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Reinhold Erdt

How to Protect Aid Workers in Conflict Situations

A Critical Analysis of International Humanitarian Law

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Preface

The body of legal norms called "International Humanitarian Law" historically developed in response to outrageous human suffering, as a result of warfare and resulting cruelties and disasters, be they intentional or non-intentional. IHL represents an attempt of the international community at least to alleviate the fate of civilians as well as combatants. New challenges have caused ever-new adaptations. In this sense, IHL has always been dynamic. What we are currently witnessing, however, affects certain core presuppositions on which the whole system of IHL is premised. Examples include the strategic involvement of civilians in acts of warfare, the growing military significance of non-state actors (e.g. terrorist groups), the denial of any "neutral space" in times of violent escalation, abduction of aid workers in conflict situation and an increasing cynicism even among major political players. Reinhold Erdt tackles such fundamental contemporary challenges in a systematic manner. His analysis is based on practical examples, a short historical account of the development of IHL, solid knowledge of relevant academic literature and, last but not least, the personal insights he gained as a young practitioner in this field.

The text is a revised version of a Master thesis, for which the author was awarded the Fritz and Maria Hofmann price of the Friedrich Alexander University (FAU) of Erlangen-Nuremberg. I would like to use this short preface to extend my congratulations to Reinhold Erdt and to recommend his book to all those interested in and concerned about the future of International Humanitarian Law in our increasingly fragmented world.

Prof. Dr. Dr. h.c. Heiner Bielefeldt (Professor of human rights and human rights politics at the FAU and former UN Special Rapporteur on freedom of religion or belief)

Abstract

The deteriorating security situation for aid workers remains one of the vital but overlooked issues in humanitarian aid. Despite advancements in ensuring respect for International Humanitarian Law, violations of its rules remain a widespread problem. The increase in attacks against aid workers in recent years once again raises questions concerning the scope of their protection and ways to improve it. One principal reason behind this negative trend has been the shift in the nature of conflicts and the role of the "war on terror" in undermining the laws authority. Other reasons stem from internal developments of humanitarian actors, namely a lack of transparency or the co-optation of aid. This results in increased politicization and the disintegration of the civilian nature of humanitarian assistance.

There is a need to reassess the role IHL can play in keeping aid workers safe. With non-State armed groups at the center of contemporary conflicts, engaging them is not longer only an option, but becomes a necessity.

Traditionally, studies have focused on why actors violate International Humanitarian Law rather than on what encourages them to respect it. Relying only on sanctions has proven to be rather ineffective. With a focus on the incentive structure of International Humanitarian Law, this thesis will analyze the reoccurring violations from a different angle in order to understand the rationale inducing armed groups to respect it and to propose viable approaches for the future. There now is a development towards a customary international rule that can curtail a State's scope of action in treating non-State armed groups. The accumulation of customary law relating to non-international armed conflict, the convergence of International Humanitarian Law applicable in international armed conflict and non-international armed conflict, the protection awarded by

International Human Rights Law and the practice of amnesties suggest that the extension of combatant status and Prisoners of War privileges should be possible.

This thesis demonstrates that incentives are central in understanding and influencing behavior of non-State armed groups and proposes the application of International Humanitarian Law without making a distinction as to the source of obligation to all parties involved in a conflict, as a promising way to achieve greater adherence to International Humanitarian Law and thus a tangible solution to keep aid workers safe

Content

1 – The ICRC in Afghanistan

The International Committee of the Red Cross (ICRC) has been working in conflicts since its establishment, and in Afghanistan for 30 continuous years. The security in Afghanistan seems to be deteriorating in general, but this is especially true with regard to aid worker security.[1] The ICRC has had serious problems in the past, but the years 2016 and 2017 proved to be particular troublesome. In December 2016, one international staff member was abducted and held hostage for a month. In February 2017, six Afghan staff members were killed during an attack on an ICRC aid convoy. Two staff members were abducted and released only seven months later. Following this attack, the ICRC suspended all operations, but resumed its work gradually. And then on September 11, 2017, the Spanish physiotherapist Lorena Enebral Perez was killed while working in a disability rehabilitation center. A patient, who was coming to the rehabilitation center for 19 years, targeted her with a weapon concealed in his wheelchair. These tragic events show just how difficult humanitarian work has become in Afghanistan.[2] And when aid services are disrupted, it is the most vulnerable who pay the immediate price. But the long-term effects, such as avoidable deaths, spreading diseases, untreated disabilities and economic loss, have a more far-reaching impact.

The increase in attacks against aid workers in recent years once again raises questions concerning the scope of their protection and ways to improve it. One principal reason behind

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[1] United Nations Assistance Mission in Afghanistan (2017): Quarterly Report on the Protection of Civilians in Armed Conflict: 1 January to 30 September 2017; United Nations Office for the Coordination of Humanitarian Affairs (2017): Afghanistan: Conflict Induced Displacements in 2017 – Snapshot.

[2] Afghan Analysts Network (2017): Working in a 'Grey Zone': ICRC forced to scale back its work in Afghanistan.

this negative trend has been the shift in the nature of conflicts and the role of the "war on terror" in undermining the laws authority. Other reasons stem from internal developments of humanitarian actors, namely a lack of transparency or the cooptation of aid. This results in increased politicization and the disintegration of the civilian nature of humanitarian assistance. There is no doubt that armed conflict changes over time and a proliferation of non-international armed conflicts (NIAC) can be observed. Nevertheless, the examples of Kosovo 1999, Afghanistan 2001 and Iraq 2003 show that predictions about the demise of traditional international armed conflict (IAC) are to some extent premature. A comprehensive assessment about whether the nature of conflict has changed, could help distinguish what challenges for International Humanitarian Law (IHL) are new, and what challenges are in fact old problems for which current scrutiny highlights controversies in the existing law. It becomes clear, however, that with the number of NIAC now prevailing over the number of IAC[3], there is a need to reassess the role IHL can play in keeping aid workers[4] safe. With non-State armed groups[5] at the center of these contemporary conflicts, engaging them is not longer only an option, but becomes a necessity.

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3 Bellal, Annysa (2017): The War Report, Armed Conflicts in 2016, Geneva: The Geneva Academy of International Humanitarian Law and Human Rights, p. 15.

4 This thesis regards aid workers as humanitarian relief personnel, personnel to humanitarian assistance missions and individuals engaged with humanitarian aid.

5 There is no shortage of terms describing parties to a conflict that are not State forces: rebels, insurgents, organized armed groups, and non-State forces. In this thesis, I will use the term non-State armed group, in order to sufficiently differentiate them from State armies, but also to suggest that such groups might achieve high levels of organization, control of territory and effectiveness and thus may approach parity with State armies.

Despite advancements in ensuring respect for IHL, violations of its rules remain a widespread problem. Traditionally, studies have focused on why actors violate IHL rather than on what encourages them to respect it. Relying only on sanctions has proven to be rather ineffective. With a focus on the incentive structure of IHL, this thesis will analyze the reoccurring violations from a different angle in order to understand the rationale inducing armed groups to respect it and to propose viable approaches for the future. Due to the confinements of this thesis, in pursuing the question how to keep aid workers safe, it will focus on non-State armed groups in NIAC, and how to increase their adherence to IHL by improving upon incentives the law provides.

I will start with a short overview of the applicable legal framework, the status of aid workers under IHL and the incentive structure of IHL, before analyzing inherent problems of the legal framework as well as problems posed by the new reality of armed conflict. To that end I will analyze what role counter terror legislation and the criminalization of aid play. This thesis will focus on NIAC, but not without clarifying the dichotomy of IAC and NIAC and how the trend of invoking IHL without making the distinction as of the source of obligation could achieve convergence. These endeavors will culminate in a display of viable approaches, analyzing whether a right to provide humanitarian aid exists, the role amnesties and the NGO Geneva Call can play. I will analyze how the old practice of recognizing belligerency could pave a way to increased protection for aid workers and how non-State armed groups could take part in the creation of IHL. And while backlash to these approaches will be inevitable, even modest improvements in IHL acceptance and compliance may very well be worth the effort. It is in the service of laying the groundwork for such efforts that this thesis concentrates on an incentive-oriented approach to aid worker security.

2 – A new Reality of Armed Conflict

2.1 – The Status of Aid Workers under IHL

Humanitarian personnel benefit form special protection under IHL. It provides for a sound protection of medical personnel[6] and aid workers in general.[7] The assessment of the scope of protection requires in each case the distinction between different types of conflict and different types of aid workers, as well as a review of national laws. IHL distinguishes between medical personnel, auxiliary personnel, hospital ship personnel, medical aircraft crews and members of other medical transports, religious personnel and other relief personnel.[8] The different levels of legal protection are recognized, but it has been stressed that all medical and religious personnel, regardless of their type of work, should be respected.[9] The obligation to respect and protect aid workers is also laid down in a number of instruments and in resolutions by the UN.[10] The emergence

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[6] Geneva Convention I, Articles 24 – 30, 32; Geneva Convention II, Articles 36, 37; Geneva Convention III, Article 33; Geneva Convention IV, Articles 17 – 20; Additional Protocol I, Articles 12 – 15, 21 – 31; Additional Protocol II, Articles 9 – 12.

[7] Geneva Convention IV, Article 30, 59 – 63, 143; Additional Protocol I, Article 71.

[8] For a more in depth numeration see: Biénczyk-Missala, Agnieszka; Grzebyk, Patrycja (2015): Safety and Protection of Humanitarian Workers, p. 234 – 238.

[9] Institute for Human Rights Expert Meeting (1990): Declaration of Minimum Humanitarian Standards, Turku/ Åbo: Åbo Akademi University, Finland, Articles 14, 15.

[10] The UN Security Council unanimously adopted Resolution 2286, strongly condemning "acts of violence, attacks and threats against the wounded and sick, medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities" and also highlighted "the long-term consequenc-

of a customary protection regime is debated and not all States have accepted the ICRC's conclusion, that these instruments and resolutions now form a part of customary IHL, only because no official contrary action by states has been found, and alleged violations of these rules were routinely denied. [11] The Geneva Conventions recognize the ICRC's role as a principal guardian of IHL and establish specific rules for personnel working under its emblems. The clear identification of aid workers through, for example, the emblems of a red cross or a red crescent is a source of protection. Having understood the importance of these emblems, States envisaged an Additional Protocol III, introducing the addition of a new emblem, the red crystal, as a symbol of the universal assistance of victims to armed conflict.[12] This addition can be seen as an attempt to increase the perception of neutrality in particular contexts of conflict, where the symbol of a cross or crescent can be perceived as having a religious or political significance.

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es of such attacks for the civilian population and the health-care systems of the countries concerned". The Resolution furthermore called on states to cooperate with international courts and tribunals. United Nations Security Council (2016): UNSC Resolution 2286 (2016): On protection of the wounded and sick, medical personnel and humanitarian personnel in armed conflict, p. 3. See also: ICRC (1992): Agreement No. 3 between Representatives of Mr. Alija Izetbegović (President of the Republic of Bosnia and Herzegovina and President of the Party of Democratic Action), Representative of Mr. Radovan Karadžić (President of the Serbian Democratic Party), and Representative of Mr. Miljenko Brkić (President of the Croatian Democratic Community) on the ICRC Plan of Action, Geneva, 6 June 1992, Paragraph II(9). And: ICRC (1995): Agreement on Ground Rules for Operation Lifeline Sudan (OLS), between Dr. John Garang, Commander in Chief of the SPLM/A, and Pierce Gerety, OLS Coordinator and UNICEF Chief of Operations, 23 July 1995, Paragraph 8.

[11]Jenckaerts, Jean-Marie and Doswald-Beck, Louise (2005): Customary International Humanitarian Law, Cambridge University Press.

[12] Additional Protocol III

The protection of aid workers is not unlimited. In IAC, aid workers and medical personnel have specific protection under IHL as long as they don't "act harmful to the enemy, outside their humanitarian function".[13] In NIAC, the loss of protection is similarly formulated in that aid workers will lose their protection if they commit "hostile acts, outside their humanitarian function".[14] But some acts, such as caring for the wounded and sick, or the presence on a battlefield to collect the wounded, never lead to loss of protection, even though they can be harmful to the enemy, because these acts are not outside their humanitarian function. This is also true, even if the beneficiaries are enemy combatants and helping them enhances their military capacity. However, IHL does not define the concept of acts harmful to the enemy, nor the consequences and the duration of the loss of special protection. According to the ICRC, acts harmful to the enemy refer to "acts the purpose or effect of which is to harm the adverse party by facilitating or impeding military operations."[15] Under customary law, acts of sheltering or transporting combatants, arms or ammunition under the protection of the symbols amount to acts harmful to the enemy. Other instances include the use of medical facilities as observation posts or as a shield against attack. Most authors consider the concept of acts harmful to the enemy as to be larger as direct participation in hostilities.[16] Civilian aid workers, who

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[13] Geneva Convention I, Article 21; Additional Protocol I, Article 13.

[14] Additional Protocol II, Article 11.

[15] Sandoz, Yves; Swinarski, Christophe; Zimmermann, Bruno (eds.) (1987): Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva and The Hague: ICRC, Paragraph 550.

[16] Levie, Howard S.; Bothe, Michael, Partsch, Karl Josef; Solf, Waldemar (2003): New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949. The Hague: Martinus Nijhoff Publishers; Melzer, Nils (2008): Targeted Killings in International Law, Oxford: Oxford University Press, p. 329.

for one reason or the other, lose their protection, remain civilians and therefore may only be attacked if, and for such time, as they directly participate in hostilities. The intentional direct targeting of personnel involved in humanitarian assistance represents a war crime in IAC and NIAC, as long as such personnel are entitled to the protection due to their civilian status under IHL.[17]

The protective regime of IHL still works in numerous instances and is not always violated. But while criticism of IHL and aid work has sometimes been expressed in rather grotesque ways,[18] it is legitimate to call for improvement. As early as 1901, IHL criticism included the argument that making war more humane would keep the institution of war alive. A legal regime may be perceived as to institutionalize, normalize and routinize violence. The argument goes that if armed conflict would unfold unmitigated, there would be efforts to stop such conflicts all together.[19] Criticism also targeted the balance between humanity and military necessity, claiming that IHL has been formulated deliberately to favor the latter.[20] There are numerous laws banning or restricting the means and methods

[17] International Criminal Court (2002): Rome Statute of the International Criminal Court.

[18] Feith, Douglas J. (1985): Law in the Service of Terror – The Strange Case of the Additional Protocol. The National Interest, Vol. 1, p. 36; Sofaer, Abraham D. (1986): Terrorism and the Law, Foreign Affairs, Vol. 64, No. 5, 1986, p. 901; Roberts, Guy B. (1985): The New Rules for Waging War: The Case Against Ratification of Additional Protocol I, Virginia Journal of International Law, No. 261, p. 10; Safire, William (1984): Rights for Terrorists? A 1977 Treaty Would Grant Them, New York Times, 15 November 1984, at A31, col. 5.

[19] Forsythe, David P. (2005): The Humanitarians: The International Committee of the Red Cross. New York: Cambridge University Press, pp. 22f, 157f..

[20] af Jochnick, Chris; Normand, Roger (1994): The Legitimation of Violence: A Critical History of the Laws of War, Harvard International Law Journal, Vol. 35, Nr. 1, p. 50.

of war. But the fact that states can still use devastating weapons is hard to dismiss. This is especially true with regard to contemporary conflicts, in which cyber attack and new weapon systems can have annihilating effects. It has been argued that combatants, who meet the hollow requirements of IHL by simply following military self-interest, receive a powerful tool that endorses military necessity without substantive limitations and that protects even controversial conduct.[21] But arguing that "by legitimating conduct, the laws serve to promote it"[22], would be wrong.

There is a fundamental paradox. Aid can prolong war, and with it the suffering it intends to alleviate. Proponents of war with no limits argue that all-out war would result in a shorter war, thus lessen suffering. They argue that humanitarian aid could prevent a conflict to take its natural path, which could faster result in peace.[23] Humanitarian action could, for example, free up State resources, such as medical supplies for military purposes, thereby prolonging conflict.[24] It has been argued further that conflict is the driver of change and "some conflicts

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[21] For a debate on weapons restrictions based on strategic considerations, see af Jochnick, Chris; Normand, Roger (1994): The Legitimation of Violence: A Critical History of the Laws of War, Harvard International Law Journal, Vol. 35, Nr. 1, pp. 49-95.

[22] af af Jochnick, Chris; Normand, Roger (1994): The Legitimation of Violence: A Critical History of the Laws of War, Harvard International Law Journal, Vol. 35, Nr. 1, p. 57.

[23] For more insight into this reasoning see: Luttwak, Edward (1999): Give War a Chance, Foreign Affairs Volume 78, No. 4, pp. 36-44; Toft, Monica Duffy (2010): Ending Civil Wars: A Case for Rebel Victory? International Security, Volume 34, No. 4, pp. 7-36.

[24] Anderson, Mary (1999): Do No Harm: How Aid Can Support Peace – or War. Boulder: Lynne Rienner Publishers, pp. 37 – 54.

must be intensified before they are resolved".[25] Some conflicts, it is said, are better left to burn out on their own.[26] But the stakes in these potential crises seem too high for a wait-and-see approach. And even if there is danger in escalating conflict through humanitarian aid, in standing idle lies the far greater danger.

The ICRC considers violence against aid workers as "one of the most crucial, yet overlooked humanitarian issues today".[27] And the consequences of attacks on aid workers represent one of the main challenges for IHL. In order to improve upon this situation, it is vital to not only understand reasons for IHL violations, but also how aid workers through their work can exert influence over such violations. Aid workers are influential interlocutors to States, but also often the only ones able to neutrally interact with non-State armed groups.

2.2 – Reasons for IHL Violations

State actors and non-State armed groups have converging, but also differing reasons and explanations of non-compliance.[28] Why conflicting parties violate IHL is not only a question of law, but also has sociological, cultural and psychological aspects. A multidisciplinary approach towards the causes of violations of IHL, covering the full spectrum of scientific fields such as sociology, psychology and anthropology could help to establish a fuller understanding. Aspects of crime, opportun

[25] Stedman, Stephen (1995): Alchemy for a New World Order. Overselling 'Preventive Diplomacy', Foreign Affairs, Volume 74, No. 3, p. 21.

[26] Stedman, Stephen (1995): Alchemy for a New World Order. Overselling 'Preventive Diplomacy', Foreign Affairs, Volume 74, No. 3, p. 17.

[27] ICRC (2011a): Health Care in Danger: Making the Case, Geneva, p. 4.

[28] Muñoz-Rojas, Daniel; Frésard, Jean-Jacques (2004): The Roots of Behaviour in War: Understanding and Preventing IHL Violations, ICRC, Geneva, p. 2.

ism, war aims, psycho-sociological reasons and aspects connected to the individual play a role. Engaging all aspects at length would surmount what is possible due to the confinements of this thesis, but important examples need to be addressed. Furthermore, the thesis focuses on psycho-sociological reasons for IHL violation and the ICRC's response.

In certain cases, aid workers are perceived as to having forfeited their protective status, because their actions seemed to have helped the enemy, willingly or not.

> "There have been several prominent cases in which NGOs were targeted as a result of their activities being perceived as either non-neutral or in violation of Afghanistan's cultural or religious customs."[29]

The question of the protective status will become a question of guilt and innocence. In other cases, aid workers are deliberately targeted because of their protective status. Violations of IHL and attacks on aid workers need to be assessed locally in order to understand the reasons behind them. They should however be also placed in a wider context of terrorist tactics that target aid workers out of political reasons, as "attacks carry a global statement".[30] This reasoning is nothing new to the ICRC. The 2003 murder of one ICRC delegate by the Taliban in Afghanistan shattered the assumption that neutrality and effective work would always keep aid workers safe. The attackers were no strangers to the ICRC. They were both outfitted with prosthetic legs by the organization.[31] The perpetrators have justified the killing of an aid worker, representing a symbol

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[29] International NGO Safety Organization (2018): Afghanistan Context Analysis.

[30] Burkle, Frederick M. (2005): Anatomy of an Ambush: Security Risks Facing Humanitarian Assistance, Overseas Development Institute, The Journal of Disaster Studies, Policy and Management, Volume 29, No. 1 pp. 26-37.

[31] Afghan Analysts Network (2013): Attack on the ICRC 2: Taleban denial.

of the imperial West fighting against Islam, through the notion of a just war. When aid workers become dehumanized, violence against them becomes justified.

Aid workers are targeted in order to destabilize areas, as a propaganda vehicle and revenue stream. Groups wanting to bring attention to their cause use attacks on aid workers as a means to demonstrate their own prowess, the weakness of their victims and the inability of rules and principles to protect them. According to that logic, the risk for aid workers does neither stem from confusion over their role and principles, nor from the ignorance of IHL, but rather from their insistence on humanitarian principles.[32] Political targeting of aid workers has become a military tactic of choice for non-State armed groups and cannot be explained as mistake or misunderstanding. It is used to demoralize adversaries and mobilize supporters.

