ENFORCING INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS

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"However difficult it may be to bring it about, some form of world government, with agreed international law and means of enforcing the law, is inevitable."

– John B. Orr

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

– Rabban Simeon ben Gamaliel,

I. INTRODUCTION

The International Committee of Red Cross defines International Humanitarian law as *"a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare."*[181] The IHL embodies the principle of *jus in bello,* and is established by treaties, conventions like The Hague and Geneva Conventions and the customary practices leading to the customary IHL. Much of the IHL, like the provisions prohibiting 'war crimes', applies only if there is existence of armed conflict.[182] An armed conflict is said to exist "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. The IHL applies (in the whole territory under parties control) from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved."[183]

The IHL applies differently according to the kind of armed conflict. It lays down a bifurcation of standards of application of the IHL between International Armed Conflict—between two or more states and Non-International Armed Conflicts—armed conflicts which are not international.[184] In cases of International Armed Conflicts, almost the whole gamut of the IHL is applicable while in cases of non-international armed conflict only certain norms—such as common Article 3 of the Geneva Conventions and Additional Protocol II and certain customary laws are applicable. In recent

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[181]'Discover the ICRC' International Committee of the Red Cross (2005) <http://www.icrc.org/eng/assets/files/other/icrc_002_0790.pdf> accessed 6 October 2013.

[182]*Prosecutor v Dusko Tadic,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (IT-94-1, ICTY) 70, 75; *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* (IT-96-23 andand IT-96-23/1-A, ICTY) 58; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949), 75 UNTS 287, art 6.

[183]*Tadic* (n 185).

[184]Rome Statute of the International Criminal Court, (1998) UN DOC A/CONF.

times vast majority of armed conflicts are non-international in nature.[185] It is to be noted that every disturbance, sporadic violence, riots etc. does not imply the existence of non-international armed conflict.[186] Intensity of violence, the level of organization of the non-State actor, the 'protracted' nature of violence are some of the characteristics which are thought to show the existence of a non-international armed conflict.

II. RELEVANCE OF THE PRESENT NORMS OF IHL IN CONTEXT OF NEW CONFLICTS

The changing patterns of the armed conflict and warfare in these new non-international armed conflicts raise difficult questions on the relevance of the mid-twentieth century IHL norms. As Morgan Kelley notes, these localized conflicts can be termed 'fourth generation' warfare which are driven by transnational connections, loss of state's monopoly on violence and existence of 'ad-hoc' combatants.[187] The problem with such emerging methods of conflict is the line between the combatants and the non-combatants is not clear. It can be arguably said that the fundamental premise on which the IHL is based is a distinction between the combatants and the non-combatants and the recognition that the non-combatants are not harmed. It is a fundamental rule laid down in the Geneva Conventions and a part of the customary IHL that attacks cannot be directed against civilian population and presence of some combatants within the civilian population does not deprive the civilian population from a protected status. Intentionally directing such an attack against a civilian population or objects which are not directly taking part in hostilities is a war crime as per the Rome Statute of the International Criminal Court (ICC).[188] This principle of distinction is necessary both in the international as well as the non-international armed conflict.[189]

In international armed conflicts, utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from the military operations is a war crime.[190] However, as we move away from State-centered warfare, this civilian-combatant distinction is being seriously challenged.

Firstly, in context of the recent non-international armed conflicts, it is difficult to say who is an innocent civilian (non-combatant) and who is a combatant. Combatants have been defined as "all members of the armed forces of a party to the conflict are combatants, except medical and religious

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[185]Carrillo-Suarez and Arturo, 'Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict' (1999) Am U Int'l L Rev 15 1.

[186]Rome Statute, arts 2(d), 2(f).

[187]Morgan Kelley, 'Challenge to Compliance with International Humanitarian Law in the Context of Contemporary Warfare' (2013) *ISP Collection.*

[188]Rome Statute, arts 8(2)(b)(i), 8(2)(b)(ii), 8(2)(b)(v), 8(2)(e)(i), 8(2)(e)(ii).

[189] J M Henckaerts, L Doswald Beck, C Alvemann (eds), *Customary International Humanitarian Law* 1 (Cambridge UP 2005) 7-10; Additional Protocol II, art 13(2) (adopted by consensus); Additional Protocol I, art 48 (adopted by consensus); art 51(2) (adopted by 77 votes in favour, one against and 16 abstentions); art 52(2) (adopted by 79 votes in favour, none against and 7 abstentions).

