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A Reconsideration of International Humanitarian Law's Procedural Fairness: A Call to Include Non-State Armed Groups Enjoying Internal Legitimacy in the Making of Customary International Humanitarian Law

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European University Institute

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Abstract

The role that non-state armed groups ('NSAGs') areallowed to play in the making of customary international humanitarian law ('IHL') has been the topic of scholarly debates for years. The far-going direct obligations IHL imposes upon NSAGs without the latter's consent, nor inclusion in law-making triggers questions of procedural fairness. On the one hand, those in favor of NSAGs' inclusion in law-making argue that IHL would be more adapted to the needs and capabilities of NSAGs, and that IHL would, by consequence, have a compliance pull vis-à-vis NSAGs. This would make IHL more 'fit for purpose'. On the other hand, those against NSAGs' inclusion argue that such inclusion would be undesirable, unreasonable, and unfeasible. What both perspectives share, however, is a state-centered logic that considers the state as the prime subject of international law and the gate keeper who decides who is invited to the table of international law-making. Nevertheless, do all general arguments pro and contra NSAGs' inclusion necessarily apply to all types of NSAGs and to the same extent? Legal scholarship is currently lacking a convincing criterion or set of criteria to decide which NSAGs could or should participate in the formation of customary IHL. This paper attempts to provide such a criterion by approaching the discussion in a non-state-centered way. It puts those most affected by armed conflict at the center of the debate, notably the individual and relevant communities under situations of 'rebel governance'. Based on social and political science, the criterion of internal legitimacy is proposed to decide which NSAGs to at least include in customary IHL's making. Internal legitimacy is generated when communities consent and support rebel governance in a non-coerced manner, motivated by performance-based and symbolic catalysts for legitimacy. This paper will elaborate on what is understood by the notions of procedural fairness and non-coerced community consent and support; how internal legitimacy can be generated; and how it answers the concerns about delegitimizing national governments and legalizing armed struggle.

Keywords

Non-state armed groups – Legitimacy – Law-making – Customary international law – International humanitarian law.

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Introduction

"Is international law fair?" This question goes to the core of the role non-state armed groups that ('NSAGs') play in the law-making process of international humanitarian law ('IHL'). The international community expects NSAGs to comply with the rules of IHL, which impose far-going direct obligations upon NSAGs. Failure to comply with IHL often leads to a lack of support for the NSAGs' cause, non-recognition, coercive countermeasures, isolation, marginalization, and criminal punishment of NSAGs' individual members. Yet, at the same time, NSAGs are generally not invited to the table of treaty negotiations, nor is their practice or *opinio juris* currently taken into account when assessing the customary status of IHL's rules. On the contrary, NSAGs have to comply with rules that are created by a state – whose authority they often contest – and a larger community of states that does not recognize them as a partner worthy of dialogue. Consequentially, and unsurprisingly, NSAGs might not consider IHL "fair".

Many authors have advocated in favor of the inclusion of NSAGs in the making of – or at least consent to – IHL based on compliance pull-argumentation. They believe that the inclusion in law-making and the accompanying ownership over IHL's norms will *inter alia* boost incentives

for NSAGs to comply with IHL.[1] Since the advantages of NSAGs' inclusion in the making of IHL have been elaborated upon elsewhere, this paper will not reiterate them here. Nevertheless, it is interesting to observe that such scholarship generally adopts a rather state-centered view on international law and its making,[2] oftentimes focusing on *how* and *why* NSAGs can contribute to customary or treaty IHL in a state-led system or influence state behavior.

This paper aims to provide a modest insight into how a change of perspective, with a focus on how procedural fairness and putting the individual and local communities at the center of international law could potentially remedy some of the challenges IHL is facing today in deciding whether or not to include NSAGs in the making of IHL. After all, local communities and individual citizens are still the true victims of armed conflicts. Since IHL treaty-making is generally finding itself in a deadlock,[3] this paper will focus on the making of customary IHL and the normative capacity, or lack thereof, awarded to NSAGs. This paper proposes a new argument, based on political and social science research, to include *at least* those NSAGs enjoying internal legitimacy, i.e. non-coerced community consent and support by the people under their control, in the making of customary IHL. It also engages with how internal legitimacy *prima facie* answers the concerns of legalizing armed struggle and delegitimizing national governments.

An important caveat has to be made from the outset: many of the questions touched upon in this paper are still open-ended and require study beyond the limits of this paper. Moreover, this paper is limited to normative considerations regarding the question of whether NSAGs enjoying internal legitimacy should participate in the making of customary IHL, not how they could. Further empirical research on the latter aspects is required.

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[1] Many authors have written about this topic, among others: Jo Hyeran, 'Law-making participation by non-state armed groups: The prerequisite of law's legitimacy?' in Heike Krieger (ed*), Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar, 2021) 357, 358. Lizaveta Tarasevich, 'Participation of Non-State Armed Groups in the Formation of Customary International Humanitarian Law: Arising Challenges and Possible Solutions' (2020) 3(1/2) Humanitäres Völkerrecht: Journal of International Peace and Armed Conflict 105; Annyssa Bellal and Ezequiel Heffes, ''Yes, I do': Binding Armed Non-State Actors to IHL and Human Rights Norms Through their Consent' (2018) 12(1) Human Rights & International Legal Discourse 120, 122-128; Sandesh Sivakumaran, 'Implementing humanitarian norms through non-State armed groups' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015); Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (2010) 1(1) Journal of International Humanitarian Legal Studies 5.

[2] Acknowledging that dealing with NSAGs requires a non-state centric perspective on international law see, for instance, Ezequiel Heffes, 'The Responsibility of armed opposition groups for Violations of International

Humanitarian Law: Challenging the State-Centric System of International Law (2013) 4(1) Journal of International Humanitarian Legal Studies 81.