> "Being an aid giver alone is enough reason to become a target, regardless of affiliations or cooperation with Western powers".[33]

Attacks on aid workers can thus be regarded as a particular form of terrorism.[34] They are carried out because perpetrators seek to gain power by targeting potent international symbols of humanitarian law.

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[32] Hammond, Laura (2008) The Power of Holding Humanitarianism Hostage and the Myth of Protective Principles. Pp. 175f. In: Barnett, Michael; Weiss, Thomas G (eds.): Humanitarianism in Question: Politics, Power and Ethics Cornell University Press.

[33] DiDomenico, Victoria; Harmer, Adele; Stoddard, Aabby (2009) Providing Aid in Insecure Environments: 2009 Update. London: Overseas Development Institute, p. 4f.

[34] For more insight in terrorist strategies see: Neumann, Peter R.; Rainsborough, Michael (writing under the name Smith, M. L. R.) (2005): Strategic Terrorism: The Framework and Its Fallacies, Journal of Strategic Studies, Volume 28, No. 4, pp. 571 – 595.

Violations of IHL can stem form deep-seated hatred, malice, ancient ethnic rivalries or the desire for vengeance.[35] And while there is merit to those explanations, there are also shortcomings, the most significant being that this line of argument cannot fully account for variations in violence over time, because it focuses on the static components of an often-dynamic situation.[36] These temporal variations in the violence against civilians and aid workers can be better explained by a loss in human and material resources prior to the violence.[37] IHL violations are sometimes simply instrumental to the non-State armed groups' strategy. Aid workers are abducted to extort ransom payments and in order to profit from their skills. In addition, concluding that violations of IHL do not yield advantages is naive. Targeting hospitals and aid workers can deprive opponents of medical and humanitarian assistance. Actors use violence when they believe it to advance their goals.

Non-State armed groups often justify IHL violations through the military superiority of the States they fight against. But it is important to put a possible advantage into perspective. The temptation of a short-term gain is real, even if there are long-term agreements. Even despite the long shadow of the future, non-State armed groups can have reasons to opt for violation of IHL.

> "The greater the division of warring parties and the greater the commitment of the parties to their goals, the greater the dete-

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[35] Wood, Reed M. (2015): Understanding strategic motives for violence against civilians during conflict, p. 16. In: Krieger, Heike (Ed.): Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region. Cambridge: Cambridge University Press.

[36] ibid., p. 18.

[37] ibid., p. 15.

rioration in adherence to the principles of IHL and their application."[38]

The duration and intensity of violence and traumatizing experiences of war have a positive impact on the adherence to IHL.[39] The more people are involved in a conflict, the more likely they are to have a positive view of IHL. This perception is however contested.[40]

Violations of IHL involve moral disengagement and are justified by group behavior and the lack of sense of responsebility.[41] Behavior is dependent upon current circumstances, external situations and the environment.[42] Research has shown that in determining behavior, the power of situations is more

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[38] Muñoz-Rojas, Daniel; Frésard, Jean-Jacques (2004): The Roots of Behaviour in War: Understanding and Preventing IHL Violations, ICRC, Geneva, p. 6.

[39] Muñoz-Rojas, Daniel; Frésard, Jean-Jacques (2004): The Roots of Behaviour in War: Understanding and Preventing IHL Violations, ICRC, Geneva, p. 6.

[40] Wood argues that the intensity of the conflict negatively influences both states and non-State armed groups' behavior towards civilians. Wood, Reed M. (2015): Understanding strategic motives for violence against civilians during conflict, p. 34. In: Krieger, Heike (Ed.): Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region. Cambridge: Cambridge University Press.

[41] "The behaviour of combatants is determined mainly by three parameters: (1) their position within a group, which leads them to behave in conformity with what the group expects of them, (2) their position in a hierarchical structure which leads them to obey authority (because they perceive it as legitimate or it acts on them as a coercive force, or a mixture of the two), (3) the process of moral disengagement favoured by the war situation, which authorizes recourse to violence against those defined as being the enemy." Muñoz-Rojas, Daniel; Frésard, Jean-Jacques (2004): The Roots of Behaviour in War: Understanding and Preventing IHL Violations, ICRC, Geneva, p. 15.

[42] Heider, Frtz (1958): The psychology of interpersonal relations. New York: Wiley.

influential than personality.[43] An individual's moral sense has to step back behind its aim to show him worthy of being a group member.[44] This situation favors the attenuation of personal responsibility and poses a great risk for adherence to IHL standards. The effects of group affiliation and conformity suggest that even though individual actors might favor IHL, pressure from leaders and group affiliation often is more significant in respecting it. This is especially true for non-State armed groups, where violations are often minimized, denied or justified, coupled with the tendency to dehumanize the adversary and to shift responsibility to the command level. Members of such groups are themselves often victimized, humiliated and traumatized in order to socialize them into war.[45] When authorities define goals, which need to be achieved by all means, violation of certain values seems to be acceptable. Once leaders equate aid workers with enemies, combatants convince themselves that violation of IHL is necessary. A lack of specific orders to uphold IHL or a tacit authorization of its violation also creates an environment, where aid workers cannot longer rely on IHL to keep them safe. Another problem is, that in a fragmented conflict like in Afghanistan leaders do not necessarily have full control over all armed actors involved.

> "The training of the bearers of weapons, strict orders as to the conduct to adopt and effective sanctions in the event of failure

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43 Ross, L., Nisbett, R. E. (1990): Introduction. In The Person and the situation: Perspectives of Social Psychology, London: Pinter & Martin, pp. 1-26; Darley J. M., & Batson, C. D. (1973): "From Jerusalem to Jericho" A Study of Situational and Dispositional Variables in Helping Behavior. Journal of Personality and Social Psychology, Volume 27, No. 1, pp. 100 – 108.

44 Milgram, Stanley (1974): Obedience to authority: An experimental view, New York: Harper & Row.

45 Muñoz-Rojas, Daniel; Frésard, Jean-Jacques (2004): The Roots of Behaviour in War: Understanding and Preventing IHL Violations, ICRC, Geneva, p. 8f.

to obey them are the prerequisites to obtain greater respect for IHL".[46]

The ICRC heavily relies on teaching and disseminating the importance of principles of IHL in keeping their workers safe to both States and non-State armed groups. The ICRC further repeatedly reminds conflict participants of their obligations under IHL.[47] Actors can apply humanitarian norms only in so far as they are aware of them and dissemination in peacetime is more promising compared to a time where armed conflict already broke out.[48] The integration of IHL in military manuals, civil instructions and domestic legislation can avoid violations in times of conflict. But these measures may not be enough. Strengthening compliance amidst recurrent violations of IHL is as indispensable as ever for the protection of aid workers. Negotiation, IHL integration and cooperation are evolutionary processes. The ICRC should keep up encounters and negotiation processes with all parties, because if those parties know that the number of encounters remains limited, it might pay for them to violate IHL.[49]

Relying only on the legal aspect of IHL fosters a mentality where ethical or moral compliance is not relevant to the deci-

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[46] Muñoz-Rojas, Daniel; Frésard, Jean-Jacques (2004): The Roots of Behaviour in War: Understanding and Preventing IHL Violations, ICRC, Geneva, p. 15.

[47] "The ICRC has ceaselessly reminded all parties of their obligations under international humanitarian law, in particular the Geneva Conventions, as it applies to the Afghan conflict. It has received assurances in this connection from the highest authorities." ICRC (2001): Press release 12 December 2001, 01/69, Geneva.

[48] Surbeck, Jean-Jacques (1983): Dissemination of International Humanitarian Law, The American University Law Review, Volume 33, No. 125, p. 127.

[49] Axelrod, Robert (1984): The Evolution of Cooperation, New York: Basic Books, p. 174.

sions being made in respecting IHL.[50] But basic moral principles of IHL can more easily be made comprehensible than the complex legal components, which can adversely increase confusion. Cultural, moral and religious guidelines can serve to improve compliance with IHL, but they can also have an adverse impact on conflicting parties with different views, who exclude certain people out of cultural, moral or religious reasons. Behavior adopted through personal conviction is more durable than behavior adopted under legal obligation.

> "The norm draws an easily identifiable red line, whereas values represent a broader spectrum which is less focused and more relative."[51]

The diverging opinion holds legal rules and a reliable system of criminal justice more fit than moral appeals to improve conditions for victims in armed conflict.[52] But legal rules alone cannot be successful in shaping ethical conduct in situations of persistent nationalism and inhumane ideologies.[53] Still, having a normative framework supports individuals to adhere to IHL. A firmly rooted framework of moral standards of conduct can prevent victims of war to enter the vice cycle of vengeance. However, knowledge of and favorable attitude towards IHL norms do not sufficiently guarantee their respect during conflicts, as general norms might be acknowledged but not

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[50] ICRC (2016): Generating respect for the law: An appraisal, International Review of the Red Cross, Volume 98, No. 2, p. 675.

[51] Muñoz-Rojas, Daniel; Frésard, Jean-Jacques (2004): The Roots of Behaviour in War: Understanding and Preventing IHL Violations, ICRC, Geneva, p. 15.

[52] Muñoz-Rojas, Daniel; Frésard, Jean-Jacques (2004): The Roots of Behaviour in War: Understanding and Preventing IHL Violations, ICRC, Geneva, p.189ff.

[53] For a skeptic view see Roberts, Adam (1994): Land Warfare: From Hague to Nuremberg, In Howard, Michael; Andreopoulos, George J.; Shulman, Mark R. (eds.): The Laws of War: Constraints on Warfare in the Western World, New Haven: Yale University Press, pp. 116-139.

applied.[54] Simply disseminating IHL through the communication of the Geneva Convention and its relevant legal obligation is not enough. An integrative approach has become indispensable. Nevertheless, "combatants who affirm that they have developed a relationship of trust with the ICRC on an individual basis are more favourable to the application of the norms of IHL".[55] The ICRC has established target groups that are addressed with different levels of IHL knowledge by specially trained dissemination delegates.[56] Among the target groups are combatants and fighters of non-State armed groups, Red Cross personnel, civil servants, the academic community, school systems, medical personnel, the media and the public.[57] The ICRC also turns to religious and local leaders. These attempts will only be accepted if the author is recognized to have a legitimate right to talk about these issues.[58]

It is important for the ICRC to make clear that respecting IHL serves the interest of all parties and violations have negative impacts on military and political objectives, on negotiations and long-lasting solutions to conflict as well as on development and reconstruction. Some scholars argue that the success of these mechanisms depends upon "the perpetrator's

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54 Muñoz-Rojas, Daniel; Frésard, Jean-Jacques (2004): The Roots of Behaviour in War: Understanding and Preventing IHL Violations, ICRC, Geneva, p. 8.

55 Muñoz-Rojas, Daniel; Frésard, Jean-Jacques (2004): The Roots of Behaviour in War: Understanding and Preventing IHL Violations, ICRC, Geneva, p. 11.

56 Surbeck, Jean-Jacques (1983): Dissemination of International Humanitarian Law, The American University Law Review, Volume 33, No. 125, p. 133.

57 Surbeck, Jean-Jacques (1983): Dissemination of International Humanitarian Law, The American University Law Review, Volume 33, No. 125, p. 128.

58 Bangerter, Oliver (2015): Comment – persuading armed groups to better respect international humanitarian law, p. 116. In: Krieger, Heike (Ed.): Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region. Cambridge: Cambridge University Press.

anticipated opportunity costs".[59] These costs are perceived to decline over time, as the longer a State is part of IHL, the lower the threshold of targeting civilians will be. The claim is that "the presence of the ICRC has no statistically significant inhibiting effect on one-sided violence by the government. The presence of the ICRC is also not related to one-sided violence committed by rebel groups".[60] Some opinions go so far as to associate ICRC activities with more, rather than fewer killings.[61] This assumption directly contradicts the ICRC's opinion, that parties to a conflict, through proactive policies, learning and socialization over time, will more often than not respect international norms.[62] Improvement in compliance is often not directly measurable and the ICRC's involvement may have delayed or indirect consequences.[63]

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[59] Bussmann, Margit; Schneider, Gerald (2016): A porous humanitarian shield: The laws of war, the red cross, and the killing of civilians, The Review of International Organizations, Volume 11, No. 3, p. 339. See also Gilligan, Michael. J. (2006): Is enforcement necessary for effectiveness? A model of the international criminal regime. International Organization, volume 60, No. 4, pp. 935–976.

[60] Bussmann, Margit; Schneider, Gerald (2016): A porous humanitarian shield: The laws of war, the red cross, and the killing of civilians, The Review of International Organizations, Volume 11, No. 3, p. 350.

[61] Bussmann, Margit; Schneider, Gerald (2010): A Porous Humanitarian Shield: The Laws of War, the Red Cross, and the Killing of Civilians, Paper presented at the Pan-European Meeting of the Standing Group on International Relations, Stockholm, p. 17f.

[62] Finnemore, M., & Sikkink, K. (1998). International norm dynamics and political change. International Organization, Volume 52, No. 4, p. 902.

[63] Lamp, Nicolas (2011): Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law, p. 283. In: Journal of Conflict and Security Law 16.

2.3 – Change in Contemporary Armed Conflict

2.3.1 – Increase in NIAC

In the relevant literature, there is a widespread feeling of a new reality of conflict and a new reality for aid worker security. Different scholars have brought forward many different characterizations of new wars, many different reasons for the changing nature of war and many different predictions with different consequences.[64] But are contemporary armed conflicts really a novelty? The character of war is certainly changing and contemporary armed conflicts differ substantially from wars in the past, but our perception of change might not be matched by reality. Many aspects of contemporary conflict that are assumed to be new, turn out not to be so, whereas there are new developments in war that cannot be ignored. The idea of a new reality of armed conflict has shed light on aspects that today appear more important than they did in the recent past, such as the internal dimension of the majority of armed conflicts or their economic underpinnings.[65] Other factors, like the developments in weaponry, communication and military technology, as well as the rise of practices of humanitarian intervention and peace keeping, reason for a new reality. But to simply attest a situation of new wars would neglect historical developments. Nonetheless, the increase in the frequency of NIAC, that is likely to spread into civilian areas, urban settings,

[64] For a critical analysis of the new war paradigm see further: Berdal, Mats (2011): The 'New Wars' Thesis Revisited, pp. 109 – 128. In: Strachan, Hew; Scheipers, Sibylle (eds.): The Changing Character of War, Oxford: Oxford University Press.

[65] Berdal, Mats (2011): The 'New Wars' Thesis Revisited, p. 110, 118. In: Strachan, Hew; Scheipers, Sibylle (eds.): The Changing Character of War, Oxford: Oxford University Press.

includes fighters not acting as such and employing weapons that affect lager areas, certainly is a novelty for IHL.[66]

IHL as a product of States' early authority remains State-centered, whereas in reality this authority is now eroding and the reality of armed conflict has shown to be less and less State-centered. There are different arguments why non-State armed groups should be bound by IHL. They are deemed to be bound through customary international law, because of the binding nature of treaties on third parties or because of the principle of legislative jurisdiction through the parent State. Without going into full detail about the wider discussion of this topic, it can be said that "while it is controversial why armed groups are bound by IHL, it is uncontroversial that they are bound by certain IHL rules".[67]

In contemporary armed conflict, classical compliance and incentive mechanisms seem to loose their significance, as they predominantly rely on States and incorporate mainly State interests in inducing compliance. This does not render them useless, but validates questions about their significance.

Asymmetrical conflicts go hand in hand with asymmetrical means of conducting the conflict. A loose hierarchy and organizational structure, often found in situations of NIAC, where the choice of means and methods is often left to those actually fighting, hinders implementation and respect of IHL. Non-State armed groups often see IHL compliance as a tactical vulnerability and prefer to adopt asymmetric strategies. It might

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[66] Allansson, Marie; Melander, Erik; Themnér, Lotta (2017): Organized violence, 1989-2016. Journal of Peace Research 54(4); Sundberg, Ralph; Eck , Kristine; Kreutz, Joakim (2012): Introducing the UCDP Non-State Conflict Dataset, Journal of Peace Research Volume 49, No. 2.

[67] Forsythe, David P. (1987): Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts, The American Journal of International Law Vol. 72, No. 2, p.292.

be easy to resort to methods contrary to IHL, if they appear to be immediately effective in evening out the asymmetry found in contemporary wars. Asymmetrical conflicts can also create perverse incentives for States to violate their own IHL obligations, when faced with a real or perceived existential threat. If compliance depends on the acceptance of values underpinning IHL and the legitimacy of the author disseminating it, compliance will deteriorate when this legitimacy is put to question. This poses a problem to situations of NIAC where the context of violence lets IHL be perceived as estranged from the reality. Non-State armed groups are neither able to ratify IHL treaties, nor are they a part of the process of their creation. This causes these groups to consider IHL as illegitimate and non-applicable to their struggle.

Even though contemporary armed conflicts pose new challenges, the obsolescence of IHL does not necessarily follow. A new reality may prompt revision of the law, as a discrepancy between the international legal system, focusing on the sovereign State as the legitimate legal actor, and the reality of power dynamics prevalent in NIAC, becomes clear. But one striking feature of contemporary problems includes the lack of political will among States to ensure greater compliance with IHL and to consider negotiating new IHL rules.[68]

2.3.2 – Terror Legislation and the Criminalization of Aid

The question of the changing character of terrorism, and the course of action to counter this development, are central to the changing character of war. Today's conflicts are often framed as issues of terrorism. This has major implications for the willingness of non-State armed groups to adhere to IHL and thus also

[68] ICRC (2016): Generating respect for the law: An appraisal, International Review of the Red Cross, Volume 98, No. 2, p. 673.

adverse impacts on aid worker security. What really is changing in terrorism is a much-debated question.[69] But neither the non-State armed group, nor the terrorism debate is new to IHL.[70] This chapter addresses the "war on terrorism" and argues for counter-terrorism (CT) legislation not to be interpreted so as to preclude engagement with non-State armed groups.

Following the 9/11 attacks, the US president George W. Bush stated that the US was engaged in a "war on terrorism" and began airstrikes as well as ground operations against the Taliban regime, the then authority in Afghanistan. The Bush Administration sought to free itself of the restrictions IHL has placed on the conduct of warfare and the treatment of captured. Its decisions have thrown well-accepted standards, of identifying when IHL applies, into disarray. In coining the term "war on terrorism", the administration and its lawyers attempted to establish a situation where its actions were exempted of regulation through IHL.[71] The "war on terrorism" raised anew the tension between military necessity and a humanitarian norm centered on individual human dignity. It

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[69] For arguments on new dimensions in terrorism see: Cronin, Audrey Kurth (2011): What is Really Changing? Change and Continuity in Global Terrorism, pp. 134 – 146. In: Strachan, Hew; Scheipers, Sibylle (eds.): The Changing Character of War, Oxford: Oxford University Press. For arguments of continuity in terrorism see: Hoffman, Bruce (2011): Who Fights? – A Comparative Demographic Depiction of Terrorists and Insurgents in the Twentieth and Twenty-First Centuries, pp. 282 – 295. In: Strachan, Hew; Scheipers, Sibylle (eds.): The Changing Character of War, Oxford: Oxford University Press.

[70] International law recognized and tried to address terrorism as a specific problem as early as 1937. International Conference on the Repression of Terrorism (1937), Geneva & League of Nations. (1937): Convention for the prevention and punishment of terrorism, Geneva.

[71] Forsythe, David P. (2005): The Humanitarians: The International Committee of the Red Cross. New York: Cambridge University Press, p. 131f. : The Bush Administration argued that the GC IV is applicable to the US, but nonetheless allows for special treatment of some prisoners.

brought forward the notion of "just war", where the civilian population would not be an indirect victim, but rather become an intentional target. This concept erodes the protective regimes of IHL and produces a dimension of good victims worthy of humanitarian assistance and bad victims unworthy of any help, which leaves no room for neutral aid.[72]

There has until now neither been a universally agreed definition of terrorism, nor a comprehensive treaty addressing terrorism. Question remain concerning the scope of application of such a definition, the debate over a relationship between the right to self-determination, foreign occupation and acts of terrorism and the question of whether and how a definition would apply to the activities of military forces.[73] Instead of one comprehensive convention, the legal response to terrorism is fragmented and only gradually accumulated over time.[74] And the CT discourse still continues in both domestic and international forums with the tendency to consider any act of violence carried out by a non-State armed group as terrorist and therefore inherently unlawful. This has adverse effects on IHL, especially when such acts are not prohibited under IHL.

