some of the most comprehensive studies on the effect of treaties and legal agreements have been conducted within the field of IHRL, one may find that IHRL can enrich the study of IHL and contribute to a better understanding of the field.

Furthermore, it is necessary to note that some of the material used in this thesis comes from the ICRC, or people working for the ICRC or National Societies of the Red Cross. Two of the main guiding principles of the Red Cross are neutrality and impartiality; however, the fact that this organisation is impartial and neutral towards the parties in conflict does not mean that they are not inclined to further their own interests. However, the extensive use of sources published and written by other humanitarian organisations, as well as scholars not associated with the Red Cross in any way makes this a minor concern.

2.4 Validity and reliability

As outlined in the latter sections, this thesis conducts a qualitative analysis of literature and previously conducted research within the area of IHRL and IHL to answer the research question. Alan Bryman points out that "qualitative research is a research strategy that usually emphasizes words rather than quantification in the collection and analysis of data".[31] Manheim et al. argue that:

> Quantitative researchers are usually able to employ some well-established rules of analysis in deciding what is valid evidence for or against their theory. These include such tools as measures of statistical significance and statistical tests of validity, as well as formal logic. Qualitative researchers generally lack this type of commonly agreed to and 'objective' tool. Rather, they must rely on their ability to present a clear

[30] ibid.
[31] Alan Bryman, *Social Research Methods,* 3rd Edition, Oxford University Press, 2008, p. 366

> description, offer a convincing analysis, and make a strong argument for their interpretation to establish the value of their conclusions.[32]

As demonstrated by the latter quote, the measures available to the quantitative researcher to ensure reliability and validity are thus not as easily available to the qualitative researcher, and therefore, a qualitative study is arguably not entirely objective. The choices made when collecting information, and the choices made when interpreting the gathered information, influence the findings. Consequently, the validity and reliability of this thesis is largely dependent upon the previously conducted research, the choice of sources, and the interpretation of these sources. To accommodate this, the research conducted to answer the stated research question has remained within an objective framework by gathering sources from a broad range of institution, scholars and organizations. An important aspect of ensuring that the two criteria are fulfilled in this thesis is the use of clearly defined concepts and frameworks, and therefore, it is important that the reader is fully informed of how the concepts are used and what they entail. In addition, adopting a cross-disciplinary approach to the subject matter increases validity, because it broadens the researchers framework and does not allow for a rigid interpretation of the material. Also, alternative explanations are explored to increase the validity of the findings in this thesis.

On the other hand, judging qualitative research on the basis of the same criteria as quantitative research is by some researches argued to be inappropriate.[33] Guba and Lincoln argue that instead of assessing qualitative research according to validity and reliability, it is more useful to assess it according to trustworthiness and authenticity.[34] One of the reasons why Lincoln and Guba suggest an alternative assessment of qualitative studies is that the criteria of reliability and validity presuppose that a single absolute account of social reality is feasible.[35] As such, it is arguably inappropriate to assume that the findings and conclusions made in this thesis constitute a single absolute.

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[32] Jarol B. Manheim, Richard C. Rich and Lars Willnat (editors), *Empirical Political Analysis: Research Methods in Political Science*, 2002, 5th edition, Toronto, Longman, p. 317
[33] Bryman, op. cit., p. 377
[34] ibid.
[35] ibid.

3 Clarification of framework and concepts

In chapter three, I will first present the framework of international humanitarian law and review the current debate about its application to non-state actors. In continuation, I will present the concept of NSAGs and explain why scholars and practitioners have failed to agree upon a concrete definition of this complex concept. Furthermore, I will briefly explain the concept of parallel legal tools, and refer to some relevant examples.

3.1 The law applicable in armed conflict

The body of law that seeks to regulate the conduct of hostilities and protect the victims of armed conflict is what we know as International Humanitarian Law (IHL) and consists of the 1949 Geneva Conventions, the two Additional Protocols from 1977 and customary international law. As stated in chapter one, the majority of armed conflicts since the end of World War II have been NIACs, yet, only one article from the 1949 Geneva Conventions speaks to such conflicts. This article, known as common Article 3 (CA 3)[36], in addition to customary international law[37] and Additional Protocol II (AP II)[38], form the

[36] Common Article 3 is listed in all four Geneva Conventions and speaks to conflicts not of an international character. 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: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. 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 endeavor 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.

[37] International law comes from both treaty law and rules of what is known as customary international law. Treaties are written conventions in which States formally establish certain rules. Customary international law, on the other hand, is not written but derives from "a general practice accepted as law". To prove that a certain rule is customary, one has to show that it is reflected in state practice and that the international community believes that such practice is required as a matter of law (International Committee of the Red Cross, "Customary International Law", http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm)

corpus of IHL that governs NIACs.[39] Currently, this legal framework is faced with a number of difficult challenges as a result of the proliferation of non-international armed conflicts: i) protection of persons deprived of liberty, ii) measures for implementing international humanitarian law and the reparation of violations, iii) the protection of the natural environment and iv) protection of internally displaced persons.[40] Apart from these four challenges, it is widely recognized that one of the most critical challenges to IHL is caused by the increased presence of NSAGs on the battlefield. A report released by the Program on Humanitarian Policy and Conflict Research in 2007 supports Luc Reydams argument that "IHL currently faces challenges resulting from the emergence of transnational terrorist networks and criminal organizations, an aspiring hegemony's militarization of its foreign and counter-terrorism policies, the privatization of traditional military activities, and the near collapse of some states".[41]

While state actors, as parties to the Geneva Conventions, AP I and AP II, are bound by the rules stipulated in these documents, the application of IHL in NIACs, and the theory under which NSAGs are bound is a bit more problematic.[42] Interestingly enough, despite the fact that NSAGs cannot become parties to treaties, and cannot contribute to the creation of customary law, the prevailing opinion is that non-state actors are bound by IHL under one or both of the following theories. First of all, as citizens of states that are bound by IHL, it follows that NSAGs who engage in armed conflict are also bound by IHL. Secondly, a NSAG that undertakes violence that rises to the level of armed conflict is legally bound by the rules applicable to internal conflicts.[43]

However, there are far less rules regulating the conduct of hostilities in NIACs than there is in IACs, and one may ask why different rules exists depending on whether the conflict is internal or international in character. It is perhaps puzzling that different laws should

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[38] AP II is a 1977 amendment protocol to the Geneva Conventions relating to the protection of victims of *non-*international armed conflicts. It defines certain international laws that strive to provide better protection for victims of internal armed conflicts that take place within the borders of a single country.
[39] Printer, op. cit.
[40] Dr. Jakob Kellenberger, "Strengthening Legal Protection for Victims of Armed Conflicts", in *International Review of the Red Cross,* Volume 92, Number 879, September 2010, p. 799
[41] Program on Humanitarian Policy and Conflict Research, Harvard University, Graduate Institute of International Studies, Geneva, "Empowered Groups, Tested Laws, and Policy Options: the Challenges of Transnational and Non-State Armed Groups", November 2007, p. 30
[42] Printer, op. cit.
[43] ibid.

guide behaviour depending on the legal character of the conflict, because after all, for the people affected by the conflict, its brutality does not depend on its legal characterisation. Nevertheless, according to Professor Norman Printer, there are three explanations for the disproportioned relationship between the two. The first is historical, and is grounded in the fact that matters internal to a state were not an appropriate subject of international law. Secondly, the notion of state sovereignty has made states reluctant to allow the international community to involve itself in matters that are generally considered to be domestic in nature, such as internal violence.[44] Lastly, Printer argues that the third consideration is legal in nature. Both domestic law and applicable human rights law continues to apply during an internal conflict, and this has lessened the need for the international community to regulate internal conflict.[45]

Previously, it was suggested that the problem regarding IHL in NIACs seems to be one of compliance rather than applicability. This however, is an easily contended argument, as many would assert that applicability and compliance are undeniably connected, and uncertainty around applicability of IHL in NIACs could lead to a lack of compliance. We shall therefore reflect upon the issue of applicability in the next section.

3.2 The issue of applicability

The first step in determining the applicable law is characterising an armed conflict as international or non-international, and due to the disproportionate relationship between treaty law in NIACs and IACs, this distinction remains highly relevant.[46] Perhaps the largest distinction between the two is the fact that in an internal armed conflict, the only legitimate forces are those of the state, and therefore, there is no entitlement to combatant or prisoner-of-war status in NIACs.[47] The application of Article 1.2 in AP II states the Protocol shall not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as

[44] ibid.
[45] ibid.
[46] Jelena Pejic, "Status of armed conflicts", in Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary IHL,* Cambridge University Press, 2007, p. 77
[47] ibid. p. 78

not being armed conflicts"[48], thus, the existence of an armed conflict is necessary for its application. Firstly, this indicates that the violence must reach a certain threshold, and secondly, one can argue that it is a precondition that belligerency, usually in the form of an identified and organized armed group, exists. Concerning the first condition however, it is necessary to mention that there exists a continuous debate on where the application of IHL begins and ends in modern conflicts, and different views exist when it comes to the matter of a threshold of violence. In inter-state wars, a declaration of a state of war would trigger the application of IHL, however it is no longer the case that a declaration of war creates the *de jure* fact of war.[49] The second condition is addressed in Article 1.1 in AP II, stating that it "shall apply to all armed conflicts (…) 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".[50] What Article 1.1 addresses is particularly relevant considering the complex nature of the various NSAGs that operate at present. Therefore, I will return to a more detailed discussion of the concept of NSAGs.

Though the two conditions set out in the latter paragraph are quite clear, the determination of whether a situation constitutes an armed conflict or not remains difficult. The fact of the matter is that there is no authoritative body at the international level that can pronounce on the legal status of an armed conflict, and therefore, such pronouncements are in practice undertaken by States, international organisations, non-governmental organisations, the ICRC, courts, scholars and others.[51] According to Pejic, determining the existence of an armed conflict is particularly sensitive in situations of NIAC, because State parties will often deny that the threshold of violence has been reached, allowing them to characterise its actions as 'law enforcement' or 'counter-

[48] AP II, Article 1.2.
[49] See for example Mary Ellen O'Connor, "Defining Armed Conflict", Journal of Conflict Security Law, Vol. 13, pp. 393-400, December, 2008, Notre Dame Legal Studies Paper No. 09-09, also see Derek Jinks, "The temporal scope of application of international humanitarian law in contemporary conflicts", *Background Paper*, Program on HPCR at Harvard University, 2003, also see ICTY jurisprudence, most importantly Prosecutor v. Tadic, Case No. IT-94-1, "Decision on the Defense Motion of Interlocutory Appeal on Jurisdiction", paras. 66-70
[50] AP II, article 1.1
[51] Pejic, op. cit., p. 79

terrorist' operations.[52] Political considerations will most particularly come into play in situations of internal violence, as states have traditionally been hesitant to allow the application of IHL for fear of acknowledging that their opponents should be treated as a party to the conflict.[53] It is for this specific reason that CA 3 explicitly says that "the application of the preceding provisions shall not affect the legal status of the Parties to the conflict"[54], which essentially means that recognizing application of CA 3 to a non-state party does not proscribe legitimacy to said party.

Despite the continuous debate on IHL application to NSAGs, as referred to by Andrew Clapham, in 2004, the Appeals Chamber of the Sierra Leone Special Court 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".[55] Clapham claims that "it has now become uncontroversial, even commonplace, to refer to non-state parties to an armed conflict being bound by international humanitarian law", but argues that though this is a "well settled" conclusion, the legal reasoning remains unclear.[56] Clapham proceeds his inquiry into why NSAGs should be considered bound by examining the various aspects of the legal framework, namely i) the law of treaties, ii) contemporary customary international law, iii) rebellion, sedition, insurrection, civil war and belligerency and iv) special agreements, unilateral declarations and codes of conduct. Having mapped out the various aspects, he addresses when exactly these obligations will be valid to the group in question and concludes with what was briefly mentioned in a previous section, namely the preconditions for the application of IHL, violence threshold and organizational requirements.[57]

For the validity of this thesis, the debate on the applicability of IHL to NSAGs is worth mentioning. However, from a legal point of view, the bottom line is that when it can be asserted that an internal armed conflict has erupted between an organized non-state actor and a state, both parties are bound by a minimum of applicable rules. As argued by

[52] ibid.
[53] ibid. p. 89
[54] ibid, and CA 3 to the Geneva Conventions
[55] Andrew Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement,* Geneva Academy of International Humanitarian Law and Human Rights, Working Paper Series, 2010, p. 6
[56] ibid.
[57] ibid. pp. 20-22

Michelle Mack, "the extensive practice of international courts and tribunals and other international bodies affirms this obligation".[58] However, being able to effectively show that the law applies, does not ensure respect for the law, or compliance with the law for that matter. Legal or rational reasoning may be efficient academically, but insufficient in practical terms.

3.3 Non-state armed groups

In order to have an understanding of the concept of NSAGs, this section will deal with the complexities of the concept, and provide a backdrop to the approach that will be dealt with in chapter five. At the end of this section, I will argue that the complex nature of the concept of NSAGs has two consequences related to the subject matter of this thesis.

