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Application of International Human Rights Law in Non International Armed Conflicts : Contemporary Challenges and Road Ahead

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ABSTRACT

War is not new to the mankind, however, the kind of wars that man has indulged into is no doubt destructive, devastating and ruinous. The existing legal framework of Human Rights Law and International Humanitarian Law (IHL) situates its existence as a response to the dreadful World Wars and attempts to humanize future conflicts. In order to extend its jurisdiction to as many instances as possible IHL distinguishes into two types of armed conflicts viz, International and Non-international.

However, the cold war and the post- cold war era, arising after World War II saw the emergence of the fourth generation of warfare wherethe State has lost its monopoly over war and a considerable increase in Non-International Armed Conflicts (NIAC) is seen. The paper analyses contemporary forms of NIAC's that have emerged recently and have posed serious implications on the application of IHL and raised doubts on its significance to address issues of human rights violations during NIAC. The paper then seeks to pose questions that been raised by the applicability of human rights law to NIACs and has tried to answer the controversial question as to whether non-state actors are bound by human rights obligations. This article tries to analyze where international law stands now of these questions and attempts to find the applicability and reliability of the International Human Rights framework during the NIACs and its relation vis-à-vis IHL.

Keywords: Armed Conflicts, International Humanitarian Law, Non-International Armed Conflicts, Human Rights

1. Introduction

Where the whole world is a battlefield.... And peace is nothing but an interval between two consecutive wars.

Violence is not new to the mankind, as even the universe emerged out of Big-Bang explosion. However, the kind of wars that man has indulged into is no doubt destructive, devastating and ruinous. We are in the 21st Century and are now evidencing the fourth generation of war. The Four Generations began with the Peace of Westphalia in 1648, which marked the First Generation, the treaty that ended the Thirty Years' War. With that treaty, the state established a monopoly on war. Previously, many different entities had fought wars—families, tribes, religions, cities, business enterprises—using many different means, not just armies and navies. Now, state militaries find it difficult to imagine war in any way other than fighting state armed forces similar to themselves.[1] The second generation developed in the First World War; and the third generation in the Second World War. The world survived the scourge of two dreadful World Wars but realized the necessity of a mechanism that could minimize their ferocity. The existing legal framework situates its existence as a response to the dreadful World Wars and attempts to humanize future conflicts.

The cold war and the post- cold war era, arising after World War II saw the emergence of the fourth generation of warfare. What makes the fourth generation of warfare peculiar is the involvement of loose networks thathave become more powerful and resilient through information technology, biotechnology and nanotechnology. It does not seek to defeat the enemy's forces, but instead "directly attacks the minds of the enemy decision-makers to destroy the enemy's political will". [2]

The monopoly over violence, particularly in the form of war, which the State had established after the Peace of Westphalia has seen to be lost in the fourth generation war. All over the world, state militaries find themselves fighting non-state opponents such as al-Qaeda, Hamas, Maoists, Hezbollah, and the Revolutionary Armed Forces of Colombia. Almost everywhere, the state is losing. Another important aspect that has been pointed out by the exponents of fourth generation war is that this generation is also marked by a return to a world of cultures, not merely states, in conflict.[3]

"War" is sometimes used as a legal concept, *i.e.*, the application or operation of a legal rule may depend on the existence of a "war," "armed conflict," or "hostilities." There is no single legal definition of these terms and all of them have varied in both domestic and international law and have been interpreted differently depending on the specific legal context at issue.

In the context of the use of force, customary international law distinguishes between *jus ad bellum* and *jus in bello* (International Humanitarian Law- IHL).

- *jus ad bellum* refers to the set of lawful criteria considered before engagement in war
- *jus in bello* (IHL) is the law that governs the way in which warfare is conducted, irrespective of whether or not the cause of war is just.

The purpose of IHL has been to humanize war, and protect civilians by creating distinctions between who and what may be targeted in conflicts, how this targeting is executed, weapons allowed, and the rights and obligations of combatant forces. [4] In the laws of war, principles of distinction, proportionality, and necessary precaution for minimal effects on civilians are essential to the way in which armed forces may participate in combat. Accordingly, IHL focuses on governing *how* military operations may take place, instead of the legality for the reason of *why* they take place.[5]

IHL finds its sources in treaties and in customary international law. The rules of IHL are set out in a series of conventions and protocols. The following instruments form the core of modern international humanitarian law also referred as the IHL treaties.