[3] See, for instance, Pauline Charlotte Janssens and Jan Wouters, 'Informal international law-making: A way around the deadlock of international humanitarian law' (2022) 104 (920-921) International Review of the Red Cross 2111. Emily Crawford, *Non-Binding Norms in International Humanitarian Law: Efficacy, Legitimacy*, *and Legality* (OUP 2021) 245-249.

1. "All is Fair in Love and War", but Who Decides What is "Fair"?

"Fairness" is a concept with many faces. Inherently subjective and/or ideologically informed, it is hard to pin down what fairness exactly entails. Often, the notion of fairness initially makes one reflect on whether the substantive content of a rule of law or a judicial decision is fair and just.[4] Within legal theory, especially among authors who focus on domestic law, concerns of fairness and justice of law have often played a protagonist role.[5] Looking beyond fairness of content, Ryngaert suggests that international law should not only be fair substantively, i.e. the law's content, but also procedurally, i.e. the law's making process.[6] In general, both aspects of fairness are necessary and required complements in the overall perception of international law's fairness.[7] The procedural fairness of international law also finds acknowledgement in the work of, among others, Franck,[8] Brunnée and Toope,[9] Hovell,[10] and Sivakumaran.[11] This paper subscribes to Ryngaert's argument which is inspired by Habermas' theory of deliberative democracy and communication. His idea of procedural fairness in essence entails that demanding compliance with direct international obligations is only justified if such obligations are the outcome of an inclusive law-making process in which the addressees of such obligations have been adequately represented and in which these addressees have been

[4] See, for instance, Catharine Tite, *The Function of Equity in International Law* (OUP 2021) 1-3.

[5] For instance, Lon Fuller's criteria for inner morality which law-making ought to respect, are procedural in nature and protect the individual against arbitrary as well as excessive exercises of power and allow individuals to construe their lives guided by law, "triggering fidelity to law" (Lon Fuller, *The Morality of Law* (Yale University Press, 1964)). See also, for instance, Ronald Dworkin, 'Is There Really No Right Answer in Hard Cases?' in Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 119; Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630; John Rawls, 'Justice as Fairness' (1958) 67(2) The Philosophical Review 164; John Rawls 'Justice as Fairness: Political not Metaphysical' (1985) 14(3) Philosophy & Public Affairs 223.

[6] Ryngaert talks about substantive and procedural *legitimacy*, i.e. "being justified and able to command widespread support". However, this paper deliberately talks about procedural fairness to avoid confusion with the notion of internal legitimacy touched upon below. Cedric Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Routledge 2010) 69-77. See also Cedric Ryngaert, 'Non-state armed groups and international humanitarian law-making – the challenge of legitimacy: A reply to Cindy Wittke and Hyeran Jo' in Heike Krieger (ed), *Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar 2021).

[7] Except arguably for norms of *jus cogens* nature (Cedric Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Routledge 2010) 71-72 and 77-78).

[8] Franck believes that generating law through the "right process" is what induces compliance by rule addressees (Thomas Franck, 'Legitimacy in the International System' (1988) 82 American Journal of International Law 705, 706). See also Thomas Franck, *Fairness in International Law and Institutions* (OUP 1998).

[9] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 73.

[10] Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (OUP 2016).

[11] Sivakumaran calls for the need to reassess the "methodology" through which IHL governing non-international armed conflicts is made (Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 562- 564.

offered an opportunity to influence the law's content.[12] If only a limited – often largely Western – governing elite participates in the making of customary IHL and, by consequence, is in a position to impose its perceptions of fairness upon the legal regime, IHL's sheer majority of addressees, i.e. NSAGs, might not consider it "fair" that they are bound by IHL.[13] This, however, does not necessarily mean that they contest the fairness of IHL's substantive content. This "limited elite"-problem in the making of customary international law is not unique to IHL and NSAGs. Hence customary international law's making is *a fortiori* also faced with a similar critique on procedural fairness by developing countries.[14]

2. The Interactional Account of International Law-Making: Replacing "Practice" with "Community of Practice"

This paper argues that adequate procedural fairness of customary IHL means that the practice and *opinio juris* of NSAGs are taken into account in the formation of customary IHL. To do so, this paper relies on a reconceptualization of custom that replaces "practice" with "community of practice". As will be explained below, such reconceptualization is not entirely new. Before elaborating upon this, it is, however, important to give a short explanation of custom as traditionally understood under the Doctrine of Sources. Advocating for the importance of procedural fairness, however, is not the same as acknowledging the existence of non-state international law but categorizing – and disregarding – it as "soft law" or "informal law". The procedural fairness argument presented in this paper advocates for an inclusion beyond the strategic dichotomies of hard – soft and formal – informal law.[15] This paper is inspired by political and social science research on legitimacy and theories on the democratization of

[12] Cedric Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law- Takers to Law-Makers* (Routledge 2010) 69-77.

[13] Even if NSAGs could be considered bound by IHL based on state consent, the legislative jurisdiction theory and/or the rejection of the *pacta tertiis* principle with regard to IHL treaties. See, for instance, Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2015) 20(1) Journal of Conflict & Security Law 101. Providing side notes on other theories see Jann Kleffner, 'The applicability of international humanitarian law to organized armed groups' (2011) 93(882) International Review of the Red Cross 443.

[14] See, for instance, B.S. Chimni, 'Customary International Law: A Third World Perspective' (2018) 112(1) The American Journal of International Law 1.

