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Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare

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**Challenges to Compliance with International Humanitarian Law in the Context of
Contemporary Warfare**

By Morgan Kelley

Spring 2013

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Preface

I originally became interested in International Humanitarian Law before I ever even stepped foot outside the U.S. However, as a somewhat naïve college student, I was generally unaware that IHL consists of more than just mandates to provide humanitarian assistance to victims of violence. After visiting the ICRC, a new-founded interest began to take form, and the *Law of Armed Conflict* clearly became a subject of curiosity. In the present reality of the “War on Terror,” I increasingly became interested in the ways that armed conflict has changed since the start of the 21st century, and in what ways parties to violent conflict find it difficult to abide by International Humanitarian Law. While there are a multitude of reasons why non-State actors should, but do not comply with humanitarian norms, I truly believe that it is the obligation of Western, “civilized” States to take responsibility for their own violations in order to more fully encourage compliance on behalf of all belligerents. Only if this is achieved—by denouncing inhumane practices in war such as counter-terrorist strategies that explicitly degrade human dignity—will the reduction of human suffering in times of armed conflict be accomplished.

Acknowledgements

I would like to thank my family and friends for their continued support during this entire process, as they have constantly been a source for encouragement and reassurance. I would also like to acknowledge my Academic Coordinator, Aline Dunant for providing assistance, with a genuinely understanding and kind attitude during a time when I did not think I would be able to successfully complete this project. Additionally, both Academic Directors Gyula Csurgai and Alexandre Lambert truly helped me with the direction for this paper, and positively contributed to my interest in the subject of International Humanitarian Law. Lastly, I would like to acknowledge my host father Walter Zainzinger for being so interested in my progress and success, and for engaging in some of the most interesting and insightful conversations I have experienced during my time in Switzerland.

Abstract

The changing nature of warfare in the 21st century poses a multitude of challenges to the perceived applicability of International Humanitarian Law for both State and non-State actors in contemporary conflicts. These issues, including but not limited to: ambiguity in the distinction of violent conflict, the changing type of actors involved, issues of asymmetric warfare, challenges of negative reciprocity, and an inhibited ability to engage with all parties to conflict, are detrimental to the overriding purpose of IHL. Still, the oftentimes inefficient nature of the international system, as well as lack of consensus regarding new legislation means that formal changes in IHL to more flexibly reflect the reality of situations will not be developed anytime in the near future. Therefore, it is in the best interest of all parties to non-international conflicts to aspire to better respect the existing norms of IHL, which can only be attained if States recognize the dire need for inclusive engagement with *all* types of non-State actors. In addition, practices of positive reciprocity must be carried out by all parties, in order to better serve the ultimate goal of International Humanitarian Law: the reduction of human suffering, and the preservation of human dignity in times of violent armed conflict.

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I. Introduction

In 2010, in his report to the United Nations Security Council on the protection of civilians in armed conflict, the Secretary-General stressed the need for “a comprehensive approach towards improving compliance with the law” by armed non-State actors, and stated that:

Improved compliance with international humanitarian law and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-state armed groups. Whether engagement is sought with armed groups in Afghanistan, Colombia, the Democratic Republic of the Congo, the occupied Palestinian territories, Pakistan, Somalia, the Sudan, Uganda, Yemen or elsewhere, experience shows that lives can be saved by engaging armed groups in order to seek compliance with international humanitarian law in their combat operations and general conduct, gain safe access for humanitarian purposes and dissuade them from using certain types of weapons.¹

Yet in the context of modern warfare of the 21st century, the practice of engaging non-State actors to ensure more comprehensive compliance with International Humanitarian Law is often thwarted by the distorted perception that IHL cannot, or should not be applied in all situations of armed combat. But what is the reason for this phenomenon, and how can it be discontinued and further prevented? What are the real-life challenges to compliance with IHL in combat, and how can they be overcome?

While the answer to these questions could no doubt fill hundreds of pages, it is the aim of this paper to outline some of the most foreboding threats to the effective practice of International Humanitarian Law in the current era, and stress the necessity for impartial engagement with the fastest growing type of belligerent in armed conflict: the non-State actor. In a period marked by the phenomenon of globalization, implications for

¹ ‘Report of the UN Secretary-General on the Protection of Civilians in Armed Conflict’ (UN Security Council, UN doc. S/2010/579, November 2010), 11.

the practice and preservation of humanitarian norms are still unclear, and it is the duty of both States and non-State actors alike, to ensure that the Law of War is upheld in order to reduce the consequent result of widespread human suffering.

The Existing Framework of International Humanitarian Law

Most articulately stated, International Humanitarian Law (IHL), also known as the Law of Armed Conflict or the Law of War, “is the body of rules that, in wartime, protects persons who are not or are no longer participating in the hostilities;” and seeks to limit the methods and means of warfare while preventing human suffering in times of armed conflict.² The principle instruments of IHL are the four universally ratified Geneva Conventions of 1949 as well as the three Additional Protocols of 1977 and 2005, as they stipulate that civilians and wounded or captured combatants must be treated in a humane manner.³ While the term *jus ad bellum* refers to the set of lawful criteria considered before engagement in war, *jus in bello* (IHL) is the law that governs the way in which warfare is conducted, irrespective of whether or not the cause of war is just. It works to humanize war, and protect civilians by creating distinctions between who and what may be targeted in conflicts, how this targeting is executed, weapons allowed, and the rights and obligations of combatant forces.⁴ In the laws of war, principles of distinction, proportionality, and necessary precaution for minimal effects on civilians are essential to the way in which armed forces may participate in combat.⁵ Accordingly, IHL focuses on

² International Committee of the Red Cross, “Discover the ICRC,” *ICRC*, 2005, http://www.icrc.org/eng/assets/files/other/icrc_002_0790.pdf, 15.

³ *Ibid.*

⁴ Schmitt, Michael, "21st Century Conflict: Can the Law Survive?" *Melbourne Journal of International Law* 8 no. 2 (2007): 444.