- The Hague Regulations respecting the Laws and Customs of War on Land;
- The Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 ;
- The Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949;
- The Geneva Convention (III) relative to the Treatment of Prisoners of War, 1949;
- The Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949;
- The Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1997;
- The Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1997; and
- The Protocol Additional to the Geneva Conventions and relating to the Adoption of an Additional Distinctive Emblem (Protocol II), 2005.

The Hague Regulations are generally considered as corresponding to customary international law, binding on all States independently of their acceptance of them and the Geneva Conventions have attained universal ratification. Many of the provisions contained in the Geneva Conventions and their Protocols are considered to be part of customary international law and applicable in any armed conflict. [6]

Other international treaties dealing with the production, use and stockpiling of certain weapons are also considered part of international humanitarian law, insofar as they regulate the conduct of armed hostilities and impose limitations on the use of certain weapons. Some of these conventions are:

- The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997;
- The Convention on Cluster Munitions, 2008;
- The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,1972 ;
- The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993;
- The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1980;
- The Treaty on the Non-Proliferation of Nuclear Weapons, 1968.

2. Types of Armed Conflicts

International humanitarian law distinguishes two types of armed conflicts, namely:

- International armed conflicts, opposing two or more States, and
- Non-international armed conflicts, between governmental forces and nongovernmental armed groups, or between such groups only.

2.1 International Armed Conflict (IAC)

According to Common Article 2 to the Geneva Conventions of 1949 IACs are those

- which oppose "High Contracting Parties", meaning States
- occurs when one or more States have recourse to armed force against another State [7]
- Rules are applicable
- Regardless of the reasons or the intensity of this confrontation
- Even in the absence of open hostilities and
- Without the formal declaration of war or recognition of the situation.

The existence of an IAC, and as a consequence, the possibility to apply IHL to this situation, depends on what actually happens on the ground. It is based on factual conditions. For example, there may be an IAC, even though one of the belligerents does not recognize the government of the adverse party.[8]

2.2 Non-International Armed Conflict (NIAC)

Two main legal sources must be examined in order to determine what a NIAC under IHL is:

- Common Article 3 to the Geneva Conventions of 1949;
- Article 1 of Additional Protocol II.

2.2.1 Non-International Armed Conflicts within the Meaning of Common Article 3

Common Article 3 applies to "*armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties*". These include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. As the four Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur "*in the territory of one of the High Contracting Parties*" has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot take place on the territory of one of the Parties to the Convention.[9]

In order to distinguish an armed conflictfrom less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation. Two criteria provided under common Article 3, are usually used in this regard: [10]

- First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.[11]
- Second, non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations.[12]

2.2.2 Non-International Armed Conflicts within the Meaning of Art. 1 of Additional Protocol II

A more restrictive definition of NIAC was adopted for the specific purpose of Additional Protocol II. This instrument applies to armed conflicts *"which take place 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"*. [13]

The definition of NIAC given under Additional Protocol II is narrower than the notion of NIAC under common Article 3 in two aspects:

- Firstly, it introduces a requirement of territorial control, by providing that non-governmental parties must exercise such territorial control *"as to enable them to carry out sustained and concerted military operations and to implement this Protocol"*.
- Secondly, Additional Protocol II expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organised armed groups. Contrary to common Article 3, the Protocol does not apply to armed conflicts occurring only between non-State armed groups. [14]

In this context, it must be reminded that Additional Protocol II "*develops and supplements*" common Article 3 "*without modifying its existing conditions of application*". [15]This means that this restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of NIAC in general. The Statute of the International Criminal Court, in its article 8, para. 2 (f), confirms the existence of a definition of a non-international armed conflict not fulfilling the criteria of Protocol II.[16]

2.3 Jurisprudence

Apart from the Conventions and Protocols, case laws have supplemented the definition of armed conflicts by bringing in elements that were not provided under the Conventions. This can be said even with special reference to NIACs. Judgments and decisions of the ICTY throw also some light on the definition of NIAC and have determined the existence of a NIAC *"whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State"*. The ICTY thus confirmed that the definition of NIAC in the sense of common Article 3 encompasses situations where *"several factions [confront]each other without involvement of the government's armed forces"*.[17]This judgment has henceforth become the landmark for determining the existence of NIACs.