[15] However, this paper does not aim to downplay the contributions that informal or soft law can make to the development of IHL. It acknowledges the importance of alternative ways of law-making in the current stalemate climate of classic state law-making. See, for instance, Pauline Charlotte Janssens and Jan Wouters, 'Informal international law-making: A way around the deadlock of international humanitarian law' (2022) 104 (920-921) International Review of the Red Cross 2111. Emily Crawford, *Non-Binding Norms in International Humanitarian Law: Efficacy, Legitimacy*, *and Legality* (OUP 2021).

international law to approach the matter in a non-state centric way,[16] adhering to anthropocentrism.[17]

The positivist definition of customary international can be found in Article 38(1)(b) of the Statute of the International Court of Justice ('ICJ') which refers to "international custom, as evidence of a general practice accepted as law". From this definition, two cumulative requirements for the existence of custom have been deducted: (1) general *state* practice that is sufficiently widespread, representative as well as consistent, and (2) *opinio juris*, i.e. the belief of complying with a certain rule because it concerns law as opposed to different systems of normativity.[18] The ICJ has reconfirmed this two-tier definition of international customary law on multiple occasions, e.g. in the North Sea Continental Shelf-case,[19] the Continental Shelf-case,[20] and the Nicaragua-case.[21] Many scholars, therefore, exclude non-state actors – with the general exceptions of (1) international organizations and (2) conferral of law-making capacity by states[22] – from the practice- and *opinio juris*-requirements in Article 38.[23] This view is also reflected in the work of the UN Special Rapporteur on international customary law, Sir Michael Wood, who submits that for the fulfilment of the practice requirement it is "primarily the practice of States that contributes to the creation, or expression, of rules of customary

[16] Looking into political and social science research to tackle such topic can; for instance, be found in the work of Ryngaert takes inspiration from Jürgen Habermas' theory of deliberative democracy and communication (Cedric Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Routledge 2010) 73). Also Brunnée and Toope's interactional account of international law also aims to provide an account of international obligation that pays tribute to both international relations and legal studies (Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010)).

[17] See, for instance, Vincent Chapaux, Frédéric Mégret and Usha Natarajan (eds), *The Routledge Handbook of International Law and Antrophocentrism* (Routledge, 2023) for an elaborate discussion of the notion in international law.

[18] See for instance*, North Sea Continental Shelf (Germany v Denmark)* (Judgement) [1969] ICJ Rep 1969 para 77; *Continental Shelf (Libya v Malta)* (Judgement) [1985] ICJ Rep 1985 para 27.

[19] *North Sea Continental Shelf (Germany v Denmark)* (Judgement) [1969] ICJ Rep 1969 para 74.

[20] *Continental Shelf (Libya v Malta)* (Judgement) [1985] ICJ Rep 1985 para 27.

[21] *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 1986 para 183.

[22] See for instance Jean d'Aspremont, 'Non-State Actors from the Perspective of Legal Positivism: The Communitarian Semantics for the Secondary Rules of International Law' in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 25-26; Duncan Hollis, 'Why State Consent Still Matters – Non-state Actors, Treaties and the Changing Sources of International Law' (2005) 23 Berkeley Journal of International Law 137; Jean d'Aspremont, 'Subjects and Actors in International Lawmaking: The Paradigmatic Divide in the Cognition of International Norm-Generating Processes' in Catherine Brolmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Law-Making* (Cheltenham, 2016) 44.

[23] See, for instance, Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 Nordic Journal of International Law 381 who explais for policy reasons why soft law is not fit for purpose; Oscar Schachter, 'The Decline of the Nation-State and its Implications for International Law' (1997) 36 Columbia Journal of Transnational Law 7, 21-23 reconfirming the primacy of states and the limited impact that non-state actors have on international law; Beth Simmons, 'International Law and International Relations' in Keith Whittington, Daniel Keleman and Gregory Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 187-190.

international law"[24] and that "conduct by other non-state actors [that are not international organizations] is not practice for the purposes of the formation or identification of customary international law".[25] These statements are mirrored in the International Law Commission's 2018 Draft Conclusions on Identification of Customary International Law which makes clear that the "conduct of other actors [than states] is not practice that contributes to the formation, or expression, of rules of customary international law" with the important that such conduct "may [nevertheless] be relevant when assessing the practice referred to in paragraphs 1 and 2 [the practice of states and international organizations]".[26] The limitations of the practice-requirement under Article 38 of the ICJ Statute for the procedural fairness of customary IHL vis-à-vis NSAGs are obvious.

Within IHL-specific scholarship on law-making and NSAGs,[27] the interactional account of law-making by Brunnée and Toope has attracted much attention to overcome the shortcomings of Article 38 of the ICJ Statute.[28] According to the interactional account, international law is not simply created and imposed top down, but also created bottom up. International law's addressees apply, interprete, violate, contest denounce etc. on a daily basis. These day-to-day actions/practices of international law's addressees in turn also influences the content of rules of international law as law is a social constuct. Therefore, international law is a reciprocal enterprise between all actors engaging with its rules and, by consequence, forming a "community of practice".[29] This paper subscribes to this view since the concept of "community of practice" allows us to remedy the flaws in customary IHL's procedural fairness, as opposed to the state-centered practice criterion under Article 38 ICJ Statute. It is, however, beyond the scope of this paper to provide an in-depth analysis of the "community of practice" within IHL. Moreover, it is not the key take away from this paper.

3. A Reconsideration of NSAGs' Role in the Making of Customary IHL: Opening Pandora's Box?

Governing elites and states approach the debate of NSAGs' inclusion with apprehension, sometimes even hostility. To acknowledge (state-centered) feasibility, desirability, and reasonability considerations regarding NSAGs' inclusion, this paper suggests that we must resolve the dilemma of NSAGs' inclusion by limiting the inclusion to *at least* NSAGs enjoying

[24] ILC, 'Draft Conclusion 5 of Second report on identification of customary international law, by Sir Michael Wood, Special Rapporteur' (22 May 2014) UN Doc A/CN.4/672, para 177.

