

Article

Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law

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I. INTRODUCTION

International law is no longer conceived of as regulating the rights and obligations of states alone, yet any suggestion that nonstate actors could or should play a role in the creation of international law remains highly controversial. States jealously guard their lawmaking powers as a key attribute of statehood, making them generally resistant to the idea of sharing such powers with any nonstate actors. States are particularly hostile to the possibility of granting nonstate armed groups a lawmaking role, given states' perceptions of the illegitimacy of and threat posed by such actors. Nonetheless, we argue that it is time to reconsider whether it is possible and desirable for nonstate actors to play a role in the making of international law. In particular, we set out the case for granting nonstate armed groups a limited role in the creation of international humanitarian law.

Recent decades have seen a significant expansion of the international humanitarian rules regulating the conduct of states and armed groups in noninternational armed conflicts. Historically, the principal concern of international humanitarian law was the regulation of inter-state armed conflicts. Until the mid-1990s, only a handful of provisions applied to the actions of states and armed groups in noninternational armed conflicts.¹ Since then, numerous treaties have been drafted or revised to regulate noninternational armed conflicts.² Customary international humanitarian law has undergone a similar expansion. Many of the rules that previously governed only states in international armed conflicts now apply to both states and armed groups in noninternational armed conflicts.³

1. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 19, May 14, 1954, 249 U.N.T.S. 240; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. An earlier approach to the regulation of noninternational armed conflicts used the concept of recognition of belligerency. Nonetheless, such recognition occurred infrequently and has not taken place for many years. See ERIK J. S. CASTRÉN, CIVIL WAR 97-206 (1966).

2. See, e.g., Convention on Cluster Munitions, Dec. 3, 2008, 48 I.L.M. 357; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 [hereinafter Ottawa Convention]; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or To Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 (as amended, and the Protocols thereto); see also Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Sept. 3, 1992, 21 T.S. 35597, 1974 U.N.T.S. 45; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163. The latter two conventions prohibit the use of chemical and biological weapons, respectively, "under any circumstances," thus including situations of noninternational armed conflict.

3. The International Criminal Tribunal for the former Yugoslavia (ICTY) led the way by holding that many of the rules governing international armed conflicts also applied to noninternational

But with this growth comes an anomaly. The established doctrine of sources recognizes three sources of international law: treaties, custom, and general principles. Under this doctrine, states, and only states, make international law by entering into treaties or through the recognition of customary rules or general principles based on states' views and practices.⁴ The rationale behind this approach has been simple. Traditionally, only states were seen as having rights, duties, and enforcement capacities under international law. Therefore only states were understood as subjects of international law. At the same time, long-standing notions of voluntarism dictated that international law must be derived from the consent of those it governed. International law was thus understood as the sum total of obligations consented to by states and binding upon those states.

This reasoning does not hold when applied to noninternational armed conflicts. Only states create the international humanitarian law that governs the conduct of both states and armed groups.⁵ In international armed conflicts, the practice and views of both parties to the conflict play a role in creating the international law that regulates such conflicts and by which the parties are bound. In noninternational armed conflicts, by contrast, the practice of either some of the parties (if the conflict is between a state and one or more armed groups) or all of the parties (if the conflict is between two or more armed groups) is excluded from consideration.⁶ As international humanitarian law now treats nonstate armed groups as subjects rather than mere objects of international law, it is worth questioning whether nonstate armed groups can and should be given a role in the creation of the international law that governs conflicts to which they are parties.

armed conflict. See *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). This approach was effectively endorsed by a majority of states in negotiations leading to the Rome Statute of the International Criminal Court (ICC). See Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 25-37 (2006); Claus Kress, *War Crimes Committed in Noninternational Armed Conflict and the Emerging System of International Criminal Justice*, 30 ISR. Y.B. HUM. RTS. 103, 104-07 (2000). A recent study on customary international humanitarian law, concluded under the auspices of the International Committee of the Red Cross (ICRC), found that all but a handful of the rules it identified applied in international and noninternational armed conflicts alike. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, at xxviii-xxix (2005).

4. See Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (referring to international conventions, international custom, and general principles of law). Although Article 38 lists the sources that the International Court of Justice (ICJ) should use in deciding cases, it is generally taken to reflect the sources of international law more generally. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5 (2008); 1 OPPENHEIM'S *INTERNATIONAL LAW: PEACE* 24, § 9 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

5. See Sandesh Sivakumaran, *Binding Armed Opposition Groups*, 55 INT'L & COMP. L.Q. 369 (2006).

6. The rules governing international humanitarian law typically are premised on a distinction between international armed conflicts (conflicts between two or more states) and noninternational armed conflicts (conflicts between a state and a nonstate armed group or between two or more nonstate armed groups). Although inter-state conflicts are by definition international, conflicts between states and nonstate armed groups can be internal to one state or have a cross-border element. We adopt the language of noninternational armed conflicts in this Article to distinguish these conflicts from inter-state armed conflicts. We do not view our analysis as limited to conflicts that take place within a single state. See Anthea Roberts, *Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11*, 15 EUR. J. INT'L L. 721, 746-48 (2004).

In Part I, we provide a framework for understanding the potential for nonstate entities to play a role in making public international law. The typically accepted dichotomy between states and nonstate entities is unhelpful in analyzing this issue because it reinforces the view that states and only states make international law, while obscuring important differences between various types of nonstate entities. We argue that any normative evaluation of whether nonstate entities should be granted a lawmaking role requires one to adopt an analytical framework that is capable of distinguishing between states, state-empowered bodies (such as the United Nations and the International Court of Justice) and nonstate actors (such as individuals, corporations, and armed groups). Focusing on the last category, we outline a variety of justifications for granting some or all nonstate actors a role in lawmaking. We conclude, however, that whether and how a particular nonstate actor should participate in law creation depends, at least in part, on the advantages and disadvantages of recognizing such a role for that particular type of actor. We argue that this analysis should be judged from the perspective of the international community as a whole rather than from the viewpoint of states alone.

In Part II, we apply this test to determine whether armed groups should be given a role in the creation of international humanitarian law applicable in noninternational armed conflict.⁷ This issue has received very little attention to date; no systematic studies have been conducted on the potential costs and benefits of recognizing such a role. Drawing on existing but rarely discussed practices, we argue that recognizing a limited lawmaking role for some armed groups could create significant benefits (such as increasing a sense of ownership and compliance) and that some of the possible costs of doing so have been overplayed (such as inappropriately legitimizing armed groups and affecting their legal status). We do not argue that armed groups should be given the same lawmaking roles as states. Instead, we propose an approach that would accommodate the practices of armed groups within a less statist approach to the doctrine of sources of international humanitarian law. We recognize that any proposal for including armed groups in the process of law creation will be met by a host of theoretical and practical objections. Nonetheless, we set out a lawmaking paradigm that allows for constructive engagement with armed groups without downgrading the standards of international humanitarian law, treating armed groups as akin to states, or granting them a comparable role to states in the creation of international humanitarian law.

7. We have chosen this case study for two reasons. First, nonstate armed groups play a particular role in noninternational armed conflicts—both when the conflict is internal to one country and when it has a cross-border element. Armed groups are one of the “parties to the conflict” and they operate under the principle of equality of obligation with respect to the law. Accordingly, the example represents an acute instance of international law being created by states but being binding on both states and nonstate actors. Second, armed groups produce a wealth of materials relating to humanitarian norms, including unilateral declarations, ad hoc agreements with states and international organizations, and codes of conduct. These materials are overlooked and their normative status remains uncertain, largely because they fail to fit within the traditional doctrine of sources. For examples, see *infra* Part II.C.

II. NONSTATE ACTORS AND INTERNATIONAL LAWMAKING

A. *Challenges to the Statist Doctrine of Sources*

International law has traditionally been defined as the law created by and governing relations between states. This is reflected in a highly statist doctrine of sources that recognizes states, and only states, as the creators of international law. The sources of international law are generally considered to be those listed in Article 38(1) of the International Court of Justice (ICJ) Statute,⁸ namely:

international conventions . . . establishing rules expressly recognized by the contesting states;
international custom, as evidence of a general practice accepted as law;
the general principles of law recognized by civilized nations; [and]
. . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 38 is considered the cornerstone of positivist approaches to international law because it distinguishes legal obligations from nonlegal practice.⁹ The provision distinguishes between three sources (treaties, custom, and general principles) and two subsidiary means of determining the law (judicial decisions and academic writings). This distinction reflects a state/nonstate division. States can create international law by, for example, entering into treaties or having their practices and views form the basis of customary international law and general principles. By contrast, the work of nonstate entities, such as courts and academics, are not sources of international law but rather provide only a subsidiary means of identifying international law.

This statist approach to the doctrine of sources is based on two principles found within traditional conceptions of international law. First, only states are subjects of international law—meaning that states are the sole entities that enjoy rights and obligations under international law, as well as the capacity to enforce international law in certain circumstances.¹⁰ Objects, by contrast, can be the focus or beneficiaries of international law, but cannot independently hold international legal rights or obligations, let alone enforce such rights or obligations on the international stage. Following this approach, nonstate entities such as individuals and armed groups—like cattle, rivers, or territory—were considered to be objects rather than subjects of international law.¹¹

8. BROWNIE, *supra* note 4, at 5; 1 OPPENHEIM'S INTERNATIONAL LAW: PEACE, *supra* note 4, at 24 § 9.

9. G.M. DANILENKO, LAWMAKING IN THE INTERNATIONAL COMMUNITY 14-15 (1993); Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 304 (1999).

10. LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 341 (1905) ("Since the Law of Nations is a law between states only and exclusively, states only and exclusively are subjects of the Law of Nations.").

11. See, e.g., 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 140-42 (3d ed. 1957); George Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT'L L. 428, 428-29 (1952). Not only did individuals not hold international rights or obligations, but any wrongs against them were cast as injuries to their state of nationality, resulting in that state having complete discretion

Second, classical positivist justifications based on “voluntarism” require international law to be derived from the consent of those it governs.¹² According to this view, as states are the only subjects of international law, and are sovereign equals, states must also be the only entities capable of creating the laws by which they are bound.¹³ As expressed in the *Lotus* case, “International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will”¹⁴ This view holds that only states, as the sole subjects of international law, can create international law and can agree to be bound by it.

Significant inroads have been made into the first principle: we now accept that a broad range of nonstate entities possesses rights and duties under international law, as well as the capacity to enforce those rights in certain circumstances.¹⁵ The concept of subjecthood under international law has widened to include a variety of nonstate entities, such as individuals (particularly under international human rights, investment, and criminal law) and international organizations (such as the United Nations).¹⁶ The concept has also become more differentiated; there is now widespread recognition that different subjects may possess different rights, obligations, and enforcement capabilities.¹⁷

By contrast, there has been little movement with respect to the second principle. Generally no link is made between nonstate entities having rights, duties, and enforcement capacities under international law, and their capacity to play a role in international lawmaking.¹⁸ The concept of subjecthood has become less statist, but consensus on how international law is created has

over whether, when, and how to pursue any international claims on their behalf. *See, e.g.*, *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, Second Phase, 1970 I.C.J. 3, ¶¶ 78-79 (Feb. 5); *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

12. Simma & Paulus, *supra* note 9, at 303, 305 (arguing that state consent may be express, as with treaties, or tacit, as with custom).

13. Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 293 (1999) (arguing that international law is “no more or less than the rules to which states have agreed through treaties, custom, and perhaps other forms of consent”).

14. S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

15. 1 HERSCH LAUTERPACHT, *INTERNATIONAL LAW: COLLECTED PAPERS* 136 (Elihu Lauterpacht ed., 1970).

16. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11); *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15, at 17 (Mar. 3).

17. For example, the ICJ recognized that the United Nations was subject to international law but noted that this did not mean that it was a state or that its “legal personality and rights and duties [were] the same as those of a State.” *Reparation for Injuries*, 1949 I.C.J. at 179. The ICJ has held that the Vienna Convention on Consular Rights creates substantive rights for signatory states and their nationals. *LaGrand (Ger. v. U.S.)*, 2001 I.C.J. 466, ¶ 77 (June 27). Some human rights regimes grant substantive and procedural rights to natural and legal persons. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Nov. 4, 1950, 213 U.N.T.S. 221. Investment treaties grant investors procedural rights to enforce investment protections. *See, e.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States arts. 25, 36, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

18. *See generally*, KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* (2011) (arguing that individuals, not just states, have rights, obligations and capacities under international law but only if and to the extent recognized by states).

remained highly statist. And the notion of voluntarism—that international law must be derived from the consent of those bound by it—rarely prompts discussion of whether nonstate actors should be entitled to play some role in authoring the laws that bind them. Nonetheless, there have been some normative and descriptive challenges to the traditional position that only states create international law.

On a normative level, modern positivists endorse the need for a doctrine of sources in order to distinguish law from non-law. They are prepared, however, to recognize that a limited range of actors other than states may play a role in codifying and progressively developing international law. Thus, Bruno Simma and Andreas Paulus suggest that the notion of state practice could be widened to include the practice and decisions of a narrow category of international bodies, such as the International Law Commission (ILC) and the ICJ.¹⁹ Although they acknowledge that various nonstate actors, including nongovernmental organizations (NGOs), global economic players, and the global media, play an increasingly important role in the international community, Simma and Paulus do not consider this role to extend to law creation.²⁰

Process theorists, by contrast, have moved away from the positivist focus on distinguishing between law and non-law, instead viewing law as an ongoing process of authoritative decisionmaking by various actors.²¹ According to proponents of the New Haven and “international law as a transnational legal process” schools, a wide range of actors other than states influences this decision-making process and thus the development of international law.²² However, these “authorized decision-makers” remain predominantly state actors (such as makers of foreign policy) and actors empowered by states (such as international courts), even if they are influenced by NGOs, individuals, and others.

On a descriptive level, international law does recognize that nonstate entities may play some role in lawmaking, but these instances tend to be treated as ad hoc exceptions. For example, international organizations can enter into treaties with states or each other, under which they accept rights and obligations related to their functions.²³ Debate remains, however, over whether states can enter into treaties with subjects of international law that are neither states nor international organizations.²⁴ The ILC, when preparing a draft of

19. Simma & Paulus, *supra* note 9, at 306-07.

20. *Id.* at 306.

21. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 39-55 (1994); Ratner & Slaughter, *supra* note 13, at 293-94.

22. See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2626 (1997); W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118, 122 (1992).

23. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, 25 I.L.M. 543 (1986) [hereinafter VCLT-IO].

24. Different interpretations are also given to *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11). Some attempt to limit its scope to state-created bodies, while others see it as establishing broader principles applicable to all nonstate actors. Compare Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL.

what was to become the Vienna Convention on the Law of Treaties (VCLT), considered the possibility of various other subjects entering into treaties with states, but ultimately excluded the issue from the VCLT's purview.²⁵ States have entered into agreements with indigenous peoples, armed groups, and foreign investors, but the legal status of these agreements is disputed.²⁶

Outside the context of treaties, various nonstate actors have been granted particular roles in lawmaking processes. For instance, the International Labor Organization has adopted a formal tripartite model in which each member state is represented by two government delegates, one employer delegate, and one worker delegate, thereby creating a role for nonstate actors.²⁷ Representatives of indigenous peoples were involved in the drafting of the 1994 United Nations Draft Declaration on the Rights of Indigenous Peoples.²⁸ NGOs are allowed to play a formal role in some international judicial proceedings,²⁹ and they have played an informal though critical role in campaigning for and then influencing the drafting of certain treaties.³⁰ The International Committee of the Red Cross (ICRC), for example, has been particularly influential in the area of international humanitarian law.³¹

W. INT'L L.J. 241, 241-50 (2001) (arguing for a limited reading of the *Reparation for Injuries* Advisory Opinion), with Robert McCorquodale, *The Individual and the International Legal System*, in INTERNATIONAL LAW 307, 309-10 (Malcolm D. Evans ed., 2d ed. 2006) (proposing a broad reading of the *Reparation for Injuries* Advisory Opinion).

25. Vienna Convention on the Law of Treaties art. 3, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

26. See, e.g., *Texaco Overseas Petroleum Co. v. Libya*, 53 I.L.R. 422, 473-74, ¶ 66 (opinion of René-Jean Dupuy); LAUTERPACHT, *supra* note 15, at 147; Derek W. Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 CATH. U. L. REV. 929 (1986).

27. See Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211, 232-33 (1991); *How the ILO Works*, INT'L LABOR ORG., http://www.ilo.org/global/About_the_ILO/Structure/lang--en/index.htm (last visited Nov. 2, 2011).

28. ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 48-49 (2007); Robert McCorquodale, *An Inclusive International Legal System*, 17 LEIDEN J. INT'L L. 477, 479-80, 493 (2004).

29. See, e.g., Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights art. 5(3), June 9, 1998, O.A.U. Doc. CAB/LEG/665, available at http://www.achpr.org/english/_info/court_en.html (permitting NGOs with observer status to initiate cases); Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 17, arts. 34, 36(2) (permitting NGO applications where the NGO was a victim and NGO interventions otherwise by permission); *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions by Third Persons to Intervene as "Amici Curiae," at D1, D12 (NAFTA Ch. 11 Arb. Trib. Jan. 15, 2001), available at <http://www.state.gov/documents/organization/6039.pdf> (permitting NGO interventions); *Practice Directions*, INT'L COURT OF JUSTICE, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (last visited Nov. 2, 2011) (permitting NGO interventions in advisory requests but not contentious disputes under Article XII). On the role that NGOs have played in international judicial proceedings, see generally Lance Bartholomeusz, *The Amicus Curiae Before International Courts and Tribunals*, in 5 NONSTATE ACTORS AND INTERNATIONAL LAW 209 (2005); and Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994).

30. See BOYLE & CHINKIN, *supra* note 28, at 54-57, 62-77; Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 110-19 (2000); Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 23-39 (1999); Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 352-53 (2006).

31. For example, the ICRC convened meetings of experts in advance of the diplomatic conferences of 1949 and 1974-77 that adopted the Geneva Conventions and Additional Protocols, and

On the whole, however, the notion of international lawmaking embodied in the doctrine of sources has remained remarkably statist in character. According to mainstream theories, nonstate entities may enjoy rights, obligations, and enforcement capacities under international law, but only if, and to the extent that, those rights, obligations, and capacities are created or recognized by states.³²

B. *Moving Beyond Statism: From Dualism to Tripartism*

We contend that, in analyzing the potential for nonstate entities to engage in lawmaking, it is necessary to move past the state/nonstate dichotomy and adopt a tripartite distinction between states, state-empowered bodies, and nonstate actors. The dualist state/nonstate distinction has been criticized for defining all nonstate entities by reference to what they are not. This negative distinction thereby reinforces the idea that states are the primary or only subjects of international law and obscures differences between different types of nonstate entities.³³ While we challenge the notion that states are the only subjects of international law, we do not dispute their continuing centrality.³⁴ Nonetheless, we believe that there are important reasons to distinguish between state-empowered bodies and nonstate actors that tend to be lost in debates that begin with the state/nonstate framework.³⁵

1. *States*

Whether an entity qualifies as a state generally depends on whether it possesses a permanent population, a defined territory, a government, and capacity to enter into relations with other states,³⁶ or is recognized as a state by other states. While the lawmaking power of states is not disputed, debate exists over the potential for entities that display many of the characteristics of states (such as Palestine, Taiwan, and the Holy See) to engage in law creation.³⁷

submitted drafts of the Conventions and Protocols to the diplomatic conferences. The ICRC has since been instrumental in the drafting and adoption of numerous other treaties, including the Ottawa Convention and the Rome Statute for the ICC. The customary international humanitarian law study concluded under the auspices of the ICRC is proving highly influential as demonstrated by citations in judgments of international and national courts and tribunals. The ICRC has also been granted observer status before the General Assembly in recognition of the mandates conferred upon it by the Geneva Conventions and its special role “in international humanitarian relations.” G.A. Res. 45/6, ¶ 2, U.N. Doc. A/RES/45/6 (Oct. 16, 1990).

32. PARLETT, *supra* note 18, at 324-25.

33. Philip Alston, *The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATE ACTORS AND HUMAN RIGHTS 3, 3-4 (Philip Alston ed., 2005); Susan Marks, *State-Centrism, International Law, and the Anxieties of Influence*, 19 LEIDEN J. INT’L L. 339, 340-41 (2006).

34. HIGGINS, *supra* note 21, at 39 (arguing for recognition of a broader array of participants in the international legal process but acknowledging that “states are, at this moment of history, still at the heart of the international legal system”).

35. This distinction is not intended to suggest that all entities within a single category are equivalent, nor is the dividing line between these categories always easy to discern.

36. Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. Other requirements may also exist. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 48-74 (2006).

37. These entities include some whose statehood is contested (e.g., Palestine and Taiwan) and

2. *State-Empowered Bodies*

We define “state-empowered bodies” as international bodies created by two or more states and granted authority to make decisions or take actions, such as developing, interpreting, applying, and enforcing international law.³⁸ The creation of state-empowered bodies by states distinguishes them from pure nonstate actors such as individuals, corporations, NGOs, and armed groups.³⁹ State-empowered bodies include entities made up of all or most states (such as the General Assembly), entities made up of sub-groups of states (such as the Security Council), and entities whose members are appointed by states (such as the ICJ, the ILC, and the Human Rights Committee).⁴⁰ This Article treats state-empowered bodies as a distinct category from nonstate actors for descriptive and normative reasons.

Descriptively, it is becoming increasingly well-accepted that many state-empowered bodies play direct and indirect roles in the formation of international law, though their means of doing so do not fit neatly within the framework of Article 38(1) of the ICJ Statute.⁴¹ For example: the Security Council is empowered to impose binding decisions on all member states of the United Nations;⁴² international organizations can enter into treaties with states

others that are neither states nor aspiring states but which enjoy many of the rights and obligations accorded to states (e.g., the Holy See and the Sovereign Order of Malta). Some of these entities enter into international agreements with states, unilaterally declare themselves bound by certain international rules, and benefit from observer status at international organizations and conferences.

38. This definition draws on contemporary debates about the delegation of powers from states to international organizations and other entities. See Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1, 3-9 (2008) (adopting a similar definition of international delegation, but not limiting it to bodies created by states).

39. State-empowered bodies include but are not limited to international organizations, which are generally defined as having been established (1) by an international agreement between states, (2) with at least one organ distinct from its member states and capable of so acting, and (3) under international law. JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 6 (2005); HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 26-39 (4th rev. ed. 2003).

40. States can delegate powers directly to a state-empowered body, or indirectly, if one state-empowered body redelegates power to another such body. ALVAREZ, *supra* note 39, at 5-6; DAN SAROOSHI, *INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS* 18-27 (2005). For example, states delegated powers to the General Assembly and the Security Council, which in turn created and redelegated powers to the ILC and ICTY, respectively. For the basis of this power of redelegation, see U.N. Charter arts. 13, 39, 41. On the legitimacy of such redelegations based on the U.N. Charter, see *Prosecutor v. Tadić*, Case No. IT-94-1-I, ¶¶ 14-22 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

41. See generally ALVAREZ, *supra* note 39, at 13-14 (describing how international organizations undertake “legislative acts,” producing “rules,” “norms,” “standards,” and “laws”); *id.* at 595-97 (explaining that international organization standard-setting often does not fit into any of the three established sources of law); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993) (noting the emergence of universally binding international law based on actions by states in multilateral fora); Jan Klabbbers, *International Organizations in the Formation of Customary International Law*, in CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE: A METHODOLOGICAL APPROACH 179 (Enzo Cannizzaro & Paolo Palchetti eds., 2005) (considering the potential for the practice of international organizations to contribute to the formation of customary international law); Jan Klabbbers, *Lawmaking and Constitutionalism*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 81, 85-99 (Jan Klabbbers, Anne Peters & Geir Ulfstein eds., 2009) (outlining a variety of challenges to the statist approach to the doctrine of sources as well as attempts to retheorize the doctrine in light of these challenges).

42. U.N. Charter art. 25. See generally ALVAREZ, *supra* note 39, at 184-98 (“The Security

and each other;⁴³ judicial decisions of international courts and tribunals play an important role in creating and developing international law;⁴⁴ and bodies such as the ILC and Human Rights Committee influence the development and interpretation of international law.⁴⁵

Normatively, state-empowered bodies are created and empowered by states, which creates a basis for arguing that any lawmaking powers exercised by such bodies are derived from state consent.⁴⁶ In addition, after an initial delegation of lawmaking powers has been made, states retain a variety of formal and informal powers to sanction state-empowered bodies if they overreach in their lawmaking efforts.⁴⁷ This means that states can affirm, acquiesce in, or reject particular lawmaking attempts by state-empowered bodies. For example, the International Criminal Tribunal for the Former Yugoslavia radically transformed the content of the law of noninternational armed conflict in *Prosecutor v. Tadić*⁴⁸ when it held that many of the rules of the law of international armed conflict were also applicable to noninternational armed conflicts. States then affirmed that view when they adopted the Rome Statute of the International Criminal Court.⁴⁹ By contrast, the United Kingdom, the United States, and France objected to the Human Rights Committee's General Comment on the impact of reservations that were incompatible with the object and purpose of human rights treaties,⁵⁰ resulting in uncertainty over the correct approach to be taken to reservations to human rights treaties. Any role that state-empowered bodies play in law creation is thus dependent on

Council as Law-maker"); *id.* at 416-24 (describing the Security Council's role as a "non-judicial actor" in dispute settlement within the U.N.); BOYLE & CHINKIN, *supra* note 28, at 109-15. For a specific example, see Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 902 (2006).

43. VCLT-IO, *supra* note 23, at 63-64.

44. See ALVAREZ, *supra* note 39, at 458-65, 545-84; BOYLE & CHINKIN, *supra* note 28, at 263-312; HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (1982).

45. See Statute of the International Law Commission, G.A. Res. 174(II), U.N. Doc. A/RES/174(II) (Nov. 21, 1947) (as amended). See generally ALVAREZ, *supra* note 39, at 304-16 (discussing the influence of the ILC's "expert" treaty-making); BOYLE & CHINKIN, *supra* note 28, at 154-57 (discussing the influence of the Human Rights Committee); *id.* at 171-204 (discussing the history, significance, and limitations of the ILC's contribution to the development of international law, and its effect on customary international law).

46. Bradley & Kelley, *supra* note 38, at 3-12. This approach leaves open many questions, including what powers are delegated to these bodies, whether they are acting within their delegated authority, and whether and to what extent such authority may change over time as a result of actions of the body coupled with acquiescence on the part of states.

47. For discussions about powers to sanction state-empowered bodies in relation to international courts and tribunals, see, for example, Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411 (2008); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005); and Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 185-95 (2010).

48. Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

49. See Danner, *supra* note 3, at 25-37; Kress, *supra* note 3, at 107.

50. Compare U.N. Human Rights Comm., General Comment No. 24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994), with Rep. of the Human Rights Comm., Observations on General Comment No. 24 (52), at 131, 135, U.N. Doc. A/50/40 (Oct. 31, 1995) (statements of the United States and the United Kingdom), and Rep. of the Human Rights Comm., at 117, U.N. Doc. A/51/40 (Sept. 16, 1996) (statement of France).

initial state consent and at least some level of ongoing state consent.

3. *Nonstate Actors*

Under this tripartite framework, “nonstate actors” are neither states nor state-empowered bodies. They include individuals, corporations, NGOs, and armed groups. Although coherent in one sense, this category is defined by reference to what it is not. It thus contains a disparate collection of actors, which complicates analysis about their actual and appropriate lawmaking role. Descriptively, this category enjoys the weakest claim to lawmaking status under international law as there is no general agreement that such actors play a role in law creation, even with respect to those laws that are binding upon them.⁵¹ Normatively, it is difficult to justify a law-creating role for nonstate actors as a group using traditional arguments based on state consent because they are neither states (with direct lawmaking powers) nor entities that are created and empowered by states (with delegated lawmaking powers). It should come as no surprise, then, that discussions about nonstate entities playing an actual or potential role in the creation of international law usually focus on the role of state-empowered bodies rather than nonstate actors.⁵²

C. *Recognizing a Law-Creating Role for Nonstate Actors*

When scholars do grapple with the question of a role for nonstate actors in international law creation, a broad spectrum of views emerges. Andrew Clapham and Robert McCorquodale, both strong proponents of challenging the statist approach to the subjects of international law, typify opposing poles of thought regarding giving nonstate actors a role in law creation.

At one end of the spectrum, Clapham argues for the recognition of rights and obligations of nonstate actors as well as increased opportunities for enforcement, but does not contend that nonstate actors have or should have a role in law creation.⁵³ He argues that one can “recognize the importance of nonstate actors and their influence without suggesting that they have achieved the role of law-maker.”⁵⁴ Nonstate actors are subjects of international law in the sense of having rights, duties, and capacities, but international law remains “mostly generated by accepted processes between states.”⁵⁵ This approach has the advantage, he contends, of maintaining the core structures of international law and not “inappropriately legitimizing the relevant non-state actors.”⁵⁶

51. See *supra* Part I. In some cases, nonstate actors might not have an interest in lobbying for recognition as a general subject of international law because they do not wish to attract general obligations under international law. For example, transnational corporations have not argued for general international legal personality, preferring to secure specific substantive and enforcement rights in limited circumstances (such as in the realm of foreign investment) without exposing themselves to international obligations more generally. A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 REV. INT'L L. STUD. 133, 143 (2001).

52. See, for example, the approaches of modern positivists discussed *supra* Part II.A.

53. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 28-29 (2006).

54. *Id.* at 28.

55. *Id.*

56. *Id.* at 29.

At the other end of the spectrum, McCorquodale argues for a broader definition of subjecthood that would include lawmaking capacities as an essential element.⁵⁷ “A ‘subject’ of the international legal system,” he argues, “can be considered to be one which has direct rights and responsibilities under that system, can bring international claims and . . . is able to participate in the creation, development, and enforcement of international law.” This leads McCorquodale to argue for an “inclusive international legal system” based on the idea of participation rather than subjecthood, in which a myriad of nonstate actors would participate in law creation whether directly or indirectly.⁵⁸ “The participation of non state actors . . . may not be the traditional method of international lawmaking,” he concludes, “but it is now an accepted method.”⁵⁹

Clapham’s statist approach to law creation would preclude armed groups from playing any role in making international law, even with respect to norms that are binding upon them.⁶⁰ McCorquodale’s inclusive approach to law creation, by contrast, represents a potentially significant challenge to the traditional paradigm of sources and lawmaking. It would create a basis for recognizing a lawmaking role of armed groups alongside many other nonstate actors. Nonetheless, he leaves unanswered many important questions regarding the modalities of law creation by nonstate actors, including what is meant by “participation” and whether it is intended to be direct (which would be relatively radical) or indirect (which would be comparatively uncontroversial).⁶¹

We argue that it is possible to eschew the extremes of statism and full inclusivity to find various mid way rationales enabling certain nonstate actors, but not others, to play a recognized role in law creation. Below, we identify four intermediate approaches that justify the participation of particular types of nonstate actors in lawmaking processes. Since we believe that different rationales might be appropriate when dealing with different types of nonstate actors, our aim is to provide a schema for understanding a range of more moderate positions. Instead of endorsing a one-size-fits-all approach that would apply to all nonstate actors, these intermediate stances provide a useful way of assessing the lawmaking potential of a variety of nonstate actors, including

57. McCorquodale, *supra* note 28, at 479-80; McCorquodale, *supra* note 24, at 307.

58. McCorquodale, *supra* note 28, at 492-97.

59. *Id.* at 496.

60. More recently, Clapham has indicated greater sympathy toward the view that armed groups might play some role in the formation of international humanitarian law norms. See ANDREW CLAPHAM, *THE RIGHTS AND RESPONSIBILITIES OF ARMED NONSTATE ACTORS: THE LEGAL LANDSCAPE AND ISSUES SURROUNDING ENGAGEMENT* 41-44 (2010) (recognizing that the involvement of armed groups in the law creation process may prove a “new direction” in engagement with armed groups, as well as fostering a sense of ownership by them over international humanitarian norms, but cautioning against collapsing the normative legal regime into a description of existing canons of behavior by all relevant actors).

61. Other unanswered questions include: Should all nonstate actors be granted a role in law creation or only those with rights and obligations? Have the views of such actors already been accounted for through their domestic relationship with their home state? How might the views and practices of nonstate actors be evidenced? And how should the views and practices of different nonstate actors be weighed against each other and those of states and state-empowered bodies? To the extent that McCorquodale argues simply for an indirect role of nonstate actors in law creation, his position is not that far removed from Clapham’s approach.

armed groups.