⁵ Presentation given to students of SIT: Geneva, at ICRC, on Tuesday 26 February 2013, in Geneva.

governing *how* military operations may take place, instead of the legality for the reason of *why* they take place. In addition to formally adopted legislation of IHL, the rules of customary international humanitarian law are norms based on human rights that are considered to be binding even for states who have not officially ratified the Additional Protocols.⁶ Furthermore, IHL distinguishes between two types of armed conflict—international armed conflicts (IACs) fought between at least two States, and non-international armed conflicts (NIACs) that do not involve two States as opposing parties to the fighting—in order to extend its jurisdiction to as many instances as possible, so it may reduce humanitarian violations at all levels of armed conflict.⁷

Changing Perceptions

Yet, in light of the changing conditions characterizing armed conflict in the 21st century, there exist many challenges to the proper application of IHL in the world today. Arguably, the perception of its irrelevance in contemporary conflicts for both State and non-State actors is the most significant obstacle to preserving its original objectives, and the subsequent lack of compliance—in any form—is undeniably detrimental to its overriding purpose. It is argued that recent developments in warfare, which change the nature of violent conflict, have led many to perceive IHL as non-applicable in the modern era. Issues concerning challenges to humanitarian intervention, while essential for providing relief to victims of war and natural disaster, are outside the scope of this paper. Instead, non-compliance by parties to the actual armed conflict due to perceived irrelevance, and subsequent practices of negative reciprocity are the most significant

⁶ Mack, Michelle, "Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts," ICRC, Geneva, 2008, 9.

⁷ Instances of violence that do not cross the threshold of the definition of "armed conflict" are therefore not subject to IHL, but rather Human Rights and domestic law.

challenges for International Humanitarian Law and the *jus in bello* doctrine in contemporary warfare—representing a vicious cycle that is most detrimental to its underlying purpose of reducing human suffering. Finally, because of the lack of consensus in the international system regarding if, and/or how IHL should be revised to better reflect 21st century conflict, this challenge can only be overcome by 1) an increased awareness of the beneficial incentives for abiding by existing IHL on the part of non-State actors 2) the realization of the benefits of positive reciprocity by both States and non-State actors, and 3) increased willingness of States to engage in nonexclusive dialogue on behalf of all parties involved. First, an explanation of why it is progressively difficult for IHL to effectively govern contemporary conflicts will be addressed.

II. The Evolving Nature of Warfare

Emerging Patterns

It is not controversial to assert that warfare in the 21st century is markedly distinctive from that of the early 20th century. Following World War II, evident changes in the nature of war itself, transformations in both civilian and military technologies, and attitudes toward military occupation have converged to call into question the adequacy of existing international norms during an era marked by the rapid proliferation of violent internal armed conflicts.⁸ These localized conflicts, driven by *transnational* connections are a product of fourth generation warfare,⁹ and are propelled by the loss of the nation-

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Wippman, David. "Introduction: Do New Wars Call for New Laws?" In *New Wars, New Laws?*, edited by David Wippman and Mathew Evangelista, Ardsley, New York: Transnational Publishers, 2005, 1.

⁹ Program on Humanitarian Policy and Conflict Research, "Transnationality, War and the Law," *A Report on a Roundtable on the Transformation of Warfare, International Law, and the Role of Transnational Armed Groups*. Cambridge: Harvard University, 2006, 7.

state's monopoly on violence as well as the existence of "ad hoc warriors" in moral conflict.¹⁰ A transformation of the traditional concept of war indicates that conflict is no longer predominately characterized by a classical, state-centered paradigm in which battle is fought between soldiers as agents of the State,¹¹ but rather by the 'intermixing of other means'¹² leading to complex and ambiguous situations of violence with less clear-cut distinctions.

In a Report for the 31st Conference of the Red Cross and Red Crescent, the ICRC outlines various evolving characteristics of warfare that illustrate these recent developments—all of which, have contributed to the fact that civilians continue to remain the primary victims of violations of IHL in armed conflicts.¹³ First, there are more frequently cases of low-intensity conflict in which a weakened state has "left room for local militias and armed groups to operate, leading to environments where looting and trafficking, extortion and kidnapping have become profitable economic strategies sustained by violence and national, regional and international interests."¹⁴ Second, instances of extraterritorial military interventions and new forms of foreign military presence in the territory of a state have caused a refocused attentiveness to the law of occupation as it relates to IHL.¹⁵ Obvious illustrations include the occupation of Afghanistan and Iraq in the first decade of the 21st century, as well as ongoing

¹⁰ "4GW—Fourth Generation Warfare," *May 2004*, http://globalguerrillas.typepad.com/globalguerrillas/2004/05/4gw_fourth_gene.html

¹¹ Program on Humanitarian Policy, "Transnationality, War and Law," 5

¹² *Ibid.*, 4

¹³ Violations such as murder, forced disappearance, torture, cruel treatment, outrages upon personal dignity, acts of sexual violence, abuses of protective emblems, and insecurity in the field all contribute to continued suffering, ICRC.

¹⁴ International Committee of the Red Cross, "International Humanitarian Law and the challenges of contemporary armed conflicts," ICRC, 31IC/11/5.1.2, Geneva, 2011, 6

¹⁵ ICRC, "'International Humanitarian Law and Challenges,'" 26.

occupations such as the Gaza Strip by Israel. Third, the impact of emerging technologies—specifically advances in cyber capabilities, and thus, the threat of cyber attack as a means for warfare—has proven to be an imminent threat and will undoubtedly have major implications for the future of applicable humanitarian laws. Whether they be denial-of-service attacks on an entire population, as evidenced by the 2008 cyber attacks on Georgia, or unmanned aerial vehicles, such as the “drones” used by the United States military, humanitarian laws created in the 1900s do not entirely reflect the reality of technology in the 21st century. Another notable trend is the blurring of the lines of distinction between ideological and non-ideological confrontations, with non-state armed groups arising from organized criminal activity.¹⁶ Instances of civil unrest rising to the level of armed conflict is demonstrated by situations in North Africa and the Middle East, such as in Libya where opposing government forces have organized to form opposition movements.¹⁷ Furthermore, the existence of transnational networks¹⁸ and multinational conflict is enabled by the evolution of globalization in the 21st century; and a heightened focus on the importance of information intelligence in a world that revolves around complex communication and information systems such as the Internet, is undeniably key to the development of modern warfare. Thus, in recent years, advances in technology, globalization, and the proliferation of internal conflicts are all contributors to an increasingly complex international system in which IHL created during the post-WWII era, was not originally intended to operate. But while it is important to recognize these occurrences affecting modes of modern war, it is equally as essential to refrain from

¹⁶ *Ibid.*, 6

¹⁷ *Ibid.*

¹⁸ Such as terrorist organizations like Al Qaeda

drawing overgeneralizations about these “new wars” when it comes to the application and implementation of International Humanitarian Law.¹⁹

The Predominance of Non-International Conflicts

Today, most armed conflicts are qualified as being of a non-international character for the purpose of classification under IHL,²⁰ and in 2009, the Stockholm International Peace Research Institute determined that 17 ‘major’ armed conflicts were all intra-state in nature.²¹ Additionally, particularly in the last decade there has been an emergence of “multinational NIACs” in which two or more national forces may be fighting together against one or more organized group within the territory of the host state.²² France intervention in Mali starting in January 2013 is perhaps the most recent example of a multinational but non-international conflict, confirming this recently recurring pattern.

