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The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors

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CRIMINAL LAW

THE NEW WARS AND THE CRISIS OF COMPLIANCE WITH THE LAW OF ARMED CONFLICT BY NON-STATE ACTORS

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I. INTRODUCTION

Since the end of World War II, an estimated 250 conflicts have taken place on almost every continent in the world, resulting in estimated casualties ranging from seventy million to 170 million, most of whom were non-combatants.¹ Almost no region of the world has been spared the human and material devastation resulting from violations of International Humanitarian Law (IHL)² by state as well as non-state actors, notwithstanding the fact that such violations are contrary to the professed fundamental values and beliefs of most of those engaged in these conflicts.³

¹ See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 45, 513, 570 (2d rev. ed. 1999) [hereinafter *CRIMES AGAINST HUMANITY*]; M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 495 (2003); Jennifer Balint, *The Place of Law in Addressing Internal Regime Conflicts*, 59 *LAW & CONTEMP. PROBS.* 103, 103-104 (1996); M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in *POST-CONFLICT JUSTICE* 6 (M. Cherif Bassiouni ed., 2002) [hereinafter *Accountability for Violations of International Humanitarian Law*]; see also PROJECT PLOUGHSHARES, *ARMED CONFLICT REPORT 2007* (2007) (providing the current ongoing conflicts), available at <http://www.ploughshares.ca/libraries/ACRText/ACR-TitlePageRev.htm#Preface> (last visited Sept. 8, 2008).

While it is difficult to allocate the casualties that occur in all of these types of conflicts as between state and non-state actors, an estimate based on the research leads to the conclusion that the majority of these casualties have been caused by state actors.

² The term includes genocide, crimes against humanity, and war crimes. M. Cherif Bassiouni, *The Normative Framework on International Criminal Law: Overlaps, Gaps, and Ambiguities in Contemporary International Law*, in *I INTERNATIONAL CRIMINAL LAW* ch. 4.8 (M. Cherif Bassiouni ed., 2008).

³ The issue is not one of values within the societies where these violations occur, but whether or not these values extend to other social groups and whether the legitimacy of a given group engaged in the process of violence trumps the legality of the means enforced,

A number of research organizations, including the Carnegie Endowment for International Peace, SIPRI, PIOOM, International Human Rights Law Institute, and others, have attempted to identify the number of conflicts of a non-international character and the level of victimization that has resulted in these conflicts.⁴ These research projects, however, seldom distinguish between groups of non-state actors who engage in armed conflicts that are legally characterized as international, non-international, or purely internal armed conflicts.⁵ A number of legal consequences derive

thus rationalizing or justifying the commission of these violations. See M. Cherif Bassiouni, *Legal Controls of International Terrorism: A Policy-Oriented Perspective*, 43 HARV. INT'L L.J. 83 (2002) [hereinafter *Legal Controls of International Terrorism*]; M. Cherif Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations*, in VALUES & VIOLENCE: INTANGIBLE ACTS OF TERRORISM (Wayne McCormack ed., University of Utah, forthcoming 2008); M. Cherif Bassiouni, *Terrorism: The Persistent Dilemma of Legitimacy*, 36 CASE W. RES. J. INT'L L. 299 (2004).

⁴ Carnegie Endowment for International Peace, <http://www.carnegieendowment.org/> (last visited Sept. 8, 2008); International Human Rights Law Institute, www.law.depaul.edu/centers_institutes/ihrli/ (last visited Sept. 8, 2008) [hereinafter IHRLI]; Research Program on Root Causes of Human Rights Violations, http://www.goalsforamericans.org/gallery/v/maps/atf_world_conf_map.pdf.html (last visited Sept. 1, 2008) [hereinafter PIOOM]; Stockholm International Peace Research Institute, <http://www.sipri.org/> (last visited Sept. 8, 2008) [hereinafter SIPRI]; see also *supra* note 1.

⁵ Some armed conflicts are in part international and in part non-international; some mutate from non-international to international; and some, like "wars of national liberation" in the context of colonialism and settler regimes, covered by Article 1(4) of Additional Protocol I to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts, are deemed to be of an international character, even though one set of combatants are non-state actors. In light of the phenomena during the 1960s and 1970s of colonies rising up against their colonial powers, Protocol I defined conflicts of this type as "wars of national liberation" and thereby categorized them as international conflicts for purposes of Protocol I. Article 1(4) states:

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Protocol I Additional to the Geneva Conventions of 12 Aug. 1949 (Relating to the Protection of Victims of International Armed Conflicts), Dec. 12, 1977, U.N. Doc. A/32/144 Annex I, *reprinted* in 16 I.L.M. 1391 (1977) [hereinafter Geneva Convention Protocol I].

Internal revolutionary activities designed to achieve regime change within the national context seek to achieve the breakup of the state and the establishment of one or more independent states; other forms of violent internal disturbances are not covered. For discussion on self-determination, see U.N. Charter art. 1(2); HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* (1996); S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131-64 (1993); M. Cherif Bassiouni, "Self-determination" and the Palestinians, 65 AM. J. INT'L L. 31 (1971). Thus, they do not benefit from the status of POW. LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT*

from these characterizations that impact on compliance with the norms of IHL, and in turn affect the levels of victimization occurring in these conflicts.

After World War II, the culture of war changed and a new generation of means and methods of warfare emerged, which extends until now. This development raises questions about the continued validity of classic assumptions underlying what is interchangeably called the Law of Armed Conflict, the Laws of War, and International Humanitarian Law. The invalidation by the new wars of the assumptions raises the question of whether these “laws” are still relevant.⁶

Three factors command consideration with respect to compliance by non-state actors. The first is that non-state actors in conflicts of a non-international or purely internal character are almost always in an asymmetrical relationship to the strength and resources of the governments that they oppose. This asymmetry puts them at a military disadvantage that precludes them from fighting a significantly more powerful opponent with the same limitations on means and methods of warfare. In fact, this

(2002); LIESBETH ZEGVELD, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 106-10 (2002); Jann K. Kleffner, *From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities - On The Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference*, 54 NETHERLANDS INT’L L. REV. 315, 322 (2007).

There is a serious question as to whether crimes against humanity and genocide apply to non-state actor groups or whether it is necessary to have a state policy. By their very nature crimes against humanity and genocide are the product of state action. Nevertheless, in the last 50 years, non-state actors have committed these crimes. International criminal law has not developed along these lines. For example, genocide is still a crime committed by states or state policy even though decided and carried out by individuals. Torture under the 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment is limited to states. Annex, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Convention Against Torture]. For a position supporting the requirement of state policy under contemporary customary international law, see BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 1. The ICTY in *Prosecutor v. Kunarac et al.* held that no such requirement existed. Case No. IT-96-23-T, Judgement (June 12, 2002). Regrettably their position, which cited a number of authorities, is unfounded since the authority they relied upon does not support that proposition. For a discussion of that case in contrast to my position, see William A. Schabas, *Crimes Against Humanity: The State Plan or Policy Element*, in THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI (Leila Nadya Sadat & Michael P. Scharf eds., 2008), at 347 [hereinafter THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW]. See generally LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT (2005); GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (W. W. Norton 2006); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES (2000).

⁶ One author even argues that consensual rules of war should be developed as in the case of contracts. See Robert A. Shoan, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443 (2007).

asymmetry compels them to resort to unconventional and unlawful means and methods of warfare as the only way to redress the military and economic imbalance they face. Without sufficient incentives for non-state actors to comply with IHL, the asymmetry of power mentioned above necessarily leads to non-compliance. The second factor is that unlike conventional armies, non-state actors operate as militias or bands with little or no military training, little or no command and control structure, and little or no internal discipline or other system of social control likely to enhance compliance. The third factor is that non-state actors have no expectation of accountability for their non-compliance. Combined, all three factors, coupled with whatever other contextual political factors that may exist in a given conflict, make voluntary compliance by non-state actors aleatory.⁷

Non-international and internal conflicts since World War II evidence the participation of a wide range of groups that had not historically participated in armed conflicts,⁸ the latter having been the monopoly of states⁹ and thus essentially involving conventional armies.¹⁰

The term non-state actor is applied to non-governmental groups who directly or indirectly engage in support of non-governmental combatants in non-international and purely internal conflicts. These groups take a variety of forms, including:

(1) Regularly constituted groups of combatants with a military command structure and a political structure;¹¹

⁷ In a prescient observation dating back to 1760, Emmerich de Vattel stated:

A civil war breaks the bands of society and government, or at least it suspends their force and effect; it produces in the nation two independent parties, considering each other enemies, and acknowledging no common judge: therefore of necessity these two parties must, at least for a time, be considered as forming two separate bodies, two distinct people, though one of them may be in the wrong in breaking the continuity of the state, to rise up against lawfully authority, they are not the less divided in fact; besides, who shall judge them? Who shall pronounce on which side the right or the wrong lies? On earth they have no common superior. Thus they are in the case of two nations, who having a dispute which they cannot adjust, are compelled to decide it by force of arms. Things being thus situated, it is very evident that the common law of war, those maxims of humanity, moderation and probity . . . are in civil wars to be observed by both sides.

EMMERICH DE VATTEL, III THE LAW OF NATIONS ch. XVIII § 293 (digital ed. 1999), http://www.constitution.org/vattel/vattel_03.htm.

⁸ These groups may not be subject to IHL, but they remain subject to the prohibitions on genocide and crimes against humanity, as well as to other relevant international criminal law conventions. They are also subject to domestic criminal law. See Kleffner, *supra* note 5.

⁹ See Kleffner, *supra* note 5, at 322.

¹⁰ GEOFFREY BEST, HUMANITY IN WARFARE (1980); GEOFFREY BEST, WAR AND LAW SINCE 1945 (1994); see *infra* note 187.

¹¹ The existence or absence of a command structure in non-state actor militias is probably the most significant factor affecting their level of compliance with IHL. Moreover, an important distinguishing characteristic of these groups is the almost total control by the

(2) Non-regularly constituted groups of combatants with or without a command structure and with or without a political hierarchical structure;

(3) Spontaneously gathered groups who engage in combat or who engage in sporadic acts of collective violence with or without a command structure and with or without political leadership;

(4) Mercenaries acting as an autonomous group or as part of other groups of combatants; and

(5) Expatriate volunteers who engage for a period of time in combat or in support of combat operations, either as separate units or as part of duly constituted or ad hoc units.¹²

These groups also include dual-purpose groups that engage in combat, as well as pursue other activities relating to their cause.¹³ This includes: (1)

leader of the movement as a whole, the leader of the military apparatus, or the commander of a given military unit over the fighters in these groups. Because such leaders and commanders have unquestioned power of life and death over the fighters, it can hardly be expected that the latter will oppose their orders even when they clearly constitute violations of IHL. The more a given group seeks to emulate army structure, the more likely it is to have a command structure with the same characteristics. For example, the Vietcong in their struggle for national liberation against colonial forces, at first the French and then the United States, evolved into the conventional structure of almost all armies in the world. The Fuerzas Armadas Revolucionarias de Colombia (FARC) in Colombia has, from its inception, established a command structure similar to that of a conventional army.

However, the situation among African groups other than those involved in decolonization has been different. See 1 UNDERSTANDING CIVIL WAR: EVIDENCE AND ANALYSIS, AFRICA (Paul Collier & Nicholas Sambanis eds., 2005); 2 UNDERSTANDING CIVIL WAR: EVIDENCE AND ANALYSIS, EUROPE, CENTRAL ASIA, AND OTHER REGIONS (Paul Collier & Nicholas Sambanis eds., 2005). Their structure is more akin to what in other societies would be called gangs because they are characterized by the control of an absolute leader who has powers of life and death over its members, who is not subject to any limitations, and whose subordinates are simply expected to carry out orders with total obedience. Notwithstanding the range of differences in command structure, these groups are different from conventional military structure in that there is effectively no control by reason of a command structure. That structure is essentially designed to carry out the orders of the military leader or the leader of the movement. It is precisely because of the absence of a command and control system that violations of IHL are products of the military leader's unilateral decision making, as is discussed below. The absence of a command and control system, to be distinguished from merely having a command structure, coupled with the characteristic impunity of the military leader and the movement's political leader (if they are different), enhances the incentive to commit violations of IHL.

¹² This was the case with the conflict in the former Yugoslavia, where some militias acted as organized crime groups. Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780, U.N. Doc. S/1994/674 (May 27, 1994) [hereinafter U.N. Final Report]; Annexes to U.N. Final Report, U.N. Doc. S/1994/674/Add.2 at Annexes I (Dec. 28, 1994) (military structure).

¹³ *Supra* note 12. The term *non-state actor* has traditionally been applied to groups directly involved in the armed conflicts, but it should extend to those who support such conflicts by aiding or abetting irregularly constituted armed forces, provide arms and

members of political parties who occasionally engage in combat and sometimes in acts of violence, which constitute violations of IHL; and (2) members of organized crime groups or groups pursuing criminal purposes while active in armed conflicts and commit violations of IHL.

The major issues discussed in this Article, although not presented in the following order due to significant overlap, are:

- Whether the new culture of war and its means and methods in conflicts of a non-international character and purely internal character, necessarily engender greater violations of IHL, and thus whether IHL is relevant to this new culture of war and can be assumed to induce compliance with its norms;
- Whether the asymmetry of power between non-state and state actors engaged in conflicts of a non-international or purely internal character is an insurmountable impediment to compliance with IHL by non-state actors;
- Whether there is sufficient experiential data arising out of the conflicts that have taken place since World War II to identify and assess the factors that enhance or detract from IHL compliance by non-state actors;¹⁴

funding, and, in the case of certain conflicts such as in the Democratic Republic of Congo, Sierra Leone, and Liberia, purchase diamonds and precious stones with the knowledge that these funds will go into supporting these violent conflicts. See GREG CAMPBELL, *BLOOD DIAMONDS* (2002). More recently, the term has been applied to those who finance terrorism. S.C. Res. 1368, U.N.Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270; INT'L MONETARY FUND, *SUPPRESSING THE FINANCING OF TERRORISM: A HANDBOOK FOR LEGISLATIVE DRAFTING* (2003); Ahmed Seif El Dawla, *Terrorism Financing*, in I INTERNATIONAL CRIMINAL LAW, *supra* note 2, ch. 6.3; Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315, 315-33 (2005). Some of these groups engaged in administering occupied territory and also engaged in organized crime-like operations, which is particularly evident now in the ongoing conflict in Iraq, where different competing militias are engaging in such activities. See M. Cherif Bassiouni, *Organized Crime and New Wars*, in *RESTRUCTURING THE GLOBAL MILITARY SECTOR: NEW WARS* (Mary Kaldor & Basker Vashee eds., 1997); M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: Is the Glass Half-Full, Half-Empty, or is it a Pyrrhic Achievement?*, in *SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL* 245 (Michael P. Scharf & Gregory S. McNeal eds., 2006).

¹⁴ Surprisingly, neither the United Nations nor the International Committee of the Red Cross (ICRC) has established a victim and violation-oriented database for the collection of information relating to conflicts of a non-international character, purely internal conflicts, and tyrannical regime victimization. The United Nations has established a number of commissions to investigate or assess violations of international humanitarian law in different conflicts. Treaty bodies have designated *rapporteurs* and independent experts, but these efforts have always been ad hoc. Moreover, these institutional experiences have never been put together into a coherent database, nor can they be retraced other than through painstaking individualized research in the archives of each fact-finding mechanism or body. As a result, a wealth of data which would be helpful is lacking.

- To what extent do double standards by states contribute to the reduction of compliance by non-state actors;
- The degree to which enforcement of IHL norms constitutes deterrence and thus positively impacts on individual and collective compliance, and *mutatis mutandis*, whether non-enforcement engenders enhanced non-compliance;
- Whether among state and non-state actors there is a correlation between actual conduct in the field and their harmful outcomes on the one hand, and proclaimed values and declared adherence to the Rule of Law on the other; and
- Whether the multiplicity of applicable legal regimes, their confusing overlaps, their normative gaps, and their rigid legal characterizations contribute to both non-compliance and non-enforcement.¹⁵

¹⁵ As discussed below, there are several overlapping applicable legal regimes, some of which have sub-regimes. The problems engendered by the multiplicity of legal and sub-legal regimes and their gaps and overlaps are symbolically reflected in the terminological confusion that arises as a result of the diversity of these legal sources.

The three legal regimes are International Humanitarian Law (IHL), International Criminal Law (ICL) and International Human Rights Law (IHRL). IHL encompasses conventional and customary international law applicable to armed conflict contexts, and its sources have different applications and consequences. In turn, IHL has two sub-legal regimes, respectively applicable to conflicts of an international and conflicts of a non-international character, the latter having less clear norms and much more uncertainty as to their applicability than the former. More importantly, the rules applicable to conflicts of a non-international character do nothing more than urge the parties to a conflict to abide by the principles and norms applicable to conflicts of an international character. They do not provide non-state actors with the status of combatants or the privileges of POWs. Bassiouni, *supra* note 2.

ICL includes certain crimes that reflect the same humanitarian values as those covered by IHL. It also criminalizes crimes against humanity, which is a historical outgrowth of war crimes, and genocide, which is in some respects an extension of crimes against humanity. ICL also criminalizes, *inter alia*, slavery and slave-related practices and torture, which are also prohibited by IHL. The difference between these crimes defined by ICL and those defined by IHL is that the former applies in times of war and peace, while the latter applies only in times of war. See BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 1, at 141-42.

IHL can be seen as part of IHRL applicable in armed conflict. Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS 94, 94 (1993). However, IHRL does not impose criminal penalties, but is instead enforced through a variety of non-coercive mechanisms which vary depending upon the treaty-body mechanism that has been created. See generally LINDA MALONE, INTERNATIONAL HUMAN RIGHTS (2002); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989); THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION (1987); HENRY J. STEINER, RYAN GOODMAN & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (2007); DAVID WEISSBRODT & CONNIE DE LA VEGA, INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION (2007).

The above-mentioned factors and others discussed in this article have a significant bearing on the non-compliance with IHL by non-state actors in conflicts of a non-international or purely internal character; and whether non-compliance has reached a crisis proportion that requires a re-examination of the validity of the assumptions underlying compliance expectations. The proposition discussed below is how to reduce the harmful human consequences produced during these conflicts by increasing the levels of individual and collective compliance with IHL.¹⁶ This requires assessing the new culture of war and its means and methods, appraising the factors leading to or detracting from compliance, and reviewing the applicable law and its enforcement, particularly as regards the dual standards employed by major states whereby their non-compliance with IHL becomes the de facto accepted exception.¹⁷

Although empirical data about factors concerning individual and collective compliance with IHL by non-state actors is limited, anecdotal data is available to illustrate the issues raised herein. In this area, past experience is unfortunately more than merely illustrative, it is shockingly telling.

It should be noted that there are also a number of major gaps in ICL with respect to non-state actors. For example, both the Genocide Convention and the Convention Against Torture apply to state actors. Crimes against humanity has not yet been embodied in a separate international convention and, under customary international law, applies to state actors, even though it would be clearly desirable to also have it apply to non-state actors. There is therefore much need to develop ICL and to fill the gaps contained therein with respect to non-state actors as there is with

Each one of these legal regimes uses different terminology, even when the subject matter or the legal protections are the same, thus creating the confusion mentioned above. Throughout this Article, the term IHL is used *largo sensu* and includes crimes against humanity and genocide. Admittedly, these two crimes arise under ICL, but their close connection to war crimes and the fact that they occur mostly during armed conflicts warrant their inclusion within the larger meaning of IHL.

¹⁶ For the applicability of IHL to internal conflicts, see MOIR, *supra* note 5; JOHN N. MOORE, *LAW AND CIVIL WAR IN THE MODERN WORLD* (1974); Rosalyn Higgins, *International Law and Civil Conflict*, in *THE INTERNATIONAL REGULATION OF CIVIL WARS* (Evan D.T. Luard ed., 1972); Evan D.T. Luard, *Civil Conflicts in Modern International Relations*, in *THE INTERNATIONAL REGULATION OF CIVIL WARS*, *supra*.

¹⁷ American exceptionalism has been growing evident in the past fifty years. See PETER HUTCHAUSEN, *AMERICA'S SPLENDID LITTLE WARS: A SHORT HISTORY OF U.S. MILITARY ENGAGEMENTS: 1975-2000* (2003); MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004); CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY AND THE END OF THE REPUBLIC* (2005); PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES—FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR* (2005).

respect to IHL.¹⁸

There is also the need to clarify the applicability and enforcement mechanisms of IHRL in connection with non-state actors.

II. INTERNATIONAL HUMANITARIAN LAW AND THE REGULATION OF ARMED CONFLICTS

IHL is the body of norms that regulates the conduct of those who are involved in armed conflicts.¹⁹ It includes the prohibition of certain ways and means of warfare and the prohibition of certain weapons. More importantly, it is designed to protect certain categories of persons and property from harm. Although these prohibitions and limitations are based on different legal sources, they apply during the course of armed conflicts whether of an international or non-international character. They extend the same protections to civilians irrespective of the legal characterization of the conflict. However, they do not extend the same rights and privileges of combatants to those engaged in combat on the side of insurgents or belligerents in conflicts of a non-international and purely internal character.²⁰ Enforcement of these norms depends on the legal characterization of the given conflict. Thus, in conflicts of an international character, the more serious violations of these norms are criminalized under the label of “grave breaches” of the Geneva Conventions and as war crimes

¹⁸ See *supra* note 5.

¹⁹ These instruments are reprinted in M. CHERIF BASSIOUNI, *A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS* (2000); ADAM ROBERTS & RICHARD GUEFF, *DOCUMENTS ON THE LAW OF WAR* (3d. ed. 2000); 1-2 *THE LAW OF WAR: A DOCUMENTARY HISTORY* (Leon Friedman ed., 1972); *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* (Dietrich Schindler & Jiri Toman eds., rev. ed. 2004).

For commentaries and analyses on these documents and customary IHL, see COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Y. Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]; GERALD I. A. D. DRAPER, *THE RED CROSS CONVENTIONS OF 1949* (1958); INT’L COMM. OF THE RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2006) [hereinafter ICRC]; HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW* (1990); JEAN S. PICTET, I-IV COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (ICRC 1952); JEAN S. PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* (1985); JEAN S. PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* (1975); M. SASSOLI & A. A. BOUVIER, *HOW DOES LAW PROTECT IN WAR?* (ICRC 1999); *THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW* (Frits Kalshoven & Yves Sandoz eds., 1989); ZEGVELD, *supra* note 5; Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175, 187 (2005); see also MORRIS GREENSPAN, *THE LAW OF LAND WARFARE* (1959).

²⁰ MOIR, *supra* note 5, at 65-66.

when these violations occur under customary IHL.²¹ For these violations, states have, *inter alia*, the obligation to criminalize, prosecute, punish, and extradite. However, in conflicts of a non-international character, the same depredations are called “violations” and the obligations of states described above are not necessarily applicable in the same manner. As to purely internal conflicts, none of the above applies, as only domestic law is deemed applicable.

International and domestic law do not always converge with respect to the laws and customs of war. The national laws of almost all countries address the regulation of armed conflicts as part of their internal military law, reflecting the obligations of international law. In addition, national military laws contain other provisions concerned with the way their military are expected to function. But IHL as codified in these laws is seldom reflected in national criminal laws applicable to those who are not part of the armed forces. Nevertheless, the values of national societies have impacted the laws and customs of war in the international context even though the values reflected in IHL are found in humanitarian principles, principles that have evolved in different civilizations over the past five thousand years.²² In time, these humanitarian principles formed an interwoven fabric of international principles, norms, and rules of conduct designed to prevent certain forms of physical harm and hardships from befalling certain persons. Protected individuals include civilian non-combatants, those *hors de combat* such as the sick, wounded, shipwrecked, prisoners of war, those covered by the Red Cross and Red Crescent emblems, and those who provide medical and humanitarian assistance in the course of armed conflicts.²³ These norms also extend to protected

²¹ The most detailed comprehensive listing of these crimes is in Article 8 of the Rome Statute. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; see also M. CHERIF BASSIOUNI, II THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT 55-94 (2005); KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICRC 2003).

²² See M. Cherif Bassiouni, *Introduction to International Humanitarian Law*, in I INTERNATIONAL CRIMINAL LAW, *supra* note 2, ch. 4.1. See also TIMOTHY MCCORMACK & H. DURHAM, THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW (1999).

²³ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art.27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force for the United States Feb. 2, 1956) [hereinafter Geneva IV] (“Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.”).

Geneva Convention Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force for the United States Feb. 2, 1956) [hereinafter Geneva III] (“Prisoners of war must at all times be humanely treated . . .”).

targets, such as civilian installations, hospitals, religious and cultural monuments, and cultural artifacts.²⁴ These protections are embodied in IHL in certain enunciated principles and are also contained in specific norms. Irrespective of whether these international legal principles and norms are absorbed in national laws, international law provides for obligations applicable to states.

The interplay between international and national law is particularly evident in the areas of individual criminal responsibility and the international responsibility of states for wrongful conduct. Thus, individual violators of these norms are subject to disciplinary and criminal sanctions

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 26, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force for the United States Feb. 2, 1956) [hereinafter Geneva I] (“The staff of National Red Cross Societies and that of other Voluntary Aid Societies . . . are placed on the same footing as [medical personnel]”).

Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea art. 12, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force for the United States Feb. 2, 1956) [hereinafter Geneva II] (“Members of the armed forces . . . who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances”); *id.* art. 36 (“The religious, medical and hospital personnel of hospital ships and their crew shall be respected and protected . . .”).

The 1949 Geneva Conventions are now part of customary international law, since 176 out of 189 member states of the United Nations have ratified them.

²⁴ In addition to the four Geneva Conventions of August 12, 1949, *supra* note 23, see Geneva Convention Protocol I, *supra* note 5, art. 52(2) (“Attacks shall be limited strictly to military objectives.”); *id.* art. 53(a) (“[It is prohibited] to commit any acts of hostility directed against the historic monuments, works or art or places of worship which constitute the cultural or spiritual heritage of peoples.”); Protocol II Additional to the Geneva Conventions of 12 Aug. 1949 (Relating to the Protection of Victims of Non-International Armed Conflicts), Dec. 12, 1977, U.N. Doc. A/32/144 Annex II [hereinafter Geneva Convention Protocol II]; *cf.*, *e.g.*, Geneva IV, *supra* note 23, art. 147 (“Grave breaches . . . shall be those involving any of the following acts . . . extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”).

This is reflected in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 1999 Protocols. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention]; Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, May 14, 1954, 249 U.N.T.S. 348 [hereinafter Hague Convention Protocol I]; Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Hague Convention Protocol II]; *see also* Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT’L LAW. 613 (2007); Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT’L L. 245 (2006); James A. R. Nafziger, *The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material*, 8 CHI. J. INT’L L. 147 (2007).

depending upon the seriousness of the violation by the state of nationality, but also by any other state under the principle of universal jurisdiction for “grave breaches” as defined in IHL and as war crimes under customary international law. Moreover, states whose personnel have committed such violations may owe compensatory and even punitive damages to the state whose nationals have been victimized.²⁵ The foregoing, however, applies mainly to conflicts of an international character, as these protections and prohibitions are not necessarily applicable to conflicts of a non-international and purely internal character.²⁶ In these contexts, international human rights law and international criminal law apply, subject to the reservations noted in the conclusion of Section I.

The sources of IHL norms are conventional and customary international law, commonly referred to respectively as “the Law of Geneva” (for the conventional law of armed conflicts) and “the Law of The Hague” (for the customary law of armed conflicts).²⁷ The Law of The Hague is not, however, exclusively customary law because it is in part made of treaty law, and also because treaty law has become part of customary law.²⁸ In turn, the Law of Geneva is not exclusively treaty law,

²⁵ For the latter, see Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631 [hereinafter Second Hague IV] (“A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation.”). For the former, the “grave breaches” of the Geneva Conventions, see Geneva I, *supra* note 23, art. 49; Geneva II, *supra* note 23, art. 50; Geneva III, *supra* note 23, art. 129; Geneva IV, *supra* note 23, art. 146.

²⁶ Only Common Article 3 and Geneva Convention Protocol II apply to non-state actors in conflicts of a non-international character. Such persons do not benefit from the status of POW. In purely internal conflicts, these norms are not applicable. See MOIR, *supra* note 5, chs. 2-3; ZEGVELD, *supra* note 5, at 55.

²⁷ See BASSIOUNI, *supra* note 19, at 18. The Four Geneva Conventions of August 12, 1949, which, as of January 1, 2007, have been ratified by 194 states, are deemed to reflect customary international law. ICRC, International Humanitarian Law: Treaties & Documents, <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (last visited Sept. 6, 2008). Also deemed customary international law are parts of Protocol I (1977), which deals with conflicts of an international character (ratified by 167 states), and Protocol II (ratified by 163 states). *Id.* In short, the Four Geneva Conventions of 1949 embody customary international law and ultimately have become customary international law, while the two Additional Protocols (1977) embody, in part, customary international law, but have not, in their entirety, risen to the level of customary international law. ICRC, *supra* note 19. The ICRC undertook a study published in 2005 on what has become customary international law, and in a sense it represents the equivalent of the 1899 and 1907 Hague Conventions on the codification of the customary law of armed conflict. *Id.* While the ICRC’s study may be deemed doctrinal, it nonetheless fills a gap left open by the political inability of states to update the 1907 Hague Convention codifying the customary international law of armed conflicts. *Id.*; see also HENCKAERTS, *supra* note 19.

²⁸ BASSIOUNI, *supra* note 19, at 18.

because it reflects customary law.²⁹ Thus, the traditional distinction between conventional and customary law has been substantially eroded.³⁰ Additionally, the treaty law that applies to weapons control derives from customary, as well as conventional, law and some of its specific norms have become part of customary law.³¹

In the last half-century, the term international humanitarian law initially denoted the protections and obligations arising out of the 1949 Geneva Conventions,³² whose origins were the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.³³ Subsequently, the term has been broadened to encompass all violations of the laws of armed conflict, whether they are contained in the 1949 Geneva Conventions and the two 1977 Additional Protocols or in customary international law as first reflected in the 1899 and then in the 1907 Hague Convention IV and its Annexed Regulations (1907 Hague IV), or that body of conventional and customary international law applicable to armed

²⁹ *Id.* at 20.

³⁰ *Id.*

³¹ *Id.* at 18, 20. With respect to the prohibition of certain weapons on the basis that they are “indiscriminate” or because they cause “unnecessary pain and suffering,” the first international instrument was the 1868 St. Petersburg Declaration which prohibits the use of dum-dum and explosive bullets. St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, 1 AM. J. INT’L L. SUPP. 95 (1907), available at <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument> (last visited Sept. 8, 2008). It was followed by the 1925 Geneva Convention on Asphyxiating Gases. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases and Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, reprinted in 25 AM. J. INT’L L. 94 (1931); see also Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 I.L.M. 1507; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 Jan. 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 45; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, 1342 U.N.T.S. 171, 19 I.L.M. 1534 [hereinafter Protocol III]; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583 1015 U.N.T.S. 163. There are thirty-five Weapons Control conventions, but few specifically criminalize the use of these weapons. BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 1, at 142-44. Instead, their criminalization can be adduced from customary international law and from the writings of the most distinguished publicists. See e.g., Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 156 U.N.T.S. 77 (citing the sources of international law).