[190] Rome Statute, art 8(2)(b).

personnel."[191] The term 'armed forces' is defined as "forces of a party to the conflict consisting of all the organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates."[192] This distinction is applicable to the non-international armed conflicts so far as the principle of distinction are concerned.[193] In the international as well as the non-International armed conflict civilians are protected against attack "unless and for such time as they take a direct part in hostilities".[194]

However, this does not help much as during a protracted conflict it is usually difficult to know who the members of the armed group are. It has been seen that in such conflicts the 'rebels' or 'insurgents' usually take advantage of the civilian support/sympathy for themselves and intermingle with the civilian population. Rarely do they have completely separate base away from the civilian population from where the conduct their operations or wear any distinctive mark indicating their membership in the armed group. Rather, they make use of anonymity and stealth to compensate for what is their weakness otherwise in the face of a strong state armed force in an asymmetric conflict and operate in civilian areas. This in itself is a clear violation of IHL norms.[195]

One of the biggest reasons for violation of the IHL in non-International armed conflict is the asymmetry of armed and military capability between the State forces and the non-State armed groups and 'rebels'. These groups strategically think that they cannot possibly defeat the militarily stronger State forces unless they violate the norms of the IHL. As the State forces have greater firepower and technology, these insurgents see recourse to violation of the IHL and the laws of war as the only means to balance their disadvantage. As Kelley notes, they are perceived to have neither the capability nor the incentive to engage in 'fair' warfare.[196] Examples of these practices can be seen in hostilities in Middle East and Iraq where these rebels regularly 'immerse' into civilian population and position their military equipments near civilian areas to get a 'shield' and cause difficulty for State forces in applying principle of distinction.[197]

Another vexing practice is the practice of feigning surrender and the combatants dressed as civilians doing suicide attacks near military installations, etc. are seen in current hostilities in Iraq and Afghanistan.[198] While these practices clearly violate the IHL,[199] the insurgents justify these practices as necessary for achieving their military objectives which they could not have been otherwise able to achieve (by following the IHL).

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[191] International Committee of the Red Cross, Customary IHL: Rule 3. Definition of Combatants, <http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule3> accessed 06 October 2013.
[192] Henckaerts (n 192) 14.
[193] ibid.
[194] ibid 203.
[195]. Kelley (n 190).
[196] ibid.
[197] ibid.
[198] ibid.
[199] Rome Statute, art 8(2)(e)(ix).

This leads to another but related problem. Due to such practices of the non-State groups, the States have often, as a way of reprisal, not respected the IHL norms and the rights accruing to these actors under the IHL.

Another major issue in the present conflicts is the existence of transnational armed groups.[200] As it can be seen in the so-called 'War of Terror' by the U.S., the existence of armed groups like the Al-Qaeda poses serious questions on the type of the conflict. Questions abound that whether the U.S. forces in Afghanistan is International armed conflict or Non-International armed conflict. It can be said that the original conflict when the U.S. attacked the Taliban Government in Afghanistan was an International armed conflict but now when the U.S. and the Afghan Government are on the same side and fighting the Taliban insurgency, it has no longer remained an international conflict but has been reduced to non-international armed conflict. However, the current framework of the IHL does not seem to envisage the role of armed groups like the Al-Qaeda which have transnational network and presence and recruit throughout the world. The tests of effective control (*Nicaragua v. US*)[201] and overall control (*Prosecutor v. Dusko Tadic*) exist[202] a non-international conflict may be 'internationalized' if a foreign government has effective or overall control (depending on which test you are using) on the rebel or insurgent groups. However, they clearly do not provide for a situation when an armed group, in an insurgency (sufficient for non-International armed conflict), is under effective/overall control of the foreign/transnational non-State actors. Under the current framework, depending on the intensity of the violence, foreign involvement etc., the Al-Qaeda as an insurgent may be involved in different non-international or international armed conflicts throughout the world, but there is no single label under which such conflicts can be described. Therefore, the assertion that the U.S. is at 'war with the Al-Qaeda', may be only politically correct and not from the International Law perspective..

Thus, the present position leads to questions of the extent of the practicability of the norms of IHL in modern conflicts. One view held is that that the present framework are designed as per conflicts of the early and the mid-twentieth century and are inadequate to meet the challenges of the present conflicts. It has been suggested that a new category of conflicts must be created within the existing framework to better suit the present day conflicts involving transnational terrorist groups. It has also been seen that a major reason for the armed groups not to respect the IHL is because they are not involved in the making of it. Much of the international law is seen as valid and legitimate by States because they are involved in its creation—either through treaties and conventions or through the State practices and customs. The customary International Law is formed by the State practice and their *opinio juris*. This 'consent' has some role to play in making the States follow the law—including the IHL norms. However, when the armed groups are not even consulted while making rules

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[200] Marco Sassoli, 'Transnational Armed Groups and International Humanitarian Law' *Collection Program on Humanitarian Policy and Conflict Research, Harvard, Occasional paper series* (Harvard University 2006).
[201] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*) Merits, ICJ Reports (1986) 14, 115.
[202] *Tadic AJ* (120).

applicable to them in non-International armed conflicts; they cannot be expected to follow them wholeheartedly. This issue, too, needs to be analyzed carefully.

A problem which has assumed limelight in the recent years is the problem of 'unlawful combatants'. States are increasingly asserting that these 'unlawful combatants' have no rights under the IHL regime, whatsoever, and are subject to the domestic law alone. This has led to the violation of their rights which would have normally accrued to them under the IHL.