Addressing the necessity to delineate IHL and the legal framework covering terrorism, it is pivotal to clarify that IHL does allow States to address terrorism adequately and that applying IHL does not lead to impunity of those committing acts of terrorism in situations of armed conflict. While IHL

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[72] See for example: Moussa, Jasmine (2008): Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law, International Review of the Red Cross, Volume 90 Number 872, pp. 963 – 990.

[73] Paust, Jordan J. (2015): Armed Opposition Groups, p. 286. In: Noortmann, Math; Reinisch, August; Ryngaert, Cedric: Non-State Actors in International Law. Oregon, Hart Publishing.

[74] See for example: UNSC Resolution 1373 (2001), UNSC Resolution 2178 (2014), UNSC Resolution 2242 (2015).

does not provide a definition of terrorism per se, it explicitly criminalizes "measures of terrorism"[75], "acts of terrorism"[76] and "acts or threats of violence the primary purpose of which is to spread terror among the civilian population"[77]. Furthermore, IHL prohibits most acts one can consider as terrorist in armed conflict, such as the prohibition of direct and deliberate attacks on civilians, hostage taking and indiscriminate attacks in general. It is equally important to remember that IHL, regulating lawful and unlawful ways of warfare, allows certain acts of violence in armed conflict, whereas any acts designated as terrorist under CT legislation are by definition unlawful. Resorting to CT measures adds overlapping, converging, and diverging legal obligations and legal uncertainty to an already complex legal system. It furthermore creates an unnecessary layer of criminalization. This is especially dangerous, because new layers of CT may criminalize actions that are legal under IHL, thereby discouraging IHL compliance by non-State armed groups.

The "war on terrorism" has thrown the incentive structure of IHL into crisis. Acts in violation of IHL and acts in compliance with IHL lead to the same sanctions. Non-State armed groups being labeled terrorists are prosecuted regardless of their adherence to IHL.[78] If the non-State armed groups designated as terrorists have no rights whatsoever, they equally have no incentive to respect IHL. The "war on terrorism" proved to pose significant problems to the classification of conflict[79], the

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75 Geneva Convention IV, Article 33.

76 Additional Protocol II, Article 4.

77 Additional Protocol I, Article 13(2).

78 Cogen, M. (2001). The Impact of Laws of Armed Conflicts on Operations Against International Terrorism. crimesofwar.org.

79 The US legal case Hamdan vs. Rumsfeld highlights the problems with classification of conflict in the context of Afghanistan. The case dealt with Hamdan, a Yemeni national, who was captured in Afghanistan and trans-

scope of application of IHL and the classification of status. IHL knows combatants and civilians. The "war on terrorism" however shed light on discussion about a third legal term of "unlawful combatant".[80] In fact, there is no such thing as an "unlawful combatant" in IHL. There is no category of persons who fall outside the scope of IHL protection. The oxymoron "unlawful combatant" waters down the important binary distinction between combatants and civilians, with the goal of depriving one or both groups of persons from their rights. This does not mean that any elaboration on improvement of the categories has no right to be discussed, but rather that this

ported to Guantanamo Bay. This case went through different instances resulting in three different decisions in order to establish the status of the individual and to classify the conflict in Afghanistan. In first instance, a judge classified it as an IAC within the Geneva Conventions. This ruling was somewhat changed by the Court of Appeals, which also characterized it as IAC, but outside the scope of the Geneva Conventions, envisaging a situation where the laws of war are not applicable. The Supreme Court, as last instance, decided to classify the conflict as NIAC, affording the protection under its rules to the individual. Duxbury, Alison (2007): Drawing Lines in the Sand – Characterising Conflicts for the Purposes of Teaching International Humanitarian Law, Melbourne Journal of International Law, Vol. 8, No. 2, pp. 259 – 272.

80 The US and Israel advanced the idea of the third category of "unlawful combatant", although in different form. Israel tried to establish this category as a necessary and reasonable development of IHL compatible with IHL, whereas the US tried to put those in the category outside the scope of IHL as well as US law. Both, however, argue that non-state armed groups have unreasonable advantages through the current IHL and seek to weaken the legal position of these actors. See further: Crane, David M.; Reisner, Daniel (2011): Jousting at Windmills, The Laws of Armed Conflict in an Age of Terror – State Actors and Nonstate Elements. In: Banks, William C. (ed.) (2011): New Battlefields, old Laws: Critical Debates on Asymmetric Warfare. New York: Columbia University Press, p. 67 – 84. While some scholars see unlawful combatants as those participating in armed hostilities without having combatant privilege, this thesis argues that those individuals would rather fall in the category of civilians taking part in hostilities directly. For the aforementioned argument see: Sloane, Robert D. (2007): Prologue to a Voluntarist War Convention, Michigan Law Review 10/29/2007, p. 458.

discourse should not be used to reduce the protection awarded by IHL.[81] In what category fit individuals who participate in the hostilities without meeting the minimum legal criteria to do so? The ICRC acknowledges that there is room for discussion by stating that "it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war".[82]

The "war on terror" also highlights the predicaments of the criminalization of aid. The US Supreme Court held that training in international law should be considered as material support to a terrorist group, as a non-State armed group could use the training to promote terrorism, to threaten and disrupt.[83] Aid workers are also coming under scrutiny for contributing to terrorist activity through ransom payments, bribes and negotiations that are perceived to give legitimacy to a group in their area of operation.[84] The rationale behind this criminalization also includes the argument that such action sets free resources of the group, giving them a military advantage. Starting in 2011, the ICRC repeatedly called attention to the risk of aid workers being criminalized due to the "prohibition in criminal legislation of unqualified acts of 'material support', 'services' and '

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[81] The consistent resistance to the US use of an unlawful combatant category suggests that there is no intermediate status and that nobody can fall outside the law. This is reinforced through Geneva Convention IV, Commentary 51.

[82] ICRC (2009): Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, p. 22.

[83] Supreme Court of the United States (2009): Holder v. Humanitarian Law Project, p. 6.

[84] Fairbanks, Andelicia (2017): Humanitarian access in a changing world: why security risk management matters, European Interagency Security Forum.

assistance to' or 'association with' terrorist organizations (…)".[85] With restrictions on contact and prohibition on providing support to non-State armed groups or individual, CT measures have a negative effect on the ability of aid workers to perform their tasks, when fundamentally important interactions are prohibited. These are for example the engagement with groups in negotiation access, transactions necessary to obtain protection, providing IHL training as well as providing assistance and protection for individuals of a designated terrorist group, such as medical care for the wounded or prisoner exchanges. Humanitarian principles require aid workers to treat all parties to a conflict equally, whereas this is not true for CT legislation. If aid workers choose to comply with it, humanitarian principles could be compromised. The ICRC, in accordance with the principle of neutrality and impartiality, has based its programs on needs. The security objectives of CT measures may lead aid workers to base their programs on constraints rather than needs. This of course has direct impacts of their perception and security. With the criminalization of aid, the incentive aid work can provide non-State armed groups, is plunged into crisis.

2.4 – Towards Convergence

The current situation, especially the inequality of parties to NIAC, is inconsistent with the spirit and the purpose of IHL. And the long time challenged dichotomy between IAC and NIAC seems to gradually be fading away. The growth of international criminal tribunals an their rulings has played an important role in this transformation, but will only briefly be addressed in this context.

[85] ICRC (2011): International humanitarian law and the challenges of contemporary armed conflicts, 31IC/11/5.1.2, Geneva, p. 52.

The Rome Statute of the International Criminal Court encompasses IAC as well as NIAC.[86] The International Tribunal for the Former Yugoslavia (ICTY) held that a "state-sovereign-oriented approach has been gradually supplanted by a human-being-oriented approach. [...] It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. [...] If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight."[87] There is a need for further clarification with regard to the dichotomy of IAC an NIAC, particularly with regard to the status of non-State armed groups and especially with regard of combatant immunity.[88] This chapter will try to elucidate on these issues.

2.4.1 – Dichotomy IAC – NIAC

A distinction between international conflicts and conflicts not of an international character exists since the Geneva Convention of 1949. The development of IHL concerning NIAC has been made primarily by analogy to the rules regulating IAC. Yet, there are major differences in both types of conflict, especially with regard to the parties to the conflicts. There does not appear to be any current situation of armed violence between organized parties that would not be encompassed by one of

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[86] International Criminal Court (2002): Rome Statute of the International Criminal Court.

[87] ICTY (1995): The Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdition, IT-94-1-AR72, Paragraph 97.

[88] This thesis accepts the term combatant in a technical sense under IHL and as defined by it, but recognizes that there is a discussion about the ethical dimension of this term. See for example: Graham, Gordon (1996): Ethics and International Relations, Oxford: Blackwell Publishers. See especially Chapter 3: War.

the two existing classifications. That does not mean that clarification is obsolete on what a NIAC encompasses. The strict dichotomy between IAC and NIAC has come under increased scrutiny. And much of the complexity of armed conflict could be overcome by a revised IHL applicable at any time a State uses its military forces to engage in hostilities.

> "Why protect civilians from belligerent violence [...] when two sovereign States are engaged in war, and yet refrain from [...] providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law [...] must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight".[89]

IHL is however still applied along this categorization. This necessitates this chapter to address this distinction and the different thresholds of these types of armed conflict.

One key distinction between an IAC and a NIAC originates from the quality of the parties involved. NIAC is armed conflict that typically takes place within States rather than across borders. It can be waged between armed State forces and non-State armed groups, or between different non-State armed groups. Before IHL was developed and adapted, due to the increase of internal violence, inter-State conflict was in the realm of international law and intra-State conflict fell into domestic jurisdiction. The four Geneva Conventions and Additional Protocol I govern IAC. Rules applicable to NIAC are set out in Common Article 3 and in Additional Protocol II, which distinguishes in particular between armed conflict and "internal disturbances and tension".[90] This body of rules was later added to, through

[89] ICTY (1995): The Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdition, IT-94-1-AR72, Paragraph 97.

[90] Additional Protocol II, Article 2.

rules governing the protection of cultural property[91] and customary law applicable to NIAC.[92] Treaty law developed and established a minimum standard of protection, which is nonetheless far less extensive than rules regulating IAC. The protection of people hors de combat in IAC is much greater than that in NIAC. It is worth noting that difficulties arise, when civil conflict is not covered by IHL, because it falls below the necessary threshold of Common Article 3.[93] IHL gives several indications, but there is no comprehensive and unambiguous definition of the distinction between armed conflict as opposed to isolated and sporadic acts of violence, civil unrest or internal tensions and turbulences.

The threshold for NIAC is laid out in the Common Article 3 of the Geneva Conventions, stating that IHL applies in cases of "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties".[94] Additional Protocol II develops and supplements Common Article 3 without changing its conditions of application. The threshold envisaged by it is higher still, in that NIAC exists when it takes place "in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to

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[91] UNESCO (1954): Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, Article 19; UNESCO (1999): Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999.

[92] ICC (2002): Statute of the International Criminal Court, Article 8(2).

[93] Inter-American Commission of Human Rights (1997): La Tublada case, Report No. 55/97, Case No. 11.137: Argentina, OEA/ Ser/L/V/II.98, Doc. 38, Paragraph 153.

[94] Geneva Conventions, Common Article 3.

implement this Protocol".[95] A series of key cases established a much clearer definition of the threshold of NIAC than can be found in treaty texts with two basis criteria. The violence must reach a minimum level of intensity and the parties involved in the conflict must show a minimum degree of organization.[96] It is however not completely clear what this threshold exactly is, even though the ICTY tried to clarify on this point.

> "An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[97]

The ICRC refers to "any engagement of the armed forces of High Contracting Parties"[98] as an armed conflict for purposes of applying IHL. This definition is criticized in a study of the International Law Committee, which "found little evidence to support the view that the Conventions apply in the absence of fighting of some intensity".[99] These examples points to the

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95 Additional Protocol II, Article 1.

96This chapter will come back to the role of the ICTY in establishing rules for NIAC on different occasions. Its role cannot be understated, which becomes evident by looking at the establishment of the guiding principle in its jurisprudence, stating that which is prohibited in IAC, must be prohibited in NIAC as well. This enabled the ICTY to draw on the laws governing IAC when dealing with NIAC, leading it to even not consider the nature of the conflict at all. See: ICTY (2004): Prosecutor v. Slobodan Miloševi, Decision on Motion for Judgement of Acquittal, IT-02-54-T, Paragraphs 16-17; ICTY (1998): Prosecutor v. Anto Furundžija, Judgment, IT- 95-17/1-T, Paragraph 59; ICTY (1998): Prosecutor v. Zenjnil Delalic, Judgment, IT-96-21-T, Paragraph 183.

97 ICTY (1995): The Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdition, IT-94-1-AR72, Paragraph 70.

98 ICRC (1952): Commentary to the Conventions.

99 International Law Association (2010): The Hague Conference – Use of Force, Final Report on the Meaning of Armed Conflict in International Law, p. 2.

difficulties of, and controversies in, determining the scope of application of IHL.

Difficulties arise as to the temporal and geographical scope of application as well. The arguments circle around the question, whether the application of IHL can be limited to the area of hostilities within the territory of a State, or are by default applicable to the whole territory of a State. The ICTY concluded in its landmark ruling that IHL applies throughout the whole territory under the control of a party, whether or not actual combat takes place.[100] This problematic is especially relevant in situations, where forces of a State engage in hostilities with a non-State party operating from the territory of a neighboring State without the latter's help or control, when a transnational NIAC is waged across multiple territories or when internal conflict spills over porous boarders.

In contemporary armed conflicts, violence moves across various levels of intensity over time. Conflicts do not only start and end, they also evolve. This happens sometimes through internationalization, for example through a third State exercising control over a non-State armed group, turning the IAC into a conflict between two States. It is also imaginable that a conflict internalizes, through a regime change, where the non-State armed group becomes the State. These processes could reinforce the perception of a lack of real distinction between IAC and NIAC.

2.4.2 – Dichotomy Civilian – Combatant

Contemporary conflicts differ from earlier conflicts, and the role of civilians is central to this change. A civilian is not defined trough a distinct, positive definition but by not being a combatant. This has been done deliberately in order not

[100] ICTY (1995): The Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdition, IT-94-1-AR72, Paragraph 70.

to leave anyone without protection. Combatants are persons authorized by a State to use force in armed conflict, excluding medical and religious personnel.[101]

> "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party".[102]

IHL distinguishes two categories of combatants, members of the organized armed forces of a State party to an armed conflict on the one hand, and on the other hand members of militia and volunteer corps wearing a fixed distinctive emblem, such as a uniform, carry arms openly and who are organized into a responsible command structure. It recognizes organized resistance movements and levées en masse, movements where civilians of a threatened territory spontaneously take up arms against an approaching invading or occupying army.[103] Members of such movements qualify for combatant status under the preconditions that they carry their arms openly, obey IHL and wear a fixed distinctive sign recognizable at a distance. Combatants have the right to participate in hostilities, are legitimate targets and as long as they have not violated IHL, may not be subject to criminal prosecution simply for their participation in a conflict.[104] It is important to note that a person is considered to be a civilian in any cases of doubt. Parties to a conflict are obliged to always distinguish between combatants and others and must direct their military actions

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[101] Geneva Convention III, Article 4; Additional Protocol I, Article 43, 44.

[102] Additional Protocol I, Article 43(1).

[103] Geneva Convention I and Geneva Convention II, Article 13(6); Geneva Convention III, Article 4(A)(6), 4(A)(2).

[104] Additional Protocol I, Article 43(2).

accordingly. The civilian population and individual civilians must not be targeted for attack, "unless and for such time as they take a direct part in hostilities".[105] In these circumstances, they do not change their status and become combatant, but rather lose the protections granted by IHL. Civilians who take a direct part in hostilities in IAC without being members of the armed forces as defined by IHL, as opposed to combatants, are liable to prosecution for taking up arms and do not enjoy prisoners of war status. Persons who are not, or no longer, taking part in hostilities shall be protected and treated humanely. Combatants, if captured, have the right to prisoners of war (POW) status. Appropriate care for them shall be given indiscriminately. Captured combatants shall be treated humanely and protected against violence. If prosecuted, they shall receive a fair judicial trial. It is not easy to see, why combatant status is one of the major incentives to uphold IHL in armed conflict.

This dichotomy is easily applicable in a sterile battlefield, in contemporary armed conflict however, this distinction becomes much more complex. The principle of proportionality and necessity postulates that killing or harming civilians can be justifiable. Disproportionate harm to civilians, meaning that the anticipated collateral damage is excessive in relation to the concrete direct military advantage expected, is forbidden, whereas unintentional killing of civilians as an unavoidable side effect of an attack on a military target, conducted with proportionality in mind, is permitted. Military victory is a legitimate objective, but forces engaged in conflict are required to take precautionary measures. This requires all parties to an armed conflict to take all feasible precautions to avoid civilian casualties and to minimize collateral damage. Only those objects that are making an effective contribution to military operations may be considered to be lawful targets and no more

[105] Additional Protocol II, Article 13(3).

force than necessary should be applied.[106] Weapons treaties restrict the right to and methods of warfare. Inflicting excessive injuries and unnecessary suffering is prohibited and the principle of military necessity can never be used as a justification for violating other principles of IHL. For example, direct military attacks on civilians or other unlawful targets can never be deemed necessary.

In contemporary armed conflict, the lines between combatant and civilian have to some extend become unclear. Thus, much discussion has been directed towards the clarification of the notion of direct participation in hostilities. While the core distinction between civilian and combatant remains, the role of the former has increased in complexity through multifaceted roles in contemporary conflicts. Civilians are protected "unless and for such time as they take a direct part in hostilities".[107] Difficulties arise in determining which activities equate to direct participation and what the term "for such time" actually covers in NIACs that are often protracted and characterized by episodic fighting. In trying to explain "taking direct part in hostilities", the ICRC speaks of a continuous combat function. According to this logic, constitutive elements of direct participation include the infliction of death, injury or destruction, the need for a direct causal link between the act and the harm, which needs to adversely affect military operations of the adversary.[108] The ICRC insists that a "deployment amounting to direct participation in hostilities begins only once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation. The return from the execution of a specific hostile act ends once the individual in ques-

[106] Additional Protocol II, Article 13.

[107] Additional Protocol II, Article 13(3).

[108] ICRC (2009): Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, p. 16.

tion has physically separated from the operation, for example by laying down, storing or hiding the weapons or other equipment used and resuming activities distinct from that operation".[109] A person exercising a continuous combat function would however be targetable at all times, regardless of the threat he actually poses, with the result that these individuals have no combatant privilege but a combatant disadvantage. There are arguments to include those in the category of direct participation, who openly support hostilities by financing, training, or storing weapons. According to this logic, as long as an individual serves to directly support hostilities, they are targetable until they cease to do so.[110] With regard to "unless and for such time"[111], the ICRC uses the criteria of threshold of harm, direct causation and belligerent nexus, which all have to be satisfied for an act to amount to participation.

A multitude of rules regulating IAC are not applicable in NIAC. Chief among them is the question of combatant status and POW status, the problematic of which is evidenced through debates about terrorism and CT legislation. Upon capture, a combatant can expect certain rights and privileges. Combatant status provides immunity from domestic criminal law for acts such as assault, murder and destruction of property. For combatants, captivity is not meant as to be some sort of punishment, but rather a protective custody to remove them from the armed conflict and to prevent them from returning to the fighting. POW status was first codified in the Lieber Code,

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[109] ICRC (2009): Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, p. 67.

[110] Jensen, Eric Talbot (2011): Direct Participation in Hostilities, A Concept Broad Enough for Today's Targeting Decisions, p. 102. In: Banks, William C. (edt.) (2011). New Battlefields, old Laws: Critical Debates on Asymmetric Warfare. New York: Columbia University Press.

[111] Additional Protocol II, Article 13(3).

adopted by the Hague Regulations and expanded through the 1929 Geneva Convention relating to the Treatment of Prisoners of War.[112] The first endeavor at defining combatant status was attempted at the Brussels Conference.[113] The four criteria laid out in Article 9 required command by a person responsible for his subordinates, having a fixed distinctive emblem recognizable at a distance, carrying arms openly and conducting operations in accordance with IHL.[114] These requirements were reiterated in the Hague Law and substantially unchanged incorporated into IHL. The Geneva Convention of 1949 thus reinforced the distinction between combatants and civilians, making it virtually impossible for non-State actors to meet the criteria of lawful combatancy. But further expansion of the category of combatant was underway through Additional Protocol I.[115]

2.4.3 – National Liberation Movements

The change in contemporary armed conflict has in the past brought about new regulations of IHL, as exemplified by Protocol I regarding National Liberation Movements. Widespread nationalism emerged in various colonial regimes after World War II. A new type of conflict broke out where one party declared their fight as an act of self-determination, a right enshrined in the UN Charter.[116] These armed conflicts were

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[112] Crawford, Emily (2010): The Treatment of Combatants and Insurgents Under the Law of Armed Conflict, Oxford: Oxford University Press, p. 63.

