



# Inviting non-state armed groups to the table

## Inclusive strategies towards a more fit for purpose international humanitarian law

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### Key messages

- Millions around the globe are affected by the actions of non-state armed groups (NSAGs). Like states, NSAGs are bound by international humanitarian law (IHL) and are addressed by other non-binding normative standards aimed at mitigating the harmful effects of armed conflict. Although a consensus is emerging on the importance of engaging NSAGs on these rules, they have not been included as participants in the processes that lead to rule development.
- NSAGs participation in such normative processes is important for two main reasons, despite concerns of 'legitimisation'. First, a self-regulatory compliance system such as IHL can only be fit for purpose if it is based on an understanding of the perspectives of the actors it regulates and the realities they face. Second, decades of experience and some evidence underscore that a sense of ownership of norms can be an important factor in securing NSAGs' compliance.
- This Brief proposes a strategic model aimed at the progressive inclusion of NSAGs in humanitarian norm development processes. At the very least, processes should consult NSAGs. Outcome documents, where appropriate, should not just address 'states', but 'parties to the conflict' (or similar) so that they can be endorsed by NSAGs. The model addresses potential sources of state opposition or apprehension and encourages the international community to find new ways of approaching these tensions and dilemmas.

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## Introduction

Non-state armed groups (NSAGs)<sup>1</sup> are active in the majority of armed conflicts around the world (Bellal, 2019; ICRC, 2018; 2020a), and therefore have an immense impact on the well-being of civilians, including the estimated 66 million people worldwide living under their authority (ICRC, 2020b). While NSAGs may at times allow state organs to continue operating in the territories they control, they can also replace them, including in the provision of services. In fact, where these entities control territory for a protracted period of time, they will start regulating everyday life through the establishment of governance systems, including formal and informal structures (Mampilly, 2015: 45). During the Covid-19 crisis, for example, several NSAGs have adopted and implemented exceptional measures to contain the virus (Geneva Call, 2020), and have engaged with other actors on this issue, including international and humanitarian organisations. In Syria, for instance, hours after the government confirmed the first case of Covid-19, the Kurdish-led autonomous administration announced a two-week lockdown in the territory under its control (Zaman, 2020). NSAGs in Myanmar have imposed travel restrictions and increased health checks (Zaw and Htet, 2020), and the Donetsk People's Republic closed checkpoints and banned the movement of people and transport (112.UA News Agency, 2020).

For better or worse, NSAGs are undoubtedly key stakeholders when discussing the development of international humanitarian law (IHL) and good practice standards towards the protection of civilians and the mitigation of the effects of armed conflicts. Yet from a legal perspective, they are seldom treated as such. Over the past 20 years, organisations such as

the International Committee of the Red Cross (ICRC) and Geneva Call have increasingly made the case for the importance of engaging NSAGs on their existing IHL obligations. These include Common Article 3 to the 1949 Geneva Conventions, which affirms that 'each Party to the conflict shall be bound to apply, as a minimum' its provisions, the 1977 Additional Protocol II to the Geneva Conventions, and the many rules regulating armed conflicts that have over time also become applicable as customary law. However, these IHL dissemination efforts—what we can call NSAG Engagement 1.0—have not yet evolved towards engaging them as participants in the development of IHL normative and compliance processes.

One reason is that the development of international law, including IHL, is the domain of states. While NSAGs vary considerably in their form, function and objectives, one thing they have in common is that they are not able to become parties to international treaties and their practice does not, *lex lata*, contribute to the formation of international customary law. They have also been excluded from the elaboration of good practice standards, such as the Irish-led process on civilian protection from explosive weapons, even though the March 2020 draft political declaration recognises that violations of IHL by NSAGs are challenges 'of grave concern' (Draft Political Declaration, 2020: para. 1.4).

A further reason for excluding NSAGs from these processes is that these non-state actors pose a threat to the very sovereignty states seek to maintain. At first glance, it would indeed be surprising if NSAGs participated alongside states in expert meetings and other consultations on specific areas of international law. Allowing NSAGs to intervene and interact in these and other fora, such as conflict resolution, could be perceived as legitimising them, a scenario that

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1 Although international law and political science literature often refers to 'non-state armed groups', 'armed opposition groups', 'armed groups', 'rebels' and 'insurgents', sometimes without distinction, this piece uses 'non-state armed groups', as the key requirements are that the entity exists independently and is, therefore, not an organ of a state, and that it lacks legal capacity to become party to international treaties. Groups should also be characterised by a certain level of organisation and be able to exercise a degree of armed violence. NSAGs comprise different types of actors such as opposition and insurgent movements, dissident armed forces, paramilitary groups, de facto authorities, national liberation movements and self-defence militias.