1. *State Consent*

A lawmaking role for certain nonstate actors could be recognized based on express or implied state consent. States could expressly agree that certain nonstate actors could play a role in treaty negotiations or unilaterally undertake to be bound by particular treaty commitments. Where a state enters into a bilateral agreement with a nonstate actor, such as an armed group, it is arguably impliedly consenting to that actor having some role in law creation, at least for the limited purpose of entering into and being bound by that agreement. Just as states can confer rights, obligations, and enforcement capacities on nonstate actors, so too are they able to confer discrete lawmaking roles on nonstate actors. This represents a limited departure from the traditional, state-centered approach to law creation as it remains tied to state action and state consent. It also parallels the way state-*empowered* bodies acquire a recognized role in law creation, which is based, to a large extent, on the notion of delegated lawmaking powers.

2. *State-Like Entities*

An exception to the purely statist approach to the doctrine of sources could be recognized for "state-like" entities that share many of the characteristics of states, such as territory, population, and government, but are not recognized as states. This approach accepts that states remain the principal actors in the international legal system, but argues for a more flexible delimitation of states as opposed to nonstates for the purposes of law-creation. A number of developments in international law already evidence this approach.

States and international organizations have traditionally conferred some legal status upon representatives of peoples that are recognized as having a right to self-determination.⁶² For example: the General Assembly granted the Palestine Liberation Organization (PLO) observer status at the General Assembly;⁶³ some argue that international agreements entered into between Israel and the PLO constitute treaties;⁶⁴ and Palestine has been permitted to participate in Security Council debates and proceedings before the ICJ, both of which have traditionally been limited to participation by states.⁶⁵ Entities

62. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/RES/25/2625, Annex (Oct. 24, 1970); BROWNLIE, *supra* note 4, at 62-63.

63. G.A. Res. 3237 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Nov. 22, 1974).

64. See, e.g., GEOFFREY R. WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* 57-74 (2000); Peter Malanczuk, *Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law*, 7 EUR. J. INT'L L. 485, 488-92 (1996); John Quigley, *The Israel-PLO Interim Agreements: Are They Treaties?*, 30 CORNELL INT'L L.J. 717, 740 (1997). But see Katherine W. Meighan, Note, *The Israel-PLO Declaration of Principles: Prelude to a Peace?*, 34 VA. J. INT'L L. 435, 452 (1994).

65. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2003 I.C.J. 428, 429 (Dec. 19); U.N. SCOR, 44th Sess., 2841st mtg. at 3-7, U.N. Doc. S/PV.2841 (Jan.

recognized as belligerents have also traditionally been afforded the capacity to enter into legal relations and conclude international agreements.⁶⁶ More generally, states have signed peace agreements with armed groups that exercise control over territory. Such groups have also signed agreements with each other. These agreements are often characterized as treaties and some have become important steps in the recognition of new states, as occurred in the former Yugoslavia.⁶⁷

On one level, this approach may represent a relatively minor conceptual departure from the traditional state-centered approach as it accepts sovereign entities as the only lawmaking entities but broadens our understanding of that category. In practice, however, it would likely be highly controversial because states often deny that these entities are states, and thus are unlikely to accept a formal law-creating role for them despite their state-like nature or functions. If this approach were accepted, it would pave the way for recognition of the lawmaking capacity of certain armed groups but not others. It would privilege those with a strong claim to state-like status because of territorial control or the exercise of governmental functions. It might also create a risk of incentivizing armed groups to use violent means in order to gain state-like qualities so as to be granted a role in lawmaking.

3. *Bearers of Rights or Obligations*

A more fundamental challenge to the statist doctrine of sources would be to decouple lawmaking capacity from statehood and to re-found it on the concept of bearing rights or obligations under international law. For instance, Anthony Clark Arend links the role of states in law creation to the traditional understanding that international law governs the actions of states and thus should be based on their consent.⁶⁸ In light of the rise of international rules binding various state-empowered bodies and nonstate actors, he questions

11, 1989).

66. Gerald Fitzmaurice, for example, explained that treaty-making capacity extends to “para-Statal entities recognized as possessing a definite if limited form of international personality, for example, insurgent communities recognized as having belligerent status—de facto authorities in control of specific territory.” Special Rapporteur, *Documents of the Tenth Session Including the Rep. of the Comm’n to the Gen. Assembly: Law of Treaties*, art. 8, ¶ 2, U.N. Doc. A/CN.4/115 (Mar. 18, 1958) (by G.G. Fitzmaurice); see BROWNIE, *supra* note 4, at 63.

67. During the dissolution of the former Yugoslavia, various sub-state entities entered into peace agreements with each other. These agreements were generally characterized as treaties and helped lead to the recognition of new states such as Bosnia and Herzegovina. For example, the Dayton Accords included a General Framework Agreement for Peace in Bosnia and Herzegovina along with Annexes and an Agreement on Initialing. The General Framework was concluded by the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia. The Annexes were mainly concluded between the Republic of Bosnia and Herzegovina and two entities involved in the conflict, the Republika of Srpska and the Federation of Bosnia and Herzegovina. The negotiators took for granted that the Republika of Srpska and the Federation of Bosnia and Herzegovina could conclude the agreements, though they were not recognized as states and the entities effectively signed away their legal personality in doing so, as they accepted a new Constitution of the Republic of Bosnia and Herzegovina in which their entities became members as a federal state. See Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT’L L. 373, 380 (2006); Paola Gaeta, *The Dayton Agreements and International Law*, 7 EUR. J. INT’L L. 147, 158-60 (1996).

68. ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 43 (1999).

whether these actors should play a role in creating such rules.⁶⁹ Similar arguments have been or could be made with respect to specific categories of nonstate actors, such as individuals and nonstate armed groups.⁷⁰ For example, Christiana Ochoa argues that, as individuals now bear rights and obligations under international law, the process by which custom is formed should be broadened to include their voices, as custom receives its legitimacy from the fact that it “originate[s] in the actions and beliefs of those whom it later comes to bind – the subjects of [international] law.”⁷¹

A variation of this argument is that nonstate actors should be able to play a role in lawmaking, but only with respect to obligations that are or may become binding upon them. Jan Klabbbers argues, for instance, that creating rights for nonstate actors requires no special justification, but imposing “obligations directly on non-state actors . . . require[s] a justification of sorts, if only for the sake of legitimacy.”⁷² If nonstate armed groups are bound by international humanitarian law, he asks, should they not play some role in determining the existence and content of their obligations?⁷³ This argument has some resonance with the different ways in which third-party rights and obligations are treated under treaty law, where consent of the third-party is usually presumed for third-party rights but required for third-party obligations.⁷⁴ It also has some parallels with certain roles granted to state-empowered bodies. For instance, the ILC is now drafting articles on the responsibility of international organizations and, as part of this process, is considering submissions from states *and* international organizations.⁷⁵

69. *Id.*

70. Some have suggested granting individuals a right to participate in lawmaking through creation of a directly elected world parliament. *See, e.g.,* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 483 (1995); Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L L. 191 (2000).

71. Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 122 (2007).

72. Jan Klabbbers, *(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors*, in NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 351, 354-55 (Jarna Petman & Jan Klabbbers eds., 2003).

73. *Id.* at 357-61; *see also* Marco Sassòli, *Taking Armed Groups Seriously: Ways To Improve Their Compliance with International Humanitarian Law*, 1 J. INT'L HUM. L. STUD. 5 (2010) (arguing that the perspectives of nonstate actors should influence international humanitarian law and suggesting ways in which nonstate actors could contribute to the formulation and operation of the law).

74. VCLT, *supra* note 25, arts. 34-36.

75. The ILC has received comments from the European Commission, International Atomic Energy Agency, International Criminal Police Organization, International Maritime Organization, International Monetary Fund, International Seabed Authority, Multinational Force and Observers, Organization of American States, Organization for the Prohibition of Chemical Weapons, United Nations Educational, Scientific and Cultural Organization, United Nations Development Program, United Nations Secretariat, World Bank, World Health Organization, World Intellectual Property Organization and the World Trade Organization. For examples of comments from these groups, *see* Rep. of the Int'l Law Comm'n, 61st sess, May 4-June 5, July 6-Aug. 7, 2009, U.N. Doc. A/CN.4/609; Rep. of the Int'l Law Comm'n, 60th sess, May 5-June 6, July 7-Aug. 8, 2008, U.N. Doc. A/CN.4/593; Rep. of the Int'l Law Comm'n, 60th sess, May 5-June 6, July 7-Aug. 8, 2008, U.N. Doc. A/CN.4/593/Add.1; Rep. of the Int'l Law Comm'n, 59th sess, May 7-June 8, July 9-Aug. 10, 2007, U.N. Doc. A/CN.4/582; Rep. of the Int'l Law Comm'n, 58th sess, May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/568; Rep. of the Int'l Law Comm'n, 58th sess, May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/568/Add.1; Rep. of the Int'l Law Comm'n, 57th sess, May 2-June 3, July 4-Aug. 5, 2005, U.N.

This approach represents a significant departure from the statist approach to the doctrine of sources, as lawmaking capacity would be tied to whether an entity bears rights or obligations under international law. If adopted, this theory would justify armed groups' playing a role in law creation, at least with respect to international humanitarian law. It would map more accurately certain realities, such as the extensive use of humanitarian law agreements between states and armed groups, regardless of whether the latter are state-like. The theory would also pave the way for many other nonstate actors to play a role in law creation. Nonetheless, it would not provide a strong basis for entities such as NGOs to claim lawmaking status, given that they are primarily concerned with lobbying for rights and obligations of actors other than themselves. In this way, this approach represents a step short of the completely inclusive approach, just as the state-like approach represents a step short of the purely statist approach.

Yet the focus on rights and obligations also suffers from practical and conceptual problems. On a practical level, it is difficult to envisage how a role in law creation for nonstate actors would work. For example, which nonstate actors would take part in treaty negotiations and according to what criteria?⁷⁶ And would making obligations on nonstate actors contingent upon their consent result in the downgrading of international law standards? On a conceptual level, might international law limit lawmaking capacity to states on the basis that they are presumed to represent the interests of their nationals and those within their territory, including persons who are subject to rights and obligations under international humanitarian law, international criminal law, and international human rights law? To some extent, this notion of representation has always been a fiction, as states may engage in lawmaking on the international plane regardless of their democratic or non-democratic nature and the domestic voices they exclude or underrepresent in doing so. But this fiction is particularly difficult to maintain when the interests of states and certain nonstate actors systematically diverge, as is the case with states and armed groups. The next approach addresses this challenge.

4. *Excluded Voices*

Instead of granting nonstate actors a role in lawmaking in all circumstances in which their rights or obligations are at issue, a fourth approach would be to recognize a lawmaking role for those actors whose views are not represented (well or at all) by states. For example, there may be situations where the interests of governments and their populations systematically diverge. This could form a basis for arguing that these individuals should play a role in law creation with respect to their rights and obligations. Much of international human rights law might come under this rationale, as one of its primary purposes is to protect individuals from the

Doc. A/CN.4/556; and Rep. of the Int'l Law Comm'n, 56th sess, May 3-June 4, July 5-Aug. 6, 2004, U.N. Doc. A/CN.4/545.

76. Ochoa struggles with the same question with respect to including the views and practices of individuals in the formulation of customary international law. Ochoa, *supra* note 71, at 176-84.

actions of their government.⁷⁷

States are unlikely to represent the views of armed groups operating within their territory, since those groups are frequently fighting against, and challenging the legitimacy of, their governments. According to Klabbers, “to argue that non-state entities are by definition represented by their governments is implausible where the very *raison d’être* of those nonstate entities is to deny the representative nature of their governments.”⁷⁸ In addition to states having an acute interest in not representing the views of armed groups fighting against them, other states may have a general interest in not recognizing such views due to a desire not to create a precedent that may work against them in the future.

The excluded-voices approach may also form the basis for recognizing a lawmaking role for NGOs on the basis that they lobby for the interests of those who are either excluded from or undervalued in the traditional statist paradigm. Isabelle Gunning, for example, argues that NGOs should have a legal voice in the creation of custom because they are able to represent neglected perspectives, such as the importance of the human rights of women.⁷⁹ Others, such as Julie Mertus and Kenneth Anderson, caution against granting NGOs a direct role in lawmaking given that the claim that NGOs serve as proxies for civil society is open to question and raises concerns about democratic legitimacy.⁸⁰

Adopting the excluded voices approach would represent a significant challenge to the traditional statist approach to the doctrine of sources, although it is more moderate than giving all nonstate actors with rights or obligations a role in law creation. The key would be to identify categories of nonstate actors that have rights or obligations under international law *and* whose views are systematically unrepresented by states. The approach would be almost the antithesis of one based on state consent. It also faces significant practical and conceptual difficulties. Which nonstate actors would be given a role in law creation and how would that role be given effect? Who would decide whether certain excluded voices should be given a role in the lawmaking process, given that states are likely to object to giving a role to nonstate actors they view as illegitimate?⁸¹ And would this approach result in international law standards

77. *Id.* at 158-62. Thus, by analogy, the U.N. Human Rights Committee found that states cannot withdraw unilaterally from the International Covenant on Civil and Political Rights because the rights enshrined therein belong to the people living in the state and cannot be abrogated by the government of that state. Rep. of the Human Rights Comm., General Comment No. 26, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997).

78. Klabbers, *supra* note 72, at 359; *see also* Sassòli, *supra* note 73, at 7-8 (“[Armed groups] would not be . . . engaged in an armed conflict . . . if they were within the practical reach of the law of the land and the law enforcement systems of the State on whose territory they are fighting . . .”).

79. Gunning, *supra* note 27, at 227-34.

80. Julie Mertus, *Considering Nonstate Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application*, 32 N.Y.U. J. INT’L L. & POL. 537, 561-62 (2000); *see also* Anderson, *supra* note 30, at 110-19 (arguing that NGOs are not directly connected to masses of people and therefore are not authentic voices of democracy).

81. States involved in noninternational armed conflicts are unlikely to accept that the armed groups against which they are fighting are underrepresented or denied an effective voice. This mirrors the special status given to wars of national liberation under Additional Protocol I, which has gone

being undermined?

D. *The Needs of the International Community*

The intermediate positions discussed above provide a schema for justifying the inclusion of different types of nonstate actors in the creation of international law. Each theory supports a role for at least certain types of armed groups in the creation of at least some types of international law. We do not endorse any overarching theory in the abstract, however. None of the theories is necessary; other theories or combinations of theories might be appropriate when dealing with different types of nonstate actors. Nor is any one of the theories sufficient, as we contend that whether a particular type of nonstate actor should be granted a role in law creation, and what the nature of that role should be, must be conditioned on and shaped by the needs and interests of the international community as a whole.

Our approach builds on the functional and incremental approach adopted by the ICJ in its *Reparation for Injuries* Advisory Opinion.⁸² In finding that the United Nations was a subject of international law, the Court clarified that “[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and *their nature depends on the needs of their community*.”⁸³ Although the United Nations possessed a large measure of “international personality and the capacity to operate on an international plane,” that did not mean that it was a state or that its “legal personality and rights and duties [were] the same as those of a State.”⁸⁴

On this basis, we argue that recognizing a law-creating role for some nonstate actors does not mean granting them the same lawmaking powers as states. Instead, in assessing whether to grant particular nonstate actors a role in law creation, and in tailoring the nature of that role to fit the type of actor in question, we must examine the needs of the international community as a whole. Although difficult to identify and define, the interests of the international community are clearly broader than those of states alone and include the interests of nonstate actors (such as NGOs, armed groups, and civilians) and state-empowered bodies.⁸⁵

virtually unused in that context because no state is willing to accept that it is involved in such a conflict. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 96(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

82. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

83. *Id.* at 178 (emphasis added).

84. *Id.* at 179.

85. Unlike the VCLT, we do not define the “international community” as limited to the “international community of States as a whole.” See VCLT, *supra* note 25, at 344. On the interests of the international community, see Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 229-35 (1994); Bruno Simma & Andreas L. Paulus, *The “International Community”: Facing the Challenge of Globalization*, 9 EUR. J. INT’L L. 266, 266-77 (1998); and J.H.H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZAÖRV 547, 556 (2004). On the difficulties of defining the international community and its interests, see Dino Kritsiotis, *Imagining the International Community*, 13 EUR. J. INT’L L. 961 (2002).