Some have described NSAGs as armed organizations independent of state control that use violence to achieve political ends, while others adopt a broader definition and argues that NSAGs are challengers to the states monopoly of legitimate coercive force.[59] It was mentioned in the introductory phase of this paper that one of the main characteristics of modern warfare is the presence of armed groups on the battlefield. While during the Cold War the international community focused on inter-state war, today it increasingly recognizes that most conflicts are civil wars fought between states and non-state actors, according to Capie and Policzer.[60] In following, they argue that "today these rebel groups, militias, warlords, and insurgents seriously threaten not just the security of states, but the most basic human rights of millions of people".[61] In "Empowered Groups, Tested Laws, and Policy Options", the authors attribute the rise of NSAGs to three post-Cold War trends. First, it can be attributed to the violent struggles by non-state actors that have resulted in the increased fragmentation of states into smaller self-governing entities.[62] Secondly, privatization of warfare and the introduction of many new private security and

[58] Mack, op. cit., p. 10
[59] Nicolas Florquin and Elisabeth Decrey Warner, "Engaging non-state armed groups or enlisting terrorists? Implications for the arms control community", in *Disarmament Forum,* no. 1, p. 17
[60] David Capie and Pablo Policzer, "Keeping the Promise of Protection: Holding armed groups to the same standard as states", *Working Paper 3,* Armed Groups Project, January 2004, p. 1
[61] ibid.
[62] Report by HPCR and HEI, op. cit., p. 18

military actors into an increasingly complex international political environment and thirdly, due to the expansion of global communications networks, states have become more accountable for their acts towards non-state actors.[63] Bruderlein *et al.* highlights the necessity of outlining the current and future nature of armed conflict to draw out the implications of and strategies for engaging transnational and non-state armed groups, in a diverse range of conflict contexts.[64] The reasoning related to why and how these groups have come to dominate the current landscape of warfare are worthy of note, however, what is perhaps more relevant for the validity of this thesis is; who and what are they? Therefore, before we can proceed, it is necessary to deal with these specific questions, and address the complexity of this concept.

First of all, NSAGs are not a homogenous group, and any attempt to provide a single, universal definition is likely to fail. Claude Bruderlein argues that: "as armed groups differ considerably, from Mafia-like militias to religious movements to corporate armies, common descriptions should not be elaborated too specifically".[65] Secondly, as the purpose of this thesis is to examine a tool that requires engagement with NSAGs, it is important to point out that most practitioners agree that the main characteristics of armed groups should be identified prior to engagement.[66] By doing so, one may detect minimum organizational standards that would make contact worthwhile.[67] In "The Roots of Behaviour in War", Munoz-Rojac and Frésard argue that: "humanitarian organizations would do well to remove the term 'destructured conflict' from their vocabulary – or at least not abuse the term – and to explore whatever avenues would allow them to know the groups better and approach them more effectively".[68]

As stated by Pablo Policzer, "while non-state armed groups have always existed, to this day there is no clear consensus on how to describe or define them, or on what should be expected from them".[69] He argues that the confusion regarding this concept is the result

[63] ibid.
[64] Bruderlein et al., op. cit., p. 5
[65] ibid. p. 8
[66] ibid.
[67] ibid.
[68] Daniel Munoz-Rojas and Jean-Jaques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations,* International Committee of the Red Cross, Geneva, October, 2004, p. 13
[69] Pablo Policzer, "Neither terrorists nor freedom fighters", *Working Paper 5,* Armed Groups Project, March 2005, p. 1

of two unresolved debates. The first unresolved debate is the product of the insurgencies and the counterinsurgencies of the Cold War and the end of colonialism, and concerns the portrayal of given groups or individuals as either "terrorists" or "freedom fighters".[70] Policzer alleges that the remaining validity of the phrase "one person's terrorist is another person's freedom fighter" is a simple recognition that this debate remains unsolved.[71] The second unresolved issue is attributed to the beginning of the 1970s, where a series of debates took place inside the humanitarian and human rights communities over how to deal with acts of violence committed by NSAGs. Policzer argues that because humanitarian and human rights norms were traditionally understood to apply only to the state, there were difficulties concerning whether groups characterised as terrorists, liberation movements, militias or freedom fighters, should be expected to respect the same norms.[72] Printer has contended that within the traditional framework, NSAGs were simply a domestic political or criminal problem, and their behaviour was not an appropriate subject matter for international law.[73] However, as pointed out in a previous section of this thesis, and as affirmed by Policzer, this traditional paradigm began to change in the 1970s, and it is now clear that "if humanitarian and human rights standards are to have any validity, they should apply to all relevant actors, not simply states".[74]

Nevertheless, while the debate on whether humanitarian and human rights norms should apply to all relevant actors has been relatively settled, there is remaining uncertainty regarding how to describe or define NSAGs. This uncertainty can partly be attributed to the changing nature of NSAGs throughout the last few decades. As argued by Bruderlein et al.:

> as compared to the role of [NSAGs] in previous decades, during which the armed groups were essentially using military force as an alternative means to democratic change to achieve political goals, most contemporary [NSAGs] are no longer modelled on political resistance movements whose modus operandi was primarily domestic and aimed at national liberation. In many instances, the new groups represent

[70] ibid.
[71] ibid.
[72] ibid.
[73] Printer, op. cit.
[74] Policzer, op. cit., p. 1

> ambitious political actors who already benefit from a significant level of regional or international legitimacy.[75]

In line with the latter quote, the report by HPCR and HEI points out that while armed groups are not a new phenomenon, "the types, motivations and how these groups fight have become far more diverse, complex, and complicated in the post-Cold War era".[76] Subsequently, while some types of groups "are recognizable from the post-World War II struggles for power and resources, there are a plethora of other groups not easily recognized and which are, consequently, not dealt with easily and straightforwardly".[77]

Aware of these complexities, the report by HPCR and HEI refers to scholars such as Mohammad-Mohmoud Ould Mohamedou, Thomas X. Hammes, Richard Shultz and Christoper Coker, and argues that in considering NSAGs, it is important to first understand that they can range in size and capability from quite limited to very sophisticated.[78] The report highlights that while some NSAGs display limited means and objectives, others have complex military and political wings. The group's identity and power can be derived from "the manipulation of powerful ethnic, ethno-national, religious, and communal differences by competing elite", and in this context, "are essentially opportunistic and use internal and transnational violence as the means for obtaining state resources and powers, secession, or group autonomy".[79] In following, the report emphasizes other important characteristics of NSAGs, and argues that any framework for understanding NSAGs, must make sense of these groups in all their different formations, and consider how and whether they might be engaged per this continuum.[80]

As demonstrated in the latter section, there are different views on what exactly the concept of NSAGs entails. However, while there is uncertainty connected to the concept, there is definite agreement that NSAGs have increasingly come to dominate the landscape of warfare. I argue that the complex nature of NSAGs has two consequences related to this paper. First, it makes it difficult, and perhaps unproductive, to ascribe a

[75] Bruderlein et al., op. cit., p. 1
[76] Report by HPCR and HEI, op. cit., p. 22
[77] ibid.
[78] ibid. p. 21
[79] ibid.
[80] ibid. p. 23

concrete definition to this concept. Second, the fact that there exists a great variety of NSAGs makes it hard to find one specific instrument that can function well for all and achieve the desired outcome. In other words, it would be naïve to suggest that parallel legal tools is a cure all solution. I will return to the latter point in chapter five.

3.4 Parallel legal tools

In the introduction to this thesis, the concept of parallel legal tools was briefly mentioned. However, additional attention must be given to this concept in order to understand what it entails.

First of all, 'parallel legal tools', encompasses special agreements as referred to in CA 3 to the Geneva Conventions, unilateral declarations, and the inclusion of IHL principles in NSAGs codes of conduct. For the purpose of this thesis, I define parallel legal tools as written agreements on IHL, committed to and signed, in whole or part, by a non-state party to a non-international armed conflict. They are referred to as 'parallel' because they allow NSAGs, who cannot become parties to the traditional IHL treaties such as the Geneva Conventions and its additional protocols, to explicitly commit to existing obligations through alternative agreements. Alternative, or parallel agreements, are arguably necessary because the body of law known as IHL is primarily state centric in the sense that NSAGs have not, and cannot, participate in its making, nor provide their support through for instance signing or ratifying said treaties or agreements. The argument made for the usefulness of parallel agreements is that they are necessary in order to stimulate NSAGs ownership of the various elements of IHL because they in effect, as argued by Olivier Bangerter, "create accepted standards, instead of what is often considered as imposed standards".[81]

As previously mentioned, the existing framework of IHL is primarily state-centric, and due to legitimacy concerns, states have been unwilling to include NSAGs in dialogue or

[81] Olivier Bangerter, "*Measures armed groups can take to improve respect for IHL"*, in "Non-State Actors and International Humanitarian Law, Organized armed groups: a challenge for the 21st century", proceedings of the 32nd roundtable on current issues, 11-13 September 2009, International Institute of Humanitarian Law - San Remo & Franco Angeli, 2010, p. 196

negotiations on IHL.[82] It is a fact that NSAGs have been unable to participate in the creation of IHL applicable in NIACs, although it is recognized that they are bound by its rules. It may be argued that in order to address IHL violations more effectively, NSAGs must be included, rather than excluded and ignored, by the international community. By utilizing parallel legal tools, one creates an opportunity for the NSAG to officially express commitment to comply with IHL, and in this regard, one could argue that NSAGs may develop a sense of ownership of IHL. NSAGs do not have legal standing under international law, and therefore, other international law instruments does not allow for NSAGs to become parties. The purpose of parallel legal tools is thus to create a platform from which NSAGs can specifically commit to complying with IHL through negotiated agreements or unilateral declarations. As put forth by Bangerter, its function comes not from changing the content of a group's legal obligation, but rather, to put in place genuine commitment to the rules.[83] The most important point to made with regards to parallel legal agreements is the fact that despite its purpose, it does not have the status or, nor is it able to produce binding legal consequences similar to those of a treaty. Its purpose solely comes from creating commitment and ownership from and for those that agree to adhere by it.

There are a number of practical examples of a variety of parallel agreements that NSAGs have committed to. First of all, special agreements have been made between the parties to NIACs that have enabled the parties to make an explicit commitment to comply with IHL. These agreements are not only based on the legal framework, but also on the mutual consent of the parties, making it clear that the parties have the same IHL obligations.[84] In 1990, the government of El Salvador and the Frente Marti para la Liberacion Nacional (FMLN) made an agreement to comply with CA3 and AP II, as well as various human rights norms. Another example which has been argued to be a successful agreement is 'The Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law' that was concluded between the government of the Philippines and

[82] Dawn Steinhoff, "Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups", in *Texas International Law Journal 45 Tex. Int'l L. J. (2009-2010)*
[83] Bangerter, op. cit., p. 196
[84] Mack and Pejic, op. cit., p. 16

the National Democratic Front of the Philippines (NDFP) in 1998.[85] Secondly, there are various examples of situations where armed groups have made unilateral declarations, or declarations of intention, in which they state their commitment to comply with international humanitarian law. This may come about as a result of own initiative, or it may be come about as a result of the ICRCs or other actor's advocacy.[86] Relevant examples of unilateral declarations are references to comply with CA3 from the Front de Liberation Nationale (FLN) in Algeria in 1956 or to both CA3 and AP II in 1988 by the FMLN in El Salvador and the NDFP in the Philippines in 1991. Also, in 1995, the Ejército de Liberación Nacional (ELN) in Colombia declared to commit itself to provisions of IHL without reference to specific treaty provisions.[87] Thirdly, armed groups have included IHL in codes of conduct in order to set up mechanism that enables its members to respect the law. Armed groups have developed internal codes of conduct at their own initiative at one time or another in countries such as Algeria, Colombia, El Salvador, Côte d'Ivoire, Liberia, Nepal, the Philippines, Sierra Leone and Sri Lanka.[88] Perhaps one of the most significant examples of parallel legal tools in practice is the effort made by Geneva Call since 2000 to engage NSAGs in a ban on anti-personnel mines. The effort comes from a realization that it is necessary to involve NSAGs in order to effectively address the landmine problem. By 2010, the efforts had resulted in 41 NSAGs signing the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action (DoC). In a progress report written in 2007, Geneva Call puts forth that signatory NSAGs have "by and large complied with Article 1 of the Deed of Commitment"[89]:

> TO ADHERE to a total ban on anti-personnel mines. By anti-personnel mines, we refer to those devices which effectively explode by the presence, proximity or contact of a person, including other victim-activated explosive devices and anti-vehicle mines with the same effect whether with or without anti-handling devices. By total ban, we refer to a complete prohibition on all use, development, production, acquisition, stockpiling, retention, and transfer of such mines, under any

[85] ibid. p. 18
[86] ibid.
[87] ibid. p. 20
[88] ibid. p. 23
[89] Geneva Call, "Engaging armed non-state actors in a landmine ban", *The Geneva Call Progress Report (2000 – 2007),* 2007, p. 16

> circumstances. This includes an undertaking on the destruction of all such mines.[90]

The Deed of Commitment is a particularly interesting case, because its creation was a pioneer effort by a humanitarian organization that is strongly dedicated to engaging NSAGs in order to increase compliance with IHL and IHRL. The Deed of Commitment will be discussed and explored further in chapter five.

[90] Geneva Call, "Deed of Commitment", http://www.c-r.org/our-work/accord/engaging-groups/geneva-call.php, consulted 15th of February, 2011

4 Perspectives on violations

4.1 Purpose of chapter

The purpose of this chapter is to investigate how violations of IHL can be understood, and furthermore, to explore some of the methods and strategies that have been employed in the effort to increase respect for IHL. It will be argued that violations of IHL by NSAGs occur due to a variety of reasons, and that no single explanation can be identified. In following, this chapter will explore suggested methods to increase compliance with IHL, and conclude that parallel legal tools have potential that has yet to be fully explored.