³² Geneva I, *supra* note 23; Geneva II, *supra* note 23; Geneva III, *supra* note 23; Geneva IV, *supra* note 23.

³³ Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 18 Martens 440, reprinted in 1 AM. J. INT’L L. 90 (1907) (Supp.), available at <http://www.icrc.org/ihl.nsf/FULL/120?OpenDocument> (last visited Sept. 1, 2008).

conflicts in connection with the protection of cultural property³⁴ and the prohibition of use of certain weapons.³⁵

The four Geneva Conventions of 1949 and their Protocol I are the principal instruments of IHL that govern conflicts of an international character.³⁶ Common Article 3 of the four Geneva Conventions of 1949 (Common Article 3) and Additional Protocol II of 1977 (Protocol II) are the principal instruments applicable to conflicts of a non-international character.³⁷ The four Geneva Conventions of 1949 and parts of Protocols I and II are deemed part of customary international law.³⁸ But these norms do not apply to purely internal conflicts, in which non-state actors are subject only to the criminal laws of the state in whose territory the conflict occurs and to applicable international criminal law norms, such as those pertaining to genocide and crimes against humanity.³⁹ Moreover, these non-state actors who are de facto, but not de jure combatants in such conflicts, and who are therefore deemed criminals under the national laws of the state where the conflicts occur, have no specific protection under IHL, other than vague and general exhortations contained in Common Article 3 and Protocol II.⁴⁰ In short, non-state actors fight “in a twilight zone between lawful combatancy and common criminality.”⁴¹

The International Committee of the Red Cross (ICRC) defines IHL as the body of rules that protects people during wartime who are not or are no longer participating in the hostilities.⁴² Its central purpose is to limit and

³⁴ This is reflected in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 1999 Protocols. 1954 Hague Convention, *supra* note 24; Hague Convention Protocol I, *supra* note 24; Hague Convention Protocol II, *supra* note 24.

³⁵ *Supra* note 31.

³⁶ See generally Geneva I, *supra* note 23; Geneva II, *supra* note 23; Geneva III, *supra* note 23; Geneva IV, *supra* note 23; Geneva Convention Protocol I, *supra* note 5.

³⁷ See generally Geneva I, *supra* note 23, art. 3; Geneva II, *supra* note 23, art. 3; Geneva III, *supra* note 23, art. 3; Geneva IV, *supra* note 23, art. 3; Geneva Convention Protocol II, *supra* note 24, at art. 1.

³⁸ See G.A. Res. 59/36, ¶ 1, U.N. Doc. A/RES/59/36 (Dec. 2, 2004) (noting “the virtually universal acceptance of the Geneva Conventions of 1949” and “the trend towards a similarly wide acceptance of the two Additional Protocols of 1977”).

³⁹ See *supra* note 5; Kleffner, *supra* note 5; SCHABAS, *supra* note 5; SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 5; Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

⁴⁰ MOIR, *supra* note 5, at 232 (discussing the lack of enforcement provisions).

⁴¹ J.E. Bond, *Application of the Law of War to Internal Conflicts*, 3 GA. J. INT'L & COMP. L. 345, 367.

⁴² See ICRC, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf).

prevent human suffering in times of armed conflict.⁴³ The rules are to be observed not only by governments and their armed forces, but also by belligerent groups and any other parties to a conflict, whether they are state or non-state actors.⁴⁴

Certain principles and norms contained in the Geneva Conventions derive from customary international law⁴⁵ and, as stated above, extend to the protection of cultural property⁴⁶ and the prohibition of the use of certain weapons that are regulated by specific treaties.⁴⁷

After World War II, crimes against humanity emerged out of war crimes, but remained connected thereto.⁴⁸ In 1950, the International Law Commission declared crimes against humanity to be unrelated to war crimes, and they became a separate category of international crimes, applicable in times of war and peace.⁴⁹ In 1948, the Genocide Convention⁵⁰ defined the new international crime of genocide, which is also applicable in both war and peace.⁵¹ Genocide and crimes against humanity, as well as war crimes, are deemed *jus cogens* international crimes, nevertheless there are questions about whether or not genocide and crimes against humanity apply to non-state actors.⁵²

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See PETER MALANCZUK & MICHAEL BARTON AKEHURST ICHAEAL AKEHURST, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 39-47 (7th ed. 1997) (discussing customary international law).

⁴⁶ See generally 1954 Hague Convention, *supra* note 24; Hague Convention Protocol I, *supra* note 24; Hague Convention Protocol II, *supra* note 24.

⁴⁷ See generally *supra* note 19.

⁴⁸ See BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 1, at 60-68; see also MAY, *supra* note 5, at 5-6; ROBERTSON, *supra* note 5, at 253.

⁴⁹ See Int'l Law Comm'n, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, With Commentaries*, ¶ 123, U.N. Doc. A/1316 (1950). See also BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 1, at 178-81; MAY, *supra* note 5, at 5-6; ROBERTSON, *supra* note 5, at 260-61.

⁵⁰ See Genocide Convention, *supra* note 39, art. 2.; see also SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 5.

⁵¹ The customary and conventional international law prohibitions mentioned above overlap in many respects, and also overlap with two other legal regimes, namely International Criminal Law (ICL) and International Human Rights Law (IHL), as discussed below. See Bassiouni, *supra* note 2. Crimes against humanity and genocide apply in both the context of war and peace, while the law of armed conflicts applies only in times of war. The first two categories of international crimes have their genesis in war crimes and are therefore an outgrowth of IHL. All three crimes, however, share the same humanitarian values and goals. *Id.*

⁵² See the discussion of this point in *supra* note 5 and in the conclusion of Section I. See also BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 1, at 239-42; Bassiouni, *Accountability for Violations of International Humanitarian Law*, *supra* note 1, at 11.

The evolution of IHL norms in both customary and conventional international law evidences the tension between humanitarian values and states' interests. Proponents of the former have sought to expand the protective scope for persons and non-military targets, as well as impose limits on the use of force and the use of certain weapons. Proponents of the latter have resisted this trend and pushed in the opposite direction by carving out exceptions, such as the doctrine of "military necessity," and by leaving certain areas ambiguous, such as the limits on military bombardments and the use of certain weapons.⁵³

The humanization of armed conflict has been difficult, because traditionally the pursuit of war has been to achieve military success through the fastest, most effective means and with the least costs to the protagonist, irrespective of the harm inflicted upon the enemy. Humanitarian arguments alone have seldom been a sufficient basis to induce states to altruistically limit the use of their might against their enemies, particularly against those who are incapable of reciprocating similar harm. Pragmatic and policy arguments, however, have greatly aided the development of IHL.⁵⁴ Mutuality of interest and other pragmatic policy considerations have combined with humanitarian concerns to produce a body of norms and rules of conduct that carry in them the expectations of voluntary compliance. But where mutuality of interest and pragmatic considerations do not exist or do not weigh in the scales of the cost-benefit analysis, voluntary compliance diminishes or disappears. Last but not least, it must be underscored that the IHL protective scheme has gaps, overlaps, and ambiguities,⁵⁵ which provide escape hatches for states unwilling to enforce IHL.

The two sources of IHL, namely customary and conventional international law and their respective legal sub-regimes as described below, not only overlap and have gaps, they also exhibit an unfair imbalance between rights and protections depending on the legal characterization of the type of conflict. Thus, a person who would otherwise qualify as a lawful combatant in a conflict of an international character becomes a common criminal in a conflict of a non-international character and in an internal conflict. This unfair imbalance is, by deduction, a factor affecting voluntary compliance by non-state actors.

The regulation of armed conflicts exists either under customary or conventional international law. For example, the "Law of the Hague" and the "Law of Geneva" are also divided according to the legal

⁵³ See *supra* note 31.

⁵⁴ THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 29-38, 45-50 (2006); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 243-47 (2000).

⁵⁵ See Bassiouni, *supra* note 2.

characterization of the types of conflict, namely, conflicts of an international and non-international character.⁵⁶ Thus, these two sources of law have in effect created two sub-legal regimes within the overall regime of the Law of Armed Conflict. The 1907 Hague IV Convention and its Annexed Regulations apply only to conflicts of an international character, namely conflicts between states,⁵⁷ as do the Four Geneva Conventions of 1949,⁵⁸ and Additional Protocol I but with a sub-regime applicable to conflicts of a non-international character contained in Common Article 3.⁵⁹ Protocol II deals exclusively with conflicts of a non-international character.⁶⁰ Common Article 3 is deemed part of customary international law.⁶¹ Only some aspects of Protocol II are however deemed customary international law, thus leaving open for conjecture what is and what is not binding under customary international law.⁶² Purely internal conflicts are not covered by any of the regimes.

The inequities created by these multiple regimes are reflected in the fact that non-state actors in conflicts of a non-international and purely internal character are not deemed *de jure* combatants in the way that state actors are, and they therefore do not benefit from POW status. The only protection for those non-state actors engaged in a conflict of a non-

⁵⁶ For the latter, see Geneva I, *supra* note 23, art. 3; Geneva II, *supra* note 23, art. 3; Geneva III, *supra* note 23, art. 3; Geneva IV, *supra* note 23, art. 3.

⁵⁷ Second Hague IV, *supra* note 25, art. 2.

⁵⁸ See, e.g., Geneva I, *supra* note 23, art. 2 (“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . .”). The three corresponding Geneva Conventions employ identical language in their respective Article 2s. See Geneva II, *supra* note 23, art. 2; Geneva III, *supra* note 23, art. 2; Geneva IV, *supra* note 23, art. 2.

⁵⁹ See, e.g., Geneva I, *supra* note 23, art. 3 (“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . .”). The three corresponding Geneva Conventions employ identical language in their respective Article 3s. See Geneva II, *supra* note 23, art. 3; Geneva III, *supra* note 23, art. 3; Geneva IV, *supra* note 23, art. 3.

⁶⁰ See Geneva Convention Protocol II, *supra* note 24, art. 1(1) (“This Protocol . . . shall apply to all armed conflicts which are not covered by [all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups . . .”); see also THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS pt. I (Howard S. Levie ed., 1987).

⁶¹ M. Cherif Bassiouni, *International Recognition of Victim's Rights*, 6 HUM. RTS. L. REV. 203, 254 n.254 (2006); M. Cherif Bassiouni, *International Recognition of Victims' Rights*, in III INTERNATIONAL CRIMINAL LAW ch. 4.10 M. Cherif Bassiouni ed., 3d ed. (2008).

⁶² See, e.g., ICRC, *supra* note 19; MAY, *supra* note 5, ch. 4; ROBERTSON, *supra* note 5, at 215; Henckaerts, *supra* note 19.

international character derive from Common Article 3 and Protocol II, which is to be treated, at minimum, in accordance with the specific contents of those provisions, which summarize the broader and more detailed protections contained in the Four Geneva Conventions of 1949. Moreover, such persons can be treated as ordinary criminals who have violated domestic criminal law, whether or not they have complied with IHL or national law. Thus, even if non-state actors engaged in a conflict of a non-international character with a state satisfied all of the requirements of a lawful combatant under Geneva III and IV and used force only against an opposing combatant who is a state actor, their action would still be deemed criminal under domestic law. IHL does not afford them the lawful status of a combatant like those who are part of the armed forces of a state. This imbalance is maintained by states that retain the monopoly of legitimate use of force and want to deny their non-state actor opponents the protections owed to POWs and the benefit of combatant legitimacy. Scholars and experts have sought to redress this imbalance by doctrinal development but with little practical success, as evidenced by the fact that the relevant norms of IHL have not been amended to date.

One of the early authoritative commentators on the Geneva Conventions, Jean Pictet, concluded that Common Article 3 should apply as follows:

- (1) That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
- (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
- (3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or
(b) that it has claimed for itself the rights of a belligerent; or
(c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
- (4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
(b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory.
(c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
(d) That the insurgent civil authority agrees to be bound by the provisions of the

Convention.⁶³

Although states' international legal positions and governmental opinions affirm that they and non-state actors are equally bound by Common Article 3 and Protocol II,⁶⁴ thus giving a false appearance of the existence of a reciprocal balance, states exclusively reserve to themselves the determination of when Common Article 3 and Protocol II are applicable.⁶⁵ Thus, two questions arise: first, whether the governments of the High Contracting Parties to the Geneva Conventions deem themselves obligated other than by their own will; and second, whether non-state actors deem themselves obligated even if states claim that they are. The actual practice of states and non-state actors in conflicts of a non-international and internal character evidences the imbalance arising out of the fact that non-state actors would be bound by certain obligations, but would not have the benefits of certain advantages as discussed throughout this Article.

A separate question is the degree to which Common Article 3 is binding upon states. The application of the Article depends on a state's determination of whether the conflict is considered a state of belligerency. However, it is left to the states to determine whether the conflict involving non-state actors is or is not considered to be part of a state of belligerency. However, states may claim that in order to be binding, there must be a state of belligerency. Consequently, if states can determine that a state of belligerency does not exist, they can argue that Common Article 3 is not applicable and thus they do not have to treat those who opposed them in accordance with its provisions. The imbalance results in unfairness and that in turn leads those who engage in such conflicts against states to ignore the obligations of humane treatment that are predicated in this situation on the assumption of reciprocity.⁶⁶ Scholars argue that the obligation of humane treatment is binding upon states, whether states declare it to be or not.⁶⁷

⁶³ PICTET, I COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 19, at 49-50.

⁶⁴ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 114, ¶ 119 (June 27); ZEGVELD, *supra* note 5, at 10. See also PICTET, IV COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 19, at 37; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 19, at 1345.

⁶⁵ ZEGVELD, *supra* note 5, at 12-13.

⁶⁶ See MOIR, *supra* note 5; MERON, THE HUMANIZATION OF INTERNATIONAL LAW, *supra* note 54; Meron, *International Criminalization of Internal Atrocities*, *infra* note 68.

⁶⁷ The writings of legal scholars are neither read nor followed by non-state actors, such as the FARC, the Janjaweed, or the Lord's Resistance Army. Consequently, it is impossible to assume that doctrine has much effect on non-state actors. Moreover, very little evidence exists that scholars writing on customary practices, which in this case includes those of non-state actors, have had access to any empirical data that supports their arguments about the practice of non-state actors. Consequently, doctrine is substantially isolated from the reality

Non-state actors have no inducement for compliance without the assurance of reciprocity, and certainly none if they are treated as common criminals, instead of lawful combatants.

To complicate matters, purely domestic conflicts are excluded from the applicability of IHL, though some experts argue that these conflicts should be included under Common Article 3 and Protocol II. Most states, however, consider them outside IHL's protective scheme.⁶⁸ Purely domestic or internal conflicts that do not satisfy the elements of a conflict of a non-international character as defined in Common Article 3 and Protocol II are referred to by the ICRC as "internal disturbances or strife" and as "internal strife."⁶⁹ These types of conflict are subject to another legal regime—that of International Human Rights Law (IHRL), which has no coercive enforcement mechanism. They are however subject to International Criminal Law (ICL), subject however to certain limitations of ICL's applicability to non-state actors as discussed above.

It is anachronistic that these different legal regimes and sub-regimes apply to the same socially protected interests and reflect the same human and social values, but differ in their applications depending on the legal characterization of the type of conflict. Governments maintain these distinctions for purely political reasons, namely, to avoid giving insurgents any claim or appearance of legal legitimacy. This political rationale is the source for the legal disparities in IHL mentioned above.

Experts argue that that there is no valid conceptual basis to distinguish between the same rights and protections extended to persons and targets because of how a conflict is legally characterized.⁷⁰ There is no valid distinction between rights and obligations that emanate from the same commonly-shared values and intended to apply to the same protected interests.⁷¹ To sidestep their argument, governments argue that the resort to

of the practice, and I submit that this is also true for the practice of state actors (save for the case of a few military legal experts who have some direct involvement or access into field practices).

⁶⁸ See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995); see also BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 1, at 254. *But see* Rome Statute, *supra* note 21, art. 8(d) (declaring specifically that the enumerated violations of armed conflict not of an international character in Article 8(c) do "not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature"). In my opinion, the provisions of the ICC missed an opportunity inasmuch as they, to a greater or lesser extent, reflect certain political realities inherent in drafting the statute rather than a progressive codification of international humanitarian law. See Bassiouni, *supra* note 2.

⁶⁹ Non-state actors engaged in these conflicts are not given any legal status under IHL, but fall under domestic criminal laws. MOIR, *supra* note 5, at 4, 65.

⁷⁰ See ZEGVELD, *supra* note 5, at 34.

⁷¹ See MERON, *supra* note 54, at 58-61; MOIR, *supra* note 5, at 32-34; ZEGVELD, *supra*

violence by domestic insurgent groups is in the nature of "terrorism."⁷² In so doing, states seek to deny non-state actors insurgents' legitimacy, and the rights and protections contained in the regulation of armed conflict.⁷³

The consequences of this artificial legal distinction are, however, significant. The 1949 Geneva Conventions and Protocol I are applicable to conflicts of an international character. They deem "grave breaches" to include, *inter alia*: murder, torture, rape, mistreatment of prisoners of war (POWs) and civilians, wanton and willful destruction of public and private property, destruction of cultural and religious monuments and objects, use of civilians and POWs as human shields, and collective punishment of civilians and POWs.⁷⁴ These same depredations are not deemed "grave breaches" in conflicts of a non-international and purely internal character.⁷⁵ Common Article 3 and Protocol II, which apply to conflicts of a non-international character, deem the same transgressions as "violations" and not as "grave breaches," even though the prohibited acts are described in substantially similar terms. As a result, the legal consequences between "grave breaches" and "violations" differ as to the duties to criminalize, prosecute, punish, and extradite, even though experts argue that they should

note 5, at 34.

⁷² Bassiouni, *Legal Controls of International Terrorism*, *supra* note 3, at 97; Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations*, *supra* note 3, at 214.

⁷³ See Bassiouni, *Legal Controls of International Terrorism*, *supra* note 3, at 98.

⁷⁴ See Geneva I, *supra* note 23, art. 50; Geneva II, *supra* note 23, art. 51; Geneva III, *supra* note 23, art. 130; Geneva IV, *supra* note 23, art. 147.

Geneva III states:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Geneva IV states:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

⁷⁵ See Geneva I, *supra* note 23, art. 3; Geneva II, *supra* note 23, art. 3; Geneva III, *supra* note 23, art. 3; Geneva IV, *supra* note 23, art. 3; Geneva Convention Protocol II, *supra* note 24.

be the same.⁷⁶ The 1949 Geneva Conventions and Protocol I establish certain consequences for “grave breaches,” which include: the duty for states to criminalize these violations in their domestic laws; to prosecute or extradite those who commit such violations; to provide other states with judicial assistance in the investigation or prosecution of such “grave breaches[;]”⁷⁷ to establish a basis for universal jurisdiction so that all state parties to the Geneva Conventions can prosecute such offenders;⁷⁸ and to remove statutes of limitation for such offenses.⁷⁹ In contrast, Common Article 3 of the 1949 Geneva Conventions⁸⁰ and Protocol II⁸¹ do not contain the same explicit legal obligations. To remedy this inconsistency, some scholars argue that the obligations to prevent and suppress “violations” of Common Article 3 and Protocol II should be treated in the same manner and with the same legal consequences as violations of the “grave breaches” of the 1949 Conventions and Protocol I.⁸²

⁷⁶ See generally MERON, *THE HUMANIZATION OF INTERNATIONAL LAW*, *supra* note 54, at 123-29; Meron, *The Humanization of Humanitarian Law*, *supra* note 54, at 253.

⁷⁷ Geneva I, *supra* note 23, art. 49; Geneva II, *supra* note 23, art. 50; Geneva III, *supra* note 23, art. 129; Geneva IV, *supra* note 23, art. 146. Protocol I, Article 86 states:

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Geneva Convention Protocol I, *supra* note 5, art. 86.

Geneva IV, Article 1 states: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Geneva IV, *supra* note 23, art. 1.

⁷⁸ The Geneva Conventions do not explicitly provide for universal jurisdiction, but they do create an “obligation to search for persons alleged to have committed . . . grave breaches, [and to] bring such persons, *regardless of their nationality*, before [the signatories’] own courts” (emphasis added). Geneva I, *supra* note 23, art. 49; Geneva II, *supra* note 23, art. 50; Geneva III, *supra* note 23, art. 129; Geneva IV, *supra* note 23, art. 146; see also STEPHEN MACEDO, *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* (2003); M. Cherif Bassiouni, *Universal Jurisdiction for International War Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 116 (2001).

⁷⁹ See M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 CORNELL INT’L L.J. 327, 380 n.319 (2005); see also G.A. Res. 2391 (XXIII), at 40, U.N. Doc. A/7218 (Nov. 26, 1968).

⁸⁰ Geneva I, *supra* note 23, art. 3; Geneva II, *supra* note 23 art. 3; Geneva III, *supra* note 23, art. 3; Geneva IV, *supra* note 23, art. 3.

⁸¹ Geneva Convention Protocol II, *supra* note 24.

⁸² See MERON, *THE HUMANIZATION OF INTERNATIONAL LAW*, *supra* note 54, at 123-29.

The imbalance that exists in IHL with respect to the norms applicable to conflicts of an international character, conflicts of a non-international character, and conflicts of a purely internal character is significant. But, the greater imbalance is in the non-applicability of these norms to what are legally characterized as conflicts of a purely internal nature. To what extent this imbalance impacts on compliance with these norms by both state and non-state actors is conjectural. However, common sense leads to the conclusion that such an imbalance favoring state actors is a factor that negatively impacts on their voluntary compliance, as well as that of non-state actors. Common sense also dictates that since non-state actors in non-international conflicts do not benefit from the same protections as combatants in conflicts of an international character, they are likely to be less motivated to voluntarily comply with IHL than if they had some inducement to do so.

III. CHARACTERISTICS OF NON-INTERNATIONAL AND INTERNAL CONFLICTS

A. LEGAL CHARACTERIZATIONS

As stated above, international law norms differ in their application to the different types of conflicts. International law is concerned with the legal characterization of conflicts, the legal status of combatants and non-combatants, and the legal status of their public or quasi-public acts, and thus, to some extent, with the recognition of non-state actors as subjects of international law.⁸³ IHL is concerned with the means and methods by which these groups conduct themselves in the course of armed conflicts, otherwise referred to as the *jus in bello*.

International law and IHL first recognized non-state actors in the era of de-colonization during the 1950s-1980s when these groups were engaged in what are called "wars of national liberation."⁸⁴ The limited recognition that they were given under public international law was based on the likely expectation that, after independence, these groups would become part of the legitimate government in their new state. Thus, in effect creating an

⁸³ See, e.g., W. THOMAS MALLISON & SALLY MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* (1983); W. Thomas Mallison, *The Legal Problems Concerning the Juridical Status and Political Activities of the Zionist Organization/Jewish Agency: A Study in International and United States Law*, 9 WM. & MARY L. REV. 556, 556-629 (1968) (discussing the Jewish Agency during the British mandate over Palestine).

⁸⁴ Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations*, *supra* note 3, at 222; Georges Abi-Saab, *Wars of National Liberation in the Geneva Conventions and Protocols*, 165 RECUEIL DES COURS 353 (1979); Gerald I. A. D. Draper, *Wars of National Liberation and War Criminality*, in *RESTRAINTS ON WAR* (Michael Howard ed., 1979); see also DANIEL MORAN, *WARS OF NATIONAL LIBERATION* (2006).

exception for certain non-state actors based on future political expectations. This and other de facto exceptions, coupled with the post-conflict practices of impunity and amnesty, have resulted in an unequal application of international law to different participants engaged in violent conflictual interactions. This political dimension has undermined the value-oriented goals of international norms designed to minimize the harmful consequences of violent conflictual interactions. In turn, this situation negatively affects individual and collective compliance with principles and norms designed to minimize harmful consequences to protected persons and targets in the course of armed conflict regardless of how the given conflict is legally characterized. The outcome has been an increase in harmful conduct, which paradoxically enhances political gains.⁸⁵ Thus, non-state actors who have the capacity to commit greater harm, even when violating IHL, are likely to receive greater political recognition, including the likelihood of impunity for their violations of IHL.

The policy considerations attendant to international law's recognition of groups engaged in wars of national liberation, which are reflected in Geneva Convention Protocol I, differ from those arising out of Common Article 3 and Protocol II and from those arising under the customary law of armed conflict applicable to conflict of a non-international character.⁸⁶ The policy considerations of Protocol I are based on the legitimacy of such conflicts and on the expectation that those engaged in these conflicts will emerge as the leaders of newly independent states. This is different from non-state actors who are insurgents against their own legitimate governments, irrespective of the legitimacy of their claims against the

⁸⁵ This is evident in so many resolutions of the General Assembly and other specialized bodies of the United Nations, giving recognition to wars of national liberation and providing standing for these organizations. For example, the PLO was admitted as an observer to the United Nations in 1975. See G.A. Res. 3375, U.N. Doc. A/RES/3375 (Nov. 10, 1975).

The recognition gave these groups some immediate legitimacy, and it gave some of their acts the legal status of a quasi-public entity. However, recognition was dependent upon certain political considerations. These political considerations were translated into legal elements, such as the extent of de facto territorial control exercised by these groups, their presumed level of representation of the indigenous population, the legitimacy of their ultimate goal, and the public law nature of their actions.

⁸⁶ See Bassiouni, *"Terrorism": Reflections on Legitimacy and Policy Considerations*, *supra* note 3, at 225; see, e.g., Roman Boed, *Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Tribunal for Rwanda*, in 13 CRIM. L.F. 293 (2003); Meron, *supra* note 68; Lindsay Moir, *Non-International Armed Conflict and Guerilla Warfare*, in 1 INTERNATIONAL CRIMINAL LAW, *supra* note 2, ch. 4.10; Michel Veuthey, *Remedies to Promote the Respect of Fundamental Human Values in Non-International Armed Conflicts*, 30 ISRAEL YEARBOOK ON HUMAN RIGHTS 37, 43 (Y. Dinstein ed., 2002).

governments that they oppose. Protocol I, however, establishes conditions for the members of these groups who are engaged in wars of national liberation enabling them to fall within the meaning of legitimate combatants and to benefit from the status of POW, as well as to benefit from other consequences deriving from their status as lawful combatants if they meet the normative requirements.⁸⁷

An additional element figures into the calculus of compliance. In some situations, non-state actor groups exercise dominion and control over a portion of a state's territory and may even exercise some of the manifestations of sovereignty or public authority over a given part of the national territory and over its inhabitants.⁸⁸ In these cases, international law tends to give such groups enhanced recognition. This means that groups that do not exercise exclusive dominion and control over a more or less defined portion of a given territory, because they operate out of a narrow territorial base from which they carry out incursions in the same or different parts of the state's territory, have less of a political or quasi-legitimate status.⁸⁹ The difference between the de facto exercise of territorial dominion and control and its absence bears upon international law's recognition of the acts of such groups as quasi-public acts that carry or imply some internationally recognized legal consequences. However, it does not bear upon the lawfulness or unlawfulness of their conduct, which

⁸⁷ Protocol I, Article 1 is applicable to wars of national liberation. Protocol I, *supra* note 5, art. 1(4).

⁸⁸ This is the case of the FARC in Colombia. See JAIME GUARACA, *COLOMBIA Y LAS FARC-EP: ORIGEN DE LA LUCHA GUERRILLERA* (1999). This is also the case in Gaza where the Hamas government is in control. But having broken away from the Palestine National Authority head quartered in the West Bank city of Ramallah, the Hamas government is a de facto non-state actors group that falls within the meaning of Protocol I, Article 1(4) or within the meaning of Common Article 3 and Protocol II, depending upon political perspectives. See Abi-Saab, *supra* note 84; Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations*, *supra* note 3, at 220; Draper, *supra* note 84. See also M. CHERIF BASSIOUNI, 1-2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT: EMERGENCE OF CONFLICT IN PALESTINE AND THE ARAB-ISRAELI WARS AND PEACE PROCESS (2005) [hereinafter DOCUMENTS ON THE ARAB-ISRAELI CONFLICT].

⁸⁹ Consider, for example, such contemporary conflicts as those in the Sudan, Uganda, and the Democratic Republic of the Congo. In these conflicts, guerrilla groups or insurgents move from one area of the territory to another without remaining in established geographic areas. Nevertheless some of the groups may have fixed bases in some of the regions or provinces allowing their paramilitary units to go into other areas to operate from which to operate from. The purpose of this illustration is merely to indicate to the reader that the geographic positions of protagonists in these types of conflicts vary. As a whole, it is possible to distinguish between groups which have control over a certain territory and have an effective presence there and are capable of exercising some dominion and control over the population, while in other types of conflicts, the protagonists may be more nomadic in terms of their movement across the territory, region, or province.

is regulated by IHL.⁹⁰ Additionally, as experience indicates, these groups occasionally succeed in their belligerency or insurgency and form a state's new government, thus acquiring full legitimacy with the consequence that their wartime depredations go unpunished. Because of the potential political transformations of these groups, international law, reflecting the practices of states, grants them a measure of international legal recognition. While this political recognition should have no bearing on these groups' compliance or lack thereof with IHL norms, acquiring political legitimacy unfortunately seems to overshadow their previous violations of IHL. This situation tends to enhance non-compliance because of the expectations of later impunity.⁹¹

Since governments refuse to give belligerent and insurgent groups international legal recognition, the latter may seek to acquire such standing by declaring themselves willing to abide by IHL.⁹² By conforming their conduct to IHL, they may seek partial recognition before the international community. In their perceptions, they implicitly become legitimate groups with some semblance of equal status to the governments with which they are in conflict. Precisely to avert such public recognition, however, governments strongly oppose the co-opting of these groups into processes of legitimacy, which in turn removes the incentives for such groups to comply with IHL and continue to act outside the boundaries of legitimacy.⁹³

International policy should be that whether state or non-state actors, all those who engage in armed conflicts are subject to: (1) IHL, which provides for the regulation of the use of force in the context of armed conflicts and whose violations constitute war crimes;⁹⁴ (2) the Genocide Convention, applicable in times of peace and war,⁹⁵ which establishes non-derogable prohibitions deemed *erga omnes*;⁹⁶ and (3) the customary law of crimes

⁹⁰ Mallison, *supra* note 83.

⁹¹ Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); see also M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409-422 (2000); M. Cherif Bassiouni, *The Perennial Conflict between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541-60 (2006).

⁹² See Churchill Ewumbue-Monono, *Respect for International Humanitarian Law by Armed Non-State Actors in Africa*, 864 INT'L REV. RED CROSS 905, 905-24 (2006). The ICTR, in deciding the applicability of Protocol II to Rwanda, noted that the Rwandan Patriotic Front had expressly considered itself bound by IHL. Prosecutor v. Kayishema & Ruzindana, No. ICTR-95-1-T, Judgement, ¶ 156 (May 21, 1999); Prosecutor v. Akayesu, No. ICTR-96-4-T, Judgement, ¶ 627 (Sept. 2, 1998).

⁹³ Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations*, *supra* note 3, at 223.

⁹⁴ See *supra* note 19.

⁹⁵ Genocide Convention, *supra* note 39, art. 1.