III. ARMED GROUPS AND INTERNATIONAL LAWMAKING

Whereas Part II set out a tripartite division of states, state-empowered bodies, and nonstate actors and outlined arguments for a potential lawmaking role of nonstate actors in general, Part III considers one specific nonstate actor—armed groups—and explores arguments for and against recognizing a role for armed groups in the creation and development of international humanitarian law applicable in noninternational armed conflict. We have focused on armed groups because of the unique role that nonstate armed groups play in noninternational armed conflicts as a party to the conflict, and because armed groups have produced a wealth of unilateral declarations, ad hoc agreements and codes of conduct relating to humanitarian norms that cannot be understood within the traditional doctrine of sources.⁸⁶

Our notion of “armed groups” is limited to those groups that are parties to noninternational armed conflicts and meet the definitional requirement of organization, such as the Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia) (FARC) of Colombia, the Liberation Tigers of Tamil Eelam (LTTE) of Sri Lanka, and the Sudan People’s Liberation Movement/Army (SPLM/A) of Sudan.⁸⁷ Many terrorist groups would fail to meet these criteria either because they lack the relevant organizational requirements or because they are involved in random acts of violence rather than being engaged in a conflict that meets the threshold requirements of a noninternational armed conflict.⁸⁸

A. *Potential Advantages*

Arguments about the potential advantages of involving armed groups in law creation usually stem from an assumption that permitting such participation would increase recognition of and compliance with humanitarian law rules by armed groups, or states, or both. No systematic studies have been conducted on this issue, but qualitative evidence suggests that these potential advantages should be treated seriously.

1. *Effect on Participating Armed Groups*

Giving armed groups a role in humanitarian lawmaking processes may increase the likelihood of those armed groups recognizing and abiding by

86. See *supra* note 7.

87. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 1, art. 3 (“Each Party to the conflict shall . . .”); Prosecutor v. Haradinaj, Case No. IT-04-84-T, Trial Judgment, ¶¶ 29-34 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

88. For example, the United Kingdom has stated, in the context of Additional Protocol I that, “[i]t is the understanding of the United Kingdom that the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.” Ratification (with Declarations and Reservations), United Kingdom of Great Britain and Northern Ireland, 2020 U.N.T.S. 76 (Jan. 28, 1998). By contrast, the United States considers itself involved in an armed conflict against Al Qaeda. See, e.g., Speech, Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Remarks to the annual meeting of the Am. Society of Int’l L. on the Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>. However, this position is itself contested.

humanitarian law norms.⁸⁹ The International Council on Human Rights Policy reports that its research and consultations suggest that where armed groups commit themselves to written codes of conduct, this encourages them to respect human rights.⁹⁰ Marco Sassòli reasons that “it is psychologically easier to have [international humanitarian law norms] accepted and respected by persons who were involved—or represented—in their development,” since this involvement promotes a sense of “ownership” over the norms.⁹¹

In some cases, armed groups have given notice that they do not consider themselves bound by, or will not comply with, particular rules because they did not participate in the creation of such rules. For example, following an appeal on the part of the ICRC, the National Liberation Front of Vietnam wrote to the ICRC indicating that it did not consider itself bound by the Geneva Conventions because it did not participate in their creation.⁹² Human Rights Watch has likewise reported that certain Colombian armed groups have informed it that “although they support humanitarian standards in theory, they do not accept [Additional] Protocol II since it was not negotiated directly with them.”⁹³ And the Frente Farabundo Martí para la Liberación Nacional (Farabundo Martí National Liberation Front) (FMLN) in El Salvador refused to follow particular humanitarian law norms on the basis that “no agreement exist[ed] between the parties.”⁹⁴

In other cases, armed groups have sought to bind themselves by particular humanitarian law rules and there is evidence to suggest that this has affected their behavior. For example, Geneva Call, a Geneva-based organization dedicated to engaging armed groups in respecting and adhering to humanitarian norms, created a Deed of Commitment on anti-personnel mines that can be signed by “armed non-state actors.” The Deed largely parallels the

89. Gauthier de Beco, *Compliance with International Humanitarian Law by Non-State Actors*, 18 J. INT'L L. PEACE & ARMED CONFLICT 190, 193 (2005) (“One way of improving compliance with the law of internal armed conflict is to give non-State actors the opportunity to conclude agreements with their government and other armed groups, and undertake unilateral declarations of conduct.”). See generally INT'L COMM. RED CROSS, INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS (2008), available at http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf (noting that the ICRC has worked to increase respect for international humanitarian law during noninternational conflicts).

90. INT'L COUNCIL ON HUMAN RIGHTS POLICY, ENDS AND MEANS: HUMAN RIGHTS APPROACHES TO ARMED GROUPS 52 (2000).

91. Marco Sassòli, Possible Legal Mechanisms To Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law 6 (Nov. 13, 2003) (unpublished manuscript), available at <http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2003-13nov-sassoli.pdf>. On the idea of ownership of the laws of war more generally, see Kenneth Anderson, *Who Owns the Rules of War?*, N.Y. TIMES MAG., Apr. 13, 2003, at 38, available at <http://www.nytimes.com/2003/04/13/magazine/who-owns-the-rules-of-war.html?>.

92. Letter from Chef de la Représentation Permanente du FLN du Sud-Vietnam en URSS to Representative of the ICRC (Oct. 16, 1965) (on file with ICRC Archives); see Int'l Comm. of the Red Cross, *The International Committee and the Vietnam Conflict*, 6 INT'L REV. RED CROSS 399, 400 (1966).

93. HUMAN RIGHTS WATCH, WAR WITHOUT QUARTER: COLOMBIA AND INTERNATIONAL HUMANITARIAN LAW 25 (1998).

94. U.N. Observer Mission in El Salvador (ONUSAL), *Second Rep. of the United Nations Observer Mission in El Salvador*, ¶¶ 64-65, U.N. Doc. A/46/658 (Nov. 15, 1991); LIESBETH ZEGVELD, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 17 (2002).

commitments incumbent upon states parties to the Ottawa Convention on the Prohibition of Anti-Personnel Mines. Numerous armed groups—forty-one at the time of writing—from Burundi, India, Iran, Iraq, Myanmar, Philippines, Somalia, Sudan, Turkey, and Western Sahara have signed the Deed, agreeing to the “complete prohibition on all use, development, production, acquisition, stockpiling, retention and transfer of [anti-personnel] mines, under any circumstances.”⁹⁵ Geneva Call has reported a decline in the use of anti-personnel mines by signatories to the Deed and has facilitated the destruction of numerous stockpiles of mines.⁹⁶ Few allegations of use or acquisition of anti-personnel mines have been made against signatories to the Deed, and of these, only one was upheld following external verification.⁹⁷ Many of the signatories used anti-personnel mines before signing the Deed, suggesting that the Deed has had some impact on their behavior.

Armed groups have also entered into agreements with international organizations and states in which they accept certain humanitarian law obligations. These, too, seem to have had a positive effect on compliance. Examples include the Ground Rules concluded between various Sudanese armed groups and the U.N. Operation Lifeline Sudan, and “action plans” on child soldiers concluded between armed groups and U.N. entities.⁹⁸ The action plans commit the armed groups to the disarmament, demobilization, and reintegration of child soldiers. As a result of these action plans, child soldiers have been rehabilitated and reintegrated into society.⁹⁹ The conclusion of the action plans cannot be considered the sole cause of these improvements; in addition, the Security Council has indicated that it may impose sanctions on

95. GENEVA CALL, DEED OF COMMITMENT UNDER GENEVA CALL FOR ADHERENCE TO A TOTAL BAN ON ANTI-PERSONNEL MINES AND FOR COOPERATION IN MINE ACTION art. 1, *available at* <http://www.genevacall.org/resources/deed-of-commitment/f-deed-of-commitment/doc.pdf> (last visited Nov. 15, 2011) [hereinafter GENEVA CALL: DEED OF COMMITMENT]. For the list of signatories, see *Signatories to the Deed of Commitment Banning Anti-Personnel Mines*, GENEVA CALL, <http://www.genevacall.org/resources/list-of-signatories/list-of-signatories.htm> (last visited Dec. 2, 2011) [hereinafter *Signatories*].

96. GENEVA CALL, ENGAGING ARMED NONSTATE ACTORS IN A LANDMINE BAN: THE GENEVA CALL PROGRESS REPORT (2000-2007), at 16-17, 32 (2007), *available at* <http://www.genevacall.org/resources/research/f-research/2001-2010/gc-2007-progress-report.pdf> [hereinafter GENEVA CALL: PROGRESS REPORT]; *see also* U.N. Secretary-General, *Rep. of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 43, U.N. Doc. S/2009/277 (May 29, 2009) (reporting the cooperation in anti-mine activities of the signatories to the Deed of Commitment).

97. *See* GENEVA CALL: PROGRESS REPORT, *supra* note 96, at 15-16.

98. *See, e.g.*, ACTION PLAN BETWEEN THE MORO ISLAMIC LIBERATION FRONT (MILF) AND THE UNITED NATIONS IN THE PHILIPPINES REGARDING THE ISSUE OF RECRUITMENT AND USE OF CHILD SOLDIERS IN THE ARMED CONFLICT IN MINDANAO (2009), *available at* [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/8A124E947E0E67E5C12578BD00519B90/\\$file/action-plan-milf-un-philippines-20-jan-2010.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/8A124E947E0E67E5C12578BD00519B90/$file/action-plan-milf-un-philippines-20-jan-2010.pdf); SOUTH SUDAN INDEPENDENCE MOVEMENT/ OPERATION LIFELINE SUDAN AGREEMENT ON GROUND RULES (1995), *available at* <http://www.sudanarchive.net/cgi-bin/pagessoa?a=pdf&d=Dn1d7.1.1&dl=1&sim=screen2Image>; SUDAN PEOPLES' LIBERATION MOVEMENT/ OPERATION LIFELINE SUDAN AGREEMENT ON GROUND RULES (1995), *available at* <http://www.sudanarchive.net/cgi-bin/sudan?a=pdf&d=Dn1d7.3&dl=1>.

99. Les Forces Armées des Forces Nouvelles (FAFN) and other armed groups were de-listed as a result of their conclusion of, and compliance with, an action plan. *See* Working Group of the Security Council on Children and Armed Conflict, *Annual Rep. on the Activities of the Security Council Working Group on Children and Armed Conflict*, July 1, 2007-June 30, 2008, ¶ 16(a), U.N. Doc. S/2008/455 (July 11, 2008).

armed groups that make no action plans or that violate them.¹⁰⁰ Nonetheless, the success of these action plans suggests a link between concluding an agreement and complying with the provisions in that agreement.

2. *Effect on States in Conflict with Armed Groups*

Giving armed groups the ability to sign onto humanitarian law norms also has the potential to improve compliance by the states they fight against. Certain states have been hesitant to sign humanitarian law instruments because the armed groups that they are fighting are unable to reciprocate. As a matter of law, state ratification of a treaty would bind armed groups that are within the state's territory but, as a matter of practice, some states have viewed ratification as a one-sided act, effectively binding them without requiring a reciprocal commitment from an armed group.¹⁰¹ Allowing armed groups to demonstrate formally their commitment to be bound, or to express their intention to comply with existing legal obligations, could relieve some of the anxiety felt by these states.

For instance, the Sudan People's Liberation Movement/Army (SPLM/A) signed the Geneva Call Deed of Commitment in 2001;¹⁰² the SPLM/A and the Government of Sudan signed a Memorandum of Understanding with the United Nations on mine action in 2002;¹⁰³ and the Government ratified the Ottawa Convention in 2003.¹⁰⁴ According to the former director of the U.N. Mine Action Service, "It is clear from conversations with senior officials of the Government, that they would not have felt able to ratify the [Ottawa] Treaty, if the SPLM/A had not already made a formal commitment to observe its provisions in the territory under its control."¹⁰⁵ Here, the air of formality seems to have helped because a previous commitment by the SPLM/A on mine action had proved insufficient to induce the Government to ratify the Ottawa Convention.¹⁰⁶

The fact that the Deed largely parallels the Ottawa Convention helps in creating the perception that the commitments of states and armed groups are equal and complementary. Thus, the Government of Colombia has

100. See, e.g., S.C. Res. 1882, ¶ 7(b), U.N. Doc. S/RES/1882 (Aug. 4, 2009); S.C. Res. 1612, ¶ 9, U.N. Doc. S/RES/1612 (July 26, 2005).

101. Sivakumaran, *supra* note 5, at 381-82.

102. See *Signatories*, *supra* note 95.

103. Memorandum of Understanding Regarding United Nations Mine Action Support to Sudan, Sudan-Sudan Peoples Liberation Movement-U.N. (Sept. 19, 2002), available at http://ochaonline.un.org/humanitariannegotiations/Documents/References/MOU-UN-Sudan-Mine_Action.pdf.

104. See *Status: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-5&chapter=26&lang=en (last visited Dec. 10, 2011) [hereinafter *Status: Anti-Personnel Mines*].

105. Martin Barber, *Preface to 1 GENEVA CALL, ARMED NONSTATE ACTORS AND LANDMINES: A GLOBAL REPORT PROFILING NSAS AND THEIR USE, ACQUISITION, PRODUCTION, TRANSFER AND STOCKPILING OF LANDMINES 1* (2005).

106. *Resolution on Problem posed by Proliferation of Anti-Personnel Mines in Liberated Parts of New Sudan, SPLM/A* (Nov. 1, 1996), in MINE BAN EDUCATION WORKSHOP IN SOUTHERN SUDAN: REPORT OF PROCEEDINGS AND RECOMMENDATIONS 64 (2003), available at <http://www.genevacall.org/resources/conference-reports/f-conference-reports/2001-2010/gc-2003-01oct-sudan.pdf>.

acknowledged Geneva Call's engagement with the Ejército de Liberación Nacional (National Liberation Army) (ELN) and has indicated that it is in favor of "a process of engagement that is complementary and parallel to" the Ottawa Convention.¹⁰⁷ Likewise, a European Parliament resolution on Sri Lanka "urges both sides, as an immediate gesture of goodwill, to cease the use of [anti-personnel] mines and to assist in their removal, and considers that, to this end, the Government of Sri Lanka should set an example by signing the Ottawa Convention and the LTTE should sign Geneva Call's Deed of Commitment."¹⁰⁸

Armed groups have also undertaken to comply with particular humanitarian rules with the aim of affecting the behavior of the states against which they are fighting. For example, on signing the Deed, the National Council for the Defense of Democracy-Forces for the Defense of Democracy (CNDD-FDD) "urged the government [of Burundi] to respect and quickly implement its obligations under the [Mine Ban Treaty]."¹⁰⁹ There are also examples of armed groups that become or form part of a new government and then continue their prior commitments to abide by particular norms. Thus, in Iraq, two signatories to the Deed, the Kurdistan Democratic Party and the Patriotic Union of Kurdistan, became part of the national authorities and encouraged Iraq's accession to the Ottawa Convention, which occurred in 2007.¹¹⁰

3. *Effect on Other Armed Groups*

Allowing armed groups to agree to comply with humanitarian law norms can also influence other armed groups to agree to comply with such norms, either directly through peer pressure or indirectly through example setting.

Geneva Call incorporates this potential for influence into its strategy for engagement. The Deed provides that signatories "see the desirability of attracting the adherence of other armed groups to this *Deed of Commitment* and

107. GENEVA CALL, ANNUAL REPORT 19 (2003), available at <http://www.genevacall.org/resources/annual-reports/f-annual-reports/2001-2010/gc-annual-report-2003.pdf>.

108. European Parliament Resolution on the Situation in Sri Lanka, EUR. PARL. DOC. (0227) ¶ 12 (2006).

109. GENEVA CALL, *supra* note 107, at 9; *see also* Ndial Deng Nhial, Chairman, Sudan People's Liberation Movement/Army Comm'n for External Relations, Info., and Humanitarian Affairs, Statement of the Sudan People's Liberation Movement/Army on the Occasion of the Signing and Depositing to Geneva Call Deed of Commitment to Ban Landmines (Oct. 4, 2001), available at <http://www.genevacall.org/resources/nsas-statements/f-nsas-statements/2001-2010/2001-04oct-splma.htm> ("And as we stand committed to deposit our DEED OF COMMITMENT, we raise our voice to the international community to bring pressure to bear on the government of the Sudan to ratify the Ottawa Convention on the ban on the use of landmines . . .").