4.2 Explaining violations

First of all, there have been various attempts within numerous of academic disciplines to understand and explain why human beings violate norms and rules, and there is no universal explanation as to why individuals bring suffering upon other individuals or groups of people, whether in times of war, or in times of peace. Toon Vandenhove, former ICRC head of the delegation in Sri Lanka, holds that: "the problem lies in the belief that these rules can be bend, that these rules are not so fundamental".[91] One of his arguments is that in situations of war, both states and non-state actors believe that exceptional situations call for exceptional measures, measures that are not consistent with IHL principles. Also, it is frequently argued that IHL violations occur due to matters of reciprocity. When one party to the conflict does not adhere to IHL, the other party justifies its violations on this very basis. On the matter of IHL application to NSAGs, it has also been argued that non-compliance occurs because there is simply no effective mechanism to prosecute violations.

These are just some of the most commonly addressed explanations for why IHL is frequently violated. Considering the vast amount of literature found within psychology,

[91] Disaster Management Coordinator, Norwegian Red Cross, Toon Vandenhove, conversation 28.02.2011

political science, history and other academic disciplines regarding human behaviour in war, it is fortunate that the ICRC published a study in 2004 that seeks to summarize information from a variety of sources such as readings, interviews, internal ICRC documents, articles, quantitative data and personal accounts. The study, written by Jean-Jacques Frésard for the ICRC and entitled "The Roots of Behavior in War: A Survey of the Literature", examines what determines the behaviour of combatants in wartime and what makes them respect or violate IHL. I will map out the various explanations for violations of IHL based on this study.

Frésard states that "there are countless reasons for violations of IHL".[92] For analytical purposes, the study has divided the reasons into six categories, which "appear to encompass almost the entire range of events that can lead to non-compliance" with IHL.[93] The categories are as follows: 1) war is conducive to criminal behaviour, 2) reasons relating to the aims of war, 3) reasons of expediency, 4) ideological reasons, 5) psychosociological reasons and 6) reasons related to the individual.[94] The first category simply takes into account that war is brutal, it is essentially about defeating the enemy, and "even a war waged in accordance with IHL involves an unleashing of violence against persons and property with all the attendant suffering and destruction".[95] The second category addresses the modernity of war, the fact that wars are fought for many reasons, with various aims, and therefore carried out using different strategies. Frésard refers to wars over issues of identity, and wars known as asymmetrical conflicts, where attacking civilians is in itself a part of the strategy rather than "collateral damage". The argument made is that "in such situations, the aims of war can be the very negation of the principles of IHL".[96] Although the armed group in question may be fully aware of the applicable rules, it does not want to comply because IHL violations such as indiscriminate attacks on civilians to spread terror may be a deliberate strategy. In these situations, the leadership promotes and support violations, and have no intention of adhering to IHL. Thirdly, it is pointed out that in many situations of war, it is viewed as necessary to violate IHL to overcome the enemy. The argument here can be summarized with a well-used phrase,

[92] Jean-Jacques Frésard, *The Roots of Behaviour in War: A Survey of the Literature,* ICRC, 2004, p. 26
[93] ibid.
[94] ibid.
[95] ibid. p. 27
[96] ibid. p. 28

namely that "the ends justifies certain means, and the ends may be many". Frésard lists the most frequently encountered reasons of expediency, among which one is related to the historical example of Hiroshimi and Nagasaki as "the determination to put an end to hostilities as quickly as possible and thus to avoid more casualties later".[97] The fourth category, ideological reasons, highlights the fact that ideology may drive combatants to believe that they are fighting a just cause where behaviour is attributed to ideologies that provide them with references, explanations and justifications. According to Frésard, one of the reasons frequently encountered in the fourth category is "the conviction that the group, ethnic community or nation is fighting for its very survival, and that consequently the humanitarian conventions no longer apply".[98] The fifth category addresses psychosociological explanations such as group influence, obedience to orders and the contagion of violence.[99] Such explanations for human behavior have been studied to great length within the field of psychology, where perhaps the most famous examples are the Milgram experiment on obedience to authority and the work of Dr. Philip Zimbardo.[100] Lastly, the sixth category addresses the idea that some individuals take pleasure in the suffering of others, and puts forth the suggestion that sadistic tendencies within human beings find expression more freely in conflict situations.[101] One of the overall conclusions drawn from this ICRC study is that although some violations of IHL are the result of passion, pathological behaviour or stress, violations are mostly the result of deliberate policies that either encourage or tolerate such behaviour. Consequently, the study argues that: "supervision of weapons-bearers, strict orders relating to proper conduct and effective penalties for failure to obey those orders are essential conditions which must all be met if there is to be any hope of securing better respect for IHL". The second observation is that "we have to make IHL a judicial and political issue rather than a moral issue".[102] This second observation is highly relevant to the subject matter of this thesis. The use of parallel legal tools on NSAGs is arguably one of the ways in which one can

[97] ibid. p. 29
[98] ibid. p. 30
[99] ibid.
[100] Stanley Milgram, "Some conditions of obedience and disobedience to authority", in *Human Relations*, Vol 18(1), 1965, 57-76 and Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil,* Random House, New York, 2007
[101] Frésard, op. cit., p. 31
[102] ibid. p. 111

contribute to making IHL a judicial and political issue, rather than a moral issue. I will now proceed to explore suggestions on how one can increase compliance with IHL.

4.3 Exploring ways to increase compliance with IHL

Practitioners have proposed many different ways to enhance respect for IHL in armed conflict, and ensure greater compliance with existing rules. First of all, it must be pointed out that the number one strategy to achieve compliance with any law should be to sanction violations of that law. Enforcement is an important mechanism, and it should not be trivialised. However, as pointed out in the introductory section of this thesis, this is complicated when it comes to NSAGs, and therefore, other approaches to the issue at hand must be explored.

With regards to the work of the ICRC, their strategy to increase respect for IHL is centred on dissemination and training activities.[103] As such, these activities are aimed at those whose actions and behaviour can affect victims of armed conflict, such as armed forces, police, security forces and others bearing arms, as well as local decision-makers and opinion-leaders at the local and international level.[104] According to Michelle Mack, this strategy is carried out on three levels: awareness-building, promotion of humanitarian law through teaching and training, and the integration of humanitarian law into official, legal, educational and operational curricula.[105] Mack argues that through these efforts, the ICRC aims to influence the attitude and behaviour so as to improve protection for civilians and other victims of armed conflict, to facilitate access to these victims, and to improve security for humanitarian personnel.[106] Claude Bruderlein, Director of the Program of Humanitarian Policy and Conflict Research at Harvard, proposes two distinct approaches that humanitarian and human rights organizations can utilize to increase compliance with humanitarian norms. It is emphasized that these strategies must come into play once a NSAG has agreed to comply with international standards.[107] The first

[103] Mack, op. cit., p. 15
[104] ibid.
[105] ibid.
[106] ibid.
[107] Bruderlein, op. cit., p. 15

approach argues that humanitarian organisations can engage in dialogue with NSAGs and assist them in building their capacity to respect IHL and IHRL, and builds on the assumption that the derivation of non-compliance comes from the NSAGs lack of capacity, rather than will, to ensure respect for international standards.[108] Bruderlein argues that in practice, responsibility for the instruction and supervision of field commanders lies with the political leaders of a group, and therefore, it follows that responsibility for the enforcement of the rules and the prosecution of violations also lies with them.[109] Thus, this responsibility is the basis for the group's accountability for the respect of international standards, and it involves the ability to investigate violations as well as the capacity to impose corrective measures, including the prosecution and punishment of those found guilty of violating the rules.[110] According to Bruderlein, capacity building begins with the establishment of a dialogue with leaders, and often, this requires the development of contact over time to create a fundament of trust.[111] This approach may involve assistance from third parties, such as members of the diaspora, churches, political parties or NGOs, but is ultimately reliant on support and help from the international community.[112] The second approach proposed by Bruderlein is the so called "naming and shaming" strategy. Humanitarian organisations can aim to exert pressure on the NSAG by "shaming it in front of the international public and its own constituency for violations of international standards".[113]According to Bruderlein, this approach differs from the first with respect to its perception of the main obstacle to the implementation of international standards. It is proposed that the obstacle to implementing humanitarian norms is not the lack of capacity as with the first approach, but rather a lack of willingness, indicating the need for political pressure to obtain respect for the rules.[114] The use of international public pressure is allegedly a preferred tool among human rights NGOs, and the purpose of this approach is to damage or question the NSAGs legitimacy within their own constituencies or domestic support groups, their diaspora and the

[108] ibid.
[109] ibid.
[110] ibid. p. 16
[111] ibid.
[112] ibid.
[113] ibid. p. 15
[114] ibid.

international community in general.[115]According to Bruderlein, naming and shaming may be more efficient with NSAGs that are dependent on international support for their war efforts, such as the rebel movements in southern Sudan and their support from the US government and American Christian support groups. This strategy will have a much more limited effect on NSAGs that rely on local constituencies and are not responsive to international public opinion, such as the Taliban movement.[116] Bruderlein emphasizes that these two approaches are in fact complimentary, but argues that one should separate between the role of humanitarian organisations and the role of advocacy groups. Basically, his argument is that the second approach is more suitable for advocacy groups, whereas the first approach, namely efforts to establish dialogue with NSAGs, is best taken on by humanitarian organisations. As previously mentioned, the first approach is reliant on a fundament of trust. One could argue that a NSAG that has been named and shaped by a humanitarian organisation will most likely not be open to enter into dialogue with that particular organisation at a later point in time. Therefore, Bruderlein asserts that in order to ensure that both approaches are used in an optimal manner, efforts should be made to distinguish humanitarian organisations from advocacy groups, in terms of institution and mandate.[117] Additionally, before using either of these approaches to increase NSAGs respect for IHL or IHRL norms, one should make a careful analysis of the most promising path to avoid making a wrongful assessment of the reasons why the NSAG fails to comply with the rules.[118] If one assumes that the NSAGs non-compliance with IHL or IHRL is due to a lack of capacity, when it in fact can be attributed to a lack of will, the first strategy may very well end up serving no purpose.

As Bruderlein, "The Roots of Behaviour in War" study bases its conceptual framework for changing combatants behaviour upon the various reasons for why combatants may violate the rules in war situations. Having established the key factors that influence the behaviour of combatants, the study suggests a conceptual framework for altering behaviour. The model is based on three main hypothesis: 1) that, just like civilians, combatants acknowledge and share humanitarian values because they are universal; 2) that

[115] ibid. p. 17
[116] ibid.
[117] ibid.
[118] ibid. p. 15

violations of IHL involve social and individual processes of moral disengagement brought about by two main mechanisms, namely the justification of behaviour and the lack of any sense of responsibility; 3) that, in situations of armed conflict, the mechanisms of this abdication of responsibility are induced chiefly by group conformity and obedience to orders.[119] With regards to preventing violations of IHL, the study highlights three main lessons. First of all, one of the most important findings in this study is the fact that if IHL is perceived from a normative point of view, combatants are less tolerant of violations. It is argued that: "the perception that there are legal norms is more effective than the acknowledgements of moral requirements in keeping combatants out of the spiral of violence".[120] It is argued that IHL needs to be treated as a legal and political matter rather than as a moral one, and communication activities needs to focus on the norms rather than on their underlying values because the idea that the bearer of weapons is morally autonomous is inappropriate.[121] Appealing to norms rather than morality allows one to draw an easily identifiable red line, and it is argued that values represent a broader spectrum that is less focused and more relative.[122] Secondly, the study concludes that training, orders and sanctions play a crucial role in efforts to achieve increased respect for IHL. This is based on Munoz-Rojas and Frésard's contention that the behaviour of combatants is determined mainly by three parameters: (1) their position within a group, which leads them to behave in conformity with what the group expects of them; (2) their position in a hierarchical structure which leads them to obey authority (because they perceive it as legitimate or it acts on them as coercive force, or a mixture of the two); (3) the process of moral disengagement favoured by the war situation, which authorizes recourse to violence against those defined as being the enemy.[123] To effectively alleviate these three parameters that shape the behaviour of combatants, the study concludes that: "the rules must be translated into specific mechanisms and care must be taken to ensure that practical means are set in place to make this respect effective".[124] Based on this contention, the authors favour a integrative approach, which basically means that IHL is

[119] Daniel Munoz-Rojas and Jean-Jaques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations,* International Committee of the Red Cross, Geneva, October, 2004, p. 3
[120] Daniel Munoz-Rojas and Jean-Jaques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations,* International Committee of the Red Cross, Geneva, October, 2004, p. 15
[121] ibid.
[122] ibid.
[123] ibid.
[124] ibid.

included in military policies, taught to officers and to the rank and file, incorporated into exercises and training, and more importantly, incorporated into the orders passed down through the chain of command, and that combatants are given the necessary means of ensuring that their behaviour can indeed comply with IHL.[125] It is also highlighted that sanctions, either disciplinary or penal, are necessary when combatants fail to comply with the rules. The authors argue that it is: "essential that the authorities should take action"[126], however, they do not mention how sanctions are to be executed when dealing with NSAGs.[127] This line of reasoning rests on the belief that humanitarian organisations such as the ICRC cannot convince combatants to act according to IHL principles, and are unlikely to be able to win them over personally.[128] Instead, the potential of success rests on being able to influence those that have ascendancy over the combatants, beginning with the instigators of any "excessive" violence and including those who prepare the political, ideological and moral ground so as to dehumanize the enemy.[129]

4.3.1 Parallel legal tools as a way to increase compliance

As demonstrated above, there are various reasons for why IHL is violated, and similarly, there are numerous of suggestions on how compliance with IHL can be improved. However, some overall ideas can be identified. First of all, it is highly relevant to point out that one of the main conclusions from the ICRC study was that: "violations are mostly the result of deliberate policies that either encourage or tolerate such behaviour". With this in mind, one could arguably make the case that compliance with IHL must also be a deliberate policy, and most of all an accepted policy, committed to by the leadership and translated onto its soldiers. Secondly, the study highlights it as crucial to make IHL a judicial and political issue rather than a moral issue. This is also pointed out by Bruderlein,

[125] ibid. p. 15-16
[126] ibid. p. 16
[127] There are a number of examples of situations where armed groups have established courts to maintain law and order in rebel-held territories. Relevant examples are the courts established by the FMLN in El Salvador, the CPN-M courts in Nepal and the LTTE courts in Sri Lanka. (See Sandesh Sivakumaran, "Courts of Armed Opposition Groups: Fair Trial or Summary Justice?", in *Journal of International Criminal Justice,* 7, 2009, pp. 489 – 513)
[128] Munoz-Rojas and Frésard, op. cit., p. 16
[129] ibid.

who argues that one needs to appeal to legal norms, rather than morality when working to increasing respect for IHL.