Therefore, on the basis of the analysis set out above, the following definitions reflect the strong prevailing legal opinion:

1. International armed conflicts exist whenever there is *resort to armed force between two or more States*.

2. Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum of organisation*.[18]

3. Types of Non-International Armed Conflicts (NIAC):

There are two constitutive elements to determine the non-international armed conflicts:

(a) A NIAC must take place within the borders of a high contracting party, that is to say, a single State; and
(b) A NIAC has to be waged between the armed forces of the State (loyal to the central government) on the one hand, and organized armed groups (including dissident armed forces) on the other or organized armed groups among themselves.

NIACs falling within the Common Article 3 threshold have involved different factual scenarios, particularly over the past decade. A key development has been an increase in NIACs with an extraterritorial element, due to which questions about the sufficiency of the current classification of armed conflicts have been posed. Provided below is a brief typology of current or recent armed conflicts between States and organized non-State armed groups, or between such groups themselves which may be classified as NIACs which was articulated by International Committee of the Red Cross, in its documented International Humanitarian Law And The Challenges Of Contemporary Armed Conflicts, prepared in 2011. While the first three types of NIAC listed may be deemed uncontroversial, the rest continue to be the subject of legal debate due to their contemporary warfare attributes and recent origin.

3.1 Classical NIAC

3.1.1 Classical:There are ongoing customary or "classical" Common Article 3 NIACs in which government armed forces are fighting against one or more organized armed groups within the territory of a single State. These armed conflicts are governed by Common Article 3, and additionally by tenets of customary IHL.[19]

3.1.2. Failed State Scenario:An armed conflict that puts two or more organized armed groups between themselves may be considered a subset of "classical" NIAC when it takes place within the territory of a single state. Examples include both situations where there is no state authority to speak of (i.e. the "failed" state scenario), as well as situations where there is the parallel occurrence of a NIAC between two or more organized armed groups alongside an IAC within the confines of a single state. Here, too, Common Article 3 and customary IHL are the relevant legal regime for the NIAC track.[20]

3.1.3 Spill Over:Certain NIACs originating within the territory of a single state between government armed forces and one or more organized armed groups have also been known to "spill over" into the territory of neighbouring states. [21]

3.2 Contemporary NIACS and New Wars

In a Report for the 31st Conference of the Red Cross and Red Crescent[22], the ICRC outlines various evolving characteristics of warfare that illustrate these recent developments—all of which, have contributed to the fact that civilians continue to remain the primary victims of violations of IHL in armed conflicts.

- The last decade, in particular, has seen the emergence of what may be called “multinational NIACs”. These are armed conflicts in which multinational armed forces are fighting alongside the armed forces of a "host" State - in its territory - against one or more organized armed groups. A current example is the situation in Afghanistan.
- A subset of multinational NIAC is one in which UN forces, or forces under the aegis of a regional organization (such as the African Union), are sent to support a "host" government involved in hostilities against one or more organized armed groups in its territory. This scenario raises a range of legal issues, among which is the legal regime governing multinational force conduct.
- It may be argued that a NIAC ("cross border") exists when the forces of a state are engaged in hostilities with a non-State party operating from the territory of a neighbouring host State without that State's control or support.
- Instances of extra-territorial military interventions and new forms of foreign military presence in the territory of a State have caused a refocused attentiveness on the law of IHL. Obvious illustrations include the occupation of Afghanistan and Iraq in the first decade of the 21st century and the ongoing occupation of the Gaza Strip by Israel.
- A final type of NIAC believed by some to currently exist is an armed conflict taking place across multiple states between Al Qaeda and its “affiliates” and “adherents” and the United States (“transnational”).
- The rise of terrorism in recent years is also relevant in the framework of ‘new wars’. Terrorism is considered a form of irregular warfare that entails the threat or use of violence against non-combatants, either by State or non-State actors.

