



2-2-2019

Applicability of International Humanitarian Law to Non-State Actors

Dr. Waseem Ahmad Qureshi

Follow this and additional works at: <https://digitalcommons.law.scu.edu/scujil>



Part of the [International Law Commons](#)

Recommended Citation

Dr. Waseem Ahmad Qureshi, *Applicability of International Humanitarian Law to Non-State Actors*, 17 SANTA CLARA J. INT'L L. 1 (2019).

Available at: <https://digitalcommons.law.scu.edu/scujil/vol17/iss1/2>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Journal of International Law by an authorized editor of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com, pamjadi@scu.edu.



Volume 17 | Issue 1

Article 1

Applicability of International Humanitarian Law to Non-State Actors

By Dr. Waseem Ahmad Qureshi

Applicability of International Humanitarian Law to Non- State Actors

Dr. Waseem Ahmad Qureshi *

* Advocate Supreme Court of Pakistan

Abstract

The wars of this era are being fought by and against non-state actors (NSAs). NSAs typically include terrorist organizations, rebels and mercenaries, acting outside the law in the territory of a sovereign territorial state. Whereas states are constrained by the guidelines and regulations of international humanitarian law (IHL), the activities of NSAs seemingly remain unregulated by IHL; their use of force is prohibited by the laws of the states where they operate, as well as by the international laws of using force. These NSAs use all sorts of unlawful means of war, constantly targeting civilians with unlawful weapons and making violent statements by bombing schools, religious places and hospitals for political motives. Despite these heinous acts being carried out by NSAs, they are not being held responsible for any of these activities. These NSAs desire power, state control and money. They are not only backed by sponsoring regimes for political reasons, but are also awarded monetary and weaponry aid by some states. The result is that civilians are the ones most affected by the use of force by NSAs. This paper will discuss the applicability of IHL to NSAs by exploring its provisions applicable to NSAs and its associated aspects. The paper will also discuss the alternative law of agreeing with NSAs for compliance with and enforcement of IHL, while discussing its pitfalls in the shape of legitimate concerns.

Table of Contents

Introduction.....	5
1. Non-State Actors (NSA).....	7
1.1. Characteristics of NSA	8
1.2. Types of NSA	9
2. Applicability of International Humanitarian Law (IHL)	10
2.1. Provisions of Applicable Law.....	12
2.1.1. Common Article 3 of Geneva Conventions (GC).....	12
2.1.2. Additional Protocol II to the GC.....	14
2.1.3. Rome Statute of the International Criminal Court (RSICC).....	15
2.2. Associated Aspects with the Application of IHL to the NSA	16
2.2.1. Internal Conflict	16
2.2.3. Responsibility of NSA	17
3. Alternative Law and its Concerns.....	18
3.1 Legitimacy Concern.....	19
Conclusion	21

Introduction

The use of force in this era – be it in the international war on terror¹ or in the domestic use of force in internal conflicts during civil wars² – is used by and against NSAs.³ In these conflicts, it is often civilians that face the horrors of war.⁴ The concept of IHL exists primarily to decrease human suffering during war⁵ and to protect precious human lives.⁶ It is considered a set of state-centric rules that bind only governments to abide by the laws of human protection.⁷ These state-centric rules are usually inapplicable against NSAs resulting in the world realizing that the applicability of IHL to NSAs is vitally important.⁸ These NSAs include anarchists and unlawful terrorists,⁹ rebels and warlords,¹⁰

¹ See BELINDA HELMKE, UNDER ATTACK: CHALLENGES TO THE RULES GOVERNING THE INTERNATIONAL USE OF FORCE 167 (2013).

² STEPHEN L. QUACKENBUSH, INTERNATIONAL CONFLICT: LOGIC AND EVIDENCE 35 (2014).

³ See HELMKE, *supra* note 1; see also *Id.*

⁴ See Daniel Rothbart, Karina V. Korostelina & Mohammed Cherkaoui, *The Place and Plight of Civilians in Modern War*, in CIVILIANS AND MODERN WAR: ARMED CONFLICT AND THE IDEOLOGY OF VIOLENCE 1 (Daniel Rothbart et. al. eds., 2012); see also Karina V. Korostelina, *Devastating Civilians at Home*, in CIVILIANS AND MODERN WAR: ARMED CONFLICT AND THE IDEOLOGY OF VIOLENCE 51 (Daniel Rothbart et. al. eds., 2012); see also Alexander B. Downes, *Military Culture and Civilian Victimization*, in CIVILIANS AND MODERN WAR: ARMED CONFLICT AND THE IDEOLOGY OF VIOLENCE 72 (Daniel Rothbart et. al. eds., 2012).

⁵ EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 177 (2016).

⁶ UNIVERSITY FOR PEACE, UNITED NATIONS, HUMAN RIGHTS, PEACE AND JUSTICE IN AFRICA 163 (Christof H. Heyns & Karen Stefiszyn eds., 2006).

⁷ Ida Gjerdrum Haugen, *Armed Groups and International Humanitarian Law: A Study on Parallel Legal Agreements, Armed Groups and Compliance with International Humanitarian Law* University of Oslo, 26 (Nov. 10, 2011).

