The Paradigm Shift: Addressing the Anomaly Created by IHL and Domestic Law in Non-International Armed Conflicts

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Abstract

During non-international armed conflicts what International Humanitarian Law (IHL) endeavours is to minimise the damage to civil life. For this purpose, some of the acts of non-state actors (NSAs) such as attack on military installations etc. are legitimate under IHL. But states being concerned more for their security criminalise many such acts. Such criminalisation does not violate IHL. It creates an anomaly between domestic laws and IHL, which plays, according to scholars, an adverse role against compliance by NSAs with the norms of IHL. Scholars say that the domestic criminal responsibility of NSAs for the lawful acts of war deprive them of any incentive to observe IHL. The result is an increased threat to the protection of civilian life during non-international armed conflicts. To address this problem, a concrete resolve is required which is the focus of this paper. The methodology is content analysis of the so far proposed mechanisms to mitigate civil damage in non-international armed conflicts, including amnesty and reduction in punishments etc. The paper proposes that unless IHL and domestic law are ready to shift their paradigms, no practical solution could be reached to attend the civil damage.

Keywords: International Humanitarian Law, non-state actors, civil life, conflict, domestic laws.

Introduction

The primary focus of International Humanitarian Law (IHL) is the protection of civilians and civilian property during international and non-international armed conflicts. The rules of IHL are intricately crafted to ensure that the civilians, hors de combat and the civilian property are protected from all sorts of violence carried out by the parties to an armed conflict. Despite the existence of an elaborated body of humanitarian law, the world still faces the challenge of heinous crimes committed during armed conflicts. During recent decades, the non-international armed conflicts (NIACs) have been more frequent than the international armed conflicts (IACs). The Uganda war (since 1987), the Congo war (1998-2003), Northern Mali conflict (2012-1015), Yemeni civil war (since 2015), and Syrian war (since 2011) are few examples. In these and other conflicts, the world has witnessed immeasurable destruction and suffering. Records are abound with instances of indiscriminate targeting of civilians and their use as human shields, plundering and ruining of civilian property, murder, rape, and torture etc.

The reason behind these atrocities is, essentially, the lack of observance of the rules prohibiting such crimes. Addressing this lack of observance of IHL during NIACs has been one of the major concerns of the international community. It has been realised that the involvement of armed groups/Non-State Actors (NSAs) as party to these conflicts makes the matter even more complex. Many writers have addressed this subject. They have attempted to accost the different

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aspects of such non-observance and highlighted various ways for the better implementation of IHL. The current paper shares a similar focus. It, however, limits itself to the violations of IHL by NSAs. It analyses the punishment of NSAs under domestic law for the legitimate acts of war as a cause of non-observance of IHL. The issue has already been pointed out by different scholars as one of the causes of the violation of IHL by NSAs. They have also very briefly touched upon the solutions for this problem. However, the literature which I examined, does not take up the issue in sufficient length to discuss and analyse the effectiveness of the solutions so proposed. This paper, therefore, critically analyses the proposed solutions. It explains that the criminalisation by domestic law of the acts of war legitimate under IHL creates an anomaly between these two laws. This anomaly despoils NSAs from any motive to obey IHL, and therefore results in damage to civil life. The anomaly is further aggravated by the fact that the IHL, keeping in view the states' concerns for their security, does not prohibit the domestic criminalisation of the lawful acts of war. Observing that the solutions proposed by the scholars suffer from various shortcomings, the paper suggests a paradigm shift both for states and IHL.

Methodology

The paper uses the qualitative research method. It relies on both primary and secondary sources. The paper begins by establishing that the anomaly created by the punishment of NSAs under domestic law for *legitimate* acts of war is a vital cause behind their disobedience of IHL. It also studies the mechanisms proposed by scholars to deal with this problem of non-observance. For developing these two parts, reliance is placed on secondary research. It includes book chapters, reports, debates, and articles.

The paper then moves on to develop an understanding of the domestic law enforcement and IHL paradigms and how the discrepancy and overlap between these two paradigms create the anomaly. In this part, both primary and secondary sources are relied upon. Primary sources include the relevant IHL instruments and different national legislation. Secondary sources primarily include ICRC commentary. It then plunges into the content analysis of the mechanisms so far proposed by different authors as solution to the problem. Finding out that the mechanism proposed by scholars suffer from various shortcomings, the paper moves on to suggest some other solutions which lead towards a paradigm shift both for states and IHL.