In 2010, one of the leading scholars within the field of IHL, Marco Sassóli, argued that one of the ways in which one can enforce international law against armed groups is "to enforce IHL directly and through international mechanisms against the armed group as a group".[130] According to Sassóli, this particular method is more innovate and less explored than the other two methods, state responsibility and individual criminal responsibility. Sassóli argues that the other two approaches have their advantages, but points to several reasons for why he chooses to focus on the use of international mechanisms against the NSAGs as a way to facilitate compliance. First of all, it is pointed out that governments often do not have the capacity to control or even influence NSAGs, and therefore, attribution is difficult to prove because specific instructions, or other forms of direction and control exercised by the state, remain secret.[131] Secondly, it is argued that for individual criminal responsibility to be an effective measure against violations of IHL, one must be certain that violations are enforced through a fair trial where the facts and their individual attribution have to be proved.[132] In regards to NSAGs however, it is put forth that criminal prosecution of members of an armed group by outside tribunals is less effective as a deterrent than is punishment by the group itself. Another important point made by Sassóli in regards to this particular point is the fact that for a member of an armed group, rejection by their own group, or their own social environment, has a greater stigmatizing effect than rejection by the international community or other states.[133] As mentioned, the idea that it is necessary to engage with armed groups to increase respect for IHL is according to Sassóli more innovative and less explored. However, it is argued that this idea has become increasingly respected. To demonstrate the accuracy of this statement, he points to the 2009 report by the Secretary General to the Security Council, where increasing compliance with IHL by NSAGs is referred to as one of the "five core

[130] Marco Sassóli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", in *International Humanitarian Legal Studies,* (2010), p. 9
[131] ibid.
[132] ibid. p. 10
[133] ibid.

challenges", and where ten out of 78 paragraphs talks about the need to engage and not only condemn NSAGs.[134]

I have argued that engagement efforts through legal tools with NSAGs can increase compliance with IHL because they translate obligation into specific commitment, because they appeal to legal norms, rather than moral, and lastly, because engagement efforts are widely acknowledged as a more modern and effective way of addressing NSAGs. However, it is important to take note that I do not argue that this alone will be effective, but rather that the goal of increasing NSAGs compliance with IHL may be achieved by combining this tool with the other mechanisms mentioned, such as training, orders and sanctions, and dissemination of IHL by external actors such as the ICRC. Also, it must be mentioned that it would be naïve to assert that this tool, in combination with other tools, provides a cure all apparatus that will end all violations of IHL committed by the vast number of NSAGs that operate at current. This will be discussed further at the end of the subsequent chapter, where I will put forth a threefold approach that contributes to a deeper understanding of *how* and *why* parallel legal tools can lead to strengthened respect for IHL, and examine for whom this tool may prove valuable.

[134] See *Report of the Secretary-General on the Protection of Civilians in Armed Conflict,* S/2009/277, 29 May 2009, paras. 38-47, also see Sassóli, op. cit., p. 10

5 A threefold approach

5.1 Purpose of chapter

As put forth in the introductory section of this paper, chapter five takes on a threefold approach to explore how parallel legal tools may facilitate compliance. The purpose of this chapter is thus to understand how, and why, this tool may potentially serve to increase respect for IHL. The first approach will probe into IHRL research and investigate the assumption that "legality matters" by discussing the value of signed agreements in generating compliance. The purpose of the first approach is thus to use reasoning from IHRL theory on commitment and compliance and discuss whether this is transferrable to NSAGs and IHL compliance. The second approach will build upon the assumption that "ownership matters", and analyse existing empirical knowledge on NSAGs and IHL, first through a general perspective, and secondly, through a more case specific perspective. The purpose of the second approach is to identify whether specific commitment to IHL by NSAGs through parallel legal tools may generate ownership of the law, which in turn may have an impact on compliance. The third approach will build upon the assumption that there is no "cure all", and use elements from the two first approaches to establish that group characteristics play a decisive role in the success or failure of parallel legal tools.

5.2 Legality matters

Through qualitative and quantitative research, Beth Simmons has published one of the most comprehensive studies on the effectiveness of international law on human rights practices. In "Mobilizing for Human Rights", Simmons claims that international legal arrangements have an important role to play in creating an atmosphere in which human rights are increasingly respected. In the following two sections, I will outline Simmons

research, as well as research from other scholars within the field of IHRL, on commitment and compliance with IHRL and discuss its applicability to NSAGs and IHL.

5.2.1 Commitment to IHRL and applicability to NSAGs and IHL

In "Mobilizing for Human Rights" Simmons attempts to answer the following question: "Why should a sovereign government explicitly agree to subject its domestic rights practices to the standards and, increasingly, the scrutiny of the rest of the world?"[135] Her prime theoretical assumption is that governments ratify treaties largely because they believe they can and should comply with them. However, as stated by Simmons, we do know that there is not a perfect correspondence between ratification and compliance, and therefore, it is essential to theorize this discrepancy.[136] For analytical purposes, Simmons argues for the usefulness of thinking about three categories of governments: (1) the sincere ratifiers, those that value the content of the treaty and anticipate compliance; (2) the false negatives, those that may be committed in principle but nonetheless fail to ratify; and (3) the strategic ratifiers, those that ratify because others do and prefer to avoid the criticism generated by non-ratification - also referred to as the false positives because they ratify for externally motivated strategic reasons.[137]

The first important finding from Simmons research is that governments ratify because they intend to comply, and the evidence presented by Simmons shows that ratification is more probable when a government believes that their preferences line up with the contents of the treaty.[138] On the other hand, Simmons findings show that nondemocratic governments have been systematically reluctant to commit themselves to the contents of legal arrangements concerning civil and political rights.[139] Regarding the matter of social rights, Simmons has found that governments who promote social values that fit uneasily with the norms reflected in these treaties are also systemically unlikely to commit.[140] This argument is exemplified by the case of how predominately Muslim societies have been

[135] Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics, Cambridge University Press,* 2009, p. 58
[136] ibid. p. 17
[137] ibid. p. 58
[138] ibid. p. 108
[139] ibid. p. 109
[140] ibid.

reluctant to ratify the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[141] The second finding is, according to Simmons, that "the nature of the legal system itself can create resistance against the ready acceptance of the international human rights regime".[142] It is argued that this is one of the consequences of trying to import externally negotiated political agreements into a locally and organically grown system of precedent, and Simmons believes that the nature of the legal system accounts for the false negatives – the supportive but uncommitted states.[143] The third important observation, as highlighted by Simmons, concerns the question on why governments would sign on to a treaty that they have no intention of complying with. It is argued that some governments engage in this so-called opportunistic ratification, but also, that they are conscious of when such insincere commitments should be made because of the short-term benefits associated with ratification. Simmons proposes a number of benefits brought about by ratification, such as a sense of joining the world's law-abiding states, avoiding criticism, gaining international praise, a strengthened claim to participate in future international rights discussions, and the support of some domestic constituency.[144] Insincere ratification however, is likely to be exposed, and accordingly, benefits gained are likely to materialize only in the short run.[145] Furthermore, Simmons argues that perhaps one of the most striking findings regarding ratification and commitment to IHRL is "the evidence that identifies strategic ratification with particular conditions".[146] Simmons research has shown that governments in countries that have never been democratic tend to ratify international human rights treaties later in their terms in office, which indicates a legacy motive consistent with short time horizons. Accordingly, Simmons argues that "the later a dictator ratifies, the more immediate the gratification and the more limited the likely repercussions".[147] On the other hand, Simmons could not detect any such behaviour for governments in democracies, whom it is argued are much more likely to be among the sincere ratifiers in the first place. The last important finding highlighted by Simmons is the extent to which governments tend to be

[141] ibid.
[142] ibid.
[143] ibid.
[144] ibid. p. 110
[145] ibid.
[146] ibid.
[147] ibid.

influenced by the decisions made by other governments in their region. It is stated that this is a very interesting dynamic of the international human rights regime, because regional effects surface in practically every measure of commitment – from ratification to reservations to the acceptance of optional protocols (OPs).[148] According to Simmons, her research shows that governments tend to time their ratifications – even coordinate their ratifications – to keep in step with other countries in their region.[149] Lastly, it is concluded that it is evident that government ratify human rights treaties for both sincere and strategic reasons. Before turning to discuss the question of compliance with international law, Simmons argues that governments "calculate the costs versus the benefits in the context of their values, region, national institutions, and time horizons".[150]

As pointed out, commitment is more likely to occur when intention to comply is present, and also, when the content of the treaty line up with the preferences of the ratifier. However, it seems that an assessment of whether intention was present at the time of ratification is difficult, both in relation to IHRL and states, and IHL and NSAGs. A simple statement of intention to comply with the given parallel agreement on IHL is not necessarily genuine, and as Simmons argues in relation to states and IHRL, there are three categories of ratifiers; the sincere, the false negatives and the strategic. When it comes to NSAGs and commitment to IHL, one could argue that the three categories are appropriate and fitting, though as mentioned, intentions are hard to analyze. First of all, NSAGs may be sincere when committing to a parallel legal agreement on IHL, indicating that the content of the agreement is valued, and compliance could be anticipated. As argued by Bangerter, "conviction that respect for IHL is the right thing goes a much longer way".[151] He points out that when the NDFP embarked on the CARHRIHL process at a time when they were "correcting errors", including harsh treatment of civilians for logistical purposes; they were still convinced that respect for IHRL and IHL was in their best interest.[152] In one of his articles on this issue, Bangerter puts forth that some NSAGs actually consider that in their struggle for better rights for the people, respecting IHL is important. In fact, it is suggested that groups with a serious

[148] ibid.
[149] ibid.
[150] ibid. p. 111
[151] Olivier Bangerter, e-mail correspondence, 8th of March 2011
[152] ibid.

commitment to IHL are more numerous than the cursory might suggest.[153] Furthermore, an analysis of the Sudan People's Liberation Movement/Army (SPLM/A), who was the first NSAG to sign the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action (DoC) in 2001, showed that humanitarian issues played a role in the signing of the DoC, in addition to other factors.[154]

With regard to the second category, the false negatives, those that may be committed in principle but nonetheless fail to ratify, one could argue that if a NSAG believes it lacks the capacity to implement the provisions in the agreement, it could cause them to fall into this second category. Antonia Handler Chayes and Abram Chayes argue that lack of capacity can be one of the reasons why governments violate treaty requirements and fail to comply, especially when it comes to the differences in resources between developing and developed countries.[155] It could be argued that if a NSAG sees that it is lacking capacity to effectively implement the provisions of a parallel agreement, it would avoid entering into a specific commitment to circumvent the risk of loosing face to those monitoring the agreement and to its own constituency. Sassóli argues that it is more difficult for NSAGs to implement IHL than it is for a government with a structure and institutions in place, for instance in regard to the difficulties some NSAGs face in ensuring compliance with IHL by its members.[156] Another example of lacking capacity could be related to the fact that to prosecute violations of IHL, the NSAG must comply with the judicial guarantees of IHL, and this may be difficult in practice.[157] This particular point is also connected to the third approach that will be dealt with at the end of this chapter, namely that group characteristics influence the potential of parallel legal tools.

A strategic ratification of a parallel legal tool, or what is referred to as a "false positive", by a NSAG is not necessarily a bad thing if it can contribute to generating rule-consistent behavior. A paper written by the ICRC for the International Humanitarian Law Research

[153] Bangerter, 2009, op. cit., p. 191
[154] Stefanie Herr, "Binding Non-State Armed Groups to International Humanitarian Law: Geneva Call and the Ban of Anti-personnel mines – Lessons from Sudan", *Peace Research Institute Frankfurt Report Number 95,* 2010, pp. 16 - 18
[155] Antonia Handler Chayes and Abram Chayes, "On Compliance", in *International Organization,* Vol. 47, No. 2*,* 1993, pp. 175 – 205 (p. 194)
[156] Sassóli, op. cit., p. 33
[157] ibid.