[25] ILC, 'Draft Conclusion 4[5] of Third report on identification of customary international law, by Sir Michael Wood, Special Rapporteur' (27 March 2015) UN Doc A/CN.4/682, para 126.

[26] ILC, 'Conclusion 4(3) of the Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc A/73.10, para 130.

[27] See, for instance, Katharine Fortin, 'Of Interactionality and Legal Universes: A Bottom-Up Approach to the Rule of Law in Armed Group Territory' (2021) 17(2) Utrecht Law Review 26; Sandesh Sivakumaran, 'Making and Shaping the Law of Armed Conflict' (2018) 71(1) Current Legal Problems 119. More subtle but proposing the same dialogic logic between law and addressees, see Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (2010) 1 International Humanitarian Legal Studies 5, 21-22.

[28] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010)

[29] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 7 and 69-70; Tamar Megiddo, 'Methodological Individualism' (2019) 60 Harvard International Law Journal 219, 220-221.

internal legitimacy – i.e. non-coerced community consent and support – in the making of customary IHL. Even if NSAGs' procedural inclusion would be limited to only a certain type of NSAGs, such conlcusion would arguably still allow for the content of customary IHL to take stock of the major concerns many NSAGs face in their battlefield realities and their capabilities under the treatment of persons paradigm.[30] Moreover, this inclusion could increase bottom up fairness through the eyes of local communities most affected by armed conflict. Further, the internal legitimacy-criterion is not relying on an analogy with belligerent occupation, nor the "equality of belligerents"-argument (*infra*) which is not uniformly accepted in the first place.[31] To the best of my knowledge, this argument has not been voiced elsewhere.[32] However, the internal legitimacy-criterion is but one perspective to approach the matter and limited to a certain type of NSAGs.[33]

Within the discussion of NSAGs' inclusion in the making of customary IHL, the following concerns are often presented at the crux of the matter: the political delegitimization of national governments, and the legalization of armed struggle. These concerns must not make us jump to conclusions and exclude all engagement of all NSAGs with the making of customary IHL altogether. Therefore, in this section, I will present relevant side notes to demonstrate that these concerns do not form roadblocks to NSAGs' inclusion based on the criterion of internal legitimacy. Different concerns such as the detrimental impact of NSAGs' practice on the protection awarded by IHL have been reflected upon as well, but have not been included in this paper due to practical limitations.

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[30] An often voiced argument in favor of NSAGs' inclusion is the presumption that it will increase IHL's "adaptedness" to NSAGs. In addition to the scholarship cited in footnote no.1, see, for instance, Ezequiel Heffes and Jonathan Somer, 'Inviting non-state armed groups to the table: Inclusive strategies towards a more fit for purpose international humanitarian law (Centre for the Study of Armed Groups, December 2020) available at: <https://odi.org/en/publications/inviting-non-state-armed-groups-to-the-table-inclusive-strategies-towards-a- more-fit-for-purpose-international-humanitarian-law/> (last accessed 28 July 2023).

[31] See, for instance, Terry Gill, 'Reconciling the Irreconcilable: Some Thoughts on Belligerent Equality in Non- international Armed Conflicts' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2020* (Springer 2022) for a critical reading of the notion of "equality of belligerents", posing questions to an "equality of rights". Proposing a reconsideration of the notion and replacing it by a "sliding scale", see Marco Sassòli and Yuval Shany, 'Should the obligations of states and armed groups under international humanitarian law really be equal?' (2011) 93(882) International Review of the Red Cross 425. Casting doubt on the legal foundations of the principle as such Michael Mandel, 'Aggressors' Rights: The Doctrine of 'Equality between Belligerents' and the Legacy of Nuremberg' (2011) 24(3) Leiden Journal of International Law 627.

[32] However, for instance, Mampilly argues in favor of engaging with such NSAGs to advance civilian welfare and hints at the advantages that recognition might bring to advancing respect for IHL, but does not make the argument of including these NSAGs in the making of IHL (Zachariah Mampilly, 'Insurgent governance in the Democratic Republic of the Congo' in Heike Krieger, Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region (CUP 2015).

[33] A complementary part of the puzzle on increasing compliance and "adaptedness" lies with states. See for instance, Alessandro Mario Amoroso, State Support for Armed Groups under International Law: Strengthening Compliance through Primary Norms (PhD thesis, 2023).

A. Limiting Procedural Fairness to NSAGs enjoying Internal Legitimacy

1. Answering Feasibility, Reasonability, and Desirability

Starting from the concerns regarding feasibility, reasonability and desirability, a distinction ought to be made between the different types of NSAGs.[34] Afterwards, a cautious selection must be made of those NSAGs whose inclusion in the law-making process would constitute a contribution to IHL's procedural fairness. Hence, it must be borne in mind that the DNA and track record of certain NSAGs would make it unreasonable and undesirable to advocate for their inclusion in the making of IHL, think of jihadi groups, such as ISIS, or organized crime, such as Mexican drug cartels. Including such NSAGs in the making of IHL would most likely hamper the law's substantive fairness. Moreover, we have to ask ourselves the honest question whether such NSAGs consider themselves as conscious international actors, bound by IHL, and strive for national and international recognition in the first place. In addition, with regard to feasibility, as it stands, the international community of states counts almost two-hundred members. Will it still be possible to identify the substantive content of rules of IHL and their customary status if an assessment of all these actors' practice and *opinio juris* has to be made? Even if the fulfillment of the practice- and *opinio juris*-requirements in the creation of customary international law is not a simple numbers game,[35] the International Committee of the Red Cross ('ICRC') still took years to distill its study on customary IHL. In 2022, the ICRC counted 524 "armed groups that are of humanitarian concern globally".[36] Analyzing the practice and *opinio juris* of all these actors would be completely unattainable. Therefore, a limitation of the NSAGs who participate in the formation of customary IHL, is required. However, legal scholarship has yet failed to distill satisfying legal criteria to decide which NSAGs could participate in customary IHL-making and which ones ought to be excluded. This paper tries to

[34] Even if no universally agreed upon typology of NSAGs exists, for instance, the From Words to Deeds-project provides one. Annyssa Bellal, Pascal Bongard and Ezequiel Heffes, 'From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms' (September 2022) 15-16.