[113] Crawford, Emily (2010): The Treatment of Combatants and Insurgents Under the Law of Armed Conflict, Oxford: Oxford University Press, p. 49.

[114] Scheipers, Sibylle (2011): The Status and Protections of Prisoners of War and Detainees, p. 404. In: Strachan, Hew; Scheipers, Sibylle (eds.): The Changing Character of War, Oxford: Oxford University Press.

[115] Dinstein, Yoram (2004): The Conduct of Hostilities under the Law of International Armed Conflict, New York: Cambridge University Press, p 41.

[116] United Nations (1945): Charter of the United Nations, Article 1(2).

internal in nature, as they took place within one State, but were fought against a foreign administration. Any conflict that arose, due to one party pursuing is right to self-determination and national liberation, was now to be considered as an IAC.[117] This led to a disruption of the traditional IAC - NIAC dichotomy.

Protocol I sought to extend the combatant status by granting national liberation movements a limited form of legitimacy. Articles 43 and 44 invoked that armed forces with the right to participate directly in hostilities shall include "all organized armed forces, groups and units"[118] under responsible command and under "an internal disciplinary system, which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict".[119] This reduced the four Brussels criteria of lawful combatancy to only two, which are responsible command and compliance with the laws of war. In doing so, the Protocol had to extend combatant privileges to fighters who did not wear uniforms or carried their arms openly, when "owing to the nature of the hostilities an armed combatant cannot so distinguish himself".[120] This seemed to have placed a disadvantage on regular combatants and shifted the balance between military necessity and the principle of humanity, as it may put civilians in danger.[121] The fighters are however obligated to distinguish themselves from civilians during attacks or in the preparatory phase of an attack. Establishing such a

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[117] Crawford, Emily (2010): The Treatment of Combatants and Insurgents Under the Law of Armed Conflict, Oxford: Oxford University Press, p. 13.

[118] Additional Protocol I, Article 43.

[119] Additional Protocol I, Article 43.

[120] Additional Protocol I, Article 44(3).

[121] Zoli, Corri (2011): Humanizing Irregular Warfare, Framing Compliance for Nonstate Armed Groups at the Intersection of Security and Legal Analyses, p. 198. In: Banks, William C. (ed.): New Battlefields, old Laws: Critical Debates on Asymmetric Warfare. New York: Columbia University Press.

distinction is considered in light of operational necessity.[122] The Protocol goes on to state that even in the case of combatants violating these rules, they shall not be deprived of combatant status. The individual would loose POW status, but "shall nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war".[123] Some scholars went so far as to attest that a distinction between combatants and those not matching the criteria of combatancy whilst taking part in hostilities, became "nominal in value"[124] and existing in name only. Others argued that Protocol I would give rights to those they deem terrorists by bringing in the concept of just war.[125]

Contemporary armed conflicts show, that Protocol I failed to induce members of non-State armed groups to distinguish themselves from civilians. It however also didn't confirm the fear of lending legitimacy to such groups. This fact discourages similar views put forward by opponents of the idea of granting combatant status to members of these groups. Beyond this, it should be clear that the conceptual framework of Protocol I is not suitable in the context of contemporary NIAC. This seems to be especially true with regard to groups rejecting the idea of noncombatant immunity and the principle of distinction.[126]

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[122] Additional Protocol I, Article 44.

[123] Additional Protocol I, Article 44.

[124] Dinstein, Yoram, (2004): The Conduct of Hostilities under the Law of International Armed Conflict, p. 47.

[125] Cassese, Antonio (1984): The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law, Pacific Basin Law Journal, Vol. 3, No. 1-2.

[126] Zoli, Corri (2011): Humanizing Irregular Warfare, Framing Compliance for Nonstate Armed Groups at the Intersection of Security and Legal Analyses, p. 198. In: Banks, William C. (ed.): New Battlefields, old Laws: Critical Debates on Asymmetric Warfare. New York: Columbia University Press.

The international community over the years has been prepared to recognize certain categories of persons as legitimate participants in armed conflicts and granted protections given to combatants and POWs. Protocol I can be interpreted as to bring about a convergence of the dichotomy of IAC and NIAC. It can arguably be seen as a comprehensive approach to create a single and nondiscriminatory set of rules applicable to all those actively taking part in hostilities. The questions remains why States were willing to accept that fighters of national liberation movements engaged in what shows all signs of NIAC, were to be granted full protection under IHL, whereas in other, similar instances, no such protection is granted.[127]

2.4.4 – Invoking IHL regardless of the Source of Obligation

The application of IHL to different forms of violence has been the subject of many publications, especially because knowing which rules apply is of paramount importance.[128] With the controversies over the definitions in mind, the question comes up, whether or not the distinction between IAC an NIAC is still relevant. It has been proposed to abandon the classification of NIAC and apply the stricter rules of IAC to all instances where a State utilizes their armed forces.[129] While this approach might

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[127] For a historical background of the denial of combatant status to insurgents see: Crawford, Emily (2010): The Treatment of Combatants and Insurgents Under the Law of Armed Conflict, Oxford: Oxford University Press, p. 69 – 73.

[128] ICRC (2009): Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law; Wilmshurst, Elizabeth (ed.) (2012): International Law and the Classification of Conflicts. Oxford University Press.

[129] As for example postulated by Emily Crawford. See: Crawford, Emily (2007): Unequal before the Law: The Case for the Elimination of the Distinction

promise to bring clarity and a better protective regime, there are many refutations, including questions raised with regard to legitimizing non-State violence and regarding States' willingness to follow this development.[130] Nonetheless, there is a trend to apply rules regarding IAC to NIAC as well, which contributes to the blurring of the dichotomy of IAC and NIAC. This is true for the principle of distinction, the requirement of proportionality, the prohibition of indiscriminate attacks and the prohibition on using means that cause unnecessary suffering.[131] The ICRC has long tried to push towards a more unified approach.[132] States, non-State armed groups and intergovernmental organizations like the UN, through their practice, contributed to the trend to observe IHL through a more uniform approach to regulation of armed conflict.

Even though Common Article 3 and Additional Protocol II clearly acknowledge that non-State armed groups take part in armed conflict, neither instrument legitimates or immunizes such participation. But the provisions of Common Article 3 and

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between International and Non-international Armed Conflicts, Leiden Journal of International Law, Vol. 20, No. 2, pp. 441 – 465.

[130] Jensen, Eric Talbot (2013): Reunifying the Law of Armed Conflict in COIN Operations through a Sovereign Agency Theory, p. 46. In: Banks, William (2013): Counterinsurgency Law: New Directions in Asymmetric Warfare. Oxford: Oxford University Press.

[131] Crawford, Emily (2010): The Treatment of Combatants and Insurgents Under the Law of Armed Conflict, Oxford: Oxford University Press, p. 30f.

[132] The ICRC added a fourth and last paragraph to Article 2 of the draft Conventions stating that "[i]n all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise depend on the legal status of the Parties to the conflict and shall have no effect on that status." Geneva Convention (III) relative to the Treatment of Prisoners of War. (1949): COMMENTARY OF 1960.

Protocol II seek to replicate the principles regarding POW status applicable to IAC. In addition, customary IHL demonstrates that similar provisions now exist in both types of conflict. This is not meant to suggest, that an equal standing between the parties to an NIAC has been achieved, but rather to indicate that functional equivalents to many provisions of IHL applicable to IAC can be found in Common Article 3 and Protocol II. This is exemplified by the requirement of Geneva Convention III, demanding that "[p]risoners of war must at all times be humanely treated"[133], which is mirrored by Common Article 3 where "those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely".[134] The commentary to the Geneva Convention clarifies that humane treatment is the basic theme of the convention and that what is written under Common Article 3 and Article 13 should be considered interchangeable.[135] Judicial bodies have affirmed this convergence through cases decided under International Human Rights Law (IHRL). Humane treatment is also a requirement of Additional Protocol II.[136] Humane treatment under Common Article 3 comprises the prohibition of murder.[137] The prohibition of murder is also implied elsewhere in Geneva Convention III[138] and this parallel has been strengthened by the ICTY in its Delalic Case.[139] This

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[133] Geneva Convention III, Article 13.

[134] Geneva Conventions, Common Article 3.

[135] Geneva Convention III, Commentary of 1960.

[136] Additional Protocol II, Article 4(1).

[137] "The following acts shall remain prohibited [...]: violence to life and person, in particular murder of all kinds" Geneva Conventions, Common Article 3(1)(a).

[138] Geneva Convention III, Article 14.

[139] "the primary purpose of common article 3 of the Geneva Conventions was to extend the "elementary considerations of humanity" to internal armed

convergence is also visible in the rule of non-discrimination, set down in Article 16 of the Geneva Convention III. Common Article 3 also applies "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria".[140] Similarly, Additional Protocol II "shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria".[141] The principle of non-discrimination of Additional Protocol II and non-discrimination under the Geneva Convention is to be understood as having the same scope.[142]

It has been shown that a considerable number of provisions of IHL regarding POW status can already be found in the rules regulating NIAC. However gaps remain in so far as some important issues are not explicitly mentioned in Common Article 3 or Additional Protocol II. This is especially true with regard to some conditions of captivity, some judicial guarantees, such as the right to assistance from an interpreter, and to the recording of personal details of detainees, an important practice to combat disappearances. Efforts to assimilate the full extend of IHL into NIAC can be observed not only in the policy of many armed forces applying de facto IAC rules to all conflicts, but

conflicts. Thus, as it is prohibited to kill protected persons during an international armed conflict, so it is prohibited to kill those taking no active part in hostilities which constitute an internal armed conflict." ICTY (1998): Prosecutor v. Zenjnil Delalic, Judgment, IT-96-21-T, Paragraph 423.

[140] Geneva Conventions, Common Article 3(1).

[141] Additional Protocol II, Article 2(1).

[142] "It is contained in other provisions of the Conventions and of the Protocols in greater or lesser detail. (1) Its scope is always the same." Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Commentary of 1987, Paragraph 4482.

also in the reorientation of the focus from States towards individuals through IHRL. This is why the role of IHRL in filling the gaps between IAC and NIAC will now be examined.

UN resolutions often refer to respect IHRL and IHL, without making the distinction as to the type of IHL.[143] Other organizations have also contributed to this trend.[144] This suggests a move towards an assimilation of rules governing IAC and NIAC. The legal distinction between IAC and NIAC has also been blurred through the rise of IHRL. In the situation of Afghanistan, there are different mechanisms put in place by the UN, which suggest for a human rights based approach to armed.[145]

Despite an on-going debate, the UN Security Council stated back in 1967 that "essential and inalienable human rights should be respected even during the vicissitudes of war".[146] Some reject the incorporation of IHRL in situations of war, while others advance its importance in the matter.[147] But only because a person finds itself in the midst of an armed conflict,

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[143] See for example the UN Resolutions entitled Respect for Human Rights in Armed Conflict, such as Resolution 3102, 3500 and 2677.

[144] Crawford, Emily (2010): The Treatment of Combatants and Insurgents Under the Law of Armed Conflict, Oxford: Oxford University Press, p. 42. See for example the Institute of International Law stating that "[a]ll parties to armed conflicts in which non-State entities are parties, irrespective of their legal status, […] have the obligation to respect international humanitarian law as well as fundamental human rights." Institute of International Law (1999): The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties, Berlin Session, Article II.

[145] UN Security Council (1998): Resolution 1193.

[146] UNSC Resolution 237 (14 June 1967) S/RES/237 (1967).

[147] Hansen, Michelle (2007): Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict, Military Law Review, Vol. 194, pp. 1 – 65.

it does not stop being human. Indeed, IHL already incorporates some aspects of human right norms that are applicable in times of armed conflict. Additional Protocol II refers to human rights, "[r]ecalling furthermore that international instruments relating to human rights offer a basic protection to the human person",[148] while the basic protection of human rights, already object in Common Article 3, is further elaborated upon in articles 4 to 6. The convergence of IHL and IHRL is also reflected for example in the decision to condemn attacks on schools as attacks on education.[149]

IHRL is contained in a number of documents, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and various other documents like the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Charter or the American Convention on Human Rights.[150] Many of these rules have achieved customary status and are now applicable regardless of whether a State has ratified the relevant document. This is especially true

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[148] Additional Protocol II, Preambel.

[149] Human Rights Council (2010): Resolution adopted by the Human Rights Council, Addressing attacks on school children in Afghanistan, A/HRC/RES/14/15.

[150] Afghanistan is a state party to the ICESCR, the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Optional Protocol to the Convention on the Rights of the Child (OP-AC) on the Involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child (OP-SC) on the Sale of Children, Child Prostitution and Child Pronography.

for fundamental provisions relating to detention.[151] The ICCPR for example determines that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".[152] Under IHRL, the prohibition of cruel, inhuman, and degrading treatment or punishment covers treatment such as detention in overcrowded or unsanitary facilities. In addition, human rights case law has reinforced the necessity for humane treatment, which includes a number of situations that go beyond what is provided in IHL.[153] Giving a second example, the prohibition of murder, framed as the right to life, is enshrined, among others, in the Universal Declaration of Human Rights[154] and the ICCPR.[155] The right to life, as the prohibition of murder and the positive obligation to prevent violence to life, thus equals the prohibition of violence to life as enshrined in Additional Protocol II and Geneva Convention III. IHRL guarantees trial by an independent, impartial and regularly constituted court. The ICCPR clarifies that a person deprived of their liberty has the right to "be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him"[156] and

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[151] Crawford, Emily (2010): The Treatment of Combatants and Insurgents Under the Law of Armed Conflict, Oxford: Oxford University Press, p. 120f.

[152] United Nations (1966): International Covenant on Civil and Political Rights, 999 UNTS 171 ICCPR

[153] Crawford, Emily (2010): The Treatment of Combatants and Insurgents Under the Law of Armed Conflict, Oxford: Oxford University Press, p. 131.

[154] United Nations (1948): Universal Declaration of Human Rights, 10 December 1948, Article 3.

[155] "No one shall be arbitrarily deprived of his life". United Nations (1966): International Covenant on Civil and Political Rights, 999 UNTS 171 ICCPR, Article 6(1).

[156] United Nations (1966): International Covenant on Civil and Political Rights, 999 UNTS 171 ICCPR, Article 14(3)(a).

"to have the free assistance of an interpreter if he cannot understand or speak the language used in court".[157] The human rights protections thus fill in the gap between rules applicable to persons with POW status and persons without the same protection under the Geneva Conventions.

The traditional position, that IHL is applicable in war and IHRL in peace changed,[158] and the applicability of IHRL to situations of armed conflict has been developed to mitigate instability and ineffectiveness of protection caused by legal uncertainty.[159] It is recognized that States have binding obligations under IHRL that apply also in times of armed conflict. IHRL is primarily applicable to States as they have the duty to respect, protect and to fulfill these rights.[160] By granting individuals rights that can be enforced against the State, IHRL is of significant importance in NIAC, where individuals may find themselves in armed conflict with their government. What may be unlawful in IHRL may very well be lawful in IHL. This is not only true for the use of force, but also for rules regarding detention. IHL allows for combatants to be detained without being criminally charged until the end of active hostilities. This stands in clear contradiction of detention practices under IHRL. Claiming IHL rights outside their scope of application

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157 United Nations (1966): International Covenant on Civil and Political Rights, 999 UNTS 171 ICCPR, Article 14(3)(f).

158 United Nations General Assembly (1968): UN GA Resolution 2444, (XXIII), 19 December 1968; United Nations General Assembly (1970): UN GA Resolution 2675 (XXV), 9 December 1970.

159 ICJ Reports (1995): International Court of Justice advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, Paragraph 25; ICJ Reports (2004): Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), Paragraph 106.

160 United Nations (1948): Universal Declaration of Human Rights, 10 December 1948, Article 2.

risks violating fundamental human rights.[161] IHL and IHRL complement each other, insofar as they both ensure basic rights and aim to protect dignity and life. And while IHRL applies at all times, IHL is a very specific legal framework, a lex specialis, applying only to situations of armed conflict. That is why questions regarding protection need to be examined first by IHL, even though additional protection may also come from IHRL.[162] IHL has in this regard priority over IHRL, but has to be interpreted in light of the broader rules of IHRL.[163] Some parties to a conflict will seek advantage from any ambiguity that may exist in order to selectively apply whichever rules they want. The International Court of Justice elaborated by stating that "some rights are exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be subject to both these branches of international law".[164] Parties to a conflict should not choose between either IHL or IHRL, but rather combine both to enhance the protection of victims.

It seems as though IHRL now applies at all times and therefore continues to apply, alongside IHL, during situations of armed conflict, although many of its provisions can be derogated from during times of national emergencies.

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[161] International Law Association (2010): The Hague Conference – Use of Force, Final Report on the Meaning of Armed Conflict in International Law, p. 33.

[162] Cubie, Dug (2017): The International Legal Protection of Persons in Humanitarian Crises. Exploring the Acquis Humanitaire. Oxford and Portland, Oregon: Hart Publishing, p. 18of.

[163] Arnauld, Andreas von (2016): Völkerrecht. Schwerpunktbereich,3rd Edition, Heidelberg: C.F. Müller, p. 523.

[164] ICJ Reports (2004): Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), Paragraph 106.

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation [...]."[165]

States are however not free in imposing derogations on civil and political rights, they need to be proportionate to the situation and their temporal application may be restricted. The need to officially proclaim a state of emergency and the invocation of the derogation clause establishes international accountability for actions taken by the State in question. A state of emergency does not abrogate individual criminal responsibility for crimes against humanity.[166] There are furthermore certain rights that may never be derogated, such as the right to life, the right to freedom from torture and other degrading or humiliating treatment, freedom from slavery, the right to a nationality, freedom from forced labor, freedom from discrimination and freedom of religion and belief.[167]

States justify derogation most times with the threat of terrorist insurgencies.[168] The Human Rights Committee, insisting

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[165] United Nations (1966): International Covenant on Civil and Political Rights, 999 UNTS 171 ICCPR (entry into force 1976), Art. 4(1).

[166] United Nations Human Rights Committee (2001): Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, CCPR General Comment No. 29, Article 4(1), Paragraph 12.

[167] United Nations (1966): International Covenant on Civil and Political Rights, Art. 4(2); Council of Europe (1950): Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR, Art. 15(2). Derogation clauses aim at striking a balance between protection of individual human rights and the protection of national needs in times of crisis by placing reasonable limits on emergency powers.

[168] Joseph, Sarah (2002): Human Rights Committee: General Comment 29, Human Rights Law Review, Vol. 2. No. 2, p. 83.

on the interconnection between IHRL and IHL, noted that not every disturbance constitutes an emergency threatening the life of the nation, which would allow derogation and that during armed conflict, rules of IHL remain applicable as a method to prevent the State from abusing its emergency powers.[169] For situations of armed conflict forming national emergencies, IHL supplements and concretizes these non-derogable rights. One example of this is IHRL prohibiting torture and mistreatment and IHL specifying this with regard to different types of persons detained in armed conflict. In another example, IHL prohibits starvation as an act of war, which builds on the IHRL norm demanding of States an adequate supply of nutrition for its citizens.[170] But even if IHL and IHRL, there are in fact situations, which are not covered satisfactorily by either body of law. Situations of national emergency falling short of the IHL threshold of armed conflict are neither covered by IHL nor all of IHRL, as important right may be derogated from in accordance with human rights law.

Taking together the rules of Common Article 3, Additional Protocol II and the provisions of IHRL, offers a comprehensive body of rights and obligations arguably equivalent to the protection offered by combatant and POW status. The trend of connecting IHL and IHRL stems from the idea that there is no valid conceptual basis for distinguishing between the protections offered the same persons based only on the legal characterization of the conflict.

> "It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be

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[169] United Nations Human Rights Committee (2001): Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, CCPR General Comment No. 29, Paragraph 3.

[170] United Nations (1966): International Covenant on Economic, Social, and Cultural Rights, Article 11.

interpreted so as to give rise to a single set of compatible obligations".[171]

The reference to IHRL narrows the protective gap between rules applicable in IAC and NIAC.

[171] International Law Commission (2006): Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Yearbook of the International Law Commission, vol. II, Part Two, Paragraph 4.