Initiative in 2004 argues that in the effort to increase respect for IHL by NSAGs, one may find it beneficial to appeal to strategic arguments. The leadership could be approached and counseled that compliance can lead to possible gains for the NSAGs, such as reciprocity by the state in treatment of detained members of the NSAGs, increased effectiveness and cohesiveness of the NSAGs itself, greater legitimacy as a political actors, increased likelihood of dialogue with the state, facilitation of humanitarian aid to areas affected by conflict and greater protection for civilians.[158] It was previously mentioned that one of the reasons why the SPLM/A entered into the DoC in 2001 was due to humanitarian concerns. However, the same analysis also showed that strategic reasons played a role, such as the realization that the use of mines had low strategic value, their dependence on financial and technical support, their internal and external need for legitimacy, transnational pressure and the costs of an eventual assumption of power.[159] Strategic argumentation to achieve ratification of a parallel legal agreement may thus be effective when dealing with NSAGs. If the NSAG in question is not convinced at the time of entering into the parallel legal agreement that compliance with the content of the agreement is at its best interest, strategic arguments from humanitarian agents may in the long-run convince the NSAGs that compliance is the best way to go. If increased compliance with IHL by NSAGs can be achieved by appealing to strategic arguments, though the commitment to a parallel legal tool in this regard is not necessarily as sincere as with the first category, it would be a positive contribution to improving the lives of those affected by conflict. However, NSAGs can also be true "false positives" that simply choose to enter into a parallel legal agreement because it sees the value of the short-term benefits it would give them. As argued by Simmons:

> The single strongest motive for ratification in the absence of a strong value commitment is the preference that nearly all governments have to avoid the social and political pressures of remaining aloof from a multilateral agreement to which most of their peers have already committed themselves.[160]

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[158] International Committee of the Red Cross, *Improving Compliance with International Humanitarian Law,* Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25th-27th, 2004, p. 7
[159] Herr, op. cit., pp. 13 - 23
[160] Simmons, op. cit., p. 13

Due to the general negative perception of NSAGs, parallel legal agreements to show support for recognized international norms may be entered into by NSAGs for the exact same reasons as Simmons argues is true for states, such as avoiding criticism, gaining international praise, a strengthened claim to participate in future international rights discussions, and the support of some domestic constituency. This behaviour, described as opportunistic ratification, is perhaps particularly important for NSAGs that have territorial control, or *de facto* control, of a certain area, because their dependence upon domestic support is quite strong. Though their failure to comply with the agreement is likely to be exposed sooner, rather than later, it may still be the case that they can thrive from the false commitment for a valuable amount of time. In 1998, the Liberation Tigers of Tamil Eelam (LTTE) made a number of pronouncements, of which some were directed to the United Nations Human Rights Commission, to respect IHL that did not lead to significant long-term changes.[161] These pronouncements however, are not equivalent to a parallel legal agreement, and it is impossible to predict whether a formal written agreement, rather than an oral pronouncement would have changed the outcome of this particular situation.

5.2.2 Compliance with IHRL and applicability to NSAGs and IHL

Commitment to legal agreements does not automatically produce treaty-consistent behaviour, and therefore, it is crucial to discuss for whom and under what circumstance legal agreements have a positive effect. As pointed out by Emilie M. Hafner-Burton and Kiyoteru Tsutsui, quantitative research has presented diverging views on the effectiveness of law. Hathaway and Hafner-Burton have argued that laws often do not work very well, Simmons suggests that there is hope in democratizing states, while Neunmayer argues that IHRL is most effective in already democratic states.[162] In "Mobilizing for Human Rights", Simmons attempts to answer the following question: "why – or under what conditions – do governments comply with their international human rights treaty commitment?" In order to answer this question, Simmons touches upon frequently

[161] Bangerter, 2009, op. cit., p. 192
[162] Emilie M. Hafner-Burton and Kiyoteru Tsutsui, "Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most", in *Journal of Peace Research,* Vol. 44, No. 4, 2007, p. 408

visited explanations for why states comply with international legal commitments. It is argued that the most common answer is "that treaties reflect the power and the interests of the states that take part in their negotiations, and add little to an understanding of why governments behave the way the do post-ratification". As argued by realists, governments may comply if a treaty does not engage a national interest, or comply if a treaty is consistent with national interests.[163] The main argument proposed by this school of thought, according to Simmons, is that governments will not honour international human rights treaties when it is not in their interest to do so.[164] Also, it is pointed out that realists would argue that treaties have little purchase over government behaviour because they are not likely to be enforced. The realist view would therefore suggest that compliance with IHRL could be achieved through enforcement. However, Simmons dismisses this suggestion by arguing that globally centralised enforcement is a chimera, and so far, there have been no evidence suggesting a strong and consistent interest in enforcing IHRL in other countries.[165] In the absence of central authority, theories of self-enforcing agreements are explored, arguing that international agreements rely on the interests of the parties themselves or the international community to keep the cooperation coming.[166] According to Simmons, much of the early thinking of cooperation theorists relied on the logic of self-enforcing agreements.[167] Compliance is theorised as something that is brought about by various mechanisms, such as reciprocity; the risk that another player will exit the agreement rather than tolerate cheating, and reputation; the risk of gaining a reputation as a unreliable treaty partner can influence the willingness of others to negotiate mutually beneficial agreements in a broader range of issues".[168] Simmons argues that this approach explains compliance by the ability to structure incentives in such a way as to make non-compliance too costly to consider in the absence of third-party enforcement. However so, Simmons dismisses the theory on self-enforcing agreements on the basis that the mechanisms proposed are completely inappropriate in the human rights area. With regards to the matter of reputational sanctions, it is argued that in relation to human rights, governments have typically been reluctant to impose costs on all

[163] Simmons, op. cit., p. 114
[164] ibid. p. 115
[165] ibid. p. 154
[166] ibid. p. 116
[167] ibid. p. 117
[168] ibid.

but the most egregious rights abusers.[169] It is also argued that international signalling models are not helpful, because they see treaties as screens but not constraints on state action.[170] Having rejected the main explanatory models for treaty compliance, Simmons suggests a theoretical reorientation of the compliance problem which is based on the idea that human rights matters the most for the citizens empowered by treaties. Thus, it is argued that the international explanations for international human rights compliance are not particularly plausible, but rather, one must look closely at domestic mechanisms. Accordingly, Simmons proposes three mechanisms through which treaties may have effects in domestic politics. First, described as a modest but not trivial mechanism, treaties may contribute to altering the national agenda. It is argued that "treaties can have an important influence on national politics simply because they alter the substantive priorities of the legislative agenda compared to what it would have been in the absence of an exogenously presented treaty obligation".[171] However, Simmons notes that agenda effects should be most noticeable in those that are regarded as sincere ratifiers, and it is suggested that the prime candidates for such effects are expected to be the Western democracies.[172]Also, agenda-setting effects are "likely to be most pronounced in polities in which legislatures tend to have relatively greater control over the national agenda". With regards to this mechanism, Simmons argues that the ideal type case where one can expect strong agenda-setting effects from treaty ratification is in a highly democratic parliamentary or presidential system.[173] Secondly, it is proposed that treaties can be used to litigate in national courts, which can influence the further development of rights jurisprudence, alter the political costs of non-compliance and stimulate the politics of rights mobilization going forward.[174] As with the latter however, this mechanism is reliant on certain preconditions, such as well functioning domestic courts. Simmons suggests that for litigation to be an important compliance mechanism, treaties have to be enforceable in domestic courts and litigation itself must be meaningful.[175] Thus, evidence shows that "treaties have stronger effects in countries with more independent judicial

[169] ibid. p. 154
[170] ibid.
[171] ibid. p. 149
[172] ibid.
[173] ibid. p. 149 – 150
[174] ibid. p. 150
[175] ibid.

systems", which according to Simmons "would be consistent with the litigation mechanism".[176] In states where courts are relatively free from political interference, treaties as legal instruments should have the greatest potential to influence policy.[177] Thirdly, it is argued that treaties can provide resources and incite social mobilization. However, in states where the government is so firmly ensconced that it can ignore social movements, or in states that are so democratic that social movements are unlikely to form in the first place, this third mechanism may not reach it intended purpose.[178] This kind of rights mobilization is according to Simmons quantitative research relatively low in autocracies because people are vary of the consequences, but it is also relatively low in democracies because treaties are largely redundant.[179]

Certainly, Simmons makes an interesting argument concerning the three mechanisms, however, considering how in a highly democratic systems the citizens may already enjoy human rights to a certain extent, her argument seems a bit too obvious. As argued by Hafner-Burton and Tsutsui, evidence suggests that human rights laws are most effective in stable or consolidating democracies or in states with strong civil society activism, which indicates that treaties may be failing in states that are in most need of reform.[180] The authors conduct a more narrow analysis on the effectiveness of IHRL than Simmons, focusing on the worst offenders, and pursue the argument that treaties have failed to change the world's worst abusers – even though they have been the targets of the human rights regime from the beginning.[181] It is proposed that theories of compliance are "to some extent divorced from research", because current studies arguing that treaties work in democracies are largely ignoring the dynamics of compliance. First, it is suggested that we must consider what we know about effectiveness, and it is argued that despite the diverging views on the effectiveness of treaties, current scholarship implies that human rights laws matter least among governments that were the primary targets of the legal regime – repressive, autocratic states without internal advocates for reform.[182] Second, the authors propose that one must consider what we know about the dynamics of treaty

[176] ibid.
[177] ibid.
[178] ibid. p. 19
[179] ibid. p. 152
[180] Hafner-Burton and Tsutsui, op. cit., p. 407
[181] ibid.
[182] ibid. p. 408

compliance, and it is argued that conformity with international law is a domestic political process. Hafner-Burton and Tsutsui propose that efforts to implement IHRL are dependent on political will and political capacity, which is probably hardest to build in repressive non-democracies.[183] Furthermore, it is highlighted that the extensive amount of empirical research has not effectively analysed whether treaty effectiveness fluctuates over time. Scholars such as Neunmayer and Keith found no direct empirical relationship between ratification of IHRL treaties and changing behaviour the same year as ratification.[184] Also, in 2005, Hafner-Burton found no significant association between ratification of any of the core UN human rights laws and protection of people from political terror one year after ratification.[185] The authors point out that all three of these studies ignore the basic theoretical argument that soft laws generally take longer to be implemented.[186] Other researchers, such as Hathaway in 2002 and Hafner-Burton and Tsutsui in 2005 have examined this dynamic by analysing the duration in years since ratification of the core UN human rights laws and behaviour consistent with the treaties. In testing the proposition that human rights treaties are more effective in bringing about compliance as the years go on, they found no evidence.[187] It is argued that neither of these studies are good tests of dynamic theories of international law, because with regards to human rights, learning or capacity-building is unlikely to take place at a steady or uniform pace over time.[188] In following, the authors advance four propositions about repressive governments compliance with international human rights law: (1) an impressive cascade of norms has taken place in the realm of international justice; (2) the problem is not just a methodological one; treaty commitments to the pursuit of justice have no clear or independent effects on most very repressive state's behaviours, either immediately or, more importantly, long into the future; (3) recent findings that treaty effectiveness is conditional on democracy and civil society do not explain the behaviour of the world's

[183] ibid. p. 409
[184] Referred to in Hafner-Burton and Tsutsui, op. cit., p. 409 (Eric Neunmeyer, "Do International Human Rights Treaties Improve Respect for Human Rights?", in *Journal of Conflict Resolution,* 49 (6), 2005, pp. 925 – 953, also see Linda Camp Keith, "The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behaviour", in *Journal of Peace Research,* 36 (1), 1999, pp. 95 - 118
[185] Referred to in Hafner-Burton and Tsutsui, op. cit., p. 409 (Emilie Hafner-Burton, "Trading Human Rights: How Preferential Trade Arrangements Influence Government Repression", in *International Organization,* 59 (3), 2005, pp. 593 - 629
[186] Hafner-Burton and Tsutsui, op. cit., p. 409
[187] ibid.
[188] ibid.

serious repressors; and (4) most realistic institutional reforms and unlikely to help much.[189]

With this pessimism in mind, it is crucial to revisit an important element, one that is highlighted as Simmons most important conclusions regarding compliance, and perhaps one of the most relevant findings as for the subject matter of this paper, namely the idea that "treaties have significant effects, but they do not have the same effects everywhere".[190] As pointed out by Simmons, and as highlighted previously, it is quite clear that one can separate between the sincere ratifiers and the strategic ratifiers. It is argued that one should expect the sincere ratifiers to have better human rights practices than the latter.[191] However, Simmons believes that in order to argue that ratification affects ongoing practices of policy and rights; one must develop a theory of how treaties matter in the politics of both willing and resistant states.[192] Through qualitative and quantitative research, Simmons proposes three types and argues that treaties have different effects on 1) stable democracies, 2) stable autocracies and 3) states that are in between the two latter categories.[193] She argues that political institutions in stable democracies, such as Norway, will not change much due to a political human rights treaty commitment. In states that fall into this category, the treaties may be readily accepted, but they are often redundant.[194] Simmons bases this argument on the idea that in stable democracies, political rights are - and have been for a while - largely protected, and therefore treaty ratification adds very little political activity to what is already considered as guaranteed protections.[195] On the other hand, in stable autocracies, treaties are largely irrelevant because potential political actors simply do not have the resources to effectively demand change.[196] However, according to Simmons, there is a third type, namely those states that are neither stable democracies, nor stable autocracies. These countries are generally characterised by unstable political institutions, and it is argued that in these states, even the most politically

[189] ibid. p. 409 - 410
[190] Simmons, op. cit., p. 16
[191] ibid. p. 113
[192] ibid. p. 113
[193] ibid. p. 16
[194] ibid.
[195] ibid.
[196] ibid.

sensitive human rights treaties have significant positive effects.[197] Simmons reasoning regarding typology, and the central argument that treaties have significant effects, but they do not have the same effects everywhere, is most interesting in the context of this thesis. This point will be revisited in section 5.4.