Literature Review

The literature review is divided into two sections. The first section will substantiate the point that the prosecution of NSAs under domestic law for lawful acts of war is one of the causes of violation of IHL and a challenge to be addressed immediately. It will also highlight the context in which the writers have discussed the matter. It will be pointed out that though the writers have taken anomaly as a cause of non-observance in various contexts, they have not endeavoured to develop a detailed percipience that how this anomaly is created which is vital for an in-depth analysis of the matter in hand. To fill that gap, an attempt will be made to develop an understanding of the IHL and domestic law enforcement paradigms, discrepancy between them, their overlap and the consequent anomaly. The second section will explore the mechanisms proposed by different scholars for addressing this anomaly. Later, the effectiveness

of the proposed mechanisms in securing compliance of IHL by NSAs will be critically analysed and the paper will propose a paradigm shift at the end. This forms the main thesis of the paper.

I. The Anomaly: Prosecution under Domestic Law as a Cause of Violation of IHL

Rosa & Wuerzner, while discussing the implementation of IHL through sanctions in the context of armed groups, argue that the indictment of NSAs simply for taking up arms against the state results in paucity of any impetus for them to obey the rules of IHL.[1] They discuss this aspect in the context of states' responsibility to punish breaches of humanitarian law. They observe that while on the one hand, the prosecution of NSAs under national law leads towards the violations of the rules of war, but on the other hand, it may cause difficulties for the state to fulfil above-stated responsibility on the other. The reason is that the state's ability to sanction the violations of IHL depends extensively upon the existence of procedures in which all the parties have confidence. The factor of NSAs incrimination under state law may malign the impartiality of procedures.[2]

Anyssa Bellal, while enumerating different causes behind NSAs' disobedience of IHL, points out the factor of their prosecution under domestic law irrespective of their observance of the norm of IHL as one of such causes.[3] She also recognises the fact that states have a growing tendency to declare all acts of NSA committed during an armed conflict as terrorist.[4] She deems such acts of states liable for the increased violations of IHL. She analyses the situation from the perspective of engaging the NSAs for the purpose of improving compliance with IHL. According to her, designating all acts of NSAs as terrorist, irrespective of their deference to the IHL, is not conducive to promoting respect of IHL through NSAs' engagement.[5]

The matter also became the subject of discussion during the International Committee of the Red Cross' 32nd International Conference in 2015. It was noted that the counter-terrorism responses by the states had obscured the distinction between an armed conflict and the acts of terrorism. This proves to be the major impediment to the observance of IHL. States have exhibited an increased inclination to declare every act of NSAs committed during an armed conflict as terrorist in nature. It is acknowledged that such incrimination of the lawful acts of war carries the effect of causing demotivation amongst the NSAs to obey the rules of IHL. All their acts would be subject to punishment despite their efforts to comply with the commands of IHL.[6]

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[1] Anne-Marie La Rosa and Carolin Wuerzner, 'Armed Groups, Sanctions and the implementation of International Humanitarian Law' (2008) 90 (870) International Review of the Red Cross 327-341, 335.
[2] Ibid.
[3] Annyssa Bellal, 'Welcome on Board: Improving Respect for International Humanitarian Law Trough the Engagement of Armed Non-State Actors' (2016) Yearbook of International Humanitarian Law (19) 37-61, 43.
[4] Ibid 55.
[5] Ibid.
[6] Extract from the report 'International humanitarian law and the challenges of contemporary armed conflicts', document prepared by the ICRC for the 32nd International conference of the Red Cross and Red Crescent (Geneva, Switzerland, 8-10 December 2015), 1-2 available at: <http://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism> accessed on 28 April 2020; Similar observations were made in a document prepared by ICRC for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, (26–30 November 2007), International Review of the Red Cross Volume 89 Number 867 September 2007, 724.