[35] See, for instance, the recent judgement in Nicaragua v Colombia, in which the ICJ made a pronouncement on the customary rule of law that a state cannot extend its continental shelf beyond 200 nautical miles – from the baselines from which the breadth of its territorial sea is measured – within 200 nautical miles from the baselines of another state, while explicitly acknowledging the small number of state practice. Interestingly, the Court came to the conclusion that the said rule is of customary nature because (1) the vast majority of states did not attempt to extend their continental shelf in such manner, and (2) even if only a small number of states asserted a right to an extended continental shelf, such assertion was met with objections by other states. Moreover, the Court explicitly deducted the establishment of *opinio juris* from this practice (Nicaragua v Colombia, Question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast, Judgement of 13 July 2023, paras 77-79). Despite the fairly modest number of active state practice, the Court inferred the customary nature of the rule. Also Thirlway acknowledged the difficulties in deciding when the threshold for the formation of custom has been reached (Hugh Thirlway, *The Sources of International Law* (OUP 2019) 60-105. See further Robert Heinsch, 'Methodological challenges in ascertaining customary international humanitarian law: Can customary international law respond to changing circumstances in warfare?' in Heike Krieger and Jonas Püschmann (eds), *Law-making and Legitimacy in International Humanitarian Law* (Eward Elgar Publishing 2021).

[36] Matthew Bamber-Zryd, 'ICRC engagement with armed groups in 2022' (12 January 2023) <https://blogs.icrc.org/law-and-policy/2023/01/12/icrc-engagement-armed-groups-2022/>(last accessed 11 July 2023).

fill this gap by transposing the concept of internal legitimacy from political and social science to law.

2. Non-Coerced Community Consent and Support

The concept of internal legitimacy used in this paper refers to the legitimacy relation between a NSAG and the population under its territorial control, i.e. civilians who do not (in)directly participate in hostilities, and the "right to rule" of the NSAG as perceived by such population.[37] It limits the debate of procedural inclusion to NSAGs which provide so-called "rebel governance" within areas of limited statehood,[38] - i.e. territories in which the state/national government is unable to enforce national decisions and/or has no monopoly over the use of force.[39] In such circumstances of limited statehood, NSAGs can generate internal legitimacy and attract non-coerced community consent and support when they assume the role traditionally assigned to states vis-à-vis a population. It concerns situations of NSAGs' "rebel governance" that goes far beyond mere military oppression, but provides public services that accommodate the population's daily life, i.e. health care, education, court system etc. though it is not required that NSAGs construct a full-fledged welfare state.

In addition, the community's consent and support have to be free, voluntary and active, not based on fear, nor threats.[40] NSAGs who rely on brutal strategies to secure community obedience e.g. harsh punishments to eliminate all forms of disobedience, such as ISIS, are, therefore, excluded from the notion of internal legitimacy.[41] This illustrates the particular advantage of internal legitimacy understood as non-coerced community consent and support: it naturally excludes those NSAGs whose practice would downgrade the substantive protection of IHL (*supra*).[42] Further, it is important to note that such local community consent and support must go beyond acquiescence and entail a willingness to obey to the NSAG's governance.[43] Therefore, the "support"-element is crucial. Of course, sporadic coercion to obey the NSAG's governance through, for instance, the operation of a court and sanction mechanism, sporadic

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[37] Podder identifies two more relations of legitimacy (1) between the NSAG and the State/central government it opposes and (2) between the NSAG and external actors, see further Sukanya Podder, 'Understanding the Legitimacy of Armed Groups: A Relations Perspective' (2017) 28(4) Small Wars and Insurgencies 686.

[38] For a detailed discussion of what NSAGs' governance or "rebel governance" entails see Nelson Kasfir, 'Rebel Governance – Constructing a Field of Inquiry: Definitions, Scope, Patterns, Order, Causes' in Ana Arjona, Nelson Kasfir and Zachariah Mampilly (eds), *Rebel Governance in Civil War* (CUP 2015).

[39] Cord Schmelzle and Eric Stollenwerk, 'Virtuous or Vicious Circle? Governance Effectiveness and Legitimacy in Areas of Limited Statehood' (2018) 12(4) Journal of Intervention and Statebuilding 449, 449.

[40] Heike Krieger, 'International Law and Governance by Armed Groups: Caught in the Legitimacy Trap?' (2018) 12(4) Journal of Intervention and Statebuilding 563, 569. See also Arjona's cooperation categorization of civilian attitudes towards NSAGs (Ana Arjona, 'Civilian Cooperation and Non-Cooperation with Non-State Armed Groups: The Centrality of Obedience and Resistance (2017) 28(4) Small Wars & Insurgencies 755).

[41] Sukanya Podder, 'Understanding the Legitimacy of Armed Groups: A Relations Perspective' (2017) 28(4) Small Wars & Insurgencies 686, 690.