3 – Incentive Structure of IHL in Crisis

The effectiveness of IHL depends heavily on the acceptance of the utility of its rules and the general attitude towards it. A groups' perception of these rules having high normative value influences its behavior and compliance. The deterrence factor of prosecution for IHL violations has long been seen as one of the most important factors inducing compliance with IHL, with parties to a conflict measuring the magnitude and likelihood of punishment.[172] But even though the behavior of non-State armed groups might be affected by the threat of prosecution, it is not clear whether it actually increases compliance, since the nature of conflict is not predictable and non-State armed groups often concentrate on short-term gains.[173] The threat of future prosecution might not even influence a non-State armed groups' behavior at all, as the likelihood of prosecution is too low to generate the desired respect for IHL. Immediate reactions are necessary to address this situation,[174] but enforcement of IHL is rightly considered to be one of its principal failings. The fact that, even though international criminal law has been established as a real threat to IHL violations, its retroactive nature limiting immediate reactions supports this. Enforcement is important but cannot be relied upon by itself. This is why this thesis, while acknowledging the important role of the development of individual criminal responsibility, and

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[172] Axelrod, Robert (1984): The Evolution of Cooperation, New York: Basic Books.

[173] Wood, Reed M. (2015): Understanding strategic motives for violence against civilians during conflict, p. 41. In: Krieger, Heike (Ed.): Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region. Cambridge: Cambridge University Press.

[174] Dinstein, Yoram (2010): The Conduct of Hostilities under the Law of International Armed Conflict, 2nd ed., Cambridge, p. 253f.

similar improvements, will now turn to incentives as a means to induce compliance with IHL.

3.1 – Incentives intrinsic to Humanitarian Aid

For the ICRC, establishing acceptance and negotiating access have long been preferred security management tools. But the events in Afghanistan forced the ICRC to question whether these tools remain viable options. The security dilemma aid workers are facing has sometimes been presented as a choice between the preservation of their neutrality, accepting heavy physical protection or leaving the hostile environment all together.[175] This chapter will however show that it is exactly the preservation of neutrality that keeps aid workers safe. The choice is therefore not between giving up neutrality or staying safe, in fact there may not even be a choice, as neutrality is the basis for keeping aid workers safe that can never be discarded.

Humanitarian aid, facilitating prisoner exchanges, care for combatants and the return of remains, serve as important material incentives for non-State armed groups. If a group is fighting for territorial autonomy, aid workers incentivize these actors to adhere to IHL, as they can provide support through development aid or capacity-building programs. Furthermore, letting aid worker help people under their control serves as an incentive for a non-State armed group trying to cultivate a positive image. This shows that the neutrality of an aid worker can be important in generating respect for IHL.

It seems reasonable to assume that the stronger the group, the bigger its political aspirations. Violations increase in situations where the non-State armed groups lack the means to shape or control civilian behavior, whereas public support

[175] Mackay, Angela (1997): Security for humanitarian workers: Can we afford it? Peacekeeping & International Relations, Vol. 26, No. 4/5, ABI/INFORM Collection, p. 1.

lowers the inclination to violence.[176] This leads to the dilemma that strong groups are more likely to adhere to IHL, whereas weaker groups are more prone to turn to IHL violations.[177] Stabilizing these groups thus could have an impact on their adherence, but this contradicts State interest. Reestablishing order in a volatile environment and providing aid to vulnerable and injured individuals affected by armed conflict can thus help in reducing violations of IHL. This makes the prospect of humanitarian aid valuable for non-State armed groups. Delivering humanitarian aid would not be possible without access. In order to obtain access, aid workers need to act neutral. This is why the following chapter will address neutrality and access as prerequisites for the incentivizing aspects of humanitarian aid.

3.1.1 – Neutrality

The ICRC makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavors to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress. Neutrality does not mean to be passive, disinterested or indifferent to acts of violence or violation of IHL. It does not imply detachment from the agony of people caused by conflict, nor does it mean a lack of affection, but rather sympathy with their suffering.

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[176] Wood, Reed M. (2015): Understanding strategic motives for violence against civilians during conflict. In: Krieger, Heike (Ed.): Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region. Cambridge: Cambridge University Press, p 21f.

[177] Non-State armed groups holding territory and controlling populations may have incentives similar to those of states to respect IHL, as it would contribute to stability and predictability and thus an increase in legitimacy among the population. ICRC (2016): Generating respect for the law: An appraisal, International Review of the Red Cross, Vol. 98, No. 2, War and security at sea, p. 677.

The concept of neutrality is not universally accepted and sometimes only if it is useful to the conflict parties. Neutrality is often criticized and some say that true neutrality doesn´t exist and humanitarian work is always political, since it has a political impact on the situation. Others blame the ICRC for having a hidden political agenda using neutrality as an excuse to pursue its political goals.[178] Critics argue that "[h]umanitarian protection as practiced by the ICRC necessarily entails a type of politics that the rhetoric of neutrality cannot erase".[179] They assume that is an "unarguable point that all actions in the public sphere are in some sense political."[180] On the one hand, aid workers have to convince governments that their engagement does not confer any legitimacy on non-State armed groups. On the other hand, the potential of legitimacy can be the main selling point for non-State armed groups to engage in negotiations in the first place. Even though the ICRC tries to minimize the impact its work has on the power relation of parties to an armed conflict, there have been instances where it failed to do so. One example can be found "in Greece in the late 1960s, where its presence in that country provided some legitimacy to the military authorities that had overthrown the democratic government".[181] Neutral aspiration does not necessarily end in neutral impact. Material assistance could benefit one particular group within a community more than another, for example

[178] Harroff-Tavel, Marion (2003): Does it still make sense to be neutral? Humanitarian Practice Network, London: Overseas Development Institute, No. 25, p. 2.

[179] Forsythe, David P. (2005): The Humanitarians: The International Committee of the Red Cross. New York: Cambridge University Press, p. 171.

[180] Rieff, David (2002): A Bed for the Night: Humanitarianism in Crisis, New York: Simon & Schuster Paperbacks, p. 151.

[181] Forsythe, David P. (2005): The Humanitarians: The International Committee of the Red Cross. New York: Cambridge University Press, p. 174.

males more than females.[182] And even if a humanitarian actor bases its assistance on the principle of neutrality and distributes aid solely on the basis of need, it may be condemned for sometimes responding to some needs and not to others.[183]

Adherence to neutrality is the preferred tool of the ICRC, as it enables trust and access.[184] But the humanitarian principles of neutrality, impartiality and humanity are not uncontested.[185] In order to enjoy the confidence of all parties involved, the ICRC must not take sides in hostilities or engage at any time in controversies of racial, religious or ideological nature and abstain from politics. The ICRC does not hold opinions on the legality of war, nor on the reasons for parties to conflict, but only determines the behavior of these parties during armed conflict. The ICRC's policy refrains in general from public naming and shaming. But there have been instances where the ICRC has accepted the limits of confidentiality, accepting that going public benefitted the people it protects.[186] It nonetheless prefers to inform parties involved of violations in a confidentially manner. However, whenever the ICRC goes public, it

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[182] Anderson, Mary (1999): Do No Harm: How Aid Can Support Peace – or War. Boulder: Lynne Rienner Publishers, pp. 37 – 54.

[183] Hammond, Laura (2008): The Power of Holding Humanitarianism Hostage and the Myth of Protective Principles, p. 192.

[184] Harroff-Tavel, Marion (2003): Does it still make sense to be neutral? Humanitarian Practice Network, London: Overseas Development Institute, No. 25, p. 2.

[185] See for example: Slim, Hugo (1997): Relief Agencies and Moral Standing in War: Principles of Humanity, Neutrality, Impartiality and Solidarity, Development in Practice, Vol. 7, No. 4, pp. 342 – 352; Leader, Nicholas (2000): The Politics of Principle: The Principles of Humanitarian Action in Practice, Oversees Development Institut, Humanitarian Policy Group Report No. 2, London: Portland House.

[186] ICRC (2007): Myanmar: ICRC denounces major and repeated violations of international humanitarian law.

does so in accordance with clearly defined criteria and is not departing from its neutrality as such.[187] While it might be legitimate to condemn for example acts of terrorism, doing so could jeopardize trust.

In order to maintain its neutrality, the ICRC does not allow their representatives to testify before courts. This policy was endorsed by the ICTY[188] and is now also written into the rules of procedure of the ICC. While this guarantees confidentiality and neutrality of the ICRC, some might see it as to undermine criminal justice. There are scholars who call for balancing the need of confidentiality against the need for prosecution and a less discreet ICRC in general.[189] The ICRC has long faced criticism for remaining silent in the face of atrocities,[190] and was urged to rely more on public condemnation.[191] Speaking up against violations can help preventing IHL violations, because potential perpetrators would think twice whether or not they risk to be identified and hold accountable. This criticism however neglects the negative side effects a naming and shaming

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[187] Harroff-Tavel, Marion (2003): Does it still make sense to be neutral? Humanitarian Practice Network, London: Overseas Development Institute, No. 25, p. 3.

[188] ICTY (2000): Prosecutor v. Simic et al., IT-95-9-PT. See further Stéphane, Jeannet (2000): Recognition of the ICRC's Long- Standing Rule of Confidentiality, International Review of the Red Cross, No. 838, pp. 403 – 425.

[189] Obradovic, Konstantin (1984): Que faire face aux violations du droit humanitaire? – Quelques réflexions sur le rôle possible du CICR, p. 493.

[190] This happened also with regard to the situation of prisoners in Guantanamo. Forsythe, David P. (2005): The Humanitarians: The International Committee of the Red Cross. New York: Cambridge University Press, p. 138.

[191] Forsythe, David P. (2005): The Humanitarians: The International Committee of the Red Cross. New York: Cambridge University Press; Bussmann, Margit; Schneider, Gerald (2016): A porous Humanitarian Shield: The Laws of War, the Red Cross, and the Killing of Civilians, The Review of International Organizations, New York: Springer, Vol. 11, No. 3, p. 341.

strategy could have on the organization's perceived neutrality. Remaining neutral can help more people in the long term, even if that means that in the short run some individuals continue to suffer. But it is not easy to delineate how much improvement in what timeframe would be enough to justify ICRC discretion. The ICRC's choice of discretion led to the allegation that the organization can be bought off in the sense that it might accept partial access, while parties to a conflict achieve keeping the ICRC away from other serious violations. Opponents argued that without full access, the ICRC cannot help all victims, but nevertheless believes to have achieved its goal by helping at least some victims. And while the parties to a conflict reap the benefits of cooperating with the ICRC, the organization is said to avoid addressing the real problem and fails to confront the authorities. But just because the organization remains reluctant to shame parties, it does not mean that it can be manipulated. Accepting partial access is not the end of ICRC commitment. While bringing support to a part of the victims, it will continue trying to reach all of them. Cooperation with parties violating IHL does not automatically lead to ICRC complicity in their behavior.

In the situation of Afghanistan, members of the conflicting parties are often locals. Even if the ICRC adheres to its principle of neutrality, local staff might be perceived as not neutral simply because of their background, connection to a specific community or a specific location. Furthermore, local politics are in a certain way always represented. Local staff generally has deeper knowledge with regard to social behavior and traditions, but might be more susceptible to pressure, intimidation and possible retaliation than international staff. It would be too simple to assume that relying on aid workers with a "cultural

proximity"[192] will solve all security problems in countries like Afghanistan. But the local community can in some instances help to keep aid workers safe, because it has specific knowledge and sometimes influence over warring parties. Relying on well-connected local actors can improve the acceptance in the community, while increasing the participation of the beneficiaries can improve trust and access. They can contribute as they may have access to prior inaccessible regions or connections to previously unknown parties involved. The local network protects aid workers. The value a local community allocates to their work can influence behavior of the parties to a conflict that try to gain legitimacy and authority within the local population. But in Afghanistan, the margin for mistakes is very narrow. There will be situations in which the local community cannot reduce security risks, maybe because they are powerless to influence actors, overlook or misjudge threats or because they prefer an allegiance with another actor to the help of aid workers. Furthermore, acceptance is a local phenomenon. Being accepted in one community or province does not imply acceptance in neighboring communities. But while control over a certain area might change and negotiations with non-State armed groups asserting control need often to be repeated, relationships with communities can remain constant.

Neutrality is widely claimed by a lot of actors and watering down the essential meaning is a risk even within the humanitarian community. The plurality of different humanitarian actors with different agendas, codes of conducts, principles and goals, and which have different perception of what it means to be neutral, make it hard to separate between them. A with much effort negotiated access can easily be undermined by

[192] On this concept see further: Brikci, Nouria (2005): Is cultural proximity the answer to gaining access in Muslim contexts? Humanitarian Practice Network, No. 29, pp. 43 – 45.

the actions of other actors. Dispensing aid to people in conflict is often a means to reinforcing authority and legitimacy. The cooptation and militarization of humanitarian aid as part of political agendas of States and non-State armed groups has direct effects on the security of aid workers. It is however important not to confuse every kind of assistance by military actors with humanitarianism, and to understand some forms of assistance as obligations under IHL to meet essential needs of the civilian population.

3.1.2 – Access

Access describes the full and unimpeded ability of actors to meet, interact and provide for populations in need. Different factors that restrict or deny access are often connected and include bureaucratic restrictions, obstacles related to climate, terrain or lack of infrastructure, deliberate diversion of aid and interference with the implementation of activities, active fighting and attacks on aid workers, goods and facilities.[193] Humanitarian access is challenged by the proliferation of non-State armed groups, conditions imposed by States in negotiations such as CT legislation and the overlapping or missing distinction between different types of actors providing humanitarian aid. In general, most of the challenges are externally imposed, even though there are important internal challenges, such as inadequate human resources or security systems.

It is important to understand the difference between mere tolerance of an organization's presence and program and true acceptance. Acceptance should be a deliberate and systematic approach consistent with and integrated into an organizational ethos. Acceptance is a mutual approach. In this regard, acceptance should not solely be a means of protection or for generating security related information, but a method to build

[193] United Nations OCHA (2010): OCHA on Message: Humanitarian Access.

a genuine relationship that lays the foundation for access to vulnerable people and for effective programming that in turn reinforces acceptance.

Non-State armed groups with a strong command structure are more likely to engage in negotiations and those that control territory are more likely to have a firm grip on the enforcement of decisions. A political wing, strong military, civilian support and territorial control all positively influence access-giving decisions.[194] The denial of access can bear individual criminal responsibility, because it might amount to war crimes, crimes against humanity or genocide. However, even judicial as well as diplomatic pressure might not suffice to force actors into giving access.[195]

The lack of respect for the provision of neutral care provided to individuals perceived as the enemy remains a major source of attacks and prosecution of aid workers.[196] Gaining and maintaining acceptance needs action beyond only good work in the field. Negotiating access takes place in a larger setting that decisively influences the negotiation outcome. This includes the gender dimension as well as cultural and religious considerations. If aid workers are being perceived as to represent opposing religious views or a lack thereof, cultural insensitivity or inappropriate behavior, erosion of trust is possible.

Trust is of paramount importance in safeguarding aid workers and will briefly be addressed. There are several conceptualizations of trust, whether it is seen as beliefs about other's relia-

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[194] Jo, Heyran; Bryant, Katherine (2013): Taming of the warlords: commitment and compliance by armed opposition groups in civil wars, p. 254f.

[195] United Nations Security Council (2016): Report of the Secretary General on the Protection of Civilians in Armed Conflict, S/2016/ 447.

[196] Rubenstein, Leonard S.; Bittle, Melanie D. (2010): Responsibility for protection of medical workers and facilities in armed conflict, The Lancet, Vol. 375, No. 9711, pp. 329 – 340.

bility, determination and predictability[197] or as beliefs about other's concern for a group, relationship or one's wellbeing.[198] Trust according to the former definition is an ability to predict other's behavior. The latter definition is characterized by an expectation about the benevolence of the adversary. Trust is described as a set of "expectations of benign behavior from someone in a socially uncertain situation due to beliefs about the person's dispositions"[199] and incorporates the act of accepting "vulnerability based upon positive expectations of the intentions or behavior of another"[200]. Most importantly, trust affects the process of negotiating safety and enables people to establish cooperation and resolve conflicts. In a situation of mutual trust, the initiation of cooperation is encouraged, whereas breaking trust may result in the deterioration of relations.[201] Trust is of high importance, because one's perception of the adversary's benevolent intentions will already increase the inclination to cooperation.[202] And cooperation in contemporary armed conflict can serve as an incentive for adherence to IHL. The more one side perceives the adversary´s initiative as motivates by self-interest, the less likely trust will developed.

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[197] Dasgupta, P. (1988): Trust as a commodity; McAllister, David J. (1995): Affect- and cognition-based trust as foundations for interpersonal cooperation in organizations; Sitkin, Sim B.; Roth, Nancy L. (1993): Explaining the limited effectiveness of legalistic "remedies" for trust/distrust.

[198] Rempel, J.K.; Holmes, J.G. (1985): Trust in close relationships; Rousseau et al., (1998): Not so different after all: A cross-discipline view of trust.

[199] Yamagishi, T. (2011). Trust: The evolutionary game of mind and society. New York, NY: Springer, p.27.

[200] Rousseau et al., (1998): Not so different after all: A cross-discipline view of trust, p. 395.

[201] Deutsch, Morton (1958): Trust and suspicion. Journal of Conflict Resolution, 2, (pp. 265–279).

[202] Yamagishi, T. (2011). Trust: The evolutionary game of mind and society. New York, NY: Springer, p.27.

Neutrality remains a valid strategy. But transparency, accountability and responsiveness have to complement this principle. This can most likely be achieved by demonstrating reliability and consistency as well as by fulfilling promises and expectations. The ICRC can counter disappointment by stating its goals clearly, delivering aid on time, as well as through monitoring and quality control. Acceptance is not a static attitude, but needs to be maintained, because it may diminish over time as people's needs and expectations evolve.

3.2 – Other Incentives

This chapter will venture to understand motivational factors for non-State armed groups to comply with IHL through analyzing their benefits for compliance. This undertaking would be futile without understanding the origins and goals of any given non-State actor. In order to develop mechanisms that improve IHL compliance, it is indispensable to understand why IHL is violated in the first place. It is not the aim of this thesis to further the ongoing discussion, but rather to deduce reasons that can practically be addressed in order to improve the safety of aid workers. In order to improve IHL compliance the incentives of self-interest, reciprocity, fear of sanctions, reputation and maybe even legitimacy have to be strengthened.[203]

Compliance with IHL can be linked to military, political and legal aspects. Regarding the first, it makes sense to recall that IHL was formulated taking into account not only humanity, but also military necessity. IHL is upheld because it does not push for a maximum in humanitarian protection.[204] What is

[203] Schmelzle, Cord (2011): Evaluating Governance. Effectiveness and Legitimacy in Areas of Limited Statehood, Berlin: SFB-Governance Working Paper Series, No. 26, p. 9.

[204] Forsythe, David P. (2005): The Humanitarians: The International Committee of the Red Cross. New York: Cambridge University Press, p. 16.

more, violating IHL can be counterproductive in terms of material costs and can lead to a loss of support among the population and among own fighters.[205]

3.2.1 – Reputation and Legitimacy

It has been established that reputation serves as an incentive for States to adhere to IHL, but discussion arises over whether the same is true for non-State armed groups. While some argue that these groups, especially those fighting along ethnical lines, do not take into account public opinion and reputation in their considerations,[206] this reasoning overlooks that non-State armed groups vary. Many of the non-State armed groups have an interest in establishing or maintaining political power. For groups pursuing political goals on the basis of coherent and stable structures, reputation remains an important incentive. Non-State armed groups "will care about international standards when adherence is beneficial for their political survival".[207] These groups' judgments of public opinion, both nationally and internationally, however vary, as violating IHL may by some be held to be useful in gaining a very different kind of reputation. Non-State armed groups can hardly rely on coercive measures only, but must also gain popular support or at least a degree of consent from the civilian population. It is however true that in contemporary conflicts these political aims seem evermore often to be subordinated to short-term military gains. Furthermore, a horizontal structure and high fluctuation of members

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[205] Bellal, Annyssa; Casey-Maslen, Stuart (2011): Enhancing Compliance with International Law by Armed Non-State Actors, Goettingen Journal of International Law, Vol. 3, No. 1, p. 194f.

[206] Lamp, Nicolas (2011): Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law, in: Journal of Conflict and Security Law, Vol. 16, p. 246ff.

[207] Hyeran, Jo (2015): Compliant rebels: Rebel groups and international law in world politics, Cambridge: Cambridge University Press, p. 78.

of an armed group contribute to the fact that long-term goals are neglected.

The proliferation of non-State armed groups and their chains of command, as factors affecting group behavior, have become less organized and consequently harder to address. Authority is often informal or unknown and diffused horizontally rather than through vertical structures, which often break-up, implode or rearrange themselves. Compliance with IHL has a positive influence on the internal functioning of a non-State armed group, as well as on its discipline and thus efficiency.[208] And the military capacity and professionalism of non-State armed groups has an impact on their compliance.[209] Organizational characteristics allow centralized compliance decisions,[210] while little or no control often results in indiscriminate violence. And violations that are connected to the capacity of the group will vary over time, as the group changes.[211]

Non-State armed groups behavior seems to be incompatible with IHL, as they often pursue policies that are in clear contradiction of the law. This induced some scholars to argue that these groups are inherently unimpressed by considerations of

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[208] Ratner, Steven (2011): Law Promotion beyond Talk: The Red Cross Persuasion and the Laws of War, in: European Journal of International Law, Vol. 22, p. 478.