Another problem is the new and emerging technologies like cyber technology, energy radiation technology etc. The potential of cyber technologies for warfare has been proved.[203] Kelley gives the example of denial-of-service attacks on an entire population like the 2008 cyber-attacks on Georgia and the UAVs used by the U.S. to say that the twentieth century IHL laws are inadequate to deal with the present day realities of warfare.[204] It is to be noted herein that the IHL imposes certain restrictions on the types of weapons that are to be used in conflicts. As observed by the ICJ in the Nuclear Weapons case,[205] according to the customary IHL, a weapon which is inherently indiscriminate (between civilians and combatants) or causes excessive and superfluous injury is prohibited and this prohibition applies for the developing and future weapons also.[206] In such circumstances, the denial-of-service attacks on an entire population,[207] as a method of warfare, will definitely fall foul as it is inherently indiscriminate between the civilians and the military objects.[208] Other technologies like the UAVs/drones pose more difficult questions about their legality. The IHL has to develop to address such problems.

III. MAKING THE ARMED GROUPS/INSURGENTS FOLLOW IHL NORMS

As we saw in the previous section, there are several reasons for armed groups' non-willingness to follow the IHL norms which range from the lack of consent in the formation of the norms to simple military strategies in the face of asymmetric warfare. In such a situation, mechanisms to implement these norms in the best form and manner must be found.

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[203] James P Farewell, Rafal Rohozinski, 'Stuxnet and the Future of Cyber War Survival' 53 (1) (2011) 23-40.
[204] Morgan (n 190).
[205] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports (1996), 226; International Court of Justice, 8 July 1996.
[206] ibid 78-79; L Doswald-Beck (1997) International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons; International Review-Red Cross, 35-55.
[207] D Brown, Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict, A Harv Int'l LJ, 47-179.
[208] JT Kelsey, 'Hacking into the International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare' *Michigan Law Review*, 1427-51.

1.1. ENGAGING ARMED GROUPS AND NON-STATE ACTORS IN MAKING OF IHL NORMS

Much of the international law is seen as valid and legitimate by States because they are involved in its creation—either by treaties and convention or through the State practices and customs. The customary International Law is formed by the State practices and their *opinio juris*. This 'consent' has some role to play in making the States follow the law,including the IHL norms. However, when the armed groups are not even consulted while making rules applicable to them in the non-International armed conflicts; they cannot be expected to follow them wholeheartedly.

One of the solutions to the problem could be engaging the armed groups and the insurgents in making of the IHL norms so that they do not feel excluded from the making of law and hence implement it with greater vigor.[209]

However it is easier said than done. The International Law, currently, is still extremely State centric and States are quite unwilling to accommodate other non-State actors in the making of international law. States alone have the power to participate, create and ratify international conventions and treaties. The treaties like the Geneva Convention (common Article 3) and Additional Protocol II which apply to non-International armed conflicts are also drafted and ratified by States alone. Similarly, the customary law (about non-International armed conflicts) are created by State practice and their *opinio juris*.[210] No non-State armed group has played a role in development of these norms.[211] Never has been the practice of non-State armed groups and their *opinio juris* been considered in development of norms relating to non-international armed conflict. Historically the states have been seen as being the right authority to wage war. This lead in many cases the States being unwilling even to actually acknowledge the existence of an armed group for the fear of giving them legitimacy, let alone consider the conflict as non-international armed conflict.[212]

In such situations, when the states are highly suspicious of non-state armed groups and deny their existence or brand them as terrorist, it will be highly impractical to think that states will let them be represented in negotiation of IHL treaties and conventions. However the states should be made to realize that recognizing that an armed group exists and considering their views on IHL norms will not be equivalent of according them legitimacy. Only for the limited humanitarian purpose their opinions will be taken on the norms which will be implemented on them and this in any way does not mean and 'victory' for the armed groups. But it is still unlikely that states will agree to this proposal of

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[209] Marco Sassoli, 'Taking Armed Groups Seriously: Ways To Improve Their Compliance With International Humanitarian Law' Journal of International Humanitarian Legal Studies 1(1) (2010) 5-51.

[210] Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' *The American Journal of International Law* 90 (2) (1996) 238-249.

[211] Sassoli (n 203).

[212] ibid.

including armed groups in negotiation and drafting of IHL conventions. Even if assuming that they agree to it, another problem which will be faced is the wide diversity of non-state armed groups. There are many kinds of armed groups based on the level of organization they have, the territory the control, the ideology the follow etc. It is unrealistic to allow each and every fringe group which calls itself an armed group to be represented in making of important IHL norms. Then some exclusionary criteria will have to be evolved according to which some 'better' or 'more able' armed groups will be represented. However then the states in which they are operating will definitely object to it as they will be unwilling to see these groups as better than or more able than other armed groups. To overcome this problem Marco Sassoli suggests that *"international community should try to apply all the legal mechanisms suggested to all armed groups. The only limitation is that such a group must be a genuine armed group engaged in a genuine armed conflict.....meeting both the necessary level of violence to make a situation an armed conflict and the necessary degree of organization to make a group a party to a non-international armed conflict."*[213] While this seems a better solution this also has some problems. Including all groups will necessarily further politicize the treaty negotiation process, making consensus almost impossible to achieve. States will hardly consent to such a situation.