According to existing IHL, in the event of a non-international conflict, Article 3 common to the four Conventions called a “treaty in miniature” by the ICRC, and Protocol II should be applied. Article 3 requires that each party to the conflict shall apply minimum humanitarian provisions prohibiting violence against, taking hostages of, and executions of, any person taking no active part in the hostilities.²³ In addition it calls for the care of the wounded and sick without any distinction founded on race, color, religion

¹⁹ The idea that “New Wars” require “New Laws” is rejected in this paper, rather the idea is presented that “New Wars” pose *challenges* to IHL, which must be overcome by suppressing the notion that it is now obsolete.

²⁰ Bellal, Annyssa, and Stuart Casey-Malsen. "Enhancing Compliance with International Law by Armed Non-State Actors ." *Goettingen Journal of International Law* 3 (2011), 2.

²¹ L. Harbon & P. Wallenstein, ‘Appendix 2A. Patterns of major armed conflicts, 2000–2009’, *SIPRI Yearbook 2010*, SIPRI, Stockholm, www.sipri.org/yearbook/2010/02/02A

²² ICRC, “International Humanitarian Law and Challenges,” 10.

²³ International Committee of the Red Cross, “International Humanitarian Law: Answers to Your Questions,” Geneva, 2004, [Www.icrc.org](http://www.icrc.org). ICRC, Oct. 2002, 19.

or faith, sex, wealth, or similar criteria; and the allowance of an impartial humanitarian body, such as the ICRC, to offer its services to the Parties to the conflict.²⁴

Yet whilst these mandates provide clear obligations and protections for the Parties in theory, the reality of conflict is much less straightforward, and it must be understood that non-international armed conflicts are generally less easily discernable than international armed conflicts. Though Additional Protocol II aims to strengthen the protection of victims in these instances,²⁵ “the treaty rules applicable in non-international armed conflicts are, in fact, rudimentary compared to those applicable in international armed conflicts. Not only are there fewer of these treaty rules, but they are also less detailed and, in the case of Additional Protocol II, their application is dependent on the specific situation.”²⁶ Furthermore, as one of the stipulations required for a conflict to be considered a NIAC under Article 3 is the fact that the violence must “reach a certain level of intensity,”²⁷ IHL does not apply in instances of internal violence that amount to situations of “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”²⁸ Therefore, the applicability of IHL as it relates to internal conflict is the core of many ongoing debates about the overall effectiveness of its authority today. An instance where the applicability of IHL was called into question is manifested in the case of Mali. Originally, the level of intensity of the

²⁴ International Committee of the Red Cross, “Answers to your Questions,” 19.

²⁵ International Committee of the Red Cross, “Discover the ICRC,” 16.

²⁶ Mack, Michelle, “Increasing Respect,” 9, 10.

²⁷ “Intensity” indicative factors as assessed by international jurisprudence include the number, duration, and intensity of individual confrontations, the type of weapons used, the number of persons involved and munitions fired, types of forces partaking in the fighting, the number of casualties, extent of destruction, and number of civilians fleeing combat zones, ICRC, “International Humanitarian Law and Challenges,” 8-9.

²⁸ Additional Protocol II, Article I, paragraph 2.

conflict was unclear, and the international community was faced with the decision of applying either IHL (if in fact it qualified as an armed conflict) or Human Rights Law (if it was to be considered merely internal violence).²⁹ This legal dilemma illustrates the increasing difficulty in classifying armed violence for the purposes of IHL, and it is argued by some scholars that the very term “armed conflict” is insufficient for the purpose of regulating much of the internal violence today.³⁰

Taking into account developing complexities in war, combined with the fact that humanitarian norms are less stringently and explicitly applicable to the most common type of conflict experienced today (NIACs), the obvious reaction is that IHL is rendering less and less relevant in instances of contemporary violence. This perspective, however, is inaccurate, and is in and of itself one of the major problems contributing to violations of humanitarian norms, and consequently to the successful application of IHL.

The Prevalence of Non-State Actors

While the very nature of 21st century warfare has arguably undergone significant developments in recent years, it is widely noted that non-State actors actively play an increasingly substantial role in contemporary violent conflicts.³¹ Although it is important to recognize the fact that armed non-State actors have been fighting against States throughout history, in previous eras, they more easily fit within the parameters of

²⁹ Interview conducted with Marina Mattiolo, Researcher at the Geneva Academy of International Humanitarian Law and Human Rights, on Wednesday 8 May 2013 in Geneva.

³⁰ Sassoli, Marco, "The Implementation of International Humanitarian Law: Current and Inherent Challenges," *Yearbook of International Humanitarian Law* 10 (December 2007), 64.

³¹ Veuthey, Michel. "Implementing International Humanitarian Law: Old and New Ways" in: RAMCHARAN, Bertrand G. (Ed.) *Human Rights Protection in the Field*. Leiden/Boston, Martinus Nijhoff, 2006, 23.

domestic law enforcement.³² As the nature of war evolves due to the phenomenon of globalization, so too does the nature of pertinent actors exerting influence, and subsequently their role as agents to armed conflict around the world.

The spectrum of new types of non-state actors is broad, “encompassing a range of identities, motivations and varying degrees of willingness and ability, to observe IHL and other international law standards.”³³ Various sorts of non-State actors include groups classified as: organized armed groups, transnational corporations, private military and security companies, paramilitary forces, urban gangs, militias and the huge variety of transnational criminal entities—including so-called “terrorist” groups and pirates.³⁴ In defining non-State actors it is also important to differentiate between armed non-State groups that use force as a means for furthering a political objective,³⁵ and non-violent non-State actors that could simply be NGOs, international organizations, or corporations. While there are many definitions for differing terms such as: violent non-State actor, armed non-State actor (ANSA), non-State actor (NSA), armed non-State group, etc., for the purpose of this paper, and for the sake of simplicity, these terms will be used interchangeably.³⁶

³² Program on Humanitarian Policy, “Transnationality, War and Law,” 7.

³³ C Australian Red Cross, “The Changing Face of Warfare in the 21st Century,” *International Humanitarian Law Magazine*. 2012, http://www.redcross.org.au/files/IHL_Magazine_Issue_1_2012.pdf, 4.