[209] ICRC (2016): Generating respect for the law: An appraisal, International Review of the Red Cross, Vol. 98, No. 2, War and security at sea, p. 675.

[210] Jo, Heyran; Bryant, Katherine (2013): Taming of the warlords: commitment and compliance by armed opposition groups in civil wars. In: Risse, Thomas (ed.): The Persistent Power of Human Rights: From Commitment to Compliance., Cambridge: Cambridge University Press, p. 240.

[211] Wood, Reed M. (2015): Understanding strategic motives for violence against civilians during conflict. In: Krieger, Heike (Ed.): Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region. Cambridge: Cambridge University Press, p. 20.

reciprocity, sanctions or legitimacy. Some go so far as to contend that non-State armed groups have succeeded in leveraging compliance in their favor and in turn co-opted conventional compliance incentives.[212] This reasoning however neglects that non-State armed groups also strive for goals based on political aspirations. Whether actors comply with IHL does depend on whether they strive for legitimacy. This aspiration manifests amongst other things in the fact that violence against aid workers is rarely an aim in itself but serves as an instrument in attaining different goals, for example gaining attention of the international community.

3.2.2 – Reciprocity

An important legal incentive of IHL can be found in reciprocity. If one party adheres to IHL and treats their adversary well, the other party is likely to do the same. Whereas positive reciprocity may instill adherence to IHL during armed conflict,[213] negative reciprocity can lead to a downward spiral of escalation of violence and to increased non-compliance, even though the legal applicability of IHL is never conditioned upon reciprocity

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[212] By using lawfare, these groups employ IHL as a means to achieve military objectives, by making it appear as though their opponent is conducting its hostilities in violation of the law. Focusing on legal standards and unclear characteristics creates the impression whereby the adversary is deprived of public support. One example can be found in non-state armed groups using human shields, a method itself outlawed by IHL, in order to increase civilian casualties in the event of an attack. Zoli, Corri (2011): Humanizing Irregular Warfare, Framing Compliance for Nonstate Armed Groups at the Intersection of Security and Legal Analyses, p. 190.

[213] This has been acknowledged also by the UN Secretary General: "The incentives for armed groups to comply with the law should be emphasized, including increased likelihood of reciprocal respect for the law by opposing parties". United Nations Secretary General (2012): Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2012/376, Paragraph 41.

between parties to a NIAC.[214] Conflicting parties are encouraged to comply with IHL under the expectation that the adversary will do the same. This logic only works, as long as the adversary is perceived to be able to act in reciprocity. Some parties to a NIAC violate IHL knowing fully that the other party does not have the means or possibility to retaliate in reciprocity.[215] Reciprocity thus presupposes a certain degree of symmetry as well as parallel interest of the parties to a conflict, which appears unlikely in NIAC. The fact that the State party to a NIAC cannot expect that the non-State actor will operate reciprocally highlights the limited role this concept plays in contemporary conflicts. Non-State actors in turn have no incentive to respect IHL, as they see their adherence to it as a military disadvantage. The absence of an equal status between combatants of a State and of a non-State actor creates a normatively asymmetrical situation, in which killing a State's combatants is illegal, killing fighters of non-State armed groups however is not.[216]

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[214] Richemond-Barak, Daphné (2011): Nonstate Actors in Armed Conflict, Issues of Distinction and Reciprocity, p. 126. . In: Banks, William C. (ed.): New Battlefields, old Laws: Critical Debates on Asymmetric Warfare. New York: Columbia University Press.

[215] Morrow, James D. (2007): When do states follow the laws of war? American Political Science Review, Vol.101, No. 3, pp. 559 – 572.

[216] Lamp, Nicolas (2011): Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law, in: Journal of Conflict and Security Law, Vol. 16, p. 248f.; Pfanner, Tonni (2005): Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action, in: International Review of the Red Cross, Vol. 87, p. 161.

4 – Viable Approaches during this Crisis

Parties to NIAC are in different power and legal positions, the one being the lawful defender of order, the other the perpetrator and criminal. While non-State armed groups are subject to IHL and thus legally obliged to respect it, IHL provides them with few incentives for compliance, even more so in contemporary armed conflict. In this chapter, I will analyze what incentivizing measures still work, before discussing the advantages of broadening the protection of IHL to all parties to a conflict, regardless of their goals and intentions. I will come back to the role voluntary commitment can play and address one approach put forward by the NGO Geneva Call. Furthermore, the issue of non-State armed groups and the creation of law will briefly be discussed. The concept of the recognition of belligerency will be analyzed in order to establish a framework for discussion on the concept of recognition of combatant status in todays NIAC as a tool to increase respect for IHL. Obviously, these incentive-type proposals are based on the assumption that a non-State armed group actually wants to respect IHL. This assumption may however often be wrong. Non-State armed groups pursuing strategies often labeled as terroristic, require IHL to transplant its rules onto an unconventional form of organized violence. The structure of such groups refutes established rules and is at odds with the one presupposed by IHL, as they repudiate the conception of noncombatant immunity and neither accept the distinction between civilian and combatant, nor the concept of necessity and proportionality.[217]

[217] Moss, Michael; Mekhennet, Souad (2007): The Guidebook For Taking A Life, N.Y. Times.

4.1 – Measures adaptable to a New Reality

4.1.1 – Right to Humanitarian Access

IHL confers on the ICRC a specific mandate to act in the event of an armed conflict.

> "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties of the conflict".[218]

Its own statute reinforces the right of initiative, authorizing the ICRC to "take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary".[219] The ICRC Code of Conduct explicitly refers to the humanitarian imperative as the "right to receive humanitarian assistance, and to offer it, […] which should be enjoyed by all citizens of all countries".[220]

Whether a right to humanitarian assistance exists in IHL has been subject to debate for quite some time.[221] It has now been established that Common Article 3 and other articles of

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[218] Geneva Conventions, Common Article 3(2); Geneva Convention IV, Article 63.

[219] ICRC (2013): Statutes of the International Committee of the Red Cross, Article 4(2).

[220] ICRC (1994): The Code of Conduct Principles of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Response Programmes, Paragraph 1.

[221] For discussion on an international law of humanitarian assistance see: Verdirame, Guglielmo (2001): Testing the Effectiveness of International Norms: UN Humanitarian Assistance and Sexual Apartheid in Afghanistan, Human Rights Quarterly, Vol. 23, pp. 733-768; Cubie, Dug (2017): The International Legal Protection of Persons in Humanitarian Crises. Exploring the Acquis Humanitaire. Oxford and Portland, Oregon: Hart Publishing, p. 319.

IHL[222] provide for such a right. The IHL framework governing humanitarian initiative is generally constituted of four interdependent layers. Each party to a conflict bears the primary responsibility to meet the needs of the population under its control. Impartial humanitarian actors have the right to offer their services, in particular in situations where a party fails to meet the basic needs of the population. Nothing in the relevant IHL provisions may be interpreted as to restrain this right. IHL however, does not specifically define what humanitarian action entails in detail. In NIACs, "relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned"[223]. Under customary law, parties to a conflict must allow and facilitate rapid and unimpeded passage[224] and ensure freedom of movement for authorized aid workers.[225] But military necessity can restrict their movements temporarily.

In order to free humanitarian organizations from unnecessary restrictions, States must not use or interpret any of the provisions in a way that constitutes an "obstacle to the humanitarian activities which the ICRC or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief".[226] The provisions subjecting aid to party consent does however not free said parties from their

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[222] For example Geneva Convention I–III Article 9; Geneva Convention IV, Article 10; Additional Protocol I, Article 81; Additional Protocol II, Article 18

[223] Additional Protocol II, Article 18(2).

[224] Jenckaerts, Jean-Marie and Doswald-Beck, Louise (2005): Customary International Humanitarian Law, Cambridge University Press, Rule 55.

[225] ibid. Rule 56

[226] Geneva Conventions I-III Article 9; Geneva Convention IV Article 10.

obligation to provide some humanitarian assistance, and they are not allowed to withhold their consent arbitrarily.[227] The question whether or not a party to the conflict can withhold its consent, is intrinsically linked to its ability to provide for the basic needs of the population under its control. The determination of this question could however prove to be difficult. IHL does also not regulate the consequences of a denial of consent.

So far, the question whether direct denial of humanitarian assistance could lead to individual criminal responsibility has not yet been sufficiently examined. But here once again, the ICTY has played a significant role in addressing the issue. In its Čelebići case the tribunal charged Hazim Delic with grave breaches of Geneva Convention IV for inter alia "deprivation of adequate food, water, medical care as well as sleeping and toilet facilities".[228] In light of the prohibition of starvation of civilians as a method of warfare, which constitutes a war crime under the Rome Statute of the ICC, denial of humanitarian aid is further restricted. Despite IHL violations lacking appropriate accountability, explicit recognition of the willful denial and deprivation of humanitarian assistance as international crimes could lead to greater respect for IHL and thus to greater protection of aid workers. Indeed, the fact that individuals and other actors could be held responsible for their criminal actions and prosecuted on an international level, could provide an important deterrent effect.[229]

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[227] International Law Commission (2016): Report of the International Law Commission, A/71/10, Article 11 (Duty of the affected state to seek assistance), Article 13 (Consent oft he affected state to external assistance).

[228] ICTY (1998): The Prosecuter v Delalic et al (Čelebići) Paragraph 25 p. 8.

[229] Sloane, Robert D. (2007): The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law, Stanford Journal of International Law 43(39), p. 71.

Once humanitarian aid work is accepted, the parties to a conflict are expected to allow and facilitate unimpeded access, subject to their right of control. In such situations, even military necessity can only temporarily and geographically restrict humanitarian aid.[230] IHL does not clearly define who should consent to humanitarian action in a situation of NIAC. One view requires only the consent of a non-State armed group when aiming at actions in areas controlled by this actor, while diverging views argue in favor of also requiring the consent of the State in which territory the area lies. The ICRC follows Article 18(2) of Additional Protocol II, which requires the consent of the High Contracting Party.[231] This approach can be problematic in cases where a State might withhold its consent based on CT legislation. This unfortunate situation could lead to humanitarian assistance being perceived as to disadvantage non-State armed groups. Establishing a right to provide assistance regardless of consent could thus prove to be an incentive for non-State armed groups.

The humanitarian imperative suggests for a right to receive as well as to provide aid. It is still a matter of discussion whether there is a right to access, based on which assistance could be given without the consent of the parties to a conflict, whether there is a right to give humanitarian assistance so to speak. [232] Even though a right to humanitarian initiative has been established, it should not be interpreted as a right to access, as

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[230] ICRC (2015): International Humanitarian Law and the Challenges of Contemporary Conflicts, Report prepared for the 32nd International Conference on the Red Cross and Red Crescent, Geneva, p. 27.

[231] The notion of consent has been an important issue in contemporary legal debate. For more information on the ICRC's view see: ICRC (2014): ICRC, Q&A and lexicon on humanitarian access.

[232] Spieker, Heike (2015): The Legal Framework of Humanitarian Action, p. 146.

consent is still required.[233] Issues arising from the debate over a right to access culminate in the question of how to design such a right while balancing the interests of all parties involved. When a right to provide humanitarian aid could be agreed upon, for example through invoking customary international law, and if violations of that right would be tied to strong accountability measures, the safety of aid workers would vastly be improved. A clear right of humanitarian actors to provide assistance, combined with the right for individuals affected by conflict to request assistance, could powerfully strengthen the motivation of all involved to respect IHL. The right to access could open a window of engagement otherwise closed. It would facilitate engagement with all parties to a conflict and launch debate on how norms and rules of IHL should be interpreted. This can encourage legal, political and social internalization of IHL rules.[234] This dialogue with non-State armed groups is important, because it has direct impact on their compliance with IHL.[235]

4.1.2 – Amnesties

Another incentive for improving compliance could be to enlarge non-prosecution for taking part in armed conflicts or granting amnesties for actions in accordance with IHL. These measures are not to be confounded with the concept of combatant immunity, as they take hold only after the conflict. Amnesties and combatant status do not have the same legal weight, as members of non-State armed groups cannot simply

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[233] ICRC (2015): International Humanitarian Law and the Challenges of Contemporary Conflicts, Report prepared for the 32nd International Conference on the Red Cross and Red Crescent, Geneva, p. 28.

[234] ICRC (2016): Generating respect for the law: An appraisal, International Review of the Red Cross, Vol. 98, No. 2, War and security at sea, p. 677.

[235] Ibid., p. 678.

assume that amnesty will be granted after the conflict, whereas combatants can rely on immunity based on their combatant status. Nonetheless, amnesties have in a way created a retrospectively functional equivalent to combatant immunity, insofar as they prevent fighters from being prosecuted under domestic law for having engaged in armed conflict against the State. In doing so, they too can provide incentives for adherence to IHL.

Amnesties can take different forms, such as amnesty agreements as part of peace treaties, unilateral amnesty declarations or domestic amnesty legislation. UN Secretary General Ban Ki-Moon reaffirmed that non-State armed groups "have little legal incentive to comply with international humanitarian law if they are likely to face domestic criminal prosecution for their mere participation in a non-international armed conflict, regardless of whether they respect the law or not"[236] and that "granting amnesty for merely participating in hostilities [...] may in some circumstances help provide the necessary incentive".[237] The ICRC notes that according to customary law, "States are not absolutely obliged to grant an amnesty at the end of hostilities but are required to give this careful consideration and to endeavor to adopt such an amnesty".[238] Amnesty is also encouraged through Article 6(5) of Additional Protocol II and various UN declarations.[239]

Adversaries to the idea of granting amnesties put forward the principle of sovereignty. A NIAC breaking out seems to

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[236] United Nations Security Council (2016): Report of the Secretary General on the Protection of Civilians in Armed Conflict, S/2016/ 447, Paragraph 44.

[237] ibid., Paragraph 44.

[238] Jenckaerts, Jean-Marie and Doswald-Beck, Louise (2005): Customary International Humanitarian Law, Cambridge University Press, p. 611.

[239] Regarding amnesties in Afghanistan see: United Nations General Assembly (1991): Situation of human rights in Afghanistan, A/RES/46/136, Paragraph 9.

manifest a certain inability of the State to maintain its sovereignty. International law provides the State with the means to restore its sovereignty, whereas amnesties are perceived by some as to undermine the States' standing. If a non-State actors seeks to overthrow the government, the prospect to be granted amnesties by the government is beside the point, as the goal of the conflict is to become the government, which, if achieved, would ultimately provide them with the power to amnesty their own acts. Adversaries also argue that IHL, a body of law, which is applicable during times of armed conflict, should not be able to influence a States' behavior towards the treatment of non-State armed groups after the end of said armed conflict. One might also argue that the prospect of amnesties entices non-State armed groups to intensify the armed conflict in order to reach the threshold of Additional Protocol II. An amnesty that is too certain can thus be a disincentive to engage in restraint. But in a situation, where the prospect of amnesties is unclear, non-State armed groups find themselves in legal limbo during the conflict. This might not be enough incentive form them to respect IHL.[240]

Only if the non-State armed group knows that an amnesty depends on a variety of factors linked to its behavior during an armed conflict, it is reasonable to see retroactive amnesty as an incentive for restraint and adherence to IHL. There seems to be a discrepancy in IHL that denies recognition of combatant status to non-State actors during an armed conflict, but nonetheless encourages States to absolve their adversaries after an armed conflict. It does not seem difficult to see why States would not want to recognize the sort of privilege of combatant status after a conflict, they were not willing to recognize during the conflict.

[240] Mégret, Frédéric (2014): Should Rebels be Amnestied?, pp. 523f.

Because there is no legal compulsion on States to grant amnesty, it might be hard to find a basis to treat its provisions as being able to support a customary rule. Their continuing use however, proofs the State's inclination to grant amnesties in NIAC, demonstrating a willingness to consider solutions other than criminal prosecution in order to achieve greater political and social aims. Furthermore, amnesties appear to be consistent not only with States' practice, but also with the spirit of IHL.[241]

4.2 – Non-State armed Groups and the Creation of Law

Engagement with non-State armed groups on the implementation and enforcement of the law has so far not sufficiently incorporated the approach of these groups enforcing IHL themselves. This chapter sets out the case for granting non-State armed groups a limited role in the creation of IHL in order to establish a constructive engagement with these actors without downgrading the standards of IHL. This does not imply that non-State armed actors should be given the same lawmaking role as States, nor does it dispute the continuing centrality of the State in the international system.

The argument of non-State groups not having any obligation under IHL, only because they didn't participate in its development, is an easy excuse. Whether non-State armed groups should be and are able to contribute to lawmaking has been a topic of much debate.[242] Opponents to giving non-State

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[241] Cassese, Antonio (2012): Should rebels be treated as criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane, pp. 521.

[242] Some argue that lawmaking remains State-centric, but non-State armed groups have an influence on this process. See: Clapham, Andrew (2006): Human rights obligations of non-State actors in conflict situations, The

armed groups a role in the creation of IHL see the risk of lending legitimacy to these groups. Another argument is that these actors might seek to weaken instead of improving the law.[243] It can, however, not be assumed that the involvement of non-State armed groups necessarily leads to a downgrading of legal standards. Giving those groups the opportunity to participate in the lawmaking process does not mean giving them the power to alter achieved IHL rules, nor the power to dictate the contents of future laws. Including non-State armed groups in the development of IHL increases their exposure to IHL, and improves internal engagement with it. The international community would furthermore get an insight on which rules non-State armed groups accept, have problems with or reject all together. What is more, their involvement could provide for a point of contact between the non-State armed groups and other actors that could prove helpful in bringing the conflict to an end. The main reason, however, is that involving non-State armed groups in the development of IHL would constitute the best way to ensure that compliance is a realistic possibility. Involving non-State armed groups in treaty-making is not an easy task and reaching an agreement over who can and who cannot participate seems almost impossible, not least because CT legislation often renders engagement practically difficult and politically controversial, to say the least.[244] However, the

International Review of the Red Cross, Vol. 88, No. 863, pp. 491 – 523. Others argue for lawmaking capacities for such actors. See: McCorquodale, Robert (2004): An Inclusive International Legal System, Leiden Journal of International Law, Vol. 17, No. 3, pp. 477 – 504.

[243] On a discussion about advantages and disadvantages see further: Roberts, Anthea; Sivakumaran, Sandesh (2012): Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law, Yale Journal of International Law, Vol. 37, No. 1, pp. 126 - 150.

[244] In 2010 the US Supreme Court ruled that providing non-State armed groups with advice or training on IHL could amount to providing material support in violation of US law. See: (2010): Holder v. Humanitarian Law

advantages could ultimately outweigh the disadvantages and including non-State armed groups in the creation of IHL could suffuse it with a greater sense of realism.[245]

Many of the disadvantages and advantages depend on the manner of how non-State armed groups would be empowered to take part in the lawmaking process. They could remain bound by existing IHL, or have the option of opting out, they could be given a right in the creation of new law, but not a right to declare themselves bound by it. They also could be given the right to adopt new laws, without being able to participate in their creation.

There are different ways of how non-State armed groups could engage in the lawmaking process. It may be that the practice and opinion juris of a non-State armed group can be used in the formation of customary IHL. This approach was taken in the Tadic Decision.[246] Non-State armed groups could do so based on the express or implied State consent. A State entering into a bilateral agreement does in fact implicitly acknowledge some form of law making role.[247] Traditionally, State-like entities had capacity to enter into legal relations and

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Project, 130 S. Ct. 2705. The government of Afghanistan similarly expressed concern that engagement with the Taliban might change perceptions about the conflict and impact the governments status. Roberts, Anthea; Sivakumaran, Sandesh (2012): Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law, Yale Journal of International Law, Vol. 37, No. 1, p. 135.

[245] Sivakumaran, Sandesh (2012): The Law of Non-International Armed Conflict, Oxford: Oxford University Press, p. 565.

[246] ICTY (1995): The Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdition, IT-94-1-AR72, Paragraphs 102, 103, 107.