What makes these contemporary and distinct NIACs more disastrous is the impact of emerging technologies—specifically advances in cyber capabilities, and thus, the threat of cyber-attack as a means for warfare—has proven to be an imminent threat and will undoubtedly have major implications for the future of applicable humanitarian laws. From be denial-of-service attacks on an entire population, as evidenced by the 2008 cyber-attacks on Georgia, to unmanned aerial vehicles, such as the “drones” used by the United States military, humanitarian laws created in the 1900s do not entirely reflect the reality of technology in the 21st century. [23]

Furthermore, the existence of transnational networks and multinational conflict is enabled by the evolution of globalization in the 21st century; and a heightened focus on the importance of information intelligence in a world that revolves around complex communication and information systems such as the Internet, is undeniably key to the development of modern warfare. [24]

3.3. Characteristics of Contemporary NIACs

The proponents of the 'new wars' thesis contend that contemporary conflicts could be distinguished by the following traits, which are deemed to qualify as structural characteristics:

- The scope is neither internal rather nor inter-state as varying combinations of State and non-State actors
- Consequently, conflict actors are mainly non-State actors, such as private armies, warlords, criminal gangs, organized communal groups and terrorist or guerrilla organisations instead of governments, professional soldiers or conscripts. This gradual privatization of armed violence leads to a certain degree of asymmetry in warring forces and belligerents.[25]
- As regards methods, the increased use of terror and guerrilla actions, as well as deliberate targeting of civilians, [26] displaces the combat from conventional battlefields.
- The models of financing tend to be external rather than internal.
- The objectives range from military targets to attacks on civilians and infrastructure, showing a tendency for strong deviation from the codified rules of war, i.e. *jus in bello*, and the laws governing use of force, *jus ad bellum*, in a brutal fashion.
- In many authors' views, contemporary conflicts, albeit not inter-State, have a regional or global dimension. For example, in West Africa and the Great Lakes region, internal conflicts have become interlinked thereby producing regional civil wars and what is called 'system of conflicts'.[27]

Thus these contemporary non-international armed conflicts have two distinct characteristics:

1. Prevalence of non- state actors and
2. Internationalised non-international armed conflict

3.3.1 The Prevalence of Non-State Actors

While the very nature of 21st century warfare has arguably undergone significant developments in recent years, it is widely noted that non-State actors actively play an increasingly substantial role in contemporary violent conflicts. [28]Although it is important to recognize the fact that armed non-State actors have been fighting against States throughout history, in previous eras, they more easily fit within the parameters of domestic law enforcement. [29]As the nature of war evolves due to the phenomenon of globalization, so too does the nature of pertinent actors exerting influence, and subsequently their role as agents to armed conflict around the world.

The spectrum of new types of non-state actors is broad, "encompassing a range of identities, motivations and varying degrees of willingness and ability, to observe IHL and other international law standards." [30]Various sorts of non-State actors include groups classified as: organized armed groups, transnational corporations, private military and security companies, paramilitary forces, urban gangs, militias and the huge variety of transnational criminal entities—including so-called "terrorist" groups and pirates.[31] In defining non-State actors it is also important to differentiate between armed non-State groups that use force as a means for furthering a political objective,[32] and non-violent non-State actors that could simply be NGOs, international organizations, or corporations.

In a research conducted by Harvard University, it was determined that new *transnational* non-State groups are characterized primarily by their statelessness, emancipation, privatization, and asymmetric position towards states, and ultimately "are problematic because they are irregular, difficult to respond to, and generally unrecognized by the long-standing laws of war."[33] The difficulties these emerging types of actors present to the application and compliance of IHL is wide-ranging. Under Common Article 3, the second condition for the regulation of a NIAC is the existence of "Parties," which "must demonstrate a certain level of organization." [34] Accordingly, regardless of the level of violence, for any non-international conflict to function as such under IHL, both parties (whether a state fighting a non-state actor, or two non-state actors fighting each other) must meet these criteria. Yet, groups that fall outside this classification like gangs, paramilitary forces, crime groups and vigilantes still pose a challenge to the respect for humanitarian norms in violent conflict. An instance where the "organization" threshold was called into question was in the case of Syria, illustrating that along with the "intensity" factor of the conflict, the level of a group's organization also contributes to ambiguity for the legal definition of armed conflict under IHL.[35]