110. *See Signatories*, *supra* note 95; *Status: Anti-Personnel Mines*, *supra* note 104. Similarly, in 2003, the National Council for the Defense of Democracy-Forces for the Defense of Democracy (CNDD-FDD) signed Geneva Call's Deed. *See Signatories*, *supra* note 95. In 2005, the CNDD-FDD became the Government of Burundi. GENEVA CALL: PROGRESS REPORT, *supra* note 96, at 9. In 2008, the Parliament of Burundi enacted legislation implementing the Ottawa Convention. Loi No. 1/30 du 10 Octobre 2008 portant mise en oeuvre de la Convention sur l'Interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction [Law No. 1/30 of Oct. 10, 2008 Concerning the Implementation of the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction] BULLETIN OFFICIEL DU BURUNDI [BULL. OFF. BURUNDI] [OFFICIAL BULLETIN OF BURUNDI], Oct. 1, 2008.

will do [their] part to promote it.”¹¹¹ According to Geneva Call, “[p]eer pressure is a useful tool in this context: armed groups that have signed the Deed of Commitment can have a significant effect on other groups if they explain their reasons for adhering to the ban and share their experience, especially in the area of mine action.”¹¹² Cognizant of this approach, armed nonstate actors themselves have indicated that they “[c]ommit to continue to actively promote, in collaboration with Geneva Call, the Deed of Commitment among non-signatories.”¹¹³ In practice, some signatories have indeed gone on to advocate the importance of a ban on anti-personnel mines to other armed groups, and Geneva Call has indicated at least one instance where an armed group has become involved with the mine ban because of the example of others.¹¹⁴

The idea of armed groups influencing one another has particular promise at the local level. If several armed groups are involved in the same armed conflict, even if they are not formally related, links between them create the potential for peer influence. Along these lines, when signing the Deed of Commitment, the Lahu Democratic Front (LDF) stated, “We will do our best to advocate to other armed Lahu groups to also stop using anti-personnel mines. As well, we will use our position within the National Democratic Front (NDF) to encourage other armed opposition groups to ban anti-personnel mines.”¹¹⁵

The effect on other armed groups can also extend across borders and conflicts. When Ban Landmines Campaign Nepal and Geneva Call organized a seminar on the role of the Communist Party of Nepal-Maoist (CPN-M) in the mine ban, the then-Chairman of the Moro Islamic Liberation Front (MILF) Coordinating Committee for the Cessation of Hostilities attended, sharing MILF’s perspective on the mine ban and on “[t]he benefits for confidence-building that this measure has brought to relations between the MILF and the Government of the Republic of the Philippines.”¹¹⁶ Similarly, the Executive Director of the New Sudan Mine Action Directorate, an entity of the SPLM/A, sent a letter to the ELN of Colombia explaining the reasons why the SPLM/A banned the use of landmines and appealing to the Government and armed groups to “[s]ave Colombia . . . from further landmines contamination.”¹¹⁷

111. GENEVA CALL: DEED OF COMMITMENT, *supra* note 95, ¶ 8.

112. GENEVA CALL, AN INCLUSIVE APPROACH TO ARMED NONSTATE ACTORS AND INTERNATIONAL HUMANITARIAN NORMS: REPORT OF THE FIRST MEETING OF SIGNATORIES TO GENEVA CALL’S DEED OF COMMITMENT 23 (2004), *available at* <http://www.genevacall.org/resources/conference-reports/f-conference-reports/2001-2010/gc-2004-oct-geneva.pdf>.

113. *Declaration by Signatories to the “Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action” to the Cartagena Summit on a Mine-Free World, Nov. 30-Dec. 4 2009* (June 19, 2009), <http://www.genevacall.org/resources/nsas-statements/f-nsas-statements/2001-2010/2009-19jun-finalsign.pdf> [hereinafter *Declaration by Signatories*].

114. 2 ANKI SJÖBERG, GENEVA CALL & THE PROGRAMME FOR THE STUDY OF INT’L ORGS., ARMED NONSTATE ACTORS AND LANDMINES: A GLOBAL REPORT OF NSA MINE ACTION 14, 79-81 (2006), *available at* <http://www.genevacall.org/resources/research/f-research/2001-2010/gc-2006-nov-ansal2.pdf>.

115. Aik Long Kham Mwe, Chairman and Gen. Sec., Lahu Democratic Front, Statement on the Occasion of Signing the Deed of Commitment to Ban Landmines (Apr. 16, 2007).

116. SJÖBERG, *supra* note 114, at 80.

117. Letter from Aleu Ayieny Aleu, Exec. Dir., New Sudan Mine Action Directorate, to the Ejército de Liberación Nacional 2 (June 2004), *available at* <http://www.genevacall.org/resources/nsas->

Outside the context of Geneva Call, which remains the most influential actor in this area, states and intergovernmental organizations have also recognized the potential for armed groups to influence one another. The U.N. Secretary-General has observed, for example, that “[i]t is anticipated that the precedent set by the commitment of the [Sudan Liberation Army] (Minawi) faction in Darfur to an action plan [on child soldiers] will generate momentum for other armed groups to follow suit.”¹¹⁸ Similarly, the Government of the Philippines stated that it was “encouraged” by the submission of an action plan on child soldiers by MILF “[a]nd was optimistic that this action plan could be the springboard of similar negotiations with other non-State actors to halt the recruitment and use of children.”¹¹⁹

Materials from armed groups have also proven influential for unrelated armed groups. For example, several Maoist groups, unrelated to the Chinese People’s Liberation Army (CPLA) or to China, adopted codes of conduct based on various instructions issued by the CPLA in 1928 and reissued in 1947. The Revolutionary United Front of Sierra Leone (RUF) adopted “Eight Codes of Conduct,” which is virtually identical to the CPLA’s Eight Points of Attention,¹²⁰ and the New People’s Army, the armed wing of the National Democratic Front of the Philippines (NDFP), uses the Three Main Rules of Discipline and Eight Points of Attention of the CPLA.¹²¹ Thus, groups that share similar ideologies have influenced one another regarding humanitarian norms, and not just rhetoric and tactics.

B. *Possible Concerns*

Arguments against involving armed groups in law creation usually stem from assumptions that permitting such participation would affect their legal status, increase their perceived legitimacy, or lead to the downgrading of humanitarian law norms. Once again, while quantitative studies do not exist, qualitative evidence suggests that some of these concerns are overstated. Other concerns reflect the self-interest of states rather than the broader interests of the international community, while still others could be assuaged through restrictions on the way in which armed groups are granted a lawmaking role.

1. *Affecting the Legal Status of Armed Groups*

States are likely to object that granting armed groups a role in law creation will enhance their legal status, possibly upgrading common criminals

statements/f-nsas-statements/2001-2010/2004-01jun-splma.pdf.

118. U.N. Secretary-General, *Rep. of the Secretary-General on Children and Armed Conflict in the Sudan*, ¶ 36, U.N. Doc. S/2007/520 (Aug. 29, 2007).

119. U.N. Secretary-General, *Rep. of the Secretary-General on Children and Armed Conflict in the Philippines*, ¶ 47, U.N. Doc. S/2010/36 (Jan. 21, 2010).

120. *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Trial Chamber Judgment, ¶ 705 (Special Court for Sierra Leone Mar. 2, 2009).

121. Declaration, Nat’l Democratic Front of the Philippines (NDF-P), Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol 1 of 1977: Annex C, Basic Rules of the New People’s Army, princ. IV, pt. 3 (May 13, 1969).

and terrorists to a position on a par with states.¹²² According to some commentators, simply applying international humanitarian law to armed groups results in their being afforded a certain measure of legal status, however that law is created.¹²³ States are especially likely to be threatened by granting armed groups a lawmaking role when this role is justified on the basis that these groups are “state-like” entities because they control territory or exercise government-like powers.

We do not view this objection as persuasive, however. To begin with, this concern clearly reflects the self-interest of states. In Klabbers’s words, as “gatekeepers of the system,” states have every reason to hesitate about “elevat[ing] newcomers to their own level” for fear that they would lose some of the prerogatives that they currently enjoy.¹²⁴ States may have a keen interest in maintaining their exclusive or dominant role in lawmaking, but the pertinent question here is whether such exclusivity or dominance benefits the international community as a whole rather than states in particular.

There is little reason to fear that granting armed groups some role in lawmaking will lead to their having the same status as states. As a matter of positive law, recognizing that different entities are subjects of international law does not make them akin to states, nor does it mean that they hold the same rights, duties, and capacities as states.¹²⁵ For instance, international organizations can enter into treaties with respect to areas within their spheres of competence, but they do not have plenary lawmaking powers.¹²⁶ If armed groups were given a role in law creation, they could be subject to similar (as well as additional) constraints.

There are precedents for states’ granting armed groups some role in lawmaking while declaring that this does not affect the groups’ legal status. Common Article 3 of the Geneva Conventions exhorts parties to the conflict to conclude agreements on international humanitarian law but provides that this “shall not affect the legal status of the Parties to the conflict.”¹²⁷ Likewise, Geneva Call’s Deed of Commitment provides that it “shall not affect our legal status, pursuant to the relevant clause in common article 3,” a provision included by the drafters “so as not to alarm states.”¹²⁸ Although such caveats

122. See, e.g., 2-B FED. POL. DEP’T, FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 330 (1949) (describing General Oung of Burma’s argument that “an attempt to safeguard the legal status of the de jure government . . . will automatically give the insurgents a status as high as the legal status which is denied to them.”).

123. E.g., Georges Abi-Saab, *Non-International Armed Conflicts*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 217, 223-24 (UNESCO ed., 1998); Ilene Cohn, *Protection of Children in Peacemaking and Peacekeeping Processes*, 12 HARV. HUM. RTS. J. 129, 155-56 (1999).

124. Klabbers, *supra* note 72, at 365.

125. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11).

126. It may prove harder to delimit the lawmaking competence of nonstate actors, such as armed groups, that do not have a constitutive instrument created by states. Nonetheless, one approach to limiting their lawmaking power may come from the underlying justification for recognizing such powers—e.g., where a lawmaking role is justified on the basis that the nonstate actor bears rights and obligations.

127. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 1, art. 3.

128. GENEVA CALL: DEED OF COMMITMENT, *supra* note 95, art. 6; GENEVA CALL, *supra* note

will not always appease states' concerns,¹²⁹ they have been expressly or impliedly included in many bilateral agreements between states and armed groups.¹³⁰

The possibility of enhancing their legal status would certainly be attractive to some armed groups. For example, the Deed was reportedly unsatisfactory to the LTTE as it did not treat the group as equal to the Government of Sri Lanka.¹³¹ But armed groups have also been willing to undertake international obligations without this formal incentive. Indeed, a commander of the SPLM/A has "encouraged Geneva Call to make clear to armed groups that signature to the Deed of Commitment does not change in any way their legal status or lend legitimacy to their struggles."¹³² Likewise, the Declaration of the Second Meeting of Signatories to Geneva Call's Deed, which was adopted solely by armed nonstate actors, notes that "humanitarian engagement does not affect the legal status of any actor."¹³³

2. *Inappropriately Legitimizing Armed Groups*

A stronger objection is that engaging armed groups in law creation would inappropriately legitimize those groups. This concern is often grouped together with objections about affecting armed groups' legal status. For example, the African Union Convention on Internally Displaced Persons provides that "[t]he provisions of this Article shall not, in any way whatsoever, be construed as affording legal status or legitimizing or recognizing armed groups."¹³⁴ Yet the

107, at 33.

129. For example, in speaking about the clause in Common Article 3, Burma's delegate at the Diplomatic Conference of 1949 took the view that the sentence was "only a bait . . . which I hope will fail in its object. Whether or not you safeguard the legal status of the *de jure* government, the mere inclusion of this Article in an international Convention will automatically give the insurgents a status as high as the legal status which is denied to them. It can easily be imagined that this paragraph is going to be an encouragement and an incentive to the insurgents." FED. POL. DEP'T, *supra* note 122, at 330.

130. Some agreements include an express clause to this effect. *See, e.g.*, Government-FARC Humanitarian Exchange Accord, Colom.-FARC, June 2, 2001, available at <http://www.c-r.org/our-work/accord/colombia/humanitarian-exchange-accord.php>; Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, pt. VI, art. 3, Phil.-NDFP, Mar. 16, 1998, available at <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/phil8.pdf>. Others include the clause by incorporation, quoting from or referring to Common Article 3. *See, e.g.*, Agreement No. 1, Bosn.-Herz., May 22, 1992, reprinted in 2 HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 1112 (Marco Sassòli & Antoine Bouvier eds., 1999).

131. Soliman M. Santos, Jr., A Critical Reflection on the Geneva Call Instrument and Approach in Engaging Armed Groups on Humanitarian Norms: A Southern Perspective 15 (Oct. 31, 2003) (unpublished manuscript), available at http://www.armedgroups.org/sites/armedgroups.org/files/santos_paper.pdf.

132. GENEVA CALL, *supra* note 107, at 33.

133. Declaration of the Second Meeting of Signatories to Geneva Call's "Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action" (June 19, 2009), available at <http://www.genevacall.org/resources/nsas-statements/f-nsas-statements/2001-2010/2009-19jun-finalpart.pdf>.

134. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa art. 7(1), Oct. 22, 2009, available at http://www.africa-union.org/root/ar/index/Convention%20on%20IDPs%20_Eng_%20-%20Final.pdf; *see* Corte Constitucional [C.C.] [Constitutional Court], May 15, 1995, Sentencia C-225/95 (Colom.), reprinted and translated in 2 HOW DOES LAW PROTECT IN WAR?, *supra* note 130, at 2266, ¶ 17; Special Representative of the Sec.-Gen.,

two objections are distinct, as it is possible to enhance the perceived legitimacy of an armed group without formally affecting its legal status, though one may lead to the other.¹³⁵

States are often reluctant to do anything that may legitimize the armed groups with which they are in conflict.¹³⁶ For example, during a 2009 Security Council debate on the protection of civilians in armed conflict, Vietnam stated that, “[r]eality has proved that, while possibly effective in certain cases, dialogue with non-State armed groups must be carefully considered and approached in the overall framework of cooperation with the States in question in order to avoid the unintended legitimization of illegal or even internationally recognized terrorist groups.”¹³⁷ The Government of Myanmar prevented U.N. entities from engaging with Burmese armed groups on child soldier issues due to legitimacy concerns.¹³⁸ And the Government of Afghanistan expressed concern that the international community engaging with the Taliban might change perceptions of the conflict and the Government’s relative status within it, “reduc[ing] the Government from being a sovereign to being a mere faction in a civil war.”¹³⁹

On occasion, engagement with armed groups on the part of NGOs or international organizations has led to the organization’s expulsion from the territory in question.¹⁴⁰ Some states have even prohibited the provision of any sort of assistance to armed groups that are considered terrorist organizations. The U.S. Supreme Court, for instance, has held that providing advice or training on international humanitarian law to the LTTE and the Kurdistan Workers’ Party (PKK) could amount to providing material support to terrorist groups in violation of U.S. law.¹⁴¹ The judgment warns that such support “lend[s] legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which

Rep. of the Special Representative of the Secretary-General for Children and Armed Conflict, ¶ 51, U.N. Doc. A/60/335 (Sept. 7, 2005).

135. See Dawn Steinhoff, *Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups*, 45 TEX. INT’L L.J. 297, 301 (2009).

136. For example, legitimacy concerns may play a part in a state’s denial of the existence of an armed conflict, failure to recognize an armed group as a party to the conflict, or failure to conclude a bilateral agreement on international humanitarian law. INT’L COMM. OF THE RED CROSS, IMPROVING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW: EXPERT SEMINARS 20 (2003) [hereinafter INT’L COMM. RED CROSS, EXPERT SEMINARS]; INT’L COMM. RED CROSS, *supra* note 89, at 17.

137. U.N. SCOR, 64th Sess., 6151st mtg., U.N. Doc. S/PV.6151, at 9 (June 26, 2009).

138. U.N. Secretary General, *Rep. of the Secretary-General on Children and Armed Conflict*, ¶ 158, U.N. Doc. A/62/609-S/2007/757 (Dec. 21, 2007); see also U.N. Secretary General, *Rep. of the Secretary General on Children and Armed Conflict in Myanmar*, ¶¶ 48-49, U.N. Doc. S/2007/666 (Nov. 16, 2007) (“The principal issue impeding dialogue with non-State actors who remain in conflict with the Government military is the restrictive stance of the Government regarding engagement by the United Nations with these armed groups.”).

139. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Institutions: Mission to Afghanistan*, ¶ 42, U.N. Doc. A/HRC/11/2/Add.4 (May 6, 2009) (by Philip Alston).

140. Nicolas Florquin & Elisabeth Decrey Warner, *Engaging Non-State Armed Groups or Listing Terrorists? Implications for the Arms Control Community*, 1 DISARMAMENT F. 17, 19 (2008).

141. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010). *But see id.* at 2731 (Breyer, J., dissenting).

facilitate more terrorist attacks.”¹⁴² Given that certain states consider mere engagement with armed groups an unacceptable acknowledgement of such groups, granting them a role in law creation may be viewed as further legitimizing them.