Another suggestion which comes is considering the practice and *opinio juris* of non-state armed groups in creation of customary IHL relating to non-international armed conflicts. However a practical problem which will be encountered in such an approach will be that of identifying their practice and *opinio juris*. The State practice and *opinio juris* is often ascertained from military manuals, judicial practices, proclamations by the government, and the diplomatic communications in multilateral bodies like the U.N. etc. None of these methods will be available in case of most non-international armed groups. The armed groups do not have military manuals or written records or courts, tribunals, etc. In the wake of the heights of hostilities it would be really difficult to ascertain their 'practice'.

Therefore, reasonably engaging armed groups in the making of the IHL may be a laudable aspiration but is very impractical and may hardly work out. There will be some level of imposition of the IHL norms on the non-State armed groups at least in the present framework of International Law (which is still inspired from Westphalia model). Only if in some distant future, States become relatively less important and no longer the central figure in International law, then perhaps the non-State armed groups, along with other non-State actors will have a major role to play in formation of the IHL. In the present day, the international politics is still state-centric and a quantum jump to non-state centric international law is neither possible nor desirable.

[213] ibid.

1.2. BIFURCATION OF STANDARDS IN NON-INTERNATIONAL ARMED CONFLICT: AN ALTERNATIVE?

However, another alternative may be proposed herein. Currently, in non-international armed conflicts both, the States as well as the armed groups and insurgents have the same standards of obligation to follow the IHL. In cases of asymmetric warfare, this leads to nothing but the non-State armed groups contemptuously rejecting to follow the IHL in favor of their existence. Following the IHL becomes very unrealistic for them. In such a situation, there is no reason why States and non-State armed groups should have same level of obligations. A State is 'state' because it has a machinery of governance, well-built organization structure, etc. Therefore, it is logical that states should have a higher level of obligation than relatively unorganized armed groups, especially in asymmetric conflicts. For example- if a state official violates the IHL norms, he/she can be tried in courts, military tribunals, etc. Similarly a soldier, during the training, can be taught the principles of IHL, especially the principle of distinction, proportion, etc. However, it is unreasonable to expect the armed groups to train their fighters in the principles of IHL as they recruit during the height of conflict and hardly have any lengthy training sessions and also to think that these armed groups will always be able to institute judicial systems to look into violation of IHL by their troops.

Therefore, a bifurcation of level of obligations in non-international armed conflict is required. The category of non-international armed conflicts may be further sub-divided to asymmetric (where the non-state armed groups are far less organized and capable than state forces) and symmetric conflicts (where the level of organization and capability of both state and non-state forces are fairly similar). In the case of asymmetric non-international conflicts, the State may be imposed with greater obligation to follow higher standards of the IHL than the non-State armed group. For example—if powerful states like US, China or Russia are fighting relatively weak insurgency in their territory, it would be fair to expect these States to uphold the highest standards of IHL (including those obligations which are applicable only in international armed conflicts) and expect these insurgent groups to uphold a lesser amount of IHL. In such situations, States should not be allowed to cite the insurgent's group's diminished responsibility or IHL violations to justify their non-application of the IHL norms or its reprisals.

In contrast, in situations of symmetric conflicts where the organization and capabilities of both State and non-State groups are similar, the level of obligations should also be similar. For example—Taliban fighting Afghanistan government (sans US forces), or the Al-Shabaab fighting Somali government may be expected to have similar levels of IHL obligations as the State itself.

However, in this model the major problem is the identification of conflicts which are asymmetric and which are symmetric. This may be formally tasked to neutral and non-politicized organizations like the ICRC who will have to classify non-international armed conflicts to asymmetric and symmetric based on its survey of ground realities.

Another problem will pertain to negotiation and infer a definition of exactly which IHL norms need to be followed by States in cases of asymmetric armed conflict. It is proposed that in case of asymmetric conflicts, States may be asked to follow the IHL which is followed in international armed conflicts i.e. the whole gamut of IHL. Else, if the states do not agree to this for political reasons, the standard should be only marginally less than that followed in the international armed conflict. Non-State armed groups in such situations may be expected to follow a minimum standard of the IHL. In creating this minimum standard of the IHL, the custom as evidenced from documented practices and *'opinio juris'* of previous and present armed groups should be considered so that this minimum standard also does not become too high and unrealistic. To enforce compliance of non-State armed groups to this 'minimum standards', the following measures may be taken:

Firstly, such minimum IHL violating non-international armed groups may be sanctioned in some other ways. One of them could be prohibiting any financial institution, bank, etc. from dealing with them—hence restraining their financial capabilities. Another could be prohibiting all arms sales, aid to them by any arms producing organization. Other countries may be prohibited to deal, anyway, with such groups. Some credible, impartial agency may be mandated to identify such IHL violating armed groups and their recommended sanctions on these groups be made binding on States to follow without any politicization.