⁸ Dayana Jadarian, *International Humanitarian Law's Applicability to Armed Non-State Actors* 8 (Fall 2007) (unpublished graduate paper, University of Stockholm) (available at http://www.juridicum.su.se/juruppsatser/2008/ht_2008_Dayana_Jadarian.pdf).

⁹ Noemi Gal-Or, *Observations on the Desirability of an Enhanced International Legal Status of the Non-State Actor*, in NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 141 (Math Noortmann & Cedric Ryngaert eds., 2016).

¹⁰ Caroline Varin, *Introduction*, in VIOLENT NON-STATE ACTORS IN AFRICA: TERRORISTS, REBELS AND WARLORDS 5 (Caroline Varin & Dauda Abubakar eds., 2017).

who bow to no rules¹¹ and exercise illegitimate violence.¹² Since the methods used by NSAs severely affect civilians during armed conflicts, legal theorists are trying to bind NSAs with IHL rules and principles to protect civilians by coming up with and applying alternative laws (laws exclusively binding NSAs) or customary international laws (that are universally applicable) to reduce human suffering.¹³ There have been a number of legitimate concerns about applying alternative IHL to NSAs through the use of agreements, such as the concern of providing NSAs with the legitimacy to use force, because without such agreements¹⁴ all use of force by NSAs is considered illegitimate.¹⁵ However, making agreements with NSAs requires admitting NSAs' legitimate authority and thus their authority to use force.¹⁶ As a result, theorists are stuck with the dilemma of balancing the reduction of human suffering and the legitimization of NSAs' authority and their use of force. Accordingly, this paper seeks to explore this dilemma in detail by analysing the applicability of IHL to NSAs, while discussing its concerns and challenges. Moreover, this paper will try to summarize the legality of the current legal framework in its efforts to reduce human suffering and applying IHL to NSAs. It will also try to come up with a neutral avenue to compel NSAs to reduce human suffering without legitimizing their use of force.

Accordingly, this paper has three sections. Section 1 will describe and define NSAs by outlining their characteristics and types. Afterwards, Section 2 will discuss the applicability of IHL to NSAs by exploring the applicable provisions of IHL and discussing the associated aspects of the application of IHL to NSAs. Thereafter, Section 3 will discuss agreeing alternative laws with NSAs for the compliance and enforcement of IHL, while discussing its pitfalls in the shape of the legitimacy concern.

¹¹ Gal-Or, *supra* note 9, at 125, 141.

¹² Varin, *supra* note 10.

¹³ Andrew Clapham, *The Right and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement* (Feb. 2010). See also Haugen, *supra* note 7.

¹⁴ Dawn Steinhoff, *Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups*, 45 TEX. INT'L L. J. 297, 309-310 (2011).

¹⁵ Varin, *supra* note 10.

¹⁶ Steinhoff, *supra* note 14, at 318, 320.

1. Non-State Actors (NSA)

Only a state can use legitimate force in its territory.¹⁷ NSAs therefore use unlawful force within a sovereign state's territory without authorization¹⁸ in order to meet private ends, such as to assume power, acquire property¹⁹, collect money,²⁰ and also for covert civic, political and economic reasons.²¹ Usually NSAs are wanted outlaws, such as rebel groups, terrorist groups, mercenaries, and drug/warlords,²² who fight against their own state.²³ ²⁴ As a result, the state fights back and uses legitimate force against NSAs.²⁵ However, for political reasons, these NSAs are also used by other states and paid as mercenaries, receiving aid in terms of modern war weaponry, funds and training.²⁶ They are also backed by these states to fight proxy wars on their behalf.²⁷ However, it is pertinent to mention here that, in accordance with the ICJ in the *Nicaragua* case, arming and abetting NSAs in another territorial state violates the international law of using force, with such arming and abetting is even considered an act of aggression.²⁸ Moreover, NSAs use all

¹⁷ JEAN PORTER, *MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY* 306 (John Witte Jr. ed., 2010).

¹⁸ Varin, *supra* note 10.

¹⁹ Anki Sjöberg & Elisabeth D. Warner, *Armed Non-State Actors: Current Trends & Future Challenges* 9 (Democratic Control of Armed Forces Horizon, Working Paper No. 5, 2015), https://www.dcaf.ch/sites/default/files/publications/documents/ANSA_Final.pdf.

²⁰ GOERAN B. JOHANSSON, *A SLAVIC PEOPLE. A RUSSIAN SUPERPOWER. A CHARISMATIC WORLD LEADER. THE GLOBAL UPHEAVAL. TRILOGY* 328 (Gillian Beal ed., Ahad Ghorbani Dehnari trans., 2013).

²¹ NATASHA EZROW, *GLOBAL POLITICS AND VIOLENT NON-STATE ACTORS* 31 (2017).

²² Varin, *supra* note 10.

²³ *Id.*

²⁴ JOHANSSON, *supra* note 20; *See also* Ezrow, *supra* note 21, at 31.

²⁵ *See* Michael Miklaucic, *Contending with Illicit Power Structures, in* NON-STATE ACTORS AS STANDARD SETTERS 199 (Anne Peters et. al. eds., 2009).

²⁶ LUIZ ALBERTO MONIZ BANDEIRA, *THE SECOND COLD WAR: GEOPOLITICS AND THE STRATEGIC DIMENSIONS OF THE USA* 246 (Americo Lucena Lage trans., Springer Int'l Pub. 2017).