In the article "On Compliance", Antonia Handler Chayes and Abram Chayes argue that the realist assumption asserts that states decide whether to comply or not through a calculation of costs and benefits, implying that noncompliance is a premeditated and deliberate violation of a treaty obligation.[198] Before presenting what they argue is the explanation for non-compliant behaviour, Handler Chayes and Chayes refer to the area of international human rights, and state that it happens that states enter into international agreements to appease domestic or international constituencies although they have little intention of implementing the agreement.[199] This is consistent with the argument brought forth in the latter section on false positives. A rather interesting suggestion made by the authors is that only infrequently does a treaty violation fall into the category of a "wilful flouting of legal obligation". If deliberate violations of treaty obligations are rare, what can explain non-compliant behaviour? Handler Chayes and Chayes discuss three circumstances that lie at the root of violations, and that are, according to them, infrequently recognized in discussions on compliance: 1) ambiguity and indeterminacy of treaty language, 2) limitations on the capacity of parties to carry out their undertakings, and 3) the temporal dimension of the social and economic changes contemplated by regulatory treaties.[200] In relation to NSAGs, circumstance two is of particular interest, as empirical studies suggest that many NSAGs fail to comply with IHL obligations due to a lack of capacity. In this regard, capacity could for instance be the lack of the command structure it requires to keep soldiers under a "tight leash" and demand that they follow certain orders that are not in violation of IHL principles. A destructured group with unclear leadership, or with untrained and inexperienced soldiers is another example of a situation where limitations on the capacity of the party could lead to IHL violations. Capacity in relation to NSAGs could also be the lack of knowledge of the principles of

[197] ibid.
[198] Handler Chayes and Chayes, op. cit., p. 187
[199] ibid. p. 188
[200] ibid.

IHL. NSAGs that operate as guerrilla groups, moving fast and often with no set headquarters may find it difficult to uphold IHL principles relating to the treatment of prisoners or detainees. AP II, Article 5, part 2 (b) states that detainees shall be allowed to send and receive letters and cards, which may prove difficult in practical terms if one is located in the midst of the jungle. Furthermore, CA 3 to the Geneva Conventions, which applies in NIACs, states that: "the sick and wounded shall be collected and cared for".[201] Unless the particular group had a doctor present at all time, or was properly trained in medical aid, it would arguably be difficult for the group to fulfil the requirements that enemy combatants receive medical treatment for wounds or injuries inflicted during battle. In guerrilla warfare, instead of spending time and energy trying to move an injured enemy combatant so that he or she can receive medical treatment, soldiers would perhaps contend that shooting him or her is the rational thing to do because they lack the capacity to transport the injured soldier. The luxury of military helicopters that are able to transport wounded soldiers hundreds of kilometres in a matter of minutes, rather than days, is arguably not easily accessible to most NSAGs.

Handler Chayes and Chayes argue that there are differences in capacity to implement between states, depending on whether they are classified as developing or industrialised states. They refer to how four years after the Montreal Protocol was ratified; the great majority of non-compliers were developing states that needed technical assistance from the treaty organization in order to implement the protocol.[202] In situations where states are unable to implement or uphold international legal agreements, it may be due to lack of scientific, technological, bureaucratic or financial capacity. In situations where NSAGs fail to respect applicable IHL, one may find the same to be true for NSAGs that want, but lack capacity, to respect the principles of IHL that they are legally bound by.

[201] GC, CA3 (2)
[202] Chandler Hayes and Hayes, op. cit., p. 194

5.3 Ownership matters

In 2010, a UN report noted that:

> whether engagement was sought with armed groups in Afghanistan, Colombia, the Democratic Republic of the Congo, the occupied Palestinian territories, Pakistan, Somalia, Sudan, Uganda, Yemen or elsewhere, experience shows that lives can be saved by engaging armed groups in order to seek compliance with international humanitarian law.[203]

The above quote demonstrates how inclusion and engagement with NSAGs to promote compliance with IHL has become relatively accepted on a global scale, and shown through experience to be practically efficient. The following section will discuss how engagement with NSAGs to generate ownership of IHL is crucial to ensure compliance by putting forth two perspectives; the general and the case specific. In this regard, ownership of IHL can be defined as the end-result of a process, in which the NSAG is voluntarily, and willingly, engaged in the creation of the applicable rules, familiar with the norms that they are expected to comply with, committed formally and personally to upholding the provisions in the agreement, and responsible for effectively implementing the rules in their conduct of hostilities.

5.3.1 The general perspective

As previously demonstrated, there are a variety of explanations for NSAGs non-compliance with IHL, and consequently, scholars and practitioners have proposed a number of mechanisms that may lead to compliance. However, in the last few years, one of the arguments most frequently invoked when attempting to explain NSAGs non-compliance with IHL is the following: IHL remains primarily state-centric. It is discussed, created and ratified by states, and still, only a small portion of IHL applies to internal conflicts. Dawn Steinhoff addresses the nature of IHL in an article discussing state legitimacy concerns with engaging NSAGs, and argues that: "the laws that regulate the

[203] United Nations Security Council, SC/10089, 22nd of November 2010, http://unispal.un.org/UNISPAL.NSF/0/7A578BB307CB3E98852577E4005180DA, consulted August 2011

conduct of the parties during conflicts (…) still reflect the state-centric international system. Only portions of the laws of war (...) apply to internal conflicts".[204] This particular issue is addressed in the previously referenced report by HPCR and HEI which argues that "foremost amongst these (challenges) is the fact that states are the building blocks of the international system and, as such, remain in control of international law and policy-making".[205] Furthermore, the President of the ICRC, Dr. Kellenberger points out that: "ultimately, only states can influence the evolution of international law".[206] The fact of the matter is that NSAGs cannot become parties to treaties and cannot influence the law that they are essentially legally bound by. The contention that the state-centric nature of IHL is of hindrance to increasing compliance by NSAGs is not only furthered by scholars and practitioners, but also by NSAGs themselves. According to the ICRC, NSAGs have denied the applicability of IHL by refusing to recognize a body of law created by states, or by claiming that they cannot be bound by obligations ratified by the government against whom they are fighting.[207] As mentioned in the introductory section of this thesis, one of the arguments for application of IHL to NSAGs is that they are bound as citizens of the state. Considering the fact that NSAGs are, in most cases, challengers to the power of the state, it seems unlikely that one could encourage compliance from NSAGs by appealing to this argument.

In a policy brief commissioned for the UN Secretary General's High Level Panel on Global Security, David Capie and Pablo Policzer argue that NSAGs present a complex policy challenge. It is stated that:

> The traditional instruments to curb human rights and humanitarian abuses were developed for use against states. Because states have diplomatic relations with other states, can sign treaties and be parties to major international institutions, a toolkit of familiar instruments is available to deal with them when they fail to uphold international standards. These range from quiet diplomacy through to more coercive instruments such as economic sanctions, and – ultimately – the use of force.[208]

[204] Steinhoff, op. cit., p. 299
[205] Report by HPCR and HEI, op. cit., p. 29
[206] Kellenberger, op. cit., p. 6
[207] Mack, 2008, op. cit., p. 11
[208] David Capie and Pablo Policzer, "Keeping the Promise of Protection: Holding armed groups to the same standard as states", *Working Paper 3,* Armed Groups Project, January 2004, p. 1

Capie and Policzer highlight that within this state-centric framework, NSAGs are increasingly being recognized as key players in armed conflicts, and the humanitarian and human rights communities are starting to hold NSAGs to the same standard behaviour as states. They argue that although more is now expected from armed groups, "our policy toolkit has not kept pace with the changing time". Furthermore, they point out that: "if armed groups are to be held accountable for violations of humanitarian norms, they have to be assigned responsibility for ending them".[209] Through parallel legal tools, one creates a functionally similar, though not equivalent in scope or legality, tool that addresses NSAGs directly and contributes to increasing NSAGs ownership of the law. As blatantly put in an e-mail from Dr. Olivier Bangerter, who has met, spoken with and engaged with a large number of NSAGs and who currently holds a position at the ICRC as advisor for the dialogue with armed groups: "I would draw the causal link between ownership of the law and compliance, because you cannot have compliance without some sort of ownership".[210] Through engaging with NSAGs, one addresses the problem of non-compliance directly, and assigns greater responsibility and accountability to NSAGs for upholding the law. The ICRC has suggested that:

> better accountability by armed groups for international humanitarian law might be achieved by granting them an opportunity to express their consent to be bound by the rules, something not provided for in existing IHL treaty law. The express consent would provide evidence of willingness to comply and could make a tremendous impact in terms of dissemination.[211]

In practice, the express consent could be a parallel legal tool such as a special agreement committed to and signed by the NSAG. By participating in the creation of the agreement, acknowledging the applicable rules, and making a genuine commitment to complying with the provisions in the agreement, the NSAG would get a greater sense of ownership for the law as compared to what the traditional state-centred framework provides. According to Sassóli, this involves a commitment and obliges leaders to think about what the

[209] Capie and Policzer, op. cit., p. 1
[210] Bangerter, 08.03.2011, op. cit.
[211] ICRC, *Improving Compliance with International Humanitarian Law: ICRC Expert Seminar,* Report prepared by the ICRC, Geneva, October, 2003, p. 21, http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2003-oct-icrc.pdf , consulted 03.03.2011

abstract rules mean in practice for their way of fighting and translates the legal provisions into instructions that are understandable for the group in question.[212] The idea that ownership of the law is connected to rule-consistent behavior is arguably not revolutionary. As pointed out by Professor René Provost, director at the McGill Centre for Human Rights and Legal Pluralism and contributor to "On the Edges of Conflict project", this perspective is "frankly that of legal pluralism, (…) which sees a continuum between formal legal processes leading to the adoption of rules and the gradual construction of legal meaning through every type of human interaction".[213] Furthermore, he argues that: "for legal norms to have more than theoretical meaning, individuals and groups must commit to hem, either individually or collectively, publicly or privately".[214] As such, one could argue that parallel legal tools serves as a mechanism for NSAGs to develop a sense of IHL as having more than theoretical meaning, but rather, a practical and understandable meaning.

Steinhoff's article also furthers the importance of engaging NSAGs in IHL processes. She argues that through negotiations, states and armed groups can agree to apply IHL to conflict, in whole or in part, which in turn provides greater protections to vulnerable groups and captured combatants.[215] Furthermore, she acknowledges the difficulty of carrying out such negotiations due to the fear of states that "non-violent engagement would legitimize the armed group".[216] States have manifested their worries through less regulation of internal conflicts under IHL and have traditionally argued that the bases of their worries are the legal consequences of bestowing legitimacy upon non-state actors.[217] Steinhoff's argument is supported by Capie and Policzer, who argue that NSAGs must be addressed directly in order to hold them accountable for violations of humanitarian norms, but acknowledges that states are reluctant to permit this because they are "wary of anything that might confer legitimacy on their enemies".[218] Thus, the challenge seems two-folded: 1) how can one most effectively engage NSAGs in order to increase respect

[212] Sassóli, op. cit., p. 32
[213] René Provost, "Statements of Principles to Enhance Compliance of Non-State Armed Groups with International Humanitarian Law", in *On the Edges of Conflict: Policy Papers,* April 2010, p. 10
[214] ibid.
[215] Steinhoff, op. cit., p. 297
[216] ibid.
[217] ibid.
[218] Capie and Policzer, op. cit., p. 2

for IHL while simultaneously 2) avoid states legitimacy concerns surrounding such engagement. As such, the tool discussed in this thesis may seem like a correct response to this two-fold challenge, because it effectively engages NSAGs without demanding recognition from the state that their resistance is challenging.