Also, the problem of Naxalism in India is not new but still remains contemporary. India although has ratified the Geneva Conventions has abstained from signing the Additional Protocols which again keeps the application of humanitarian law at bay. Although the naxalist/ maoist movement in India is by and large qualified and fulfills the stipulation to be a non-international armed conflict, the reluctance of the Indian State to recognize it as an internal armed conflict has led to gross humanitarian violations.

4. Challenges Due to New Conflict Patterns

One of the significant attribute of contemporary armed conflict is that it has changed the relationships of parties to a conflict in a great way making the situation more acute. There have been several changes in the conflict patterns that have raised challenges to the application of existing framework of IHL. Some of the intricate challenges have

been identified in the Report Document titled, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts"[36] prepared by the International Committee of the Red Cross Geneva, which are being discussed below.

On the State side:

- The number of foreign interventions in many ongoing armed conflicts contributes substantially to the multiplication of actors involved.
- In many situations, third States and/or international organizations, such as the United Nations (UN) or the African Union (AU), intervene, sometimes themselves becoming parties to the conflict. This intervention – in support of States or of non-State armed groups – poses extremely complex questions concerning conflict classification.
- These often arise because of a lack of precise information about the nature of the involvement of third parties but also when third parties do not acknowledge their participation in the hostilities at all.

On the non-State side:

- A myriad of fluid, multiplying and fragmenting armed groups frequently take part in the fighting.
- Often, their structure is difficult to understand.
- The multiplication of such groups poses a number of risks for the civilian population, the first being that it necessarily entails an increase of the front lines with the ensuing risk that civilians will be caught in the fighting.
- The multiplication of non-State armed groups also signifies a greater strain on resources, especially natural and financial, as every new party needs to sustain itself.
- Also, although this is difficult to quantify, as parties multiply and split societies become fractured. Communities and families come under pressure and are divided over their allegiance to different armed groups, people are at higher risk of being associated with one of the many parties, and thus at higher risk of reprisals.
- As far as humanitarian action is concerned, the opacity or lack of the chain of command or control of some groups poses a challenge not only in terms of security but also for engaging such groups on issues of protection and compliance with IHL.

The growing atrocity and fierceness of the contemporary conflicts are a reason of profound alert and caution for the international regime. Numerous cases of violation of humanitarian law by the State as well as non-state actors are recorded every day. States don't recognize conflicts as NIACs to forego accountability and escape themselves from applying the IHL, whereas non-state armed groups outrightly reject the humanitarian laws as they feel they are not bound by it leading to the non-compliance of the IHL framework.

5. Emerging Need of Applicability of Human Rights in NIAC

Not tested but still evident that IHL has failed to prevent and punish humanitarian violations take have taken place in the last two decades due to constant rise in NIACs. However, what is more alarming is the human rights violation of the non-combatants, women and children who are trapped in the conflict zone. Recent civil wars in Libya, Syria and Democratic Republic of Congo are unfortunate examples as to how the inapplicability and non-compliance of humanitarian laws has led to gross human rights violations in NIACs.

In Libya, Amnesty International concluded that it found evidence that forces loyal to Colonel al- Gaddafi committed violations of international humanitarian law amounting to war crimes and gross human rights violations amounting to crimes against humanity. [37] It also concluded that members of the Libyan National Transitional Council (NTC), the opposition fighting the Gaddafi government, committed human rights abuses and violations of international humanitarian law.[38] The same conclusions were reached by Human Rights Watch [39] and a number of other human rights organizations. [40] Even the Security Council, in its Resolution 2009, condemned human rights violations committed on both sides involved in the conflict. [41] In Syria, Human Rights Watch, Amnesty International, the US State Department and even the UN Human Rights investigators have concluded that while the Syrian security forces committed the overwhelming majority of crimes, armed opposition groups, including the Free Syrian Army (FSA), also committed serious human rights abuses, including war crimes. [42] In the DRC, the United Nations and different international human rights organizations have concluded that in the civil war in the Eastern DRC, both the Congo army and rebel groups carried out gross human rights abuses. [43]