²⁷ *Id.* at 291-95.

²⁸ MAX HILAIRE, *NIJHOFF LAW SPECIALS, INTERNATIONAL LAW AND THE UNITED STATES MILITARY INTERVENTION IN THE WESTERN HEMISPHERE* 101 (Martinus Nijhoff Pub. ed., 1997).

sorts of unorthodox weapons and techniques in armed combat, because they are outlaws and do not bow to any rules or regulations. For example, terrorists use suicide vests to blow themselves up as a means of using force and causing terror and fear.²⁹ Similarly, rebels in Syria have used chemical weapons against civilians, which is outlawed.³⁰ The UN defines an NSA as a group of people that has “*the potential to employ arms in the use of force to achieve political, ideological or economic objectives; [but] are not within the military structures of states, state-alliances or intergovernmental organizations; and are not under the control of the state(s) in which they operate*”.³¹

1.1. Characteristics of NSAs

NSAs are involved in the continual use of force or armed activities resulting in losing their categorization as civilians under IHL.³² However, the International Committee of the Red Cross has noted that, though NSAs are considered combatants, they cannot enjoy the legal privileges that are ascribed to state combatants.³³ The most influential NSAs are those that openly control larger territories in a state, compared to weaker NSAs that work clandestinely, because NSAs aspire to gain power, land and to undermine state control.³⁴ Their control can be both transnational and affect civilians in several countries. This is the case for terrorist organizations such as: the “Moro Islamic Liberation Front”, which controls territory in the Philippines, Sri Lanka, Sudan and Nepal; the Lord’s Resistance Army which controls territory in Uganda, Democratic Republic of the Congo and Sudan;³⁵ and Al-Qaeda which controls territory in Syria, Yemen and Somalia.³⁶

²⁹ AMI PEDAHZUR, SUICIDE TERRORISM 182-83 (2005).

³⁰ *UN’s Del Ponte says evidence Syria rebels ‘used sarin,’* BBC NEWS: MIDDLE EAST (May 6, 2013), <https://www.bbc.com/news/world-middle-east-22424188>.

³¹ FRANCOISE BOUCHET-SAULNIER, THE PRACTICAL GUIDE TO HUMANITARIAN LAW 439 (Laura Brav & Camille Michel eds. & trans., 3d ed. 2013). See also Tim Rutherford, *Everyone’s Accountable: How Non-State Armed Groups Interact with International Humanitarian Law*, 198 Austl. Def. Force J. 76, 77 (2015).

³² Rutherford, *supra* note 31.

³³ *Id.*

³⁴ Sjöberg & Warner, *supra* note 19.

³⁵ *Id.*

³⁶ DONALD HOLBROOK, AL-QAEDA 2.0: A CRITICAL READER 101 (2018).

Usually, these NSAs are funded by foreign aid, which includes monetary aid, weapons and transportation. For instance, the US, the UK and France provide arms and aid to rebels in Syria to fight for their cause and defend their political interests in the region.³⁷ (Maybe a conclusion sentence to wrap up this section).

1.2. Types of NSA

NSA rebel groups are groups of people that undertake sporadic and organized acts of violence against a legitimate state.³⁸ They can be either organized or disorganized, and control or not control parts of any territory.³⁹ Rebels have no rights, as they use unlawful force against the state and civilians;⁴⁰ they are legally bound by the domestic laws of force and are considered wanted criminals.⁴¹ Rebels often are supported financially through foreign funds (gained for political reasons) and by fighting as mercenaries. For instance, Syrian rebels are funded by the US, the UK and France.⁴² Mercenaries are lawless armed groups that fight proxy wars for money and power against their own countries as well as in cross-border conflicts.⁴³ Rebels and mercenaries also start and fight civil/guerrilla wars as well in order to destabilize countries.⁴⁴ Such destabilizations give territory, control and power to armed bands of rebels, mercenaries and terrorists.⁴⁵ Terrorists are also NSAs,

³⁷ BANDEIRA, *supra* note 26, at 246, 291-95.

³⁸ Jadarian, *supra* note 8, at 12.

³⁹ Sjöberg & Warner, *supra* note 19, at 8-9.

⁴⁰ Varin, *supra* note 10.

⁴¹ Jadarian, *supra* note 8, at 12-13.

⁴² BANDEIRA, *supra* note 26, at 246, 291-95.

⁴³ *Id.* at 291-95.

⁴⁴ See David E. Cunningham, et. al., *Non-State Actors in Civil Wars*, in PEACE AND CONFLICT 2016 50 (David Backer et. al. eds., 2016). See also *Guerillas*, in IBERIA AND THE AMERICAS: CULTURE, POLITICS, AND HISTORY 531 (John Michael Francis ed., 2006) (explaining the context of guerilla warfare to destabilize states).

