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Armed Opposition Groups and Shared Responsibility

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Abstract

Modern armed conflicts are characterised by numerous interactions between armed opposition groups and other actors (states, international organisations, other non-state actors etc.). Some of these interactions result in harmful outcomes that cannot be easily attributed to a single actor. Issues of shared responsibility thus arise. Such issues have so far been largely ignored in international law. The article argues that the legal *régime* of shared responsibility applicable to armed opposition groups could be construed in two ways. On the one hand, it would be possible to extend to armed opposition groups rules of (shared) responsibility for internationally wrongful acts which apply to states. On the other hand, the legal *régime* could be based on liability (strict responsibility), or on standard-setting. The article shows that all these options have certain limitations stemming from the specific features of armed opposition groups (limited legitimacy, internal diversity, and temporary existence) and suggests combining their elements.

Keywords: armed opposition groups, international humanitarian law, liability, responsibility for internationally wrongful acts, shared responsibility, standard-setting

1. Introduction

Contemporary international relations are marked by a growing plurality of actors operating at the international scene. Besides states, these actors include universal and regional international organisations, individuals, and a host of organised non-state actors[1] (terrorist groups, armed opposition groups, transnational corporations, private military and security companies, non-governmental organisations etc.). This holds both in times of peace and in times of armed conflicts.[2] This article deals solely with the latter type of situation. More

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[1] In line with the introductory article to this symposium, organised non-state actors are defined as 'those non-state actors who exercise some form of public authority and whose action may lead to harmful actions at the international level'. D'Aspremont et al. 2015, section 2.

[2] Armed conflict is 'a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'. *Prosecutor v. Duško Tadić*,

specifically, it focuses on one organised non-state actor regularly present in the battlefield – armed opposition groups (AOGs).[3]

AOGs are organised collective entities that actively participate in armed conflicts using violent means and fighting either against governmental forces or against other AOGs, usually within the territory of a single state.[4] AOGs, as a category, exhibit certain general features that are relevant to the question of shared responsibility. One is their controversial legitimacy. Challenging the power of states, AOGs are seen as *personae non gratae* of the international system. Another feature relates to the diversity of AOGs. Some of them are regular, well established groups, such as the FARC (Fuerzas Armadas Revolucionarias de Colombia) in Colombia or the PKK (Kurdistan Workers' Party) in Turkey. Others are rather loose bands of individuals fighting for common goals or for profit (many groups present in Uganda, the Democratic Republic of Congo, etc.). Finally, most AOGs exist for a limited period of time. Once the armed conflict they take part in is over, they either disappear or are integrated into governmental structures.

The scene of armed conflicts is often a very complex one, with many actors, including armed opposition groups, interacting with each other. Some of these interactions may result in harmful outcomes. Due to the plurality of actors involved, such harmful outcomes cannot be easily attributed to one actor only. This might give rise to shared responsibility. Shared responsibility arises in 'situations where a multiplicity of actors contributes towards a single harmful outcome that is not causally divisible'.[5] It is characterised by four elements: the plurality of actors, a single harmful outcome, the impossibility to attribute the contributions of individual actors on the basis of causality, and the distribution of responsibility.[6]

Shared responsibility has three conceptually different forms.[7] The first is that of *joint responsibility* (also cooperation or co-action). Here, several actors together – either through a joint action or through the action of a joint organ – engage in a conduct bringing harmful outcomes. Joint responsibility occurs, for instance, when a state and an AOG, or several AOGs, carry out a joint military operation (under or without joint command) in the course of which a civilian population is deliberately targeted, or prohibited means and methods of warfare (chemical weapons, biological weapons, blinding laser weapons, etc.) are used.

The second form is that of *concurrent responsibility* (also concurrence). In this case, several actors engage in a series of uncoordinated, independent acts that result in a single harmful outcome. Each act, at the same time, would in itself be sufficient to produce this outcome. The uncoordinated acts may take place in a confrontational setting, when 'states and non-state

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ICTY Case No IT-94-1-AR72 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

[3] The classical book on armed opposition groups by Liesbeth Zegveld does not have a general definition of the term. Yet, it notes that 'the word "group" points to a collectivity being more than the sum of its members. While the word "opposition" refers primarily to the conflict against the established government, it is proposed to use the same term even when the government does not participate in the hostilities'. Zegveld 2002, pp. 3-4.

[4] The term 'armed opposition groups' is used in this article in the descriptive meaning, encompassing all entities that meet the conditions described above, regardless of the type of armed conflict they fight in and of whether they enjoy international legal personality or not.

[5] D'Aspremont et al. 2015, section 2.

[6] See Nollkaemper and Jacobs 2013.

[7] See Nollkaemper 2014, pp. 9-12.

actors may also take concurrent yet uncoordinated action contributing to the same harm'.[8] This happens, for instance, in the Srebrenica-like scenario, when an AOG engages in unlawful killing of civilians, while a state or an international organisation fails to take measures to prevent or stop this conduct. The uncoordinated acts may also occur in a complementary setting, when '[n]on-state actors may team up with states to bring about a prohibited or harmful outcome, either by taking joint action, or by one actor aiding and assisting the other'.[9] This might happen when, for instance, a state and an AOG, acting independently of each other, deliberately target the same group of civilians.

The third form is that of *cumulative responsibility* (also accumulation). In this case, several actors contribute to a single harmful outcome by independent acts, none of which would of itself be sufficient to produce this outcome. Cumulative responsibility arises, when a state and an AOG engage in violent acts which, when combined, constitute a widespread or systematic attack against the civilian population, thus fulfilling the contextual requirement of crimes against humanity. Cumulative responsibility is sometimes understood in a broader sense, as encompassing situations when one actor commits an act bringing harmful outcomes and another actor contributes to this outcome indirectly (indirect responsibility). A contribution may consist in aiding and assisting. This happens when an AOG deliberately targeting civilians obtains finances, weapons, or other aid from a state that is well aware of its acts. A contribution may also consist in directing and controlling. This happens when an AOG deliberately targeting civilians acts under the orders of a state. Finally, a contribution may consist in coercion. This happens when an AOG is coerced by a state or another actor to commit an act producing harmful outcomes.