[247] Roberts, Anthea; Sivakumaran, Sandesh (2012): Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law, Yale Journal of International Law, Vol. 37, No. 1, p. 120.

to conclude treaties. It could be deducted that non-State armed groups fulfilling many characteristics of a State, like territory, population, government, could engage in the law making process. However, this approach seems to be impossible to implement, as States will feel threatened by granting groups a lawmaking role, especially when these groups are State-like. It furthermore might incentivize said groups to using violent means to achieve that State-like status.[248] The ICRC study on customary IHL does include some statements and practices of such groups, which are however listed under "other relevant practice".[249] The question whether customary IHL is now being derived not only from the practice of States, but also from the practice of non-State armed groups, remains.[250]

This chapter proposes that non-State armed groups should be bound by existing IHL, but at the same time should be enabled to contribute to the law creation process through issuing binding unilateral decisions, committing to existing and taking on new obligations. Non-State armed groups should similarly be encouraged to enter into bilateral or multilateral agreements, affirming their IHL obligations and bringing new obligations into play. Allowing non-State armed groups to declare their commitment and their intention to comply with IHL could also promote the advantages of the incentive of reciprocity.

All parties to a conflict are required to enforce IHL and bring alleged perpetrators to justice. Courts established by parties to the conflict could serve to that purpose, especially

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[248] ibid., pp. 120f.

[249] Jenckaerts, Jean-Marie and Doswald-Beck, Louise (2005): Customary International Humanitarian Law, Cambridge University Press, Articles 64, 77, 115, 126, 356, 412, 778, 870, 2882, 3610.

[250] The ICRC study on Customary Law considers the legal significance of such practice unclear. Jenckaerts, Jean-Marie and Doswald-Beck, Louise (2005): Customary International Humanitarian Law, Cambridge University Press.

because command responsibility suggests the establishment of these courts. The ICC even stated that "the availability of a functional military judicial system [within the non-state armed group] through which [a commander] could have punished crimes committed and prevented their future repetition"[251], is an important part of command responsibility. Many non-State armed groups establish courts in their territory of control. They are often viewed as illegitimate and inconsistent with the standards of fair trial. Some even argue that non-State armed groups are inherently incapable to afford due process guarantees.[252] But Additional Protocol II simply requires the "essential guarantees of independence and impartiality", [253] implying that even non-State actors can set up courts. State actors in a NIAC often see these courts as an encroachment on their sovereignty.[254] Any neutral observance of these courts is feared to lend them legitimacy and some kind of legal status. It might even support secessionist aims.[255] And non-State armed groups implement courts precisely to present the image of a functioning and legitimate regime and an alternative to State authority.

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[251] International Criminal Court (2009): The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, p. 184.

[252] It is "difficult for them to show that any 'court' they establish for this purpose is able to offer 'the essential guarantees of independence and impartiality' " Rowe, Peter (2005): The Impact of Human Rights Law on Armed Forces, Cambridge: Cambridge University Press, p. 201. The " "judicial" apparatus [...] is likely to fall below international standards." International Council on Human Rights Policy (2000): Ends & means: human rights approaches to armed groups, Versoix, p. 52.

[253] Additional Protocol II, Article 6(2).

[254] Sivakumaran, Sandesh (2012): The Law of Non-International Armed Conflict, Oxford: Oxford University Press, p. 550.

[255] International Council on Human Rights Policy (2000): Ends & means: human rights approaches to armed groups, Versoix, p. 50.

The claims of State actors thus have merit, but they need to be balanced against the possible benefits these courts can provide.

The courts could serve as a mechanism to enforce IHL, to contribute to the maintenance of law and order and to prosecute violations and are therefore fighting impunity. In the particular case of Afghanistan, various States have urged caution in engaging with non-State actors such as the Taliban. The government of Afghanistan voiced concerns, because engaging non-State armed groups "would reduce the Government from being a sovereign to being a mere faction in a civil war"[256] while others added that "contact [...] with non-State armed groups can be established only with the consent of the Government of the relevant States [...] so as not to legitimize existing outlawed units"[257]. As noted earlier, CT legislations may even render these engagements illegal. While giving legitimacy to armed groups is a valid concern, some non-State armed groups' courts may indeed have a claim to legitimacy, especially if they provide the means for prosecution, when otherwise no one would.

A system could be envisaged where courts of non-State armed groups will be granted the ability to prosecute petty crimes, disputes, and lesser violations of IHL by their own fighters, while obliging them to transfer grave breaches of IHL to international jurisdiction. The question whether certain decisions by these courts should be recognized remains a difficult one. An examination on a case-to-case basis might provide an answer as to which courts and which court decisions should be recognized. It however remains unlikely for States to accept

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[256] United Nations General Assembly (2009): Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum Mission to Afghanistan, A/HRC/11/2/Add.4, p. 24.

[257] Rogachev, Ilya (2009): Note to Secretary General, Report (S/2009/277).

courts established by a non-State armed group it is in conflict with, not to speak of recognizing their decisions as law. The ICRC acknowledges the complexity of having two legal systems of law during the conflict, but does not regard it as impossible.[258]

The international community should seek to make advantage of the role these courts can play in ensuring respect for IHL and for aid workers, rather than to condemn them without offering suggestions of improvement. A way forward, too lengthy for this thesis, but not without importance, would be to limit the admissibility of non-State armed groups legislating and setting up courts, by analogy to the rights an occupying power is allowed to exercise under the law of belligerent occupation.

4.3 – Codex of Commitment

> "Improved compliance with international humanitarian law and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-State armed groups".[259]

Non-State armed groups are often criticized and rarely encouraged, their violation of IHL exploited while their compliance is presupposed. There are however mechanisms, which allow non-State armed groups to commit to, increase their engagement with, and ratify legal obligations similar to IHL. Some of them will be addressed here in order to propose a general codex of commitments as an incentivizing tool for non-State armed groups to adhere to IHL.

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[258] Sandoz, Yves; Swinarski, Christophe; Zimmermann, Bruno (eds.) (1987): Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva and The Hague: ICRC, p. 1399.

[259] United Nations Security Council (2010): Report of the Secretary-General on the Protection of Civilians in Armed Conflict, S/2010/579, Paragraph 52.

Non-State armed groups can make unilateral declarations, which normally set out a group's position on IHL. They might deal with particular norms of IHL or with the full body of law and may even create legal obligations going beyond the Geneva Conventions.[260] It is important that these unilateral declarations do not obligate other parties to a conflict towards additional rules. Making unilateral declarations does not entail that they are, or should be nonbinding, nor does it imply, that no benefits accrue to the party that follows the declaration. However, these declarations are hard to enforce and might be made based on political reasons without much real intention to implement them.[261]

Parties to a conflict can draw up codes of conduct. One example for such a code of conduct is the Layha for the Mujahadeen of the Taliban of Afghanistan, issued in 2001 and revised in 2009 and 2010. [262]

Common Article 3 provides the instrument of special agreements, so as to show commitment for IHL. "The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention".[263] Special agreements, being concluded within the framework of IHL, cannot be used to diminish rights and obligations applicable to armed conflict. Since non-State armed groups are increasingly playing a role in contemporary armed conflicts, these agreements may prove crucial

[260] ICRC (2008): Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts, Geneva, p. 16.

[261] Mack, Michelle (2008): Increasing Respect for International Humanitaruan Law in Non-International Conflicts, Geneva: ICRC, p.19.

[262] Munir, Muhammad (2011): The Layha for the Mujahideen: an analysis of the code of conduct for the Taliban fighters under Islamic law.

[263] Common Article 3 Geneva Conventions.

for encouraging compliance with IHL. They can be concluded with one or more parties, but can also be concluded with UN entities and NGOs.[264] It can be differentiated between declaratory agreements, in which actors clarify their already existing obligations under IHL, and constitutive agreements, representing the concurrent will of all parties to a conflict to abide by IHL, what serves the purpose of potentially enhancing the obligations by going beyond already applicable provisions. These agreements[265] involve the non-State actor in the creation of rules that will apply to them, thus improving ownership of IHL in general. This sense of ownership, a symbolic validation, is a way of improving respect for IHL.[266] The agreements address the direct relationship between non-State actors and IHL and serve as an entry for further dialogue with the non-State armed group.[267] The single fact of engaging in dialogue may already improve adherence to IHL, as it enables the actors involved to engage in conversation that might otherwise not take place. However, despite being enshrined in the Geneva Conventions, the applicable legal regime for such agreements is not entirely

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[264] Sivakumaran, Sandesh (2015): Implementing humanitarian norms through non-State armed groups, p. 128.

[265] One example of such a special agreement in Afghanistan is the Afghan Peace Accord, which included clauses concerning the release of detainees. Parties to a NIAC can also agree to other obligations in a special agreement, such as international human right norms. Sivakumaran, Sandesh (2012): The Law of Non-International Armed Conflict, Oxford: Oxford University Press, p. 125.

[266] ICRC (2016): Generating respect for the law: An appraisal, In: International Review of the Red Cross (2016), 98 (2), 671–682. War and security at sea, p. 676.

[267] Sivakumaran, Sandesh (2015): Implementing humanitarian norms through non-State armed groups, p. 133. In: Krieger, Heike (Ed.): Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region. Cambridge: Cambridge University Press.

clear and there is no obligation to actually conclude them.[268] The mechanism of these agreements has in itself not been able to stop violations of IHL.[269]

If there were to be a code of conduct or public statements on the respect for IHL, non-State armed groups could more easily be held accountable. These actors could show their commitment to international standards even though they don't have the legal capacity to become party to the Geneva Conventions. Respecting IHL can be in the interest of non-State armed groups.[270] They might gain reciprocal respect by the State actor, including proper treatment of detained members and achieve a greater probability of dialogue with the adversary. Lives can be saved through the facilitation of aid. Non-State armed groups might adhere to these agreements and codes, because they perceive it as a step towards more legitimacy and because they can differentiate themselves from other more vicious groups.

The NGO Geneva Call, observing the challenges posed by the State-centric nature of IHL, can serve as an example of IHL inclusion of non-State armed groups. To give a case in point, the NGO has drawn up a "Deed of Commitment", obtaining obligations equivalent to those contained in the Ottawa Con-

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[268] Heffes, Ezequiel; Kotlik, Marcos D. (2014): Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime, International Review of the Red Cross, 96 (895/896), p. 1200.

[269] Geiß, Robin (2011): Das humanitäre Völkerrecht im Lichte aktueller Herausforderungen p.61f.. In: Heintze, Hans-Joachim, Ipsen, Knut (eds.): Heutige bewaffnete Konflikte als Herausforderungen an das humanitäre Völkerrecht. 20 Jahre Institut für Friedenssicherungsrecht und humanitäres Völkerrecht - 60 Jahre Genfer Abkommen.

[270] Sivakumaran, Sandesh (2011): Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War, International Review of the Red Cross, Vol. 93, No. 882, pp. 463 – 482.

vention on Land Mines, that non-State armed groups can voluntarily commit to.[271] The deed incorporates a monitoring mechanism for violations and signatories have reporting obligations. Similarly, the UN Security Council has brought forward the idea of "Action Plans", requiring certain listed States and non-State armed groups to halt recruitment of child soldiers. This mechanism includes a working group monitoring the development of, and compliance with these action plans.[272]

These examples could be drawn upon and translated into a general codex of commitment with regard to IHL. Non-State armed groups would be encouraged to sign a declaration, which provides for several obligations, including issuing the necessary order and directives to commanders and fighters in understandable form for the implementation of, education in and adherence to IHL. This declaration could enable a non-State armed group to express its adherence to treaties it is not able to ratify. The codex of commitment could incorporate specific provisions that reinforce commitment to IHL and also serve as a basis for a clear understanding of the nature and content of the code, as well as of IHL more generally. It needs to be stable against incidents of its violation that can occur through members of a group, sub-groups or the group as a whole. Such a codex of commitment could empower signatories to enact disciplinary measures such as demotion, suspension, expulsion and imprisonment of individuals not adhering to the rules laid out in the deed. Furthermore, a two level monitoring mechanism could be envisaged to supervise the non-State armed groups' undertakings. Monitoring is necessary, because even though all possible mechanisms of prevention and sanctions

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[271] Geneva Call (2000): Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action.

[272] United Nations Office of the Special Representative of the Secretary General for Children and Armed Conflict (2018): Action Plans with Armed Forces and Armed Groups.

are in place, violations may still occur.[273] This mechanism could first allow for self-monitoring and self-reporting in the form of submitting reports to an impartial actor that would facilitate continued debate about IHL. The self-reporting mechanism would yield the advantage that non-State armed groups take responsibility for their commitment and explain their response to allegations of violence, but also implements a sense of ownership and leads to greater knowledge of IHL.[274] If non-State armed groups were to take the self-reporting mechanism seriously, they might even be allowed to report on the compliance by their government or other adversaries. This would serve as another incentive to respect IHL, as non-State armed groups are given a tool to demand greater compliance with IHL by other parties to a conflict. A second level of monitoring could include an impartial actor writing its own reports and conducting routine follow up missions and verification missions in the case of credible allegations of IHL violations. There may be a need for outside assistance in achieving this, but the responsibility would ultimately have to lie with the non-State armed group itself. Without its explicit intention, it remains doubtful that internalization of IHL and an improvement in aid worker security could be achieved. There is a link between concluding agreements and complying with the agreements, just as there is a link between taking part in the negotiation of rules and abiding by these rules. This is clearly documented by some non-State armed groups declaring not to be bound by IHL, because they did not participate in its creation.[275] "Without the

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[273] Bangerter, Oliver (2015): Comment – persuading armed groups to better respect international humanitarian law, p. 114.

[274] Geneva Call (2007): Engaging Armed Non-State Actors in a Landmine Ban: The Geneva Call Progress Report (2000–2007), Geneva, p. 25.

[275] Roberts, Anthea; Sivakumaran, Sandesh (2012): Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law, Yale Journal of International Law, Vol. 37, No. 1, p. 127.

opportunity to expressly commit themselves to the treaty provisions, armed groups may be unwilling to consider themselves bound to international obligations agreed to by political structures of which they were not part".[276]

There are areas where States are anxious to retain as much scope for freedom of action as possible. With the international community remaining rather State-centered with States playing the dominant role and other actors having a secondary role despite changes in the international system, it is the question, whether the present climate is conducive to such an instrument.[277] But if States are to realize that such an instrument would not change their obligations, but rather increase the obligation by non-State armed groups that would then be subject to obligations stemming from IHL as well as from the new instrument, they might not object to the creation of it. Geneva Call, various States and the UN have recognized the potential for non-State armed groups to influence one another through agreements on compliance with IHL.[278] Non-State armed groups may sign such a codex of commitment in order to persuade other parties to a NIAC to make similar commitments or implement existing obligations, ensuring reciprocity. The commitments may even have influence on groups and States not directly involved in NIAC.[279]

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[276] ICRC (2004): Improving Compliance with International Humanitarian Law, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge: HPCR, p. 5.

[277] Cassese, Antonio (2014): Gathering up the Main Threads, pp. 645f., 648-652.

[278] Roberts, Anthea; Sivakumaran, Sandesh (2012): Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law, Yale Journal of International Law, Vol. 37, No. 1, pp. 130ff.

[279] Sivakumaran, Sandesh (2015): Implementing humanitarian norms through non-State armed groups, p. 131.

4.4 – Achieving Universial Combatant Status

During the nineteenth and early twentieth centuries, internal violence was not regulated through a comprehensive legal framework but rather through the tool of recognition of belligerency[280], ad-hoc agreements and instructions.[281] The recognition of belligerency is based on the idea that when an insurgent party achieved quasi-State characteristics, the armed conflict should be regarded as a conflict between two independent entities, thus bringing the laws of war into a conflict between de facto two States.[282] Accordingly, members of non-State armed groups were treated as combatants. The hostilities conducted by non-State armed groups should not be placed on the same level with those conducted by the lawful government.[283] It followed that the non-State actor could no longer be prosecuted simply for participating in the conflict but the mechanism differs from the government simply abstaining to prosecute non-combatants fighting against it through the enforcement of criminal law.

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[280] A historical analysis shows that besides the recognition of belligerency, a recognition of insurgency was possible. For more information see: Paust, Jordan J. (2015): Armed Opposition Groups, pp. 28of. This chapter will however focus on the former.

[281] Instructions as found for example in the Lieber Code. The Code did not derive from state side alone and entails many instructions being given to combatans and to non-state armed groups. See: Sivakumaran, Sandesh (2012): The Law of Non-International Armed Conflict, Oxford: Oxford University Press, p. 24.

[282] de Vattel, Emer (1797): The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury, Indianapolis: Liberty Fund, p. 338.

[283] Castrén, Erik (1966): Civil War. Helsinki: Suomalaisen Tiedeakatemian Toimituksia, Annales Academiae Scientiarum Fennicae, Vol. 142, No. 2, p. 136.

The policy of recognition of belligerency saw its prime in the nineteenth century, but disappeared over the twentieth century.[284] By looking at how and why combatant immunity derived from the recognition of belligerency, it can be assessed, whether there is room for it in contemporary conflicts as well. The purpose of this chapter is to reexamine the recognition of belligerency in light of today's nature of conflict and propose the recognition of combatant status as way forward.

Historically, war making power was deemed a sovereign prerogative and any situation of NIAC was considered to be a matter of the affected State alone. The lawful government as a party to NIAC had the right to confer a status of belligerency on the other party to the conflict, whereas the unlawful belligerents could not demand that they be recognized as belligerents.[285] The recognition was not regarded as to be mandatory.[286] Nevertheless, recognition of belligerency was deemed necessary, when the extend of the conflict amounted to that of general war.[287] There was however no consequence for failing to

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[284] For a historical perspective explained through the incorporation of the examples of the American Civil War, the Spanish Civil War and the Vietnam War see: Parsons, Rymn J. (2013): Combatant Immunity in Non-International Armed Conflict, Past and Future, ExpressO, Unpublished Paper, pp. 12 – 22. See also Castrén, Erik (1966): Civil War. Helsinki: Suomalaisen Tiedeakatemian Toimituksia, Annales Academiae Scientiarum Fennicae, Vol. 142, No. 2, pp. 38 – 78.

[285] Castrén, Erik (1966): Civil War. Helsinki: Suomalaisen Tiedeakatemian Toimituksia, Annales Academiae Scientiarum Fennicae, Vol. 142, No. 2, p.135.

[286] For a discussion about mandatory recognition see for example: Siotis, Jean (1958): Le Droit de la guerre et les conflict armés d'un charactère non-international, Paris: Pichon et Durand-Auzias, p. 129; Wehberg, Hans (1953): Krieg und Eroberung im Wandel des Völkerrechts, Frankfurt am Main: A. Metzner.

[287] Moir, Lindsay (2002): The law of internal armed conflict, Cambridge Studies in International and Comparative Law, Cambridge: Cambridge University Press, p. 3.

recognize belligerency.[288] Some acts by the lawful government could be regarded as indirectly recognizing belligerency. They include acquiescence to or the imposition of a blockade, as well as the application of certain types of neutrality legislation.[289] These regulations changed over time and it now seems as though recognition would have to be explicitly acknowledged.[290] For the lawful government, recognition of belligerency at first glance implied more disadvantages than benefits, as it would confer rights to non-State armed groups that it as the sovereign already possesses. But if the recognition would achieve adherence to IHL and thus better treatment for their combatants, the lawful government would benefit as well. The recognition of belligerency did not change the legal nature and obligations of the lawful government, which gained the advantage of reciprocity vis-à-vis non-State armed groups.

Considerations about whether a state of belligerency could be recognized were subject to much debate. Although recognition of belligerency required certain factors, precisely what these factors were, was contested. They included a de facto political and military organization, the actual employment of military forces, the holding of territory, the duration of the conflict and the observance of the law of war. The debate about these factors is reminiscent on today's discussion about the

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[288] There has been discussion about an obligatory recognition of belligerency. In practice, there has however never been such a requirement. See further: Siotis, Jean (1958): Le Droit de la guerre et les conflict armés d'un charactère non-international, Paris: Pichon et Durand-Auzias, pp. 109f., 128 – 131.

[289] Sivakumaran, Sandesh (2012): The Law of Non-International Armed Conflict, Oxford: Oxford University Press, p. 18f.

[290] Turkel Commission (2010): The Public Commission to Examine the Maritime Incident of 31 May 2010, Report Part One, Paragraph 42 clarifies that the naval blockade of the Gaza Strip "should not be interpreted in any way to suggest that the historic doctrine of "belligerency" is applicable or appropriate in this case".

definition of NIAC. Other factors were the attitude of States not involved in the violence to define their attitude to the conflict, as well as the practical necessity to define outside recognition.[291] This was needed in order to distinguish genuine instances of recognition from those intended to help the non-State armed group.[292]

Out of humanitarian reasons the recognition of belligerency should be examined as early on in a conflict as possible. However, as there is no obligation for recognition, it had to be expected that this question would be calculated based on self-interest or exigency rather than compulsion. Only on rare occasions did humanitarian concerns influence the decision to grant recognition, for example in the Greek War of Independence in the 1820s.[293]

The use of the recognition of belligerency remained inconsistent with some States acknowledging a state of belligerency while others treated the same situation as a rebellion. In light of these drawbacks and the insufficiency of ad-hoc agreements, States turned to IHL to regulate NIACs. With the Geneva Conventions taking form and especially through the legal framework regulating NIAC, recognition of belligerency seemed to loose importance.[294] Recognition of belligerency was only seldom resorted to and highly inconsistent State practice suggests

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[291] McNair, Arnold D. (1956): International Law Opinions: Selected and Annotated, Volume One: Peace, Cambridge: Cambridge University Press, pp. 143f.