The inequality created by this anomaly was also the subject of debate in 2011 between Marco Sassoli and Yuval Shany.[7] The former acknowledges the fact that states' legislation interdicts everyone except the states themselves to engage in an armed conflict. This results in an inequality between states and armed groups under domestic law. IHL, however, does not prohibit the enactment of such domestic laws in view of the states' concern for their security and protection. NSAs are involved in the NIACs, for all practical purposes, in the same ways as the state armed forces but the IHL considers only needs and difficulties of the states. Therefore, the IHL's claim to apply equally to NSAs makes it less effective and leads toward its violation by armed groups. Sassoli observes that for enhancing the implementation of IHL, this inequality needs to be addressed.

While discussing how non-state actors are bound by IHL, Cedric cursorily notes the fact that under domestic law, they are outlawed as terrorists and are harshly punished for their acts against the state. Though, he does not talk about the ensuing violations of the rules of IHL due to the said prosecution/punishment, he, however, acknowledges that such prosecution 'puts them at a distinct disadvantage vis-à-vis state armed forces'.[8]

Noelle Higgins points towards this state-centric nature of IHL as the biggest cause of uncertainty in NSAs' observance of its rules.[9] According to him, states label the freedom fighters as terrorists and rebels in order to make them subject only to the domestic law and limit the application of IHL to internal conflicts. The writer cites the example of the Irish Republic Army who sought the prisoner of war status for their imprisoned members. Nonetheless, they were regarded as terrorists subject to the measures of domestic law only.[10] Likewise, the Indonesian government treated GAM (Geurakan Acèh Meurdèka) as a 'peace disturbing gang' and applied Indonesian Law to all their acts.[11]

The writer emphasises that since non-state actors are actively involved in wars, it is, therefore, crucial to develop such an IHL schema that practically takes into account the needs of NSAs.[12]

II. Solutions Proposed by Scholars

The legal thinkers, referred to in the first section of the literature review above, have proposed various solutions aimed at neutralising the demotivation caused by the criminalisation of lawful acts of war by the domestic law. This section discusses those suggestions. A later section of this paper will critically analyse these suggestions.

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[7] Marco Sassoli and Yuval Shany, 'Debate: Should the obligations of states and armed groups under IHL really be equal?' (2011) International Review of the Red Cross 92(882) 425-436, 428.
[8] Cedric Ryngaert, 'Non-state Actors and International Humanitarian Law' in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on non-state actors in International Law* (Routledge 2011), 284.
[9] Noelle Higgins, 'The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements' (2009) Human Rights Brief 17 (1) 12-18, 16.
[10] Ibid.
[11] Ibid.
[12] Ibid.

a. Amnesty

Amnesty refers to a sovereign act of absolving criminals of all their criminal responsibility.[13] It may take the form of a legislative or an executive act, a treaty, or a political agreement. It can be granted to terminate the pending prosecutions, to set aside a conviction or to repeal an already awarded sentence.[14] Amnesty is a tool of transitional justice and may serve many purposes. It helps in establishing the truth, and reaching peace agreements and national reconciliations. It is also regarded as capable of providing an incentive to NSAs for obeying IHL.[15] Scholars suggest that states may grant 'amnesty' for 'mere participation in hostilities,' thereby absolving NSAs of their liability under domestic law for taking up arms against the state and consequently encouraging them to obey IHL.[16] The suggestion is substantiated by referring to Article 6(5) of Additional Protocol II, 1977 which encourages the states to grant broadest possible amnesty at the end of the conflict.

b. Reduction of Punishment

ICRC and scholars have suggested reduction of punishments for crimes under domestic law in order to persuade NSAs to obey IHL.[17] According to them, courts may be empowered to grant such reduction at the time of awarding the punishments. It means that the courts may, while determining the extent of punishment in a particular case, consider the compliance with the humanitarian law as a mitigating factor.

c. Combatant-like Status

It has been suggested that the states may grant combatant-like status to NSAs.[18] This means that the states may declare their intention of not prosecuting the NSAs under domestic law if they choose to obey the principles of humanitarian law.

d. Sliding Scale of Obligations

Sassoli points out the inequality between states and the armed groups in NIACs as a cause of violation of IHL. According to him, the inequality ensues from (a) the fact that the NSAs are less