Current international law fails to indicate clear rules which would apply in cases of shared responsibility involving armed opposition groups. The purpose of such rules would be twofold – to ensure that any harmful outcome may be accounted for, and to reflect that such an outcome was brought about by a plurality of actors. This article argues that the legal *régime* of shared responsibility applicable to armed opposition groups could be construed in two ways. On the one hand, it would be possible to extend to armed opposition groups rules of (shared) responsibility for internationally wrongful acts which apply to states. On the other hand, the legal *régime* could be based on liability (strict responsibility), or on standard-setting.

The article is organised along the two approaches. The two following sections have a similar structure in that they both give the main characteristics of the approaches, scrutinise whether they find some support in the international practice, and draw attention to their limits. The two sections address two of the three questions asked in the introduction to this symposium,[10] relating to responsibility in the traditional sense of the term and the turn to standard-setting, and supervisory mechanisms and sanctions as one of the alternatives to responsibility. The article does not contain a specific section addressing the question of dispute-settlement. Rather, examples of cases decided within dispute-settlement mechanisms are used as evidence in support of either of the two approaches.

[8] D'Aspremont et al. 2015, section 7.
[9] D'Aspremont et al. 2015, section 7.
[10] D'Aspremont et al. 2015, section 5.

2 Armed opposition groups and shared responsibility – extending the rules of (shared) responsibility for internationally wrongful acts?

The first way of construing the legal *régime* of shared responsibility of AOGs consists in extending to these groups the rules of (shared) responsibility for internationally wrongful acts which are applicable to states. After summarising the main principles of the existing legal regulation of shared responsibility applicable to states (and to international organisations), the section explores the possibility of, and limits implied in, its extension to AOGs.

2.1 Shared responsibility under current international law

Current international law does not have a comprehensive set of rules regulating shared responsibility. It is however not fully ignorant of this phenomenon. One way in which it has sought to address this, is that of integrating shared responsibility within the legal framework regulating the responsibility of states for internationally wrongful acts. This framework was codified by the International Law Commission (ILC) in its 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[11] Later on, the regulation was extended, albeit not without criticism,[12] to international organisations (the 2011 Articles on the Responsibility of International Organizations – ARIO).[13]

The framework is based on the premise that actors are bound by primary rules of international law; violations of such rules attributed to these actors qualify as internationally wrongful acts; and such acts result in international responsibility entailing legal consequences regulated by secondary rules of international law.[14] In many cases, wrongful acts are brought about by acts of a single actor and then the usual framework applies. When, however, such acts are brought about by joint, concurrent, or cumulative acts of several actors, special rules are needed to address the instances of shared responsibility. The ARSIWA and the ARIO both contain such rules, although the regulation is far from comprehensive. The special rules pertain to the attribution of conduct, the attribution of responsibility, the invocation of responsibility, and the content of responsibility.[15]

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[11] Articles on Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2) (ARSIWA). Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2) (ARSIWA Commentary).

[12] See e.g. Ragazzi 2013.

[13] Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO). Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary).

[14] The ILC defines secondary rules as rules '[d]etermining in what circumstances conduct is to be attributed to the State … [d]etermining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter … [s]pecifying the content of State responsibility … [d]etermining any procedural or substantive preconditions for one State to invoke the responsibility of another State'. ARSIWA Commentary, p. 31.

[15] Shared responsibility also gives rise to interesting institutional questions, relating to the forum in which, and the conditions under which it can be invoked. As these questions are contextspecific, and closely linked to the jurisdictional and other rules applicable in various (quasi-)judicial bodies, this article leaves them aside.

The criteria for the *attribution of conduct* are set out in Part I Chapter II of the ARSIWA and ARIO. States and international organisations are responsible for violations of international law which result from the conduct of their organs *de jure* or *de facto*[16] and, exceptionally, from other conduct (conduct adopted as its own, etc.). These rules are appropriate in cases of individual responsibility. They can also apply, without modification, to cases of shared responsibility based on concurrence and accumulation. These forms presuppose the presence of two (or more) independent acts which are attributed to two (or more) actors. Thus, the standard criteria of attribution are of relevance here, with each state or organisation being attributed the conduct carried out by its own organs.

The situation is more complicated in case of shared responsibility based on cooperation.[17] Here, the conduct, whether carried out through a joint action or though the action of a joint organ, is attributable to two (or more) entities at the same time. In its commentary to the ARSIWA, the ILC notes that '[t]he principle of independent responsibility reflects the position under general international law … In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them'.[18] The commentary to the ARIO confirms that 'although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded'.[19]

The attribution of conduct differs from the *attribution of responsibility.* The latter relates to instances 'where one state is responsible for the conduct of another state'.[20] It is thus relevant for indirect responsibility or, more exactly, for two of its forms – direction and control, and coercion. In the former case, the actors are both responsible for the act. In the latter case, the responsibility is 'transferred' to the coercing actor, while the responsibility of the coerced actor is precluded.

The *invocation of responsibility* of a multiplicity of actors is addressed by Article 47 of the ARSIWA and Article 48 of the ARIO.[21] The two instruments introduce the same rule, under which 'where several States /organizations/ are responsible for the same internationally wrongful act, the responsibility of each State /organization/ may be invoked in relation to that act' (Arts. 47(1) of the ARSIWA and 48(1) of the ARIO). Of the three types of shared responsibility, only cooperation and, partly, accumulation fall under this regulation. In these cases, all actors involved are (cooperation), or may be (accumulation in the form of direction and control), held responsible for the wrongful act. Concurrence and accumulation in its other forms do not give rise to shared invocation, because the actors involved are responsible for different wrongful acts.