[42] This paper will not further discuss the challenges that, for instance, propaganda strategies of drug cartels in gaining local support could form for the concept, though these are identified as remaining question to be mindful of.

[43] Sukanya Podder, 'Understanding the Legitimacy of Armed Groups: A Relations Perspective' (2017) 28(4) Small Wars & Insurgencies 686, 687.

cases of violence or discontent by civilians towards the NSAG's governance institutions, or public unrest such as demonstrations or protests do not impede overall community consent. Central governments who do not find themselves in situations of armed conflict and have established well-functioning democracies are also faced with such sporadic instances of disobedience by individual members of their community.

3. A Combination of Performance-based and Symbolic Legitimacy

But when can we conclude on the existence of non-coerced community consent and support? There are two types of catalysts that can bolster consent and support: performance-based and symbolic catalysts for legitimacy. On the one hand, research reveals that the internal legitimacy of NSAGs' governance is often linked to its effectiveness (performance-based) – also known as the "virtuous governance cycle".[44] The better and more efficient the provision of public goods and services, the higher the level of internal legitimacy enjoyed by the NSAGs concerned.[45] Moreover, rebel governance by NSAGs opposing the central state is often more successful and met with less resistance in failed states characterized by insufficient and ineffective democratization and poor provision of public goods and services.[46] On the other hand, efficient governance is often not the only explanatory, nor causal catalyst in relation to community consent and support.[47] Non-coerced community consent and support are likely to be generated when the NSAG's governance relies on catalysts for symbolic legitimacy:[48] when the NSAG is sensitive to the community's interpersonal relations and "historically contingent values, norms and beliefs",[49] demands for political change,[50] and economic considerations and grievances.[51] A clearly successful example of rebel governance operationalizing symbolic legitimacy constitutes the Maï Maï governance in the Democratic Republic of the Congo's Southern Kivu region, in which the NSAG relied upon the community's values and beliefs to secure consent and support.[52] In practice, the internal legitimacy-criterion is presumably

[44] Claire Mcloughlin, 'When does Service Delivery Improve the Legitimacy of a Fragile or Conflict-affected State?' (2015) 28(3) Governance 341; Derick Brinkerhoff, Anna Wetterberg, and Stephen Dunn, 'Service Delivery and Legitimacy in Fragile and Conflict-affected States – Evidence from Water Services in Iraq' (2012) 14(2) Public Management Review 273.

[45] Heike Krieger, 'International Law and Governance by Armed Groups: Caught in the Legitimacy Trap?' (2018) 12(4) Journal of Intervention and Statebuilding 563.

[46] Sukanya Podder, 'Understanding the Legitimacy of Armed Groups: A Relations Perspective' (2017) 28(4) Small Wars & Insurgencies 686, 690; Ana Arjona, 'Civilian Resistance to Rebel Governance' in Ana Arjona, Nelson Kasfir and Zachariah Mampilly (eds), *Rebel Governance in Civil War* (CUP 2015).

[47] A more complete and nuanced theory of the virtuous governance cycle in areas of limited statehood can be found in Cord Schmelzle and Eric Stollenwerk, 'Virtuous or Vicious Circle? Governance Effectiveness and Legitimacy in Areas of Limited Statehood' (2018) 12(4) Journal of Intervention and Statebuilding 449.The authors also note that further research has to be done to the causation/correlation relationship of the various factors with regard to internal legitimacy.

[48] Klaus Schlichte and Ulrich Schneckener, 'Armed Groups and the Politics of Legitimacy' (2015) 17(4) Civil Wars 409, 417-418.

[49] Sukanya Podder, 'Understanding the Legitimacy of Armed Groups: A Relations Perspective' (2017) 28(4) Small Wars & Insurgencies 686, 688 and 691.

[50] Sukanya Podder, 'Understanding the Legitimacy of Armed Groups: A Relations Perspective' (2017) 28(4) Small Wars & Insurgencies 686, 688 and 691.

[51] Klaus Schlichte and Ulrich Schneckener, 'Armed Groups and the Politics of Legitimacy' (2015) 17(4) Civil Wars 409, 411-412.

[52] Kasper Hoffmann, 'Myths Set in Motion: The Moral Economy of Maï Maï Governance' in Ana Arjona, Nelson Kafir and Zachariah Mampilly (eds.), *Rebel Governance in Civil War* (Cambridge University Press 2015).

dependent upon a combination of both performance-based and symbolic catalysts for legitimacy.

4. Internal Legitimacy vs Territorial Control

It is important, however, not to conflate internal legitimacy with mere territorial control or *de facto* regimes. Often, while referring to the "equality of belligerents",[53] territory-holding NSAGs are presented as actors that have to be taken more seriously since they, for instance, have the capacity and/or prerogative to consent to humanitarian assistance, legislate, establish courts, detain people, hold trials etc.[54] In a similar vein, the rules of occupation, in particular Article 43 of the Hague Regulations, are proposed to be applied by analogy to award territory-holding NSAGs the same prerogatives.[55] This more lenient stance towards NSAGs having territorial control might be due to the inherent territorial organization of international law, paying tribute to the territorial organization of the nation state. Berkes, for instance, states that NSAGs having territorial control and constituting a *de facto* regime are a specific subcategory of NSAGs that has to be taken more seriously in the formation of customary IHL.[56] Nevertheless, not every NSAG exercising control over territory or forming a *de facto* regime enjoys internal legitimacy. For instance, coerced regimes can hold territorial control and/or form a *de facto* regime as well. Think again of ISIS' Kalifate in Syria. The other way around, NSAGs enjoying internal legitimacy will often hold territory. Recalling the virtuous governance cycle (*supra*), effective and internally legitimate rebel governance can only exist in areas of limited statehood when NSAGs provide *inter alia* public goods to the population within a certain territory. Successful symbolic legitimacy, for its part, is likely to generate exclusive control over territory, if not established prior, and/or push competing governmental agencies out of the territory. Based on the above, this paper argues to go beyond the territorial-criterion and relies on internal legitimacy, rather than the equality of belligerents or the occupation analogy, to decide which NSAGs are to be included in the making of customary IHL.