There are reasons to be skeptical of the legitimacy objection, however. Concerns about legitimacy are often skewed in one direction: the concern more often raised is whether engaging an armed group in dialogue will legitimize it; the concern less often raised is whether failing to do so will legitimize a state.¹⁴³ Moreover, the characterization of an armed group as a terrorist group is frequently a political one. Although states that are involved in noninternational armed conflicts may characterize their opponents as terrorists, not everyone will share that perspective. For example, during the 2011 armed conflict in Libya, Colonel Gaddafi accused the armed group headed by the Transitional National Council of being a terrorist organization.¹⁴⁴ A number of states, however, recognized the Council as the “legitimate governing authority.”¹⁴⁵ Not dealing with armed groups that appear on terrorist lists may also be problematic. As an EU official noted, the Humanitarian Aid department of the European Commission needs “to act in full conformity with relevant legislation, and therefore cannot either engage directly or fund any organisation that is on its terrorist list. At the same time . . . it is very difficult to ignore some organisations that are on the list.”¹⁴⁶

It will always be hard to strike a balance between constructively engaging with armed groups in order to improve humanitarian conditions and not legitimizing those groups or their causes. Different entities will strike this balance in different ways. For instance, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions met with armed groups,¹⁴⁷ but chose not to meet with the Taliban due to political sensitivities. He later declared this a “mistake” as “[t]aking account of information provided by such sources would permit a more nuanced understanding of Taliban and other

142. *Id.* at 2725. *But see id.* at 2736-37 (Breyer, J., dissenting) (“This ‘legitimacy’ justification cannot by itself warrant suppression of political speech, advocacy, and association . . . [and] itself is inconsistent with critically important First Amendment case law.”).

143. Olivier Bangerter, *The ICRC and Non-State Armed Groups*, in EXPLORING CRITERIA & CONDITIONS FOR ENGAGING ARMED NON-STATE ACTORS TO RESPECT HUMANITARIAN LAW & HUMAN RIGHTS LAW 74 (2008), available at <http://www.genevacall.org/resources/conference-reports/f-conference-reports/2001-2010/gc-2007-04-05jun-geneva.pdf>.

144. See, e.g., Ian Black, *Libya Rebels Rejects Gaddafi's Al-Qaida Spin*, GUARDIAN (Mar. 1, 2011), <http://www.guardian.co.uk/world/2011/mar/01/gaddafi-libya-al-qaida-lifg-protesters>.

145. See, e.g., Chair's Press Statement, Fourth Meeting of the Libya Contact Group (July 15, 2011), available at <http://www.state.gov/p/nea/rls/rm/168764.htm> (“Representatives from 32 countries and 7 international organizations . . . agreed to deal with the National Transitional Council (NTC) as the legitimate governing authority in Libya.”).

146. GENEVA CALL AND INTERNAL DISPLACEMENT MONITORING CENTER, ARMED NON-STATE ACTORS AND THE PROTECTION OF INTERNALLY DISPLACED PEOPLE (2011), available at http://www.genevacall.org/news/events/f-events/2001-2010/GC_SE_GVA_IDMC/GC_2011_ANSAs_Report_EN.pdf.

147. Special Rapporteur to the Secretary-General, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Philippines*, U.N. Doc. A/HRC/8/3/Add.2 (Apr. 16, 2008) (by Philip Alston) (describing engagement with nonstate groups such as the NDF-P).

[antigovernment element] strategies.”¹⁴⁸ The Special Rapporteur indicated that, “while . . . contacts could indeed be pursued in ways that might somehow ‘legitimize’ these groups, contact in order to request its view on particular incidents, criticize its conduct, and urge better human rights and IHL compliance does not ‘legitimize’ that group.”¹⁴⁹

Even though states may dislike or object to engagement with armed groups, we argue that such engagement may be justified if it leads to concrete benefits, such as increased knowledge of and compliance with international humanitarian law. As the U.N. Secretary-General has stated in making the case for engaging with armed groups in general, not just in the context of law creation:

We must . . . focus more attention on compliance with international humanitarian law by non-State armed groups. Unpalatable as it may be for some States, engagement with such groups is critical. The United Nations must be able to talk to all warring parties, including armed groups. Failure to do so is always likely to mean more, not fewer, civilians killed and wounded. I urge Member States to accept this necessity. . . . We know from experience that regular engagement, monitoring and reporting creates a culture in which both States and non-State groups are increasingly being made aware of the need to respect international humanitarian law.¹⁵⁰

Against this, there is a risk that armed groups will seek to improve their reputations by issuing unilateral declarations or concluding bilateral agreements declaring an intention to respect international humanitarian law even when they have no real intention of complying with the terms of these documents.¹⁵¹ This danger, however, is not unique to armed groups; it also exists in relation to a state’s ratification of humanitarian law conventions.¹⁵² We do not view this risk as sufficient to prevent armed groups from playing a role in lawmaking. Nonetheless, it is worth looking for ways to mitigate this danger when modeling the specific ways in which armed groups might play a role in lawmaking.¹⁵³

3. *Downgrading Humanitarian Law Protections*

The strongest concern from the perspective of the international

148. *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Institutions*, *supra* note 139, ¶ 42.

149. *Id.* ¶ 43.

150. Press Release, Ban Ki-Moon, U.N. Secretary-General, Honouring Geneva Conventions, Secretary-General says Debate “No Longer between Peace and Justice but between Peace and What Kind of Justice,” U.N. Doc. SG/SM/12494 (Sept. 26, 2009), available at <http://www.un.org/News/Press/docs/2009/sgsm12494.doc.htm>; see also *Rep. of the Secretary-General on the Protection of Civilians in Armed Conflict*, *supra* note 96, ¶¶ 40, 45 (advocating engagement and dialogue with armed groups to protect civilians). Engagement with armed groups may also form confidence-building measures, which can in turn lead to the fostering of relationships and rapport. See Bangerter, *supra* note 143, at 83.

151. See INT’L COMM. RED CROSS, EXPERT SEMINARS, *supra* note 136, at 21; INT’L COMM. RED CROSS, *supra* note 89, at 19; François Bugnion, Jus ad bellum, jus in bello and Non-International Armed Conflicts, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 167, 194 (Tim McCormack & Avril McDonald eds., 2003).

152. INT’L COMM. RED CROSS, *supra* note 89, at 20; Bugnion, *supra* note 151, at 194.

153. Bugnion, *supra* note 151, at 194; see *infra* Part III.C.

community, as distinct from the self-interested perspective of states involved in noninternational armed conflicts, is that allowing armed groups to play a role in law creation might lead to the downgrading of humanitarian law protections. For example, would permitting armed groups a role in lawmaking in the future allow these groups to declare themselves not bound by existing legal obligations? Could they hold up the process of reaching agreement on new norms or water down the content of such norms during negotiations? Much depends on how the lawmaking role of armed groups is conceived, which we address in Part III.C. We argue that giving armed groups a role in lawmaking is not the same as giving them a license to dictate the content of the law and that armed groups should not be given a role equal to that of states or be able to displace existing legal obligations. However, before discussing the ways in which the concerns about ratcheting down protections may be addressed, it is worth making three points.

First, it cannot be assumed that involving armed groups in law creation would necessarily lead to the downgrading of legal standards. There are certainly cases where the practice of armed groups appears to be at odds with the requirements of international humanitarian law (for example in targeting).¹⁵⁴ Nonetheless, there are other cases where armed groups have undertaken obligations above and beyond those of states or existing international law. For example, the Ottawa Convention prohibits mines that are “*designed* to be exploded by the presence, proximity or contact of a person,” while Geneva Call goes further and prohibits mines that have that *effect*, whether or not they are actually designed for that purpose.¹⁵⁵ In addition, the fact that forty-one armed groups have signed Geneva Call’s Deed of Commitment, taken together with the existence of groups that have not signed the Deed but have indicated their general approval of the ban,¹⁵⁶ arguably moves the prohibition on land mines closer towards inclusion as a principle of

154. Contrary to the position under existing international humanitarian law, a number of armed groups have asserted that various classes of persons may be legitimately attacked. *See, e.g.*, Prosecutor v. Limaj, Case No. IT-03-66, Transcript, (Int’l Crim. Trib. for the Former Yugoslavia Nov. 19, 2004), available at <http://www.icty.org/x/cases/limaj/trans/en/041119ED.htm> (“[A]ll Serbian forces, whether the police, the military, or armed civilians, are our enemy.”); FRENTE FARABUNDO MARTÍ PARA LA LIBERACIÓN NACIONAL, THE LEGITIMACY OF OUR METHODS OF STRUGGLE 8-9 (1988) (arguing that it is permissible to capture mayors and members of the civil defense, and target military advisors); Declaration, National Democratic Front of the Philippines, Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977 (July 5, 1996), available at <http://www.hartford-hwp.com/archives/54a/036.html> (asserting that it is permissible to attack “units, personnel and facilities belonging to” the armed forces, national police, paramilitary forces, and intelligence personnel); Statement, Kurdistan Workers’ Party, Statement to the United Nations, (Jan. 24, 1995), available at <http://www.hartford-hwp.com/archives/51/009.html> (arguing that it is permissible to attack members of the armed forces, contra-guerrilla forces, the intelligence service, the gendarmerie, and village guards).

155. Ottawa Convention, *supra* note 2, art. 2(1) (emphasis added); *see also* GENEVA CALL: DEED OF COMMITMENT, *supra* note 95, art. 1.

156. *See, e.g.*, Position Statement on Landmine Use, National Democratic Front (Burma), Letter No. 01-2007 (Jan. 29, 2007), available at <http://www.genevacall.org/resources/nsas-statements/f-nsas-statements/2001-2010/2007-28feb-ndf.pdf> (condemning the indiscriminate use of landmines, allowing the use of landmines in self-defense, but subjecting such use to specific conditions); Statement on the Use of Landmines, Karenni National Progressive Party, Statement No. 02/06 (Aug. 31, 2006), available at <http://www.genevacall.org/resources/nsas-statements/f-nsas-statements/2001-2010/2006-31aug06-2-knpp.pdf> (condemning the use of landmines but allowing such use to defend troops in military zones).

customary international law. In the meantime, forty-one armed groups have voluntarily accepted additional humanitarian law obligations.

Second, awareness of areas of the law in which the views of states and armed groups diverge can be instructive for identifying breaches of existing law as well as potential for the future development of the law.¹⁵⁷ The breach of an existing custom is simultaneously a seed for a new legality.¹⁵⁸ Where armed groups violate legal standards but seek to justify their conduct within the boundaries of the existing rule and its exceptions, their breaches have the effect of reinforcing rather than undermining the referenced legal prohibitions. However, when armed groups openly violate a legal standard and attempt to justify their position by calling for a change in existing rules or understandings, their practice may contribute towards the development of customary norms if their position is accepted or acquiesced to by other relevant actors.

Identifying areas where the law is breached systematically may be useful in considering whether the law is realistic or unachievable. As Sassòli explains, allowing armed groups to participate in the formation of international humanitarian law “would constitute the best way to ensure that compliance with IHL is realistic” for such groups.¹⁵⁹ Just as the law of naval warfare would not be revised without considering the practice and views of navies, Sassòli reasons that armed groups should be involved in the creation of international humanitarian law because the essence of such law is that it is created and applied by the parties based on “an understanding of the problems, the dilemmas and the aspirations of the parties to armed conflicts.”¹⁶⁰ Although the law should not always be amended to reflect actual practice, when law and practice systematically diverge, it is worth examining whether the law has been appropriately adapted to the circumstances.

Accordingly, considering the practice of armed groups may prove useful in shaping international humanitarian law. For example, the practice of armed groups may demonstrate the inadequacies of international humanitarian law taking a “one size fits all” approach in all circumstances and might support the recognition of different standards for states and armed groups, or for different types of states and armed groups, in certain circumstances. Some room for differentiation is already built into certain humanitarian law rules, such as those obliging parties to act “within the limits of their capabilities”¹⁶¹ or “to the fullest extent practicable.”¹⁶² There have also been suggestions that the

157. Sassòli, *supra* note 91, at 9.

158. ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 97-98 (1971).

159. Sassòli, *supra* note 73, at 20.

160. Marco Sassòli, *The Implementation of International Humanitarian Law: Current and Inherent Challenges*, in *YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW* 45, 64 (2007).

161. Additional Protocol II, *supra* note 1, art. 5(2).

162. *Id.* art. 7(2); *see also id.* art. 4(3)(b) (“all appropriate steps shall be taken”); *id.* art. 8 (“[w]henver circumstances permit”); *id.* art. 17 (“all possible measures”). The key here is not to water down core legal standards but to permit some differentiation in circumstances where doing so would make non-core standards more realistic and achievable. *See generally* Sandesh Sivakumaran, *Re-Envisaging the International Law of Internal Armed Conflict*, 22 *EUR. J. INT’L L.* 219, 253-60 (2011) (describing different ways to tailor norms to meet the particularities of the situation).

differing abilities of states should be taken into account when assessing compliance with their humanitarian law obligations.¹⁶³ Thus, an armed group that exercises control over a significant portion of territory and operates as a de facto government may be able to assume obligations akin to those of states, while imposing similar obligations on groups with lesser levels of control or without relevant resources could prove meaningless.

A good example of this differentiation of responsibilities is the prohibition on sentencing and execution prior to a fair trial by a regularly constituted court. The FMLN in El Salvador advocated that “the type of tribunal and law required by [Additional] Protocol II have to be adapted to the conditions and capacity of the contending party; the particular mechanisms necessary for defense must be adjusted to the real possibilities of the zone where the trial is held.”¹⁶⁴ Similarly, the LTTE took the view that the nature of its judicial system varied with the level of territorial control that it had. According to the Head of the LTTE Judicial Division:

In the beginning we were a guerrilla organization, engaging in hit and run tactics against the Sri Lankan armed forces. We had no stable control over large territories or populations. Therefore we neither had the resources nor the environment to set up and run a proper judicial system. But in 1993, as soon as we were in control of most of the north, our leader established the Tamil Eelam Judiciary and College of Law.¹⁶⁵

Finally, there may also be merit in allowing armed groups to advocate for changes to humanitarian law norms even when states and armed groups have divergent views. States may have a collective interest in not recognizing the interests of armed groups, but this interest may not necessarily be shared by the broader international community. Armed groups would be likely to campaign, for example, for combatant immunity and prisoner-of-war status for their fighters taken captive, as was the case with the National Liberation Front of Algeria.¹⁶⁶ States have a clear interest in not recognizing this as a customary law obligation because they would be prevented from trying members of an armed group for taking part in hostilities. Nonetheless, the international community may have a different interest if armed groups would be more likely to comply with humanitarian law were they to receive combatant immunity or prisoner-of-war status in exchange.¹⁶⁷

The advantages and disadvantages of giving armed groups a role in lawmaking must be weighed against each other and should be judged by reference to the needs of the international community. Further work needs to be

163. For example, the Eritrea-Ethiopia Claims Commission noted that, when assessing what was meant by “required” medical care, it was “mindful” that it was dealing with two states with “very limited resources.” Partial Award on Prisoners of War, Eritrea’s Claim 17, (Eri. v. Eth.) 42 I.L.M. 1083, ¶ 117 (Eri.-Eth. Claims Comm’n 2003).

164. FRENTES FARABUNDO MARTÍ PARA LA LIBERACIÓN NACIONAL, *supra* note 154, at 20.

165. Interview with E. Pararajasingham, Head, Tamil Eelam Legal System (Oct. 30, 2003), available at <http://www.tamilnation.co/tamileelam/defacto/031030judicial.htm>.

166. ALGERIAN OFFICE, WHITE PAPER ON THE APPLICATION OF THE GENEVA CONVENTIONS OF 1949 TO THE FRENCH-ALGERIAN CONFLICT 23-25 (1960).

167. See INT’L COMM. RED CROSS, EXPERT SEMINARS, *supra* note 136, at 22-23; Bugnion, *supra* note 151, at 194-95; Sassòli, *supra* note 73, at 26.

undertaken on the merits. However, the evidence that exists to date suggests that, at least with respect to certain groups and certain norms, there is a link between allowing armed groups a role in the creation of international humanitarian law and their increased compliance with that law. Insofar as the downsides are concerned, many relate to the self-interest of states and should thus feature less strongly in the balancing equation. The strongest potential disadvantage relates to a weakening of humanitarian protections, which would be contrary to the interests of the international community. Nonetheless, many of the advantages and disadvantages depend on the *manner* in which armed groups could play a role in law creation, an issue to which we now turn.