The fourth area of special rules pertains to the *content of responsibility.* The two sets of ILC Articles, while acknowledging the possibility of shared responsibility, do not provide any

[16] Arts. 4-11 of the ARSIWA and Arts. 6-9 of the ARIO.
[17] For more details, see Messineo 2014.
[18] ARSIWA Commentary, p. 124.
[19] ARIO Commentary, p. 81.
[20] Fry 2014, p. 103.
[21] See Vermeer-Künzli 2014. While the term shared responsibility is not invoked in either the ARSIWA or ARIO, the commentary to the latter refers to 'joint responsibility'. This term is understood as referring to any 'case where an international organization is responsible for a given wrongful act together with one or more other entities, either international organizations or States'. ARIO Commentary, p. 142.

guidelines in this regard. The general rule is that the legal consequences of an internationally wrongful act encompass the continued duty of performance, the obligation of cessation of the wrongful act, the obligation to offer appropriate assurances and guarantees of non-repetition, and the obligation to make full reparation for the injury caused by the international wrongful act.[22] In principle, this rule could apply to instances of shared responsibility as well. However, two questions arise: whether shared responsibility entails shared consequences and if so, how such consequences should be allocated and whether the injured actor, when invoking shared responsibility against one responsible actor, can collect the whole amount of reparation or just an allocated part of it.

The ARSIWA and ARIO fail to address these questions. Yet, Articles 47(2)(b) and 48(3)(b), respectively, indicate that the right to invoke the responsibility of each of the actors responsible for the same internationally wrongful act is 'without prejudice to any right of recourse that the State /organization/ providing reparation may have against the other responsible States /organizations/'. This suggests that the consequences, at least as far as reparation is concerned, can be divided and the injured actor may collect more than just an allocated part of reparation from any responsible actor.[23] The regulation is however silent on the criteria of allocation (fault, contribution, etc.) and the applicable principles (joint and several responsibility,[24] etc.).

The two instruments do not regulate shared responsibility in a comprehensive way. They are both based on the principle of independent and exclusive responsibility under which 'the state or international organization … is responsible for its own conduct and its own wrongs'.[25] The only forms of shared responsibility acknowledged in the text, – cooperation and indirect responsibility (direction and control, and coercion) – are exceptions to the principle. Moreover, the criteria for the allocation of shared responsibility remain unclear. Despite these shortcomings, the legal *régime* of responsibility for internationally wrongful acts is the only well-established uniform set of rules applicable with respect to acts producing harmful outcomes. It is therefore interesting to consider whether it could, even in its imperfect form, be extended to armed opposition groups.

2.2 Extending the rule on shared responsibility to armed opposition groups?

The *legal régime* of responsibility for internationally wrongful acts, including the rules on shared responsibility, was originally designed for states. Later on, it was extended, with some modifications, to international organisations.[26] Could it be extended further, to armed opposition groups? Prima facie, AOGs seem well suited to be subsumed under the *régime.* They are more state-like than most other non-state actors: they usually pursue political goals, have an internal hierarchical organisation and sometimes even control a certain territory. Moreover, at least some AOGs are considered legal persons under international law, endowed

[22] Arts. 28-39 of the ARSIWA and Arts. 28-40 of the ARIO. See also D'Argent 2014.
[23] This is confirmed by the Commentary to Art. 31 of the ARSIWA, see ARSIWA Commentary, pp. 91-94.
[24] See Noyes and Smith 1988.
[25] See Nollkaemper and Jacobs 2013, p. 381.
[26] As Allain Pellet claims, 'it remains the case that the responsibility of international organizations is largely governed by the same general principles which apply to the responsibility of States, and that, seen from afar, it has the same general characteristics and is susceptible of the same type of analysis'. Pellet 2013a, p. 7.

with functional personality. This is the case of AOGs taking part in a non-international armed conflict. Such groups are bound by rules of international humanitarian law (IHL) contained in Common Article 3 of the four 1949 Geneva Conventions, the 1977 Additional Protocol II to these Conventions,[27] several treaties of the Hague Law and customary rules.[28] The extent to which AOGs are bound by other branches of international law, for instance human rights law, remains open to discussion.[29]

Furthermore, while no rules on direct responsibility of AOGs have so far emerged, creating what some describe as an 'accountability gap',[30] there is a growing consensus that an AOG 'may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces'.[31] This is a logical fallout of the idea that 'the existence of an international legal order postulates that the subjects on which duties are imposed should equally be responsible in the case of a failure to perform those duties'.[32] It is true that 'the consequences of such responsibility are not clear'.[33] It is also true that the establishment of direct responsibility of AOGs for their internationally wrongful acts is a necessary pre-condition for the extension of the rules on shared responsibility – an actor can hardly be held responsible jointly, if it cannot be held responsible individually in the first place.

Yet, if 'there /is/ just one unequivocal notion of responsibility in international law',[34] it might be expected that the regulation of responsibility of AOGs would be construed analogically to that of other collective entities, i.e. states and international organisations. This means that violations of primary rules binding on AOGs by a conduct attributable to them would constitute internationally wrongful acts entailing responsibility with its classical content (reparation, cessation, assurances and guarantees of non-repetition).[35] The extension, moreover, could relate not only to the rules on direct responsibility but also to those on shared

[27] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287 (1949 Geneva Conventions). ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, in force 7 December 1978, 1125 UNTS 609 (Additional Protocol II). Additional Protocol II only applies to armed conflicts 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol', Art. 1(1).

[28] Most of the 161 customary rules of IHL identified by the ICRC in its 2005 Study on Customary International Humanitarian Law apply both in international and in non-international armed conflicts. See Henckaerts and Doswald-Beck 2005.