⁹⁶ *Id.* art. 4.

against humanity, also applicable in times of peace and war, which establishes non-derogable prohibitions deemed *erga omnes* (also embodied in positive international criminal law in the Statutes of the International Criminal Court (ICC),⁹⁷ the International Criminal Tribunal for the former Yugoslavia (ICTY),⁹⁸ and the International Criminal Tribunal for Rwanda (ICTR)).⁹⁹

What is also lacking in this legitimacy dilemma is that the international community does not link political legitimacy to accountability mechanisms. In other words, there is no sign-on declaration available in which groups of non-state actors would be given some legitimacy in exchange for their formal recognition of the applicability of IHL and the acknowledgement that those who violate it commit war crimes, crimes against humanity, and genocide will be subject to prosecution, whether before an international or national legal institution.

Norms applicable to conflicts of a non-international character and purely internal conflicts grew out of the conceptual framework of norms applicable to conflicts of an international character. The norms that

⁹⁷ Rome Statute, *supra* note 21, art. 7.

⁹⁸ The ICTY Statute, in Article 5, states:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]. The following cases decided whether an internal armed conflict is taking place. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgement, ¶¶ 561-68 (May 7, 1997); Prosecutor v. Delalic, Mucic, Delic & Landzo, Case No. IT-96-21-T, Judgement, ¶ 183 (Nov. 16, 1998); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgement, ¶ 55 (Dec. 10, 1998).

⁹⁹ The Statute of the ICTR, in Article 3, states:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, art. 3, Annex to S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]. The following case describes and defines an armed conflict. Prosecutor v. Rutaganda, ICTR-96-3, Judgement and Sentence, ¶ 91 (Dec. 6, 1999).

emerged from the 1949 Geneva Conventions are not truly part of a separate legal regime suited to conflicts of a non-international character. Protocol II attempted to create a separate legal regime for conflicts of a non-international character, but it is essentially an extension by analogy to the regime applicable to conflicts of an international character. This proposition is reinforced by the fact that some of these conflicts are normatively deemed to be conflicts of an international character as established in Article 1(4) of Protocol I while others are not.¹⁰⁰ The reluctance of governments to recognize the peculiarities of conflicts of a non-international character and to provide for compliance-inducing factors by non-state actors, while carving out exceptions for transgressions of IHL, contributes to non-compliance by both state and non-state actors. Lastly, the absence of conflict resolution mechanisms leaves no alternative options to violent confrontation. When that occurs, non-state actors find themselves more often than not facing an asymmetry of forces and power-relations with state-actors. Consequently, non-state actors engage in violations of IHL, and in acts of “terrorism,” as a way of redressing the imbalance of power and forces—thus, decreasing their compliance with IHL.

All of these factors mentioned reduce voluntary compliance, which already suffers from a significant difference deficit. An analysis of specific IHL provisions assists in the appreciation of the conflict engendered by overlapping legal regimes. Before embarking on this task, it is essential to identify a method of legal interpretation. If that method is legal positivism, reliance on the specific language of the normative text on the basis of the original intent with which it was drafted and on the basis of which it was signed and then ratified by states is required. If, in contrast, the method employed falls in the broad category of progressive interpretation, then the textual language will be interpreted in a way that varies in accordance with the custom and practice of states or in accordance with the “writings of the most distinguished publicists.”

Common Article 3, which is frequently referred to as a “mini-convention” within the 1949 Conventions, offers a useful starting point. An interpretation of the scope, content and consequences of this provision is necessary. If the positivist approach is followed, it will take into account that the textual language of Common Article 3 and Protocol II¹⁰¹ is different from that of “grave breaches” as contained in all four Conventions,¹⁰² as

¹⁰⁰ Geneva Convention Protocol I, *supra* note 5, art. 1(4).

¹⁰¹ Common Article 3: Geneva I, *supra* note 23, art. 3; Geneva II, *supra* note 23, art. 3; Geneva III, *supra* note 23, art. 3; Geneva IV, *supra* note 23, art. 3; *see also* Geneva Convention Protocol I, *supra* note 5.

¹⁰² Grave Breaches Provisions: Geneva I, *supra* note 23, art. 49; Geneva II, *supra* note

well as in Protocol I.¹⁰³ This is evident in the use of the terminology employed in these two normative sources and the consequences that ensue from their violations. These differences reveal that the drafters of the 1949 Conventions sought to establish a distinction between “grave breaches” and their consequences, as they arise in the context of a conflict of an international character, and the “violations” contained in Common Article 3.¹⁰⁴ The prohibitions contained in the “grave breaches” provisions are more specific and more encompassing than the “violations” contained in Common Article 3,¹⁰⁵ which are described with less specificity and without clear and express obligations deriving from their violations. The plain language and meaning of the relevant provisions reveal that the same legal consequences do not arise from “violations” of Common Article 3 as do with respect to “grave breaches.” The positivist interpretation would lead to the conclusion that Common Article 3 “violations” do not have the same standing and consequences of “grave breaches.” In contrast, a progressive interpretative method, which is advocated in the writings of various scholars,¹⁰⁶ transforms the “violations” of Common Article 3 into the functional equivalent of “grave breaches,” thereby carrying the same legal consequences. These are: the obligation for all states to enforce and criminalize the violations in their national legal systems; prosecute and/or extradite alleged offenders; ensure the punishment of those adjudged responsible; provide mutual legal assistance to states investigating or seeking to prosecute; provide universal jurisdiction for all states to prosecute; eliminate the defense of obedience to superior orders; establish command responsibility; and to eliminate the immunity of heads of state.¹⁰⁷

23, art. 50; Geneva III, *supra* note 23, art. 129; Geneva IV, *supra* note 23, art. 146.

¹⁰³ Geneva Convention Protocol I, *supra* note 5.

¹⁰⁴ Common Article 3: Geneva I, *supra* note 23, art. 3; Geneva II, *supra* note 23, art. 3; Geneva III, *supra* note 23, art. 3; Geneva IV, *supra* note 23, art. 3.

¹⁰⁵ *Supra* note 104.

¹⁰⁶ See, e.g., ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003); Veuthey, *supra* note 86; Meron, *supra* note 68, at 554.

¹⁰⁷ The Statutes of the ICTY and the ICTR and their jurisprudence confirm the position taken by the “most distinguished publicists” and serve as evidence of customary practice. Furthermore, the Rome Statute of the ICC, which entered into force on July 1, 2002 and has been ratified by 105 states, is also evidence of *opinio juris*. International Criminal Court, Assembly of States Parties, <http://www.icc-cpi.int/statesparties.html> (last visited Sept. 8, 2008); Rome Statute, *supra* note 21, art. 8. Compare Hague Convention Protocol II, *supra* note 24, prmb, with the 1907 Second Hague IV, *supra* note 25, prmb., “Marten’s Clause.” The Marten’s Clause was modernized in the Protocol I, Article 1, paragraph 2 which states, “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” The laudable humanitarian purpose of this Clause and its significance for the advancement of IHL, however, cannot be argued to satisfy any rigid

A separate interpretive problem arises with respect to conditions determining the status of combatants. The applicable law is not uniform on the subject and thus creates norm-defeating ambiguity that detracts from compliance. The threshold conditions for determining whether combatants qualify for POW status are defined by both Article 4 of the Third Geneva Convention of 1949 and Article 1 of Protocol II.¹⁰⁸ The Third Geneva Convention requires four conditions for combatants to benefit from the status of lawful combatant and POW.¹⁰⁹ Article I requires only two of these conditions, namely that the combatants be commanded by superior officers and that they accept the obligations contained in the Geneva Conventions (the 1949 Conventions, as well as those contained in Protocol II).¹¹⁰ Thus, for some states, the issue of whether a combatant in a conflict of a non-international character wears a uniform with a distinct emblem or insignia and carries his arms in the open, as required by Article 4, is critical to the recognition of the status of lawful combatants and POW status, whereas for other states these characteristics do not inform the determination.

Nevertheless, the essence of the requirements contained in both Article 4 of the Third Geneva Convention of 1949 and Article 1 of Protocol II is the same, namely whether such combatants are willing to abide by IHL. The problem, however, is how to ascertain the existence of this. Is it to be determined subjectively on the basis of each combatant's intention, or objectively on the basis of some external factors? This problem has not been sufficiently addressed in the literature on the subject. One approach could be to establish a legal presumption that non-state actors who engage in conflicts of a non-international armed character are legally presumed to have known and accepted the obligations arising under IHL. Another approach would be to develop a mechanism by which such groups could communicate their willingness to be bound by IHL to the ICRC. Lastly, a third approach would be to require states to declare that they will abide by IHL in any conflict with non-state actors engaging in a conflict of a non-international character, which would induce said groups to reciprocate. These three options would in fact co-opt non-state actors into compliance and enhance state compliance.

approach to legal positivism. See BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 1, at 398.

¹⁰⁸ Geneva III, *supra* note 23, art. 4; Geneva Convention Protocol II, *supra* note 24, art. 1.

¹⁰⁹ The four conditions set forth in Article 4, paragraph 2 of Geneva III include: (1) that of being commanded by a person responsible for his subordinates; (2) that of having a fixed distinctive sign recognizable at a distance; (3) that of carrying arms openly; (4) that of conducting their operations in accordance with the laws and customs of war. Geneva III, *supra* note 23, art. 4(2).

¹¹⁰ Geneva Convention Protocol II, *supra* note 24, art. 1.

A further complication is that the practice of states leads to the conclusion that the determination of whether an insurgent group meets the two or four conditions required for non-state actors to qualify as lawful combatants respectively under Article 1 of Protocol II and Article 4 of the Third Geneva Convention is left to states' unilateral determination. This problem has recently been highlighted by the position of the United States in relation to Taliban and Al Qaeda fighters in Afghanistan.¹¹¹

There are also a number of other ambiguous aspects of IHL on which experts differ as to their interpretations. They include: military necessity, proportionality, infliction of unnecessary pain and suffering, command responsibility, the distinction between civilians and non-civilians, and obedience to superior orders.¹¹² Judicial and quasi-judicial decisions by international tribunals, including the ICTY and ICTR have addressed these

¹¹¹ The Supreme Court belatedly reversed this position in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); see also *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). For the Administration's position, see Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, Dep't of Defense, Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 9, 2002), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 38-79 (Karen J. Greenburg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*]; for a critique of its position, see M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 *CASE W. RES. J. INT'L LAW* 389 (2006). See also JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* (2007). For the inside story about how the War on Terror turned into a war on American ideals, see JANE MAYER, *THE DARK SIDE* (2008). Concerning the legal trail of institutionalization of torture, see PHILLIPE SANDS, *TORTURE TEAM* (2008). For torture in foreign locations, see Jordan J. Paust, *Secret Detentions, Secret Renditions, and Forced Disappearances during the Bush Administration's "War" on Terror*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW*, supra note 5, at 253. See also Christopher C. Joyner, *Terrorizing the Terrorists: An Essay on the Permissibility of Torture*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW*, supra note 5, at 227; Christopher L. Blakesley, *Acting Out Against Terrorism, Torture, and Other Atrocious Crimes: Contemplating Morality, Law and History*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW*, supra note 5, at 155.

¹¹² The term *civilian* is not used in Common Article 3; however, it does distinguish between members of armed forces who have laid down their arms and persons taking no part in the hostilities. It does not make a clear distinction between active participants in hostilities and membership in the armed forces. Kleffner, supra note 5, at 324. Protocol II uses the terms *civilians* and *civilian population*, but without defining them. *Id.* However, civilian is understood to be anyone who is not the member of an armed forces group or an organized armed group. *Id.*; M. BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, 671 (1982). Protocol II says that civilians are protected "unless and for such time as they take a direct part in hostilities." Geneva Convention Protocol II, supra note 24, art. 13(3). Common Article 3 and Protocol II mention membership in "armed forces" and "organized armed groups" when stipulating the field of application of Protocol II. Kleffner, supra note 5, at 325; Geneva Convention Protocol II, supra note 24, art. 1, ¶ 1.

issues.¹¹³

B. CONTEXT SPECIFIC DIFFERENTIATIONS OF LEGAL NORMS APPLICABLE TO NON-STATE ACTORS

As stated above, legal norms applicable to non-state actors are context-specific. Therefore, there are differentiations between norms intended to protect the same social and human interests that depend upon the context, the participants, and who determines certain relevant legal facts in a given armed conflict. The power of factual appreciation and legal characterization left to the states by IHL gives them the power to determine legal outcomes pertaining to non-state actors, and that imbalance between state and non-state actors ultimately leads to non-compliance by both. The following is an applied analysis of these observations.

1. Wars of National Liberation and Regime Change

Wars of national liberation change are treated as an exception to other norms applicable to non-state actors in conflicts of a non-international character. Non-state actors engaged in wars of national liberation under Protocol I, receive status equivalent to combatants in conflicts of an international character. The Protocol's Article 1(4) covers "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."¹¹⁴ Thus, wars of national liberation, which before Protocol I used to be classified as conflicts of a non-international character, have been re-classified as equivalents of international conflicts,¹¹⁵ even though their combatants are non-state actors. Article 96(3) of Protocol I provides that these groups can indicate to the International Committee of the Red Cross their intention to comply with the provisions of the Protocol.¹¹⁶ The

¹¹³ Kleffner, *supra* note 5, at 325; 1-12 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Andre Klip & Goran Sluiter eds., 2008) [hereinafter ANNOTATED LEADING CASES].

¹¹⁴ Geneva Convention Protocol I, *supra* note 5, art. 1, ¶ 4.

¹¹⁵ *Id.* art. 1, para. 4.

¹¹⁶ Geneva Convention Protocol I states:

The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

- (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
- (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

assumptions underlying these provisions are that they will induce compliance with IHL by the non-state actors. However, a given non-state actor group who qualifies for Article 1(4) of Protocol I may subsequently engage in conflicts whose goal is internal regime change and thus fall under the provisions of Common Article 3 and Protocol II, and lose the legal status of combatant for purposes of receiving POW protections. Thus, the characterization of a non-state actor group as engaging in a conflict of an international or non-international conflict may change depending upon the evolution of the conflict.¹¹⁷

Legal distinctions become more difficult when they are dependent on the goals of the combatants, and that is evident in connection with different conflict-specific contextual factors as described below.

In the context of de-colonization, the goal of insurgent groups is the removal of foreign occupying forces from the indigenous territory with a view to achieving independence. In the case of conflicts against settler regimes, the goal may be of settler removal from the indigenous territory or that of a regime change, which shifts power from the settler regime in favor of the indigenous population.¹¹⁸ In the case of internal revolutionary transformation, the goal is to wrest power from one regime or group in order to transfer it to another regime or group.¹¹⁹

(c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

Id. art. 96, ¶ 3.

¹¹⁷ For example, the conflict in the former Yugoslavia, particularly in Bosnia, was characterized in part as a conflict of an international character and in part, as a conflict of a non-international character. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement (July 15, 1999). Another example is the legal status of Hezbollah in Lebanon. In its attack on Lebanon, which commenced on July 12, 2006, the Israeli government claimed that Hezbollah was a group that acted either with the consent of the government or as a result of the complacency of the government of Lebanon. This was said to “justify” the government of Israel in carrying out an incursion into that country that would otherwise be labeled as aggression and the destruction of infrastructure in Lebanon far beyond what may have been required to carry out a simple retaliation against a non-state actor carrying military operations outside the framework of the state. *See Report of the Secretary General on the Implementation of Security Council Resolution 1701*, S/2007/641 (Oct. 30, 2007); Bassiouni, “Terrorism”: *Reflections on Legitimacy and Policy Considerations*, *supra* note 3, at 227; *Timeline of the July War 2006*, DAILY STAR, http://www.dailystar.com.lb/July_War06.asp; U.N.: *Cease-fire Begins Monday*, CNN, Aug. 12, 2006, <http://www.cnn.com/2006/WORLD/meast/08/12/mideast.main/index.html>; *see also* HUMAN RIGHTS WATCH, *FATAL STRIKES: ISRAEL’S INDISCRIMINATE ATTACKS AGAINST CIVILIANS IN LEBANON* (2006), *available at* <http://www.hrw.org/reports/2006/lebanon0806/>.

¹¹⁸ This occurred in South Africa with the agreement between Nelson Mandela and F. W. de Klerk in 1991. *See* DARYL GLASER, *POLITICS AND SOCIETY IN SOUTH AFRICA* (2001).

¹¹⁹ Irrespective of the purposes and goals of the group seeking to achieve a power-outcome, the means and methods employed by the insurgent forces and the degree of compliance with IHL will depend on the level of symmetry or asymmetry of military power.

In the case of secession, internal conflicts arise between different ethnic, national, or religious groups who seek to exercise their “right to self-determination”¹²⁰ by resorting to armed force with a view to achieving the breakup of the state and the establishment of one or more newly independent states. In this context, the generality of the “right of self-determination” and the absence of peaceful methods to determine such a right, or to provide an enforceable peaceful outcome, leaves the proponents and opponents of this right with no other recourse than to resort to the use of force to resolve the issue of legitimacy that underlies their respective claims to the resort to violence. Furthermore, whenever the process of violence occurs, experience indicates that few, if any, peaceful means to resolve such conflicts exist. As a result, the level of violence increases, and only when it reaches a point of intolerability do the parties agree to a peaceful settlement, either on their own or because of third party military or diplomatic intervention. Thus, there is an advantage to increased of violence, enhancing the prospects of IHL violations.

In some cases, the character of the conflict is what conditions third party military intervention or involvement in the conflict, be it military or otherwise.

Following are some examples that illustrate the distinctions mentioned above.

(a) The Vietnam conflict was characteristic of the goal of self-determination¹²¹ aimed at the reunification of North and South Vietnam, with the added factor of combating what part of the indigenous population considered to be a foreign occupying force. The United States, however, considered the actions of North Vietnamese aggression and the insurgency of those in South Vietnam a guerilla war.

(b) The conflict in the former Yugoslavia was characteristic of a self-determination conflict whose goal was the breakup of a federal state into separate states, based on the predominant ethnic characteristics of the inhabitants of each geographic region.¹²² The same type of conflict

While it can be said that every conflict is *sui generis*, there are nevertheless patterns of similarities that arise in part because of the asymmetry of power relations between opposing groups. Almost invariably, the availability of resources, military equipment, training, and personnel impacts directly on the means and methods of warfare. See 1 UNDERSTANDING CIVIL WAR, *supra* note 11; 2 UNDERSTANDING CIVIL WAR, *supra* note 11.

¹²⁰ U.N. Charter, *supra* note 5, art. 1(2); HANNUM, *supra* note 5; Anaya, *supra* note 5; Robert D. Sloane, *The Policies of State Succession: Harmonizing Self-Determination and Global Order in the Twenty-First Century*, 30 FORD. INT’L L.J. 1288 (2007); Bassiouni, *supra* note 5.

¹²¹ *Supra* note 120.

¹²² See M. CHERIF BASSIOUNI WITH PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA ch. 1 (1996) (describing the background

occurred in Cyprus, resulting in the separation of its the two ethnic groups (Greek and Turkish) into de facto separate states. During the conflict the intervention of a third party, Turkey, gave the Turkish Cypriot community the opportunity to achieve its goal of de facto statehood.¹²³ However, when these two conflicts first developed they were respectively characterized in the former Yugoslavia as a conflict of a non-international character and in Cyprus as a purely internal conflict. Subsequently, the conflict in the former Yugoslavia was deemed in certain parts and at certain times to be of an international character.¹²⁴ After the Turkish Army's invasion of a certain part of Cyprus, the conflict was deemed to be of an international character.

(c) The de-colonization conflicts in Africa (Sub-Saharan Africa and North Africa) were characteristic wars of national liberation against a foreign occupier, which at the time they started were called internal conflicts. The non-state actor combatants were labeled "terrorists." As the level of violence in these conflicts intensified and international political recognition of the legitimacy of the colonized people's claims become recognized, these conflicts were deemed wars of national liberation, and as such, they were equivalent to conflicts of an international character. Protocol I, however, came to existence after most of these conflicts had ended and simply codified what had become customary international law.¹²⁵

(d) The conflicts in South Africa and Palestine were characteristic of settler regime versus indigenous population conflicts (even though in the case of Palestine, Jews had inhabited that land since the time of Moses). In the case of South Africa, the goal of the non-state actors was to produce a regime change from white apartheid to indigenous African rule, but without the expulsion or exclusion of the white settlers.¹²⁶ In the case of Palestine, the United Nations decided on a division between a Jewish and Palestinian

of the conflict); *see generally* MISHA GLENNY, *THE FALL OF YUGOSLAVIA* (1996). The conflict in Yugoslavia was at certain times determined to be of an international character.

¹²³ *See generally* CHRISTOPHER HITCHENS, *CYPRUS* (1984); CHRISTOPHER HITCHENS, *HOSTAGE TO HISTORY: CYPRUS FROM THE OTTOMANS TO KISSINGER* (1997); CHRISTOS P. IOANNIDES, *IN TURKEY'S IMAGE: THE TRANSFORMATION OF OCCUPIED CYPRUS INTO A TURKISH PROVINCE* (1991).

¹²⁴ *See* Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgement, ¶¶ 46-52 (May 7, 1997); Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995); Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 *EUR. J. INT'L L* 265, 267, 269-75 (1996).

¹²⁵ *See generally* DAVID BIRMINGHAM, *DECOLONIZATION OF AFRICA* (1996); GERARD KREIJEN, *STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA* (2004); MORAN, *supra* note 84, at 130-31, 138-51.

¹²⁶ *See generally* P. ERIC LOUW, *THE RISE, FALL AND LEGACY OF APARTHEID* (2004); S. TERREBLANCHE, *A HISTORY OF INEQUALITY IN SOUTH AFRICA* (2003).

Arab state. The partition of Palestine was the international community's solution in the early stages of the conflict.¹²⁷ That conflict has subsequently evolved into an attempt by the Palestinians to reconstitute the State of Palestine in whole or part on the territory that used to be under the Mandate system of the League of Nations¹²⁸ and, prior to that, as Palestine was constituted under the Turkish Ottoman Empire.¹²⁹ For Israel, it meant the opportunity to expand its boundaries at the expense of the Palestinians. Israel became a state in 1948, but Palestine has not become a state. Between 1948 and the present, there have been four wars (1948, 1956, 1967, 1973) involving multiple states, making these conflicts international in character.¹³⁰ But since 1967, when Israel occupied all of what was formerly Palestine, having seized these territories from Jordan and Egypt, it has not recognized the Palestinian resistance as a conflict of a non-international character.

(e) The conflicts in Argentina,¹³¹ Chile,¹³² and El Salvador¹³³ were characteristic internal regime changes based on different visions of political, social, and economic systems in these countries.¹³⁴ The same is true, to some extent, of the internal conflict that existed in Lebanon¹³⁵ and in

¹²⁷ G.A. Res. 181, U.N. Doc. A/RES/181(II)(A+B) (Nov. 29, 1947); Phyllis Bennis, *The United Nations and Palestine: Partition and Its Aftermath—UN Stance on Palestine's Displacement and Creation of Israel*, 19 ARAB STUD. Q. 47 (1997); see generally BASSIOUNI, DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 88.

¹²⁸ See generally Wm. Roger Lewis, *The United Kingdom and the Beginning of the Mandates System, 1919–1922*, 23 INT'L ORG. 73, 73–96 (1969); Balfour Declaration, November 2, 1917, in BASSIOUNI, DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 88; JUSTIN MCCARTHY, *THE POPULATION OF PALESTINE: POPULATION HISTORY AND STATISTICS OF THE LATE OTTOMAN PERIOD AND THE MANDATE* (1990).

¹²⁹ See generally PALESTINE IN THE LATE OTTOMAN PERIOD: POLITICAL, SOCIAL AND ECONOMIC TRANSFORMATION (David Kushner ed., 1986).

¹³⁰ For documents on the conflict, see BASSIOUNI, DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 88.

¹³¹ See generally MARGUERITE FEITLOWITZ, *A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE* (1999); PAUL H. LEWIS, *GUERRILLAS AND GENERALS: THE DIRTY WAR IN ARGENTINA* (2001); M. PATRICIA MARCHAK, *GOD'S ASSASSINS: STATE TERRORISM IN ARGENTINA IN THE 1970s* (1999).

¹³² See generally SIMON COLLIER, WILLIAM F. SATER, *A HISTORY OF CHILE, 1808-2002* (2004); PAMELA CONSTABLE & ARTURO VALENZUELA, *A NATION OF ENEMIES: CHILE UNDER PINOCHET* (1993).

¹³³ See generally ELISABETH JEAN WOOD, *INSURGENT COLLECTIVE ACTION AND CIVIL WAR IN EL SALVADOR* (2003).

¹³⁴ Internal regime changes may be aimed at transformation of political, social, and economic systems or part of a given system. For example, the Red Brigades in Italy, the Baader-Meinhof Group in Germany, and the Red Liberation group in Japan in the 1960s and 1970s advocated internal social change. Bassiouni, "*Terrorism*": *Reflections on Legitimacy and Policy Considerations*, *supra* note 3, at 226.

¹³⁵ See EDGAR O'BALLANCE, *CIVIL WAR IN LEBANON, 1975-92* (1998); ELIZABETH

Guatemala, although the latter, unlike the former, had a significant ethnic component.¹³⁶ These conflicts were deemed internal, though they had the characteristics of non-international conflicts.

(f) The conflicts in Rwanda¹³⁷ and in the Great Lakes area of Africa, including the Congo and Uganda, are characterized as internal ethnic and tribal warfare, notwithstanding the involvement of combatants from several states.¹³⁸

(g) The conflict in Cambodia was characterized as internal regime change.¹³⁹ This was also the case in Russia after the Revolution of 1917 followed by the policies and practices of Lenin and Stalin in the violent elimination of political opponents for the fulfillment of the Marxist State's goals.¹⁴⁰ The same was said of post-1949 Maoist repressions in China, followed by the Cultural Revolution.¹⁴¹ These were deemed oppressive regime states using force to achieve domestic political goals.

In all of these conflicts, the predominantly civilian victims were protected persons under IHL.¹⁴² They were also covered by IHRL and ICL. In fact, these victims did not benefit from the protective scheme of IHL or IHRL, and ICL was not applied except in rare cases.¹⁴³ The non-state actors

PICARD, LEBANON: A SHATTERED COUNTRY: MYTHS AND REALITIES OF THE WARS IN LEBANON (2002); Hans-Peter Gasser, *International Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon*, 31 AM. U. L. REV. 911 (1982).

¹³⁶ See generally MIQUEL DEWEVER-PLANA & MIQUEL DEWEBER-PLANA, LA VERDAD BAJO LA TIERRA: GUATEMALA, EL GENOCIDIO SILENCIADO (2007); JOHN WESLEY SHILLINGTON, GRAPPLING WITH ATROCITY: GUATEMALAN THEATER IN THE 1990S (2002).

¹³⁷ See generally KINGSLEY MOGHALU, RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE 9-13 (2005); VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 48, 49 (1998); GERARD PRUNIER, THE RWANDA CRISIS (1995); Alan J. Kupperman, *Rwanda in Retrospect*, 79 FOREIGN AFF. 94, 95 (2000).

¹³⁸ See generally THE AFRICAN STAKES OF THE CONGO WAR (John F. Clark ed., 2002).

¹³⁹ See M. Cherif Bassiouni, *Mixed Models of International Criminal Justice*, in III INTERNATIONAL CRIMINAL LAW, *supra* note 61, ch. 2.4; David Scheffer, *Special Tribunal for Cambodia*, in III INTERNATIONAL CRIMINAL LAW, *supra* note 61, ch. 2.6; Steven R. Ratner, *Accountability for the Khmer Rouge: A (Lack of) Progress Report*, in POST-CONFLICT JUSTICE, *supra* note 1, at 613. For a discussion of Cambodia, see generally Aaron J. Buckley, *The Conflict in Cambodia and Post-Conflict Justice*, in POST-CONFLICT JUSTICE, *supra* note 1, at 637; Nema Milaninia, *Appeasing the International Conscience or Providing Post-Conflict Justice: Expanding the Khmer Rouge Tribunal's Restorative Role* (Bepress Legal Series, Working Paper 1274, 2006), available at <http://law.bepress.com/expresso/eps/1274/>.

¹⁴⁰ See generally GEORGE HERMAN HODOS, SHOW TRIALS: STALINIST PURGES IN EASTERN EUROPE, 1948-54 (1987).

¹⁴¹ See generally GUOKAI LIU, A BRIEF ANALYSIS OF THE CULTURAL REVOLUTION (Anita Chan ed., 1987); RODERICK MACFARQUHAR & MICHAEL SCHOENHALS, MAO'S LAST REVOLUTION (2006).

¹⁴² *Supra* note 2.

¹⁴³ See POST-CONFLICT JUSTICE, *supra* note 1; JANE STROMSETH & DAVID WIPPMAN, CAN

combatants were not given POW status,¹⁴⁴ nor were they treated in accordance with Common Article III. The victimization, which surely involved war crimes, also involved in some cases genocide and crimes against humanity. Nevertheless, there were only limited prosecutions, mostly before the ICTY and ICTR, and some domestic prosecutions.¹⁴⁵

In the course of many conflicts deemed at the time to be of a non-international or purely internal character, a number of insurgent groups have succeeded in achieving their goals, namely, the removal of foreign or colonial forces and civilian settlers, independence or secession and the establishment of newly independent states (there were seventy-four states in 1946; there are now 192 member states of the United Nations),¹⁴⁶ and domestic regime change. In many of these conflicts, the high level of victimization indicates an almost generalized practice of non-compliance by both governmental forces and non-state actors. Thus, violence accompanied by IHL violations has tended to produce rewarding outcomes, which, it can be assumed, is not conducive to compliance with IHL and other international law norms.

A few non-state actors have, at times, manifested their willingness to comply with IHL, presumably in exchange for the recognition of lawful combatant and POW status.¹⁴⁷ However, governments have almost always rejected such offers from groups like the Irish Republican Army, the African National Congress, the Palestine Liberation Organization, and others.¹⁴⁸

MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER POST-CONFLICT SITUATIONS (2006); Jane Stromseth, *Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, 49 WM. & MARY L. REV. 1443 (2008).

¹⁴⁴ Geneva IV, *supra* note 23.

¹⁴⁵ See BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 1; MAY, *supra* note 5; ROBERTSON, *supra* note 5; SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 5.

¹⁴⁶ United Nations Member States, <http://www.un.org/Overview/unmember.html> (Oct. 3, 2006).

¹⁴⁷ Ewumbue-Monono, *supra* note 92.