³⁴ *Ibid.*, 4

³⁵ DCAF, Geneva Call, “Armed Non-State Actors: Current Trends & Future Challenges,” *The Geneva Centre for the Democratic Control of Armed Forces*. 2011, <http://www.dcaf.ch/Publications/Armed-Non-State-Actors-Current-Trends-Future-Challenges>, 7.

³⁶ These terms all refer to a violent group not belonging to State military forces that take up arms against an opposing force or population in order to further a military, political, religious, or ideological objective

In addition, the characteristics of violent non-State groups are wide-ranging. Their members may include men, women and children who are recruited either forcefully or voluntarily, they may or may not effectively exert control over a physical territory, operate internationally or nationally, have ranging degrees of political motivation, use varying tactics such as guerrilla warfare in rural areas or urban violence against civilian populations, and rely on varying levels of resources.³⁷ In spite of their diversity, violent non-State actors generally operate in the “illegitimate” sphere for purposes of domestic law,³⁸ and are largely considered illegal and clandestine. Regardless of their characteristics, they are capable of endangering the lives of communities by “hindering humanitarian aid, planting landmines, recruiting and using child soldiers, and by trafficking and misusing small arms and light weapons”³⁹ Additionally, their existence and contribution to non-international armed conflict often goes unacknowledged by the States under whose territory they operate.

In a Report conducted by Harvard University, it was determined that new *transnational* non-State groups are characterized primarily by their statelessness, emancipation, privatization, and asymmetric position towards states, and ultimately “are problematic because they are irregular, difficult to respond to, and generally unrecognized by the long-standing laws of war.”⁴⁰ The difficulties these emerging types of actors present to the application and compliance of IHL is wide-ranging. Under Article 3, the second condition for the regulation of a NIAC is the existence of “Parties,” which

³⁷ DCAF, Geneva Call, "Armed Non-State Actors," 5-10.

³⁸ *Ibid.*, 9

³⁹ *Ibid.*, 12

⁴⁰ Program on Humanitarian Policy, “Transnationality, War and Law,” 10.

“must demonstrate a certain level of organization.”⁴¹ Accordingly, regardless of the level of violence, for any non-international conflict to function as such under IHL, both parties (whether a state fighting a non-state actor, or two non-state actors fighting each other) must meet these criteria. Yet, groups that fall outside this classification like gangs, paramilitary forces, crime groups and vigilantes still pose a challenge to the respect for humanitarian norms in violent conflict. An instance where the “organization” threshold was called into question was in the case of Syria, illustrating that along with the “intensity” factor of the conflict, the level of a group’s organization also contributes to ambiguity for the legal definition of armed conflict under IHL.⁴²

While there is no question that International Humanitarian Law *does* in fact regulate the actions of non-State actors in armed conflicts, the fact that non-State actors are more influential than ever only serves to illustrate the necessity for the better application, implementation and compliance with IHL in contemporary times. It is precisely for this reason that in a period largely characterized by ongoing non-international armed conflicts wherein non-State groups make up at least half of all belligerents,⁴³ the importance of IHL as it applies to these situations must be actively clarified and more accurately applied and enforced in order to uphold its original objective. Thus, as shaped by these evolving patterns in warfare, predominance of non-international armed conflict, and increasing emergence of non-State actors—in the

⁴¹ “Organization” indicators developed by the international jurisprudence may include the existence of a command structure, disciplinary rules and mechanisms within the armed group, the ability to obtain, transport or distribute arms, ability to plan, coordinate and carry out military operations, the existence of headquarters, the ability to negotiate and conclude agreement such as peace accords, etc. ICRC, “International Humanitarian Law and Challenges,” 8.

⁴² Interview, Marina Mattiolo.

⁴³ Bellal, Annyssa, and Stuart Casey-Malsen, “Enhancing Compliance,” 4.

contemporary legal, political, and concrete reality of International Humanitarian Law, there exists a multitude of specific conditions that cause both non-State actors as well as States to disregard their obligation of compliance during periods of armed conflict.

III. Challenges to IHL in the Context of Contemporary Conflicts

While there are far too many issues to specifically address for the purpose of this paper, one useful outline for understanding the challenges that face non-State actors in complying with IHL is drafted by the Geneva Academy of International Humanitarian Law and Human Rights. It categorizes the factors into five main groups, including: 1) strategic military concerns, 2) likelihood of prosecution under domestic law, 3) lack of knowledge of international norms, 4) ideology as a cause for deliberate violation, 5) a lack of “ownership” over international norms.⁴⁴ While external incentives, both negative and positive such as ideology certainly affect compliance with IHL, in the following sections the main focus will be on reasons that involve both State and non-State groups in the interplay of norms and reactions leading to humanitarian violations.

Non-State Actors: Bound Without Consent or Opportunity for Participation

It is perhaps readily apparent that one of the most prominent challenges to the effectiveness of International Humanitarian Law is the issue of non-compliance by the multitude of non-state actors formerly mentioned. But analogous to this problem is the fact that non-State actors are not autonomously or voluntarily Party to the treaties and conventions under which they are *legally* bound. Instead, IHL as ratified by States around the world includes the definitions of, and stipulations for NSAs in times of armed conflict

⁴⁴ Geneva Academy of International Humanitarian Law and Human Rights, *Rules of Engagement: Protecting Civilians Through Dialogue with Armed Non-State Actors*, October 2011, <http://www.geneva-academy.ch/docs/publications/Policy%20studies/Rules-of-Engagement-EN.pdf> 5-6.

simply because they are *de facto* parties to the conflict. The theory referred to as the ‘principle of legislative jurisdiction’ is a majority view of the international community, holding that non-state actors are bound under IHL by reason of their being active on the territory of a Contracting Party (a State Party to the Geneva Conventions and/or its Additional Protocols).⁴⁵ But without their participation in the creation of these laws, and even oftentimes without their knowledge of them, it is difficult to expect comprehensive compliance, and ironically, “there are no groups that feel less represented by the State than armed opposition groups.”⁴⁶ Aside from a contradiction regarding the treatment of NSAs in domestic law versus IHL, the mere fact that non-State actors are not privy to the international laws governing them does little to ensure that they will abide by their standards. Thus, arguably at the heart of this issue is the denial of consent and participation in rule making. In addition, the argument of IHL’s inherent “legitimacy” has little substance from the perspective of non-State actors, and “willingness to comply on the part of an actor is crucially dependent on the perception of its having consented to, or at least having participated in the formation of the law one is bound by.”⁴⁷ As such, in a period when violent non-State actors increasingly exert influence in modern warfare, the reality that only States are party to the treaties of IHL is a negative factor hindering effective compliance.