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some may try to avoid.<sup>2</sup> Yet some examples do exist, showing that including these non-state actors in norm-development processes is already taking place in different spheres and with different degrees of (in)formality.

The rationale behind these processes is that IHL must be realistic if parties to armed conflict are to comply with it, and the likelihood of compliance will be increased if it is rooted in the notion of ‘ownership’. As to the latter point, a seminal study has concluded that ‘a sense of ownership increases the likelihood that rules will take root within the rebel movement and be perceived as meaningful and worthwhile’ (Jo, 2015: 255). Simply ordering NSAGs to comply with IHL is less likely to change their behaviour and less likely to result in normative standards that respond to the realities of modern conflict. A more pluralistic approach to norm development may in turn attract, ‘from all classes of agents, normative commitments on the basis of understandings shared in a community of practice’ (Provost, 2012: 37). In other words, if NSAGs are included as stakeholders in relation to the applicable law and good practice standards, it is expected that their level of respect for the rules will increase, and that the normative framework will be more fit for purpose.

Based on these observations and the authors’ own combined experiences encompassing close to 20 years of direct engagement with NSAGs and participation in norm-development processes, this contribution aims to present a 2.0 NSAG engagement model of a more inclusive and strategic approach to future normative developments addressing IHL (and relevant international human rights law), good practice guidance and compliance mechanisms. Drawing on lessons from stakeholder processes, we first establish a landscape that measures the level of NSAG participation in normative and compliance

processes, assess what is at stake, and provide examples from recent initiatives. We then sketch out an aspirational model that suggests the most appropriate level of NSAG participation based on the type of initiative. It considers the reality of the international order, including the challenges that the participation of NSAGs may entail. We hope that the model and its proposals will foster further discussions about this critical gap in efforts to mitigate harm in situations of armed conflict.

## Proposing a participation model

Our point of departure is that, since NSAGs have an immense impact on IHL compliance and further mitigation of harm, failure to include them in discussions related to this legal framework will almost inevitably lead to less protective outcomes. The strategy to be undertaken, as well as the arenas where the respective processes will take place, will differ from one case to another.

### The NSAG participation landscape

Below we propose a model that can be applied strategically to include NSAGs in norm-development processes (Table 1). It is adapted from the five levels of participation identified in the IAP2 Public Participation spectrum, which is known from stakeholder engagement processes: *inform, consult, involve, collaborate, empower*.<sup>3</sup> Which alternatives are adopted depends on the specific stakeholder and its goals, and these may vary throughout the process. For instance, NSAGs may be more open to share their views on specific rules at the beginning of the process, thus serving as an entry point for exchanges about other norms. Processes should be seen as cumulative and in no way exclusive, meaning that those aiming to *empower* or *collaborate* may also seek to *inform, consult* and *involve*.

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2 Despite the fact that IHL creates direct international obligations for NSAGs, Common Article 3 notes that its application does not affect their legal status. Geneva Call’s Deeds of Commitment also reflect this provision, wherein signatory NSAGs explicitly accept this state of affairs.

3 The IAP2 Spectrum of Public Participation was created by the International Association of Public Participation, and is found in public participation plans throughout the world. The authors have adapted the spectrum to fit a particular type of relationship, where the stakeholder in question (NSAGs) have the same obligations as the decision-making authorities. This horizontal relationship in regard to their obligations differs from the traditional vertical relationships between authorities and citizens common to most public stakeholder processes. For further information on the spectrum, see <https://sustainingcommunity.wordpress.com/2017/02/14/spectrum-of-public-participation/>