⁴⁵ See Ibrahim Mazlum, *ISIS as an Actor Controlling Water Resources in Syria and Iraq*, in VIOLENT NON-STATE ACTORS AND THE SYRIAN CIVIL WAR 109-128 (Özden Oktav et. al. eds., 2017) (explaining how ISIS gained control in Syria). See also Maria Gloria Polimeno, *Fury and Soldiery of Non-God: ISIS's Psycho-Structural Dysfunctions and the Future of Counter-Terrorism*, in REGIONAL INTEGRATION AND NATIONAL DISINTEGRATION IN THE POST-ARAB SPRING MIDDLE EAST (Imad H. El-Anis & Natasha Underhill eds., 2016) (discussing ISIS control). See also Alia Chughtai, *Syria's war: Who controls what?*, AL JAZEERA (May 10, 2018),

using unlawful force against states and civilians for political, power and religious reasons.⁴⁶ Because terrorists are considered NSAs,⁴⁷ and because most of the rebel groups/mercenaries in this age are considered terrorists who commit heinous war crimes,⁴⁸, this paper uses “terrorists” and “NSAs” interchangeably.

2. Applicability of International Humanitarian Law (IHL)

The applicability of IHL to NSAs is widely controversial. There are three prominent theories for how IHL is already applicable to NSAs. However, it is apparent that NSAs choose to ignore it. For instance, terrorist organizations break laws and rules during their acts of terrorism, such as bombing innocent children in schools.⁴⁹ The first argument is that, like all non-party states, NSAs are bound by customary international law, including the principles of distinction, proportionality, precaution and necessity and the prohibition on indiscriminate attacks.⁵⁰ By this argument, even if NSAs have not agreed to or have signed a treaty, they are still bound by IHL, since IHL also acts as customary international law.⁵¹ This argument is backed by the inclusion of NSAs in common Article 3 of the Geneva Conventions (GC) and its self-explanatory declaration that customary international humanitarian law is applicable to NSAs.⁵² This group goes so far as to assert that, since

<https://www.aljazeera.com/indepth/interactive/2015/05/syria-country-divided-150529144229467.html?xif=>. (discussing rebel-controlled territory in Syria).

⁴⁶ Varin, *supra* note 10, at 5, 15.

⁴⁷ *Id.*

⁴⁸ HYERAN JO, COMPLIANT REBELS 11 (2015). *See also* DANIEL BYMAN, UNDERSTANDING PROTO-INSURGENCIES 1(2007).

⁴⁹ *See* KEVIN BURTON, MANAGING EMERGING RISK: THE CAPSTONE OF PREPAREDNESS 142 (2016) (illustrating how terrorists bomb children in schools).

⁵⁰ Tatiana Londono-Camargo, *The Scope of Application of International Humanitarian Law to Non-International Armed Conflicts*, 130 VNIVERSITAS 207, 223 (2015).

⁵¹ *Id.* at 225. *See also* Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen *International law and armed non-state actors in Afghanistan*, 93 INT’L REV. OF THE RED CROSS 1, 9 (2011).

⁵² *See* Chris De Cock, *Counter-Insurgency Operations in Afghanistan*, 13 Y.B. INT’L HUMANITARIAN L. 97, 109 (2010). *See also* Bellal et al., *supra* note 51, at 55.

IHL is universal in nature and seeks to ensure the protection of civilians in armed conflict, everyone – including NSAs – is bound by its rules.⁵³

The second argument is that, owing to the applicability of all domestic laws to NSAs, NSAs are bound by all of IHL through its inclusion in legislation/domestic law.⁵⁴

The third argument is that IHL is applicable to NSAs since they are bound by all the legal responsibilities and obligations of the state where they are operating.⁵⁵ The argument continues that all the IHL obligations that bind a state also bind all NSAs and individuals within the territories of that state.⁵⁶ This argument is known as the “principle of legislative jurisdiction”, by which NSAs are automatically bound by all state obligations.⁵⁷ This claim is even substantiated by common Article 3, which makes NSAs also responsible for IHL rules and regulations.⁵⁸ Noticeably, the United Nations Security Council is also of the view that NSAs are bound by IHL in internal armed conflicts.⁵⁹ While NSAs cannot legally become parties to treaties, and cannot contribute to creating customary international law, the prevailing view is that IHL is applicable to NSAs.⁶⁰ For these reasons, it can be established that all kinds of NSAs are already bound by IHL.⁶¹

⁵³ Bellal et al., *supra* note 51, at 55.

⁵⁴ *Id.*

⁵⁵ CLAUDIE BARRAT, STATUS OF NGOS IN INTERNATIONAL HUMANITARIAN LAW 232 (2014).
See also Bellal et al., *supra* note 51, at 56.

⁵⁶ Cedric Ryngaert, Non-State Actors and International Humanitarian Law 5 (2008) (unpublished working paper) (on file with the Inst. for Int’l Law).

⁵⁷ *Id.*

⁵⁸ *See* Geneva Conventions Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Common Article 3].

⁵⁹ Londoño-Camargo, *supra* note 51, at 224.

⁶⁰ Haugen, *supra* note 7, at 26.

⁶¹ Londoño-Camargo, *supra* note 50.

2.1. Provisions of Applicable Law

NSAs are explicitly mentioned under the IHL provisions of the Geneva Conventions,⁶² its additional protocol⁶³ and the Rome Statute of the International Criminal Court.⁶⁴

2.1.1. Common Article 3 of the Geneva Conventions (GC)

For some commentators and legal theorists, common Article 3 is applicable only to parties to a conflict that are under state control.⁶⁵ Others believe that NSAs (which are not under state control) are also covered under the same Article only for civilian immunity.⁶⁶ Scholars seeking to apply IHL to NSAs often substantiate their stance by questioning why only the state must follow IHL, whereas NSAs use force free from any legal liabilities and rules.⁶⁷ Thereby, it gives NSAs an advantage over governments, whose acts and strengths are limited by the rules of IHL, while NSAs execute their plans without any fear of responsibilities.