¹⁴⁸ For example, the Provisional Revolutionary Government of Algeria attempted to formally adhere to IHL, but Switzerland and France challenged it. Switzerland also challenged an attempt by the Smith government in Rhodesia. The Kosovo Liberation Army expressed its desire to sign the Geneva Conventions, but was turned down. ZEGVELD, *supra* note 5, at 14 n.18. These groups made offers to comply with IHL with the state with which they were in conflict; some of these declarations or offers were made in political communiqués, public speeches, or statements. Established governments considered those as being merely propaganda. These were missed opportunities. The international organizations such as the UN and ICRC could have used these openings, no matter how narrow they may have been, to push forward the agenda of compliance. Prior to Geneva Convention Protocol I, these included the Provisional Government of the Algerian Republic (1958), the Provisional Government of Vietnam (1974), the Eritrean People's Liberation Front (1977), the African National Congress (1980), União Nacional pela Independência Total de Angola

Limited empirical evidence exists to indicate what factors contribute to compliance with IHL, such as mutuality of interests, political status recognition, and the likelihood of post-conflict prosecution. However, the high level of victimization indicates an almost generalized practice of non-compliance by both governmental forces and non-state actors engaged in conflicts of a non-international character and internal conflicts. No empirical evidence exists to indicate whether non-compliance by state actors enhances the same by non-state actors, but the emulation factor is assumed to exist. This is evidenced by the political discourse of non-state actors, which is in the nature of a *tu quoque* argument, deemed invalid since the end of World War II.¹⁴⁹ In the past several decades, state actors have labeled such violent interactions “terrorism.”¹⁵⁰ In response, non-state actors have labeled state actors’ conduct as “state-terrorism.” The result has been to reinforce the respective claims of the protagonists to legitimacy, in turn producing confusion as to the legitimacy of the resort to violence.¹⁵¹

2. *Conflicts of an International Character Involving Non-State Actors Operating on the Side of State Actors*

Non-state actors who fight alongside or as part of the armed forces of a High Contracting Party to the Geneva Conventions in a conflict of an international character are deemed lawful combatants and benefit from POW status if they satisfy the requirements of the Third Geneva Convention’s Article 4(2):

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of

(1980), South West Africa People’s Organization (1981), and the Palestine Liberation Organization (1982). Such declarations are filed with the ICRC in Geneva. *See, e.g.*, Ewumbue-Monono, *supra* note 92. The ICTR, in deciding the applicability of Geneva Convention Protocol II to Rwanda, noted that the Rwandan Patriotic Front had expressly considered itself bound by IHL. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 627 (Sept. 2, 1998); *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgement, ¶ 156 (May 21, 1999).

¹⁴⁹ FRITS KALSHOVEN, *BELLIGERENT REPRISALS* (2005); FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 73 (3d ed. 2001).

¹⁵⁰ Bassiouni, “*Terrorism*”: *Reflections on Legitimacy and Policy Considerations*, *supra* note 3.

¹⁵¹ *Id.*

war.¹⁵²

Additionally, Protocol I includes the following requirements, in Article 44:

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.¹⁵³

Once the conflict of an international character ends, the non-state actors who qualified for combatant and POW status but who continue to engage in armed conflict no longer benefit from their previous status, and become subject to domestic criminal law.

3. Non-State Actors in Non-International Conflicts

Common Article 3 to the Four Geneva Conventions provides the basic framework for the application of IHL to non-state actors engaged in combat and combat support activities in the context of non-international armed conflicts. This Article provides for protections equivalent to those afforded civilians in international conflicts, but non-state actors do not benefit from POW status available to combatants in international conflicts under the Third Geneva Convention.¹⁵⁴ This provision sets forth minimum

¹⁵² Geneva III, *supra* note 23, art. 4(2).

¹⁵³ Geneva Convention Protocol I, *supra* note 5, art. 44(3), (4).

¹⁵⁴ Geneva III states in Article 3:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,

humanitarian standards for parties engaged in such conflicts.¹⁵⁵ Thus, all persons who are *hors de combat* are to be treated humanely, and in particular there are prohibitions against murder, mutilation, cruel treatment, torture and other forms of violence, taking of hostages, humiliating and degrading treatment, and extra-judicial sentences and executions. Protocol II further develops the law applicable in non-international armed conflict and offers some clarification as to the factors that trigger the application of such protections.¹⁵⁶ Article 1 of Protocol II declares that its provisions apply to all non-international armed conflicts (except “wars of national liberation,” covered by Protocol I) that take place between the armed forces of a contracting party and other armed groups “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.”¹⁵⁷

the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded, sick and shipwrecked shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Geneva III, *supra* note 23, art. 3.

¹⁵⁵ *Id.*

¹⁵⁶ Geneva Convention Protocol II, *supra* note 24.

¹⁵⁷ Geneva Convention Protocol I, *supra* note 5, art. 1(1).

4. *Normative, Doctrinal, and Jurisprudential Efforts Addressing Gaps and Overlaps in the Legal Regimes Applicable to Non-International and Internal Conflicts*

As stated earlier, purely internal conflicts do not fall under Common Article 3 and Protocol II. This means that IHL does not extend even minimum humanitarian protections to non-state actors in such conflicts.

Common Article 3 distinguishes between those who engage in hostilities and those who refrain from an active role in hostilities.¹⁵⁸ Protocol II specifically refers to the “civilian population,” but fails to define it.¹⁵⁹ Even though it does not define *civilians*, the distinction between members of armed groups and civilians has not necessarily been eliminated, because civilians lose their protection “for such time as they take a direct part in hostilities.”¹⁶⁰

Some confusion still exists as to how far the definition of conflicts of a non-international character can extend to purely internal conflicts. The ICRC defines IHL as the body of rules that, during wartime, protects people who are not or are no longer participating in the hostilities, and seeks to limit and prevent human suffering in times of armed conflict.¹⁶¹ Some experts argue that purely domestic conflicts should be included under Common Article 3 and Protocol II. However, if the conflict is purely domestic or internal and does not satisfy elements of a conflict of a non-international character, which the ICRC refers to as “internal disturbances or strife” and “internal strife,” it becomes subject to another legal regime—that of IHRL. The existence of three sub-legal regimes applicable to conflicts of an international and non-international character and purely domestic or internal conflicts is incongruous insofar as the values and goals of all three sub-regimes are the same, namely the protection of certain persons and targets in times of conflicts.¹⁶²

There is a growing doctrinal and jurisprudential trend to combine IHL and IHRL, at least where they are overlapping,¹⁶³ and thus extend their

¹⁵⁸ Common Article 3, *supra* note 104; Kleffner, *supra* note 5, at 324 (discussing Common Article 3’s mention of “members of armed forces who have laid down their arms” and “persons taking no active part in the hostilities” as two categories as falling under protection).

¹⁵⁹ Geneva Convention Protocol II, *supra* note 24, at art. 5(1)(b),(e); Kleffner, *supra* note 5, at 324.

¹⁶⁰ Geneva Convention Protocol II, *supra* note 24, at art. 13(3); *see also* Kleffner, *supra* note 5, at 324-25.

¹⁶¹ *See* ICRC, *supra* note 42; Bassiouni, *Introduction to International Humanitarian Law*, *supra* note 22.

¹⁶² *See* ICRC, *supra* note 42; Bassiouni, *supra* note 22.

¹⁶³ *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9). The Israeli Supreme

respective protections in a way that reduces the harmful effects of armed conflicts and violent interactions irrespective of legal characterization. This is based on the proposition that there is no valid conceptual basis upon which to distinguish between the protections offered the same persons and targets as a result of the legal characterization of the conflict.¹⁶⁴ Such distinctions exist because governments do not wish to grant insurgents engaged in internal conflicts a legal status likely to give them political legitimacy.¹⁶⁵ This is why governments usually argue that the resort to violence by domestic insurgent groups is “terrorism,” and thus that such groups can be denied not only legitimacy, but the fundamental safeguards and protections contained in the regulation of armed conflict.¹⁶⁶

Court also addressed this issue in H CJ 7957/04 Mara’abe v. Prime Minister of Isr. [2005], translated in 45 I.L.M. 202 (2006). For a diverse spectrum of views regarding this issue, see generally Marc H. Ellis, *The Mural-Covered Wall: On Separation and the Future of Jews and Palestinians in Israel/Palestine and the Diaspora*, 5 CHI. J. INT’L L. 271 (2004); Richard A. Falk, *Towards Authoritativeness: The ICJ Ruling on Israel’s Security Wall*, 99 AM. J. INT’L L. 42 (2005); Zaha Hassan, *Building Walls and Burning Bridges: Legal Obligations of the United States with Respect to Israel’s Constructions of the Wall of Separation in Occupied Palestinian Territory*, 13 WILLAMETTE J. INT’L L. & DISP. RESOL. 197 (2005); Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An IPSE Dixit from the ICJ?*, 99 AM. J. INT’L L. 62 (2005); Joel S. Tashjian, *Contentious Matters and the Advisory Power: The ICJ and Israel’s Wall*, CHI. J. INT’L L. 427 (2005); Geoffrey R. Watson, *The “Wall” Decisions in Legal and Political Contexts*, 99 AM. J. INT’L L. 6 (2005); Sarah Williams, *Has International Law Hit the Wall? An Analysis of International Law in Relation to Israel’s Separation Barrier*, 24 BERKELEY J. INT’L L. 192 (2006).

¹⁶⁴ MERON, THE HUMANIZATION OF INTERNATIONAL LAW, *supra* note 54, at 58-61; Meron, *The Humanization of Humanitarian Law*, *supra* note 54, at 240; *supra* note 163; see Meron, *International Criminalization of Internal Atrocities*, *supra* note 68, at 89; see also BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 1, at 254.

¹⁶⁵ See Moir, *supra* note 86.

¹⁶⁶ See generally HELEN DUFFY, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW (2005); PAUST, *supra* note 111. The most glaring contemporary example is the denial by the Bush Administration of POW status to combatants from the 2001 War in Afghanistan and their detention at Guantanamo, Cuba, where their reported treatment is in violation of the Geneva Conventions’ norms to which the U.S. is a state-party. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2001), reprinted in 41 I.L.M. 252 (2002); Memorandum from President George W. Bush to the Vice President et al., Feb. 7, 2002, reprinted in THE TORTURE PAPERS, *supra* note 111 (stating that the Geneva Conventions did not apply). This was reversed by the Supreme Court in *Hamdan v. Rumsfeld*. 548 U.S. 557 (2006). See also Bassiouni, *supra* note 111; Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325 (2003). The same applies to the detention and torture of Iraqis by U.S. forces during their occupation of that country since 2003. See MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004); SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004); LILA RAJIVA, THE LANGUAGE OF EMPIRE: ABU GHRAIB AND THE AMERICAN MEDIA 11-19, 35-54 (2005); ERIK SAAR & VIVECA NOVAK, INSIDE THE WIRE: A MILITARY INTELLIGENCE SOLDIER’S EYEWITNESS ACCOUNT OF LIFE AT

The ICTY expanded the customary law applicable to non-international armed conflicts in the *Tadic* case, holding that violations of the laws and customs of war include serious violations committed in non-international armed conflicts.¹⁶⁷ The Tribunal subsequently held that customary law prohibits attacks on the civilian population in internal armed conflicts.

The ICTR, which has the unprecedented jurisdiction to prosecute violations of the laws of war in an internal conflict, has applied IHL to non-state actors. Article 4 of the ICTR Statute provides for individual criminal accountability for violations of Common Article 3 and Protocol II, shifting the focus of such provisions from minimum standards to obligations, which creates internationally enforceable criminal accountability.¹⁶⁸

The ICTY's jurisprudence holds that civilians are those who do not participate directly in hostilities, a definition that applies regardless of the type of conflict.¹⁶⁹ In the ICTR, the jurisdiction was specifically over crimes in a non-international armed conflict, and the Tribunal also disregarded the labels of combatants in this type of conflict.¹⁷⁰

One expert summarizes the complexity of combatant status as follows:

It is clear from the relevant conventional provisions and customary international humanitarian law that the formal status of "combatant" does not apply in non-international armed conflicts. As such, combatant status and its aforementioned consequences is one of the areas, in which customary international humanitarian law has *not* evolved beyond the dichotomy of international and non-international armed conflicts, despite the imprecise use of the term "combatant" in some texts, which relate to both types of conflicts. In non-international armed conflicts, therefore, acts lawful under the laws of armed conflict, such as the killing of a member of the state

GUANTANAMO (2005); *see also* Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005). Understandably, if the purposes of IHL and human rights law are to protect certain persons from harm and to prohibit certain means of harm, than the fact that there is a common socially protected interest should not be distinguished on the basis of which body of law or legal regime applies thereto. *See also* Michael Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, in *NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 75, 117 (David Wippman & Matthew Evangelista eds., 2005).

¹⁶⁷ *See generally* Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgement, ¶¶ 46-52 (May 7, 1997); Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995); Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUR. J. INT'L L. 265, 267 269-75 (1996).

¹⁶⁸ *See* ICTR Statute, *supra* note 99, art. 4.

¹⁶⁹ *See* Prosecutor v. Blagojevic & Jokic, Case No. IT-02-60-T, Judgement, ¶ 544 (Jan. 17, 2005); Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement, ¶ 180 (Mar. 3, 2000); *Tadic*, Case No. IT-94-1-I, ¶ 639 (discussing "civilian population" by referring to Common Article 3 regarding crimes against humanity); Kleffner, *supra* note 5, at 326.

¹⁷⁰ Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgement, ¶ 179 (May 21, 1999); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, ¶ 100 (Dec. 6, 1999).

armed forces or damage to, or the destruction of, a military objective, remain in principle punishable under domestic law. All that the laws of armed conflict do is to encourage (not oblige) “the authorities in power” to grant the widest possible amnesty to persons who have participated in the armed conflict, provided such persons have not committed war crimes or other international crimes, which states are obliged to investigate and prosecute. Furthermore, those who have directly participated in hostilities in a non-international armed conflict and have been interned or detained are not entitled to treatment as prisoners of war. The reason for the absence of combatant status in non-international armed conflicts is obvious: states are not prepared to grant their own citizens, and even less others who might engage in fighting on behalf of a non-state group, the right to do so. Nor are they willing to grant them any further reaching rights than common criminals if captured. Anything else would, in the eyes of states, undermine their claim to the monopoly of force, would promote the formation of non-state armed groups by those who are disenfranchised, and encourage individuals to join such groups. In short, none of the aforementioned aspects of combatant status (combatant privilege and prisoner of war status) are, therefore, of relevance to non-international armed conflicts. This is only different for situations in which those who directly participate in hostilities on behalf of a party to a non-international armed conflict are granted that status in accordance with a special agreement envisaged under Common Article 3 paragraph 3, or by virtue of a unilateral act of one or more parties to the conflict.

If compared to the situation under the law of international armed conflict, the absence of combatant status in non-international armed conflicts creates an imbalance between the parties under domestic law, with all its negative implications for compliance with the laws of armed conflict, which so fundamentally rests on the equality and reciprocal interests of belligerent parties. It reinforces the perception of state armed forces that they are engaging criminals who, unlike themselves, lack the right to fight, rather than engaging “equals,” who represent a state and its government. Members of non-state armed forces, on the other hand, may be inclined to ask: “When compliance with the laws of armed conflict cannot keep me out of jail, why comply?” The imbalance between state and non-state armed forces, in other words, undermines the notion that legally equal parties are facing each other. It needs to be emphasised immediately, however, that this inequality of the parties to a non-international armed conflict is purely a matter of domestic law. In contrast, the laws of armed conflict grant equal rights to, and imposes identical obligations on, all parties to an armed conflict.¹⁷¹

The Rome Statute of the International Criminal Court sets forth the most recent statement of IHL applicable during non-international, or internal, conflicts. Like the ICTR Statute, the Rome Statute criminalizes violations of Common Article 3 under Article 8. This includes a list of twelve acts that constitute war crimes in internal conflicts, including: intentionally targeting civilians, medical units, humanitarian assistance workers or members of a peacekeeping mission; pillage; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence; conscripting or enlisting children under the

¹⁷¹ Kleffner, *supra* note 5, at 322-23 (emphasis in original, citations omitted).

age of fifteen years; forced displacement; declaring that no quarter will be given; subjecting persons to physical mutilation or to unjustified or dangerous medical or scientific experiments of any kind; and destroying or seizing the property of an adversary.¹⁷² The ICC Statute also uses a broader definition of internal conflicts than Protocol II, stating that these provisions apply to “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”¹⁷³

These and other IHL distinctions, their doctrinal elaboration and the jurisprudence of the ICTY and ICTR, and the progressive codification of IHL in Article 8 of the ICC Statute¹⁷⁴ reveals the legal complexities pertaining to non-state actors in the various forms of armed conflict. To presume that non-state actors can understand these complexities and have a clear understanding of the law of armed conflict is preposterous.

Treaty law distinguishes between *civilians* and *combatants* defining *civilians* as those who are not members of the armed forces, but without providing a more detailed definition of *civilian*.¹⁷⁵ The ICRC “Customary Law” study shifts the focus away from defining who is a civilian to what conditions cause a civilian to lose IHL’s legal protections.¹⁷⁶ The “term ‘combatant’ . . . is used in all IHL normative provisions in its generic meaning, indicating persons who do not enjoy the protections accorded to civilians, but does not imply a right to combatant status or prisoner-of-war status” for those who engage in conflicts of a non-international or internal character.¹⁷⁷ The ICRC Study focuses on how a “civilian” can lose civilians status and protection.¹⁷⁸ Rule 5 of the ICRC study states that “persons who are not members of the armed forces” are civilians.¹⁷⁹ It is not clear, however, whether “members of armed opposition groups are civilians subject to Rule 6 on loss of protection from attack in case of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6.”¹⁸⁰

None of these efforts have yet resolved the problems of gaps and

¹⁷² Rome Statute, *supra* note 21, art. 8(2)(c); Dörmann, *supra* note 21; BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 21.

¹⁷³ Rome Statute, *supra* note 21, art. 8(2)(f).

¹⁷⁴ BASSIOUNI, *supra* note 21, at 55-94.

¹⁷⁵ *Id.* at 324.

¹⁷⁶ ICRC, *supra* note 19, at 19 R. 6; Kleffner, *supra* note 5, at 324.

¹⁷⁷ ICRC, *supra* note 19, at n.35.

¹⁷⁸ Kleffner, *supra* note 5, at 326.

¹⁷⁹ ICRC, *supra* note 19, at 19 R. 5; *see also* Geneva Convention Protocol I, *supra* note 5, art. 50(1).

¹⁸⁰ ICRC, *supra* note 19, at 19 R. 6.

overlaps of the multiple legal and sub-legal regimes applicable to conflicts of a non-international and internal character. Thus, the status of non-state actors engaged in these conflicts remains the same, which may in part explain why these combatants feel that they have no inducement for compliance. This conclusion in no way means that non-state actors would otherwise comply with IHL in view of the asymmetry of forces and the culture of new wars, as discussed below.

5. *The United States' Exceptionalism*

As of September 2001, the George W. Bush administration has taken the position that the "war against terrorism" does not have to be subject to a formal declaration of war as ordinarily required by the Constitution.¹⁸¹ Moreover, President Bush declared that the Geneva Conventions do not apply to the Taliban or other "terrorist" groups, and authorized a policy of torture of detainees by United States government officials.¹⁸² Through this policy of torture, the Bush administration has not only violated its obligations under IHL, as well as under the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹⁸³ but it has also provided an added incentive for non-state actors to take the position that IHL does not apply to them. If a government's claim of legitimacy can override the obligations of IHL, then a non-state actor can make the same claim with the same consequence. This signals the end of the relevance of IHL, which is predicated on the assumption that irrespective of the legitimacy or illegitimacy of any claim by any party to engage in armed conflict, the parties to such a conflict must abide by the neutral rules of armed conflict, which regulates its means and methods. In *Hamdan v. Rumsfeld*, the Supreme Court reversed the United States'

¹⁸¹ U.S. CONST. art. VIII, § 8, cl. 11; War Powers Resolution, 50 U.S.C. § 1541 (2000).

¹⁸² Bassiouni, *supra* note 111; *see also* Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001); Memorandum from President George W. Bush to the Vice President et al., *supra* note 166; Steven W. Becker, "Mirror, Mirror on the Wall . . .": *Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563, 580-92 (2003) (describing President Bush's Military Order in detail and arguing that it is *ultra vires* because it was issued without Congress first formally declaring war); Paust, *supra* note 166, at 325. The Military Order was patterned after a proclamation/military order by President Franklin D. Roosevelt in 1942 concerning the trial by a military commission of Nazi agents. *See* Proclamation No. 2561, 3 C.F.R. 309 (1938-1943); Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 323-24 (2007) (discussing *Ex parte Quirin*, 317 U.S. 1 (1942)). For a collection of the orders and directives, *see* THE TORTURE PAPERS, *supra* note 111; Newton, *supra* note 166, at 78. For a critical appraisal of the Bush Administration's orders in this context, *see* PAUST, *supra* note 111; Bassiouni, *supra* note 111.

¹⁸³ Convention Against Torture, *supra* note 5.

position, holding that the Uniform Code of Military Justice (UCMJ) required the application of Common Article 3 to all combatants.¹⁸⁴ Common Article 3's prohibition on the "passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" was determined by the Supreme Court to be required by Section 821 of the UCMJ.¹⁸⁵

As of 2004, judicial decisions and actions have evidenced a gradual trend tending to curtail the administration's policies and practices that violate IHL and CAT. Regrettably, however, even if this trend manages to entirely overturn prior practices, some of which are still ongoing, the United States will have lost its position of moral rectitude in the eyes of the international community.¹⁸⁶

IV. THE CULTURE OF WAR IN NON-INTERNATIONAL AND PURELY INTERNAL CONFLICTS: ITS METHODS AND MEANS, AND ITS IMPACT ON COMPLIANCE AND NON-COMPLIANCE WITH IHL

A. THE NEW CULTURE OF WAR

A new culture of war which emerged after World War II resulted in greater non-compliance with the laws of armed conflict. The reasons for that outcome derived in part from the absence of effective conflict resolution mechanisms, the asymmetry of military power between state and non-state actors and also because legal norms are premised on certain assumptions about the methods and means of warfare in existence at the time that the norms were formulated, namely: that conflicts are between regularly constituted armed forces that share mutuality of interests. However, as the methods and means of war have radically changed in recent years, it is difficult to maintain that the same expectations of compliance that existed heretofore between regularly constituted armed forces are still valid, as between armed forces and non-state actors.¹⁸⁷ Non-

¹⁸⁴ 548 U.S. 557, 571-84 (2006).

¹⁸⁵ *Id.* at 628-29 (citing Common Article 3 of the Geneva Conventions).

¹⁸⁶ See Bassiouni, *supra* note 111.

¹⁸⁷ John Keegan's classic book, *The Face of Battle*, began the study of modern wars and the culture of war since World War II. JOHN KEEGAN, *THE FACE OF BATTLE* (1976). It was followed by his remarkable work, *A History of Warfare*, in which the author contradicts the heretofore dominant view of von Clausewitz that "war is the continuation of diplomacy by other means." JOHN KEEGAN, *A HISTORY OF WARFARE* 3 (1993); CARL VON CLAUSEWITZ, *1 ON WAR* 22, 119 (1982); see also STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 161-214 (2005); MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* 33-42 (1991) (discussing the "Trinitarian War" concept developed by von Clausewitz).

state actor groups tend to fight in accordance with their own opportunistic rules.¹⁸⁸

The first generation of modern warfare can be said to have its genesis in the Napoleonic Wars of 1803-1815; the second generation developed in the First World War; and the third generation in the Second World War. The fourth generation of warfare, arising after World War II, involves loose networks that become more powerful and resilient through information technology,¹⁸⁹ and does not aim at defeating the enemy's forces but "directly attacks the minds of the enemy-decision makers to destroy the enemy's political will."¹⁹⁰

Today's conflicts are seen as evolutions of the "irregular warfare" of Mao Tse Tung (Zedong)'s "protracted war" in China, the Spanish guerrilla attacks against Napoleon in 1812-1813, America's revolutionary war of independence against Britain, and others. However, modern versions of this "irregular warfare" has had significant consequences: the British were driven out of Palestine, the French from Algeria, the Americans from Vietnam, the Russians from Afghanistan, and the Israelis from Lebanon.¹⁹¹ The lesson of failed counter-insurgency efforts by state actors is that "one

Keegan asserts that war "is always an expression of culture." KEEGAN, A HISTORY OF WARFARE, *supra*. Keegan further expands on the iconoclastic view of Victor Davis Hanson in *The Western Way of War: Infantry Battle in Classical Greece* and other works. See John Keegan, *Foreword to* VICTOR DAVIS HANSON, *THE WESTERN WAY OF WAR: INFANTRY BATTLE IN CLASSICAL GREECE* (1989); see also VICTOR DAVIS HANSON, *CARNAGE AND CULTURE: LANDMARK BATTLES IN THE RISE OF WESTERN POWER* (2001); DAVID KENNEDY, *OF WAR AND LAW* (2006). Conversely, John A. Lynn in *Battle: A History of Combat and Culture* shows how culture, irrespective of values, laws, and humanitarian concepts, is a dominant factor in war. JOHN A. LYNN, *BATTLE: A HISTORY OF COMBAT AND CULTURE* (2003); BEST, *HUMANITY IN WARFARE*, *supra* note 10; BEST, *WAR AND LAW SINCE 1945*, *supra* note 10.

¹⁸⁸ *Brains, Not Bullets*, *ECONOMIST*, Oct. 27, 2007, at 15, available at http://www.economist.com/opinion/displaystory.cfm?story_id=10024437. Nearly 2,000 years ago, Jewish militants, called Zealots, revolted against the Romans in Palestine. Bassiouni, *Legal Controls of International Terrorism*, *supra* note 3, at 215; M. Cherif Bassiouni, *Forward: Assessing "Terrorism" in the New Millennium*, 12 *DEPAUL BUS. L.J.* 1, 1 (2000). The Romans responded by destroying the temple in Jerusalem and taking the treasure in it. Bassiouni, *Legal Controls of International Terrorism*, *supra* note 3, at 216. But these practices are also used by state actors. Great Britain used its air force to easily quell rebellious tribes in Iraq in the 1920s, as well as the Mahdi's rebels in Sudan in the nineteenth century. See generally FERGUS NICOLL, *THE SWORD OF THE PROPHET: THE MAHDI OF SUDAN AND THE DEATH OF GENERAL GORDON* (2004).

¹⁸⁹ *After Smart Weapons, Smart Soldiers*, *THE ECONOMIST*, Oct. 27, 2007, at 33, available at http://www.economist.com/world/international/displaystory.cfm?story_id=10015844 [hereinafter *Smart Weapons*].

¹⁹⁰ *Id.*; see also THOMAS X. HAMMES, *THE SLING AND THE STONE: WAR IN THE 21ST CENTURY* (2004); KENNEDY, *supra* note 187.

¹⁹¹ *Smart Weapons*, *supra* note 189; HAMMES, *supra* note 190.

side can win every battle, yet lose the war.”¹⁹²

Although regularly constituted armies are superior in firepower, technology and mobility, non-state actors’ weapons are “agility, surprise, the support of at least some sections of the population, and above all, time.”¹⁹³ The central objective of guerilla warfare is not destruction of their enemy, but rather the support of the population and the de-legitimizing of state actors. State actors are learning in Afghanistan and Iraq that a comprehensive strategy including political and economic strategies needs to be employed when fighting non-state actors.

The type of military hierarchy that exists in conventional armies is lacking in the force structure of non-state actors engaged in the fourth generation of warfare. Frequently, these combatant forces consist of independent units varying in size, commanded by a leader who is mostly free of hierarchical control. The absence of hierarchical command and control in these conflicts is also dictated by geography, since different units operate in different geographic locations and frequently without contact with other units operating in different areas. These self-contained units living off the land and free of command and control are dominated by the personality of the leader or small group of persons in command of such units. These commanders have life and death powers over their subordinates who may be commanded to commit violations of IHL. Moreover, the subordinates have no expectations that their field commanders will be prosecuted or punished for the crimes they order to be committed. To assume that individual morality will overtake the expectations of harsh punishment and death in the case of disobedience of orders is utopian. Thus, there is every incentive to comply with unlawful orders and almost no incentive to disobey them in order to comply with IHL.

Experience indicates that in regularly constituted armies, discipline achieves a higher level of military performance and enhances states’ military and political goals. It is well settled “war is the continuation of diplomacy through other means,” as stated by von Clausewitz.¹⁹⁴ However,

¹⁹² HAMMES, *supra* note 190; *see also* JOHN NAGL, COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM: LEARNING TO EAT SOUP WITH A KNIFE (2002) (describing the problems of waging war against counterinsurgents). According to Mao, guerrillas must be like fish swimming in the water of the general population; T.E. Lawrence described regular armies as plants—“immobile, firm-rooted, nourished through long stems to the head,” while guerrillas were like a “vapour.” He said a soldier was “helpless without a target, owning only what he sat on, and subjugating only what, by order, he could poke his rifle at.” *Smart Weapons*, *supra* note 189, at 34; MAO TSE-TUNG, ON GUERRILLA WARFARE 93 (Samuel B. Griffith II trans., 1961).

¹⁹³ *Smart Weapons*, *supra* note 189; HAMMES, *supra* note 190; MORAN, *supra* note 84.

¹⁹⁴ CLAUSEWITZ, *supra* note 187.

in the case of conflicts of a non-international and purely internal character, these conflicts are not the continuation of diplomacy, nor are they aimed at achieving a diplomatic goal. Instead, these conflicts are aimed at achieving political power-outcomes. Consequently, the structures of the non-state actor groups that engage in these types of conflicts and use unconventional means and methods of warfare have, for reasons discussed through this article, little or no inducement to comply with IHL. In fact, the opposite is probably more accurate, namely that the more such groups engage in indiscriminate violence or what is more commonly called "terrorism," the more likely it is that they will achieve their desired political results.¹⁹⁵

The gap between the ideal and the real is strikingly evident in conflicts of a non-international and purely internal character, irrespective of whether the protagonists are state or non-state actors. The resort to indiscriminate attacks on protected persons and targets has become a common feature in almost all armed conflicts since the Korean War began in 1951. It has also become the main characteristic of so-called "terrorism" or ideologically motivated violence by non-state actors in the pursuit of power-outcomes. Ideologically motivated violence differs from that traditionally and historically associated with conventional wars between the opposing armed forces of states.¹⁹⁶

The model of the universal combatant in a conventional army, in which discipline and compliance with the law of armed conflicts is part of the ethic and honor code of armies and is enforced by effective command and control, has significantly eroded since the end of World War II. Since then, conflicts have been mostly characterized by the participation of non-state actors as the core combatants, who do not share the ethic that exists as a matter of honor in regularly constituted armed forces, and who are not subject to the discipline of effective command and control.¹⁹⁷ Maybe more significantly, they feel that to abide by IHL would put them at a disadvantage with their state-actors opponents because of the asymmetry of

¹⁹⁵ See *supra* note 3.

¹⁹⁶ Bassiouni, *Legal Controls of International Terrorism*, *supra* note 3, at 84.

¹⁹⁷ It should be noted that the terms *ethic* and *honor* have different philosophical meanings. Probably that which better applies to military structures is the term *professionalism*, which includes a sense of ethic and honor that is more related to the organization itself as opposed to the broader meanings of ethic and honor in legal philosophy. Larry May in his recent book, *War Crimes and Just War*, refers to the notion of honor in his introduction, but fails to make this important distinction. LARRY MAY, *WAR CRIMES AND JUST WAR* intro. (2007). While it is possible to find in military units a shared understanding of certain ethical and moral values, as these may exist in that particular society, it is not usually what is understood by the military honor code of conduct, which varies from army to army and which sometimes includes matters that are contrary to ethics and morality, such as covering up on the illegal acts of one's comrades in arms.

power between the protagonists. This new reality has marginalized the combatant model upon which conventional armies are built, and upon which the assumptions of compliance with IHL are based.¹⁹⁸

Victory in any conflict, but particularly in conflicts of a non-international or purely internal character, means different things depending upon the conflict and the power-outcome goals sought by the protagonists. In non-international conflicts, it could mean any of the following: (1) removing the ruling regime from power (however that regime may be characterized, i.e. foreign colonial regime, settler regime, ethnic dominated regime, or a junta regime); (2) acquiring political or economic concessions from the ruling regime; (3) removing foreign forces stationed in-country with the consent of the ruling regime; (4) impacting on foreign economic interests in-country; (5) impacting on national and foreign policy. All of the above are power-outcomes, obtained through the use of violence, which produces human victimization and negative economic consequences. These conflicts are about winning on the political end even if it means losing on the human end.¹⁹⁹ For the humanist, they are Pyrrhic victories,²⁰⁰ for the political realist, they are all that matters if they achieve the desired political result.²⁰¹

What follows are observations based on a variety of publicly available sources, including the views of experts and this writer's personal experience. To gauge the culture of these new wars, it may be useful to have a standard for purposes of comparison—the North African theater of World War II. The German forces were under the command of Field Marshal Erwin Rommel, an officer in the tradition of the Prussian military system developed by Kaiser Frederick II.²⁰² The Allied forces were commanded by Generals Alexander, Montgomery, and Patton, who were professional military officers brought up in the best British and American military traditions.²⁰³ The opposing forces were professional soldiers, well-

¹⁹⁸ See RUPERT SMITH, *THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD* (2005) (describing, *inter alia*, the changing faces of war—from war among duly constituted combatants to indiscriminate war against the general population).