**Table 1 Norm-development processes involving non-state armed groups**

	<b>Inform</b>	<b>Consult</b>	<b>Involve</b>	<b>Collaborate</b>	<b>Empower</b>
<b>Level of stakeholder engagement</b> The landscape focuses on NSAGs as stakeholders	To provide NSAGs with balanced, accurate and consistent information on existing legal norms or ongoing normative and compliance processes.	To obtain and share feedback from NSAGs on their perspectives regarding existing legal norms or ongoing normative and compliance processes.	To exchange perspectives between NSAGs, experts and other stakeholders on existing legal norms or ongoing normative and compliance processes.	To include NSAGs 'around the table' in normative and compliance processes but excluding them from final decision-making.	To fully incorporate NSAGs into normative and compliance processes, including in final decision-making.
<b>Type of process</b> Processes are described without regard to whether NSAGs currently participate at the relevant level	Dissemination sessions on international norms.	Development of policy reports.	Organisation of expert meetings.	Informal good practice/policy processes: Red Cross/Red Crescent International Conference UN bodies (including International Law Commission) Diplomatic conferences.	Same as collaborate.
<b>Examples involving NSAGs</b>	NSAG IHL and normative training sessions conducted by, for example, ICRC, Geneva Call and local organisations.	ICRC's 'Safeguarding the provision of health care'; Geneva Call's 'In their words' reports. <sup>i</sup>	Geneva Call's Garance Talks; <sup>ii</sup> Fight for Humanity/ Geneva Academy's 2019 Meeting on Administration of Justice in North-East Syria; <sup>iii</sup> Chatham House Healthcare Roundtable summary.	National liberation movements participating in the 1974–1977 Diplomatic Conferences on the Additional Protocols.	Non-existent.
	No joint state participation.	No joint state participation.	Possible joint state participation.	Joint state participation.	N/A
<b>Outcomes</b>	NSAGs are aware of existing legal norms or ongoing normative processes. Difficulties for NSAGs to see beyond their specific contexts.	Key stakeholders are aware of NSAGs' views on international law. Difficulties for NSAGs to see beyond their contexts.	Key stakeholders are aware of NSAGs' views on international law. NSAGs feel that policy-makers are willing to listen to their views. NSAGs interact with each other on international law.	States are aware of NSAGs' views on international law. NSAGs feel treated as valuable actors in normative development by the international community.	NSAGs and states discuss on equal terms. Entry point to increase the level of compliance with the applicable law.

Source: adapted from IAP2 Public Participation spectrum

- i Geneva Call has produced public reports on the perception of NSAGs with respect to education and humanitarian action, and on their practice and policies towards protecting civilians from explosive weapons, among others.
- ii Three Garance Talks have been organised on the topics of NSAGs' positive obligations under international law (2015), detention and administration of justice (2017) and NSAGs' conduct of hostilities (2020).
- iii See, in this regard, Fight for Humanity, Expert Meeting Report 'ISIS Members Detained in North East Syria – Legal and Security Challenges and Recommendations for their Judgment under International and National Law', Geneva 2019, available at [https://static.wixstatic.com/ugd/dead75\\_7395d8f1aa884853b2f60089d0909a3c.pdf](https://static.wixstatic.com/ugd/dead75_7395d8f1aa884853b2f60089d0909a3c.pdf)

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## What does the NSAG participation landscape show us?

The more we move into the participative end of the spectrum (*empower*), the less we see NSAG involvement. This is not surprising when one considers the discussion above regarding their possible ‘legitimation’. Yet states, international organisations and NGOs have at times, although in different ways and through different means, included NSAGs in norm-development processes. While some have taken the form of consultations on how groups perceive and apply their existing international obligations, others have attempted to develop new normative frameworks and good practice standards. Below, we assess the amount of activity at each level; while we do not purport to provide a complete inventory, some in-depth examples are provided.

### Inform

Training NSAGs on their IHL obligations has (almost) become mainstream. The longstanding work of the ICRC, joined now by other organisations such as Geneva Call and a few local NGOs, has been endorsed by the UN Secretary-General and the UN Security Council (UN Secretary-General, 2019; UN Security Council, 2009). However, some states continue to object to IHL dissemination to parties to conflict that they consider ‘terrorist’ organisations and may refuse permission to do this on their territory. At least one state has criminalised IHL training of listed terrorist organisations per se, considering it to fall under the ban on provision of services, even though Common Article 3 stipulates that impartial humanitarian bodies may offer their services to parties to conflict (Holder v. Humanitarian Law Project et al., 2010).<sup>4</sup>

- Example: Geneva Call has developed IHL training modules specifically for NSAGs, including 15 rules that attempt to boil down

key IHL obligations. These modules have been developed with adult-education specialists and include presentations and practical exercises addressing NSAGs’ practical concerns about implementing international standards in the contexts in which they operate. They are regularly updated in accordance with the needs of Geneva Call. IHL training is a key aspect of Geneva Call’s engagement process, as members of NSAGs, in general, are not trained to the same depth as members of a state’s armed forces, and they have little knowledge of the actual content and nuances of international law beyond some general notions. Providing information on IHL is therefore essential to increase NSAGs’ respect for this legal framework.

### Consult

Few processes beyond Geneva Call’s ‘In their words’ publications series take even the basic step of consulting NSAGs. Typically, when stakeholders are mentioned, the list will include states, affected communities, scholars and the international community, but not NSAGs.

- Example: In 2015, the ICRC published a thematic report on healthcare and armed groups (ICRC, 2015), based on consultations with 36 NSAGs from 10 contexts. These groups ‘were diverse in terms of size, organizational structure, strategic objectives and extent of territorial control’, and the participatory approach ‘was designed to provide insight into armed groups’ behaviour with regard to respect for and access to health care’ (p. 17). The report illustrates practical measures taken by NSAGs and concludes with a ‘model unilateral declaration’ for NSAGs to adopt, which includes some of their IHL obligations in this area.