[13] ICRC Commentary on Additional Protocols of 1977 to the Geneva Conventions of 1949 (1987), 1402 [4617].
[14] Ibid.
[15] Michelle Mack, 'Increasing respect for International Humanitarian Law in Non-international Armed Conflicts' (2008) ICRC, 28; ICRC, *Improving Compliance with International Humanitarian Law, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law* (Cambridge, 2004) 4 <https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_humanitarian_law.pdf> accessed on 5 May 2020
[16] Ibid; La Rosa and Wuerzner (n 1).
[17] La Rosa and Wuerzner (n 1); ICRC (n 13) 5.
[18] ICRC (n 13).

organised and less capable of fulfilling the IHL obligations and (b) their liability for lawful acts of war under the domestic law of the state against which they are fighting.[19]

In order to address this inequality, Sassoli proposes a sliding scale of obligations i.e. expecting respect of the laws of war from the armed groups according to their capacity.[20]

e. Special Agreements

Special agreements between state and armed groups have been suggested as one of the means of dealing with the challenge of non-compliance of IHL by NSAs. Through these agreements, the parties may agree to follow the broader obligations of humanitarian law other than those prescribed under common Article 3 and APII. It has been proposed that the grant of amnesty conditional on the compliance of IHL by the armed group can be incorporated into such special agreements, thereby substantiating the commitment of both the parties.[21]

Understanding the IHL and Domestic Law Enforcement Paradigms

A thorough understanding of the present subject is not possible without comprehending how IHL and domestic law paradigms operate and how they create the anomaly under discussion. The following part is an attempt towards that end.

I. The IHL Paradigm: IHL & NIACs

The part of IHL which regulates the conduct of NIACs is contained under Article 3 common to the four Geneva Conventions of 1949, Additional Protocol II of 1977 (APII) and the customary IHL.

A NIAC is a conflict which takes place within the territory of a state. Yet it is not every brawl between state and civilians/NSAs which qualifies as an armed conflict. According to Article 1 clause (1) of the Protocol II of 1977 additional to Geneva Conventions (1949), a NIAC is an armed conflict which takes place between state's forces and insurgents who act: (1) under responsible command and (2) exercise such territorial control as is sufficient to enable them to: (a) carry sustained and concerted military attacks and (b) implement the Additional protocol II.

Article 1 clause (2) of the Additional Protocol II excludes the situations of internal disturbances and internal tensions from the definition of NIAC. Such situations may include riots, and isolated and sporadic acts of violence etc.

In NIAC, the employment of force by the armed forces of the state and of the organised armed groups is governed by the conduct of hostilities framework laid down under IHL. It requires the parties to the conflict, inter alia, to humanely treat all persons not taking direct part in

[19] Marco Sassoli and Yuval Shany, 'Debate: Should the obligations of states and armed groups under IHL really be equal?' (2011) International Review of the Red Cross 92 (882) 425-436, 428-29.
[20] Ibid 430-431.
[21] ICRC (n 13).

hostilities,[22] to care for wounded and sick,[23] to ensure basic rights of the persons interned or detained,[24] and not to attack civilian population and civilian property[25] etc.

IHL regulates the conduct of warring parties keeping in view their primary objective to prevail over the enemy. IHL, therefore, does not prohibit the attacks on (a) enemy combatants and (b) military objectives.[26] The concession is equally available to state and non-state party to the conflict. According to Article 43(2) of Additional Protocol I of 1977,[27] combatants are the members of armed forces of a party to the conflict. With respect to non-international armed conflict, definition of combatant is not available. However, in NIAC, the members of states' armed forces and the members of organised armed groups or the persons directly taking part in hostilities are considered combatant for the purpose of 'distinction' between lawful and unlawful targets.[28] It should be noted here that no combatant status is available in NIACs. It means that when captured the NSAs are not entitled to the prisoner of war protection under IHL.