¹⁹⁹ ZEEV MAOZ, *PARADOXES OF WAR: ON THE ART OF NATIONAL SELF-ENTRAPMENT* 251 (1990) (describing, *inter alia*, the paradox of winning the war and losing the peace).

²⁰⁰ *Id.* at 251 (In 279 B.C.E., Pyrrhus makes the well-known and now popular statement “Another such victory and we are lost.”).

²⁰¹ See generally ROGER D. SPEGELE, *POLITICAL REALISM IN INTERNATIONAL THEORY* (1996); HENRY KISSINGER, *DIPLOMACY* (1995).

²⁰² See generally B.H. LIDDELL HART, *THE ROMMEL PAPERS* (1982).

²⁰³ See generally MARTIN BLUMENSON, 1 *THE PATTON PAPERS, 1885-1940* (1972); MARTIN BLUMENSON, 2 *THE PATTON PAPERS 1940-1945* (1976); ALUN CHALFONT, *MONTGOMERY OF ALAMEIN* (1976); Brian Holden Reid, *Alexander, in CHURCHILL'S GENERALS* (John Keegan ed., 1991).

trained and well-disciplined. They were commanded by officers who had leaders' training, discipline, and shared an unwritten honor code. The opposing forces conducted war in the desert and, with few exceptions, away from cities. Consequently, civilian casualties and destruction of property were at a minimum. Combatants treated each other with chivalry and respect. There was no unnecessary infliction of pain and suffering. POWs were treated humanely and respectfully in accordance with high standards later established by the Third Geneva Convention of 1949. The relatively exemplary conduct of war between these opposing forces has been unparalleled in any similar theater of military operations.²⁰⁴ The culture of war that these combatants reflected was a consequence of the professionalism of the combatants and their sense of tradition, honor, and duty. Discipline was enforced by an effective command structure and the attitudes and values of the senior commanders, particularly the respective Commanders-in-Chief. In the judgment of this writer and based on numerous accounts of the military history of that period, the characteristics mentioned above shaped the strategies and the tactics employed in the field by the combatants.

While this model may be deemed too ideal to be expected as a standard model for all conflicts, it is nonetheless useful to gauge the extent of the departure from the culture and practices of this model in comparison with the culture of new wars of a non-international and internal character and their practices.

Most of the conflicts of a non-international and internal character that have occurred since World War II pitted governmental forces consisting of army, police, and, in some cases, paramilitary forces, either working directly for the government or independently thereof, but pursuing the goals of the government, against a range of opposition groups, often termed rebels, insurgents, or guerrillas.²⁰⁵ A number of publications describe the various conflicts of a non-international character and purely internal conflicts, and the harmful consequences that derived therefrom.²⁰⁶ The

²⁰⁴ See generally GEOFFREY BEST, *CHURCHILL AND WAR* (2006); BEST, *WAR AND LAW SINCE 1945*, *supra* note 10; JOHN KEEGAN, *THE BOOK OF WAR* (1999); KEEGAN, *THE FACE OF BATTLE*, *supra* note 187; JOHN KEEGAN, *THE SECOND WORLD WAR* 320-43 (1989); B.H. LIDDEL HART, *HISTORY OF THE SECOND WORLD WAR* (1999).

²⁰⁵ HOWARD S. LEVIE, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA* 27 (1987); see generally Antonio Cassese, *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30 *INT'L & COMP. L.Q.* 416 (1981).

²⁰⁶ Jennifer L. Balint, *Conflict, Conflict Victimization, and Legal Redress, 1945-1996*, 59 *LAW & CONTEMP. PROBS.* 231 (1996); see also Balint, *supra* note 1; M. Cherif Bassiouni, *The Need for International Accountability*, in III *INTERNATIONAL CRIMINAL LAW*, *supra* note 61, ch. 1.1; MOIR, *supra* note 5, at 1-2; MICHEL VEUTHEY, *GUERRILLA ET DROIT HUMANITAIRE*

composition and mixture of these governmental forces and paramilitary forces varies depending upon the character of the conflict. State-actor forces opposing those waging wars of national liberation have been primarily military and police forces representing the state and seeking to preserve the status quo. In contrast, non-state actors may or may not attain a level of organization and resources that would allow them to be considered as having the characteristics of military units, as they do not have the organizational structure and effective command and control that regularly constituted armies have,²⁰⁷ and they do not have the economic resources and access to sophisticated weapons that state actors have. Moreover, they do not usually have international legitimacy and support by governments in other states.

In almost all of these conflicts, clear dividing do not always separate the opposing forces, whether in the field of battle or in the field of politics. These conflicts have been waged, in large part, in populated areas, including cities and villages, thus leading to a higher number of civilian casualties and the greater likelihood of violations of IHL. Precisely because of the typology described above, which is different from that of conventional wars in which opposing forces are distinguishable from one another and in which the geography of the conflict is characterized by the occupation and control of specific territories, conflicts of a non-international character are characterized by the protagonists' desire to control the civilian population in addition to the territory, but more importantly their strategic political goals determine their tactics. As a result, in many of these conflicts, non-state actors seek to control civilian populations by subjecting them to terror, by displacing them, or by exterminating those that they deem to be enemies or even unfriendly

(2d ed. 1983); Veuthey, *supra* note 86.

²⁰⁷ It should be noted that in the context of non-international and purely internal conflicts, particularly those involving regime changes, the state may create or support paramilitary units, which are designed to operate outside the context of regular military units for purposes of plausible deniability. In other words, if these military groups commit violations of IHL, the state can deny any knowledge or involvement. These groups are usually organized on the same basis as military and police units in that country, and in many cases they involve former military and police personnel. This was the case for example in the paramilitary units in the conflict in El Salvador. See WOOD, *supra* note 133. Israel during its occupation of Southern Lebanon between 1971-1981, which created the Army of Southern Lebanon which was involved in the Sabra and Shatilla massacres, while the Israeli army gave the external protection. KAHANE COMMISSION, REPORT OF THE COMMISSION OF INQUIRY INTO THE EVENTS AT THE REFUGEE CAMPS IN BEIRUT (1983), available at <http://www.mfa.gov.il/MFA/>; Linda Malone, *The Kahan Report, Ariel Sharon and the Sabra-Shatilla Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Populations*, 1985 UTAH L. REV. 373 (1985).

civilians.²⁰⁸ This is usually part of a strategy designed to terrorize, intimidate, and demoralize civilian populations in order to control both territory and the population. This, in turn, prevents the opposing governmental forces from exercising dominion and control over that portion of the state's territory and population. Whenever such territory has important economic resources or a strategic value for the state, territorial control by non-state actors becomes an important goal whose pursuit is seldom constrained by humanitarian considerations. Governmental forces are all too frequently motivated by the same considerations of outcomes leading them to engage in the same tactics as their opponents, committing IHL violations. When the opposing forces engage in these same tactics, the tendency is for the humanitarian harmful consequences to spiral upwards.

Some of these conflicts have been characterized as "ethnic cleansing,"²⁰⁹ as in the conflicts in Bosnia,²¹⁰ certain parts of Croatia, Kosovo, and the Great Lakes of Africa.²¹¹ Other methods of terrorizing civilian populations in order to control territory have been used in such conflicts as Angola,²¹² Mozambique,²¹³ East Timor,²¹⁴ and, to some extent, in El Salvador²¹⁵ and Colombia.²¹⁶ These types of situations inevitably

²⁰⁸ In any conflict, territorial control is included among the goals and is frequently linked to the control of power. Territorial control may be done in conventional military fashion, as has been known throughout the history of war, or whenever there is a significant population mix by means of transferring out of the territory the population group that would not be considered friendly. See KEEGAN, *A HISTORY OF WARFARE*, *supra* note 187. The policy of ethnic cleansing was particularly evident in the conflict in the former Yugoslavia. See BASSIOUNI, *supra* note 122.

²⁰⁹ U.N. Final Report, *supra* note 12; Annexes to U.N. Final Report, *supra* note 12, Annex IV (policy of ethnic cleansing).

²¹⁰ *Id.*

²¹¹ Michael J. Matheson, *United Nations Governance of Post-Conflict Societies: East Timor and Kosovo*, in *POST-CONFLICT JUSTICE*, *supra* note 1, at 523. In Rwanda, it took the form of genocide.

²¹² See generally PHILIPPE LE BILLON, *FUELLING WAR: NATURAL RESOURCES AND ARMED CONFLICTS* (2006); Justin Pearce, *War, Peace and Diamonds in Angola: Popular Perceptions of the Diamond Industry in the Lundas*, 13 *AFR. SECURITY REV.* 51, 51-64 (2004).

²¹³ See generally LANCE S. YOUNG, *MOZAMBIQUE'S SIXTEEN-YEAR BLOODY CIVIL WAR* (1991).

²¹⁴ See generally *EAST TIMOR: LESSONS LEARNED* (David Cohen & Suzannah Linton eds., 2007); Suzannah Linton, *East Timor and Accountability for Serious Crimes*, in *III INTERNATIONAL CRIMINAL LAW*, *supra* note 61, ch. 2.7.

²¹⁵ See generally Paul Seils, *The Limits of Truth Commissions in the Search for Justice: An Analysis of the Truth Commissions of El Salvador and Guatemala and Their Effect in Achieving Post-Conflict Justice*, in *POST-CONFLICT JUSTICE*, *supra* note 1, at 775; WOOD, *supra* note 133.

²¹⁶ See generally STEVEN DUDLEY, *WALKING GHOSTS: MURDER AND GUERRILLA POLITICS IN COLOMBIA* (2004); MARCO PALACIOS, *ENTRE LA LEGITIMIDAD Y LA VIOLENCIA: COLOMBIA*

carry the “war” indiscriminately to the civilians, causing large scale victimization.²¹⁷

As stated above, modern warfare has evolved, according to some military experts, through four generations.²¹⁸ Unlike prior generations, the fourth generation of warfare is not intended to achieve battlefield victory, occupation of territory, or destruction of the enemy’s forces. Instead it is directed at achieving internal power-outcomes, including regime-change, altering domestic and foreign policies and achieving socio-political transformation. Fourth generation warfare relies essentially on methods and means designed to maximize the effectiveness of the relatively weak military and economic power of the non-state actors and to drain the resources of state actors by protracting the conflict.²¹⁹

Unlike conventional wars, fourth-generation wars are not strictly limited to the national context and rely a broader network of support, based on political, economic, social, military, or public relations factors, to carry out their overall strategy. This means that external spill-over effects occur. These networks available internally and externally make use of the state’s need for domestic political support which, as experience shows, is usually limited in duration. Thus, the strategy of the fourth generation of warfare is to turn factors that would normally disfavor non-state actors into factors that disfavor state actors, and to advance intended power-outcome goals by whatever means available and through whatever alliances can be made. Thus, the distinctions between lawful and unlawful means and methods of warfare have been substantially blurred with respect to combatant groups pursuing legitimate and illegitimate goals, and to those having legitimacy in pursuing their goals and those who do not.²²⁰

1875-1994 (1995); RAFAEL PARDO RUEDA, *LA HISTORIA DE LAS GUERRAS* (2004); BERT RUIZ, *THE COLOMBIAN CIVIL WAR* (2001).

²¹⁷ BASSIOUNI, *supra* note 122.

²¹⁸ HAMMES, *supra* note 190, ch. 1.

²¹⁹ This is evidenced by the long duration of such conflicts in China (1921-1949) and Vietnam (1945-1975); those in the decolonization contexts in Africa, such as Algeria, Angola, and Mozambique; regime change struggles such as the Sandinistas in Nicaragua (1961-1979) and in Africa (the anti-apartheid struggle which went on for over 30 years); and the conflicts in Palestine (1948 to date) and Chechnya (1995 to date) and now Afghanistan (2002 to date) and Iraq (2003 to date), to name only a few. Thus, these types of warfare are measured in years, if not decades, because they are sustainable and parties have the knowledge that resoluteness and time is on their side, as evidenced by the historic record of these conflicts. The United States, in its only military defeats in over two hundred years, can be said to have lost a major war in Vietnam and two smaller wars in Lebanon and Somalia at the hands of groups that resorted to fourth generation war methods.

²²⁰ During the conflict in the former Yugoslavia and at present in Iraq that some militias or elements thereof, claiming to act on the basis of a political or religious motive, also engage in for-profit activities commonly associated with organized crime groups. The

Parts of the tactics of fourth generation warfare is for the protagonists to involve the entire society in the conflict and the use of the politics of hate, in order to divide the civil population. As the entire society becomes involved in the conflict, not necessarily by choice but because of the combatants' strategies as described above, the traditional distinction between combatants and non-combatants is blurred. Civilians necessarily become drawn into the conflict, in part as a means of survival and in part because they are compelled by the protagonists to do so. When this occurs, civilians are no longer deemed to be outside the sphere of the conflict, irrespective of the degree of their involvement, which ranges from passive sympathizing to active assistance. Civilians may have a limited role, such as providing material support, concealing combatants, providing supplies, or simply giving information. In exchange for such aid, civilians receive protection and even life-saving supplies, the latter frequently being the principal motivation for civilians to take sides. Combatants often use food as their principal instrument of coercion and control.²²¹ The involvement of entire societies in this type of conflict enhances human harm, particularly with regard to women and children, the most vulnerable elements of society.²²²

In these conflicts, IHL violations have brought great harm to the civilian population at large, including the physical destruction of private and public property, the dislocation of civilian populations, and the destruction and breakup of families.²²³ In some of the more recent conflicts, three particularly heinous practices have emerged: the systematic

Commission of Experts on Yugoslavia Annexes identified eighty-nine paramilitary groups, many of them operating independently, but others operating under the direct or indirect command of the formal military structure. Geneva Convention Protocol I, *supra* note 5, Annex IIIA; on Iraq, see M. Cherif Bassiouni, *America's Iraq Policy*, INT'L LAW NEWS 6 (2006).

²²¹ Blocking humanitarian relief sought to be delivered by United Nations High Commission for Refugees (UNHCR), the ICRC and various non-governmental organizations (NGOs) has been all too frequent, at times necessitating foreign military intervention when combatants deny these organizations the ability to assist refugees. This was one of the reasons that the United States sent troops into Somalia during the Clinton Administration. Thus, food and refugees become not only instruments of control and coercion, but also instruments of war in violation of IHL.

²²² This is evident in almost every conflict of a non-international character that has occurred in the last thirty years, especially in former Yugoslavia (1991-1995), Liberia (1989-1996, 2002-2003), Sierra-Leone (1991-2002), Cambodia (1967-1975), Somalia (2006), and Afghanistan (1979-1989).

²²³ For the overall victimization arising out of these conflicts, see note 1 (discussing the conflicts since World War II). In addition, there are numerous reports by UNHCR with respect to different conflicts and different areas of conflict which have produced victimization. See generally UNHCR, The UN Refugee Agency, www.unhcr.org (last visited Sept. 1, 2008).

rape of women, which occurred in Bosnia, Liberia, Uganda, Sierra Leone, and Darfur;²²⁴ the coerced use of children in combat in Sierra Leone and Uganda; and the horrifying practice of hacking off the limbs of children to prevent their recruitment as combatants by the opposing group.²²⁵

Non-state actor groups engaging in the fourth generation of warfare are unlikely to voluntarily comply with IHL because it is contrary to their overall strategy. Moreover, voluntary compliance cannot exist without mutuality of interest. In fact, the opposite is true since such wars often resort to indiscriminate and terror-inspiring violence, committed intermittently but consistently, and timed in a way to maximize surprise, generate horror, and inspire fear.²²⁶ As to the likelihood of accountability,

²²⁴ U.N. Final Report, *supra* note 12; Annexes to U.N. Final Report, *supra* note 12, Annexes II, IX; see Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 1 (1994); see also *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, U.N. ESCOR, Comm'n on Hum. Rts., 50th Sess., Provisional Agenda Item 6, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998); KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTIONS IN INTERNATIONAL WAR CRIMES TRIBUNALS* (1997); ASIAN CTR. FOR WOMEN'S HUMAN RIGHTS, *COMMON GROUNDS: VIOLENCE AGAINST WOMEN IN WAR AND ARMED CONFLICT SITUATIONS* (Indai Lourdes Sajor ed., 1998); M. Cherif Bassiouni & Marcia McCormick, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia* (IHRLI Occasional Paper No. 1, 1996); Susan Jeanne Toepfer & Bryan Stuart Wells, *The Worldwide Market For Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & L. 83 (1994).

²²⁵ See *Report of the Secretary-General on Children and Armed Conflict, delivered to the Security Council*, U.N. Doc. S/2002/1299 (Nov. 26, 2002); see also GREENBURG RESEARCH, INC., *THE PEOPLE ON WAR REPORT: ICRC WORLDWIDE CONSULTATION ON THE RULE OF WAR 9-10* (ICRC ed., 2000) [hereinafter *PEOPLE ON WAR REPORT*]. Thomas Lubanga, the notorious Lord's Liberation Army Chief is on trial before the ICC for kidnapping and coercing children as soldiers and having them commit heinous crimes, as well as kidnapping girls and offering them as a reward to these child soldiers. See, e.g., JIMMIE BRIGGS, *INNOCENTS LOST: WHEN CHILD SOLDIERS GO TO WAR* (2005); ILENE COHN & GUY S. GOODWIN-GILL, *CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT* (1994).

²²⁶ Part of that tactic feeds into the overall strategy of showing the ineffectiveness or impotence of state actors—government, armed forces, and police—to predict, prevent, protect, and ultimately to suppress and punish. Such a strategy is also designed to push state actors into engaging and unreasonable measures, including curtailing constitutional legal rights, abusing executive power, and establishing a repressive social environment. These measures drain resources from the economy and direct them towards police and military, which places the state on war footing and generally creating a social, political, and economic environment that cannot be tolerated for a long period of time. The more burdensome the cost of a war type environment is to a given society, the more likely the society is to weaken in its resolve to continue the struggle. Thus it becomes more amenable to political concessions to the otherwise much weaker non-state actor belligerent or insurgent groups. In many cases it also means admission of failure and defeat. ROBERT B. ASPREY, *WAR IN THE SHADOWS: THE GUERRILLA IN HISTORY* (1975); J. BOYER BELL, *ON REVOLT: STRATEGIES OF NATIONAL LIBERATION* (1976); WESLEY K. CLARK, *WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT* (2001); RICHARD A. CLARKE, *AGAINST ALL ENEMIES:*

as discussed below, it can hardly be said to have existed until the establishment of the ICTY and ICTR (1994) and the ICC (2002-date of entry into force).

B. THE MILITARY STRUCTURE AND THE STRATEGY OF VIOLENCE BY NON-STATE ACTORS

The methods and means of warfare engaged in by non-state actors in the fourth generation of warfare, irrespective of each group's goals, purposes, and ideology, are determined by their strategy. They focus on the use of indiscriminate violence in order to cause terror within a given population, to inflict indiscriminate harm and damage against society at large or a segment of society, and to show the government's vulnerability and weakness while draining its resources.²²⁷ The inability of government to protect the civilian population and public and private property, as demonstrated by the harm itself, reveals its inability to deal with the violent tactics employed.²²⁸ To overcome this situation, governments frequently engage in the same or similar internationally unlawful uses of force and also commit violations of domestic law. The result is that such tactics discredit governments, causing them to lose credibility and even legitimacy, and that places government at the same moral and legal level as the non-state actors. This outcome is what the strategy of non-state actors seeks to achieve.²²⁹

State actors resorting to conventional war also have power-outcome goals; because they seek legitimacy, or the appearance thereof, they are more likely to comply with IHL or to minimize their violations. Members of regular armies who commit IHL violations usually rationalize their conduct by claims of legitimacy, military necessity,²³⁰ or obedience to

INSIDE AMERICA'S WAR ON TERROR (2004); GUERRILLA STRATEGIES: AN HISTORICAL ANTHOLOGY, FROM THE LONG MARCH TO AFGHANISTAN (Gerard Chalind ed., 1982).

²²⁷ See *infra* notes 187 and 189 (discussing the new wars).

²²⁸ For example, the United States, with all of its might, was unable to prevent the attacks of September 11, 2001, which exposed the vulnerability of American civilians, as well as private and public property, to attack by what President Bush subsequently referred to as a "warring party" when he declared war against Al Qaeda.

²²⁹ This has been evident in so many conflicts that have been referred to as "dirty wars" that Colonial Algeria by the French forces mainly in 1956, in Argentina, Chile, Guatemala, El Salvador, and in so many parts of the world. On a much smaller scale, this is what happened when the Bush Administration did what Vice President Cheney referred to as "going to the dark side" by resorting to torture in Afghanistan, Iraq, and Guantanamo. See Bassiouni, *supra* note 111; see also *supra* note 112. See also MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* (2007).

²³⁰ Armies, however, tend to expand the doctrine of "military necessity" to justify their transgressions of IHL. See CHARLES GUTHRIE & MICHAEL QUINLAN, *JUST WAR—THE JUST WAR TRADITION: ETHICS IN MODERN WARFARE* (2007); Burts M. Carnahan, *Lincoln, Lieber*

superior orders even though they know or should have known that military necessity has its constraints and that obedience to superior order is not a defense to IHL violations, save for when it can be deemed a form of duress.²³¹

Anecdotal data reveals that most combatants, particularly non-state actors, when asked if they consider IHL violations moral, conclude for the most part that they are not.²³² They may in general recognize the illegality of their conduct, but discount it either on the basis of their perceived necessity or because they perceive that their legitimate goals justifies it. They also see illegality as something conditioned upon being caught, and take comfort in the knowledge or belief that their superiors will disregard the violations or cover-up for them. Moreover, individual combatants separate the morality and legality of IHL from their own behavior, reflecting a dichotomy between the abstract recognition of immorality and illegality and the de facto acceptance of such conduct for the reasons stated above.²³³ All of this explains the lack of compliance with IHL by both state and non-state actors.

Following are some telling examples of such wars. In the conflict in the former Yugoslavia (1993-1994), there were eighty-nine paramilitary groups operating at one time alongside six regular armies.²³⁴ Some of these paramilitary groups turned to tactics similar to those of organized crime. They engaged in black market sales of contraband and pillaging as a way of rewarding the volunteer combatants in these units. This was particularly evident in the former Yugoslavia, where one such unit called the "Tigers,"

and the Laws of War: The Origins and Limits of the Principle of Military Necessity, 92 AM. J. INT'L L. 213 (1998); Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CAL. W. INT'L L.J. 177 (2007); E. Jaworski, "Military Necessity" and "Civilian Immunity": *Where is the Balance?*, 2 CHINESE J. INT'L L. 175, 175-206 (2003); Michael A. Newton, *Modern Military Necessity: The Role and Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 877 (2007).

²³¹ See YORAM DINSTEIN, *THE DEFENSE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW* (1965); LESLIE GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976); NICO KEIJZER, *MILITARY OBEDIENCE* (1978); EKKHART MULLER-RAPPARD, *L'ORDRE SUPÉRIEUR MILITAIRE ET LA RESPONSABILITÉ PÉNALE DU SUBORDONNÉ* (1965); Leslie Green, *Superior Orders and Command Responsibility*, 1989 CAN. Y.B. INT'L L. 167.

²³² See, e.g., Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 863 INT'L REV. RED CROSS 491, 491-523 (2006).

²³³ This is mostly based on three rationalizations. The first is that the ends justify the means. The second is that their opponents do the same. The third is that their opponents deserve it. The latter comes close to rationaliation of dehumanizing the enemy, discussed below as the "politics of hate."

²³⁴ U.N. Final Report, *supra* note 12; Annexes to U.N. Final Report, *supra* note 12, Annex III(A).

commanded by “Arkan” (Zjelco Raznatovic), engaged in the worst acts of ethnic cleansing, civilian murder, rape, pillage, and destruction of property.²³⁵ The combatants were encouraged to pillage as a reward for volunteering into this unit.²³⁶ “Arkan” developed a network of black market operations in food as well as fuel that made him very wealthy after the war ended.²³⁷ It is also believed that he used his paramilitary organization for drug trafficking.²³⁸ Thus, such units are more like organized crime operations.

This is also evident in the present conflict in Iraq, where some political parties with affiliated militias have allowed them and other splinter groups to engage in a variety of organized crime related activities.²³⁹

Although the results were similar, a different pattern developed in the internal conflict in Afghanistan, which started with various resistance movements against Russian occupation in 1979. After the Afghani fighters successfully forced the USSR to withdraw in 1989, an internal conflict erupted between warlords leading to Taliban control of the country. From 1989-2002, the warlords and the Taliban engaged in wholesale violations of IHL, IHRL, and ICL. After the American-led invasion of Afghanistan in 2001 and the subsequent overthrow of the Taliban, and the quasi-legitimatization of these warlords by the U.S. as a way of establishing local alliances, some of these groups, warlords, and local commanders have converted into drug lords. Thus, they achieved their transformation to this type of organization.²⁴⁰

C. NON-STATE ACTORS AS STATE SURROGATES

Throughout the history of warfare, states have frequently used either

²³⁵ *Id.* (describing “Arkan”).

²³⁶ *Id.*

²³⁷ *Id.*; CHRISTOPHER S. STEINROD, *HUNTING THE TIGER: THE FAST LIFE AND VIOLENT DEATH OF THE BALKANS MOST DANGEROUS MAN* (2007).

²³⁸ STEINROD, *supra* note 237.

²³⁹ As president of DePaul University’s International Human Rights Law Institute and as President of the International Institute of Higher Studies in Criminal Sciences, I oversaw judicial training, education, and human rights projects in Iraq from 2003 to date. See M. Cherif Bassiouni, *Post-Conflict Justice in Iraq*, 33 HUM. RTS. 15 (2006); M. Cherif Bassiouni, *In Afghanistan and Iraq: Strengthening the Rule of Law through Judicial Education and Law School Development*, 47 THE JUDGES’ J. 24 (2008).

²⁴⁰ I served as the United Nations’ Independent Expert on Human Rights in Afghanistan and described this situation in two official reports. See U.N. Econ. & Soc. Council [ECOSOC], *Report of the Independent Expert on the Situation of Human Rights in Afghanistan*, ¶ 45, U.N. Doc. E/CN.4/2005/122 (Mar. 11, 2005); U.N. GAOR, *Report of the Independent Expert of the Commission on Rights on the Situation of Human Rights in Afghanistan*, U.N. Doc. A/59/370 (Sept. 21, 2004).

mercenaries or other groups to work for them or on their behalf. After World War II, this became a feature of the Cold War. Both the USSR and the U.S. resorted to a strategy of employing non-state actors, either connected to a given state or not, in order to carry out their respective foreign policy objectives in other countries without assuming the responsibilities arising from the actions of such surrogate groups.²⁴¹

The USSR usually supported national groups engaged in wars of national liberation in decolonization and regime change contexts. The U.S. seldom supported such groups; instead, it usually relied on groups operating as paramilitaries in support of existing regimes, particularly in Latin America.²⁴² This strategy allowed the superpowers to fight their wars through surrogates and on territory other than their own, while the harmful consequences of these wars were borne by others, particularly in terms of human casualties.²⁴³ More significantly, it gave the superpowers what is euphemistically referred to as “plausible deniability,” which means that each side could deny, with some degree of plausibility, responsibility for the conduct of these groups.²⁴⁴ Thus, the superpowers could not only avoid responsibility for their respective actions, but they could also shield their surrogates from responsibility for their violations of IHL, ICL, and IHRL.²⁴⁵ The leaders and field commanders of these groups were protected by the military and political influence of those powers on whose behalf they acted. Consequently, non-state actors who were surrogates of superpowers were operating under de facto impunity for their international crimes. Such an a priori de facto protection eliminates any inducement for compliance with IHL and other international law norms; in fact, it can be argued that such a policy encouraged the commission of higher levels of violations producing even greater harmful results than in other conflicts. As knowledge of these practices and their immunity outcomes became more widely known, whether in the context of a given conflict or as such information became known to participants in other conflicts, the overall levels of IHL non-

²⁴¹ This was evident in a number of conflicts in Africa, such as Angola and Mozambique, where two opposing factions confronted each other. Each was supported respectively by the USSR and the USA. See generally RICHARD J. BLOOMFIELD, REGIONAL CONFLICT AND U.S. POLICY: ANGOLA AND MOZAMBIQUE (1988); HELEN A. KITCHEN, ANGOLA, MOZAMBIQUE, AND THE WEST (1987).

²⁴² See also ANN HIRONAKA, NEVERENDING WARS: THE INTERNATIONAL COMMUNITY, WEAK STATES, AND THE PERPETUATION OF CIVIL WAR (2005); IGNATIEFF, *supra* note 17; SANDS, *supra* note 17. See generally HUTCHAUSEN, *supra* note 17; JOHNSON, *supra* note 17.

²⁴³ BLOOMFIELD, *supra* note 241; KITCHEN, *supra* note 241.

²⁴⁴ See, e.g., the case of the US's covert military action against Nicaragua described below. See also HUTCHAUSEN, *supra* note 17.

²⁴⁵ While the proposition stated above is self-evident, on occasion, responsibility attaches as in the case of the *Nicaragua* case concerning the Contras. See *infra* note 247.

compliance increased as did the overall levels of human harm and economic destruction.²⁴⁶

Only one international judicial case exists concerning such activities by one of the superpowers—the United States. Here, Nicaragua brought an action against the United States before the International Court of Justice (ICJ) for, among other allegations, the latter's support of the "Contras"—a non-state actor group that carried out military operation inside Nicaragua—and for laying mines in Nicaraguan harbors.²⁴⁷ The U.S. armed, trained, equipped, and funded the Contras, whose base of operations was on U.S. military bases in Honduras. The Contras were for all practical purposes surrogates used by the United States in their struggle to unseat the elected Nicaraguan government—the "Sandinistas."

This conflict was part of the worldwide Cold War conflict between the U.S. and the USSR mentioned above.²⁴⁸ Since the question in this case arose under the customary law principles of state responsibility, it involved the issue of agency relationship, could the Contras be deemed U.S. agents?²⁴⁹ The ILC Draft Articles on State Responsibility reflect customary international law and establish that an agency relationship requires a state's exercise of control over the actions of the agent.²⁵⁰ Providing support,

²⁴⁶ As stated above, there is a substantial lack of data on factual questions dealing with compliance and non-compliance; however, the resulting harmful outcomes in these conflicts necessarily speak for the proposition of heightened levels of violations. The attribution of the causes for these violations is based on experiential observations and anecdotal data. The assertion made above is my own deduction.