C. *Proposals for Moving Forward*

Granting armed groups a role in lawmaking could mean many things: armed groups could remain bound by existing legal obligations or be given the right to opt out of these obligations; they could be given a right to participate in the creation of new legal norms but not a right to declare themselves bound by those norms; or they could be given the right to adopt new norms as binding upon them without being granted a role in the law creation process. Those favoring a traditional approach to the doctrine of sources would contend that armed groups remain bound by existing legal obligations imposed by states and should have no role in the creation or adoption of new legal norms. By contrast, those who strongly support the rights of nonstate actors in general or armed groups in particular would argue that such groups should not be bound by existing legal obligations because they played no role in their creation and have not consented to them, and should be given rights on par with states to participate in the creation and adoption of new legal norms.

We do not support either position. Instead we chart an intermediate course. For the reasons set out above, the traditional, statist approach to the doctrine of sources is both descriptively outdated and normatively questionable. Nonetheless, giving armed groups plenary lawmaking powers would effectively upgrade them to the level of states and would subordinate the interests of the international community as a whole to the interests of armed groups. Accordingly, we argue for striking a balance between recognizing the interests of armed groups in creating and developing international humanitarian law and maintaining important humanitarian protections. Specifically, we propose that armed groups should remain bound by existing obligations but be given certain roles in the norm creation process going forward, including being granted the formal capacity to recognize existing obligations and to undertake new ones. These roles can take a number of different forms.

1. *Unilateral Declarations*

We contend that armed groups should be permitted, even encouraged, to issue binding unilateral declarations through which they commit to respect existing international humanitarian law obligations and take on additional obligations. In the *Nuclear Tests* cases, the ICJ recognized that, with respect to

states, “declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations,” depending on the intention of the state making the declaration and how it may be reasonably understood by other actors.¹⁶⁸ Under our proposal, unilateral declarations from armed groups would be given weight analogous to unilateral declarations from states. International law generally sets a high bar for determining that a statement amounts to a binding unilateral declaration.¹⁶⁹ We argue, however, that when declarations on humanitarian norms are issued in the midst of a noninternational armed conflict or cast in legal language, there should be a presumption that they are binding. We recommend that these declarations be made publicly available, preferably in a centralized repository, so that they can be easily accessed, monitored by various entities, and can potentially influence other armed groups. We also support the introduction of verification mechanisms, such as those adopted by Geneva Call with respect to its Deed, in order to hold armed groups accountable for the commitments they have made.¹⁷⁰ This would help ensure that only those armed groups that genuinely intend to comply with their obligations issue unilateral declarations.

Our proposal builds on existing practice. A number of armed groups have already issued unilateral declarations in which they agree to be, or recognize that they already are, bound by certain humanitarian law obligations. This has occurred on both an ad hoc basis and in more structured environments. Geneva Call provides the best example of the structured approach, but it is not the only one. States themselves have envisaged the possibility of national liberation movements adopting unilateral declarations undertaking to comply with particular humanitarian law treaties. Article 96(3) of Additional Protocol I permits national liberation movements to “undertake to apply” the Geneva Conventions and Additional Protocol I.¹⁷¹ The effect of such an undertaking is that:

(a) the Conventions and this Protocol are brought into force for the [national liberation movement] as a Party to the conflict with immediate effect; (b) the [national liberation movement] assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.¹⁷²

The 1980 Convention on Certain Conventional Weapons adopts a similar framework.¹⁷³ No instruments applicable in noninternational armed conflict include a specific mechanism for unilateral declarations, but numerous armed groups have made such declarations nonetheless. For instance, the FMLN and the PKK issued unilateral declarations in which they committed to abide by

168. *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, ¶¶ 43-46 (Dec. 20); *see also* *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 4, ¶ 39 (Dec. 22).

169. *See Nuclear Tests*, 1974 I.C.J. at ¶ 44.

170. *See supra* Part III.A.

171. Additional Protocol I, *supra* note 81, art. 96(3).

172. *Id.* art. 96.

173. Convention on Certain Conventional Weapons, *supra* note 2, art. 7(4).

international humanitarian law.¹⁷⁴

There is some acceptance in the literature of the binding nature of unilateral declarations made by nonstate actors.¹⁷⁵ Geneva Call treats its Deed of Commitment as binding on its signatories, as do the signatories themselves.¹⁷⁶ On occasion, international courts have also referred favorably to undertakings by armed groups. For example, in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ noted that Palestine had submitted a unilateral declaration undertaking to comply with the Fourth Geneva Convention, which the depositary had treated as “valid.”¹⁷⁷ Similarly, in the *Akayesu* trial judgment, the International Criminal Tribunal for Rwanda noted that the Rwandan Patriotic Front (RPF) had “stated to the International Committee of the Red Cross that it was bound by the rules of international humanitarian law.”¹⁷⁸ Outside the courtroom, various U.N. entities have treated unilateral declarations of armed groups as binding and have called upon the international community to monitor and enforce such undertakings.¹⁷⁹

In our view, recognizing the possibility of armed groups making binding unilateral declarations should be relatively uncontroversial. Given that armed groups would be committing to respect existing obligations or to take on additional obligations, the risk of downgrading legal obligations does not arise. Accordingly, the fact that these commitments would emanate from armed groups alone, without any involvement on the part of states, is not problematic. The lack of direct interaction between states and armed groups also minimizes concerns about legitimizing armed groups by treating them on par with states. Adopting a unilateral declaration approach would also leave the traditional architecture of international law—which is based primarily on treaties, custom and general principles—unaffected.

2. *Hybrid Treaties*

a. *Bilateral or Trilateral Treaties*

In addition to favoring unilateral declarations, we propose that armed

174. See, e.g., FRENTE FARABUNDO MARTÍ PARA LA LIBERACIÓN NACIONAL, *supra* note 154, at 7; Statement, Kurdistan Worker’s Party, *supra* note 154.

175. E.g., CLAPHAM, *supra* note 60, at 19-20; Klabbers, *supra* note 72, at 351-69.

176. Thus, signatories monitor their commitments through self-reporting, issuing internal orders and sanctioning non-compliance. Geneva Call engages in third-party monitoring and verification missions to investigate allegations of violations. See GENEVA CALL: PROGRESS REPORT, *supra* note 96, at 18-19, 25-28.

177. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 91 (July 9). The text of Switzerland’s note of information sent to State Parties to the Geneva Conventions is reprinted in *Palestine and the Geneva Conventions*, 274 INT’L REV. RED CROSS 64, 64 (1990).

178. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 627 (Sept. 2, 1998).

179. See Special Representative of the Secretary-General, *Additional Rep. of the Special Representative of the Secretary-General for Children and Armed Conflict*, ¶ 20, U.N. Doc. E/CN.4/2000/71 (Feb. 9, 2000) (by Olara Otunnu); Special Rapporteur to the Secretary-General, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 30, U.N. Doc. E/CN.4/2006/53/Add.5 (Mar. 27, 2006) (by Philip Alston).

groups should be encouraged to conclude agreements on international humanitarian law with states and state-empowered bodies such as international organizations. Through these agreements, the parties would affirm their intention to comply with existing obligations or agree to bring new legal obligations into play. As these agreements would be modeled on treaties, and share with treaties the characteristic of being binding on the parties, we term them “hybrid treaties.” This terminology is not intended to suggest that these instruments are quasi-binding or akin to soft law. Instead, although just as obligatory as treaties proper, these agreements are hybrid in the sense of being concluded between subjects with recognized lawmaking capacities (states and international organizations) and ones without (armed groups).

As with unilateral declarations, this recommendation builds on existing practices. For instance, the Government of the Philippines and the NDFP entered into an agreement on human rights and international humanitarian law;¹⁸⁰ the Government of Sudan and the SPLM/A concluded an agreement on the protection of civilians;¹⁸¹ and the Government of the Philippines and the MILF reconfirmed their obligations to respect humanitarian and human rights law.¹⁸² Humanitarian law obligations also form a common component of ceasefire and peace agreements entered into between governments and armed groups, such as those between the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG), the Government of El Salvador and the FMLN, and the Government of Sierra Leone and the RUF.¹⁸³ Armed groups have also entered into tripartite agreements with states and U.N. entities in which they accept certain humanitarian law obligations, such as the Memorandum of Understanding between the Government of Sudan, the SPLM/A, and the United Nations regarding U.N. Mine Action Support to Sudan.¹⁸⁴

To date, some international and domestic courts have rejected the idea that agreements involving armed groups amount to treaties or are binding under international law on the basis that only states can create international obligations. The Colombian Constitutional Court has held that agreements concluded pursuant to common Article 3 “are not, strictly speaking, treaties, as they are not established between entities subject to public international law but between the parties to an internal conflict, which are subject to international

180. Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law, Phil.-NDFP, *supra* note 130.

181. Agreement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack, Sudan-SPLM (Mar. 10, 2002), *available at* [http://www.ecosonline.org/reports/2002/Agreement between the government and splm.pdf](http://www.ecosonline.org/reports/2002/Agreement%20between%20the%20government%20and%20splm.pdf).

182. Agreement on the Civilian Protection Component of the International Monitoring Team, Phil.-MILF (Oct. 27, 2009), *available at* http://hdcentre.org/files/Agreement%20on%20Civilian%20Protection%20Component%20of%20IMT_27%20Oct%2009.pdf.

183. *See* Bell, *supra* note 67, at 381. *See generally* CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS (2000); CHRISTINE BELL, ON THE LAW OF PEACE (2008) [hereinafter BELL, ON THE LAW OF PEACE] (discussing the extent to which peace agreements contain obligations relating to human rights and humanitarian law).

184. Memorandum of Understanding, *supra* note 103.

humanitarian law.”¹⁸⁵ Similarly, the Special Court of Sierra Leone held that the Lomé Agreement between the Government of Sierra Leone and the RUF was not a treaty because it was signed by the government and an armed group,¹⁸⁶ though this conclusion has been criticized.¹⁸⁷

This cursory dismissal of such agreements is not convincing, however. Although the VCLT applies to international agreements between states, it does not preclude recognition of international agreements between other subjects of international law.¹⁸⁸ The international community has also recognized the possibility of international organizations entering into treaties with states and each other.¹⁸⁹ Accordingly, this approach, which was mooted during the drafting of the Convention,¹⁹⁰ recognizes agreements entered into by subjects of international law, such as armed groups.

Again, there is some practice on point. The ICTY has treated the May 22, 1992 agreement between representatives of the President of the Republic of Bosnia-Herzegovina, the President of the Serbian Democratic Party, the President of the Party of Democratic Action, and the President of the Croatian Democratic Community, in which the parties committed to respect certain humanitarian law obligations, as binding on the parties.¹⁹¹ Similarly, the Independent Commission of Inquiry on Darfur noted that the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) “possess under customary international law the power to enter into binding international agreements (*jus contrahendi*), and have entered into various

185. Corte Constitucional [C.C.] [Constitutional Court], mayo 15, 1995, Sentencia C-225/95 (Colom.), *reprinted and translated in* 2 HOW DOES LAW PROTECT IN WAR?, *supra* note 130, at 2266, ¶ 17.

186. Prosecutor v. Kallon & Kamara, Case No. SCSL-04-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶¶ 45-50 (Int’l Crim. Trib. for Rwanda Mar. 13, 2004).

187. See, e.g., Bell, *supra* note 67, at 387; Antonio Cassese, *The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty*, 2 J. INT’L CRIM. JUST. 1130, 1134-35 (2004).

188. VCLT, *supra* note 25, art. 3; see *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reps. of the Commission to the Gen. Assembly*, *reprinted in* [1966] 2 Y.B. Int’l L. Comm’n 190, U.N. Doc. A/CN.4/SER.A/1966/Add.I.

189. VCLT-IO, *supra* note 23.

190. *Summary Records of the Fourteenth Session: 24 Apr.-29 June, 1962*, [1962] 1 Y.B. Int’l L. Comm’n 58, 170, U.N. Doc. A/CN.4/Ser.A/1962 (indicating that reference to “other subjects of international law” included entities such as the Holy See, international organizations, insurgent communities and belligerents which had received de facto recognition); *Documents of the Fourteenth Session Including the Rep. of the Comm’n to the Gen. Assembly*, [1962] 2 Y.B. Int’l L. Comm’n 164, U.N. Doc. A/CN.4/SER.A/1962/Add.I (“The phrase ‘other subjects of international law’ is primarily intended to cover international organizations, to remove any doubt about the Holy See and to leave room for more special cases such as an insurgent community to which a measure of recognition has been accorded.”).

191. Agreement No. 1, *supra* note 130. The ICTY has used the agreement primarily as a means by which to bring into force certain other treaty provisions that could then form the basis of prosecution. See Prosecutor v. Galić, Case No. IT-98-29-A, Judgment, ¶ 119 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); Prosecutor v. Blaskić, Case No. IT-95-14-T, Judgment, ¶ 172 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 135 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998). For various views on the legal status of agreements between states and armed groups, see BELL, ON THE LAW OF PEACE, *supra* note 183, at 128-32; ZEGVELD, *supra* note 94, at 28-30; Cassese, *supra* note 187, at 1130; and P.H. Kooijmans, *The Security Council and Nonstate Entities as Parties to Conflicts*, in INTERNATIONAL LAW: THEORY AND PRACTICE 333 (Karel Wellens ed., 1998).

internationally binding agreements with the Government” on issues pertaining to international humanitarian law.¹⁹²

The name “hybrid treaty” has both symbolic and substantive importance. Symbolically, the characterization eases concerns about affecting the legal status or perceived legitimacy of armed groups as it signals that these entities are not being treated on par with states. Substantively, the notion of hybridity supports the argument that, even if armed groups are given some role in law creation, it need not be coextensive with the plenary lawmaking power of states. The lawmaking role of armed groups could be limited in certain ways: it could be confined to particular substantive areas (such as international humanitarian law) or subject to certain constraints (such as the continued application of existing laws). Furthermore, given that armed groups would be entering into hybrid treaties with states or state-empowered bodies (in accordance with their powers as defined by states), states maintain a direct or indirect role in relation to the parties with which they are entering into such binding agreements.

There is some precedent for the notion of hybrid treaties in the area of peace agreements. For example, Bell has called for the creation of a new law of peace agreements (*lex pacificatoria*) in order to account for their hybridity in terms of parties (state and nonstate) and content (international and domestic law).¹⁹³ As evidenced by the examples above, this hybrid approach has potential outside the realm of peace agreements. It would also give a more formal legal status to ad hoc bilateral agreements that are frequently concluded between states and armed groups, some of which have been expressly welcomed by the international community.¹⁹⁴

b. *Multilateral Treaties*

Multilateral treaties are different from bilateral and trilateral treaties, not because of the number of parties that sign them but because they are open rather than closed. Different approaches could be used to integrate armed groups into multilateral treaties. State parties might give armed groups a role in treaty negotiations, whether direct or indirect. Alternatively, or in addition, the international community could recognize a right for armed groups to ratify or accede to the treaty. Another approach would be to provide for the possibility of a unilateral undertaking to abide by treaty commitments within the framework of the treaty itself. The modalities for creating a role for armed groups in multilateral treaties are complicated, and we recognize that different strategies will be necessary. However, we have drawn on existing practices in order to provide a framework for future debates about how armed groups might

192. Rep. of the Indep. Comm’n of Inquiry on Darfur to the Secretary-General, ¶ 174, U.N. Doc. S/2005/60 (Feb. 1, 2005).

193. Bell, *supra* note 67, at 407-10. See generally BELL, ON THE LAW OF PEACE, *supra* note 183 (investigating the history and nature of peace agreements, and their relationship to law, and arguing for the existence of a developing “law of the peacemaker,” or *lex pacificatoria*).

194. See, e.g., G.A. Res. 45/172, U.N. Doc. A/RES/45/172 (Dec. 18, 1990) (welcoming the Government of El Salvador-FMLN Agreement on Human Rights).

be integrated into multilateral humanitarian law treaties.

In terms of a direct role in the negotiating process, armed groups could be given a formal role in international humanitarian law treaty negotiations. These groups could seek to affect the content of these treaties to reflect better their interests and realities, even if states remain in control of the final formulation of obligations. For example, certain national liberation movements were entitled to “participate fully” in the Diplomatic Conference of 1974-77 that gave rise to the Additional Protocols, but were not given a vote.¹⁹⁵ These movements were invited due to the “paramount importance of ensuring broad participation” and the recognition that “the progressive development and codification of international humanitarian law applicable in armed conflicts is a universal task in which the national liberation movements can contribute positively.”¹⁹⁶ Although states reserved their positions regarding whether this created a precedent,¹⁹⁷ and historical circumstances may make such invitations difficult to replicate,¹⁹⁸ the example has been cited as a broader model.¹⁹⁹ This would raise practical difficulties, however, as to which groups would be allowed to participate and the modalities by which they would do so.