One trend has been to apply international human rights law (IHRL) to these conflicts. The extent to which international human rights law applies to civil wars such as those in these countries is still controversial. Even more controversial is the extent to which non-State actors such as rebel groups involved in civil war are bound by international human rights law. The Commission of Inquiry in Syria, for instance, was not only interested in violations of IHL in Syria, but also human rights violations. Interestingly, it notes that these human rights obligations are binding upon non-state armed groups as well as the Syrian state: "at a minimum, human rights obligations constituting peremptory international law (*jus cogens*) bind states, individuals and non-state collective entities, including armed groups. Acts violating *jus cogens* – for instance, torture or enforced disappearances – can never be justified." [44] The

applicability of human rights norms to non-state actors is generally a topic of debate in international law, but there is a trend towards armed groups being bound by core human rights norms, especially those representing *jus cogens*.

It has been argued that the application of international human rights law to 'new wars' would be more appropriate in some circumstances. [45] In contrast to IHL, which was developed to regulate conduct between states, IHRL law is a system that also regulates the relationship between the state and its citizens. It is therefore arguably more appropriate in regulating NIACs.

In applying IHRL the state maintains its prerogative to fight those who challenge state authority, but the way in which it does so is regulated by an existing body of international law. Furthermore, by applying IHRL, there is less of a concern that it will bestow status or legitimacy upon internal rivals, a key concern associated with applying IHL. Abresch makes the convincing argument that in certain situations, IHRL may be more capable of applying to an internal conflict than IHL, giving the example of the European Court of Human Rights' use of the 'right to life' article in cases of armed conflict:

"The ECtHR's approach has the potential to induce greater compliance, because it applies the same rules to fights with common criminals, bandits, and terrorists as to fights with rebels, insurgents, and liberation movements. To apply human rights law does not entail admitting that the situation is 'out of control' or even out ofthe ordinary."[46]

Although there is a good argument to apply IHRL to some internal conflicts, there are also some apparent problems when it is applied to an internal armed conflict. Firstly, the law generally binds states who are a party to the Human Rights Conventions, but does not establish corollary duties on its citizens. Although it has been argued that IHRL equally applies to non-state actors such as rebel groups as it does to states, [47] it has proved difficult to apply IHRL to non-state groups. This stands in contrast to IHL, which establishes rights and duties upon both sides. Secondly, although IHRL applies at all times, not just during times of peace, some rights are capable of derogation in times of public emergency and war. Contrarily, IHL only applies in times of war, and can therefore be seen as a specialised form of IHRL that applies during armed conflict as *lex specialis*. [48] There is a growing consensus among experts that IHL and IHRL are not mutually exclusive and can therefore co-exist. Despite these criticisms, IHRL may be appropriate in regulating certain conflicts simply because states routinely dismiss the application of IHL to their internal conflicts. States such as the United Kingdom, Turkey and Russia denied application of IHL to their internal struggles, but IHRL was still able to regulate the conflict through applications to the European Court of Human Rights. [49] In these situations applying IHRL may help to promote compliance with a set of legal norms during armed conflict where states and rebels alike have determined that IHL obligations do not apply. [50] Ultimately, however, human rights law was not designed for application in armed conflict and can have only limited practical effect in such situations.

6. Conclusion

'New wars' pose a number of complex and challenging questions for international law and the law of armed conflict. Recent debates have focused on the use of new technology such as the use of unmanned aerial vehicles or the use of private military and security companies, both of which are changing the nature of modern warfare. The development of new weapons systems or military tactics is something to which the law can adapt. Yet 'new wars' present a shift in the very nature of war itself. War is no longer a duel between competing states, but comprises a complex mix of internal and international elements, taking place in a globalised context involving an ever-greater number of state and non-state actors. In such conflicts, the traditional dichotomies upon which the law of armed conflict is based are simply outdated.