Common Article 3 reads:

ARTICLE 3

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

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

⁶² See Common Article 3, *supra* note 58.

⁶³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art.1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

⁶⁴ Rome Statute of the International Criminal Court art. 8, July 1, 2002, 2187 U.N.T.S. 94-98 [hereinafter Rome Statute 2002].

⁶⁵ Bellal, et al., *supra* note 51, at 7.

⁶⁶ *Id.*

⁶⁷ Dayana Jadarian, *International Humanitarian Law's Applicability to Armed Non-State Actors*, Univ. of Stockholm, (2007).

prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
 - b) Taking of hostages;*
 - c) Outrages upon personal dignity, in particular humiliating and degrading treatment;*
 - d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*
- 2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.*⁶⁸

The first requirement in this Article is that there must be a non-international armed conflict for the Article to apply, and one party to that conflict must be a state.⁶⁹ This means that this Article applies only to internal conflicts and not to international conflicts.⁷⁰ Scholars argue that the other party must be non-state, such as an NSA. Over the years, case law, customary law and state practices have established that common Article 3 does indeed apply to NSAs.⁷¹ In accordance with the International Criminal Tribunal for the Former Yugoslavia, there must be two characteristics for the application of IHL to an NSA.⁷² The first is that the duration of the armed conflict must be sufficiently long. The second is that the NSA must be organized.⁷³ For instance, the fight against Al-Qaeda in Afghanistan has been going on for a long time, and Al-Qaeda as a terrorist organization certainly shows the signs of an organized group. Therefore, Article 3 is applicable to the

⁶⁸ See Common Article 3, *supra* note 58.

⁶⁹ Lindsay Moir, *The Law of Internal Armed Conflict*, 35-36 (2002). See also Common Article 3, *supra* note 59.

⁷⁰ See Common Article 3, *supra* note 58.

⁷¹ Bellal, et al., *supra* note 51.

⁷² See Tamas Hoffman, *Trying Communism through International Criminal Law* in *THE HIDDEN HISTORIES OF WAR CRIMES TRIALS* (2013). See also Bellal, et al., *supra* note 51.

⁷³ See Tamas Hoffman, *supra* note 72. See also Bellal, et al., *supra* note 51.

armed conflict between Afghanistan and Al-Qaeda.⁷⁴ However, Article 3 does not require any prerequisites for the application of IHL; it is simply applicable to all NSAs. Nevertheless, it is pertinent to note that this Article in no way decreases the state's right to put down these rebels or terrorists.⁷⁵

2.1.2. Additional Protocol II to the GC

Similar to common Article 3,⁷⁶ Additional Protocol II (AP II) also discusses the applicability of IHL to NSAs.⁷⁷ Article 1, paragraph 1, of AP II reads:

*[T]o all armed conflicts ... which takes places in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*⁷⁸

In comparison to common Article 3,⁷⁹ Article 1 of AP II raises the threshold of applicability of IHL to NSAs. The NSA must reflect all four characteristics outlined under Article 1 of AP II. First, the NSA must have system of “responsible command” for allocating responsibility,⁸⁰ such as the Taliban’s “Code of Conduct”.⁸¹ Second, the NSA must control a significant territory. Third, the NSA must have sustained continuous armed attacks on the state. Fourth, the NSA must be able to implement the protocol.⁸² Scholars have argued that such state-like characteristics, together with the requisite of implementing the protocol, makes it apparent that the protocol is only applicable to the parties already implementing it.⁸³

⁷⁴ Bellal, et al., *supra* note 51.

⁷⁵ Londono-Camargo, *supra* note 50.

⁷⁶ See Common Article 3, *supra* note 58.

⁷⁷ Protocol II, *supra* note 63.

⁷⁸ *Id.*

⁷⁹ Common Article 3, *supra* note 58.

⁸⁰ Protocol II, *supra* note 63.

⁸¹ Bellal et. al., *supra* note 51, at 11.

⁸² Protocol II, *supra* note 63.

⁸³ Bellal et. al., *supra* note 51, at 12.

2.1.3. Rome Statute of the International Criminal Court (RSICC)

Similar to common Article 3 of GC⁸⁴ and Article 1 of AP II to the GC,⁸⁵ Article 8 (e) and (f) of the Rome Statute of the International Criminal Court (RSICC) applies IHL to NSAs.⁸⁶ Article 8 (f) reads:

*Article 8 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between government authorities and organized armed groups or between such groups.*⁸⁷

In a similar way to common Article 3,⁸⁸ Article 8 of the RSICC also applies to internal conflicts within a state.⁸⁹ The threshold of applying IHL to NSAs is higher than that of common Article 3⁹⁰ but lower than that of Article 1 of AP II.⁹¹ This Article sets out four main prerequisites for the application of IHL to NSAs. First, the armed conflict must be non-international. Second, the conflict must be protracted and not sporadic. Third, the NSA must be organized. Fourth, the conflict must be between a state and an NSA, or between one NSA and another (even without involving the state).⁹² Moreover, Article 8 (e) outlines IHL. It states that “*civilians, transportation vehicles, buildings, religious places, wounded people and property cannot be targeted in an armed conflict*”, while prohibiting the use of “*slavery, forced prostitution, forced pregnancy, rape, sexual violence,*

⁸⁴Common Article 3, *supra* note 58.