For ascertaining what objects will fall within military objectives the considerable factors are: (a) the capability of the object to effectively contribute towards the military action and (b) the military advantage which the adversary can attain through the ruination, seizure, or neutralisation of such objects. For ascertaining the capacity of such objects, the parties may take into account the nature, location, purpose, and use of the objects.[29] Examples of military objectives may include the establishments and buildings where the enemy combatants, their material and armaments are located. Military means of transportation & communication and the economic targets which may effectively support military operations can also be cited as examples of the military objectives.[30]

So, both the parties to an internal armed conflict can lawfully attack the combatants and military objectives for gaining military advantage over the enemy. However, parties are required to observe the principle of proportionality while executing attacks against lawful targets. This principle obliges parties to carry only those armed attacks which might not cause such civilian damage as would be excessive to the anticipated military advantage.[31]

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[22] Additional Protocol to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) 1977; art 4 (1) & art 3, Geneva Conventions of 1949.
[23] Ibid art 7.
[24] Ibid art 5.
[25] Ibid art 13.
[26] The principle of distinction is contained in both customary and treaty law; 'Customary IHL, Rule 1' (*ICRC IHL database)* <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1> accessed on 5 May 2020 (Article 13-16 of APII lays down the principle of distinction enunciating that the civilian population, objects indispensable to their survival, works and installations containing dangerous forces and cultural objects and places of worship cannot be subjected to attack.)
[27] Additional Protocol I of 1977 related to the protection of victims of international armed conflict.
[28] 'Customary IHL, Rule 3' (*ICRC IHL database)* <https:// ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3> accessed on 5 May 2020
[29] 'Customary IHL, Rule 8' (*ICRC IHL database)* <http:// ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule8> accessed on 6 May 2020; Protocol Additional to the Geneva Conventions 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol I) 1977, art 52(2). (Definition under article 52 (2) is part of customary IHL and equally applicable to NIACs.)
[30] 'Customary IHL, Rule 8' (*ICRC IHL database)* <http:// ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule8> accessed on 6 May 2020.
[31] 'Customary IHL, Rule 14' (*ICRC IHL database)* <*https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14*> accessed on 28 October 2020.

The above discussion does not fully explain the IHL paradigm vis-à-vis NIACs and NSAs. Article 3 of the APII is also relevant here. It argues that the law regulating the internal conflicts does not limit the authority of the states with respect to the maintenance of law and order in their territory. Another provision to the similar effect is the para 4 of the common Article 3 to the Geneva Conventions of 1949. According to this provision, the application of IHL does not confer any legitimacy on the non-state party to the conflict. States may prosecute and punish their opponents according to their laws.[32]

These provisions clearly show that the IHL does not ignore the fact of states' concern for their security and entitles them to enact all type of legislation and take all legitimate actions which they may consider appropriate for their preservation.[33] The effect is that the IHL would not interfere if states, for the purpose of their security, declare such acts of NSAs as illegal which are the lawful acts of war under IHL.

II. Domestic Law Enforcement Paradigm: Domestic law & NIACs

Every state's primary concern has always been its security and territorial integrity and a major part of states' domestic laws addresses this area. Situations of internal disturbances and tensions are solely governed by states' domestic laws and are treated under the domain of 'law enforcement'.

As far as the NIACs are concerned, IHL is not the only applicable legal domain. The state's domestic legal enforcement systems also remain intact for the maintenance of law and order in the country. The acts of the NSA's are governed by international law and domestic law simultaneously.

For preserving their security and integrity, states have outlawed the acts of treason, rebellion, sedition, and every other act which they may regard as injurious. Therefore, the acts designed to overthrow the government, attack states armed forces and military installations or take membership of any rebel group are crimes under municipal laws. Under IHL, however, these acts are not illegal. For example, Pakistan's Anti-Terrorism Act, 1997 (Section 6 (5)) declares every act done for the benefit of a proscribed organisation as terrorist. Section 2 (d) of the Pakistan Army Act, 1952 declares it an offence to attack the armed forces, law enforcement agencies, or military installations. IHL, however, does not declare every act done for a proscribed organisation as terrorist. Similarly, the acts against armed forces and military installations during a NIAC are justified on account of military necessity. Likewise, in India, Section 15 of the Unlawful Activities (Prevention) Act, 1967 labels an act a terrorist act which is done with the intention of damaging the security and sovereignty of India, or destroying any property or equipment intended to be used for the defence of India. Under IHL, however, taking up arms against the state or attacking its defence equipment during a conflict is not outlawed or regarded as terrorist. The lawful attacks on military objectives may also terrorise the civilians

[32] 'ICRC Commentary on Article 3 Common to Geneva Conventions of 1949, 2016' (*ICRC Treaties, States Parties and Commentaries database)*, <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3> accessed on 10 May 2020

[33] Ibid; ICRC Commentary on Additional Protocols 1977 to the Geneva Conventions of 1949 (1987), 1362-1363.

but IHL designates only such acts as terrorist[34] which are specifically designed to terrify the civilian population during an armed conflict. In Croatia too, participation in an armed rebellion against the state falls within anti-state terrorism under Article 142 of the Code of Criminal Procedure, 1993. These are the few examples which provides an evidence of the anomaly between IHL and domestic laws.