²⁴⁷ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27); see also Antonio Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649 (2007) (discussing *Nicaragua* after the *Bosnia* decision).

²⁴⁸ This was most noticeable in Angola and Mozambique, but in other African conflicts as well. In Latin America, Che Guevara, the Cuban revolutionist supported by the Castro communist regime, went on to export that revolution to other Latin American countries, recruiting local revolutionists, but also using those from other Latin American countries. See ERNESTO GUEVARA, *CHE GUEVARA ON GLOBAL JUSTICE* (Oceana Press 2002); ERNESTO GUEVARA, *GUERRILLA WARFARE* (1969).

²⁴⁹ See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. 91 (Feb. 26); BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW*, *supra* note 1, at 85-88 (discussing the international criminal responsibility of states). For discussion of responsibility of states for acts of agent that were *ultra vires* or contrary to instructions, see *Ireland v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A), ¶ 159 (1978); Yeager, 17 *Iran-US Claims Tribunal Rpts.* 92, ¶ 43 (1987); Angelo Piero Sereni, *Agency in International Law*, 34 AM. J. INT'L L. 638, 638-60 (1940).

²⁵⁰ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of Its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, p 43, UN Doc A/56/10 (2001); JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002).

aiding and abetting, and having an agency relationship whereby the principal controls the action of the agent, are factors that establish the basis of state responsibility for non-state actors.

In *Nicaragua*, the ICJ weighed the responsibility of the United States, both directly and indirectly, for the injuring and killing of Nicaraguan citizens through its support of the Contras, and for laying mines and other explosives.²⁵¹ Regarding indirect responsibility, the ICJ found that the U.S. legislative and executive branch had funded and designed the strategy and tactics of the Contra forces.²⁵² Although the U.S. claimed that funding was not support, the Court noted that once the Contras received U.S. funding their numbers grew from an initial body of 500 men to over 10,000 at their peak.²⁵³ Although the financing of the ontras was initially undisclosed in the U.S., it “subsequently became the subject of specific legislative provisions and ultimately the stake in a conflict between the legislative and executive organs of the United States.”²⁵⁴

The control that the U.S. had over the Contras through funding, training, providing logistical support, and devising their military tactics was also discussed in the case, as was the United States’ control over the timing of Contra operations.²⁵⁵ The ICJ noted that although not every single operation launched by the Contras was totally devised by the United States:

[I]t is in the Court’s view established that the support of the United States authorities for the activities of the contras took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court finds it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the contras by the United States [T]he financial support given by the Government of the United States to the military and paramilitary activities of the contras in Nicaragua is a fully established fact. The legislative and executive bodies of the respondent State have moreover . . . openly admitted the nature, volume and frequency of this support [T]he Court holds it established that the United States authorities largely

²⁵¹ *Nicaragua*, 1986 I.C.J. ¶ 76 (discussing the mines), ¶ 81 (discussing CIA planted explosions and other attacks), ¶ 87 (discussing overflights on Nicaraguan territory), ¶ 92 (discussing joint military maneuvers with Honduras).

²⁵² *Id.* ¶¶ 102-05. The ICJ’s judgment followed Article 8 of the ILC Draft Articles on State Responsibility, which according to the court reflected customary international law. *Id.* ¶ 398. Article 8 requires “instructions,” “directions,” or “under the control of the state” in order to have conduct attributed to a state. *Id.*

²⁵³ *Id.* ¶ 94.

²⁵⁴ *Id.* ¶ 95. The initial funds went to the CIA for “covert” actions. *Id.* ¶¶ 96, 99.

²⁵⁵ *Id.* ¶¶ 102-05.

financed, trained, equipped, armed and organized the FDN.²⁵⁶

Although the Court found that the acts of the Contras were not directly attributable to the U.S.,²⁵⁷ it found that the U.S. breached its obligations under customary international law not to intervene in the affairs of another state by training, arming, equipping, financing, and supplying the contra forces, or otherwise encouraging, supporting, and aiding military and paramilitary activities in and against Nicaragua.²⁵⁸

The significance of the case is based on the assumption that it established a sufficient deterrent to states against using non-state actors as surrogates. After *Nicaragua*, states using surrogates could no longer easily claim “plausible deniability” in order to avoid responsibility for the surrogate actors.²⁵⁹

D. FINANCING, FUNDING, AND ARMING OF NON-STATE ACTORS

The military and civilian structure of non-state actors depends on their funding and access to supplies. This includes both money and weapons, which come from both foreign and domestic sources.²⁶⁰ One of the ways these groups finance their operation is through control of certain natural resources in the areas under their power. An early example of such financing occurred in the 1960s in the Congo where one faction sought to control the region of Katanga, rich with precious stones.²⁶¹ It was also evident in the conflicts in Liberia and Sierra Leone with respect to the control of diamond mines, whose product was then used to finance the rebels’ war.²⁶² The diamonds were smuggled abroad and sold to legitimate

²⁵⁶ *Id.* ¶¶ 106-08.

²⁵⁷ *Id.* ¶¶ 114-16.

²⁵⁸ *Id.* ¶ 292.

²⁵⁹ In *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, ¶ 145 (July 15, 1999), the ICTY decided that the standard of “overall control” goes beyond financing and equipping of such forces and involves also participation in the planning and supervision of military operations); *see also* *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement, ¶¶ 407-08, 421, 511 (Sept. 27, 2006) (acquitting the defendant because of no effective control); *Prosecutor v. Delalic, Mucic, Delic & Landzo*, Case No. IT-96-21-A, Judgement, ¶¶ 268, 293, 313-14, 1047 (Feb. 20, 2001) (affirming acquittals of Delalic and Delic; confirming conviction of Mucic of sexual assaults through a command responsibility theory). But the ICJ in the case of *Bosnia v. Serbia* found that Serbia had some responsibility for Genocide in Srebrenica in 1995, yet it managed to avoid condemning Serbia, and failed to hold it liable to damages. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 91 (Feb. 26).

²⁶⁰ Bassiouni, *Legal Controls of International Terrorism*, *supra* note 3, at 86.

²⁶¹ *See generally* EDGAR O’BALLANCE, *THE CONGO-ZAIRE EXPERIENCE, 1960-98* (2000); THOMAS TURNER, *THE CONGO WARS: CONFLICT, MYTH AND REALITY* (2007).

²⁶² CAMPBELL, *supra* note 13. There has been a meager effort after the terrible tragedies

businesses in the West, and the proceeds were then laundered through western banks.²⁶³ A number of conflicts exist where combatants finance their operations from income generated either by directly trading in drugs or by providing protection to drug traffickers, as in Columbia but also in as the case of the PKP in the Kurdish areas of Turkey, and that of the Afghan warlords.²⁶⁴ Although terrorism financing is proscribed,²⁶⁵ it does not appear that these efforts have had any impact on curtailing terrorism in various parts of the world.²⁶⁶

In addition to using diamonds to finance, small weapons have flooded the world market, are easily available on the black market, and in many instances have been made available by interested or complicit governments.²⁶⁷ More significantly, small weapons are cheap. International embargos and limits on the sale of such weapons have proven ineffective.²⁶⁸ It is well-established that illicit arms traders have made a large quantity of small arms available throughout Africa, which has not only contributed to the number of conflicts, but more significantly, to the

in Sierra Leone and Liberia, in what is called the Kimberley Process, for the diamond industry to improve its human rights record. However, this process is far too ineffective, relying on voluntary self-regulation. Kimberley Process Homepage, <http://www.kimberleyprocess.com> (last visited Sept. 8, 2008).

²⁶³ For anti-laundering measures, see PAUL ALLAN SCHOTT, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM (International Monetary Fund 2003); Dimitri Vlassis, *Challenges in the Development of International Criminal Law: The Negotiations of the United Nations Convention Against Transnational Organized Crime and the United Nations Convention Against Corruption*, in I INTERNATIONAL CRIMINAL LAW, *supra* note 2, ch. 7.2; Andreas Schloenhardt, *Transnational Organized Crime*, in *id.* ch. 7.3.

²⁶⁴ UNODC issues an annual report on international drug trafficking as does the U.S. The UNODC World Drug Reports are available at <http://www.unodc.org/unodc/en/data-and-analysis/WDR.html> (last visited Sept. 1, 2008). The U.S. International Narcotics Control Strategy Reports are available at <http://www.state.gov/p/inl/rls> (last visited Sept. 1, 2008).

²⁶⁵ S.C. Res. 1368, *supra* note 13; S.C. Res. 1373, *supra* note 13; G.A. Res. 54/109, U.N. Doc. A/RES/54/109 (Feb. 25, 2000); INT'L MONETARY FUND, SUPPRESSING THE FINANCING OF TERRORISM: A HANDBOOK FOR LEGISLATIVE DRAFTING (2003); Bantekas, *supra* note 13, at 315-33; Dawla, *supra* note 13.

²⁶⁶ *Supra* note 162.

²⁶⁷ United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, June 26–July 7, 2006, *Report of the United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, U.N. Doc. A/CONF.192/2006/RC/9 (July 12, 2006); CLIVE GIFFORD, THE ARMS TRADE (2004).

²⁶⁸ Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/55/383/Add.2 (July 2, 2001). It has only been ratified by sixty-seven countries.

large number of victims. Yet paradoxically, the withholding of arms from a given group that is being attacked either by another group or by governmental forces tends to enhance victimization.²⁶⁹ Weapons trafficking, even though illicit, is in part made possible by financing obtained by money laundering.

This new category of non-state actors who are not directly involved in combat, but whose role is indispensable to the sustenance of conflict escape has developed in connection with financial operations, money laundering, and arms trafficking. This category of participants also involves lawyers, accountants, financial advisers, bankers and others, who when they engage in the same or similar activities in the domestic context are deemed “white collar” criminals. International criminal law and domestic criminal law has not proven effective with respect to such persons who should be deemed part of the non-state actor groups that they support, aid and abet by their actions.²⁷⁰ If they were deemed responsible for the conduct of others, they would be accountable under IHL. But, so far, they are not, even though without them certain violent conflicts would not exist or would not last as they do. Funding and weapons is what makes conflicts last and produce harm.

E. THE POLITICS OF HATE

Hate has always been a factor in the incitation of violence. Most frequently, however, hatred is couched in religious or racist terms. History reveals how often wars have occurred in the name of religion.²⁷¹ Veiled and euphemistic motivation for violence, ranges from the outright hate

²⁶⁹ This occurred as a result of an arms embargo on Bosnia during the conflict in the former Yugoslavia, which left Bosnia in an imbalanced relationship with Serbia and in turn to the higher victimization of Bosnians by Serbs. This is also evident in the conflict in Darfur where one group, the Janjaweed, supported by the government, had more access to weapons than the groups they attacked, thus leading to the significant victimization suffered by civilians including harm suffered as refugees in a desert area to which humanitarian organizations had limited access. S.C Res. 1779, U.N. Doc. S/RES/1779 (Sept. 28, 2007) (extending mandate of expert panel monitoring weapons ban on Darfur); S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005); Human Rights Watch, *Darfur Documents Confirm Government Policy of Militia Support*, Briefing Paper, July 20, 2004; Julie Flint & Alex de Waal, *Ideology in Arms: The Emergence of Darfur's Janjaweed*, DAILY STAR, Aug. 29, 2005.

²⁷⁰ Since they are not encompassed within the meaning of Common Article 3 and Geneva Convention Protocol II, they are not covered by IHL.

²⁷¹ Suffice it to recall the Crusades between Christians and Muslims, the Hundred Years' War between Protestants and Catholics, and many others throughout history. For a contemporary assessment, see CHRIS HEDGES, *WAR IS A FORCE THAT GIVES US MEANING* (2003).

propaganda of the Nazis²⁷² to the assumptions underlying anticipated civilizational clashes.²⁷³ The former was also glaringly evident in the Rwandan genocide of the Hutus against the Tutsi.²⁷⁴ Whatever its basis, hate is a significant factor in almost all conflicts and is an almost indispensable component of the process of dehumanization, which makes acts of violence against persons easier to commit. Experience indicates that the lower the level of education in a given society, the higher the prospects of the dissemination of hatred and the dehumanization of the targeted enemy.²⁷⁵ This leads to a higher level of non-compliance with IHL, which presupposes the recognition of the enemy's human rights or at least the

²⁷² Racial hatred was made the most obvious in connection with the Holocaust. See EUGENE DAVIDSON, *THE TRIAL OF THE GERMANS* 525 (1966) (describing the case of Hans Fritzsche, who was tried before the IMT at Nuremberg instead of Joseph Goebbels, who killed himself in the bunker with Hitler). The chapter is appropriately named "The Propagandist." Joseph Goebbels, Fritzsche, and his collaborators were putting into action Hitler's *Mein Kampf*, which meant that they devised and propagated a policy of hatred toward Jews and other people they considered inferior. It was the task of the SS to carry out the policy of exterminating such persons, as was made evident in the Eichmann case described in GIDEON HAUSNER, *JUSTICE IN JERUSALEM* (1966). The policy of hatred was a precursor to the Holocaust as well as to other crimes against different groups of people. This is also evident in so many other conflicts.

²⁷³ See SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996); ROBERT JAY LIFTON, *SUPERPOWER SYNDROME: AMERICA'S APOCALYPTIC CONFRONTATION WITH THE WORLD* (2003).

²⁷⁴ ROBERT GELLATELY & BEN KIERNAN, *THE SPECTER OF GENOCIDE* (2003); MANUS I. MIDLARSKY, *THE KILLING TRAP: GENOCIDE IN THE TWENTIETH CENTURY* (2005); SAMANTHA POWER, *A PROBLEM FROM HELL* (2003) (describing the conflict in Rwanda). The entire jurisprudence of the ICTR addresses issues of Hutu genocide of the Tutsi including the use of hate propaganda. See, e.g., *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgement (Sept. 4, 1998); *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgement and Sentence (Sept. 4, 1998).

²⁷⁵ It should be noted that this is not universally true. There are societies with a low level of formal education that have not exhibited hatred toward a targeted enemy, but that may be due to the fact that such groups may exist in areas where there are no other groups of an ethnic or religious identity. As a general example, the Tibetan population may have a lower level of education than those of Western European societies, but because of their religious beliefs they have a much higher level of tolerance than their counterparts in those societies that have higher levels of formal education. Tolerance cannot be equated to formal education. However, it seems that in the context of African conflicts, involving different ethnic and religious groups, there is a correlation to education. For example, in the Nigerian conflict, pitting the government's majority of Muslim tribes against the Christian Ibo tribes, an estimated one million Ibos were killed by government forces and by their supporters in the local population. See generally OSITA AGBU, *ETHNIC MILITIAS AND THE THREAT TO DEMOCRACY IN POST-TRANSITION NIGERIA* (2004). The same can be said of the war of independence of Bangladesh, once a part of Pakistan, where East Pakistanis, who are Muslims, killed close to one million West Pakistanis, who are also Muslims. Ved P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321, 336 (1972).

recognition of the enemy's humanity. The process of dehumanization regardless of its source seems to have been a much greater driving force and motivating factor in conflicts of a non-international character and in purely internal conflicts involving non-state actors than any other factor.

The politics of hate lead the protagonists to rely on ethnic, religious, and social distinctions to fan the fires of hatred which, in turn, increases the levels of indiscriminate violence against protected civilian populations under IHL, IHRL, and ICL (subject to the reservations made earlier about the applicability of certain ICL crimes to non-state actors and IHRL). In these contexts, governments have sometimes utilized the technique of public dissemination of hatred as a way of spurring spontaneous reactions by the general public as was the case with the Nazi's hate propaganda against the Jews²⁷⁶ and the Hutus against the Tutsi.²⁷⁷

The incitation to hatred invariably escalates violence, engendering circularity and reciprocal self-justification. Acts of revenge perceived as justifiable reprisals fuels the escalation of retaliatory violence.²⁷⁸ These actions include IHL, IHRL, and ICL violations which the protagonists may not morally or legally justify per se, but which they rationalize through the distortion in perception caused by the propaganda of hate.²⁷⁹ Because many

²⁷⁶ These techniques were developed by Joseph Goebels, a defendant at the Nuremberg Trials of War Criminals. DAVIDSON, *supra* note 271, at 525-53.

²⁷⁷ See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14) (arrest warrant issued by Belgium for Congolese foreign minister based on incitement to genocide). In Cambodia, the propaganda was framed in ideological terms. See BEN KIERNAN, *THE POL POT REGIME* (2002) *see also* Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR-99-52-T, Sentence (Dec. 3, 2003).

²⁷⁸ Although this is anecdotal, I experienced this firsthand in April 1993 in a Serb-controlled area outside of Sarajevo. At the time that I chaired the Security Council Commission to investigate violations of international humanitarian law in the former Yugoslavia, I met with a group of Serb militias who were shelling the city of Sarajevo. For a record of the shelling of Sarajevo, see U.N. Final Report, *supra* note 12; Annexes to U.N. Final Report, *supra* note 12. Their leader told me that "the Turks" who were in Sarajevo, meaning Bosnian Muslims (who are not Turks, nor descendants of the Turks, with few exceptions) deserved to be killed because of what they did to the Orthodox Serbs when the Turkish Ottoman Empire invaded the Kingdom of Serbia, which culminated in the Battle of Kosovo in 1389. To my utter dismay, the entire Serb militia group consisting of eleven men had compressed time, and what had happened in 1389 was perceived as if it had happened yesterday. There are many similar incidents or historical grievances that are stored in social psychology and conveyed from one generation to another, until such time as another conflict occurs bringing together in an indiscernible fashion not only historical claims but also terrifying legends and lore, fueling whatever conflict is ongoing.

²⁷⁹ In social psychology, dehumanizing one's enemy makes it easier to inflict upon him or her inhuman or degrading treatment. Almost every experience in history involving mass killings rising to the level of genocide or crimes against humanity has involved a campaign of hatred and dehumanization, if not sub-humanization, of the identified enemy. In fact, even the ordinary training of regular armed forces involves a dimension of it, particularly

of these combatants are young and uneducated, the impact of hate propaganda is more effective in altering ordinary inhibitions against violence, and thus intensifies aberrant human behavior.²⁸⁰ The history of war since antiquity is a testimony to this phenomenon whose biblical origins are in Cain's slaying of Abel.

V. FACTORS ENHANCING AND DETRACTING FROM COMPLIANCE WITH IHL

A. CLAIMS OF LEGITIMACY

In the context of armed conflicts, claims of legitimacy,²⁸¹ however they are characterized, play a role in connection with violations of IHL. At the risk of oversimplification, state actors pretend to have a greater claim to legitimacy than non-state actor insurgents, whether the conflict is characterized as a conflict of a non-international character or a purely internal one.²⁸² States seek to de-legitimize non-state actors' claims while advancing their own claims of legitimacy. In more common terms, protagonists in conflict seek legitimacy by respectively claiming to be the "good guys" fighting the "bad guys." The implication is that the "good guys" may have a greater margin of acceptance for their transgressions than the "bad guys."²⁸³ Thus, even when the "good guys" are on occasion investigated or prosecuted, the outcomes tend toward dismissing the

with respect to bayonet training in the infantry. It is difficult for a human being to stick a bayonet into another human being without either perceiving an overwhelming sense of danger, or by looking at the other person as being somewhat less deserving to be treated as an equal human being.

²⁸⁰ See BEST, *supra* note 10.

²⁸¹ This goes back to the formulation of doctrines of just war in natural law philosophy, which were first developed by St. Augustine of Hippo. See SAINT AUGUSTINE OF HIPPO, *THE CITY OF GOD* (Marcus Dods trans., 2000). These doctrines were elaborated by St. Thomas Aquinas in his *Summa Theologiae*, and by the founder of modern international law, Hugo Grotius. SAINT THOMAS AQUINAS, *SUMMA THEOLOGIAE* (Fathers of the English Dominican Province trans., 1998); HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRE TRES* (Francis Willey Kelsey trans, 1962); see also GUTHRIE, *supra* note 230; MAY, *supra* note 197.

²⁸² To my knowledge, a state has never claimed that its use of force against a non-state actor was illegitimate. In every case in which a state has been involved in a conflict with a non-state actor, it has claimed legitimacy or higher legitimacy. If nothing else, the state claims to have a monopoly on the use of force. When non-state actors challenge that monopoly, the state's declare their use of force as lacking legitimacy. This frequently leads to the state claiming that the non-state actor group's use of force constitutes terrorism, whether that group engages in violations of IHL or not.

²⁸³ Israel always claims that all forms of violence by Palestinians, even when used in accordance with IHL, are terrorism, and that all of its retaliations, even when in violation of IHL, are justified. In bombing impermissible targets in Afghanistan and Iraq, the U.S. claims "collateral damage" of civilians as a justification, and engages in torture under pseudo arguments.

charges or acquittal,²⁸⁴ and when convicted, the penalties are lower in comparison with the penalties meted out for the same crimes to the “bad guys.”²⁸⁵

Presumably if international instruments held out legitimacy as an inducement to compliance with obligations under IHL, the violations would be lessened. This is not presently the case with Common Article 3,²⁸⁶ but more so with the two Protocols.²⁸⁷ Protocol I, which applies to wars of national liberation, characterizes non-state actor combatants in this type of conflict as combatants, which is one of the reasons some states refuse to ratify it, even though Article 4 specifically states that such recognition does not affect the legal status of the parties.²⁸⁸ Protocol II, which applies to other categories of non-state actors in the context of conflicts of a non-international character, emphasizes in Article 3 that none of its provisions shall be interpreted as affecting the sovereignty of a state or justifying interventions whether direct or indirect.²⁸⁹ Some governments, including the United States, refuse to ratify Protocol II because they believe that it gives non-state actors too much legal, and thus political recognition.²⁹⁰ The same problem exists with respect to the less explicit Article 3 of the Third Geneva Convention of 1949, notwithstanding paragraph 4, which was intended to mitigate that reaction.²⁹¹ Governments resist granting insurgents the status of lawful combatants, particularly the status of POWs, in order not to give these groups legal and political legitimacy. They also believe that doing so would encourage insurgencies. Instead, governments who are confronted by insurgent groups frequently label them terrorists, whether the use of force by such insurgent groups is within or outside the

²⁸⁴ For example, in the Abu Ghraib tortures, not a single officer has been convicted. See *supra* note 111.

²⁸⁵ Contrast the absence of any convictions in the United States for the Abu Ghraib and Guantanamo human rights abuses. There have also been no convictions for acts of “extraordinary rendition” whereby tortures is committed by others for and at the request of the United States. See Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE WEST. RES. J. INT’L LAW 309 (2006). A review of the sentences of the ICTR and ICTY also shows that those deemed to be “good guys” got lesser sentences than those who were “bad guys.” See, e.g., 1-12 ANNOTATED LEADING CASES, *supra* note 113.

²⁸⁶ Geneva I, *supra* note 23, art. 3; Geneva II, *supra* note 23, art. 3; Geneva III, *supra* note 23, art. 3; Geneva IV, *supra* note 23, art. 3.

²⁸⁷ Geneva Convention Protocol I, *supra* note 5; Geneva Convention Protocol II, *supra* note 24.

²⁸⁸ Geneva Convention Protocol I, *supra* note 5, art. 4; Bassiouni, *Legal Controls of International Terrorism*, *supra* note 3, at 98.

²⁸⁹ Geneva Convention Protocol II, *supra* note 24, art. 3.

²⁹⁰ *Id.*

²⁹¹ Geneva III, *supra* note 23, art. 3.

scope of its proper use in a conflict of a non-international character.²⁹² Such refusal by governments to give insurgent forces the recognition of lawful combatants and POW status removes the inducement for such groups to comply with IHL norms, assuming that such recognition would indeed constitute an inducement for compliance.²⁹³ This non-recognition gives governments the opportunity to deny such combatants the protections of the Geneva Conventions and to engage in reprisals that violate IHL, without incurring legal consequences.²⁹⁴ By considering insurgent groups terrorists, governments claim only the applicability of domestic legal norms, rather than of IHL, to the commission of crimes within the national context. Such governmental actions, in turn, provide a basis for the insurgent groups to consider themselves free of the limitations imposed by IHL.²⁹⁵ The interactive process of violence leads to escalation and to increased IHL, IHRL, and ICL violations by both sides.²⁹⁶

Occasionally, governments will announce that they intend to act in accordance with the requirements of the Geneva Convention, thus giving it *de facto* application, but not *de jure* recognition. For example, Israel declared that it intended to apply the protections of the Fourth Convention to the Palestinians, but that it is not legally bound by it.²⁹⁷ In addition,

²⁹² For example, the United States considers the Taliban who are fighting in Afghanistan against U.S. occupation to be terrorists, much as it does various militias in Iraq who are fighting U.S. occupation of that country. Similarly, Israel considers Palestinians fighting against Israeli occupation to be terrorists. In these conflicts, the labels are used consistently and indiscriminately, meaning that they are applied by these governments to the insurgents whether these insurgents are acting within or without the bounds of IHL. Without question, suicide bombings directed against civilian targets are war crimes, and if they are widespread and indiscriminate, they also fall within the category of crimes against humanity. Conversely, these governments, when they engage in similar indiscriminate violence against civilian populations, either characterize their conduct as justified under the theory of "military necessity" or argue that the targeting of civilians was not intentional and that it was "collateral damage." These and other examples demonstrate the application of double standards that reflect non-compliance by one set of combatants and in a perverse way invite or enhance non-compliance by non-state actor groups.

²⁹³ It was the position of President George W. Bush in his Executive Order regarding unlawful combatants that such persons were not subject to the Geneva Conventions. This position was overturned by the U.S. Supreme Court in *Hamdan*. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Nevertheless, Congress established Military Commissions for trial of such persons, where there is less than full compliance with the Geneva Conventions with respect to the rights of defense. Moreover, the Bush Administration took the position that U.S. citizens arrested in U.S. territory could be held indefinitely in detention without regard to the U.S. Constitution. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

²⁹⁴ KALSHOVEN, *supra* note 149; KALSHOVEN & ZEGVELD, *supra* note 149.

²⁹⁵ Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations*, *supra* note 3, at 224.

²⁹⁶ *Id.* at 225.

²⁹⁷ It was criticized for that position by the United Nations. See G.A. Res. ES-10/6, U.N.

Israel has refused to apply the Third Convention to the Palestinians, thus depriving Palestinian combatants of POW status.²⁹⁸ The U.S. did the same with respect to Taliban combatants held in Guantanamo Bay until the Supreme Court reversed this position in *Hamdan*.²⁹⁹

The expectation of compliance with IHL is accepted de jure by governmental combatants, consequently, it is expected that they will also comply de facto. As a result, it is assumed that non-compliance will be the exception and that compliance will be the rule. This assumption is strengthened by the obligation accepted by all governments to provide their combatants with appropriate training, which, coupled with the assumption that a disciplined command structure exists and will enforce compliance, enhances overall compliance by all interested parties. These factors cannot be extrapolated to non-state actors engaged in conflicts of a non-international character.

Insurgent groups consider that the factual assumptions underlying the usual norms do not apply when their forces oppose governmental forces, because of the military and economic asymmetry that exists between them.³⁰⁰ The outcome of this reasoning is that insurgent groups can engage in some violations of IHL as a way of redressing the military and economic imbalance.³⁰¹ Insurgent groups draw on the legitimacy of their cause to support that proposition. The perception of legitimacy by insurgent forces leads these groups to rationalize their violations of IHL by confusing the legitimacy of their purpose with the illegitimacy of their means, thus eliminating an element of compliance inducement or at the very least by

Doc. A/RES/ES-10/6 (Feb. 9, 1999) (Illegal Israeli Actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory and the Applicability of the Fourth Geneva Convention). See also BASSIOUNI, DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 86, at 204.

²⁹⁸ Issa Qaraqea, *The Legal Status of Palestinian POWs, Through the lens of International Law*, JERUSALEM TIMES, May 14, 2004, available at <http://www.jerusalem-times.net/article/news/details/detail.asp?id=57&edition=529>.

²⁹⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

³⁰⁰ See generally IVAN ARREGUIN-TOFT, *HOW THE WEAK WIN WARS: A THEORY OF ASYMMETRIC CONFLICT* (2005); ROGER W. BARNETT, *ASYMMETRICAL WARFARE: TODAY'S CHALLENGE TO U.S. MILITARY POWER* (2003); STEVEN METZ & DOUGLAS V. JOHNSON II, *ASYMMETRY AND U.S. MILITARY STRATEGY: DEFINITION, BACKGROUND, AND STRATEGIC CONCEPTS* (Strategic Studies Institute/U.S. Army War College 2001); Ivan Arreguin-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict*, 26 INT'L SECURITY 93, 93-128 (2001); Andrew J.R. Mack, *Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict*, 27 WORLD POLITICS 175, 175-200 (1975); J. Paul Dunne et al., *Managing Asymmetric Conflict*, 58 OXFORD ECON. PAPERS 183, 183-208 (2006).

³⁰¹ Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations*, *supra* note 3, at 20.

removing an inhibiting factor to the commission of such violations.

B. ASYMMETRY OF FORCES

Insurgent groups claim that an asymmetry exists between their forces on the one hand and governmental forces on the other, both in terms of military personnel and military means.³⁰² They argue that such asymmetry does not permit them to comply with the same norms applicable to conflicts of an international character where governmental forces, having more or less equal characteristics, can fight each other with some degree of military equality.³⁰³ The assumption that non-state actors will voluntarily comply with IHL notwithstanding asymmetry and the lack of mutuality of interest they have with state actors makes the likelihood of compliance with IHL less likely.

In the conflicts that have occurred since World War II, the question of asymmetry takes on three distinct, but related, dimensions.³⁰⁴ The first is the economic asymmetry, which gives governmental forces greater advantages both in combat and in non-combat situations. The second is control of the means of communication, either directly or through government-controlled access to information, which places insurgents at a disadvantage. The third is military technology, which gives governments greater advantages than insurgents can ever achieve. As to the latter, insurgents point to the greater destructive capabilities, for example, of aerial bombardment and other sophisticated weapons-systems capable of inflicting damage and harm at distance. The public perception of these means of warfare is that they are more antiseptic, even though they are more destructive and produce more harm to protected persons and targets. The permissibility of the use of such means raises a presumption that their harmful and destructive consequences are also legitimate. The harm and damage to protected persons and targets caused by these weapons are euphemistically called "collateral damage."³⁰⁵ Insurgent groups, however, cannot respond in kind and benefit from the same latitude given to governmental forces. Their weapons are primitive by comparison to those of governmental forces, but the harm they cause to protected persons and

³⁰² Dominic D. McAlea, *Post-Westphalian Crime, in NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 111, 112 (David Wippman & Matthew Evangelista eds., 2005).

³⁰³ Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations, supra* note 3, at 220.

³⁰⁴ *Id.*

³⁰⁵ Yoram Dinstein, *Collateral Damage and the Principle of Proportionality, in NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 111 (David Wippman & Matthew Evangelista eds., 2005).

targets is more visible and less antiseptic.³⁰⁶ Thus, a smart bomb launched from miles away, which kills the same number of civilians as a suicide-bomber, will never be judged by the same standards. Government forces benefit from a presumption of legality, which, due to their ability to control access to information (and thus its dissemination) and to control the decision-making process by which their conduct is assessed, almost always results in a mostly de facto determination of legality.³⁰⁷ Conversely, insurgent forces which commit similar in-kind violations are almost always publicized as criminal and result in a de facto determination of illegality.