5. Remaining Questions

The argument proposed in this paper of course shifts the discussion of inclusion at the normative level to among others the next dilemmas of "When and how can we decide which NSAGs tick the boxes of internal legitimacy to be worthy of inclusion?", "What is the relation between symbolic and performance-based legitimacy?", "What is the relation between internal legitimacy and external recognition?", "How do we define coercion and non-coercion?" and "What is the impact of mere propaganda statements and pledging respect to IHL to foster

[53] See, for instance, Annyssa Bellal and Ezequiel Heffes, ''Yes, I do': Binding Armed Non-State Actors to IHL and Human Rights Norms Through their Consent' (2018) 12(1) Human Rights & International Legal Discourse 120, 127-128.

[54] See, for instance, ICRC, *Detention by Non-State Armed Groups: Obligations under International Humanitarian Law and Examples of how to Implement them* (2023) and the importance it adheres to the practice of NSAGs exercising territorial control. See also Tom Gal, 'Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance' (2017) 50(1) Israel Law Review 25; Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict' (2007) 89 International Review of the Red Cross 655, in particular 687-688.

[55] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 530-532.

[56] Antal Berkes, The Formation of Customary International Law by De Facto Regimes' in Sufyan Droubi and Jean d'Aspremont (eds)*, International Organisations*, *Non-State Actors, and the Formation of Customary International Law* (OUP 2020) 363-381.

symbolic legitimacy when this is not answered with accompanying practice of respecting IHL?" An in-depth analysis of these questions, however, exceeds the scope of this paper. A potential and reasonable first step in this necessarily empirical assessment could be to look at the NSAGs' political agenda and limit the law-making capacity accordingly to those NSAGs who claim to represent community interests, even if political motivations are not considered relevant for the applicability of IHL otherwise. National liberation movements such as SWAPO and PLO arguably *prima facie* "tick the box". Interestingly, they are both also internationally recognized as "representatives", though this does not *ipso facto* allow us to conclude that they enjoy internal legitimacy as well.[57]

B. The Political Delegitimization of National Governments

Even if awarding NSAGs a participatory role in the making of customary IHL might boost the regime's procedural fairness, critics might state that it infringes and undercuts the political legitimacy of the national governments fighting these NSAGs. States notably have a tendency to perceive legitimacy as a cake: the bigger the piece NSAGs enjoy, the less is left for them.[58] Nevertheless, it is important to bear in mind the correct cause of the precarious political internal legitimacy of certain governments. In many (if not all) of these cases, the internal legitimacy conundrum of the national government is caused by the armed struggle itself, not by taking NSAGs seriously. Such armed struggle, moreover, oftentimes only becomes "armed" after a large build-up of the government lacking internal legitimacy and/or oppressing the people represented by the NSAG. Further, legitimacy is not necessarily a cake. Opening dialogue with the relevant NSAG as such does not defy the government's internal legitimacy, perhaps it can even increase the government's legitimacy in the eyes of the "renegades".[59] Adhering to the internal legitimacy-criterion might, in addition, allow us to focus on the actors enjoying popular political support. As such, the internal legitimacy-argument is based on a similar social contract-theory and community representation-narrative as can be found in peace- and state-building more generally. This, in turn, pays tribute to the idea that the individual functions as the prime subject of international law and the democratization of international law as described by Peters.[60] After all, when starting from anthropocentrism, states are only abstract units that

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[57] The UNGA recognized the PLO as representative of the Palestinian people (UNGA Res 3210(XXIX) (14 October 1974) and UNGA Res 3236(XXIX) (22 November 1974).). UNGA Res 3111(XXVIII) (12 December 1973) recognizes SWAPO as national liberation movement and representative of the people of Namibia at the time of Namibia's colonization by South Africa (Mandate South-West Africa). For a discussion on the different internal and external relations of legitimacy see, for instance, Sukanya Podder, 'Understanding the Legitimacy of Armed Groups: A Relations Perspective' (2017) 28(4) Small Wars and Insurgencies 686.

[58] Jo Hyeran, 'Law-making participation by non-state armed groups: The prerequisite of law's legitimacy?' in Heike Krieger (ed*), Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar, 2021) 357, 370.

[59] Similarly, relying upon external actors in the provision of basic services can both boost and impede the national governments internal legitimacy, depending on a variety of factors (Cord Schmelzle and Eric Stollenwerk, 'Virtuous or Vicious Circle? Governance Effectiveness and Legitimacy in Areas of Limited Statehood' (2018) 12(4) Journal of Intervention and Statebuilding 449, 461-462 referring to John Ciorciari and Stephen Krasner, 'Contracting Out, Legitimacy, and State Building' (2018) 12(4) Journal of Intervention and Statebuilding 484 and Matthew Winters, Simone Dietrich and Minhaj Mahmud, 'Aiding the Virtuous Circle? International Development Assistance and Citizen Confidence in Government in Bangladesh' (2018) 12(4) Journal of Intervention and Statebuilding 468).