[29] See Clapham 2006a and 2006b.

[30] Zegveld 2002, p. 97. For a broader understanding of the term, see D'Aspremont et al. 2015, section 4.

[31] ARSIWA Commentary, p. 52, para. 16.

[32] Dionisio Anzilotti, cit. in Pellet 2013a, p. 4.

[33] Henckaerts and Doswald-Beck 2005, p. 530 (Rule 149).

[34] Pellet 2013b, p. 44.

[35] For more details, see Bílková 2015.

responsibility. In fact, the possibility of such an extension has already been, albeit indirectly, acknowledged in the case law of the International Court of Justice (ICJ or Court).[36]

In the *Nicaragua* case,[37] Nicaragua accused the United States of America (USA) of recruiting, organising, paying and commanding the right-wing military groups operating in its territory, known as the 'contras'. The ICJ solely had to deal with the responsibility of the USA and the attribution of the acts of the contras to it. Yet, having discarded this attribution, the Court did not shy away from noting that 'the contras remain/ed/ responsible for their acts and … the United States /was/ responsible for its own conduct … including conduct related to the acts of the contras'.[38] Stressing that 'the lawfulness or otherwise of such acts of the United States is a question different from the violations of international humanitarian law of which the contras may or may not have been guilty',[39] the ICJ implicitly recognised that the contras – an AOG – might potentially be held responsible for its own violations of IHL and that this responsibility could materialise simultaneously as that of the USA, a state. The ICJ unfortunately did not indicate what form this shared responsibility would take and which legal rules would apply to it.

Equally relevant is the *Bosnian Genocide* case.[40] In this case, the ICJ was asked to assess whether the respondent state, Serbia and Montenegro (previously the Federal Republic of Yugoslavia – FRY), was responsible for the acts of genocide committed in Srebrenica by the Army of the Republika Srpska. This army qualified as an AOG. Similarly as in the *Nicaragua* case, the ICJ first rejected the possibility of attributing the acts of genocide to Serbia and Montenegro. In the next step, however, it did not focus on the acts of the state solely but discussed whether Serbia and Montenegro could be held responsible for complicity in genocide under Article III(e) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[41] Although the Court concluded that it was not the case, it did so on the ground that 'it ha/d/ not been conclusively established that the crucial time, the FRY /had/ supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide'.[42] This suggests that should the FRY have been in full awareness, the state could be found complicit in genocide committed by an AOG. The ICJ also stressed that Article III(e) of the Genocide Convention was in substance identical to Article 16 of the ARSIWA noting: 'to ascertain whether the Respondent is responsible for "complicity in genocide" … the Court must examine whether organs of the respondent State … furnished "aid or assistance" in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility'.[43] Although the ICJ recalled that Article 16 ARSIWA only applied between states and was thus 'not directly relevant to the present case',[44] it added that the provision

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[36] See Nollkaemper 2011.
[37] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Rep. 1986, p. 14 (*Nicaragua*).
[38] *Nicaragua*, para. 116.
[39] *Nicaragua*, para. 116.
[40] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Rep. 2007, p. 43 (*Bosnian Genocide*).
[41] Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277 (Genocide Convention).
[42] *Bosnian Genocide*, para. 423.
[43] *Bosnian Genocide*, para. 420.
[44] *Bosnian Genocide*, para. 420.

'nevertheless merit/ed/ consideration'.[45] In that way, the ICJ *de facto* extended the scope of the ARSIWA, or at least of its Article 16, to the relation between a state and an AOG and it clearly did so in the context of shared responsibility (accumulation in the form of aid assistance).

The case law, although scarce, confirms the possibility of *extending* the rules on (shared) responsibility for internationally wrongful acts to AOGs. Yet, since these groups differ from states, the rules designed for the latter can hardly be 'transposable "lock, stock and barrel"'[46] to them. The extension would require certain changes and clarifications. Some of them would relate to the direct responsibility of AOGs, others to the special rules applicable to shared responsibility.

The *former* category encompasses, for instance, the criteria of attribution. In principle, AOGs should most probably bear responsibility for the conduct of their organs/members.[47] Yet, who those members/organs are is not clear. By analogy to the rules applicable to states, *de jure* and *de facto* organs/members of AOGs could be distinguished. *De jure* organs/members would be those officially designated by an AOG to act on its behalf, such as members of its armed forces. *De facto* organs/members would be those which do not have an official place within the AOG structure but factually act under its control and/or in its interest. To identify the *de facto* organs/members, several criteria can be adopted. Zegveld suggests the 'effective control test' inspired by Article 8 of the ARSIWA.[48] The International Committee of the Red Cross (ICRC) believes that 'the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities'.[49] While the first approach gives more weight to the behaviour of the group, the latter is attentive to the attitude of individuals. International practice is too scarce to allow us to choose between the two approaches.

Other changes and clarifications would be needed with regard to *special rules* on shared responsibility. The regulation contained in the ARSIWA and ARIO presumes that actors sharing responsibility are if not identical, then at least similar in nature, and the relationship between them is that of horizontal coordination (states) or of membership (international organisations). With AOGs, the situation is different. AOGs are non-state actors and they usually operate within the territory of a single state. Most of them, moreover, contest the legitimacy of a state by fighting against its armed forces and/or by depriving it of the control over some parts of its territory. States are, for obvious reasons, unwilling to treat AOGs as their peers with whom they would be ready to share responsibility (as sharing always presupposes some kind of mutual recognition).

This unwillingness has found its reflection in the existing rules, as codified in the ARSIWA. The Articles are not fully ignorant of the fact that non-state actors can commit acts bringing harmful outcomes and that such acts may imply an active contribution by a state. Yet, the

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[45] *Bosnian Genocide*, para. 420.
[46] Pellet 2013b, p. 43.
[47] Zegveld 2002, p. 153.
[48] Under the effective control test, 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct', Art. 8 of the ARSIWA.
[49] Melzer 2009, p. 33.