⁸⁵ Protocol II, *supra* note 63.

⁸⁶ Kristen E. Boon, *The Application of Jus Post Bellum in Non-International Armed Conflicts*, in *JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS* 263 (Carsten Stahn et. al. eds., 2014). *See also* Rome Statute 2002, *supra* note 64.

⁸⁷ Rome Statute 2002, *supra* note 64.

⁸⁸ Common Article 3, *supra* note 58.

⁸⁹ Boon, *The Application of Jus Post Bellum in Non-International Armed Conflicts*, in *JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS*, *supra* note 87.

⁹⁰ Common Article 3, *supra* note 58.

⁹¹ Protocol II, *supra* note 63.

⁹² Rome Statute 2002, *supra* note 64.

*displacement of civilians, poisoned weapons and underage combatants in the armed conflicts”.*⁹³

2.2. Associated Aspects of the Application of IHL to the NSA

This subsection will briefly explore the internal conflict and the responsibilities of NSAs as “contingent aspects” and “nature of conflict” in the context of the application of IHL to NSAs.

2.2.1. Internal Conflict

It is interesting to note that the relevant provisions apply IHL to NSAs only in internal conflicts (non-international armed conflicts).⁹⁴ However, globalization has mutated internal conflicts into international and transnational armed conflicts through the intervention of third-state parties that involve themselves to either support or stop one party that is involved with the conflict.⁹⁵ IHL specifically avoids considering NSAs in international conflicts for legal reasons,⁹⁶ because states are forbidden from intervening in the internal matters of a state in accordance with the laws of the use of force, owing to the shield of sovereignty.⁹⁷ The principle of non-interference is also enshrined in Article 2 (7) of the UN Charter.⁹⁸ Article 2 (7) reads:

*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.*⁹⁹

However, this does not mean that international conflicts involving NSAs remain unregulated by the rules and guidelines of IHL.¹⁰⁰ On the contrary: if an armed conflict is

⁹³ *Id.*

⁹⁴ Common Article 3, *supra* note 58. *See also* Rome Statute 2002, *supra* note 64.

⁹⁵ Jadarian, *supra* note 8, at 36.

⁹⁶ *Id.*

⁹⁷ Clapham, *supra* note 13.

⁹⁸ U.N. Charter art. 2, ¶ 7.

⁹⁹ *Id.*

¹⁰⁰ Jadarian, *supra* note 8, at 36.

“international” in nature, IHL is applicable,¹⁰¹ as compared to internal conflicts, where only a few IHL laws apply.¹⁰²

2.2.3. Responsibility of NSAs

The Appeals Chamber to the International Criminal Tribunal for the Former Yugoslavia established that NSAs’ officers in command carry command responsibility for war crimes committed by combatants fighting and using force under their command.¹⁰³ The Court noted that this principle of command responsibility is the most efficient way of bringing justice and enforcing criminal law to NSAs.¹⁰⁴ The Court established this liability by reasoning that military organization requires responsible command, which implies accountability, including criminal accountability.¹⁰⁵ Therefore, a commander can be held liable for prohibited acts committed by a combatant who they are responsible for.¹⁰⁶ Categorically, IHL is only triggered when there is an armed conflict and all the prerequisites of the application of IHL are fulfilled.¹⁰⁷ Hence, if IHL applies to an NSA, there must be responsible command, because otherwise, IHL would not be applicable.¹⁰⁸ Therefore, in accordance with these rules, officers in command can be held criminally liable for the crimes of their subordinates and for failing to prevent such crimes.¹⁰⁹

¹⁰¹ *Id.*

¹⁰² Common Article 3, *supra* note 58. *See also* Protocol II, *supra* note 63. Rome Statute 2002, *supra* note 64.

¹⁰³ Clapham, *supra* note 13.

¹⁰⁴ Eve La Haye, WAR CRIMES IN INTERNAL ARMED CONFLICTS 327 (2008). *See also* Clapham, *supra* note 13.

¹⁰⁵ Clapham, *supra* note 13.

¹⁰⁶ La Haye, *supra* note 104, at 326-27. *See also* Clapham, *supra* note 13.

¹⁰⁷ Clapham, *supra* note 13.

¹⁰⁸ *Id.*

¹⁰⁹ La Haye, *supra* note 104, at 326-27. *See also* Clapham, *supra* note 13.