Secondly, it can be seen that many insurgent and armed groups aspire either to topple and replace the existing government or to create a new state. Therefore a norm may be created that any such national government/state formed by IHL-violating armed groups shall not be recognized by the international community and international organizations like the UN. They will face complete isolation and international sanctions even if they succeed in toppling their governments or creating new states.

Thirdly, the leader of such groups may be prosecuted for violations of the IHL in institutions such as the International Criminal Court (ICC). Currently the UN Security Council Referral (giving the ICC complete jurisdiction) is one way to do so if the State is not a party to the Rome Statute.[214] However political dynamics often prevent such referrals. Therefore, organizations like the ICRC may be empowered to make referrals to the ICC (in the manner of the UNSC).

Similarly, in the case of symmetric conflicts, both the state and the armed groups may be required to apply the level of IHL higher than the minimum level which the weak armed groups are supposed to apply in case of asymmetric non international armed conflict.

There are reasons to believe that such an action will not be rejected by most of the States. Firstly, if a State considers itself having monopoly on violence and sees armed groups as criminals, then it will be only politically correct for the States to assume greater IHL obligation than the armed groups in

[214] Rome Statute, art 13(b).

order to be recognized as the 'stronger' and 'better' party. Similarly, the armed groups which are trying to topple the government will have a better image if they are seen as adhering to the IHL norms than violating them. However, the only stumbling block to this arrangement can happen when the States refuse to recognize that there is a non-international armed conflict. To bypass this problem, the only way is some objective third party determination of the factum of armed conflict and the type of armed conflict. This can be done, as suggested earlier, by organizations like the ICRC, or a new dedicated organization/agency under the aegis of the UN (like the United Nations Human Rights Council or United Nations High Commissioner for Refugees).

1.3. OTHER WAYS OF INDUCING COMPLIANCE TO IHL BY ARMED GROUPS

Sometimes Armed groups despite wanting to comply with IHL norms cannot do so due to lack of knowledge about the IHL norms in grassroots. A campaign of dissemination of the IHL principles may be undertaken among the entire population of a country so that if in future a conflict breaks out, the potential combatants irrespective of which side they in will have some knowledge of the IHL.[215] This course of action is quite promising and should be taken up earnestly by the UN in its educational programs like the ICRC. States may be asked to include basic IHL in their curriculum.

1.3.1. INDUCING VOLUNTARY COMMITMENTS

Another way forward to voluntarily inducing commitments by non-State armed groups is shown by the NGO Geneva Call. Geneva Call is a neutral NGO dedicated to "engaging armed non-State actors towards compliance with the norms of IHL".[216] It seeks to achieve its objective making the Non-state Armed Groups sign "Deeds of Commitment".[217] These deeds of commitments are treaty-like instruments which mirror international treaties, which these groups by signing pledge their adherence to IHL norms.[218] Monitoring the compliance of these commitments also happen though verification mechanisms provided in them. Geneva Call's Deeds of Commitment have a system of self-reporting, third-party monitoring, and field missions to proactively ensure compliance. 38 out of 41 signatories of the Deed of Commitment Banning Anti-Personnel Mines have successfully abided by their self-reporting obligation.[219] International Law would do well to make such instruments binding by extending the principle of *pacta sunt servanda*[220] to them. Much like the States are free to negotiate and enter into binding treaties, the armed groups, too, may be allowed to enter into binding treaties (even with States or other groups) or deeds of commitment enforceable by some ICJ-like body. For this purpose, the armed groups may be given limited legal persona in international law.

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[215] Rome Statute (n 191).
[216] ibid.
[217] Geneva Call, 'An Inclusive Approach to Armed Non-State Actors and International Humanitarian Norms: Report of the First Meeting of Signatories to Geneva Call's Deed of Commitment' *Genf* (2004).
[218] ibid.
[219] Rome Statute (n 189).
[220] Josef L Kunz, 'The Meaning and the Range of the Norm Pacta Sunt Servanda' *The American Journal of International Law* 39.2 (1945) 180-197.

Even common Article 3 of the Geneva Conventions allows the parties to a non-international conflict "to bring into force, by means of special agreements, all or part of the other provisions" of the Conventions which are then governed by international law. This mechanism was used earlier in conflicts arising in the former Yugoslavia, Sudan, Congo and Sierra Leone under auspices of the UN or the ICRC.[221] Similarly, the National Liberation movements have the option of declaring unilateral accession to the IHL treaties, bringing them into force between themselves and the State parties. Such practices may, further, be encouraged and incentivized. If not above, the armed groups should also be encouraged to come out with their own code of conducts and IHL Manuals (after negotiating them with international bodies like the UN or the ICRC) which would be enforceable against them.[222]

Such steps are likely to be welcomed by the armed groups as such measures will only add to their credibility in the eyes of the world community. If the problem of unrealistic IHL norms is taken care of by the bifurcation of non-international conflict standards as proposed earlier, there is no reason why an armed group should not try to improve its credibility by implementing IHL.