Interestingly enough, with respect to political achievement, the more destructive bombardments and similar military responses are, the less likely a positive outcome becomes for government forces. Conversely, the more visible and psychologically shocking the acts of violence committed by insurgents against protected persons and targets, the more likely the positive political outcomes become. The reason for this dichotomy is that the first situation detracts from the legitimacy of the governmental use of force and enhances the legitimacy of the use of force by insurgents, even when in clear violation of existing norms. It also increases recruitment into insurgent forces' ranks and enlarges the base of support they can obtain from the civilian population. One of the consequences of this situation is to increase the level of intolerability within the society that suffers the consequences of these violations, which in due course leads to the search for a political solution. In a perverse way, this asymmetry ultimately tends to work against the political interests of government forces and in favor of non-state actors.

³⁰⁶ Bassiouni, *Legal Controls of International Terrorism*, *supra* note 3, at 85.

³⁰⁷ It is almost always the case that an attack by Israeli armed forces against Palestinian targets is presented in the public discourse as being legitimate both in purpose and in means, while a Palestinian attack upon Israeli targets is almost invariably described in opposite terms. An attack upon military targets is permissible under IHL. Thus, if the Palestinians attack Israeli armed forces, they are legitimate targets. However, Israel always describes such attacks as terrorist attacks. For Israel to recognize the legitimacy of such attacks upon its armed forces would be a major political concession to Palestinian nationalistic claims and would add significantly to the legitimacy of their conflict against Israel as being a war of national liberation. Geneva Convention Protocol I would apply to such a conflict, thus giving the Palestinian combatants the status of POWs, which Israel has denied to date. The analogy in this case extends only with respect to Israeli armed forces. With respect to Israeli attacks on Palestinian targets, the target may be a civilian one, which is not authorized under IHL, or a legitimate military target, but attacked with disproportionate use of force that causes civilian casualties and destruction of private property, which would be prohibited by IHL. In both of these cases, the attack would be a violation of IHL, but is almost always presented as justified. Conversely, when the Palestinians attack a legitimate military target, it is almost always labeled an act of terrorism. Without question, if Palestinians attack a civilian target, that violates IHL. See Bassiouni, *"Terrorism": Reflections on Legitimacy and Policy Considerations*, *supra* note 3.

The premise of IHL with respect to non-international conflicts is that a *quid pro quo* can exist between governmental and insurgent forces. But since the latter receive no recognition as lawful combatants and are denied the status of POWs, they cannot exchange their acceptance of restrictions imposed by IHL on the means and methods of the use of force contained in these norms. The benefit for governmental forces would be that insurgent forces would abide by these norms. But experience indicates that governmental forces and insurgent forces do not live up to these exceptions negating the assumptions mentioned above.³⁰⁸ The clear absence of *quid pro quos* in conflicts of a non-international character or in internal armed conflict enhances the level and intensity of IHL violations by the protagonists in these conflicts.

IHL has chosen to focus on the means and methods of using force, i.e., *jus in bello*, irrespective of the legitimacy of the resort to the use of force.³⁰⁹ As a result, it removes from consideration the issue of legitimacy of resort to the use of force from both sides, restricting only the means and methods they can employ. Insurgent groups claim that such a choice necessarily favors governmental forces because of the military asymmetry that exists between them. Thus, insurgent groups seek to introduce the legitimacy of their cause as a justification for violating the restrictions on means and methods.³¹⁰ The consequences are increased lack of compliance, and thus increased IHL violations.

The issues of legitimacy and asymmetry are as related to one another as the issues of counterpart behavior. These arguments are not new. Niccolo Machiavelli argued in the 1500s that “the ends justify the means,” which is the antithesis of IHL’s premises and values.³¹¹ Robespierre and

³⁰⁸ As discussed throughout this Article, IHL assumes a mutuality of interests between parties to a conflict who share the same characteristics in respect to their military forces, irrespective of their military parity. In other words, there is a *quid pro quo* that enhances voluntary compliance for the protagonists in conflicts of an international character whose combatants are duly constituted armies. This does not exist with respect to conflicts of a non-international or internal character. Experience indicates that quite contrary to the expectation of mutuality of interest, there are divergent interests that push the opposing parties in opposite directions, and therefore reduce incentives to compliance while enhancing non-compliance. Thus, for example, as governments deny insurgent groups the status of combatants and POWs to avoid having such groups’ claims enhance their political legitimacy, they explicitly remove an important factor which is likely to enhance compliance with IHL by these groups if they received such legal protections. In addition, when government forces fail to comply with IHL norms and offer double standards as explanations for their conduct, they also encourage reciprocal non-compliance by non-state actors.

³⁰⁹ *Supra* note 3.

³¹⁰ *Supra* note 3.

³¹¹ See generally NICCOLO MACHIAVELLI, *IL PRINCIPE: LE GRANDE OPERE POLITICHE* (G.M. Anselmi & E. Menetti trans., 1992); KARMA NABULSI, *TRADITIONS OF WAR:*

Lenin, more conscious of legal concepts, rationalized the precept by articulating in *realpolitik* terms that the outcome differentiates between those who become criminals and those who become heroes.³¹² Robespierre reportedly said to the revolutionary masses assembled at a rousing speech he gave to ferret out the monarchists and those of the *ancien regime*: “Victory will decide whether you are rebels or benefactors of humanity.”³¹³ Later, Mao Tse Tung, echoing the same concept, said, “Political power grows out of the barrel of a gun.”³¹⁴ Obviously none of the above believed in Thomas Hobbes’ assertion: “*non auctoritas sed veritas lex facit*.”³¹⁵ The legitimacy argument is far from easy to resolve. On the contrary, it is intractable so long as we do not have, to paraphrase Aristotle, the same laws in Athens and in Rome—laws that apply equally to all.³¹⁶ Double standards enhance non-compliance.

A number of conflicts have demonstrated that when governments grant some recognition to insurgent groups in order to conduct negotiations, the level of violence is reduced. This has been the case in the conflict in El Salvador and, to some extent, in Colombia. Conversely, when the government of Serbia refused to recognize the Kosovo Liberation Army (KLA), this resulted in the escalation of violence in Kosovo, and ultimately led to NATO intervention. Israel refused to recognize the Palestinian Liberation Organization (PLO) as a negotiating counterpart until the 1993 Oslo agreements.³¹⁷ The Popular Movement for the Liberation of Angola (MPLA) in Angola was refused similar recognition, leading to a protraction of that conflict.³¹⁸ The same occurred with the governments of Georgia and Russia in Abkhazia and Chechnya, respectively.³¹⁹ Thus, recognition

OCCUPATION, RESISTANCE AND THE LAW 84-90 (1999).

³¹² See ALBERT PARRY, *TERRORISM: FROM ROBESPIERRE TO ARAFAT* (1976).

³¹³ *Id.*

³¹⁴ MAO ZEDONG, *II PROBLEMS OF WAR AND STRATEGY: SELECTED WORKS* 22 (1938).

³¹⁵ See generally THOMAS HOBBS, *LEVIATHAN: SIVE DE MATERIA, FORMA, ET POESTATE CIVITATIS ECCLESIASTICAE ET CIVILIS* (1841).

³¹⁶ See generally ARISTOTLE, *THE NICOMACHEAN ETHICS* (David Ross trans., Batoche Books 1998).

³¹⁷ Sharm el-Sheikh Memorandum, Isr.-Palestine Liberation Org., Sept. 4, 1999, 38 I.L.M. 1465; Wye River Memorandum, Isr.-Palestine Liberation Org., Oct. 23, 1998, 37 I.L.M. 1251; Protocol Concerning the Redeployment in Hebron, Note for the Record, Isr.-Palestine Liberation Org., Jan. 17, 1997, 36 I.L.M. 650; Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Isr.-Palestine Liberation Org., Sept. 28, 1995, 36 I.L.M. 551; Declaration of Principles on Interim Self-Government Arrangements, Isr.-Palestine Liberation Org., Sept. 13, 1993, 32 I.L.M. 1525; BASSIOUNI, *DOCUMENTS ON THE ARAB-ISRAELI CONFLICT*, *supra* note 86.

³¹⁸ LE BILLON, *supra* note 212; Pearce, *supra* note 212.

³¹⁹ M. LORD KIPANIDZE, *THE ABKHAZIANS AND ABKHAZIA* (1990); I. Maxine Marcus, *Post-Conflict in Chechnya: Faltering Justice*, in *POST-CONFLICT JUSTICE*, *supra* note 1.

serves to reduce violence and enhances the prospects of a political settlement.

IHL is predicated on certain assumptions of mutuality of interest reflected in the quid pro quo described above. In examining the outcome of conflicts of a non-international character, it is clear that either these assumptions are not valid or that there is insufficient inducements to compliance. In part, this may be due to the absence of positive inducement factors but it is also due to the absence of deterrence factors resulting from the lack of enforcement of these norms. Along with mutuality of interest, the following factors are believed to lead to compliance. Their listing below does not represent a hierarchy among them. They are: (1) positive inducement factors, (2) commonality of shared values, (3) enforcement, and (4) the removal of double standards applicable to governmental forces and non-state actors.

C. POSITIVE INDUCEMENT FACTORS

Notwithstanding two significant disincentive factors, the refusal to give POW status to non-state actors, and the resort by governmental forces to reprisals which are in violation of IHL, past experience has demonstrated that certain conditions can create positive inducements for compliance.

One anecdotal example is that of the revolutionary forces during the El Salvador conflict, who minimized their attacks upon civilian populations under the control of governmental forces when they received some political recognition in the course of the peace process.³²⁰ In this situation, the inducement was the peace process, intended to lead to a legitimate place at the negotiating table for the insurgents.³²¹ That inducement ultimately led to the cessation of hostilities and the achievement of peace.³²²

In the Algerian War of Independence, the violence and the violations on both sides raged, particularly when French governmental forces engaged in torture, killing of prisoners whose status as POW was never recognized, extra-judicial executions, and unlawful reprisals against civilians led the insurgents to assassinations and indiscriminate killing of civilians.³²³ This lasted until Charles De Gaulle's French government opened the door for negotiations leading to the independence of Algeria and the withdrawal of

³²⁰ Seils, *supra* note 215.

³²¹ *Id.*

³²² *Id.*; WOOD, *supra* note 133.

³²³ See generally MOHAMMED BEDJAOU, *LAW AND THE ALGERIAN REVOLUTION* (1961); TODD SHEPARD, *THE INVENTION OF DECOLONIZATION: THE ALGERIAN WAR AND THE REMAKING OF FRANCE* (2006); LA BATTAGLIA DI ALGERI (THE BATTLE OF ALGIERS), directed by Gillo Pontecorvo (1966); see also *infra* note 358.

French forces and settlers from that country.³²⁴ These instances seem to indicate that conflict resolution mechanisms are probably the strongest inducement for compliance than any other factor. But internal political processes of this type are few and far between.

There is a current line of thinking that argues in favor of educating insurgent forces in IHL as a means of achieving greater compliance with its norms.³²⁵ These views, however, are predicated on the assumption that insurgent forces have the military discipline necessary to ensure, through superior officers commanding these forces that compliance will be carried out by subordinates. Such an assumption may, however, prove unfounded if the rank and file of these forces does not have the necessary educational and cultural background to understand the scope and application of these norms.

Even if education of insurgents is accomplished, the assumption that it would achieve greater compliance is vitiated by the fact that substantial asymmetry in the military forces eliminates any inducement to compliance unless strongly outweighed by the benefits of legitimacy and recognition, which governments opposing such forces are reluctant to concede. Furthermore, unlawful reprisals by governmental forces and excessive use of force, as well as torture, extra-judicial executions, destruction of public and private property, and other human rights violations have clearly signaled to non-state actors that they have no reason to be bound by norms that the opposing governmental forces violate at will and with impunity.³²⁶ Moreover, non-state actors have no expectations of accountability and thus feel no deterrence.

D. VALUES AND BEHAVIOR

Many conflicts of a non-international character have pitted opponents against one another who claim to adhere to substantially the same values, and yet this has done little to alter their behavior.³²⁷ For example, in the

³²⁴ *Supra* note 323.

³²⁵ The ICRC has for years sought means of educating insurgent groups by indirect means, since governments would usually oppose having formal training as offered to the military personnel of armed forces of the High Contracting Parties to the Geneva Conventions. The ICRC has regular training programs, oversees training programs at the San Remo Institute in Italy, and has regional offices in various parts of the world that conduct regular training sessions for armed forces. None of these, however, include non-state actors. For further information on ICRC military training programs, see International Committee of the Red Cross, Promoting Humanitarian Law to Armed Forces, Police, and Other Weapon Bearers, [http://www.icrc.org/Web/Eng/siteeng0.nsf/html/armed_forces?](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/armed_forces?OpenDocument) OpenDocument (last visited Sept. 6, 2008).

³²⁶ The situation in Palestine/Israel since September 1999 evidences this situation.

³²⁷ For example, the present conflict in Darfur is Muslim versus Muslim; the War of

conflict in the former Yugoslavia, Christian Serb Orthodox and Christian Catholics fought one another, each committing violations against the other, even though they share the same fundamental Christian values. These two groups in their conflicts with the Muslims in Bosnia also committed the same type of violations as did the Bosnian Muslims, even though Christianity and Islam share the same values embodied in IHL's prohibitions.³²⁸ In the conflict between Russian and Chechnyan forces, the Russian governmental forces were well-organized and well-disciplined, and they were commanded by superior officers who are knowledgeable in IHL. Nonetheless, they committed IHL violations against the Chechens.³²⁹ In turn, the Chechens, who adhere to the values of Islam, committed against the Russians violations of these norms which embody their religious values. In the conflict between Israel and Palestine, Judaic and Islamic values coincide with respect to the protection of civilians, and yet both sides have committed violations of these norms.³³⁰

In all sorts of conflicts in which the protagonists adhere to certain religious values, it has been evident nonetheless that their behavior has not conformed to these values. Consequently, there is a vast field to be explored as to why the commonality of values does not result in the adherence to these values in the combatants' behavior. It could well be that this is simply due to the belief by these groups that the higher legitimacy of their cause over that of their opponents justifies their violations. More often, however, each side claims the other's violations as justification of their own. If that assertion is valid, it would lead to the assumption that enhanced compliance by the protagonists would lead to reduced violations.

It may be, however, that the issue of legitimacy perceived by opposing forces has overtaken the values reflected in the restrictions on means and methods. It is therefore necessary to reconsider what may constitute inducement and deterrence leading to behavioral conformity in conflicts of a non-international character and also, for that matter, in the context of conflicts of an international character. Lastly, it should be observed that religious leaders, far from opposing these violations, have either encouraged them or failed to take action to oppose them.³³¹

Independence of Bangladesh was fought by East Pakistan, and both groups involved were Muslims; in Rwanda, Catholic Hutus fought against Catholic Tutsis; and for one hundred years Catholics fought Protestants in Europe. See generally JONATHAN SUMPTION, *THE HUNDRED YEARS WAR* (2001).

³²⁸ Bassiouni, *Introduction to International Humanitarian Law*, *supra* note 22.

³²⁹ Marcus, *supra* note 319.

³³⁰ M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence*, 8 *CHI. J. INT'L L.* 119 (2007).

³³¹ For example, most of the Christian clergy living in the Nazi regime did not oppose the atrocities committed against the Jews and others. See JAMES BENTLEY, MARTIN NIEMOLLER

E. CRIMINOLOGICAL FACTORS—COMPLIANCE/DETERRENCE ISSUES
IN IHL

The basic assumptions underlying national legal prescriptions are substantially absent in the IHL enforcement system. These assumptions include at the national level that: (a) norms reflect prevailing commonly shared social values; (b) norms protect commonly perceived social interests; (c) norms prohibit conduct commonly deemed to constitute a social harm; (d) the prohibited conduct is clearly enunciated in law; (e) promulgation and public dissemination gives notice to potential violators; (f) there is a strong likelihood of apprehension, prosecution, adjudication, and punishment if found guilty; and (g) there is a high probability of receiving a punishment that outweighs the benefits of committing the violations.³³²

Every criminal justice system throughout history has been predicated on all or some of these assumptions.³³³ More importantly, modern criminal justice systems are dedicated to the goal of prevention, even where in part also based on retribution. Similarly, the criminalization of IHL norms seeks to achieve the goal of prevention. This goal cannot be achieved, however, without accountability and the prospects of effective sanctions, which are presumed to have a deterrent effect.³³⁴

Notwithstanding the historic debate in national criminal justice systems about the effectiveness of general deterrence, it is nonetheless recognized by all criminal justice systems in the world as having some legal validity. Prosecutions do not have the limited or exclusive goals of providing retributive punishment, but also include other goals such as rehabilitation and social reintegration.³³⁵ While it is impossible to assess

(1984). In the conflict in Rwanda, the Catholic Hutu clergy not only did not oppose the genocide, but actively participated. In the conflict in the former Yugoslavia, the Serb Orthodox, Croatian Catholic, and Muslim religious leaders did not voice their opposition to a war in which religion and religious hatred was a factor. In the Israeli-Palestinian conflict, there are no religious voices on either side that decry attacks upon innocent civilians. In this, and other conflicts involving protagonists from different religions, or for that matter of the same religion, there are few religious voices that decry human rights violations. It seems as if religious establishments have been co-opted by governments or that they feel compelled to support their coreligionists no matter how immoral or unlawful their conduct may be. For one courageous Israeli secular voice, see SHLOMO BEN-AMI, *SCARS OF WAR, WOUNDS OF PEACE: THE ISRAELI-ARAB TRAGEDY* (2006).

³³² CHARLES P. NEMETH, *CRIMINAL LAW* (2003); GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* (1998).

³³³ The exceptions are when criminal processes are used by dictatorial regimes as a repressive means to establish, maintain, and preserve their power.

³³⁴ H. L. A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968); *supra* note 333.

³³⁵ For example, social integration and rehabilitation as well as considerations of individual responsibility have caused every legal system in the world to distinguish between

the potential deterring effect of prosecutions on non-state actors engaged in conflicts of a non-international character, it is valid to draw from the experiences of national criminal justice systems that: (1) some potentially deterring effect exists in the knowledge that a given conduct is criminalized, (2) it is likely to be prosecuted, and (3) in the event of conviction, there is likely to be some punishment whose effects will outweigh the benefits of committing the prohibited act.

All of these assumptions extend to conflict situations involving non-state actors. In fact, all of these assumptions are operative upon non-state actors within the same territory where such conflict occurs. These same non-state actors are in some way individually deterred by the domestic criminal laws of the state in the ordinary course of their lives, which is evidenced by the fact that they do not commit the same crimes that they do once they join non-state actor groups and engage in conflicts of a non-international or internal character. The common sense conclusion is that they are deterred in their individual action in the former context, but they are not deterred when they become part of a group that commits acts of violence in the second context. Logic would dictate that there are reasons for the breakdown of the deterrent effect of the law. Among these reasons are the following:

(1) Domestic criminal law creates a higher expectation of enforcement than international humanitarian law.

(2) Enforcement at the domestic level by means of law enforcement, prosecutorial, and/or judicial systems has a demonstrable effect even though with varying degrees of efficiency in different national legal

adults and juveniles, thus, treating juveniles in different ways than adults both as to procedure and substance, even when they commit the same crimes as adults. It is noteworthy that this criminological and human rights consideration has been disregarded by the Bush Administration's decision to prosecute an individual under the Military Commissions Act who at the time he was captured in Afghanistan was fifteen years old. His prosecution under the Act is a violation of the United Nations Convention on the Rights of the Child (CRC). G.A. Res. 44/25, art. 37, U.N. Doc. A/RES/44/25 (Nov. 20, 1989). Moreover, a number of human rights instruments, such as the U.N. Minimum Standards for the Treatment of Offenders (1955), prohibit keeping minors in the same places of confinement as adults, a rule also violated in this case. U.N. Doc. A/CONF/611 (1957), Annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. No. 1, U.N. Doc. E/3048, amended by E.S.C. res. 2076, 62 U.N. ESCOR Supp. No. 1, at 35, U.N. Doc. E/5988 (1977). Lastly, the U.N. has adopted the Beijing Rules for the prosecution of juveniles, which also provide the same prohibitions. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33 Annex, U.N. GAOR, 45th Sess., Supp. No. 53, U.N. Doc. A/40/53/Annex (Nov. 29, 1985). The CRC has an optional protocol which prohibits the use of children in armed conflicts. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263 (May 24, 2000), entered into force on 12 February 2002. It provides that those who use children in armed conflict are the ones to be criminalized, not the children.

systems, but no such mechanisms exist in IHL. Thus for example, there is little expectation that an ad hoc tribunal such as the ICTY or ICTR is going to be established for every non-international and internal conflict, and it is highly doubtful that the ICC, which is still in its nascent stage, will be dealing with anything but a few representative perpetrators in leadership positions.

(3) As a result of this prior experience, the expectation of punishment is significantly remote. Even with respect to those who may be deterred by the prospects of being prosecuted before an international ad hoc tribunal or before the ICC, the long duration of these proceedings and their exclusion of the death penalty and long term imprisonment tend to diminish the already limited prospects of deterrence.

(4) More important is the falsity of the assumption that IHL is as well known as domestic criminal law among the general population of states where such conflicts occur. Instead, the general assumption by non-state actors who become part of militias is that they have the same privileges of resorting to acts of violence as do members of the armed forces of the state. Admittedly this begs the question of the lawfulness of the means, however, since regularly constituted armed forces in these types of conflicts frequently engage in the same type of violations of IHL as do non-state actors. One can infer the existence of an emulation factor or the assumption that combatants draw on one another's practices as setting up the parameters of expected practices,

(5) There is a significant counter-detering factor operating against compliance within non-state actor groups namely that commanders in the field have power of life and death over members of their groups and they are almost unaccountable for their conduct.³³⁶

(6) There is a substantial lack of clarity in the legal norms that convey obligations to those who are to abide by the law, particularly with respect to the legal status of combatants in conflicts of a non-international character and those engaged in purely domestic conflicts.³³⁷

³³⁶ See *supra* note 1. As indicated above, in connection with the over 250 conflicts which have occurred between 1948 and 1998, there has been very little evidence of international prosecutions other than those before the ICTY and ICTR. See Bassiouni, *supra* note 139; Roman Boed, *The International Criminal Tribunal for Rwanda*, in POST CONFLICT JUSTICE 487 (M. Cherif Bassiouni ed., 2002); Megan Kaszubinski, *The International Criminal Tribunal for the Former Yugoslavia*, in POST CONFLICT JUSTICE 459 (M. Cherif Bassiouni ed., 2002). There have been few national prosecutions. See *The National Judicial Model*, in POST CONFLICT JUSTICE 487 (M. Cherif Bassiouni ed., 2002). While the ICC has indicted four persons it has not started prosecutions as of this writing.

³³⁷ Combatants covered by Common Article 3 are not given POW status. They are subject to national law and can therefore be charged and punished as common criminals. Protocol II encourages giving such combatants amnesty except for war crimes. See Geneva

(7) Double standards applied by governments and the lack of, or merely selective, enforcement by governments contributes to reciprocal non-compliance by non-state actors.³³⁸

Just as IHL offers no incentives for compliance to non-state actor groups, international criminal law conventions defining prohibited acts of terrorism also offer no incentives for compliance with IHL and ICL.³³⁹ What is likely, however, to produce a greater level of compliance than what has been historically witnessed in these types of conflicts is a higher level of deterrence. However, deterrence is essentially predicated on some reasonable certainty of apprehension, prosecution and punishment if guilt is established. Historic experience with non-international conflicts and purely internal conflicts occurring since the end of World War II reveals that impunity, rather than accountability, has been the norm.³⁴⁰ It should be underscored that criminological research on deterrence, no matter how

Convention Protocol II, *supra* note 24, at 6(5); COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 19, at 1402 (discussing Paragraph 5); KALSHOVEN, *supra* note 107.

³³⁸ Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations*, *supra* note 3, at 220.

³³⁹ See *supra* note 3; see also M. Cherif Bassiouni, *Perspectives on International Terrorism*, in INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937-2001) 1 (M. Cherif Bassiouni ed., 2001); Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Hijacking Convention), Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Hijacking Convention), Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal Protocol), Feb. 24, 1988, 27 I.L.M. 627; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; United Nations Convention on Law of the Sea, Dec. 10, 1982, U.N. Doc. A/Conf.62/122, 21 I.L.M. 1261; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (Diplomats Convention), Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention on the Safety of United Nations and Associated Personnel (U.N. Personnel Convention), G.A. Res. 49/59, U.N. Doc. A/Res/49/59 (Feb. 17, 1995); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; International Convention Against the Taking of Hostages (Hostage-Taking Convention), Dec. 17, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205; Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention), Dec. 15, 1997, U.N. Doc. A/Res/52/164; Convention for the Suppression of the Financing of Terrorism (Terrorism Financing), Dec. 9, 1999, 39 I.L.M. 270; see also INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM (United Nations 2001); INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937-2001), *supra*; 1-2 INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS (1972-2001) (M. Cherif Bassiouni ed., 2002).

³⁴⁰ POST-CONFLICT JUSTICE, *supra* note 1; Bassiouni, *supra* note 206.

tenuous its conclusions, reveals that the absence of any high level of certainty of prosecution and punishment essentially eliminates the deterrent effect.

Common experience also reveals that deterrents are more effective when they come from the top down, rather than from the bottom up. This is the premise of the theory of command responsibility, which exists in international humanitarian law as well as in the military laws of every country of the world. Command responsibility, however, is very difficult to establish, let alone to enforce, within the command structures of non-state actor groups, which as stated above, are sometimes akin to organized crime groups where the leaders have the power of life and death over their men. It may even be said, though this is purely deductive and without any empirical foundation,³⁴¹ that positive command responsibility theories exist in this typology of conflicts and violent interaction.

The exception to the assumptions of impunity which prevail in conflicts of a non-international and purely internal character are the conflicts in the former Yugoslavia and Rwanda,³⁴² which have seen the establishment of international investigation commissions,³⁴³ followed by international tribunals, and some example of mixed model institutions in Sierra Leone, and East Timor.³⁴⁴ In these conflicts, the doctrine of command responsibility has been the basis for prosecution, but that jurisprudence is limited and its general popularized impact is doubtful, owing to limited public dissemination.

Non-military leaders in conflicts of a non-international character and purely internal conflicts have, with few exceptions, historically managed to insulate themselves from criminal responsibility. It is unclear whether this factual outcome is the result of the ability of such leaders to negotiate some

³⁴¹ In fact, there is no empirical research into the methods and structures of the type of warfare described herein, or into what may or may not cause compliance or have an effect on deterrence. Surprising as it may seem, there has been very little criminological research in connection with this type of conflict, which is probably due to the fact that criminologists have not yet expanded their field of research from the problems of domestic violence and deviance to international violence and deviance.

³⁴² 1-12 ANNOTATED LEADING CASES, *supra* note 113.

³⁴³ Commission of Experts on Yugoslavia, Annexes has identified 89 paramilitary groups, many of them operating independently, but others operating under the direct or indirect command of the formal military structure. Annexes to Final U.N. Report, *supra* note 12, Annex IIIA.

³⁴⁴ Bassiouni, *supra* note 139; see also Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551 (2006). There are other examples of mixed tribunals such as Cambodia, but the latter in particular is yet to produce evidence that it is anything more than a limited, if not sham, exercise. See M. Cherif Bassiouni, *Mixed Models of International Criminal Justice*, in III INTERNATIONAL CRIMINAL LAW, *supra* note 61, ch. 2.4.

form of explicit or implicit amnesty or if it is simply the natural outcome of the *realpolitik* that usually characterizes how these conflicts are resolved.³⁴⁵

Lastly, based on general observation and not empirical study, most combatants, including commanders, of non-state actor groups engaged in these types of conflicts are poorly educated, if at all, and have very little if any, knowledge or understanding of IHL, international criminal law, and IHRL. Thus, the assumption that education produces some deterrence is either totally or significantly flawed in the context of these conflicts.

Another factor which should be taken into account in connection with the enhancement of voluntary compliance and with the enhancement of deterrence is the double standard applied to governments and insurgents. It is quite customary for government forces, whether military, police, or paramilitary, to use the same methods and tactics as their opponents, which they label "terrorism," but deem them "justified" when used by their side.

It is generally believed that enforcement is the key factor lacking in fostering compliance with IHL, particularly with respect to the leaders who all too frequently benefit from impunity. If the assumptions mentioned above are valid, then the lack of enforcement is conducive to the lack of compliance.³⁴⁶ In other words, the absence of prosecution and punishment, particularly of the leaders of such conflicts, may well be considered a determining factor leading to non-compliance. But that, too, is not supported by available empirical data, and can only be assumed on the basis of anecdotal data and common sense observation based on experiences in the national criminal justice context.³⁴⁷

³⁴⁵ See *infra* notes 377-86 discussing recent prosecutions of heads of state.

³⁴⁶ See Newton, *supra* note 166, at 75; DRUMBL, *supra* note 229.

³⁴⁷ S.C.Res. 780, ¶ 2, U.N. Doc. S/Res/780 (Oct. 6, 1992). During the last few months of 1993 in the conflict in the former Yugoslavia, at a meeting of ICRC officers in Geneva attended by myself in my capacity as Chairman of the Security Council Commission, it was reported that several Serb prison camp commanders invited ICRC observers to visit their camps in order to show that they were not committing violations with respect to prisoner treatment. As reported by these ICRC officers, prison camp commanders indicated that the existence of the U.N. Security Council Commission established pursuant to Resolution 780 (1992), coupled with the establishment of the ICTY, was the reason they wanted to establish their respective personal records of compliance. This highlights the efficacy of general deterrence. Indeed, as the Commission of Experts observed, the level of violations of the laws and customs of war diminished significantly as of the beginning of 1994. Dr. Yves Sandoz, former legal advisor to the ICRC, attests to my close relationship to the ICRC in *The ICRC and International Humanitarian Law*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW*, *supra* note 5, at 431.

In the Rwanda conflict, the presence of a French military contingent may have been responsible for the reduction of the level of violence, as Tutsi forces had by then overcome Hutu forces. It could be argued that a foreign military presence reduced the level of vengeful violence that the Tutsis could have inflicted on the then near-defeated Hutus. In the Cambodian conflict, the military intervention by Vietnam brought about the elimination of

The underpinnings of enforcement are the likely expectations of prosecution, the relatively swift adjudication, the knowledge of a significant penalty in case of guilt, the equal application of law and its consistent (as opposed to occasional) application, as well as occasional or symbolic application undermining deterrence. This means that enforcement should be applied in the same way to state actors and to non-state actors and also applied to all perpetrators. Without these characters, enforcement becomes selective and loses much of its legitimacy. In fact, it becomes counter-productive if it is used only against non-state actors. Consistency is related to the issue of legitimacy, but is also necessary as a norm-reinforcing mechanism.

Enforcement must be viewed as an accountability mechanism; consequently, it should be part of other accountability mechanisms,³⁴⁸ such as truth and reconciliation and reparations to victims.³⁴⁹ In other words, IHL enforcement should not be viewed solely as post hoc retribution. It should be viewed as a process that ranges from criminal prosecutions during an ongoing conflict, to post-conflict justice modalities, including integration with domestic conflict resolution mechanisms. Enforcement should particularly be developed as an educational system whose goals include retribution, recording history, addressing victims' needs, and providing deterrence.