ARSIWA solely address one aspect of the situation, namely whether, and under what conditions, the conduct carried out by a non-state actor with some contribution of a state can be attributed to the latter.[50] Article 8 ARSIWA stipulates that such an attribution takes place if (and only if) the non-state actor, when carrying out the conduct bringing harmful outcomes, was 'in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. The test is strict, as the state must have either given instructions or 'directed or controled the specific operation and the conduct complained of was an integral part of that operation'.[51]

As a text dealing exclusively with the responsibility of states, the ARSIWA does not indicate whether the conduct of non-state actors which is attributed to states could give rise to a parallel responsibility of non-state actors and if so, what rules would apply to such shared responsibility. It also fails to address the other instances of shared responsibility between states and non-state actors, where no attribution takes place.[52] The emphasis is simply placed on trying to ensure that at least in some cases, acts producing harmful outcomes that are carried out by non-state actors will not remain without legal consequences. Now, if AOGs could be held directly responsible in parallel with states, how would such responsibility be shared? Could the special rules on shared responsibility foreseen in the ARSIWA be applied here? Or would some modifications of these rules be needed?

The special rules on shared responsibility relating to the *attribution of conduct* and the *attribution of responsibility* seem *prima facie* well adapted to accommodate AOGs. In case of shared responsibility in the form of concurrence and accumulation, each actor would be attributed its own conduct. In case of cooperation, the same conduct would be attributed to all actors involved. Moreover, actors exercising direction and control over other actors, and actors coercing other actors to commit a certain act, would be attributed the acts of the latter. Some adjustment of the current rules would probably be needed. For instance, by application of Article 8 of the ARSIWA, the conduct of AOGs over which a state exercises effective control is attributed to this state already under the rules of direct responsibility. It would make little sense to extend to this conduct the rules on the direction and control (Art. 17 of the ARSIWA), which would bring about the attribution of responsibility.

Similar difficulties arise with respect to the *invocation* and *content* of shared responsibility. The extension of Article 47 of the ARSIWA would imply that if a state and an AOG, or several AOGs, shared responsibility on the basis of cooperation or direction and control, the responsibility of any of them could be invoked and the relevant actor might be required to provide the whole sum of reparation. Such solution, albeit not unjust, implies difficulties. In most cases, it could be hard in practical terms to invoke the responsibility of AOGs, provided there are no international fora where claims against them are adjudicated. Moreover, AOGs

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[50] In addition of attributing to the state a conduct of non-state actors that was done under the direction or control of that state (Art. 8), the ARSIWA also makes it possible to attribute to states a conduct of non-state actors to which the states did not contribute (Arts. 5, 9-11 ARSIWA). In the latter type of situation, the attribution takes place to ensure that acts producing harmful outcomes will not remain without legal consequences.

[51] ARSIWA Commentary, p. 47, para. 3.

[52] In the comment to Draft Art. 14 (now Art. 10 ARSIWA), the special rapporteur stated that the article dealing with the responsibility of non-state actors 'falls outside the scope of the draft articles and should be omitted. The responsibility of such movements, for example, for breaches of international humanitarian law, can certainly be envisaged, but this can be dealt with in the commentary'. Crawford J, 'First report', UN Doc. A/CN.4/490 (1998), p. 53, para. 272.

usually cease their legal or factual existence once the armed conflict they engage in is over. In such a situation, the injured parties would most likely be tempted to turn against the most 'stable' actor, the state, and seek to make it 'pay' both on its own account and on that of an AOG. States however would be hardly willing to respond to such claims positively.

To sum up, the rules of responsibility for internationally wrong acts, including rules on shared responsibility, applicable to states and international organisations, could in principle be extended to AOGs. This extension has already found some, albeit limited, support in the case law of the ICJ (*Nicaragua*, *Bosnian Genocide*). The rules could not be transposed 'lock, stock and barrel'. Certain modifications would be necessary, for instance with respect to the criteria of attribution.

Moreover, the extension would be confronted with the problems stemming from the general features of AOG (the controversial legitimacy, the internal diversity of AOGs, and the temporary nature of these groups). While relating more to the direct responsibility of AOGs than to shared responsibility, these problems obviously affect the practical chances of the extension of the legal rules to AOGs and the potential efficiency of these rules in the new context. If many AOGs disappear before they can be held responsible for their misconduct, the legal *régime* risks having very limited outcomes. If states are not willing to treat AOGs as their legal counterparts and to share responsibility with them, the *régime* risks not to materialise at all. In this situation, it might be wise to consider alternative approaches to shared responsibility, as the next section does.

3 Armed opposition groups and shared responsibility – building up legal *régimes* of liability, or on standard-setting?

Extending the rules on responsibility for internationally wrongful acts to AOGs is one possible way of dealing with shared responsibility involving these non-state actors. The purpose pursued by these rules – to ensure that any harmful outcome may be accounted for and to reflect that such an outcome was brought about by a plurality of actors – can however be achieved by other means as well.

One means might be that of relying on *ex ante* arrangements, as suggested by Nollkaemper and Jacobs.[53] Such arrangements are actually foreseen in Common Article 3 of the Geneva Conventions. Under Article 3(2), the parties to non-international armed conflicts 'should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention'. Whereas the provision mostly targets other primary rules of IHL, there is no reason why special agreements could not regulate (shared) responsibility. Most of them do not however do so.[54] In fact, special agreements remain rather scarce in practice. This is largely due to the fear of states that by concluding such agreements with AOGs, they would enhance the legitimacy of the latter. This fear would most likely be

[53] See Nollkaemper and Jacobs 2013, pp. 393-394.