1.3.2. INCENTIVISING OBSERVATION OF IHL AND DIS-INCENTIVISING BREACH

Sassoli proposes that measures by third States like denying refugee status to members of armed groups who violated the IHL or prosecuting them, applying the exemption from extradition for political offenders in extradition treaties to the members of armed groups involved in an armed conflict, except for acts contrary to the IHL can act as an incentive.[223] The States involved in the conflict can take measures such as giving maximum amnesty, if not immunity, to members of the armed forces who have respected IHL and giving maximum punishments to individuals and groups violating IHL. All of these proposals should be implemented by the states.

Another proposal which the author may venture to give is treating members of IHL violating non-State armed groups in the same way as pirates are dealt with. Pirates are considered the 'common enemies of Humanity'—*pirata est hostis humani generis*.[224] IHL violating combatants should also be seen as *hostis humani generis* ie as common enemy of humankind and hence subject to universal jurisdiction. By way of treaty, States may be given an obligation to prosecute persons violating IHL, regardless of their status and immunities accruing otherwise. Similarly prisoner-of-war status may be revoked if the combatants are found violating the IHL (however not all rights accruing to them under P- o- W status be revoked—otherwise it will lead to tyranny of the States). Measures like these may be effective incentives for ensuring compliance with IHL.

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[221] ibid.
[222] ibid.
[223] ibid.
[224] Jr Burgess and R Douglas, 'Hostis Humani Generis: Piracy, Terrorism and a New International Law' 13 (2005) U Miami Int'l and Comp L Rev, 293.

1.3.3. HELPING NON-STATE ARMED GROUPS IMPLEMENT IHL

In situations where non-State Armed Groups are willing to implement IHL, they must be extended all help in achieving that goal. As noticed earlier these groups face significantly different challenges in implementing IHL than the states. Only where they are in effective control/de facto control of some territory and have clear organizational system, there they can evolve some type of legislative or judicial mechanisms for implementing the IHL. However where they are not in such control, they can implement IHL by the 'power to punish' mechanism. A superior in such organization may be made bound to punish his/her subordinates for violation of the IHL norms. In fact, this power to punish is one of the determining criteria to infer existence of a superior-subordinate relationship for purposes of Superior Responsibility according to Article 28 of the Rome statute. As Sassoli notes, *"disciplinary sanctions, such as demotion, assignment of extra duty or withdrawal of the weapon" etc. may ensure adherence to IHL even in loosely coordinated group. International Organizations like ICRC should extend technical help to them in doing so".*[225]

States also must change their attitude to such help extended to the insurgents. Rather than seeing such help as aiding the insurgents/rebels and hence challenging their sovereignty, they should acknowledge that the only purpose of such help is to implement the IHL—an objective to which the States themselves are committed to. One of the examples of narrow mindedness of the States can be exemplified from the US Patriot Act which prohibits 'any assistance' given to organizations which have been designated terrorist organizations. This was upheld by the Hon'ble US Supreme Court in *Holder v. Humanitarian Law Project.*[226] Such cases and legislations not only preclude the possibility of having a meaningful engagement and dialogue with the so-called 'terrorist' organizations, but also prohibit humanitarian organizations like the ICRC from extending any humanitarian assistance and promoting IHL among them. Such attitudes must change and assisting the armed groups in implementing the IHL must be viewed positively as it helps reduce unnecessary casualty and suffering in conflict. Indeed, it would be better for the States if the armed groups implemented the IHL as the indiscriminate attacks they often carry out will stop.

1.3.4. MONITORING THE COMPLIANCE

Several monitoring mechanisms can be adopted to monitor the compliance with the IHL by armed groups. One of them already discussed is self-reporting. Apart from self-reporting by the armed groups, specialized international organizations like the UNHCR, the UN Human Rights Council, and the International Committee of Red Cross, etc. can monitor the compliance to the IHL in addition to monitoring compliance by the States.[227] A mechanism must be created that where ever

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[225] Sassoli (n 212).

[226] *Holder v Humanitarian Law Project,* 561 US (2010), 130 SCt2705.

[227] As Sassoli notes The Inter American Commission on Human Rights has come up with model which may be ideal. When receiving and reviewing reports by States on their compliance with human rights, it has also decided to monitor the behaviour of armed opposition groups and their compliance to IHL.

armed conflict breaks out and the status of the situation as 'armed conflict' is determined by a competent body then observers from agencies like the UNHRC or the ICRC be sent there to continuously monitor the compliance of the IHL by both parties to the conflict.