The means by which retributive and restorative justice are achieved rely the choice of international or national jurisdictions. The former are more costly and cumbersome; the latter are more effective and less costly, but frequently unavailable. National jurisdictional mechanisms have a more direct impact on the culture of violence in a given society, but only when the political will exists to accomplish the goals of justice. More significantly, the inability of these national justice systems to function often leads to a failure to achieve justice. The international community has not sufficiently focused on the means to rebuild national justice systems.³⁵⁰

the Khmer Rouge as a force and the establishment of a new regime, which, from all available information, has not engaged in massive retaliation against the former Khmer Rouge.

³⁴⁸ See Chicago Principles on Post-Conflict Justice (IHRLI 2008); POST-CONFLICT JUSTICE, *supra* note 1.

³⁴⁹ See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 147, U.N. Doc. A/Res/60/147 (Mar. 21, 2006); CHICAGO PRINCIPLES ON POST CONFLICT JUSTICE (Int'l. Hum. Rts. L. Inst. 2008); M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203 (2006).

³⁵⁰ For example, this is the situation in Afghanistan, which I have mentioned in my capacity as U.N. independent expert on the human rights situation in Afghanistan. ECOSOC, Comm. On Human Rights, *Report of the Independent Expert on the Situation of*

The ICC may be used as an international mechanism, but it should be reserved for the more serious violations and punishing the higher-ups who are responsible for these violations. It should not be trivialized with the trials of lesser offenders.

Enforcement at the national level which is believed to be the preferred and most effective option is however problematic. First, because of domestic political factors, second because most states have not incorporated into their law IHL and ICL norms. The first and foremost hurdle is the reluctance of governments to prosecute state actors and this is frequently done by *de jure* or *de facto* amnesty for perpetrators of international crimes committed during an armed conflict.³⁵¹

The political and practical impediments to international and national enforcement mentioned above, raise the question about whether the prospects of enforcement have the potential to deter. Consequently, the expectations that enforcement will achieve the goals of retributive and restorative justice are questionable. The best that can be expected is that an incremental process of enforcement can be developed and that this can gradually strengthen compliance.

Finally, the assumption that government forces are more likely to enforce IHL because of their command structure and system of internal discipline has been proven to be largely incorrect. State actors' violations against insurgents have historically benefited from impunity, even when

Human Rights in Afghanistan, ¶ 45, U.N. Doc. E/CN.4/2005/122 (Mar. 11, 2005) (prepared by M. Cherif Bassiouni); ECOSOC, Comm. On Human Rights, *Report of the Independent Expert of the Commission on Rights on the Situation of Human Rights in Afghanistan, delivered to the General Assembly*, U.N. Doc. G.A. A/59/370 (Sept. 21, 2004) (prepared by M. Cherif Bassiouni). It was further evidenced in the Rome Conference, convening donors to rebuild the justice system, where I was also a rapporteur. See Rome Conference on the Rule of Law in Afghanistan, July 2-3, 2007, <http://www.rolafghanistan.esteri.it/ConferenceRol>; M. Cherif Bassiouni & Daniel Rothenberg, *An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan, Executive Summary for the Rome Conference on the Rule of Law in Afghanistan* (delivered July 2-3, 2007), available at <http://www.rolafghanistan.esteri.it/NR/rdonlyres/F16F08B8-5C24-48C6-B0F0-8D65B4003521/0/Assessmentjusticesectorandruleoflawreform.pdf>; M. Cherif Bassiouni, *The Need for a Comprehensive Strategy for Justice Sector and Rule of Law Reform in Afghanistan*, Report of Rapporteur of the Institutional Strategies Panel, Rome Conference on Rule of Law in Afghanistan (delivered July 2-3, 2007), available at http://www.rolafghanistan.esteri.it/NR/rdonlyres/41AD15EC-F4B0-4445-82B4-E8AD6D79D4D8/0/Final_Report_GL2.pdf.

³⁵¹ In July of 2008, the ICC prosecutor presented to the pre-trial Chamber an indictment to be confirmed against eleven Sudanese public officials, including the sitting head of state, General Omar Al-Bashir. The government of the Sudan, with strong support from other Arab and Muslim state governments, rejected the indictment. Understandably heads of state are not likely to voluntarily or cooperatively submit themselves to international or national prosecution. Their prosecution occurs when they are out of power for one reason or another.

they rise to the level of war crimes and crimes against humanity. For all practical purposes, insurgents are not deemed lawful combatants because of the uncertain status of the law, making them quasi-legitimate prey. This was evident among U.S. armed forces during the Vietnam conflict, where the only two prosecutions were of Lt. William Calley³⁵² and Capt. Ernest Medina.³⁵³ The first was convicted then pardoned, and the second was acquitted. During the 1956 and 1967 wars between Israel and Egypt, ample evidence existed that Israeli forces killed Egyptian POWs and civilians, but Israel refused to investigate, even after some of its own officers admitted in public disclosures that they had committed such crimes.³⁵⁴ Another example is the Sabra and Shatila massacre of Palestinian civilians in refugee camps by Lebanese militias acting under the command of Israeli forces.³⁵⁵ An investigation in Israel, the Kahane Commission, found grounds which would have been sufficient to court martial some of the officers who were involved in this operation, but no prosecution ensued.³⁵⁶ The only principal sanction was to remove Ariel Sharon, then Minister of Defense, from that post, and to deny him and another general officer the right to military command.³⁵⁷

In France, a retired special operations officer, General D'Aussaresses, who admitted in a book to committing torture and extra-judicial executions of Algerian civilians over several years during that war of independence, was not investigated.³⁵⁸ Since that bloody war, during which an estimated one million Algerians were killed, France has never investigated any violations, let alone brought about any prosecutions. The government of

³⁵² *United States v. Calley*, 48 C.M.R. 19 (1973); *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975); see also *THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF THE LAW* (Joseph Goldstein et al. eds., 1976); Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99 (1972).

³⁵³ *Medina v. Resor*, 43 C.M.R. 243 (1971).

³⁵⁴ CRIME AND PUNISHMENT (Egyptian Organization for Human Rights 1996); Ronal Fisher, *Mass Murder in the 1956 War*, MA'ARIV, Aug. 8, 1995; Gabby Bron, *Egyptian POWs Ordered to Dig Graves, Then Shot By Israeli Army*, YEDIOTH AHRONOTH, Aug. 17, 1995 (reporting on the admissions of then-Captain Aryeh Biro, who knowingly killed a number of civilians and a number of POWs in the 1956 war). For an eyewitness account, see DR. AHMED SHAWKI EL-FANGARI, *ISRAEL AS I KNEW IT* (1960) (telling the story of a physician at the Rafah hospital near Gaza, where he witnessed the wholesale killing of injured and sick patients and medical personnel).

³⁵⁵ KAHANE COMMISSION, *supra* note 207; Malone, *supra* note 207.

³⁵⁶ KAHANE COMMISSION, *supra* note 207.

³⁵⁷ *Id.* Subsequently, however, he became Prime Minister and was able to command the Israeli military.

³⁵⁸ Beauge Florence, *L'accablante confession du Général Aussaresses sur la torture en Algérie*, LE MONDE, May 3, 2001; see PAUL AUSSARESSES, *SERVICES SPECIAUX, ALGERIE 1955-1957* (2001); PAUL AUSSARESSES, *THE BATTLE OF THE CASBAH: COUNTER-TERRORISM AND TORTURE* (2005).

Vietnam also has never investigated any of the allegations of torture of U.S. POWs by its forces. Recently, however, Russia has started to investigate and prosecute its military personnel who have committed crimes against Chechnyan combatants and civilians, and since then it is believed that the level of violations has abated in comparison with the earlier stages of that conflict.³⁵⁹ But by then, Russia had defeated the Chechnyans and controlled the territory.

In all the cases where enforcement by governments has not taken place, the reason appears to be political. Thus, it is valid to ask whether the culture of humanitarianism has sufficiently permeated the political culture of governments. Most interestingly, an ICRC survey, the *People on War Report*, revealed that non-state actors and victims lament the lack of enforcement even when they are the ones committing the violations.³⁶⁰ They particularly blame lack of enforcement by governments and by the international community for the high level of non-compliance with IHL.³⁶¹ In addition, they underscore that the impunity given to the leaders is a factor in non-compliance and in the reduction, if not elimination, of deterrence.³⁶² Since leaders believe that they will not incur any consequences for their crimes because they can barter peace for impunity, they are not deterred; in fact, they may even be induced to commit crimes to enhance their chances of success in the arena of political negotiations. But even if there are a higher number of international prosecutions notwithstanding the political difficulties that face these prospects,³⁶³ limited or symbolic prosecutions are not likely to achieve general deterrence.³⁶⁴

F. POLITICAL CONSIDERATIONS: THE POLITICAL QUICK FIX FOR ENDING CONFLICTS

So far, the international community has not adopted the principle of “Responsibility to Protect,” as expressed in U.N. General Assembly Resolution 60/1 of 2005.³⁶⁵ Consequently, the Security Council is

³⁵⁹ Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights for the Council of Europe, on his visits to the Russian Federation, 15 to 30 July 2004, 19 to 29 September 2004 (April 20, 2005), available at <https://wcd.coe.int/ViewDoc.jsp?id=846655>.

³⁶⁰ PEOPLE ON WAR REPORT, *supra* note 225.

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ This is evident in the Darfur situation, which was referred to the ICC by Security Council Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005), a resolution which excluded U.N. funding for the case. Since then the Security Council has withheld support for the ICC.

³⁶⁴ See JOHANNES ANDENEAS, PUNISHMENT AND DETERRENCE (1974); Frank Zimring & Norval Morris, *Deterrence and Corrections*, 381 ANNALS AMER. ACAD. POL. & SOC. SCI. 137, 137-146 (1969).

³⁶⁵ G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 25, 2005); RICHARD H. COOPER &

completely free to decide when to intervene to prevent potential or control ongoing conflicts. The result has been to reduce international interventions and for the U.N. to develop political quick fixes to end conflicts, which provide de facto impunity.³⁶⁶ Moreover, the limited access, or total lack thereof, of international and regional organizations and NGOs during conflicts of a non-international character has prevented the effective monitoring of such conflicts as they unfold. As a result, there is little to no information available that would otherwise permit the international community to exercise some influence on limiting the level of violence and, more particularly, the level of IHL violations either by exerting external influence or by military intervention. Humanitarian organizations such as the ICRC and the UNHCR, as well as humanitarian relief and refugee NGOs, have more access but do not disclose what they witness in order to preserve their access and ability to assist, and thus do little to increase public awareness.

Sanctions are frequently ineffective, and they are mostly unfair since they tend to penalize an entire society whose individuals have very little or no control over their governments. This was particularly true of Iraq, where United Nations sanctions resulted (albeit indirectly) in the deaths of an estimated 500,000 children due to lack of pharmaceuticals and food.³⁶⁷ This type of sanction inevitably reinforces the government's hold on the civilian population and serves to direct blame against those who sponsor the sanctions. Such a government can then get on to yet another round of IHL violations and rationalize it on the basis of the inhumane results of sanctions.

The pursuit of political settlements to end conflicts invariably requires negotiating with the leaders of such conflicts. Such negotiations all too frequently offer amnesty or impunity, de jure or de facto, as an exchange for the cessation of hostilities.³⁶⁸ This was evident in the initial efforts to bring about peace in Sierra Leone,³⁶⁹ as well as in Haiti.³⁷⁰ Amnesty is

JULIETTE VOINOV KOHLER, THE "RESPONSIBILITY TO PROTECT:" THE NEW GLOBAL MORAL COMPACT (2006), available at <http://r2pcoalition.org/media/R2PUS.pdf>.

³⁶⁶ The Secretary-General, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, delivered to the Security Council and the General Assembly*, U.N. Doc. A/55/305, S/2000/809 (Aug. 21, 2000).

³⁶⁷ S.C. Res. 660, U.N. Doc No S/RES/660 (Aug. 2, 1990); S.C. Res. 661, U.N. Doc No S/RES/661 (Aug. 6, 1990); JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW (2008); HANS KOCHLER, THE UNITED NATIONS SANCTIONS POLICY & INTERNATIONAL LAW (1995); Christopher C. Joyner, *United Nations Sanctions After Iraq: Looking Back to See Ahead*, 4 CHI. J. INT'L L. 329 (2003).

³⁶⁸ Bassiouni, *supra* note 206.

³⁶⁹ The Lome Agreements were reversed with the establishment of the Sierra Leone tribunal, which is presently prosecuting Charles Taylor, the former dictator who seized

presently one of the principal demands of the FARC in Colombia. Offers of amnesty were also used as part of the process of ending the internal conflicts in Argentina and Chile, although since then the situation in these two countries has changed significantly. Argentina has had a number of prosecutions and is currently expanding their scope;³⁷¹ Chile had been pursuing criminal action against its former head of state until his recent death.³⁷² In addition, the peace agreement in El Salvador only provided a fig leaf to what was otherwise a de facto amnesty.³⁷³ The same is true with respect to Cambodia, even though the United Nations in cooperation with Cambodia has established a mixed international-national tribunal, which has yet to start its operations and is not likely to prosecute more than five persons.

After the regime change in Uganda (1987-present) and Ethiopia (1974-1991), the respective heads of states, Idi Amin and Mengistu Haile Mariam, have respectively sought refuge in Saudi Arabia and Zimbabwe. Demand for their prosecution has never been made.³⁷⁴ In the conflict in the former Yugoslavia, it was not until Slobodan Milosevic started "ethnic cleansing" in Kosovo that the ICTY indicted him his crimes.³⁷⁵

power in Sierra Leone and who was party to the previous agreement which gave him immunity. The Special Court for the Sierra Leone, www.sc-sl.org/ (last visited Sept. 6, 2008); see also David Crane, *Special Court for Sierra Leone*, in III INTERNATIONAL CRIMINAL LAW, *supra* note 61, ch. 2.4.

³⁷⁰ The then military strongman, General Jean Cedras, was given impunity and asylum in Panama thanks to a deal made by the United States. Rodolfo Mattarollo, *The Transition to Democracy and Institution Building: The Case of Haiti*, in POST-CONFLICT JUSTICE, *supra* note 1, at 763; Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX INT'L L.J. 1 (1996).

³⁷¹ Human Rights Watch, *Argentina: Amnesty Laws Struck Down: Supreme Court's Long-Awaited Ruling Allows Prosecution of 'Dirty War' Crimes* (June 14, 2005), <http://www.hrw.org/english/docs/2005/06/14/argent11119.htm>.

³⁷² *R. v. Bow St. Metropolitan Magistrate and Others, ex parte Pinochet Ugarte* (No. 1), 3 WLR 1456 (H.L.(E.) 1998); Christine M. Chinkin, *United House of Lords: Regina v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 93 AM. J. INT'L L. 703, 704 (1999); see also *R. v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte*, [2000] 1 A.C. 147, 225-29 (H.L. 1999); *R. v. Bow St. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 2 WLR 827 (H.L.(E.) 1999); Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057 (Aug. 2004).

³⁷³ Seils, *supra* note 215.

³⁷⁴ Although Amin passed away, Mengistu's prosecution is still possible.

³⁷⁵ *Prosecutor v. Milosevic*, Case No. IT-99-37, Indictment (May 22, 1999). Speculation was that he had a tacit understanding of impunity as a reward for signing the Dayton Accords. Only after he was no longer in power and after he was surrendered to the ICTY were indictments returned against him for IHL violations in Bosnia and Croatia. *Prosecutor v. Milosevic*, Case No. IT-99-37, Amended Indictment (June 29, 2001). Notwithstanding all the information in the Commission of Experts Final Report and Annexes, *supra* note 12,

The decision-makers who led these conflicts, senior field commanders, and low-level perpetrators of violations of IHL, genocide, and crimes against humanity, have consistently benefited from impunity.³⁷⁶ Recently, however, decision-makers have not been as immune from accountability as they have been in the past. Jean Kambanda, the Hutu former head of state of Rwanda, was found guilty by the ICTR and is serving a 30-year sentence.³⁷⁷ Milosevic died while on trial before the International Criminal Tribunal for the former Yugoslavia (ICTY);³⁷⁸ Radovan Karadzic, the former head of state of the Republica Srpska of Bosnia is presently on trial before the ICTY; Saddam Hussein and other Iraqi leaders were tried before a tribunal in Iraq and executed;³⁷⁹ Charles Taylor, former head of state of Liberia, who sought refuge in Nigeria was ultimately surrendered to the special tribunal in Sierra Leone, which has established a chamber for his

which could easily establish Milosevic's command responsibility, it appears that until such time as the third ICTY prosecutor, Carla del Ponte, issued the first indictment against Milosevic there were no investigatory files opened by her two predecessors that she could find, as she related to me.

³⁷⁶ Bassiouni, *Combating Impunity for International Crimes*, *supra* note 91; M. Cherif Bassiouni, *Proposed Guiding Principles for Combating Impunity for International Crimes*, in *POST-CONFLICT JUSTICE*, *supra* note 1, at 255-82. *But see* Rome Statute, *supra* note 21, art. 27 (with respect to head of state responsibility), which states:

Article 27: Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Id.; *see also* BASSIOUNI, *supra* note 21. For other immunities of government officials, see Arrest Warrant of 11 April 2000 (Dem. Rep. Cong. v. Belg.), [2002] ICJ Rep 3 (14 Feb.); M. Cherif Bassiouni, *Universal Jurisdiction Unrevisited: The International Court of Justice Decision in Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 12 PALES. YEARBOOK INT'L L. 27, 27-48 (2002-2003) [hereinafter *Universal Jurisdiction Unrevisited*].

³⁷⁷ Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgement and Sentence (Sept. 4, 1998); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement (Sept. 4, 1998).

³⁷⁸ Milosevic died in his cell on March 11, 2006. *See* Report of Judge Parker to the President, Death of Slobodan Milosevic, May 30, 2006, available at <http://www.un.org/icty/milosevic/parkerreport.pdf>.

³⁷⁹ *See* M. Cherif Bassiouni & Michael Wahid Hanna, *Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein*, 39 CASE WEST. RES. J. INT'L L. 21 (2007); Bassiouni, *supra* note 139; Michael Wahid Hanna, *National Prosecutions of International Crimes: A Historical Overview*, in III INTERNATIONAL CRIMINAL LAW, *supra* note 61, ch. 3.2.

trial in the Hague;³⁸⁰ Hissene Habre, former head of state in Chad, is under prosecution in Senegal;³⁸¹ Alberto Fujimori who was head of state in Peru and committed a multitude of fundamental human rights violations in that country, has been extradited from Chile to Peru.³⁸² General Augusto Pinochet of Chile was indicted in Chile, but his trial was suspended because of his age and presumed lack of mental capacity.³⁸³ General Jorge Videla, former head of state of Argentina, was tried, convicted, and sentenced to jail.³⁸⁴ Last, but not least, the ICC prosecutor filed an indictment before the pre-trial chamber for confirmation, against Sudan's sitting head of state, General Omar Al-Bashir.³⁸⁵ The ICJ, however, dealt a set-back to this trend in *Congo v. Belgium*³⁸⁶ when it upheld the rule that sitting heads of states, incumbent ministers, and diplomats have temporal immunity.³⁸⁷

These prosecutions are few and far between, however, and they seldom involve the key perpetrators and senior executors of the major crimes committed during these conflicts. The 120 some prosecutions before the ICTY and ICTR have surely advanced international criminal justice. But how far they advanced general deterrence among the populations in

³⁸⁰ See *Prosecutor v. Charles Ghankay Taylor-Special Court for Sierra Leone*, <http://www.sc-sl.org/Taylor.html>. Taylor was indicted on March 7, 2003, for crimes against humanity, violations of Common Article 3 to the Geneva conventions, and other violations of international humanitarian law. The indictment was sealed until June 4, 2003. On March 16, 2006, the Judge of the Special Court approved an amended indictment reducing the number of counts to eleven. *Id.*

³⁸¹ See Trial Watch: Hissene Habre, http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/hissene_habre_86.html (last visited Sept. 6, 2008):

In May 2006, the United Nations' Committee Against Torture (CAT) rebuked Senegal for failing to bring Hissène Habré to justice. The panel requested Senegal to prosecute Habré in Senegal or extradite him to stand trial in Belgium or elsewhere. In July 2006, an AU panel recommended that Habré be tried in Senegal, Chad or another African nation that has adopted the international Convention Against Torture, rather than in Belgium. The AU decided that Senegal should serve as the location of Habré's trial. Senegal's President Wade agreed with this solution, but cautioned, that the necessary legal bases had to be laid first. On 12 July 2007, Senegal's Justice Minister Sheik Tidiane Sy announced that Habré will stand trial before a Senegalese criminal court, rather than before a special tribunal as previously decided.

³⁸² An international arrest warrant was issued for Fujimori in November of 2006, and the Supreme Court of Chile ordered extradition on September 21, 2007. He was extradited the next day to Peru. Trial Watch: Alberto Fujimori, http://www.trial-ch.org/en/trial-watch/profile/db/facts/alberto_fujimori_320.html (last visited Sept. 6, 2008).

³⁸³ See *supra* note 372.

³⁸⁴ See *Argentine Court Overturns "Dirty War" Pardon*, Reuters, Apr. 10, 2007, available at <http://www.reuters.com/article/worldNews/idUSN2545319320070425>.

³⁸⁵ See Trial Watch: Omar Hassan Ahmad al-Bashir, http://www.trial-ch.org/en/trial-watch/profile/db/facts/omar-hassan-ahmad_al-bashir_779.html (last visited Sept. 23, 2008).

³⁸⁶ Arrest Warrant of 11 April 2000 (Dem. Rep. Cong. v. Belg.), [2002] ICJ Rep 3 (14 Feb.).

³⁸⁷ *Id.*; Bassiouni, *Universal Jurisdiction Unrevisited*, *supra* note 376.

question and throughout the world is probably limited.³⁸⁸

VI. CONCLUSIONS AND RECOMMENDATIONS

The recommendations that follow are reasonable and achievable, but the long and arduous history of IHL attests to the fact that government and their militaries are intractable on certain matters even if their obstinacy incurs enormous human and material costs. These state actors are solidly anchored in a culture of war that has existed for millennia. The military's goal is to achieve victory over "the enemy," who is necessarily somewhat dehumanized in order to make the killing of fellow human beings possible without paralyzing inner compunction or guilt. The goals of war are essentially: to kill, more people, faster, and more efficiently; to secure military victory; to prevail politically; to occupy territory; and to subjugate people. IHL has been used to enable, in whole or in part, these and other political and military goals, but subject to certain limitations. IHL and IHRL have tried to limit the human harm and destruction, but progress has been slow and grudgingly advanced. We continue to have multiple legal regimes, which overlap, which have gaps and ambiguities, and which create imbalance between combatants depending upon the legal characterization of the conflict. It is unnecessary, unreasonable, and contrary to the humanitarian values admittedly pursued not to have complete uniformity in the protective legal scheme applicable to any violent processes, irrespective of the context's legal characterization. Protected persons and targets should be the same, and, for example, the prohibition of torture should not depend on how a conflict is defined.³⁸⁹ In a similar vein, combatant status should be extended to all contexts, including purely domestic conflicts, provided that non-state actors abide by the conditions required for them to qualify as legal combatants.

Mutuality of interest and legitimacy should be enhanced through education at all levels to enhance compliance; and by the monitoring and reporting of violations by one or more independent bodies such as the ICRC; special unit(s) in the office of the United Nations High Commissioner for Human Rights; the European High Commission for Human Rights; and regional human rights bodies in the Americas and Africa. The United Nations in particular should have a database of prior and ongoing conflicts, as well as investigative and other reports that

³⁸⁸ Moreover, the costs of such prosecutions are so high that the international community has already signaled its intentions to avoid them. The Security Council has decided that both the ICTY and ICTR should be closed by 2010. By then, it is estimated that their costs will reach \$2 billion.

³⁸⁹ As is the case with the U.S. under the Bush Administration, see Bassiouni, *supra* note 111.

establish a historic record, now shockingly absent. International civil society should become more involved in the monitoring and reporting on a consistent basis what occurs in conflicts.

More importantly, states must include in their domestic criminal legislation the crimes of genocide, crimes against humanity, war crimes, torture, slavery and slave-related practices (including trafficking and other forms of sexual abuse against women and children), prohibition of the use of child-soldiers and mercenaries. Domestic jurisdictions must enforce these crimes after the end of conflicts, as if there is a realistic threat of prosecution and punishment, deterrence is enhanced, otherwise it fails.

National civil society, and also international civil society, should be vigilant against the propagation of hate, and against acts of discrimination, both of which lead to dehumanization and to victimization.

The asymmetry of forces between state and non-state actors is almost always going to lead to violations of IHL by the weakest protagonist. Political inducements may not be enough, nor likely to be feasible. What is needed is to develop and put in place mechanisms of conflict resolutions and an effective system of action to prevent violence based on the developing concept of the "Responsibility to Protect."³⁹⁰

Another important issue is the control by governments of the media, as well as access by the media to information about ongoing conflicts, results in a covering-up of government violations, and thus encourages violations by non-state actors. This situation drives non-state actors to engage in particularly dramatic violations which the media cannot ignore in order to propagate their claims or assert their presence or effectiveness. The use of terroristic violence and the symbiotic relation it creates with the media becomes an important, if not indispensable, strategy in the perception of non-state actors, thus leading to their non-compliance.

The battle for the "hearts and minds" of the people in a society where conflict exists is a primary goal of both state and non-state actors. Thus, the media's role, public perceptions, and legitimacy are among the protagonists' main strategic goals.

Finally, the culture of observance of the law and adherence to the Rule of Law is all too frequently lacking in conflict situations. This is evident even in societies which in non-conflict times observe the law and adhere to the Rule of Law. The temptation of governments to set aside observance of the law and adherence to the Rule of Law in what they deem to be times of emergency is all too evident. This undermines the legitimacy of governments and enhances the claims by non-state actors of their own

³⁹⁰ For more details on the Responsibility to Protect (R2P), see Responsibility to Protect: Engaging Civil Society, <http://www.responsibilitytoprotect.org/> (last visited Sept. 8, 2008).

legitimacy. It also provides non-state actors with opportunities to rationalize their violations of IHL.

Following are some conclusions and recommendations:

- A Protocol to the Geneva Conventions should be added to eliminate the disparities in protections between all forms of conflicts, and to give combatants willing to abide by IHL the status of lawful combatant and that of POW. This Protocol should address the peculiarities of the new wars and the rights and responsibilities of non-state actors. In addition, the Protocol should address the questions raised in this article and which are reflected in the recommendations which follow. More importantly, it should address issues of education and training for non-state actors.
- Governments should drop their reluctance to recognize non-state actors engaged in conflicts of a non-international character by recognizing them as lawful combatants and granting them lawful combatant and POW status when they agree to comply with IHL.
- The emergence of new categories of non-state actors who have a supporting role in conflicts of a non-international character is so far not specifically included in the normative scheme of IHL and is also not covered by the traditional norms of criminal law in many national legal systems should be included in a new Protocol to the Geneva Conventions.
- The use of non-state actor surrogates by governments to engage in armed violence with de facto assurances of impunity should be included in the prohibition against mercenarism.
- The elimination of double standards reflected in the practice of governments, who consider their violations as legitimate while characterizing the same kind of violations by non-state actors as illegitimate.³⁹¹
- IHL norms should be consistently enforced with impartiality against state and non-state actors.
- Legitimacy of goals all too frequently becomes the rationale for resorting to unlawful means by both state and non-state actors. This approach tends to escalate the interactive processes of violence. More particularly, it is used to rationalize unlawful reprisals by both sides in conflict, thus escalating and feeding processes of violence.
- Reinforcing domestic justice systems in their exercise of criminal

³⁹¹ The resort by governments to characterizing non-state actors' actions as terrorist, even when they are within the permissible bounds of IHL, evidences a double standard that detracts from compliance by non-state actors and should be remedied by the adoption of a comprehensive convention on terrorism. INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 339, at 263-304 (draft comprehensive Convention on the International Suppression of Terrorism).

jurisdiction over perpetrators of war crimes, crimes against humanity, and genocide.

- Establishing within the United Nations and the ICRC of a permanent monitoring system to document the practices of state and non-state actors in conflicts of a non-international character. Such monitoring bodies should be published and disseminated.
- The United Nations should recognize the Responsibility to Protect. This recognition supported by state action would be one of the measures to prevent certain conflicts.³⁹²
- The new Protocol should emphasize the prohibition of reprisals under any name or form.³⁹³
- Last but not least, ICL needs to be revisited with respect to the responsibility of non-state actors. In particular, the Genocide Convention³⁹⁴ and the Convention Against Torture³⁹⁵ must be amended to specifically reflect their applicability to non-state actors whenever the latter have a structure which has some of the characteristics of the state and particularly when they control territory and exercise dominion and control over it and over individuals on it whether they be combatants or non-combatants. Moreover, crimes against humanity require that they be embodied in a convention that would hopefully have the same widespread acceptance as the Genocide Convention.³⁹⁶ Such a convention should specifically allude to the responsibility of non-state actors.

Large-scale IHL violations that reward the perpetrators with impunity violate the victims' need for justice.³⁹⁷ The memory of such violations among victims is not erased simply because a peaceful settlement has been achieved by political leaders. There is no such thing as a political erasure of the memory of such crimes. At best, it remains in the limbo of a victim's

³⁹² Experience indicates that international intervention, either military or diplomatic, does not take place before a conflict has reached a high level of violence. Consequently, it encourages non-state actors to escalate violence, including IHL violations, which in turn brings about a general escalation of violence, including violations by state actors. Thus, there is a premium on the escalation of violence which seems to necessarily include a high level of IHL violations.

³⁹³ Governmental actions that constitute unlawful reprisals and which escalate violence, reduce legitimacy and enhance counter-claims of legitimacy, and provide a rationalization for committing similar in-kind violations by opponents, should be discouraged by means of the ICRC's monitoring and reporting.

³⁹⁴ Genocide Convention, *supra* note 39; SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*, *supra* note 5.

³⁹⁵ Convention Against Torture, *supra* note 5; Daniel H. Derby, *The International Prohibition of Torture*, in *I INTERNATIONAL CRIMINAL LAW*, *supra* note 61, ch. 5.3.

³⁹⁶ See M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 *COLUM. J. TRANSNAT'L L.* 457 (1994). See also *supra* note 5.

³⁹⁷ See DRUMBL, *supra* note 229.

psyche, occasionally presses itself to consciousness, and then, like the embers of a fire, may re-ignite and demand retribution.³⁹⁸ The absence of justice is not conducive to reconciliation, and without reconciliation, peace is only ephemeral. Peace can hardly be expected to occur without justice, and justice cannot occur unless the truth is known to the satisfaction of the victims. These self-evident truisms are reflected in the three Abrahamic faiths as follows:

If you see a wrong [you should seek to] right it;

With your hand if you can, otherwise

With your words, otherwise

With your heart, and that is the weakest of faith.

—Prophet Mohamed, from a *Hadith*

If you want peace, work for justice.

—Pope Paul VI

The world rests on three pillars: on truth, on justice, and on peace.

—The Talmud

The three are really one, if justice is realized, truth is vindicated and peace results.

—A Talmudic commentary

³⁹⁸ Chicago Principles on Post-Conflict Justice, *supra* note 349.