[60] Anne Peters, Beyond Human Rights: The Legal Status of the Individual in International Law (CUP, 2016). See

inter alia function as representatives of their citizens at the international level. This proposal to shift perspectives is not based on the ideologic belief in a utopian global democracy, but derived from the reality that IHL inherently covers situations of democratic failure. As if often stated, "armed conflict arises there where democracy fails". During armed conflict, NSAGs generating internal legitimacy and the communities that they represent often feel misrepresented by the central government that ought to represent their interests at the international level.[61]

C. The Legalization of Armed Struggle

The fear to legalize armed struggle against the national government has surrounded the codification of IHL applicable in non-international armed conflicts for decades. During the drafting of the 1949 Geneva Conventions, it was therefore decided to explicitly include in Common Article 3(4) that the application of the relevant provision would have no effect on the legal status of NSAGs. The limited functional or relative legal personality NSAGs arguably enjoy under international law is limited to the fulfilment of their rights and obligations under IHL,[62] perhaps including international human rights law as well.[63] Granting NSAGs a say in defining the modalities of such rights and obligations would arguably merely be a correlative of such functional legal personality. Moreover, though intertwined, law-making capacity and legal personality are not the same.[64] Granting NSAGs law-making capacity under customary IHL does not automatically transform their functional legal personality under IHL into a general international legal personality, nor does it legalize them. The criterion of internal legitimacy as proposed in this paper does not confer legality upon NSAGs either, nor does it legalize armed struggle. It is exactly because NSAGs find themselves in a legality vacuum that this paper proposes to rely on legitimacy.[65]

Further, IHL is a legal regime that looks at the facts on the ground and does not pronounce itself on the (il)legality of governmental regimes. The latter is a question of general international law.[66] Governments' (il)legality is, however, relevant under *jus ad bellum*. In particular in cases of foreign intervention upon invitation, where it is required that the legal government consents

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also Grainne de Burca, 'Developing Democracy beyond the State' (2008) 46(2) Columbia Journal of Transnational Law 221.

[61] For instance, Megiddo calls for a proper assessment of the individual's contributions to international law since, among others, the interests, ideologies, and values of individuals and states often do not coincide (Tamar Megiddo, 'Methodological Individualism' (2019) 60 Harvard International Law Journal 219, 220 and 250).

[62] Providing nuanced reflections on legal personality beyond IHL as proposed by Murray (Tom Gal, 'Book Review Essay: The International Legal Status of Armed Groups: Can One Be Determined Outside the Scope of Armed Conflict?' (2018) 51(2) Israel Law Review 321). See also Gus Waschefort, 'The Pseudo Legal Personality of Non- State Armed Groups in International Law' (2011) 36 South African Yearbook of International Law 226.

[63] Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing, 2016) 21-155.

[64] Eva Kassoti, 'The Normative Status of Unilateral Ad Hoc Commitments by Non-State Actors in Internal Armed Conflicts: International Legal Personality and Lawmaking Capacity Distinguished' (2017) 22(1) Journal of Conflict & Security Law 67.

[65] As explained by Krieger, NSAGs have to rely on legitimacy since they do not enjoy legality (Heike Krieger, 'International Law and Governance by Armed Groups: Caught in the Legitimacy Trap?' (2018) 12(4) Journal of Intervention and Statebuilding 563, 565).

[66] ICRC Commentary to GCI, paras 234 and 399.

to such intervention, the question of governmental (il)legality becomes relevant. Yet, *jus ad bellum* is still a distinct and independent branch of law from IHL. Under IHL, on the other hand, it is the *de facto* government that presides over the legal government in cases of conflict qualification.[67] An authoritative precedent is the qualification of the armed conflict in Afghanistan at the time of the US' invasion in October 2001. Despite the invasion enjoying consent by the legal government (Afghan Northern Alliance), the 2001 conflict was qualified as international armed conflict since the Taliban was considered the *de facto* government at the time,[68] controlling almost 90% of Afghanistan.[69] The 2001 conflict between the US and the Taliban was requalified to non-international armed conflict when the US-led coalition defeated Taliban and the government of Hamid Karzai took office on 19 June 2002.[70]

Conclusion

This paper has made a plea to boost customary IHL's procedural fairness by including the practice and *opinio juris* of certain NSAGs in its making. Despite the advantages that NSAGs' inclusion might entail for the legal regime of IHL, this paper has recognized that also procedural fairness has to be moderated due to concerns regarding feasibility, reasonability, and desirability. When shifting the state-centered focus of international law to a perspective that puts the individual and its community at the center stage, arguably *at least* NSAGs enjoying internal legitimacy ought to be taken into account for the making of customary IHL. This paper has defined internal legitimacy as non-coerced community consent and support which is fostered by efficient NSAG governance (performance-based legitimacy) that also answers the community's social, political, and economic interests and particularities (symbolic legitimacy). Further, this paper briefly explained how internal legitimacy as a yardstick can answer two of the core concerns regarding NSAGs' inclusion. In particular, side notes to counterarguments have been made to provide a more nuanced perspective on the concerns of the political delegitimization of national governments, and the legalization of armed struggle. As indicated in this paper, further research – in particular empirical research – still has to be done to finetune multiple aspects beyond the limits of this paper.

[67] Chiara Redaelli, 'Military Intervention on Request in *Jus ad Bellum* and *Jus in Bello* and the Question of Recognition of Governments' (2022) 12(1) Goettingen Journal of International Law 105; Marco Sassòli,*International Humanitarian Law, Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar 2019) 170.

[68] Only Pakistan, Saudi Arabia, and the United Arab Emirates recognized Taliban as the legitimate Afghan government at the time (Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, 'International law and armed non-state actors in Afghanistan' (2011) 93 International Review of the Red Cross 47, 49)

[69] Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, 'International law and armed non-state actors in Afghanistan' (2011) 93 International Review of the Red Cross 47, 49.

[70] Robin Geiβ and Michael Siegrist, 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities' (2011) 93(881) International Review of the Red Cross 11, 13-15.