[54] For instance, the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of Philippines and the National Democratic Front of the Philippines, The Hague, 16 March 1998, solely indicates 'the necessity and significance of assuming separate duties and responsibilities for upholding, protecting and promoting the principles of human rights and the principles of international humanitarian law' (Preamble).

even stronger if the agreements referred to mechanisms of compliance and when, furthermore, they presupposed some form of 'sharing' of responsibility between states and AOGs.

Moreover, even if concluded, special agreements would not necessarily constitute a solution to the shared responsibility problem. It is hard to imagine that such agreements would bind all parties to the conflict and would cover all possible scenarios of shared responsibility. In addition, the challenge related to the temporary nature of AOGs would arise. On the one hand, AOGs could not conclude an agreement before they would come into legal existence, i.e. before an armed conflict would break out. From that perspective, the arrangements would not be truly *ex ante.* On the other hand, whatever the content of the agreement, AOGs could hardly be held responsible on its basis once the conflict ends and/or their legal existence is over. Another difficulty is that relying on *ex ante* arrangements could result in a fragmented system of shared responsibility. Finally, there are practical difficulties such as the absence of means through which special agreements could be enforced.

In addition to *ex ante* arrangements, other legal means could be used to deal with shared responsibility involving AOGs. This section discusses two of them, namely liability (strict responsibility), and standard-setting.

3.1 Liability and armed opposition groups?

Liability arises in certain cases when activities not prohibited by international law cause harmful outcomes. There is no uniform legal *régime* of liability under current international law similar to that of responsibility for internationally wrongful acts. Over the past decades, however, several independent, separate *régimes* of liability have emerged under international treaties. All these *régimes* focus on activities involving a risk of causing significant harm affecting several states. Thus, liability applies in the area of nuclear energy, oil pollution or space law.

Since 1973, the International Law Commission sought to identify the common principles applicable in the area.[55] In 2001, the ILC adopted the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.[56] Five years later, it produced the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities.[57] Whereas the former instrument focuses on prevention, the latter codified rules on the allocation of loss. Under the Draft Principles, states have an obligation to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities. They also have to take measures to preserve and protect the environment.[58] References to state liability have been eliminated from the two

[55] In 1973, the ILC concluded that it could 'undertake the study of the so-called responsibility for risk after its study on responsibility for wrongful acts has been completed, or it can do so simultaneously but separately', ILC Report, UN Doc. A/9010/Rev.1 (1973), para. 39. In 1978, the new topic of International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law was included in the ILC agenda.
[56] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, ILC Yearbook 2001/II(2).
[57] Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, ILC Report on the work of its fifty-eighth session, UN Doc. A/61/10 (2006), pp. 106-110.
[58] Principles 4 and 5 Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

documents. Civil liability, on the contrary, is mentioned in Article 4 of the Draft Principles which states that measures taken by a state to ensure compensation 'should include the imposition of liability on the operator or, where appropriate, other person or entity' (para. 2).

Moreover, several international treaties provide for (civil) liability. For instance, the 1960 Organisation for Economic Co-operation and Development Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention) provides in Article 3 that private operators of nuclear installations are liable for 'damage to or loss of life of any person; and damage to or loss of any property … caused by a nuclear accident'.[59] Operators have the obligation to provide compensation, which is limited by a maximal sum set in Article 7 of the Paris Convention. Similar provisions can be found in the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (Art. 3) or the 2010 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (Art. 7).[60] Such treaties, while prima facie establishing an international *régime* of civil liability, 'only lay down minimum standards, which states subsequently have to implement and enforce in their domestic legal order'.[61] These instruments remain silent on instances of shared responsibility.[62]

Could a liability *régime* akin to civil liability be established with regard to AOGs? And could it be shared with other non-state actors and states or international organisations? There are arguments in support of such an approach. A liability *régime* would be fixed on harmful outcomes, not on violations of international law. From that perspective, it might better ensure that no harm occurs without legal consequences. Moreover, it would render obsolete the debate as to which AOGs are bound by international law and which are not, and what rules are applicable to these groups. It would no longer be necessary to focus on primary norms, provided that liability would arise irrespective of any violations of international law that might have taken place. In this way, the *régime* would be more favourable to victims and would increase their chance of being compensated. In fact, in view of the recent turn to victims,[63] the prospects of introducing liability rules into IHL have already been discussed by scholars.[64] Moreover, states might be less reluctant to accept, and to share, liability with AOGs provided that it would not entail any substantive extension of AOGs' rights and duties and that, moreover, many of them have civil liability of legal persons regulated in their domestic legal systems.

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[59] Convention on Third Party Liability in the Field of Nuclear Energy, Paris, 29 July 1960, in force 1 April 1968, 956 UNTS 251 (Paris Convention).
[60] International Convention on Civil Liability for Bunker Oil Pollution Damage, London, 23 March 2001, in force 21 November 2008, 973 UNTS 3; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, London, 3 May 1996, NYIF.
[61] International Law Association, Non-State Actors Committee, Conference Report Washington 2014, p. 17.
[62] Some limited practice in this respect exists under the 1982 UN Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3. In *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Request to Render an Advisory Opinion of 28 March 2013, ITLOS Case No. 21, the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea held that the liability of a state and that of a private actor were independent of each other. Yet, the decision relates to responsibility for internationally wrongful acts rather than international/civil liability.
[63] See Zegveld 2003.
[64] Ronen 2009.

The approach, however, also has shortcomings. Since there are no common rules on (shared) liability, the *régime* would need to be construed anew. It would be necessary to determine which harmful outcomes are so serious so as to give rise to liability. The criteria for the distribution of liability would also have to be defined in cases involving shared liability. On the one hand, such criteria would not need to respect the threefold classification of shared responsibility (cooperation, concurrence, accumulation). They could be uniform and include factors such as fault or contribution. Shared liability is a well-established concept under national legal orders which could serve as a source of inspiration.[65] On the other hand, there seems to be no practice at the national or international level which would relate specifically to AOGs, and it is uncertain whether principles applicable to other non-state actors could work with respect to these groups. Furthermore, the temporary nature of AOGs would constitute a problem. If it is not possible to hold AOGs liable after the end of armed conflict, it is so not merely because they cease to be bound by international law, but because in many cases they disappear altogether. Thus, the approach based on liability is not without difficulties.