Asymmetric Warfare

As illustrated, in recent years a number of overarching patterns have been

⁴⁵ Ryngaert, Cedric, “Non-State Actors and International Humanitarian Law,” *Katholieke Universiteit Leuven Faculty of Law, Nstituut Voor Internationaal Recht*, K.U. Leuven, 2008, 5

⁴⁶ Ryngaert, Cedric. “Non-State Actors and International Humanitarian Law,” 5.

⁴⁷ *Ibid.*, 8

observed. Namely, findings show an increase in the *diversity* of situations of armed conflict, ranging from conditions utilizing the most advanced technology and weapons systems by sophisticated government militaries (for example, the US) in asymmetric warfare, to instances characterized by low technology and a high degree of fragmentation of parties to the conflict.⁴⁸

In considering the major progressions of warfare, it is concluded that paramount to the challenge they pose is their contribution to the notion of asymmetry in warfare—a reality central to the difficulty of compliance for both State and non-State actors. While it is recognized that the obvious preference in warfare is to be on the stronger side of an asymmetric conflict in order to prevail, modern technology has given wealthy State militaries an extraordinary advantage in combat—a reality that largely undermines compliance with IHL.⁴⁹ It is noted that the more asymmetric a conflict is, the more difficulties arise for implementation of IHL and for humanitarian action, as both sides are convinced that they must violate or at least ‘reinterpret’ IHL to suit their needs.⁵⁰ In a case where a major, technologically capable, and organized militaristic state power is fighting a loosely organized militant rebel group, most rules are in practice largely addressed to only one side⁵¹ (The militaristically advantaged side most likely to win).⁵² Politically driven conflicts may incite violence against groups other than the military enemy, and the weaker side in an asymmetric conflict often lacks the “necessary structures of authority, hierarchy, communication between superiors and subordinates

⁴⁸ ICRC, "International Humanitarian Law and Challenges," 5.

⁴⁹ Schmitt, Michael, "21st Century Conflict," 460-65

⁵⁰ Sassòli, Marco, "Current and Inherent Challenges," 58.

⁵¹ Sassòli, Marco, "Current and Inherent Challenges," 58.

⁵² Schmitt, Michael, "21st Century Conflict," 462

and process of accountability, all of which are necessary [...] to enforce IHL or any other rules.”⁵³ Violations of IHL are often perceived as necessary for less sophisticated non-State armed groups because they have neither the incentive, nor the capability to “fairly” defeat the stronger enemy State (as evidenced in combat in the Middle East); conversely they are perceived as necessary for the State as the only means by which sensitive information about terrorist activities can be obtained (as evidenced by the *War on Terror*).⁵⁴ Both of these situations of asymmetry will be examined in the following section, illustrating that the *perceived* necessity for violating IHL in asymmetrical battle is a major challenge to the respect of humanitarian norms in violent conflict, leading to issues of negative reciprocity, and subsequent issues of non-compliance.

Combat in the Middle East

The Wars in Iraq and Afghanistan provide clear illustrations of the manifestation of humanitarian violations by both State and non-State actors as a direct result of asymmetric warfare. For the technologically disadvantaged side of insurgents in Iraq, violations of IHL offered ways to 1) ensure survival⁵⁵ and 2) get close enough to enemy US soldiers to kill them.⁵⁶

Consider the practice of immersion into civilian populations. The act of taking advantage of protected property by positioning military equipment and troops in or near civilian buildings inherently caused difficulty in the principle of distinction for Coalition forces while also providing illegitimate shields in combat. In a direct violation of

⁵³ Sassòli, Marco, “Current and Inherent Challenges,” 58-59

⁵⁴ *Ibid.*

⁵⁵ Interview, Marina Mattiolo.

⁵⁶ Schmitt, Michael, “21st Century Conflict,” 462

Additional Protocol I,⁵⁷ Iraqi forces misused specially protected objects such as al-Nasiriyya Surgical Hospital, the Baghdad Red Crescent Maternity Hospital, and the Imam Ali and Abu Hanifa mosques for military purposes.⁵⁸ In addition, the tactic of perfidious attack (ruses) including dressing as civilians in order to cause the enemy to lower its guard, and feigning surrender were all blatant violations practiced by Iraqi forces.⁵⁹ Because non-State armed groups are most oftentimes operating within populated areas, and though this is in-and-of itself a direct violation of IHL, military justification for bypassing the legal precautions necessary to minimize risk to civilians is even amplified.⁶⁰ The tactic of dressing as a civilian in order to conduct suicide bombings is a growing phenomenon seen not only in Iraq, but also in asymmetric conflicts in Afghanistan and Israel as well.⁶¹ Furthermore, Iraqi forces resorted to tactics intended to undercut the morale of the civilian population by attacking individuals directly in situations where engaging in combat against the advanced Coalition forces had little effect.⁶²

In these cases, the first principle of IHL (distinction) was blatantly violated because of the perceived need to disregard humanitarian norms. According to Marina Maittirolo, a researcher at the Geneva Academy of International Humanitarian Law and Human Rights, the occurrence of battle in areas largely populated by civilians is an increasingly frequent phenomenon of modern warfare, and only makes it harder for the

⁵⁷ Article 12(4) states, “under no circumstances shall medical units be used in an attempt to shield military objectives from attack”

⁵⁸ Schmitt, Michael, "21st Century Conflict," 465

⁵⁹ Schmitt, Michael, "21st Century Conflict," 462

⁶⁰ ICRC, “International Humanitarian Law and Challenges,” 6.

⁶¹ Schmitt, Michael, "21st Century Conflict," 463

⁶² Schmitt, Michael, "21st Century Conflict," 468.

proper application of IHL to be implemented in combat;⁶³ ultimately leading to the death of thousands of innocent civilians every year.

State Power and the Global “War on Terror”

It must be conceded that the issue of non-compliance with International Humanitarian Law is not only applicable to the perspectives and actions of non-State actors, and in many cases, it is indeed the State itself that disregards principles of IHL in times of armed conflict. From a historical perspective, the monopolization of violence by the state and its perceived role of right authority to wage war have undoubtedly played a fundamental role in the development and application of IHL,⁶⁴ and the fact that only States have the power to participate in conventions and ratify international legislation gives national governments a sense of overriding authority in non-international armed conflicts. In many cases the State is even unwilling to actually acknowledge the existence of an armed group, fearing that in doing so, a level of legitimacy will be given to its cause.⁶⁵ Furthermore no consensus as to the content of *jus in bello* currently exists, and it should be noted that many states are *not* ratifying parties to the Additional Protocols in IHL,⁶⁶ which does little to ensure humanitarian norms are formally respected.