In terms of an indirect role in the negotiating process, mechanisms could be adopted in diplomatic conferences to allow armed groups to feed their views into the conferences even if they were not given a formal role in treaty negotiations.²⁰⁰ NGOs and international organizations could convene pre-conference meetings with armed groups in order to solicit their views and communicate these to the conference delegates. For example, shortly before the Second Review Conference of States Parties to the Ottawa Convention, Geneva Call convened a meeting of signatories to its Deed of Commitment. The participants of that meeting issued a Declaration to the Second Review Conference that, *inter alia*, urged states to ratify the Ottawa Convention.²⁰¹ Interested states could do likewise. For example, in 2010, the Swiss Federal Government together with the Geneva Academy of International Humanitarian Law and Human Rights convened a meeting with armed groups to ascertain

195. Res. 3(I) (Mar. 1, 1974), in 1 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 1974-1977, at 238 (1978) [hereinafter OFFICIAL RECORDS].

196. *Id.*

197. The Final Act, in OFFICIAL RECORDS, *supra* note 195, at 119 (“It is understood that the signature by these movements is without prejudice to the positions of participating States on the question of a precedent.”).

198. The inclusion of national liberation movements may be an actor-specific case, given the particular historical background against which the Diplomatic Conference took place, namely in a period of decolonization. Even then, the movements that were invited were those that had been recognized by regional intergovernmental organizations, and those that were not so recognized were not invited. Res. 3(I) (Mar. 1, 1974), in OFFICIAL RECORDS, *supra* note 195, at 238.

199. With varying degrees of caution, see de Beco, *supra* note 89, at 191-92; Jean-Marie Henckaerts, *Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law*, 27 COLLEGIUM 123, 127-28 (2003); and Sassòli, *supra* note 73, at 22.

200. CLAPHAM, *supra* note 60, at 42.

201. Although not a statement of armed groups on various substantive legal issues, and although not formally part of the Review Conference, the Declaration does suggest the possibility of indirect input on the part of nonstate armed groups to treaty negotiations. *Declaration by Signatories*, *supra* note 113.

their views on the concept of “ownership” of humanitarian norms by such groups.²⁰² Just as diplomatic conferences on international humanitarian law are usually preceded by conferences of government experts, they could also be preceded by conferences of armed groups to allow the views of such groups to be ascertained and then presented to the conference delegates. Granting armed groups a direct role in negotiations enables states and armed groups to interact with one another, creates potential for compromise, and allows positions to be developed in a way that setting out a static position ahead of a diplomatic conference does not. Moreover, an indirect role will likely prove far less controversial given that states may object to negotiating with armed groups and may fear that granting such groups a direct role in negotiations is akin to treating them on par with states.

Irrespective of whether armed groups are granted a direct or indirect role in negotiations, they could be given the right to accede to, ratify, or unilaterally accept multilateral treaties. If armed groups were given a role in negotiations and then could ratify the multilateral treaty, this might suggest that they are being treated on par with states, with all of the controversy that would entail. In the alternative, armed groups could be given no role or a lesser role in multilateral negotiations, such that states remain in control of the content of the treaty, but be given the opportunity to accede to, ratify or unilaterally accept these norms. For the idea of unilateral acceptance, we draw on the approach taken in Additional Protocol I,²⁰³ while for the idea of accession, we point to the exceptional case of the Provisional Government of the Algerian Republic acceding to the Geneva Conventions two years before Algeria gained independence as a state.²⁰⁴

Regardless of whether armed groups are permitted to participate in multilateral treaty negotiations or to ratify the resulting agreement, we argue that armed groups should remain bound by existing treaty obligations as this would help to ensure stability and prevent the uncertainty caused by starting from a blank slate. Accordingly, armed groups could not unilaterally exempt themselves from existing legal obligations. Importantly, they also would not be able to impose obligations on a state without the latter’s consent. Instead, hybrid treaties would provide a mechanism by which armed groups could express their commitment to abide by existing legal obligations or undertake additional legal obligations.²⁰⁵ Thus, as with unilateral declarations, the hybrid

202. See *Armed Nonstate Actors and International Norms*, ADH GENEVA, <http://www.adh-geneva.ch/policy-studies/ongoing/armed-nonstate-actors-and-protection-of-civilians> (last visited Nov. 2, 2011).

203. Additional Protocol I, *supra* note 81, art. 96(3).

204. See Instruments of Accession of the Algerian Republic to the Geneva Conventions, Aug. 12, 1949, (registered at Berne, 20 June 1960), in MOHAMMED BEDJAOUI, *LAW AND THE ALGERIAN REVOLUTION* 199 (1961); Michel Veuthey, *Learning from History: Accession to the Conventions, Special Agreements, and Unilateral Declarations*, 27 *COLLEGIUM* 139, 143 (2003). The accession was accepted by some states and rejected by others. The compilation of the reactions of states is found in ICRC Archives B AG 041-083 (Apr. 4, 1960-Aug. 28, 1962) (on file with ICRC archives).

205. One issue to consider is the effect of inconsistent obligations under treaties and hybrid treaties. To the extent that hybrid treaties create additional or higher burdens than currently exist under treaties, any conflict between the two will be unproblematic. Where a hybrid treaty seeks to vary or lower existing treaty standards, it would be subject to a number of constraints, including that hybrid

treaty approach captures the benefits of involving armed groups in the process of law creation while minimizing potential disadvantages.

3. *Quasi-Custom*

A third, more difficult, approach is to allow armed groups to play a role in the creation of customary international humanitarian law. We contend that it would be possible for armed groups to play a role in the creation of what we term “quasi custom,” but we acknowledge that the modalities for doing so are difficult and that some of the potential downsides cannot be entirely mitigated.

A number of armed groups have publicized their practices and views with respect to international humanitarian law.²⁰⁶ Some have published their codes of conduct, which could be treated as akin to state military manuals, which are regularly used as evidence of state practice or *opinio juris* for the purposes of determining customary international law.²⁰⁷ For example, the CPLA of China adopted the Three Main Rules of Discipline (1927; reissued in 1947), the Six Points for Attention (1928; reissued in 1947 as the Eight Points for Attention), and the Four Policies for the Lenient Treatment of Captives (1928).²⁰⁸ Other armed groups have issued internal orders, drafted constitutions, or created penal codes, many of which contain international humanitarian law provisions. For example, the Ejército Zapatista de Liberación Nacional (EZLN) of Mexico enacted a Revolutionary Women’s Law, the Nepalese CPN-M drew up a Public Legal Code, and the LTTE in Sri Lanka issued a Child Protection Act.²⁰⁹ Other

treaties could not undermine *jus cogens* norms or exempt states and armed groups from obligations owed to third states and third-party beneficiaries. The precedence of treaty and hybrid treaty obligations could be analyzed by general interpretive rules, such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori*. See generally Rep. of the Int’l Law Comm’n, 58th sess., May 1-June 9, July 3-Aug. 11, 2006, ¶ 251, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006) (discussing conclusions of the ILC study group on the fragmentation of international law, including the application of *lex specialis derogat legi generali* and *lex posterior derogat legi priori*).

206. There may be various motivations for this. Publication may be intended to promote compliance with the relevant laws, it may have the aim or effect of influencing the development of international law, or it may be for other reasons such as increasing the group’s legitimacy, support, or funding base.

207. See, e.g., Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 31 n.50 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (citing the military manuals of Australia, Canada, Germany, the Netherlands, New Zealand, the former Soviet Union, and the United States); 2 HENCKAERTS & DOSWALD-BECK, *supra* note 3, at 1987-91 (citing the military manuals of Argentina, Australia, Belgium, France, Germany, New Zealand, and the United States, among others); see also THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 41 (1989) (“[M]anuals of military law . . . providing for the implementation of humanitarian law norms as internal law should be accepted as . . . evidence of practice, and sometimes as statements of *opinio juris* as well.”); Charles Garraway, *The Use and Abuse of Military Manuals*, 7 Y.B. INT’L HUM. L. 425, 431-38 (2004) (stating that national manuals provide evidence of state practice and *opinio juris* in relation to the states that issued them).

208. The practice of the CPLA is reprinted in He Xiadong, *The Chinese Humanitarian Heritage and the Dissemination of and Education in International Humanitarian Law in the Chinese People’s Liberation Army*, 841 INT’L REV. RED CROSS 141, 144-45 (2001). For more recent examples, see *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, ¶ 705 (Mar. 2, 2009) (reprinting part of the Revolutionary United Front’s Eight Codes of Conduct); and The Islamic Emirate of Afghanistan, The Lahya [Code of Conduct] for Mujahids (2010), translated in 93 INT’L REV. OF THE RED CROSS 103 (2011).

209. Tamil Eelam, Tamil Eelam Child Protection Act (2006) (on file with authors); Communist Party of Nepal-Maoist, United Revolutionary Peoples’ Council, Public Legal Code, 2060 (2003/2004) (on file with authors) (unofficial translation); Zapatista Nat’l Liberation Army (EZLN), Revolutionary

armed groups have issued statements on particular international humanitarian law issues,²¹⁰ while still others have expressed disagreement with legal interpretations given by U.N. special rapporteurs and human rights organizations.²¹¹

The legal status of these materials remains contentious, however. For example, the influential customary international humanitarian law study concluded under the auspices of the ICRC collected and listed the practices of armed groups, including the ELN of Colombia, the FARC of Columbia, the RPF of Rwanda and the SPLM/A of Sudan, as well as certain unidentified armed groups,²¹² but ultimately did not utilize this “other practice” because its legal significance was “unclear.”²¹³ By contrast, the ICTY took into account the practice of the CPLA, FMLN, and the Royalists in Yemen in determining that a number of customary rules applied to noninternational armed conflicts.²¹⁴

We suggest that one way forward would be to develop a theory of quasi-customary international law that would be based on the practices and views of states plus actors other than states, including, in the present context, armed groups. Calls to reformulate understandings of custom along these lines already exist. For example, Arend argues that custom could be based on the practice of all international actors, with different customs binding different types of actors.²¹⁵ McCorquodale points out that the ICJ statute’s reference to custom describes it as “general practice accepted as law” without requiring that practice to be state practice alone.²¹⁶ Sassòli and de Beco have both argued for the practice of armed groups to be considered in the creation of customary international humanitarian law.²¹⁷ Yet these suggestions are not widely supported and they also raise a variety of concerns (such as whether incorporating the practice of armed groups would lead to a downgrading of

Women’s Law (Dec. 1993), *reprinted and translated in* VOICES OF FIRE (Ben Clark ed., 1994).

210. *See, e.g.*, Statement by the Opposition Movements, Justice and Equality Movement-Sudanese Liberation Movement Unity, *available at* <http://www.hdcentre.org/files/Statement%20by%20the%20opposition%20movements110708.pdf> (last visited Nov. 2, 2011).

211. *See, e.g.*, Statement, Sudan Justice and Equality Movement (JEM), Report of the Panel of Experts Established Pursuant to Resolution 1591 (2005) Concerning the Sudan Issued 29 October 2009: A Response from JEM (Nov. 18, 2009), *available at* <http://www.sudanjem.com/2009/11/report-of-the-panel-of-experts-established-pursuant-to-resolution-1591-2005-concerning-the-sudan-issued-29-october-2009/>; Press Release, Karen National Union, Press Statement on Report of UNSG (Apr. 27, 2009), *available at* <http://www.genevacall.org/resources/nsas-statements/f-nsas-statements/2001-2010/2009-27apr-knu.pdf>; Letter from National Democratic Front of the Philippines to Ban Ki Moon, U.N. Sec.-Gen. (Nov. 24, 2008), *available at* <http://www.philippinerevolution.net/statements/letter-of-the-ndfp-nec-to-un-secretary-general-ban-ki-moon>.

212. 2 HENCKAERTS & DOSWALD-BECK, *supra* note 3, at 64, 77, 115, 126, 356, 412, 778, 870, 2882, 3610.

213. *Id.* at xxxvi. Elsewhere, however, one of the study’s authors has advocated the inclusion of the practice of nonstate armed groups in the determination of customary rules. Jean-Marie Henckaerts, *Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law*, 27 COLLEGIUM 123, 128-29 (2003).

214. *Prosecutor v. Tadić*, Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 102, 103, 107 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). Nonetheless, in subsequent cases, the ICTY has not relied on the practice of armed groups. It is unclear what (if anything) can be drawn from this subsequent practice.

215. AREND, *supra* note 68, at 177-78.

216. McCorquodale, *supra* note 28, at 498-99.

217. de Beco, *supra* note 89, at 191-92; Sassòli, *supra* note 73, at 6-7.

customary law protections) and questions (such as what would happen if the practice of states and armed groups diverged). To mitigate these concerns, we suggest the following.

First, drawing inspiration from the way in which international law addresses the customary law rights and obligations of new states, we contend that armed groups should remain bound by existing customary international law obligations. International law protects the stability of the legal system by providing that new states remain bound by existing customary law obligations, even if the new government or state played no role in the creation of those obligations and therefore had no opportunity to persistently object during their formation.²¹⁸ We contend that armed groups should expect to be bound in the same fashion.

Second, armed groups, acting alone, would not have the power to create a new custom or undermine or change an existing custom. Such developments would require some sort of consensus between armed groups and states. In this way, armed groups could contribute to the process of developing customary law, without being able to control its outcome. Whether the practice of armed groups would help to change customary law would depend not just on its generality and consistency, but also on the actions and reactions of states, thus retaining a central role for state consent.

Third, when it comes to weighing the practice of armed groups and states going forward, their practice need not be treated equally. The centrality of the role of states in international law means that their practice should still be given more weight. As with traditional notions of custom, state-empowered bodies (such as courts and tribunals) will likely play a critical role in identifying and articulating customary rules, allowing those bodies to evaluate conflicting practices of states and armed groups in light of the broader interests of the international community. If the views of armed groups were considered, there might also be an argument for including the views of other affected parties, such as civilians.

As can be seen, different options are possible. Quasi-custom would allow armed groups to play some role in the creation of customary norms without ceding all, or even equal, control to armed groups. At the same time, we acknowledge that any theory of quasi-custom is likely to prove more controversial in theory and difficult to implement in practice than recognition of hybrid treaties and encouraging unilateral declarations, particularly since the role of state action and consent in quasi-custom would be more attenuated and there is a greater chance of ratcheting down humanitarian protections.

IV. CONCLUSION

Given that international law now regulates the rights and obligations of many nonstate actors in addition to those of states, this Article asks whether

218. 1 OPPENHEIM'S INTERNATIONAL LAW: PEACE, *supra* note 4, at 14, §5; MALCOLM N. SHAW, INTERNATIONAL LAW 91 (6th ed. 1991); Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 115, 122 (Malcolm D. Evans ed., 2d ed. 2006).

some or all nonstate actors can and should play a role in creating international law. Although we set out a general framework for approaching this issue, we argue that this question cannot be answered in the abstract, as the answer depends on the advantages and disadvantages of recognizing a particular lawmaking role for the particular nonstate actor in question.

Focusing on one particular kind of nonstate actor, namely nonstate armed groups, we contend that it is possible to move away from the traditional statist approach to sources, which denies armed groups any role in law creation, without moving to the extreme position of giving such groups complete control over their obligations or equal lawmaking powers with states. To this end, we have suggested various mechanisms (unilateral declarations, hybrid treaties, and possibly quasi-custom) for giving armed groups an opportunity to recognize existing obligations or undertake new ones, while reducing the risk of placing them on par with states or downgrading international humanitarian protections. We believe that these mechanisms provide a way to involve nonstate armed groups in the creation of international humanitarian law while respecting the crucial and primary role of states.

These proposals are likely to be controversial and to encounter theoretical and practical objections. Nonetheless, they build on existing practices and have the potential to improve armed groups' knowledge of and compliance with international humanitarian law. They may create certain incentives for armed groups to comply with international humanitarian law, such as a commitment not to prosecute them for taking part in hostilities. They may also allow us to distinguish between armed groups that are willing to comply with the law from those that are not, thus providing a means by which armed groups can be disaggregated. More broadly, these proposals create a framework for other nonstate actors to engage in the creation of international law. For instance, corporations might undertake unilaterally to abide by human rights obligations or enter into hybrid treaties with states and international organizations. We can expect states to resist the idea of granting any nonstate actors a role in law creation, but that does not mean that recognizing such a role would be contrary to the needs and interests of the international community as a whole.