3.2 Standard-setting and armed opposition groups?

Another approach offers a more radical departure. It breaks away from the distinction between primary and secondary rules, with shared responsibility being traditionally subsumed under the latter category. Instead of concentrating on the legal consequences of violations of international law or on activities implying a risk of substantive harmful outcomes, this standard-setting approach places emphasis upon 'strengthening standards and commitments by both non-state actors and states, coupled with supervisory mechanisms'.[66] The aim is thus to create efficient mechanisms which could prevent internationally wrongful acts or harmful conduct from materialising in the first place. The approach is preventative rather than reactionary in nature and it is based on the *ex ante* rather than *ex post* logic. Most of its mechanisms are soft in nature in that they solely impose voluntary and/or legally non-binding commitments.

Standard-setting is not a direct functional equivalent to the (shared) responsibility and liability *régimes.* Yet, by seeking to ensure that those *régimes* will not actually be needed, they serve the same overall purpose – to ensure that any harmful outcome may be accounted for and to reflect that such an outcome was brought about by a plurality of actors – in an indirect way.[67] If the term shared responsibility is used in this context, it usually refers to basic principles that all actors should abide by, i.e. to certain duties and obligations that actors together undertake to respect and to promote. The reference to shared responsibility defined in this way appears in various official documents.[68]

The approach based on standard-setting has been adopted with respect to several non-state actors, such as private military and security companies, non-governmental organisations, or

[65] See Law Reform Commission of British Columbia, 'Report on Shared Liability', LRC 88, August 1986; or Moore and Matlock 2014.
[66] D'Aspremont et al. 2015, section 5.3.
[67] Similar relationship exists between the concepts of humanitarian intervention and of responsibility to protect. While the former focuses on how to deal with man-made violations of human rights, the latter seeks to prevent such violations in the first place.
[68] See e.g. UN Doc. A/59/565 (2 December 2004).

transnational corporations. For instance, the 2011 UN Guiding Principles on Business and Human Rights state that states have a duty to protect human rights, whereas transnational corporations have a corporate responsibility to respect these rights. Such responsibility is defined as 'a global standard of expected conduct for all business enterprises wherever they operate'.[69] The legal duty of states and the corporate responsibility of transnational corporations complement each other. Responsibility is 'shared' in the sense that all actors – states and/or non-state actors – are interested in protecting certain standards and commit themselves to uphold such standards. 'Sharing responsibility' in this context thus means being part of a community of actors with the same common values and interests.

It would seem that AOGs, these *personae non gratae* of the international system, must a priori be excluded from all standard-setting initiatives. This was indeed largely the case in the past. Yet, the gradual increase in the number of non-international armed conflicts over the decades has drawn attention to AOGs and to the way in which their compliance with international law could be enhanced and their behaviour, in general, improved. Among the mechanisms which have been tested are those of unilateral declarations and of voluntary codes of conducts. *Ex ante* arrangements, including special agreements, which have been described above, are sometimes included among these mechanisms as well.[70]

Unilateral declarations 'provide armed groups with an opportunity to explicitly express their commitment to abide by the rules of humanitarian law'.[71] They may relate to other branches of international law as well, for instance human rights law. Declarations are issued at the initiative of an AOG, and are often passed over to the United Nations or the ICRC. Most authors believe that the legal effects of unilateral declarations are limited. 'Armed groups remain bound by the provisions and rules of IHL … regardless of whether they make a unilateral declaration'.[72] It is also uncertain whether AOGs may make themselves bound by other branches of international law, such as human rights law, due to their limited, functional personality. Yet, despite all this, declarations are important because they bring AOGs to the 'table' giving them a feeling of ownership over the legal framework in which they operate and enhancing their motivation to abide by international law. Unilateral declarations, relating to the respect for IHL, were issued by the Coordinadora Guerrillera Simon Bolivar in Colombia in 1987 or the National Democratic Front of the Philippines in 1991 and 1996.[73]

A special category of unilateral declarations are those adopted at the request of the ICRC or another international actor. Some of the requests are made *ad hoc*, for a concrete armed conflict, and they only relate to the conflict concerned. Other requests are of a more general nature. They encourage AOGs to undertake general commitments and, sometimes, to create mechanisms to monitor compliance with such commitments. The prime example is 'Geneva Call'. It is a non-governmental organisation, established in 2000 by the Italian scholar Marco Sassòli, which seeks to engage in dialogue with AOGs and other armed non-state actors.[74] Up

[69] Guiding Principles on Business and Human Rights and Commentary, Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04 (United Nations, 2011), p. 13. See also Karavias 2015.
[70] Mack 2008. See also Ryngaert and Van de Meulebroucke 2012.
[71] Mack 2008, p. 19.
[72] Mack 2008, p. 19.
[73] Mack 2008, p. 20.
[74] Armed non-state actors are defined as 'organized armed entities involved in internal armed conflicts that are primarily motivated by political goals, operate outside State control and therefore lack the legal capacity to

to now, Geneva Call has drafted three Deeds of Commitments which give such actors 'the opportunity to formally express their agreement to abide by humanitarian norms and take ownership of these rules'.[75] The Deeds concern the ban on anti-personnel mines and cooperation in mine action (2000), protection of children from the effects of armed conflict (2010), and the prohibition of sexual violence in situation of armed conflict (2012).