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4 Common Article 3. Other countries have also reacted to the engagement of NSAGs by humanitarian organisations. Turkey, for instance, has noted that the signing of Geneva Call’s Deed of Commitment on the prohibition against using landmines by the PKK/KADEK/KONGRA-GEL, which is considered to be a terrorist group by certain states, should be taken with ‘utmost caution and prudence in order to prevent’ it being ‘exploited for the purposes of terrorism’. Turkey also affirmed that the ‘signing took place without the prior information and consent of the State Party concerned, the Republic of Turkey. Consequently, it contradicts the understanding of a number of State Parties, including Turkey ... and, therefore, is inappropriate and unacceptable’. See [www.apminebanconvention.org/fileadmin/APMBC/MSP/7MSP/7MSP-Turkey-position-on-univ-Jan07.pdf](http://www.apminebanconvention.org/fileadmin/APMBC/MSP/7MSP/7MSP-Turkey-position-on-univ-Jan07.pdf)

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## Involve

As challenging as it is to go into areas where NSAGs operate to conduct IHL training or interview representatives, it may be even more difficult to convene representatives from different NSAGs in a viable location together with international experts. Doing so requires a government willing to provide visas and allow entry, and trust that NSAG representatives will not abscond or seek asylum. The governments of Switzerland and the Philippines have so far been some of the few who have facilitated such processes by convening workshops on IHL norms that include former and current NSAG members (Geneva Academy of International Humanitarian Law and Human Rights, 2011: 4; 2014: 6). That said, when such processes are convened, there is a great deal of interest in listening to NSAG perspectives.

- Example: A 2015 Chatham House roundtable in Geneva on access to healthcare in areas contested or controlled by NSAGs brought together five academics, seven individuals associated with NSAGs and four representatives of international organisations, among others (Lillywhite, 2015). ICRC and Geneva Call assisted in the organisation of the roundtable, which aimed to address how NSAGs could contribute to the provision of healthcare during armed conflict, to ‘examine the barriers to their providing health services and to consider how such barriers might be eliminated or mitigated’. Based on exchanges with the participants, the report laid out a number of recommendations, two of which are relevant here: (1) that the illegal nature of NSAGs under domestic law makes it ‘extremely difficult for them’ to gain access to medical supplies; and (2) that international counter-terrorism legislation makes it difficult for humanitarian aid ‘to reach populations living in territories under NSAGs, designating them as being under terrorist control’ (p. 5).

## Collaborate

States have recently become more accommodating to the participation of civil society actors in norm-development processes. They have been key participants, for example

in formal processes such as the Anti-Personnel Landmine Convention, and in political norm-development processes (see Box 1). However, this openness has not yet extended to NSAGs, and in the only known example (shown here), it was limited to those considered to be national liberation movements recognised by regional intergovernmental organisations in the context of decolonisation.

- Example 1: Several national liberation movements (NLMs) were invited to participate in the negotiation and drafting process that led to the 1977 Additional Protocols, and some even signed the Final Act of the Diplomatic Conference (which might be effectively considered the outcome document). During its First Session, which ran from 20 February to 29 March 1974, issues related to these invitations were addressed. Although agreement had been reached on the list of NLMs recognised by regional intergovernmental organisations and invited to participate in the Conference, there was no compromise regarding Guinea-Bissau (before its recognition as a state) and the Provisional Revolutionary Government of the Republic of South Vietnam. At the Conference, NLMs were refused voting power. Participating groups included the African National Congress (ANC), the African National Council of Zimbabwe (ANCZ), the Angola National Liberation Front (FNLA), the Mozambique Liberation Front (FRELIMO), the Palestine Liberation Organisation (PLO) and the South West Africa People’s Organisation (SWAPO). Several statements are noteworthy in this context. The US delegation, for instance, ‘understood and respected the desire of certain national liberation movements to take part in the work of the Conference’, and furthermore hoped that their participation ‘would lead to greater respect for the law and greater concern for basic precepts of humanity in the conduct of the armed conflicts in which those movements [were] taking part’ (Official Records, 1974–1977: 69). The representative of Mali, in a similar vein, affirmed that NLMs ‘could

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### **Box 1 The Safe Schools Declaration: a precedent-setting process that could have been ...**

The Safe Schools Declaration and accompanying Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict were born out of a civil society initiative bringing together representatives from governments, militaries, United Nations agencies and international humanitarian and human rights inter-governmental and non-governmental organisations, some of which had direct and indirect contact with NSAGs.<sup>i</sup>

Following the second consultation, at Lucens in Switzerland in 2012, the Draft Lucens Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict were published. An annex includes reference to NSAG practice, and the preface contains a number of ‘basic considerations’, including the following related to NSAGs:<sup>ii</sup>

- ‘States and non-state parties to armed conflicts are invited to adopt the Guidelines in the spirit in which they are promulgated, and to adapt them in practice to suit their specific circumstances’.
- ‘The Guidelines have been produced for the use of all parties to armed conflict. They are intended, therefore, for wide dissemination and implementation by both states and non-state parties to armed conflicts.’