[292] Sivakumaran, Sandesh (2012): The Law of Non-International Armed Conflict, Oxford: Oxford University Press, pp. 12f.

[293] ibid., pp. 17f.

[294] Attempts to extend the full protection of IHL to situations where the criteria for the recognition of belligerency were met, were rejected at the Diplomatic Conferences debating the adoption of the Geneva Conventions. See: Federal Political Departement (1949): Final Record of the Diplomatic Conference of Geneva of 1949, Volume II B, Berne, pp. 352 - 330.

that this mechanism might have been abandoned.[295] However, it cannot be concluded that this regulatory framework has completely been foregone, or that it cannot be used in the future.

The conflict in Afghanistan displays characteristics on which the theory of recognition of belligerency was formulated and implemented.[296] One could argue that the Security Councils determination that the situation "in Afghanistan still constitutes a threat to international peace and security"[297], or the extent of the military operations conducted by the multinational coalition constitute a de facto recognition of belligerency. In fact, establishing a functional equivalent between the authorization by the Security Council and the recognition of belligerency could go a long way in improving adherence to IHL. The possibility of a variation of the recognition of belligerency taking hold in contemporary armed conflicts will now be addressed and the recognition of combatant status will be presented as the most promising incentive for non-State armed groups to adhere to IHL.

IHL regulating NIAC binds each party of the conflict to the same obligations and rights. This fundamental principle of the equality of belligerents is challenged by the fact that non-State armed groups remain subject to domestic prosecution and by the lack of equal status, i.e. combatant status. No treaty provision applicable to NIAC mentions either combatant immunity or POW status.[298] The protection awarded by the combatant

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[295] Ruys, Tom (2014): The Syrian civil war and the Achilles' heel of the law of non-international armed conflict. Stanford Journal of International Law, Vol. 50, No. 2, p. 259.

[296] Parsons, Rymn J. (2013): Combatant Immunity in Non-International Armed Conflict, Past and Future, ExpressO, Unpublished Paper, p. 23.

[297] United Nations Security Council (2001): UNSC Resolution 1386 (2001), p. 2.

[298] Sivakumaran, Sandesh (2012): The Law of Non-International Armed Conflict, Oxford: Oxford University Press, p. 513.

status is as much about excluding specific individuals as they are about protecting others. The combatant status thus reflects the predominance of States in the creation of IHL.[299] However, combatant immunity is a crucial incentive for compliance, no less relevant for NIAC as it is in IAC. This is widely accepted[300] and there have been initiatives to include immunity in laws governing NIAC even in the formulation of the Geneva Conventions. Norway's provision where the "application of the Conventions [...] would not prevent the lawful government from instituting regular procedure for the prosecution of the rebels. The latter, however, could not be punished on the sole grounds of having taken part in the conflict"[301] was not met with much enthusiasm.[302] Similarly, Great Britain suggested "that the signatory countries agree to amend their penal law to prevent them from condemning vanquished rebels on the sole grounds of having borne arms against the legal government"[303], but the initiatives proved to be unsuccessful. Later on, the ICRC continued to pursue the introduction of combatant

[299] Oeter, Stefan (1999): Die Entwicklung des Kriegsgefangenenrechts, p. 48.

[300] It was for example noted at the Conference that "limitation of the partisans' right to PW status might induce them to disregard the laws of war, thus making [...] the conflict more pitiless". ICRC (1974): Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, p. 110.

[301] Federal Political Departement (1949): Final Record of the Diplomatic Conference of Geneva of 1949, Volume II B, Berne, p. 44.

[302] Federal Political Departement (1949): Final Record of the Diplomatic Conference of Geneva of 1949, Volume II B, Berne, pp. 50, 99.

[303] Federal Political Departement (1949): Final Record of the Diplomatic Conference of Geneva of 1949, Volume II B, Berne, p. 49.

immunity into IHL, but here too, no improvement was achieved.[304]

This thesis argues that non-State armed groups should be granted immunity from domestic prosecution for lawful acts under IHL, while the possibility for domestic prosecution of non-State armed groups starting or engaging in a conflict should remain intact, in order not to legitimize or encourage violence by non-State armed groups. And State practice has shown that the approach of combatant immunity and POW for non-State armed groups in NIAC is possible. During the conflict in the Former Yugoslavia, an agreement on the release and transfer of prisoners provided that "all prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law [...] will be unilaterally and unconditionally released", essentially giving members of non-State armed groups POW status.[305]

Similarly to the recognition of belligerency, there is no obligation to recognize combatant status. If States were free to grant recognition, it would be logical to assume that they are free in withdrawing recognition as well. This would however defeat the whole purpose of the recognition, because the incentive of non-State armed groups to comply falls away, if they fear that recognition can arbitrarily be withdrawn, even if they comply with the conditions of recognition. Withdrawal of combatant status should therefore not be undertaken arbitrarily.

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304 ICRC (1969): Reaffirmation and Development of the Laws and Customs applicable in Armed Conflicts, Report submitted by the International Committee of the Red Cross, Geneva, p. 104.

305 (1992): Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners, Article 3(1).

States will be reluctant to grant combatant status to non-State armed groups, arguing that the prospect of gaining full combatant status could serve as an incentive to escalate violence.[306] Similarly to argumentations concerning the recognition of belligerency, the fear of lending legitimacy to these groups also plays a role. Granting combatant status furthermore has been perceived as imposing on States obligations that are inherently opposed to their security imperatives.[307] But recognition of combatant status does not infringe on the demands for military necessity. It in fact increases the legal basis for attacks on non-State armed groups, as their members become legitimate targets and their adversaries do no longer have to engage in the discussion whether members of non-State armed groups are combatants, civilians taking a direct part in hostilities, or "unlawful combatants". In the same line of argument, much debate about the difference between IAC, NIAC and about the threshold and scope of application would be eliminated.[308] Opponents might argue that granting combatant status and subsequent POW status fails to serve as a real incentive, because "persons who resort to guerilla warfare [...] face many privations and the promise of POW status is unlikely to be an inducement to restrain operations which they believe necessary for victory".[309] There are those relating any expansion of coverage under IHL through changes in combatant status criteria to an increase in non-State actors deliberately non-

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306 Melzer, Nils (2012): Bolstering the Protection of Civilians in Armed Conflict, p. 516.

307 Jinks, Derek (2004): Protective Parity and the Laws of War, Notre Dame Law Review, Vol. 79, No. 4, p. 1494.

308 Crawford, Emily (2010): The Treatment of Combatants and Insurgents Under the Law of Armed Conflict, Oxford: Oxford University Press, p. 161.

309 Suter, Keith (1984): An International Law of Guerilla Warfare: Th Global Politics of Law-making. New York: St. Martin's Press, p. 168.

compliant with IHL and emboldened in their view that IHL itself is a strategic target.[310]

The criminalization of non-State armed groups suppresses the incentive structure in favor of discouraging future members from taking up arms in the first place. States in this regard ignore that the very structure of IHL already discourages civilian participation in conflict. This happens for example through the fact that peaceful civilians are immune to attack, civilians at the time of fighting however are not.[311] Would-be fighters assume substantial risk when taking up arms, the criminalization of them doing so thus only serves as a modest additional disincentive. The recognition of combatant immunity is no blank check and conferring it on non-State armed groups for acts lawful under IHL leaves ample room for prosecution of unlawful acts under IHL. But dealing with non-State armed groups solely under domestic law may worsen respect for humanitarian considerations.[312] Furthermore, there are advantages for a State to grant combatant status to its adversary in a NIAC. Severe treatment of members of a non-State armed group deters surrender, thus encourages the members to keep up their fight and also encourages reprisals. Harsh treatment of the enemy might also undermine the morale of the own combatants and might decrease political support for the State's effort.[313] Granting combatant status improves the prospect

[310] Zoli, Corri (2011): Humanizing Irregular Warfare, Framing Compliance for Nonstate Armed Groups at the Intersection of Security and Legal Analyses, p. 198.

[311] Jinks, Derek (2004): Protective Parity and the Laws of War, Notre Dame Law Review, Vol. 79, No. 4, p. 1524.

[312] Parsons, Rymn J. (2013): Combatant Immunity in Non-International Armed Conflict, Past and Future, ExpressO, Unpublished Paper, p. 8.

[313] Reiter, Dan; Stam, Allan C. (2002): Democracies at War, Princeton: Princeton University Press, p. 47.

of reciprocity, not at least because non-State armed groups become more State-like and a more symmetrical relationship is established.

5 – Conclusion

How and when the ICRC can resume its activities in Afghanistan is not yet clear. But despite the difficult situation, the ICRC remains committed to its principles, its work and the protection regime of IHL. IHL infuses the violence of war with humanitarian considerations. It does not put either military success or State survival at risk. It does consequently not need to become as sensitive of State interest in further development, as some think.[314] But it needs to be upheld, because the alternative of a war without limits simply is not acceptable. That IHL has its flaws is nothing new and the problems concerning its improvement have been discussed already for quite some time.[315] It has been argued that the emergence of new wars, like the war on terror, or conflicts characterized by deliberate targeting of civilians, where the question of legitimate military targets becomes hard to answer, makes IHL inapplicable and necessitates a new approach.[316] IHL is not a static body of law, as new norms may be developed, older norms acquire the status of Customary IHL and changing factual contexts like new military developments call for reinterpretations and improvement of existing norms. Technology is already revolutionizing how issues of armed conflict are communicated. New techno-

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[314] Schmitt, Michael N. (2010): The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis, Harvard Journal of National Security Law, Vol. 1, pp. 5 – 44.

[315] Lauterpacht, Hersch (1956): The Problem of the Revision of the Law of War, British Yearbook of International Law, Volume 29, pp. 363 – 64; Kunz, Josef L. (1956): The Laws of War, American Journal of International Law, Vol. 50, No. 2, pp. 313-337.

[316] Lamp, Nicolas (2011): Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law, in: Journal of Conflict and Security Law, Vol. 16, pp. 225 – 262.

logical developments, such as autonomous weapon systems, cyber warfare and human enhancement challenge underlying assumptions of IHL, but also give rise to complex ethical questions.[317] Can human enhancement and a shift to autonomous warfare reduce hatred and the spiral of violence, or does it initiate growing asymmetries, which in turn may lead to more violations of IHL? Another factor that challenges IHL is the fact that contemporary warfare takes increasingly place in urban settings. Difficulties arise from very technical legal questions and conceptual barriers, where rules do not provide clear answers to modern questions. But the basic principles are still relevant. The changing landscape of conflict nevertheless calls for a refocus of IHL away from a State-centered interpretation.

The complex issue of aid worker security far exceeds what can be discussed in this thesis. Many aspects have not been addressed in depth, while some important issues have not been brought up. Important though they are, this topic is not confined to incidents in Afghanistan, Syria and Yemen, often talked about in the press. Comparable incidents happen on a large scale in South America and on the African Continent as well.[318] The question, whether current developments are only a phase or the manifestation of a trend towards more violence against aid workers, cannot ultimately be answered, even though it seems like attacks on aid workers have become a sad new standard in contemporary conflicts. Complex questions remain with regard to dilemmas in defining the terms combat-

[317] Cyber warfare in the context of occupation, for example, challenges the notion of effective control and thereby the rules determining occupation themselves. ICRC (2016): Generating respect for the law: An appraisal, International Review of the Red Cross, Vol. 98, No. 2, War and security at sea, p. 680.

[318] Stoddard, Abby; Harmer, Adele; Czwarno, Monica (2017): Aid Worker Security Report 2017, Behind the attacks: A look at the perpetrators of violence against aid workers.

ant and civilian and other designations such as direct participation in hostilities. Another issue that prompts intense debate, but cannot be elaborated upon is, whether an armed conflict can exist outside the IAC and NIAC paradigm, for example extraterritorial military operations against non-State actors or transnational armed conflicts.[319] Given the prevalence of these conflicts and operations, determining the applicable legal framework is critical. Even though it would make sense, from a humanitarian point of view, to comply with IHL during all military operations, the reality is different.[320]

Other problems have only risen with the proposed way forward. These include the question whether some forms of rebellion deserve to be amnestied, whereas others do not, or more generally, whether the taking up of arms itself can be pardoned. Should the use of force by non-State armed groups, a right to resistance, be allowed in cases of self-defense against grave breaches of IHL or similar threats? The absence of an international jus ad bellum for non-State armed groups makes these problems apparent. IHL insists on only concerning the jus in bello. But with regard to granting a privilege of belligerency to national liberation movements through Additional Protocol I, the jus ad bellum seems to be included in IHL.[321] But this thesis is not the place to develop further on this issue.[322]

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[319] Corn, Geoffrey S. (2007): Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict, Vanderbilt Journal of Transnational Law, Vol. 40, No. 2, pp. 299f.

[320] See further: Corn, Geoffrey, S. (2011): Extraterritorial Law Enforcement or Transnational Counterterrorist Military Operations, The Stakes of Two Legal Models, pp. 23 – 44.

[321] Mégret, Frédéric (2014): Should Rebels be Amnestied?, p. 537.

[322] On this issue see further: Mégret, Frédéric (2008): Le droit international peut-il être un droit de résistance? Dix conditions pour un renouveau de l'ambition normative internationale, Études Internationales, Vol. 39, No. 1, pp. 39 – 62; Mégret, Frédéric (2009): Civil Disobedience and International

The consequences of a shift towards more IHRL in IHL have not been sufficiently explored. Questions remain for example with regard to circumstances in which non-State armed groups have human rights obligations and how these obligations could be enforced.[323] Where non-State armed groups hold territory or exercise de facto authority over a population, it seems reasonable to argue that IHRL should be applicable to them. The ILA concluded that even though "the consensus appears to be that currently [non-State armed groups] do not incur direct human rights obligations enforceable under international law",[324] they would still be bound by jus cogens norms. As human rights norms are part of jus cogens, the ILA indicated "prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination"[325], whereas the UN Human Rights Committee identified arbitrary deprivations of life, torture and inhuman or degrading treatment, taking hostages, imposing collective punishments, arbitrary deprivations of liberty, or deviating from fundamental principles of fair trial, including the presumption of innocence, as the peremptory norms of international law.[326]

Law: Sketch for a Theoretical Argument, Canadian Yearbook of International Law/Annuaire Canadien De Droit International, Vol. 46, pp. 143-192.

323 Sivakumaran, Sandesh (2014): How to Improve upon the Faulty Legal Regime of Internal Armed Conflicts, p. 525. In: Cassese, Antonio (2012). Realizing utopia: The future of international law. Oxford: Oxford University Press.

324 International Law Association (2010): The Hague Conference – Non-State Actors, First Report of the Committee Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues, Paragraph 3.2.

325 United Nations (2001): International Law Commission, Commentary on Article 26, in Draft Articles on Responsibility of States for Internationally Wrongful Acts - With Commentaries, Part Two, p. 85.

326 United Nations Human Rights Committee (2001): Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, CCPR General Comment No. 29.

A set of new rules building upon a redefinition of IHL, a revision of IHL in its entirety or in the form of a new Additional Protocol seems unrealistic. Law-making processes are slow, lengthy and controversial. And even if a compromise can be found, political agendas of individual powerful States could counter these aspirations.[327] Furthermore the risk remains that States would use the call for new rules to water down existing rules rather than improving upon them.[328] It would be a mistake to conclude that IHL is flawless, but it would also be a mistake to assume that a new set of rules would be the solution without addressing the core issues behind the problems, namely a lack of incentives for non-State armed groups to adhere to IHL. It may seem hypocritical that the World Humanitarian Summit of 2016 envisaged "a world whose fundamental humanity is restored, a world where no one confronted by crisis dies who can be saved, goes hungry, or is victimized by conflict because there is not enough political will or resources to

[327] The refusal to ratify important treaties like the United States refusing to become a party of the ICC Statute serve as a reminder of how much can actually be achieved. See: International Criminal Court (2018): The State Parties to the Rome Statute.

[328] The adaptation of new law can lead to developments that soften up existing law. One example where the adaptation of new law led to developments that soften up existing law can be found in the prohibition of incendiary weapons. The use of these kinds of weapons was prohibited under the Saint-Petersburg declaration of 1868. It enshrined the prohibiting the use of of "any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances" (1868): Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg. With the adoption of the 1980 Protocol III on Prohibitions or Restrictions of the Use of Incendiary Weapons, these weapons can be used against military personnel under certain conditions. CCW (1980): Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva.

help"[329] and that this exact lack of political remains one of the most important obstacles to IHL adherence. This call for action could however also be seen as a step in the right direction. IHL needs to be developed continually, but its current provisions still provide a strong foundation of protection. Neglecting these provisions offered by IHL would be a fatal mistake.

This thesis contents that despite the remaining, but impaired validity of traditional compliance and incentive structures, there is no real alternative other than to engage with non-State armed groups. As this thesis has shown, a severe dilemma remains in that the necessity to engage those actors directly contradicts the interests of States in general, and of those party to a NIAC in particular. Improving the safety of aid workers in contemporary armed conflict relies on accommodating the interests of non-State armed groups, as much as State interest.

With a focus on NIAC and especially the role of non-State armed groups, the proposed direction towards an improvement of the incentive structure can, hopefully, serve as impetus for further reflection. This thesis has argued that the convergence of treaty and customary IHL enables discussions about a more uniform approach to armed conflict. As has been demonstrated, there are considerable advantages of no longer making the distinction between types of armed conflict. I have shown that there remain significant barriers, one of the most important being the differing treatment of participants in NIAC. Current State practice with regard to amnesties and IHRL form a set of rules and protections that can fill in the gap between those enjoying combatant status and those taking part in activities, without having the right to do so.

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[329] World Humanitarian Summit Secretariat (2015): Restoring Humanity: Synthesis of the Consultation Process for the World Humanitarian Summit. New York, United Nations, p. viii.

Considerable backlash against the proposals has to be expected, not least because of contemporary trends with regard to national CT legislation. The ultimate aim of such proposals, protecting those who cannot protect themselves, as well as keeping those helping civilians safe, should serve as incentive enough for honest discussion. Until a more comprehensive law can be established, intermediary steps, like improving the use of amnesties, or extending POW treatment instead giving a full POW status, will help to improve the situation. Only if the benefits of the proposed granting of combatant status for non-State armed actors, who comply with IHL, are made clear, important steps towards increased aid worker security become a tangible possibility.

This thesis has demonstrated that incentives are central in understanding and influencing behavior of non-State armed groups. It is argued that there now is a development towards a customary international rule that can curtail a State's scope of action in treating non-State armed groups. The accumulation of customary law relating to NIAC, the convergence of IHL applicable in IAC and NIAC, the protection awarded by IHRL and the practice of amnesties suggest that the extension of combatant status and POW privileges, in much the same way, as status was extended for persons involved in national liberation movements, should be possible.

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The deteriorating security situation for aid workers remains one of the vital but overlooked issues in humanitarian aid. Despite advancements in ensuring respect for International Humanitarian Law, violations of its rules remain a widespread problem. The increase in attacks against aid workers in recent years once again raises questions concerning the scope of their protection and ways to improve it. One principal reason behind this negative trend has been the shift in the nature of conflicts and the role of the "war on terror" in undermining the laws authority. Other reasons stem from internal developments of humanitarian actors, namely a lack of transparency or the cooptation of aid. This results in increased politicization and the disintegration of the civilian nature of humanitarian assistance.

There is a need to reassess the role IHL can play in keeping aid workers safe. With non-State armed groups at the center of contemporary conflicts, engaging them is not longer only an option, but becomes a necessity. Traditionally, studies have focused on why actors violate International Humanitarian Law rather than on what encourages them to respect it. Relying only on sanctions has proven to be rather ineffective. With a focus on the incentive structure of International Humanitarian Law, the author will analyze the reoccurring violations from a different angle in order to understand the rationale inducing armed groups to respect it, and to propose viable approaches for the future. There now is a development towards a customary international rule that can curtail a State's scope of action in treating non-State armed groups. The accumulation of customary law relating to non-international armed conflict, the convergence of International Humanitarian Law applicable in international armed conflict and non-international armed conflict, the protection awarded by International Human Rights Law and the practice of amnesties suggest that the extension of combatant status and Prisoners of War privileges should be possible.

Analyzing these developments, the author proposes the application of International Humanitarian Law without making a distinction as to the source of obligation to all parties involved in a conflict, as a promising way to achieve greater adherence to International Humanitarian Law and thus a solution to keep aid workers safe.

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