It is clear from the above discussion that for regulating the conduct of a NIAC, IHL declares some acts as lawful. These acts are declared unlawful by the states under their law enforcement paradigms. The reference to different national laws shows that during NIACs, the domestic laws remain applicable and non-state actors are treated as criminals and terrorists. Upon their capture, they are punishable under the domestic criminal laws. IHL, nonetheless, takes into account the states' autonomy over the maintenance of law and order within their territory and does not interfere when states enact such legislation. This discrepancy between these two paradigms gives birth to the anomaly which the current paper aspires to address. It is indicated in the first section of the literature review that during recent decades, states have reacted even more sensitively against the armed groups and NSAs. They have shown the tendency of indiscriminately declaring every organisation which may oppose them as terrorist. It has already been observed and will also be established below that this tendency has made the situation more complicated.

Critical Analysis of the Solutions Proposed by Scholars

I. Amnesty

The role played by amnesties as a tool of bringing an end to the conflict, peace building, and national reconciliation is, no doubt, significant. Therefore, the ICRC, United Nations and other International and Regional organisations have been encouraging the states to grant broadest possible amnesties. However, to what extent amnesties can serve the purpose of eliciting subservience to IHL by NSAs is debatable.

Amnesties are usually granted at the end of the conflict. The same is conceived by Article 6 (5) of APII which calls on states to grant amnesty at the end of the hostilities for encouraging reconciliation. Since at the end of the conflict the rules have already been violated and the wrongs have already been done, amnesties can do nothing except for bringing peace and reconciliation. To this, legal thinkers[35] have responded by suggesting the grant of amnesty during continuation of the conflict. When an armed conflict is taking place, a state can announce its intention of not prosecuting the militants for taking up arms against the authorities if they obey the rules of IHL and respect the principles of distinction[36] and proportionality[37] etc. This appears to be an attractive proposal; and if states opt to go by this suggestion, NSAs' respect for IHL can improve.[38] However, the discretionary nature of amnesties leaves the decision of whether to grant amnesties or not

[34] Protocol Additional to the Geneva Conventions 1949, art 13 (2); Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) 1977.
[35] La Rosa and Wuerzner (n 1).
[36] 'Customary IHL, Rule 1' (n 25).
[37] 'Customary IHL, Rule 14' (n 30).
[38] Ibid.

totally to the states. A state that finds itself in a better position militarily and is confident of winning the conflict may wish to punish its criminals for waging war against itself, instead of forgiving them for attacking its forces and military installations. Political motives may outweigh the desire to get respect for the international law.

Furthermore, as noted above, states declare every act opposing their authority as terrorist. Acts designated as terrorist are considered different from the ordinary crimes because of their gravity and heinous nature. In general perception, these crimes are unforgivable and not compoundable. It is argued that granting prospective amnesty (i.e, absolving and purging the terrorist even from the guilt of the future acts) for such acts during an armed conflict would be equivalent to creating a conceptual dilemma and making a mockery of the fact that how abhorrent some acts are considered by the state and its people.

Scholars have noted that designating every other act as terrorist would create hurdles even in building peace at the end of the conflict. Bellal has made this point in the context of engaging the so-called terrorist organisations in peace processes. She notes that declaring every other organisation as terrorist makes the chances of entering any dialogue with them very bleak. In such cases, the state might lose the public trust and support for entering into a dialogue with the 'terrorists,' whose elimination and punishment it has promised with its people.[39] The same could be true of granting amnesties during an armed conflict.

II. Reduction in punishment

Reduction in punishment does not appear to be an alluring offer. Once the militants are in the hands of state authorities, where different investigation processes usually fall short of the commands of human rights laws, lesser punishment might not remain an attractive offer. NSAs are not forgetful of such eventualities. So, how far the NSAs trust the willingness of states to reduce punishment and to run neutral procedures would decide the effectiveness of this proposal. However, the chances are bleak in view of the states' policies and investigative attitude vis-à-vis 'terrorists' in recent years.