Arguably one of the most controversial and ambiguous challenges to International Humanitarian Law in the 21st century is the development of the so-called *War on Terror* declared by the United States government following the attacks on September 11, 2001.

⁶³ Interview, Marina Mattiolo

⁶⁴ Watkin, Kenneth, “Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict” In *New Wars, New Laws?*, edited by David Wippman and Mathew Evangelista, Ardsley, New York: Transnational Publishers, 2005, 141.

⁶⁵ Interview conducted with Dr. Michel Veuthey, Vice President of the International Institute of Humanitarian Law, on Monday 29 April 2013, in Geneva, Switzerland.

⁶⁶ Schmitt, Michael, “21st Century Conflict,” 459.

Though the UN has generally agreed that any measure taken to combat terrorism must do so in accordance with international law, including the rules of IHL,⁶⁷ in practice this is not always the case, and national governments, namely the US, frequently partake in activities strictly forbidden under IHL in the name of the allusive *War on Terror*. A desire to bypass compliance with the Geneva Conventions in this “new kind of war” which “places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities,” is illustrated in a memo to former President Bush stating that the “new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners...”⁶⁸ Exceptions to protection for non-State actors are advocated and applied by military personnel, and include “the desirability of torture and other inhumane or degrading treatment in order to extract crucial intelligence (e.g., waterboarding), the transfer of detained fighters outside the territory where they were captured [for example, to Guantanamo], and the use of military commissions to put captured ‘enemy combatants’ on trial.”⁶⁹

In addition, contrary to the U.S. view, from a legal standpoint the *War on Terror* is often not actually regarded as an internationally legitimate conflict,⁷⁰ and though the practice of denying the existence of an internal armed conflict is traditionally the mechanism by which states avoid responsibility under IHL, the US actually does the

⁶⁷ "Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996," UN General Assembly - Legal - Sixth Committee. *UN News Center*. UN, Apr. 2011, 5.

⁶⁸ Draft Memorandum from Alberto Gonzales, White House Counsel: Schmitt, Michael, "21st Century Conflict," 447.

⁶⁹ Ryngaert, Cedric. "Non-State Actors and International Humanitarian Law," 12, 13.

⁷⁰ Interview, Marina Mattiolo

opposite. Despite the fact that acts of terrorism are in fact subject to domestic law, the *War on Terror* has effectively caused states such as the US to “over classify” situations of violence, in order to apply IHL even where it does not apply—allowing for actions such as the targeted killings of “terrorists” as legitimate enemy combatants.⁷¹ Previous proponents of applying IHL in the broadest sense possible are now faced with the challenges this ‘overapplication’ presents in the contest of “New Wars,” as it deprives persons of the better protection they would benefit from under the law of peace, it is applied selectively, and overall it weakens “the willingness to respect IHL entirely, unconditionally and independently of conflicting contrary interests even in situations where IHL actually and uncontroversially applies.”⁷²

Holder vs. Humanitarian Law Project

Aside from direct activities which violate IHL, the problem is not aided by the fact that “Certain governments have also been reluctant to acknowledge the need for the ICRC and other components of the Movement to engage non-state armed groups on issues relating to their security and access to victims, as well as to disseminate IHL and humanitarian principles, on the grounds that the armed groups in question are ‘terrorist organisations’ or are otherwise outlaws.”⁷³ The U.S. Supreme Court ruling of 2010 in the case of *Holder v. Humanitarian Law Project* upheld the USA PATRIOT Act, which bans any “assistance” to terrorist organizations, effectively ensuring legal grounds for the prosecution of anyone engaging in the promotion of humanitarian norms with groups or

⁷¹ Sassòli, Marco, “Current and Inherent Challenges,” 50.

⁷² *Ibid.* 51.

⁷³ ICRC, “International Humanitarian Law and Challenges,” 5

individuals listed as terrorists.⁷⁴ Not only does this prevent organizations from “legally” engaging in productive dialogue with armed non-State actors, but by listing a group as terrorists, their inclusion in activities such as peace negotiations, and the opportunity for furthering their understanding of, and compliance with IHL is completely diminished—perhaps even prolonging violent conflict responsible for the death of innocent lives.⁷⁵ The very act of labeling groups as “terrorists” is not conducive to furthering respect for humanitarian norms, and in the words of a former fighter, “once you are labeled a terrorist you act as one; once listed, ‘you are rejected’ and ‘you have nothing to lose.’”⁷⁶

Thus, in reality the self-serving attitude adopted by states, and method of “picking and choosing” when and how the rules of IHL can apply, should be regarded as one of the gravest threats to humanitarian norms that the world is currently facing, if for no other reason than the fact that it is practiced by the very States who drafted the rules of IHL in the first place.

The Reciprocity Obstacle

The principle of reciprocity has historically functioned as a longstanding cornerstone to the law of war, even before IHL came into its current form of existence, and “Reciprocity continues to form a critical component of the law of war and structures both theoretical and pragmatic discourse.”⁷⁷ But in the context of modern warfare, negative reciprocity, and the justification of humanitarian violations by citing an opposing force’s violations is commonly expressed. “There is an obvious temptation—

⁷⁴ Geneva Academy, “Rules for Engagement,” 17.

⁷⁵ *Ibid.*, 16

⁷⁶ Geneva Academy, “Rules for Engagement,” 16.

⁷⁷ Watts, Sean. "Reciprocity and the Law of War." *Harvard International Law Journal* 50, no. 2 (2009), 367.

and often also pressure from within the armed group or the concerned communities—to respond to abuses by government forces or other non-state armed actors. Responding with abuses of their own will merely risk an increasing spiral of violence.”⁷⁸

Mistreatment and/or execution of captured combatants is likely to result in abuses by the opposing force; and while causing belligerents to subsequently fight until death, is actually counterproductive in warfare. Although reciprocity is not a legal justification for humanitarian violations, the idea of *positive* reciprocity is undoubtedly a non-legal incentive for better respect of humanitarian norms,⁷⁹ and should be encouraged wherever and whenever possible. The true challenge is making the transition from negative to positive reciprocity in armed conflicts, especially in an era where the realities of combat do little to reprimand the practice of the former.