2. MAKING THE STATES FOLLOW IHL IN NON-INTERNATIONAL ARMED CONFLICT

In this section, some of the controversial practices of the States in Non-International Armed Conflicts will be analyzed. I will endeavour to examine some of the recent practices of States in conflicts such as the concept of 'unlawful combatants', justifying torture and 'inhuman treatment,' etc. and analyze how such practices lead to violation of IHL and escalation of such violations from both sides.

IV. RECOGNISING EXISTENCE OF NON-INTERNATIONAL ARMED CONFLICT: UNDER-INCLUSION AND OVER-INCLUSION

It has been observed that many times States do not recognize the existence of armed conflict in their territory. The primary fear is recognizing that an armed conflict exists and henceforth, applying the IHL norms will lead to some legitimacy for the opposing armed groups leading to some kind of diplomatic defeat for such States. Such an attitude hinders the application of the IHL when the situation has assumed sufficient gravity to be called armed conflict.

In other situations, as seen during the 'War on Terror' governments (such as US) tend to imply existence of non-international armed conflict when there is none. As Kelley notes, sometimes the U.S. government has 'over-classified' its operations against terrorists as non-international armed conflict allowing it to target and kill the 'terrorists' with impunity as 'enemy combatants' or 'unlawful combatants'.[228] Thus it has led to a situation where IHL is selectively applied to deprive persons the rights which they would otherwise have under domestic laws. It is criticized that such selective application of IHL weakens the commitment to respect IHL even in situations of the uncontroversial application of IHL. Therefore Kelley quite rightly says that *"in reality the self-serving attitude adopted by states and method of 'picking and choosing' when and how the rules of IHL can apply, should be regarded as one of the gravest threats to humanitarian norms."*[229]

To author's mind the most effective solution to this problem is having an impartial, neutral and apolitical body established legally under the aegis of the UN dedicated to finding the existence of armed conflicts and the status of such conflicts—as international or non-international. The designation on a situation as 'armed conflict' by this agency must be made binding over the states and other parties to the conflict for purposes of application of IHL. As long as states decide when there is armed conflict and when there is not, they will decide it as per their advantage.

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[228] Kelley (n 190).
[229] ibid.

1.1. RIGHT OF REPRISAL

A limited right of reprisal is allowed to enforce the IHL in case of International Armed Conflicts.[230] However in case of non-international armed conflicts the Customary IHL prohibits the right to reprisal.[231] Common Article 3 of the Geneva Conventions which prohibits violence to life and person, the taking of hostages, outrages upon personal dignity, in particular humiliating and degrading treatment, and the denial of fair trial "at any time and in any place whatsoever" prohibits by necessary implication the right to reprisal involving violation of any of these norms. Similarly, Article 4(2) (b) of the Additional Protocol II prohibits 'collective punishments' which can arguably include reprisals. However, despite this prohibition, reprisal killings and detention have happened in the conflicts in Chad, Colombia, Democratic Republic of the Congo, Mali, Rwanda and Turkey, though they have been roundly condemned.[232]

Reprisals are arguably the worst method of enforcing the IHL as they often lead to a spiral of violence and escalate conflicts by way of series of reprisals, counter-reprisals and so on. This norm prohibiting reprisals must be strengthened in the international law to ensure that the IHL norms are respected by the states regardless of the extent of its violation by the non-state armed groups violate.

Also, as will be elaborated in the succeeding sections, the IHL is not based on reciprocity rather it is a unilateral obligation, thus, making reprisal for violation by the other party illegal.[233]

1.2. JUSTIFYING INHUMAN TREATMENT AND TORTURE TO GAIN INFORMATION

International Law absolutely prohibits torture in any form for whatever purposes and this prohibition is said to have attained the status of a non-derogable obligation of *jus cogens.*[234] Therefore, the international crime of torture has attained a non-derogable status.[235] No emergency, war, terrorism etc. would justify torture.[236] The western states in the recent times have been justifying the use of torture or

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[230] Rome Statute (n 192) 513.

[231] ibid 526.

[232] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Reports para 1251–1253; Special Rapporteur on the Situation of Human Rights in Rwanda, Reports para 1254–1255; Special Rapporteur on Torture and Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Joint Report para 1256; Special Rapporteur on the Situation of Human Rights in Zaire, Report para 1257; UN Verification Mission in Guatemala, Director, First–Fourth Reports para 1258.

[233] FJ Hampson, 'Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949' (1988) Int'l and Comp LQ, 37- 818.

[234] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 5; common art 3 of the Geneva Convention, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR), art 3; Standard Minimum Rules for the Treatment of Prisoners; (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 30 August 1955) arts 31-34; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 7.

[235] M Cherif Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes", Law and Contemporary Problems' (1996) 59 (4) Accountability for International Crimes and Serious Violations of Fundamental Human Rights 63, 74.

[236] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 1465 UNTS 85 (CAT), art 2.

as they would like to call 'harsh interrogation techniques'. Increasingly torture in being supported in the so called 'ticking bomb scenario' to gain vital information.[237] The subtle differences between torture and inhuman treatment (mainly being the purposive element and severity)[238] are being exaggerated and it has been argued that the practices of state constitute inhuman treatment and not the *jus cogens* crime of torture.