III. Combatant-like status

ICRC's background paper[40] proposed that states may consider granting some sort of combatant-like status to NSAs 'inspired by the law applicable in IACs'. Thereby the NSAs could not be prosecuted for mere participation in hostilities. 'Thus, acts that are lawful under international law would also be lawful under national law.'[41]

The question arises that how and when such status is to be granted and what would be its limitations or conditions (if any). The document is silent about the later part of the question. Regarding the former, assumption can be made considering the context in which the suggestion occurs. Shortly after suggesting this strategy, the document discusses the idea of the use of 'special

[39] Bellal (n 3) 56.
[40] ICRC (n 13).
[41] Ibid 5.

agreements' with the NSAs for extending the provisions of international armed conflicts to internal conflicts.

As the 'combatant status' is a notion of the law of IAC, it seems that the suggestion of granting combatant-like status is conceived as an arrangement between the parties on a case-by-case basis. The states involved in armed conflicts may declare their intention through agreements made during the conflicts to grant such a status so as to motivate NSAs to comply with IHL. In such a case, it will be similar to granting an amnesty, and therefore can be criticised on the same grounds.

Furthermore, for granting such a status on the condition that NSAs obey IHL, states will have to enter into negotiations with them which, as discussed above,[42] are difficult in view of their indiscriminate labelling of NSAs as terrorists. The use of the sentence 'thus, acts that are lawful under international law would also be lawful under national law' invites further criticism. It says that by granting such a status, states would be regarding the acts of NSAs lawful under national laws. Forgoing with the prosecution or punishment for certain acts is one thing and regarding them lawful is totally another. States may be ready to adopt any strategy to motivate NSAs to obey IHL but would not buy the idea of calling their acts lawful under national laws and consequently granting them any legitimacy. So, with the idea to regard NSAs acts lawful under national laws, the suggestion does not come as an effective solution.

IV. Sliding Scale of Obligations

Sliding Scale of Obligations proposed by Sassoli addresses only the first cause of inequality i.e. the NSAs are less organised and less capable of fulfilling the IHL obligations. Though Sassoli emphasises the second point (NSAs' liability for lawful acts of war under the domestic law of the state against which they are fighting) as a cause of inequality in his discussion, the solution proposed by him does not seem to address this cause.

V. Special agreements

Such agreements can be a useful method of inducing compliance with IHL, but the indiscriminate labelling of the armed groups as terrorists adversely affects the possibility of reaching these agreements.[43] As noted above, attempts to enter into dialogue with NSAs may be hampered by the loss of public support and trust.[44]

The Paradigm Shift

Bearing in mind the analysis given above, there is a need for more concrete and balancing solution for the instant problem. The vitality of the states' concern for their security is undeniable. Similarly, important is the need for the proper implementation of and compliance with the rules of IHL during NIACs. IHL already pays due regard to the states' concern for their security. That is why any legislation declaring the lawful acts of war as illegal does not violate IHL. This depicts

[42] Ibid 14.
[43] Bellal (n 3) 55.
[44] Ibid 56.

the state-centric nature of IHL. Both IHL and domestic law keep in view the interests of the states in one way or the other. It is suggested that both the legal domains must shift their paradigms to allow for a more practical solution to the problem.

(1) States may not be ready to legalise every act of NSAs which is lawful under IHL. This is due to their sensitivity towards their security which deserves due regard and respect. Yet, the matter is not unresolvable. Scholars have noted the fact that enlisting every person or organisation which is opposing the state as terrorist is the biggest obstacle in inducing compliance from NSAs.[45] So for states, the paradigm shift recommendation flows from this observation. States should not indiscriminately declare every organisation as terrorist. States are both the creators and the subjects of the international law. The responsibility to respect the basic principles of international law, which are developed by states themselves after a long-term struggle, totally lies with them. Therefore, they should refrain from all such acts which may undermine any principle of international law. States' growing tendency of indiscriminately declaring every organisation as terrorist does not only adversely affects the tenets of humanitarian law but also undermines the principle of 'the right of people to self-determination'. States' labelling of the organisations as 'terrorist' should follow a neutral and unbiased pattern sparing dissident groups which are fighting for their rights (their problems must be resolved by resorting to democratic ways and in accordance with the international laws). Following such a design of domestic laws and policies would help states focus their energies on the real terrorists. For persuading states to develop their policies accordingly, the United Nations and the regional organisation should play an effective role.