IV. Implications for Compliance with IHL

Necessity for Working in the Context of the Existing Framework

In light of these challenging developments, as previously expressed, some have emphasized the decreasing relevance of IHL as “treaty law may fall into desuetude when a change in the nature of conflict renders it ill-fitting in contemporary warfare.”⁸⁰ In reality however, war has never been a clear-cut matter, and throughout history there have always been instances of combat that fall outside the scope of man-to-man battle in the field.⁸¹ While new technologies and unique developing patterns *do* have an effect on the way in which war is generally fought, obstacles to Just War have always been present. Thus, the relevance of IHL in the 21st century is entirely dependent upon its *perceived*

⁷⁸ Bellal, Annyssa, and Stuart Casey-Malsen. "Enhancing Compliance," 20.

⁷⁹ Sassòli, Marco, "Current and Inherent Challenges," 58.

⁸⁰ Schmitt, Michael, "21st Century Conflict," 446.

⁸¹ Interview, Michel Veuthey.

relevance by actors involved, and subsequently their willingness to comply with its stipulations. Though these changes in the nature of conflict remain problematic to the determination and application of appropriate bodies of international law, they are not the *sole* reason for violations of IHL by both State and non-State actors party to conflict. An inherent issue of IHL is the fact that it seeks to operate in “an international society of states not willing to uphold the rule of international law,” which inhibits the very mechanisms already in place for successful implementation.⁸² As such, the lack of political will illustrated by national governments to abide by existing law is considerably the most detrimental factor inhibiting the goal of gaining compliance by non-State actors.⁸³

Certainly, the question of *how* to better ensure compliance with existing humanitarian norms by NSAs in the face of new conflicts is one argued by many scholars. Among a vast array of varied opinions, there is a major division between two approaches pitted against one another: the development of new law versus the ideal of self-preservation.⁸⁴ Though there is a strong case for revising the existing legal framework in a way that could extend further protection to NSAs in combat from the stigma of domestic law, subsequently providing more concrete incentives for violent groups to obey international law,⁸⁵ it is argued here that the international system is far too

⁸² Sassòli, Marco, “Current and Inherent Challenges,” 52.

⁸³ *Ibid.*

⁸⁴ Program on Humanitarian Policy, “Transnationality, War and Law,” ii.

⁸⁵ Nils Melzer argues for extending full combatant privilege to non-state belligerents through a two-pronged approach that leaves the domestic criminalization of breaches of “the public peace” intact while providing effective incentive for NSAs to fully respect IHL by liberating legal acts of war from the stigma of domestic criminal law that frames these acts as ‘murder’ or ‘terrorism.’

“Realizing Utopia,” 895

slow and ineffective to reach a consensus anytime in the near future.⁸⁶ Continuously ongoing debates in the international sphere concerning the legal definition and regulations of “terrorism” and “counterterrorist” approaches on a global level are an example of the lack of consensus, and unlikelihood of such a mandate to transpire.⁸⁷ Even supplementary treaties applicable to non-international conflict, such as the Ottawa Convention banning anti-personnel landmines, are still only addressed to States, and are limited in their ability to enforce accountability.⁸⁸

While International Humanitarian Law does not perfectly reflect the realities of warfare in contemporary conflict, it is important to realize that long-standing humanitarian norms are not *so* archaic that they cannot be applied in practice. The duty of lawyers in any field is to interpret existing laws and employ them as best as possible to a present situation, and the same truism applies to non-international conflicts and IHL in the world today.⁸⁹ Therefore, it is necessary to consider the ways in which IHL can and should be implemented given the current circumstances and available mechanisms for securing enhanced compliance.

Taking Steps Towards Promoting Non-State Compliance

Regardless of if, when, or how IHL should be revised, some key findings over the years have been identified as good practices to furthering compliance with existing IHL. Contrary to decisions made by governments such as the U.S., it is argued here that central

⁸⁶ For example, the structure of the United Nations relies on a consensus-based system that is not conducive toward rapid developments in IHL. Additionally, ad hoc committees only arise for specific issues, and there is no dominant mechanism, by which IHL could be rapidly reformed—perhaps for good reason. Additionally, not even all States are party to the Additional Protocols, so what would force them to adopt any new IHL now?

⁸⁷ Interview, Marco Sassòli.

⁸⁸ Sassòli, Marco, “Current and Inherent Challenges,” 63.

⁸⁹ Interview, Marco Sassòli.

to assuring compliance with humanitarian norms by violent non-State actors is *comprehensive, active engagement*—irrespective of any criteria which might preclude a group from lawful interaction with State actors. Activities aiming to incorporate non-State actors in the decision making process, which ultimately give them a sense of ownership and accountability for the humanitarian rules under which they must function during armed conflict, are crucial to the successful implementation of IHL. According to the Geneva Academy for International Humanitarian Law, “A variety of mechanisms exist for ANSAs [Armed non-State Actors] to commit to respecting international norms, such as unilateral declarations, special agreements, Memoranda of Understanding, ‘Ground Rules’, Action Plans, or deeds of commitment;”⁹⁰ and these methods must be unequivocally pursued by outside actors capable of helping non-State groups attain compliance. There are many organizations that regularly engage with armed non-State groups, including, but not limited to: The ICRC, Geneva Call, Human Rights Watch, Amnesty International, and the Centre for Humanitarian Dialogue; and the activities of each should be regarded as indispensable toward furthering compliance with IHL.

First, it must be acknowledged that the very task of disseminating the rules of IHL to armed non-State actors is a challenging prerequisite for its understanding and ultimate application. Indeed, “an important step in enhancing compliance with international norms is to ensure that the relevant ANSA is aware of its obligations under international law. In some cases, for example, such groups have not been aware of the prohibition on child recruitment and the potential individual liability.”⁹¹ In considering a solution to this issue,

⁹⁰ Geneva Academy of International Humanitarian Law and Human Rights, *Rules of Engagement*, 34.

⁹¹ Bellal, Annyssa, and Stuart Casey-Malsen. "Enhancing Compliance," 22.

Marco Sassòli advocates for the negotiation of a simple, two page “code of conduct” specifically tailored for armed groups, helping to simplify the over 500 articles of The Geneva Conventions and Additional Protocols—which are arguably far too complex for the purpose of furthering understanding and observance in urgent times of armed conflict.⁹² By giving armed groups a simple outline of the rules of IHL, the potential for acceptance and perceived advantages for complying are enhanced. The adoption of a code of conduct by an armed non-State group is evidence of its intention to “ensure military discipline while respecting local culture and the civilian population, while remaining in compliance with international norms,”⁹³ ensuring that the group assumes responsibility for adoption, dissemination, and implementation of applicable norms.