AOGs which sign the Deeds 'agree to take the necessary measures to enforce their commitment, and to allow and cooperate in the verification of their compliance by Geneva Call'.[76] For instance under the 2000 Deed, AOGs agree to prohibit under any circumstance the use, production, stockpiling, and transfer of AP mines; and to undertake and cooperate in stockpile destruction, mine clearance, victim assistance, mine awareness, and various other forms of mine action, in cooperation with specialised organisations. The compliance with the Deeds is monitored by Geneva Call which may publicise its findings, if it finds it appropriate. According to the data of Geneva Call, the first Deed has been signed by 48 armed non-state actors, the second by 13 and the third by 12. Geneva Call also indicates that those armed non-state actors having signed the Deeds 'have overall respected their obligations'.[77]

Codes of Conduct are internal documents of AOGs adopted by their supreme organs to ensure internal discipline. The Codes resemble similar documents (doctrines, military manuals, etc.) issued by states and international organisations. Yet, they are less common in practice as only a minority of AOGs have them. The ICRC sees codes of conduct as 'a logical "next step"'[78] following the adoption of unilateral declarations, though such a step is not always taken. Codes of Conduct differ from each other. Some refer to international law (mostly IHL), others to local traditions or cultural norms. Some are drafted by AOGs, others are taken over from the ICRC or another organisation. Codes of conduct have been adopted by AOGs in Algeria, Colombia, El Salvador, Liberia, Nepal, Sierra Leone, Sri Lanka or Syria.[79]

One of the recent Codes of Conduct was adopted by 54 brigades of the secular AOG fighting in Syria, the Free Syrian Army (FSA) in May 2014. Entitled 'The Pledge of the Syrian Revolutionaries from the Battlefields', the Code starts from the premise that the actions done by parties to an armed conflict 'are accompanied by responsibilities'.[80] This premise makes the FSA 'announce /its/ unconditional commitment to international law and legislation and … unconditional commitment to respect for human rights'.[81] The Code then enumerates obligations stemming from IHL (obligation to provide decent treatment to all persons not involved directly in military actions, prohibition of the taking of hostages and of collective punishment, etc.). The FSA also takes on the obligations 'to investigate all complaints

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become party to relevant international treaties'. Geneva Call. http://www.genevacall.org/who-we-are/faqs/. Accessed 15 February 2015.

[75] Geneva Call, Deed of Commitment. http://www.genevacall.org/how-we-work/deed-of-commitment/. Accessed 15 February 2015.

[76] Geneva Call, Deed of Commitment.

[77] Geneva Call, Mission. http://www.genevacall.org/who-we-are/. Accessed 15 February 2015.

[78] Mack 2008, p. 22.

[79] Mack 2008, p. 23.

[80] ETANA, 'Armed groups agree on Codes of Conduct to respect International Humanitarian Law and rights', 3 July 2014. http://www.responsibilitytoprotect.org/PAX%20Syria%20statement%20on%20FSA%20code%20of%20conduct(3).pdf. Accessed 15 February 2015.

[81] ETANA 2014.

regarding violations of human rights' and 'to take all necessary measures to prevent similar violations and to initiate legal action against those responsible for such violations'.[82]

Standard-setting initiatives are useful in that they place emphasis upon prevention. Rather than dealing with legal consequences of the violations of international law, they endeavour to make AOGs respect international law in the first place. They seek to reach this goal by engaging AOGs in a dialogue and giving them a feeling of ownership over the legal regulation. A unilateral pledge by AOGs to respect international standards does not affect the legal status of such groups. Yet, it might make them appear less illegitimate, thus potentially increasing the willingness of states to deal with such non-state entities. Moreover, if 'shared responsibility' is no longer about determining who, and to what extent, contributed to a certain harmful outcome but about upholding common standards, it might again be more difficult for states to reject the concept on the pretext that it strengthens the position of AOGs. Another advantage of this approach consists in that international standards that AOGs undertake to respect are of immediate use. They apply during the armed conflict in which AOGs take part and the temporary nature of these groups is therefore less of a problem here.

At the same time, the approach based on standard-setting is not without difficulties. First, it can only be successfully applied with respect to regular, well established groups which care about their reputation and seek to gain some legitimacy. It can, on the contrary, hardly affect the behaviour of undisciplined, loose bands of individuals fighting for profit or for personal pleasure. The difficulty stemming from internal diversity of AOGs therefore arises. It would be coupled with that of the lack of tools to be used in case prevention fails. What would happen to AOGs if, in spite of having issued unilateral declarations, having signed deeds of commitments or having adopted codes of conduct, they fail to live up to the international standards? And what would happen to those that do not undertake any voluntary obligations in the first place? There are no clear answers to these questions.

4. Concluding remarks

The article argued that the legal *régime* of shared responsibility applicable to armed opposition groups could be construed in two ways. It would be possible to extend to AOGs the rules of (shared) responsibility for internationally wrongful acts which apply to states. It would also be possible to build a new legal *régime* based on liability or on standard-setting. The article showed that all the options have some limits stemming from the specific features of AOGs. Whereas the responsibility and liability *régimes* primarily struggle with the limited legitimacy and the temporary existence of AOGs, the approach putting emphasis on standard-setting is mainly confronted with the internal diversity of AOGs.

Some of the limitations could potentially be overcome by combining elements of several (or all) approaches. For instance, unilateral declarations or codes of conduct issued by AOGs could determine what happens if voluntary commitments are violated and/or harmful outcomes occur. Either the responsibility or the liability *régimes* could be established in this context. The declarations and codes could also foresee rules that would apply when harmful outcomes have been brought about by the conduct of several actors. Due to the lack of

[82] ETANA 2014.

practice, it would certainly take some time to find out which rules could work with respect to AOGs. Moreover, some of the specific features of AOGs, such as their temporary existence, would still impose limits on the operation of such rules. Yet, starting to consider what these rules could be like gets increasingly urgent in the period when AOGs regularly engage in interactions with other actors and when these interactions, equally regularly, produce harmful outcomes.

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