3. Alternative Law and Its Concerns

Some legal theorists argue that IHL is not applicable to NSAs simply because NSAs have not consented to it.¹¹⁰ They propose that, to make NSA responsible in international law, it is first necessary to acquire their consent and agreement to the applicable IHL.¹¹¹ Therefore, advocates of creating alternative laws to bind NSAs by IHL argue that states should sign agreements with NSAs to bind them to IHL and the rules of armed conflict as an alternative law to IHL.¹¹² By contrast, this paper argues that IHL is already applicable to NSAs¹¹³ and that states do not need to come to agreement with NSAs, for four main reasons. First, NSAs are already subject to state rules,¹¹⁴ by which they are forbidden from using any force.¹¹⁵ Second, they are subject to the state obligations of IHL, where NSAs' use of force also creates criminal responsibilities.¹¹⁶ Third, NSA are already obliged to follow IHL, because it is customary international law.¹¹⁷ Fourth, signing agreements with NSAs legitimizes the NSAs'/terrorists' use of force,¹¹⁸ by agreeing that NSAs/terrorists can use force but their use of force must be executed in a particular fashion. Furthermore, the main issue with the argument that IHL is not applicable to NSAs is that it presupposes that if any individual or group of individuals choose to ignore the laws of the land or customary international law they can live freely without being subject to any regulations. This not only creates anarchical situations, where individuals can massacre civilians without any criminal responsibility or fear of persecution in a scenario of lawlessness, but also creates the prospect of licensing terrorists to conduct their heinous criminal activities.

¹¹⁰ Cedric Ryngaert, *Non-State Actors and International Humanitarian Law*, 11 (Katholieke Universiteit 2008).

¹¹¹ *Id.*

¹¹² Haugen, *supra* note 7 at, 34-37.

¹¹³ Common Article 3, *supra* note 58. *See also* Protocol II, *supra* note 63. *See also* Rome Statute 2002, *supra* note 64. *See* Londono-Camargo, *supra* note 50. *See also* Bellal, et al., *supra* note 51.

¹¹⁴ Bellal, et al., *supra* note 51.

¹¹⁵ Caroline Varin and Dauda Abubakar, *Violent Non-State Actors in Africa: Terrorists, Rebels and Warlords* (Springer 2017) 5.

¹¹⁶ Bellal, et al., *supra* note 51.

¹¹⁷ Bellal, et al., *supra* note 51.

¹¹⁸ Steinhoff, *supra* note 14, at 309–316.

Such attempts to circumvent legal obligations seem to support NSAs in the sovereign territory of other states for political reasons. This fear of legitimating terrorists by signing agreements with them is reflected in the views of several scholars and states.¹¹⁹ Many legal theorists believe that IHL is already applicable to NSAs,¹²⁰ and coming to agreement with NSAs gives them a sense of legitimacy and treats them as state-like institutions, even providing NSAs with a seat at the international table and legitimizing NSAs/terrorists' use of force.¹²¹

3.1 Legitimacy Concern

Despite the possible benefits of applying IHL, states do not come to agreement with NSAs for the application of IHL for fear of legitimizing the NSAs'/terrorists' use of force by state laws.¹²² If a state allows NSAs to use force in a certain manner prescribed by an agreement; this permits them to use force in the legally defined ways of IHL. States are of the view that there is already a defined set of laws, which is state/domestic law,¹²³ according to which terrorists cannot use legal force against the state or the civilians.¹²⁴ If the states come to agreement with terrorists regarding the rules of engagement through IHL, this would mean that NSAs can legally use force against the state, and that the state recognizes terrorists as users of legitimate force which grants NSAs a place to negotiate at the international table.¹²⁵ Such legal status enjoyed by NSAs/terrorists would make it more difficult for states to fight terrorism against organizations with a façade of political legitimacy,¹²⁶ which would grant terrorists immunity from being prosecuted for a number

¹¹⁹ *Id.* at 316.

¹²⁰ Bellal, et al., *supra* note 51.

¹²¹ Steinhoff, *supra* note 14, at 316.

¹²² *Id.*

¹²³ Bellal, et al., *supra* note 51.

¹²⁴ Caroline Varin and Dauda Abubakar, *Violent Non-State Actors in Africa: Terrorists, Rebels and Warlords* (Springer 2017) 5.

¹²⁵ Steinhoff, *supra* note 14, at 316.

¹²⁶ To see NSAs' willingness to abide by IHL as a façade for gaining political legitimacy, see Lee James McConnell, *Extracting Accountability from Non-State Actors in International Law: Assessing the Scope for Direct Regulation* (Taylor & Francis 2016) 146. See also Steinhoff, *supra* note 14, at 316.

of kinds of activities.¹²⁷ For the same reason of not granting terrorists/NSAs positions equal to states, states do not acknowledge the legitimacy of agreements between NSAs and humanitarian aid groups.¹²⁸

Moreover, according to the international law of using force, internal conflicts or matters of state are the concern of the state alone, and other states cannot interfere.¹²⁹ According to ICJ case law, state X cannot arm or fund an NSA/rebel/terrorist organization in state Y.¹³⁰ A conflict remains an internal matter even if state Y accepts the help of state Z (or a group of states) to fight the NSAs/rebels/terrorists in its territories.¹³¹ However, it would not remain an internal matter if the NSA is backed by state X.¹³² If state X interferes in the internal matters of state Y, then, legally speaking, state X is declaring war against state Y, which is considered to be an act of aggression.¹³³ Therefore, in accordance with the law, the NSA cannot use any force, whether against the state or civilians; all kinds of use of force by the NSA are impermissible.¹³⁴ A host state where the NSA resides or operates can use lawful force against the NSA.¹³⁵ However, no state can back NSAs/terrorists in the territory of another state,¹³⁶ which would be considered an act of aggression.¹³⁷

¹²⁷ Steinhoff, *supra* note 14, at 316.