However the violation of highest international norms against torture and inhuman treatment by states leads to a negative spiral wherein non-state armed groups justify their violation by referencing to the illegal conduct of states. The reports of torture or 'enhanced interrogation techniques' such as water-boarding used by the U.S. against the suspects kept in Abu Ghraib and Guantanamo bay has sparked worldwide outrage and is being used by the 'terrorists' for propaganda purposes and legitimizes their own unsavory acts.[239]

While an absolute prohibition of torture is desirable and indeed is the international norm, it will be unrealistic to assume that the states in deference to a principled opposition against torture will not employ it if faced with the 'ticking bomb' situation where information gained from torture can save hundreds of lives. However once this 'ticking bomb' exception is recognized it leads to a slippery slope where slowly torture to gain knowledge of 'potential ticking bomb', in 'national interest' gain legitimacy. This in long run leads to a situation where the prohibition against torture becomes limited only to 'sadistic, or confession oriented torture' and torture to gain any useful information is legitimized and legalized. This outcome is hardly desirable—legally, or morally. Therefore it is imperative to keep intact the absolute prohibition against torture. To enforce this prohibition mechanism like accurate monitoring by independent organizations like ICRC, criminal and civil prosecution of erring officials can go a long way. But more than anything else the legitimacy around these acts must go.

Since the aim of this paper is not to examine the issue of torture committed by states but is the observance of IHL, I will confine my observations to torture in context of non-international armed conflicts. In my opinion the ICC should be empowered to seize upon the cases involving allegation of torture. Indeed it is desirable that an independent body like ICC should be given universal jurisdiction over not only the cases of torture but on all *jus cogens* crimes. For this an international consensus must be created to give ICC a chance.

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[237] Abraham McLaughlin, 'How Far Americans would Go to Fight Terror' *Christian Science Monitor Boston* (2001) 1; Alan M. Dershowitz, 'Why Terrorism Works' (2002) 150.

[238] See (n 4).

[239] M. Cherif Bassiouni, 'The Institutionalization of Torture under the Bush Administration' Case W Res J Int'l L 37 (2005)389.

1.3. ISSUE OF UNLAWFUL COMBATANTS:

Over years another dubious concept of 'unlawful combatants' has developed allowing states to violate IHL with impunity. It has been said that the fighters of Al-Qaeda and Taliban are 'unlawful combatants'.[240] According to this self-serving doctrine full protection of Geneva Conventions apply only to uniformed soldiers and guerrillas who wear distinctive insignia, bear arms openly and abide by the rules of war (lawful combatants).[241] It has been said that, the distinction between lawful and unlawful combatants conform to the more basic distinction between combatants and non-combatants. It has been argued that the rules of *Jus in Bello* are based on fair play and an unstated (if romanticized) assumption that the opponents are evenly matched.[242] Tamar Meisels argues that *"Irregulars ('unlawful' combatants) do not merely breach the formal reciprocal rules of fair play, their tactics of camouflage and disguise take advantage of the very code they breach. They are free riders on the prohibitions civilized nations adhere to."*[243] Furthermore, the author argues that by acquiring a hybrid identity of combatant-civilian, they also blur the more basic distinction between those who may and those who may not be targeted in wartime. Thus they pose threat "civilized" conduct of war and the protections it affords to an identifiable defenseless civilian population.[244]

The above justification for the concept of Unlawful Combatants is based on the idea that the rules of International Humanitarian Law or 'fair play' are based on 'reciprocity'. This assumption is questionable. As the ICJ held in Nuclear Tests case, a state may be bound by its public pronouncement (intending to be binding) without any other requirement.[245] Although generally obligations in international law are reciprocal, circumstances can prove otherwise. However it is sound to consider that obligations under International Humanitarian Law especially treaties like Geneva Conventions do not impose reciprocal obligations but they impose unilateral obligations. This is borne out of the Common Article 1 which aims for ensuring "respect for the present Convention in all circumstances".[247] Employing the methods of interpretation embodied in Article 31 of Vienna Convention of Law of Treaties (which is also international customary law[247])—the principle of effectiveness of treaty's object and purpose also leads to the result that the IHL obligations were intended to be unilateral. Treaties protecting Human Rights such as the European

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[240] Joseph P Bialke, 'Al-Qaeda and Taliban: Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict' (2004) 55AFL (Rev) 1.

[241] ibid.

[242] George Fletcher, 'Romantics at War-Glory and Guilt in the Age of Terrorism' (Princeton UP 2003) Paul Gilbert, 'New Terror, New Wars, Edinburgh' (Edinburgh UP 2003).

[243] Tamar Meisels, 'Combatants: Lawful and Unlawful' *Law and Philosophy* 26 (1) (2007), 31-65.

[244] ibid.

[245] *Australia v France; New Zealand v France* [1974] ICJ (Rep) 253

[246] Hampson (n 237).

[247] Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points' (1951) 28 BYIL 1-2.