In addition, non-state armed groups could be provided with advisory services by impartial organizations such as the ICRC in order to more fully develop comprehension of responsibility and accountability in warfare. While such a service currently exists for States, it should also be available for non-State armed groups as a tool for reducing violations.⁹⁴ Moreover, providing information to military commanders rather than political representatives is indispensable to furthering compliance with humanitarian norms, as there is often disconnect between political and diplomatic relations and the realities of combat.⁹⁵ Other methods include disseminating information to populations that are difficult to access through public broadcasts or television exposés, educating individuals on their rights and responsibilities under the law.⁹⁶

⁹² Sassòli, Marco, “Current and Inherent Challenges,” 64.

⁹³ Geneva Academy, *Rules of Engagement*, 35.

⁹⁴ Sassòli, Marco, “Current and Inherent Challenges,” 65.

⁹⁵ Interview, Marco Sassòli.

⁹⁶ *Ibid.*

A second step for furthering compliance with humanitarian norms is by engaging non-state actors in informal discussions and conventions. Correspondingly, it is essential that humanitarian groups that engage in dialogue with non-State groups are open to truly hearing and considering their concerns and grievances.⁹⁷ It is unproductive to just simply hand over a pamphlet and expect a violent armed group to automatically adhere to the contents—mediation and genuine discourse are essential.⁹⁸ Geneva Call is an impartial and neutral NGO that is “dedicated to engaging armed non-State actors towards compliance with the norms of IHL” by focusing on NSAs that operate outside effective State control through employing contracts called “Deeds of Commitment.”⁹⁹ These treaty-like instruments, by which the armed non-State actor formally pledges to respect humanitarian norms is meant to mirror the texts of international treaties which these NSAs cannot legally sign.¹⁰⁰ Areas in which Geneva Call specifically works to further the observance of IHL norms concern landmines, children, and gender issues. One of the main advantages of Geneva Call is that it is solely a humanitarian dialogue organization, and does not serve the purpose of providing humanitarian aid. This is a benefit because representatives of an organization like ICRC are often faced with the decision of giving in to norms of non-compliance by a non-State actor, in order to provide aid to a population in need.¹⁰¹

⁹⁷ It should also be noted that in some instances, former members of a non-State armed group can exert more influence over the current members, and if at all possible, should be encouraged to engage with NSAs in order to further compliance with IHL

⁹⁸ Interview, Marco Sassòli.

⁹⁹ www.genevacall.org

¹⁰⁰ Geneva Call, "Humanitarian Engagement of Armed Non-State Actors." *Geneva Call*. 2010. http://www.genevacall.org/resources/panels/f-panels/2010_GC_Flyer.pdf

¹⁰¹ Interview, Marco Sassòli.

Lastly, monitoring compliance with humanitarian norms is vital. Yet, most verification mechanisms addressing the conduct of armed non-State rarely appear in multilateral treaties, and even when they do, are “weak and not applied in practice.”¹⁰² While most IHL and human rights treaties only address the conduct of states, neither Additional Protocol II nor Common Article 3 have any provisions for regulating the monitoring, reporting and verification (MRV) of non-State group behaviors. It is therefore necessary that better mechanisms for these practices be developed. For example, Geneva Call’s *Deeds of Commitment* utilize a three-pronged system including: self-reporting, third-party monitoring, and field missions to proactively regulate compliance with groups who have pledged not to use anti-personnel land mines. In practice, 38 out of 41 signatories of the *Deed of Commitment Banning AP Mines* have succeeded to abide by their self-reporting obligation. Creating a sense of ownership and personal accountability is invaluable to the ultimate success of IHL, and the work of engagement organizations such as Geneva Call is essential to furthering compliance with non-State actors typically not given a voice in international discourse.

VI. Concluding Remarks

For as long as non-state armed groups are a reality of war, their existence and influence must not be ignored; nor should the paradigm that some are inherently ‘bad’ restrict productive dialogue aiming to advance the effectiveness of International Humanitarian Law in armed conflicts. By refusing to engage these types of actors, there

¹⁰² Bongard , Pascal , and Jonathan Somer, "Monitoring armed non-state actor compliance with humanitarian norms: a look at international mechanisms and the Geneva Call Deed of Commitment," *International Review of the Red Cross* 9 No. 883, 3September 2011, <http://www.genevacall.org/resources/gc-articles/f-gc-articles/2001-2010/irrc-883-bongard-somer.pdf>, 673.

is little to no likelihood that non-international armed conflicts will in any way be reduced in frequency or intensity; and in fact, both blind ignorance as well as lack of effect means for non-state actors to comply with IHL will only further the suffering and despair of innocent lives. It is a vicious cycle, and it is not one that will be easy to break without more respect, regard, and responsible application of International Humanitarian Law by the national governments that agreed to ratify the four Geneva Conventions in the first place. In his 2010 report, the Secretary-General of the UN urged Member States to “consider the potential humanitarian consequences of their legal and policy initiatives and to avoid introducing measures that have the effect of inhibiting humanitarian actors in their efforts to engage armed groups for humanitarian purposes.” Yet, as evidenced by the actions of States like the US in the *War on Terror*, the policy of national governments unwilling to engage with armed non-State actors is a challenge still to be overcome.

There is now, an overtly apparent and inherent necessity for IHL to become more flexible in the context of contemporary conflicts, as they are only becoming more complicated. It is undisputed that non-State groups will continue to exert influence, and as former ICRC President Jakob Kellenberger has stated, "while lack of compliance of non-State armed groups is a very serious problem that we need to address, reinforcement of international law rules and mechanisms lies in the hands of States."¹⁰³ The lack of political will by powerful government and military representatives is not an excuse for the continued human suffering that still takes place as a result of indifference toward

¹⁰³ Kellenberger, Jacob, “Ensuring respect for international humanitarian law in a changing environment and the role of the United Nations”, 60th Anniversary of the Geneva Conventions – Ministerial Working Session, 26 September 2009, <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-260909.htm>

internationally binding laws and treaties; and it is absolutely imperative that the State and its armed forces act in a way that exemplifies correct behavior in times of armed conflict, in order to encourage behaviors of positive reciprocity, if there is any hope of achieving compliance by violent non-state actors in the increasingly complex reality of contemporary warfare.

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