For several years the Lucens Guidelines remained in draft form as negotiations took place on how to formalise them. Discussions also considered ways to consult NSAGs on the text. Eventually, Norway and Argentina came forward as state champions with the intention of convening a state-led process. In the meantime, at a November 2014 meeting of signatories to the Geneva Call Deeds of Commitment involving 36 NSAGs from 13 countries, a session discussed the Lucens Guidelines, facilitated by some of the drafters. The Conference Declaration contained a provision to ‘take into consideration the [draft Lucens Guidelines] and appreciate that the Guidelines have recognised armed non-state actors as stakeholders’.<sup>iii</sup> However, this consultation was not connected to the Norwegian/Argentinian process.

The following month, the Guidelines were ‘finalised’ via the Norwegian/Argentinian process. At the Oslo Conference in May 2015, the Safe Schools Declaration was unveiled, and states were invited to commit to use the Guidelines.<sup>iv</sup> The Guidelines had, however, been stripped of the preface and annexes, and therefore all direct reference to NSAGs, including the important consideration directly inviting NSAGs to adopt them. The Safe Schools Declaration does contain a preambular reference welcoming efforts to disseminate and promote implementation among armed forces and armed groups, but there is nothing in either the Declaration or the final Guidelines that considers NSAGs as active participants, and there is no process by which they can endorse the Guidelines.

On reflection,<sup>v</sup> the Lucens process started in a manner that recognised the value of NSAG participation, but when stewardship moved from civil society to states, the focus on their participation was not taken forward. One can question whether civil society actors did enough to push the agenda with state conveners. However, it is likely that the priority of simply getting a Declaration outweighed the risk of state pushback on references to NSAGs. While there are lessons for future good practice processes, the opportunity to set a precedent was lost.

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i Global Coalition to Prevent Education from Attack, Questions and Answers on the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict, undated, available at [https://reliefweb.int/sites/reliefweb.int/files/resources/questions\\_and\\_answers.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/questions_and_answers.pdf)

ii Draft Lucens Guidelines, 22 October 2014, available at [https://protectingeducation.org/wp-content/uploads/documents/documents\\_draft\\_lucens\\_guidelines.pdf](https://protectingeducation.org/wp-content/uploads/documents/documents_draft_lucens_guidelines.pdf)

iii Geneva Call, The Third Meeting of Signatories to Geneva Call’s Deeds of Commitment Summary Report, 17–20 November 2014.

iv See [https://www.regjeringen.no/en/topics/foreign-affairs/development-cooperation/safeschools\\_declaration/id2460245/](https://www.regjeringen.no/en/topics/foreign-affairs/development-cooperation/safeschools_declaration/id2460245/)

v Note that one of the authors participated in the two civil society-led meetings and was on the drafting committee of the Guidelines.



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make a contribution in drafting new rules of war’ (ibid.). Tanzania stated that, by admitting NLMs into the norm-development process, ‘the Conference had recognized that the problems which it would be called upon to settle were of interest not only to States, but also to other entities involved in armed conflicts’ (ibid.: 165). Canada noted that NLMs ‘recognized by regional intergovernmental organizations could make a positive contribution to the work of the Conference, particularly in relation to situations of non-international armed conflict [and] would therefore welcome the presence of such movements with full participation, short of voting rights’ (ibid.: 19). The FRELIMO representative stated that the struggle for national liberation was recognised as legitimate at the international level, ‘and the peoples engaged in the struggle were consequently subject to international law: that justified their full and entire participation in the work of the Conference’ (ibid.: 70).

- Example 2: Geneva Call’s Deeds of Commitment can also be considered a *collaborate* initiative, although one not directly involving states (Geneva Call, n.d.).<sup>5</sup> Four such documents have been developed, on the prohibition of anti-personnel landmines, child protection, the prohibition of sexual violence and gender discrimination, and the protection of healthcare.<sup>6</sup> Although the texts mirror international standards – thus not creating new rules – NSAGs commit to implement measures such as endeavouring to assist victims in cooperation with aid organisations, and to cooperate in the monitoring of their adherence to their commitments. The drafting process of each Deed has included discussions with

NSAGs, scholars and other humanitarian organisations working in conflict settings. These exchanges have taken the form of face-to-face meetings and written exchanges, allowing NSAGs to assess the content of the drafts, discuss them with Geneva Call and, at the same time, provide inputs based on their own experiences. Including NSAGs’ views in these processes serves as a ‘reality check’, as these actors will be in charge of their implementation on the ground.