¹²⁸ Elizabeth G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action* (Brookings Institution Press 2011) 73. *See also* Steinhoff, *supra* note 14, at 316.

¹²⁹ Steinhoff, *supra* note 14, at 309.

¹³⁰ Hilaire, *supra* note 28. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 192 (June 27).

¹³¹ Steinhoff, *supra* note 14, at 310.

¹³² See Antonio Cassese, et al., *The Oxford Companion to International Criminal Justice* 381(2009). *See also* Steinhoff, *supra* note 14, at 310.

¹³³ Steinhoff, *supra* note 14, at 309.

¹³⁴ Caroline Varin and Dauda Abubakar, *Violent Non-State Actors in Africa: Terrorists, Rebels and Warlords* (Springer 2017) 5.

¹³⁵ Jean Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* (Wm. B. Eerdmans 2010) 306.

¹³⁶ Hilaire, *supra* note 28.

¹³⁷ *Id.*

Conclusion

A state is responsible for bringing criminals to justice in its jurisdiction and it enjoys a monopoly of the use of force in its territory.¹³⁸ But in internal armed conflicts where an NSA is responsible for violating international laws of armed conflict,¹³⁹ who has authority to decide whether or not the NSA is violating IHL? Who can effectively prosecute violators?¹⁴⁰ The International Criminal Court could be seen as the most competent body to prosecute perpetrators of war crimes, such as NSAs, terrorists, and rebels, owing to its universal jurisdiction.¹⁴¹ However, there is no mechanism to formulate the execution of this court in this context.¹⁴² Therefore, there is an apparent lack of enforcement in the current international judicial system to the application of IHL to NSAs.¹⁴³ Nevertheless, if the whole presumption of applying IHL to NSAs is based on the pretext that the state is incapable of bringing NSAs to justice, then the most reasonable way to curtail NSAs'/terrorists' illicit activities is by aiding and supporting the territorial state to fight them, and *not* the other way around, that is, by aiding or abetting an NSA. For instance, the on-going wars in the Middle East that have escalated to the decade-long destruction of numerous countries is attributable to the fact that a number of states chose to support NSAs, terrorists, and or rebels¹⁴⁴ who use unlawful force¹⁴⁵. Owing to such support, the territorial states are incapable of fighting these terrorists/NSAs. Therefore, if the whole purpose of

¹³⁸ Jean Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* 306 (2010).

¹³⁹ Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* 11 (2015); *see also* Daniel Byman, *Understanding Proto-Insurgencies* (2007).

¹⁴⁰ Londono-Camargo, *supra* note 50.

¹⁴¹ *See* HÉCTOR OLÁSULO, *THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT* 155 (2005) (demonstrating how the ICC's universal jurisdiction works). *See also* Londono-Camargo, *supra* note 50.

¹⁴² Londono-Camargo, *supra* note 50.

¹⁴³ THEODOR MERON, *THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE: A VIEW FROM THE BENCH: SELECTED SPEECHES* 68 (2011). *See also* Londono-Camargo, *supra* note 51.

¹⁴⁴ BANDEIRA, *supra* note 26, at 246, 291-95.

¹⁴⁵ Varin, *supra* note 10.

applying IHL to NSAs is to decrease human suffering and enforce lawful regulations,¹⁴⁶ then states must choose to support the territorial states in their fight against NSAs, rather than supporting the NSAs/rebels. Moreover, to deter support for terrorists, the ICJ must prosecute states supporting NSAs/rebels/terrorists, while the territorial state must be supported by other states in fighting and prosecuting NSAs. Only in this way can IHL be effectively implemented and enforced and lawfulness be restored. If we were to apply this analysis in the Syrian case, then all support to the Syrian rebels/NSAs/terrorists must be halted and their supporters prosecuted, because such support destabilizes the region and makes IHL enforcement even harder. The Syrian state must be supported in fighting all kinds of NSA.

In conclusion, this paper establishes that IHL is already applicable to NSA¹⁴⁷ and that states do not need to come to agreement with NSAs, for four main reasons. First, NSAs are already subject to state rules¹⁴⁸ not to use force.¹⁴⁹ Second, they are subject to the state obligations of IHL, and NSAs' use of force also creates criminal responsibility.¹⁵⁰ Third, NSAs are already subject to IHL, because IHL is customary international law.¹⁵¹ Fourth, by signing agreements with NSA that legitimize their use of force,¹⁵² the state basically agrees that NSAs/terrorists can use force, but only in a particular fashion, where targeting the state is essentially and predominantly allowed.

¹⁴⁶ See CRIDDLE & FOX-DECENT, *supra* note 5 (explaining the purpose of IHL). See also UNIVERSITY FOR PEACE, UNITED NATIONS, HUMAN RIGHTS, PEACE AND JUSTICE IN, *supra* note 6.

¹⁴⁷ Common Article 3, *supra* note 58. See also Protocol II, *supra* note 63; Rome Statute 2002, *supra* note 64.; Londono-Camargo, *supra* note 51; Bellal et al., *supra* note 51.

¹⁴⁸ Bellal et al., *supra* note 51.

¹⁴⁹ Varin, *supra* note 10.

¹⁵⁰ Bellal et al., *supra* note 51.

¹⁵¹ *Id.*

¹⁵² Steinhoff, *supra* note 14, at 297, 309-316.