At least three approaches have been used in defining the extent to which international human rights law applies in times of armed conflicts: the first gives priority to IHL as the only law applicable during armed conflicts, rejecting any IHRL application; the second approach gives priority to IHRL as the only applicable law, rejecting or ignoring the IHL application; and the third approach sees a mixed combination of the two branches of law. In all three approaches, the principle of *lex specialis derogate general* applies, but with different interpretations.[51]

This third approach was developed by the ICJ in its *Palestinian Wall* Opinion. [52] In fact, it looks like a revised and reformulated interpretation of its *lex specialis* theory as developed in the 8 July 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. [53]Under the new reformulation, the ICJ stated:

"More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into

consideration both these branches of international law, namely human rights law and, as *lex specialis* international humanitarian law."[54]

Although the Court reiterated these three possible situations in its ruling in the *Democratic Republic of the Congo v. Uganda* case, [55] neither here nor in the *Palestinian Wall* Opinion did the Court specify which human rights and/or IHL violations fall into each of the above mentioned three categories. And even if IHRL is applied, will the rebel groups and the non-state parties of an NIAC be bound by IHRL? This assumption is based on traditional approach of international law which holds that "only Governments can violate human rights and thus, such armed groups are simply committing criminal acts."[56]

Despite the most recent evolution of international law acknowledging the international legal personality of non-State actors,[57] including armed groups,[58] and a significant number of real-world illustrations challenging the assumption that States still hold the monopoly of the above-mentioned capacity granted by international legal personality, international human rights law has remained reluctant to accompany this progress with the imposition of international human rights obligations on non-State actors.

This refusal to adapt to new realities in the development of international law and the balance of power between States and non-State actors has been qualified by Philip Alston as a "not-a-cat" syndrome: [59] a non-State actor such as a rebel group should be allowed to get away with its human rights violations just because it is simply "not-a-state."

The "not-a-cat" syndrome and the continued support by some scholars that neither international human rights treaty law nor customary international law can be the source of holding rebel groups accountable for their human rights violations [60] has led the United Nations to resort to desperate measures whichare more theoretical than practical. According to the Special Rapporteur, States are responsible for human rights violations committed by armed groups in the three following cases: (a) for the actions of non-State actors that operate at the behest of the Government or with its knowledge or acquiescence (e.g. private militias controlled by the Government which may be ordered to kill political opponents, paramilitary groups and deaths squads; (b) for the actions of private contractors (including military or security contractors), corporations and consultants who engage in core State activities (such as prison management, law enforcement or interrogation); and (c) where there is pattern of killings and the Government's response is inadequate (while in most cases an isolated private killing is a domestic crime and does not give rise to State responsibility, this situation creates a heightened duty). [61] It is theoretically easy to say that States are responsible not only for their direct human rights violations, but also their lack of due diligence in taking appropriate measures to deter, prevent, and investigate human rights violations by non-State actors within its territory engages their international human rights responsibility. This approach is, however, practically impossible to be fully implemented in the world where even the United States agrees that the "power in the international system, once exercised more or less exclusively by a handful of great powers, is now shared by a wide array of states, institutions, and non-state actors." [62] The United Nations itself acknowledges this difficulty. This may be the reason why in the Special Rapporteur's document mentioned above, the United Nations did not include in the list of acts of States' responsibilities those committed by non-State armed groups which are parties to an armed conflict. This has, however, created more problems than solutions; on the one hand the Special Rapporteur agrees that rebel groups do "not have legal obligations under ICCPR", but on the other hand excludes a State's responsibility for human rights committed by such rebel groups. This leaves a dangerous vacuum in which accountability for human rights violations in NIAC becomes impossible.[63]

This answer can be replied only when the dichotomy of 'new wars' is resolved and whatever may be the reasons behind the different interpretations on the application of international human rights law during armed conflicts, one thing seems obvious: this question is far from being settled. There is still more work to do before we can have a clear and unified answer to the question of when, how, and which international human rights law applies during armed conflicts in general, and in particular during armed conflicts of non-international character. This unfortunately means that perpetrators of such violations will continue to hide behind this lack of consensus to escape from accountability.

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