### **An NSAG participation model defined**

Now that we better understand how the NSAG participation landscape currently *looks*, the next step is to propose how it *should* look, keeping political realities in mind. Before presenting an aspirational model, however, we address several points related to the nature of the current international state-centric legal system. This is because NSAGs and what they are allowed to do within the international sphere, or rather are restricted from doing, is determined by an international order seemingly oriented to preserve the status quo. Three arguments are often used to defend this state of affairs: (1) inviting NSAGs to participate would not necessarily lead to more protective outcomes, since these entities ‘are not known for their respect of IHL’ (Ryngaert, 2011: 289); (2) this may legitimise the goals of these groups, which often contradict those of states; and (3) NSAGs are not in fact willing to participate in these legal discussions.

It is clear that certain NSAGs (as well as states, for that matter) do not respect international rules. However, the above arguments should be nuanced. First, problems related to compliance in conflict settings can be found in all parties, irrespective of whether they are state or non-state in nature, and this has not prevented the former from participating in norm-development

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5 States have indirectly assisted the work of Geneva Call by providing funds, diplomatic support in regard to other states and visa facilitation.

6 See the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, the Deed of Commitment for the Protection of Children from the Effects of Armed Conflict, the Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination, and the Deed of Commitment for the Protection of Health Care in Armed Conflict.



processes. This argument seems to put an additional standard on the NSAGs' side. It should be noted that IHL violations by one member do not necessarily reflect the position of the NSAG as a whole, and there are instances where NSAGs have undertaken obligations that go beyond those of states.<sup>7</sup> Second, on the legitimisation point, we acknowledge that this indeed may be the case. Yet 'one needs to understand and emphasize that the resulting legitimisation is that of the actor as rights-holder and duty bearer, not of its goals and conduct' (Cismas, 2014: 75). The humanitarian objective of alleviating the effects of armed conflict must remain an imperative. Third, and perhaps this is the strongest argument against the above-mentioned criticisms, there is no actual proof that including NSAGs in norm-development processes may lead to a 'humanitarian regression'. A historical example, such as the NLMs' involvement in the 1974–1977 Diplomatic Conferences, does not sustain this hypothesis, also demonstrating that there are cases where NSAGs are indeed willing to participate in legal discussions.

Based on these understandings and on the above examples, Table 2 illustrates what would be an aspirational level of NSAG participation for each type of initiative in the proposed model, noting that the model is a guide, and each process and context is unique.

### IHL dissemination

The mainstreaming of IHL (and related dissemination efforts) to *inform* NSAGs' behaviour should be encouraged and supported, whether by states, the UN or humanitarian organisations, noting that IHL stipulates that impartial humanitarian bodies may offer their services to parties to conflict. Restrictive measures or counter-terrorism measures, including donor conditions, should make clear that engaging NSAGs on IHL, and incidental expenses towards these ends, are not prohibited (see 'The NSAG participation landscape: Inform').

### Policy reports

Efforts to shed light on IHL implementation should *consult* on the perspectives of different parties to conflict, be they state or non-state actors. It is not necessary that the same report, or even process, consults both types of entity, but that their views are expressed in an appropriate balance. Specialised organisations such as the ICRC or Geneva Call could be asked to facilitate the gathering or pooling of these different perspectives.

### Expert meetings

There is a growing number of examples of processes that involve NSAGs and often also UN agencies such as UNICEF and UNHCR.

**Table 2 Non-state armed group participation model**

Initiative type	Inform	Consult	Involve	Collaborate	Empower
IHL dissemination	✓	N/A	N/A	N/A	N/A
Policy reports	✓	✓	N/A	N/A	N/A
Expert meetings (without states)	✓	✓	✓	N/A	N/A
Expert meetings (with states)	✓	✓	?	N/A	N/A
Good practice/policy process (without states)	✓	✓	✓	✓	?
Good practice/policy process (with states)	✓	✓	✓	?	×
RCRC International Conference	✓	✓	✓	✓	×
Formal legal/norm development (e.g. UN bodies, Diplomatic Conferences)	✓	✓	?	×	×

<sup>7</sup> For instance, while the Ottawa Convention prohibits mines that are 'designed to be exploded by the presence, proximity or contact of a person', Geneva Call has gone further by prohibiting in its Deed of Commitment those mines having that effect, whether or not they are actually designed for that purpose. This has been signed by numerous groups (Geneva Call, n.d.).