5.3.2 The specific perspective: the Deed of Commitment

Chapter three provided a few practical examples of parallel legal tools, and mentioned that one of the most innovative mechanisms was advanced by the humanitarian organization Geneva Call, who since its creation in 2000 has engaged over 60 NSAGs in 17 countries in a landmine ban.[219] The initiative was inspired by the adoption of the Ottawa treaty[220] in 1997, and though this served as a milestone in arms regulation, it is, like other international treaties, developed, written and directed towards states. Geneva Call argues that because NSAGs cannot negotiate or become parties to international treaties such as the Ottawa treaty, their incentives to respect the norms of the treaty are limited. It is also their contention that the "mechanism provided under the Convention to enforce the ban - criminalization of prohibited acts - is not effective against NSAGs".[221]

In order to effectively respond to this challenge, Geneva Call developed a mechanism entitled the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, hereinafter called the DoC. The purpose of the DoC is to allow NSAGs, who were not including in the process leading up to the Ottawa Treaty, and who are not eligible to enter into the Ottawa Treaty, to explicitly commit to and undertake to observe its norms.[222] At the time Geneva Call released its

[219] Geneva Call, "Engaging armed non-state actors in a landmine ban", *The Geneva Call Progress Report (2000 – 2007),* 2007, p. 16
[220] Officially known as the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, but also called the Ottawa Treaty or the Mine Ban Treaty
[221] Geneva Call, *Anti-personnel mines and armed non-state actors,* http://www.genevacall.org/Themes/Landmines/landmines.htm, consulted May 2011
[222] Geneva Call, *Anti-personnel mines and armed non-state actors,* http://www.genevacall.org/Themes/Landmines/landmines.htm, consulted May 2011

2010 annual report, 41 NSAGs[223] had signed the DoC, and the overall assessment shows that "signatories are abiding by the core prohibitions and are undertaking mine action activities and/or facilitating access by specialized organizations".[224] It is argued that the "innovate methodology [to achieve increased protection for civilians] serves as a unique entry point towards engagement with armed non-state actors".[225] Furthermore, the organization states that the DoC "provides armed non-state actors with a standard, universal and recognizable mechanism by which they formally pledge to respect humanitarian norms and are held accountable for their commitments".[226] In order to hold the NSAGs accountable, the DoC is countersigned by the Government of the Republic and Canton of Geneva, which acts as its custodian.[227] Geneva Call argues that there is a need for engagement with NSAGs to increase respect for humanitarian norms and argues that:

> while NSAGs play an increased role in contemporary warfare and are responsible for many abuses, the State-centric nature of international law still poses challenges for addressing the behavior of NSAGs. First, the mechanisms to enforce both IHL and IHRL remain mostly focused on States. Second, NSAGs cannot negotiate or become parties to international treaties, and there is no consensus on whether they can contribute to the formation of international customary law. Therefore there is little opportunity for NSAGs to express their adherence to IHL and IHRL norms. NSAGs may not feel bound by rules they have not been involved in making, nor are allowed to sign on to.[228]

The latter quote demonstrates how Geneva Call has recognized the need for alternative mechanisms to ensure greater respect and compliance for IHL and IHRL, and support the idea that non-compliance may come about as a result of a lack of ownership of the law.

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[223] 41 NSAGs in Burundi, Somalia, Sudan, Western Sahara, Burma, India, Philippines, Turkey, Iran and Iraq have become signatories to the DoC (Geneva Call, *Signatories to the Deed of Commitment banning anti-personnel mines (at date 41),* http://www.genevacall.org/resources/list-of-signatories/list-of-signatories.htm, consulted October 2011)
[224] Geneva Call, *Annual Report 2010,* p. 8, http://www.genevacall.org/resources/annual-reports/f-annual-reports/2001-2010/gc_annual_report_2010.pdf, consulted August 2011
[225] Geneva Call, *Annual report 2010,* op. cit., p. 7
[226] ibid.
[227] ibid.
[228] Geneva Call, *About us,* op. cit.

According to Mary Foster, the prevailing opinion among those participating in the conference that led up to the DoC in Geneva in 2000, which included academics, activists, representatives of NGOs, representatives of governments and NSAGs, was that in the effort to ban landmines, one must address non-state as well as state use of mines. The DoC involves NSAGs in the effort to combat the landmine problem by allowing them to become parties and signatories and by providing them with an opportunity to contribute to the creation of humanitarian norms. As mentioned in the methodology chapter, interviews with NSAGs would have provided this thesis with an interesting dimension, but in lack thereof, I will refer to some of the statements made by representatives from NSAGs that have committed to the DoC. Hkun Okker, chairperson from the Pa'o Peoples Liberation Organization (PPLO) and the Pa'o People Liberation Army (PPLA) in Burma specifically stated that they were grateful to Geneva Call for "recognizing our small groups as having a role to play and approaching us on this important issue".[229] Also, the Congress of nationalities for a Federal Iran (CNFI) states that they recognize the DoC "as a specific mechanism enabling non-State actors to commit to the mine ban and as a necessary complement to the Mine Ban Treaty".[230] The two statements demonstrate an appreciation to Geneva Call for recognizing NSAGs as actors on the international arena, and illustrates how inclusion in IHL, rather than exclusion, is valuable to strengthen protection for those affected by armed conflict. As argued by Miriam Coronel Ferrer: NSAGs must be engaged because "they are part of the problem, and they are part of the solution".[231]

Though the latter has provided brief introduction to the DoC, and suggests that the DoC has been a positive contribution to the development of alternative mechanisms for NSAGs, it does not provide a deeper understanding of the effectiveness of the tool. In order to appreciate its value, one needs to go back to the issue of ownership as an important factor in increasing compliance. One could argue the DoC is a true practical

[229] Statement of the PPLO/PPLA at the occasion of signing the DoC, 16th of April, 2007, http://www.genevacall.org/resources/nsas-statements/f-nsas-statements/2001-2010/2007-16apr-pplo.pdf, consulted August 2011

[230]The Congress of Nationalities for a Federal Iran, *Resolution supporting the ban on anti-personnel mines*, 3 April 2009http://www.genevacall.org/resources/nsas-statements/f-nsas-statements/2001-2010/2009-03apr-cnfi.pdf, consulted August 2011

[231] Miriam Coronel Ferrer, "Conference Rational and objectives", in "Engaging Non-State Actors in a Landmine Ban", *Full Conference Proceedings, Geneva 24th and 25th of March 2000,* p. 11, accessible through http://www.genevacall.org/resources/conference-reports/f-conference-reports/pre/gc-2000-24mar-geneva.pdf

example of putting in place a genuine commitment to humanitarian norms, and what Bangerter has described as creating "accepted standards, instead of what is often considered as imposed standards".[232] From the beginning, this thesis has proposed that the one of the main factors impeding NSAGs from gaining greater respect for IHL is the state-centric nature of the IHL framework, and the lack of mechanisms that addresses the gap between the practical reality and the legal reality. As argued by Sassóli, to ensure that NSAGs comply with IHL, it is a requirement to increase their sense of ownership over this law.[233] As mentioned several times throughout this paper, the matter of whether NSAGs are legally obliged to comply with IHL has been settled. However, as pointed out, in practice, it is always easier to obtain respect of rules by getting acceptance of that rule by those whom it is addressed to, "rather than by arguing in favor of sophisticated legal constructions".[234] In this regard, Sassóli makes a persuasive argument by referring to an example from El Salvador, where the FMLN would not let the ICRC evacuate wounded enemies because they did not consider themselves bound by AP II, unless it had concluded an agreement to this effect.[235] Thus, the main argument furthered is that parallel legal agreements matter because they put in place specific commitments and because it has been shown that they have the ability to influence the behavior of NSAGs. The DoC has been widely recognized as a successful initiative, and is a true example of how ownership matters in practice.[236]

5.4 No cure for all

It was previously asserted that the concept of NSAGs is in itself extremely hard to discuss in a general sense, because no single definition can be ascribed to it. When trying to answer what constitutes a non-state armed group, one will be left with a variety of answers that are likely to cause more confusion than enlightenment. The complex and changing nature of NSAGs have led scholars and practitioners to focus their efforts on

[232] Bangerter, op. cit., p. 196
[233] Sassóli, op. cit., p. 29
[234] ibid.
[235] ibid. (referring to Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 17)
[236] *Report of the Secretary-General on the Protection of Civilians in Armed Conflict,* op. cit., para. 43

trying to categorize NSAGs according to their main characteristics. Assessing the main characteristics of a group is particularly highlighted as an important preliminary step to dialogue or negotiations, as group characteristics are likely to influence the fruitfulness of that engagement.[237] In 2006, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) published a manual and a set of guidelines to provide guidance to practitioners on how to prepare for and conduct humanitarian negotiations with NSAGs. It is argued that "each armed group is different", and therefore, one must consider the characteristics of NSAGs in order to increase the efficiency and the desired outcomes of the negotiations.[238] Consequently, characteristics of NSAGs is divided into eight separate categories: (a) motivations; (b) structure; (c) principles of action; (d) interests; (e) constituency; (f) needs; (g) ethno-cultural dimensions; (h) control of population and territory.[239] The first category encourages practitioners to consider the original motivation for the formation, behaviour and conduct of the armed group. It is put forth that in terms of founding motivations, NSAGs usually fall into three categories: *reactionary, opportunistic or ideological.*[240] The NSAGs motivation at the time of its formation may however have changed over time, and it is therefore necessary to assess the NSAGs current motivation. Secondly, the structure of the armed group is likely to affect negotiation efforts. It is argued that: "the organization's leadership structure has implications for the ability to secure commitment and implementation from the leadership to any agreed outcome of negotiations".[241] One must also attempt to assess the power structure of the NSAG as well as the level of autonomy among regional/local sub-commanders.[242] Thirdly, humanitarian actors should understand the NSAGs core principles, their principles of action. Mc Hugh and Bessler suggest that an NSAG may be guided by principles of guerrilla warfare; religious, ideological, political or cultural principles; or purely economic objectives. Understanding and learning about these principles may, according to the authors, improve the likelihood of successful

[237] Bruderlein, op. cit., p. 8
[238] Gerard Mc Hugh and Manuel Bessler, "Humanitarian Negotiations with Armed Groups: A Manual for Practitioners", *Produced by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) in collaboration with members of the Inter-Agency Standing Committee (IASC),* 2006, p. 17
[239] Mc Hugh and Bessler, op. cit., p. 17
[240] ibid.
[241] ibid. p. 18
[242] ibid.

negotiations.[243] Next, it is proposed that one should have an understanding of the NSAGs interests, particularly because humanitarian actors may use this information to highlight areas of shared interest.[244] Though Mc Hugh and Bessler focus on humanitarian negotiations in general, this particular category may perhaps be valuable for those seeking to improve NSAGs compliance with IHL. If negotiators are able to identify NSAGs interest in increasing its own legitimacy among the local population, one may perhaps be successful in convincing the NSAG that adherence to IHL is vital. If this interest is genuine, and the humanitarian actor is successful in convincing the NSAG that adherence to IHL may increase its legitimacy, the NSAG may be more prone to accepting its legal obligations. The fifth category urges humanitarian negotiators to assess whether the NSAG claims a legitimate constituency, and argues that many NSAGs "may profess to act on behalf of a particular group (…) when in many cases the group has no basis for claiming a mandate from the purported constituents".[245] Sixth, Mc Hugh and Bessler put forth that one must separate the NSAGs needs from its interests, and "be attuned to the potential for the existential of functional needs (e.g. financial needs) of the armed group to influence the negotiation strategy of the group". The last two categories argue that when attempting to characterize the NSAGs, one must assess whether certain cultural, religious or ethnic characteristics may influence the armed groups strategy/approach, as well as the extent of control exerted by the armed group over a given population or territory.[246]

Mc Hugh and Bessler manage to provide a valuable framework that rests on the notion that NSAGs as a whole cannot be defined, but rather, they can be differentiated according to their main characteristics. However, the most interesting aspect related to categorizing NSAGs is the idea that for IHL norms to be effectively implemented, and respected, certain group characteristics are indispensable. As Olivier Bangerter argues: "we have to recognize that some armed groups have goals that in themselves amount to violations of IHL, or wilfully choose to violate IHL as a part of their way of waging

[243] ibid.
[244] ibid. p. 19
[245] ibid.
[246] ibid. p. 20

war".[247] Though these NSAGs are interesting purely because they pursue their goals through tactics that are extremely brutal and violent, they are arguably not relevant within the framework of this thesis because they simply do not possess the characteristics necessary for legal instruments to work. I will now proceed to discuss this argument.

As put forth by Bangerter, one must recognize that some NSAGs are simply not willing or able to adhere to IHL. He argues that where there is no genuine commitment by the NSAG to adhere to IHL, the application of any of the measures described in this thesis that constitutes as a parallel legal tool will not result in significant and sustainable improvement of the situation on the ground, in terms of respect of IHL.[248] In following, one could argue that it is presupposed that for parallel legal instruments to function correctly, the group must not only have the capacity to comply with IHL, but also express their willingness to adhere to IHL for any possible reason. However, the argument that NSAGs can and want to comply with IHL might seem strange considering the generally negative perception of NSAGs conduct in civil wars. As pointed out by Bangerter, "the general attitude towards armed groups in Western society is quite negative and a number of people question their ability to respect IHL".[249] He argues that this conceptualisation of armed groups as violators of IHL is grounded in three claims: 1) NSAGs are by definition de-structured, 2) NSAGs are by trade the worst violators of IHL and 3) NSAGs pay no attention to IHL.[250] Bangerter proceeds to refute these three claims by arguing that: first, to function as a group and not as a mob, an armed group needs to have an organisation of some kind. Lack of organisation is fatal in the face of adversaries, whom most armed groups are facing; and armed groups need to organise, or face quick destruction.[251] Second, by referring to data from Uganda, Peru and Mozambique[252], Bangerter argues that "we should simply acknowledge the fact that where reliable date exists, it is impossible to predict which party will commit most abuses. Any Party to a

[247] Bangerter, op. cit, p. 196 (According to Bangerter, 'ethnic cleansing' by armed groups as illustrated in the former Yugoslavia is a relevant example of situations in which the armed group has goals that in themselves amount to violations of IHL)
[248] ibid.
[249] ibid. p. 188
[250] ibid.
[251] ibid. p. 189
[252] In Guatemala, post-conflict investigations credit state forces with 93 % of violations in Uganda from 1981 -1985, the Ugandan NRA is credited with 17 % while the government is charged with 45 %, but in Mozambique, the Mozambican RENAMO was charged with 82 % of violations. (Bangerter, op. cit., p. 190)

non-international conflict, regardless of its legal status, can commit violations of IHL.[253] Thirdly, Bangerter asserts that "there is no fixed pattern" as to whether NSAGs pay attention to, or care about, IHL.[254] The relevant point to be made here is the fact that NSAGs are not by definition sadistic, unruly and disorderly. Some may be, but others may not be, and it would therefore be incorrect to paint such a general picture of NSAGs, and assume that they are unable or unwilling to comply with IHL. Inadvertently, it is necessary to point out that if parallel engagement instruments are to be effective, non-compliance with IHL must not be a result of a lack of will, but rather due to lack of capacity, or the belief that the rules are imposed by states and therefore not practically applicable. This would indicate that the issue of ownership or recognition as a party to the conflict becomes essential to promoting compliance. Because of the fact that some groups operate with strategies that are inherently in violation of IHL, group characteristics is obviously an important aspect of application, and therefore, it is stated in AP II, article 1(1) that the protocol shall apply to:

> 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.[255]

As demonstrated earlier, the elements of territorial control and group structure is also highlighted in the OCHA manual. In terms of group structure, the element of command structure is particularly important because it indicates that combatants are inclined to follow instructions from superiors. Claude Bruderlein argues that "a basic command structure", is one of the minimal organizational standards that would make contact worthwhile. NSAGs with a basic command structure have combatants that "are organized according to a unitary command structure and follow its instructions. The commanders have at least a minimum control over the conduct of their combatants, particularly regarding the group's behaviour towards civilians".[256] Furthermore, Bruderlein argues that any "dialogue on humanitarian issues with fragmented groups and groups with strong internal dissension are likely to be unproductive, if not

[253] Bangerter, op. cit., p. 191
[254] ibid.
[255] Additional Protocol II, Article 1 (1)
[256] Bruderlein, op. cit., p. 8

counterproductive".[257] One could argue that a NSAG with basic command structure is an easier target in terms of promoting compliance with IHL through parallel legal tools because commitments made by the leadership would influence the groups as a whole. If one manages to secure genuine commitment to such agreements from the military commanders or political leadership, there is a higher probability that this commitment will be transferred onto the combatants, both in terms of acceptance and enforcement. In addition to having a basic command structure, Bruderlein argues that the second main characteristic is "the use of violence to achieve political ends". In this context, violence is "often employed not as a military tactic aiming for a takeover, but as a means to render the political status quo unsustainable". The violence may take different forms, however, the "extent to which combatants are allowed to engage in independent criminal activities indicates how well a group's leader control it".[258] The third main characteristic, according to Bruderlein, is "independence from state control". It is argued that the issue of state control is problematic, because in many situations it is difficult to distinguish between autonomous pro-government forces, such as paramilitary groups in Colombia, and government-controlled paramilitary forces, such as the South Lebanese Army in Israeli-occupied Lebanon. However, as with the latter, "the degree of the leader's control over the conduct of combatants remains an important indicator of the independence of the group".[259] Bruderlein argues that practitioners generally encourage caution with groups whose characteristics fail to meet one or more of the above-mentioned criteria. The NSAGs that fail to meet the basic command structure criteria, such as irregular and disorganized combatants, criminal gangs, bandits and looters, are according to Bruderlein "unlikely to engage constructively in a dialogue on humanitarian issues".[260] Thus, it can be argued that possession of group characteristics such as command structure, organisation and territorial control, would increase the potential of parallel legal tools.

As stated previously, Simmons argues that treaties have significant effects, but they do not have the same effects everywhere. In following, it is argued that neither stable democracies, nor stable autocracies are likely compliers as a result of legal agreements.

[257] Bruderlein, op. cit., p. 8
[258] ibid. p. 9
[259] ibid.
[260] ibid.

Simply put, Simmons argues that the effect of legal agreements is dependent on the type of state, and the characteristics of this state. Due to the large number of states, and the large variety between them, Simmons has concluded that it is impossible to make any definite conclusions on whether legal agreements concerning IHRL have a positive, or negative effect on states, because it is so largely dependent on what type of state we are dealing with. In chapter three, it was put forth that the concept of NSAGs is inherently complex, and in the latter section, I have argued that group characteristics influence the fruitfulness of engagement. Though a direct transfer of Simmons typologies to NSAGs is arguably difficult, it is the underlying reasoning of Simmons typology, the idea that is matters for some but not all, that is useful in a study of NSAGs and parallel agreements.

By using Simmon's framework, one can ask several questions related to NSAGs and IHL, firstly, who are possible committers and secondly, what NSAGs are potential compliers? Though it may be a far stretch to argue that some NSAGs are "stable democracies" in the same manner as those referred to by Simmons, it is a fair argument that many NSAGs that operate at present are "stable autocracies", because they use techniques and strategies that are extremely brutal and inconsistent with both IHRL and IHL. This is especially true for groups that pursue genocidal aims and also for groups that use violations of IHRL or IHL to pursue their goals. The deliberate killing of civilians through attacks on buildings or areas where non-combatants are located is an indication that the NSAG in question is perhaps not approachable on matters related to IHL. This does not automatically suggest that these NSAGs are unable to change their conduct, and therefore, appealing to commitment would fail. Rather, it suggests that such efforts would require a slower process of strategic argumentation, because the NSAG in question is not already convinced that compliance with humanitarian norms is constructive. As Hafner-Burton and Tsutsui suggest, treaties have failed to change the world's worst abusers.[261] The same could arguably be true with NSAGs, as those that are characterised as violent, oppressive and de-structured are perhaps similar to these states, because the end result would be the same regardless of whether a legal agreement was in place or not. With these states, or with these NSAGs, as perhaps appropriately described by Bruderlein as "mafia-like militias", legal agreements would most likely fail to make a difference. With these NSAGs,

[261] Hafner-Burton and Tsutsui, op. cit., p. 421

as with Simmons "stable autocracies", one could argue that legal agreements are largely redundant and irrelevant, because non-compliance with IHL is due to a lack of will, rather than a lack of capacity or ability. However, by establishing what NSAGs are not likely committers, nor compliers, we are left with a large number of groups who fall into Simmons "middle category". When using Simmons theory, it is important to revisit one of the points made in this section, namely the fact that most practitioners agree that the main characteristics of armed groups should be identified prior to engagement. As I have pointed out, Bruderlein argues that an assessment of the NSAGs main characteristics is an important preliminary step to dialogue or negotiations, because these are likely to influence the fruitfulness of that engagement. Simmons three types can therefore be compared to the way scholars and practitioners dealing with NSAGs use group characteristics to determine whether engagement efforts are thought to be successful or not. For practitioners dealing with NSAGs, a genuine commitment, and a willingness to adhere to IHL is extremely important. Also, to refer to AP II, for IHL to apply it is essential that we are dealing with an organized armed group, who is under responsible command and who exercises control over territory. One group that would arguably fall outside of this categorization is Al-Qaeda. For Simmons, neither stable democracies, nor stable autocracies, have the right characteristics to be greatly influenced by legal agreements on human rights. For those promoting engagement with NSAGs through parallel legal tools, neither disorganized militia-groups, nor groups that use violations of IHL as a part of their strategy, have the right characteristics to be greatly influenced by parallel agreements on IHL. Based upon the research conducted within the field of IHRL, and the empirical accounts from research on NSAGs and IHL, it can be argued that the effectiveness of legal agreements are largely dependent on the characteristics of the ratifier. This suggestion is valid for both state, and non-state actors. As such, it must be emphasized that considering the different characteristics of NSAGs operating at current, this thesis does not suggest a universal solution that may potentially lead all NSAGs to comply with IHL. To get a clearer idea of the line of reasoning put forth in the latter section a summary is presented on the subsequent page.

Potential committers	Unlikely committers
Dependent on domestic or international support: the NSAGs is convinced that commitment to the agreement is necessary for strategic reasons. Dependence on domestic support may indicate that the NSAG has some form of territorial control.	Not reliant on international public opinion, such as the Taliban. The NSAG is not convinced that commitment to the agreement is necessary for strategic reasons **OR** the NSAG lacks territorial control, is decentralized or consists of fragmented groups, or cells, like Al Qaeda.
The leadership promotes and supports compliance with IHL.	The leadership promotes and supports violations of IHL.
Violations of IHL are due to lack of capacity **OR** due to lack of ownership of the law.	Violations of IHL are a deliberate strategy **OR** violations of IHL are due to lack of capacity.
The NSAG values the short-term benefits from committing to the agreement, and wants to avoid the scrutiny from not committing.	The NSAG sees no short-term benefits from committing to the agreement, and does not care about external pressure to commit.

Potential compliers	Unlikely compliers
The NSAG has territorial control over an area and is dependent on support from their constituency.	The NSAG lacks territorial control, is decentralized or consists of fragmented groups, or cells, like Al Qaeda.
Strong degree of command control: soldiers follow instructions from the leadership, and are instructed and trained to behave in accordance with IHL.	Weak degree of command control: soldiers do not follow instructions from leadership and IHL is not translated from the leadership to the combatants.
Compliance with IHL is viewed as necessary in the struggle against the state, and the content of the agreement is consistent with their interests.	Violations of IHL is a deliberate strategy (ethnic cleansing etc.) **OR** violations of IHL are due to lack of capacity.
The leadership sanctions violations.	The leadership does deliberately not sanction violations **OR** the group lacks the capacity to sanction violations.

6 Conclusion

The purpose of this thesis has been to analyze *whether, and how, parallel legal tools can contribute to increasing NSAGs compliance with IHL*. The initial parts of this study highlighted how the changing nature of warfare has brought fort a number of challenges to the framework of IHL. It was argued that while the international laws guiding conduct in war remains state-centered, the practical reality is less and less centered on the state. Subsequently, it was put forth that enhancing NSAGs compliance with IHL is viewed as one of the core challenges to strengthen protection of civilians in armed conflict. It was argued that in order to effectively deal with these challenges, NSAGs have to be addressed and engaged directly. A variety of available engagement tools were explored, and it was suggested that one of the most innovative tools in the contemporary toolbox is the use of parallel legal agreements on IHL.

Based on research conducted within the field of IHRL, it has been shown that commitment to agreements occurs for a variety of reasons, and that commitment does not necessarily ensure compliance with that agreement. It can be argued that commitment and compliance theory from IHRL is not directly transferrable to NSAGs and IHL, however, the general reasoning on treaty commitment and compliance provide some insight and guidance. In particular, the observation from IHRL research that the effectiveness of legal agreements is dependent upon the characteristics of the ratifier was also found in observations from research on NSAGs. Thus, it can be concluded that though legality matters for some, it does not matter for all. As such, it has not been argued that signed agreements by NSAGs automatically generate compliance, but rather, that deviation from the content can occur because the genuine committer has a lack of capacity, or because the disingenuous committer has a lack of will. Furthermore, parallel legal agreements arguably contribute to increasing NSAGs compliance with IHL because through explicit commitment, theoretical obligations can be transformed into accepted, and solid obligations. The successful example set by Geneva Call through the DoC shows that the value of parallel legal tools is not just an idea, but also, a practical reality.

As the analysis has illustrated, the potential of engagement efforts through parallel legal tools is enhanced by certain group characteristics. Dependence on domestic or international support, genuine support of IHL norms from the leadership, the belief that one is not bound by IHL unless one has concluded an agreement to that affect, or simply, a realization that the short-term benefits from committing to an agreement is valuable, are all reasons for why NSAGs would commit to a parallel legal agreement on IHL. However, as this thesis demonstrated, group characteristics such as the level of territorial control, the ability of the leadership to control, instruct and train their soldier to behave in accordance with the agreement, the belief that the content of the agreement is consistent with their interest and goals, and the use of sanctions are all factors that can bring about compliance. As such, it is argued that considering the different characteristics of NSAGs, this thesis does not suggest a universal solution that may potentially lead all NSAGs to comply with IHL. Thus, it can be argued that practitioners seeking to engage NSAGs in parallel legal agreements must be wary of how the tools constructiveness is influenced by the characteristics of the recipient.

As mentioned, increasing state and non-state actors compliance with IHL is important to strengthen protection for those taking part in hostilities, as well as civilians affected by conflict. The legal challenges in terms of how to deal with NSAGs using IHL has practical consequences, and further research should continue to explore alternative mechanisms that can increase NSAGs compliance with IHL. As argued, experience has shown that engagement efforts with NSAGs are effective in confronting this challenge, and continued efforts to include NSAGs in the realm of IHL is encouraged.

It was put forth that research on IHRL has shown that treaties have failed to change the world's worst abusers, and furthermore, that those researching NSAGs and IHL have reinforced this observation by encouraging caution with extremely violent groups on the basis that engagement is likely to be unproductive. However, further research should continue to explore whether other mechanisms have the ability to change the worst abusers, and in particular, whether NSAGs that fall into this category are susceptive to any measures. If previous efforts to strengthen compliance with IHL have been made, an in-depth case study of one of these groups could explore why this particular effort failed,

and theorize whether the NSAGs characteristics were decisive in bringing about failure, or whether other factors played a larger role. Furthermore, as the DoC is categorized as a successful initiative it would be interesting to conduct a more thorough analysis of the NSAGs that have committed to this agreement. More specifically, a comprehensive analysis of the NSAGs that have committed, and subsequently complied with the DoC could contribute to the debate on group characteristics and reveal whether a detectable pattern is present.

Ultimately, this thesis does not suggest that parallel legal tools have the potential to end all violations of IHL committed by NSAGs. What it suggests, however, is that parallel legal tools do have the ability to strengthen compliance with IHL for NSAGs that inhabit certain characteristics. While this is not ideal, it would be a chimera that increased compliance with IHL by NSAGs could be achieved through a universal solution. In sum, it is argued that engagement efforts through parallel legal tools have practical utility because they address the gap between the practical reality and the legal reality.

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