(2) IHL would not be able to achieve its purpose if it does not take in to account the challenges faced by the armed groups along with the interests of the states. The literature review shows that the legal thinkers have already felt the need to revamp the existing legal framework with an intent to provide NSAs with protection from the reproach of domestic law and to offer them an incentive to obey IHL.[46]

Therefore, it is being proposed that IHL should shift its paradigm from a one-sided approach to the two–sided approach. Only then it could be able to get rid of the stigma of its unrealistic nature. This could be achieved only by introducing certain provisions in IHL to provide NSAs with some legal incentive for obeying. . This will provide a more concrete, certain, uniform, and lasting solution to the problem as compared to the tentative ways discussed above such as amnesty and reduction in punishment etc. It is being proposed that *provisions granting limited immunity* to NSAs from punishment under domestic law if they show deference to IHL must be introduced in IHL. This is conceived as a limited concession extending only to the non-prosecution of NSAs under domestic law. The grant of such an immunity should primarily be based upon two conditions:(1) The members of armed groups are already paying due regard to the rules of IHL while conducting hostilities and (2) they make a declaration showing their commitment for future obedience. In case the armed groups meet these criteria, they must be entitled to immunity from prosecution under domestic law. The benefit should continue as far as NSAs keep obeying IHL.

Once the immunity to be granted to NSAs for motivating them to obey IHL finds the cover of the law, it will inculcate a sense of surety and confidence in them regarding applicability of

[45] ICRC (n 13); Higgins (n 9).
[46] Higgins (n 9).

IHL. As the NSAs would be aware of the conditions for attaining the concession, they will try to avail it by abiding the rules of IHL from the very beginning of the conflict. It clearly provides the instant suggestion an edge over other means which are employed to incline NSAs to obey IHL when they already have committed number of violations and caused great damage to civilian life. Moreover, once such grant of status is required by the law itself in order to protect the civilian life, it will not raise any public resentment as pointed out in the cases of amnesty or combatant-like status above.[47]

The question may arise if such a provision will be tantamount to conferring legitimacy upon armed groups by making them lawful combatants. It is submitted that this will not be the case because the NSAs would not be given the immunity as a matter of right, neither their acts will attain any lawful status under national laws. This will be similar to creating an exception. The underlying objective of such a provision would be to encourage respect for law and not to entitle them to any right or lawfulness. The NSAs would only be able to benefit from such provision if they fulfil the prescribed conditions. Their acts will still be regarded as criminal under the domestic laws and the states would only be forgoing their prosecution in the interest of IHL and protection of their own civilians. This makes the current suggestion a better option as compared to the combatant-like status proposed above.

It can further be considered that the grant of such limited immunity may be restricted only to such individuals who already form part of the armed group at the time the violence matured into an armed conflict. So, the civilians who later joined the hostilities may not benefit from the provision. This is being suggested in view of the states' fear of gradual failure of their law enforcement system and their criminal law becoming futile because of the civilians' continuous joining of the armed groups with an intention to obey IHL. It might provide states with a sense of security. However, the practicality of this suggestion needs further research.

Conclusion

Law cannot be static. To keep itself alive, it must keep evolving. . With the passage of time, it needs to address all the hindrances which may come in its way to weaken and deprive it of bearing the fruits which it is designed to bear. Non-observance of IHL by non-state actors is such a hindrance in the way of protection of human life during wars. Against this backdrop, it is argued that the domestic laws and IHL need to look at the problem from different angles for reaching some better resolve. The responsibility mainly falls on the states. Be it IHL or domestic law, it is the states who make, change, and implement them. The paradigm shifts proposed above for IHL and domestic laws are basically the paradigm shifts for states. . These are the states themselves which must change domestic law and policies vis-à-vis internal threats and have to introduce concessions in IHL for NSAs. It is high time for them to take proper steps to eliminate all threats which may be cause the failure of IHL and damage to civil life

[47] Ibid 13-15.