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It is easier for think tanks and civil society actors to convene such processes, fostering a dialogue with IHL experts. While it would be desirable to bring NSAGs around the table to involve them in expert meetings alongside state representatives, the political reality is that this is currently most likely to happen in a partisan manner, meaning when states support a certain NSAG or group of NSAGs. As this type of initiative encourages direct dialogue in a manner that will often maintain confidentiality or at least anonymity, for example through the Chatham House Rule, efforts should be made to encourage direct dialogue in ‘safe spaces’ or contexts, with the emphasis on confidence-building measures. Experience shows that international and state participants are often ‘won over’ by the opportunity for direct exchanges with NSAGs (Geneva Call and PEIC, 2015: 19), and therefore the more *involving* them can be demystified, the more common it can become.<sup>8</sup>

#### Good practice/policy processes

With little current appetite in the international community for formal legal development, good practice and guideline development processes are becoming more commonplace. They generally involve a thematic or compliance issue, vary in the number of states involved, and are adopted over several rounds of meetings and/or written submissions, in varying degrees of transparency. There are few, if any, examples of NSAGs having a seat at these tables, but at least one process has consulted NSAGs (see Table 1). Due to the relative informality of such processes, it should be standard practice to *consult* NSAGs, and where possible *involve* and even *collaborate* with them. A higher level of NSAG participation (*involve, collaborate*) will be more realistic in processes involving a smaller number of states, and particularly where

a significant number of states promote NSAG engagement, for example, the donor states of organisations such as Geneva Call. Regardless of the level of participation of NSAGs, it is also important that the substantive provisions of outcome documents do not refer only to ‘states’ so that they can also be endorsed by NSAGs. If conducting such processes with states is difficult to envisage in a particular context, peer-to-peer meetings of NSAGs, such as those organised by Geneva Call with the groups that have signed the Deeds of Commitment (Geneva Call, 2004; 2014), should be encouraged. These non-state processes could take place at the level of *collaborate* and even *empower*.

#### International Conference of the Red Cross and Red Crescent

The International Conference takes place every four years and is unique in that it comprises all states party to the Geneva Conventions – essentially all states – as well as the components of the Red Cross and Red Crescent Movement (RCM).<sup>9</sup> In 2019, there were over 2,000 participants, including representatives of 187 National Societies, 170 states and 77 observer organisations.<sup>10</sup> The members debate and agree on non-legally binding resolutions regarding, among other things, the implementation of IHL and its development. Of particular interest are provisions contained in the Rules of Procedure of the International Conference, which have been adopted by states and the RCM. The Rules stipulate that all participants must respect the Fundamental Principles of the RCM, including neutrality; that none of the speakers engages in controversies of a political, racial, religious or ideological nature; and that all documents must apply the same standards before being authorised for circulation.<sup>11</sup> States have also agreed to respect

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8 Note that the reference to ‘won over’ is to the value of exchanging perspectives on humanitarian issues, not to the political objectives of the participating NSAG.

9 The components of the RCM are National Societies, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.

10 33rd International Conference: Facts and Figures. Available at [https://rcrcconference.org/app/uploads/2020/03/33IC-Infographic\\_Facts\\_Figures\\_FINAL030320.pdf](https://rcrcconference.org/app/uploads/2020/03/33IC-Infographic_Facts_Figures_FINAL030320.pdf)

11 Statutes of the International Red Cross and Red Crescent Movement, Art. 11(4), available at [www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf](http://www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf)

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the adherence by all components of the RCM to the Fundamental Principles at all times.<sup>12</sup> These unique circumstances could be leveraged by the RCM to encourage the participation of NSAGs up to and including the level of *collaborate*. It is likely that many states will object to such an immediate change. However, as the composition of the Conference itself – with only one type of party to conflict represented – amounts to a structural challenge to the RCM’s neutrality, the RCM should engage in a concerted step-by-step effort to increase the level of participation by NSAGs in International Conferences, beginning with the next one in 2023. This could include consultations with NSAGs on the processes and background documents in preparation of the Conference, the sharing of NSAG perspectives during the Conference, possibly at sanctioned side events that could include pre-recorded NSAG video messages, and participation in the conference by former members of NSAGs, particularly ones that have become (or have assimilated into) governments. In the long term, NSAGs could participate as observers, a category permitted by the Rules of Procedure, ‘unless the Conference decides otherwise’.<sup>13</sup> As the Rules of Procedure protect against the politicisation of the International Conference, NSAG contributions would be limited to the humanitarian sphere, and the Conference would be protected from abuse for political or legitimisation purposes.<sup>14</sup>

### Formal legal/norm development

Including NSAGs in formal norm-development processes seems highly unlikely in the current political environment, even if this could serve to develop a sense of ownership by these NSAGs and thus enhance their level of respect for the law. Past experience, as noted above, has shown that engaging NSAGs towards a sense of ownership on applicable legal frameworks can be an important

factor in ensuring compliance. Such formal processes should establish means to at least *consult* NSAGs, and eventually aim, if the political climate allows, to *involve* them.

## Conclusion

In 2015, the International Law Commission’s Special Rapporteur on environment and armed conflict issued a report acknowledging that an understanding of NSAG practice is ‘of certain interest’ in articulating international guidelines on the topic (UN General Assembly, 2015: 5, para. 8). In the ensuing discussion, a state delegation replied that such an understanding would be of ‘very limited value’.<sup>15</sup> This exchange highlights both the opportunities and challenges in moving towards an NSAG engagement 2.0 model.

While inviting NSAGs to the table may increase their level of respect for the law, doing so also follows the inherent logic of the system and goals of individual normative processes. If they aim to have a similar protective outcome for populations affected by both states and NSAGs, it is only reasonable that states and NSAGs are involved in the development of the framework that governs their behaviour. Considering only states, but aiming to have an impact on ‘all parties to conflict’, may lead to certain norms that may be beyond the capacity of many NSAGs to implement. As has been eloquently stated, ‘no one would suggest revising the law of naval warfare without consulting the world’s navies’ (Sassòli, 2019: 591).

Our model proposes that, at the very least, all normative processes addressing IHL and good practice standards with respect to the protection of civilians and the mitigation of the effects of armed conflict should consult NSAGs. Expert meetings should involve NSAGs (or at

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12 Ibid., Art. 2(4).

13 Ibid., Art. 11(5).

14 A challenge would be to determine which NSAGs would contribute – while the number of state parties to the Geneva Conventions is predetermined, the number of NSAGs is not.

15 Republic of Poland. Permanent Mission to the United Nations. Statement by Professor Władysław Czapliński. Expert at the Legal and Treaty Department. Ministry of Foreign Affairs of the Republic of Poland, available at <http://statements.unmeetings.org/media2/7655151/poland.pdf>

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least ‘former’ NSAGs), and some processes, such as the International Conference of the Red Cross and Red Crescent, are well suited to push the level of participation even further. Where appropriate, outcome documents should not just address ‘states’, but ‘parties to the conflict’ (or similar) so that they can be endorsed by NSAGs. While it may not be feasible at present to consider higher levels of participation in formal law-making processes – in particular due to the reluctance of various stakeholders, counter-terrorism legislation and the negative perception that some NSAGs have within the international community – we should not forget that at least ‘recognised’ groups did participate up to the level of collaboration in the Diplomatic Conference leading to the adoption of the two Additional Protocols in 1977.

With the goal of *involving* NSAGs in legal discussions, the Geneva Academy of IHL and Human Rights and Geneva Call have recently undertaken a research project aiming to (i) analyse and compile NSAG practice and interpretation with respect to international law in order to provide a better sense of how and why it is complied with (or not) in conflict settings; (ii) generate useful information for the humanitarian sector and contribute to the design of more effective protection strategies and programming; and (iii) inform future international law-making processes (Bellal et al., 2019). This is a valuable step, but more efforts combining academic and operational realms should be encouraged.

Clearly, the challenges of activating an NSAG 2.0 participation model are many: from logistical and security issues to the issuance of visas,

scepticism about its effectiveness and pushback from the guardians of the international order. While Geneva Call’s Deeds of Commitment provide a framework for NSAG ownership, it is a parallel process rather than a shared community of practice. Our analysis of the Safe Schools process shows that, while many stakeholders may consider NSAG participation as a ‘nice to have’, it risks becoming a ‘necessary casualty’ for the sake of the greater goal of reaching an agreement. This narrow approach fails to consider how any particular process is connected to the overall picture of how we better alleviate the harm caused by armed conflict.

The Covid-19 and climate crises indicate that we do not have the luxury of meeting the challenges of the future with the strategies of the past. NSAGs’ participation, as the above examples show, is possible, despite the inherent limitations of international law. Some of these non-state entities are indeed willing to be involved in legal discussions and contribute to studies on how the rules are applied and interpreted by parties on the ground. With the goal of reducing the impact of armed conflict and improving the lives of people in territories under the control of NSAGs, these precedents should not be neglected or dismissed depending on their formal nature, but rather embraced. It is important to strengthen existing cases and strategically foster new experiences, so that NSAGs’ participation at higher levels of legal, normative and compliance discussions becomes more common over time. The proposed NSAG participation model can serve as a tool to guide convenors of processes towards these humanitarian ends.

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